

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT No. \_\_\_\_\_

██████████,  
Plaintiff,

v.

SHAWN JENKINS,  
Interim Commissioner of the Massachusetts Department of Correction,  
Defendant.

**COMPLAINT**

1. Plaintiff ██████████ is a 72-year-old woman in the custody of the Massachusetts Department of Correction (“DOC”) who has been incarcerated for over 32 years on her first and only state prison sentence. She currently resides in the Health Services Unit of MCI-Framingham.

2. Ms. ██████████ suffers from myriad medical conditions that debilitate her to the point that she is not able to independently perform basic life tasks. She is unable to dress herself; she is unable to shower herself; she is unable to use the toilet by herself; she is unable to sleep lying down in a bed due to severe back spasms; and she is unable to walk unaided, being confined to a wheelchair except occasionally for short distances where she can use a walker with the assistance of another person.

3. A licensed physician on the faculty of Harvard Medical School and Massachusetts General Hospital attested after reviewing her medical records and conducting an in-person examination that Ms. ██████████ has “multiple severe, irreversible, debilitating medical conditions which restrict her ability to ambulate and perform her [activities of daily living]” and that she is “permanently incapacitated without hope of any meaningful improvement.”

4. A physician employed by the DOC's medical provider who treats Ms. [REDACTED] at MCI-Framingham described Ms. [REDACTED] as having "multiple medical problems" including "moderate to severe physical limitations," a recent history of "sudden decompensations" requiring hospitalization, and kidney disease and heart failure that "are chronic and progressive with risks of end stage organ failure and may be terminal illnesses."

5. Based on her deteriorating medical condition, Ms. [REDACTED] petitioned for medical parole in June 2023, but her petition was denied by former DOC Commissioner Carol Mici in September 2023. In February 2024, Ms. [REDACTED] requested reconsideration of the denial, highlighting errors in the commissioner's decision and supplementing her application with additional factual support, but the request for reconsideration was denied by Interim Commissioner Shawn Jenkins in April 2024.

6. In denying Ms. [REDACTED]'s request, Defendant Jenkins ignored critical facts in the record, including an uncontroverted declaration from a licensed physician regarding Ms. [REDACTED]'s irreversible physical incapacitation, substituted his judgment for that of medical professionals in contradiction of the statutory scheme, and provided no rational justification for his conclusion that Ms. [REDACTED]'s release would present a public safety risk. The decision was arbitrary and capricious, an abuse of discretion, and contrary to the medical parole statute. Ms. [REDACTED] now appeals that decision through this Complaint for certiorari review.

### **Jurisdiction**

7. Jurisdiction to review the decision of Interim Commissioner Jenkins is conferred by G.L. c. 249, § 4, as authorized by G.L. c. 127, § 119A(g). Declaratory relief is authorized by G.L. c. 231A, § 1.

### **Parties**

8. Plaintiff [REDACTED] is a 72-year-old woman who has been in the custody of the Massachusetts Department of Correction since March 1992. She is currently confined in the Health Services Unit of MCI-Framingham in Framingham, MA 01702. She is serving a life sentence following a trial and conviction for first-degree murder for her involvement in a killing in 1990. The other woman convicted of the killing, who shot and killed the victim, pled guilty to second-degree murder and has since been released on parole.

9. Defendant Shawn Jenkin is the Interim Commissioner of the Massachusetts Department of Correction, an agency of the Commonwealth of Massachusetts, with its principal office at 50 Maple Street in Milford, MA 01757. Defendant Jenkins assumed his position upon the retirement of prior DOC Commissioner Carol Mici on March 29, 2024. Defendant Jenkins is responsible for deciding petitions for medical parole pursuant to G.L. c. 127, § 119A.

### **The Medical Parole Statute and Regulations**

10. The medical parole statute was enacted as a provision of the Criminal Justice Reform Act in 2018. The statute requires the release of any prisoner in serving a sentence in Department of Correction custody who is terminally ill or permanently incapacitated such that if released they would remain at liberty without violating the law, and whose release would not be incompatible with the welfare of society. G.L. c. 127, § 119A.

11. Terminal illness is defined in the statute as “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(a).

12. Permanent incapacitation is defined in the statute 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.” G.L. c. 127, § 119A(a).

13. Debilitating condition is not defined in the statute, but is defined in regulations 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 CMR 17.02.

14. Medical parole is not discretionary. Rather, it must be granted upon a finding that the subject of a petition meets the statutory standard. The statute provides that, “[n]otwithstanding any general or special laws to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation pursuant to subsections (c) and (d).” G.L. c. 127, § 119A(b).

15. A petition for medical parole must be filed with the superintendent of the facility where the prisoner is confined. The superintendent must, within 21 days of filing, develop a medical parole plan for the prisoner, obtain a written diagnosis of the prisoner from a licensed physician, perform an assessment of the prisoner’s risk of violence, obtain an updated clinical review of the prisoner by the DOC’s health services provider, convene a multidisciplinary review team, and transmit a recommendation as to the release of the prisoner to the commissioner. 501 CMR 17.04; *Buckman v. Comm’r of Corr.*, 484 Mass. 14, 32 (2020).

16. The superintendent’s risk for violence assessment “must be based upon the results of a standardized assessment tool that measures clinical prognosis, such as the LS/CMI

assessment tool and/or COMPAS.” 501 CMR 17.04(2)(d). The risk of violence assessment

“shall” also consider, pursuant to 501 CMR 17.04(3):

- a. the prisoner’s diagnosis and prognosis;
- b. the prisoner’s current housing situation (e.g., placement in general population, institutional infirmary, Lemuel Shattuck Hospital, or outside hospital);
- c. the necessary clinical management of the prisoner’s terminal illness/permanent incapacitation;
- d. an assessment for mobility, gait and balance, specifically, whether the prisoner is bedridden, 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 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;
- g. a mental health assessment; and
- h. the prisoner’s age, height, weight, ability to eat independently, and if the prisoner is fed intravenously.

17. The risk for violence assessment and all supporting documentation must be transmitted to the commissioner with the superintendent’s recommendation, who then must grant or deny the petition within 45 days. 501 CMR 17.04(4) & (5).

### **Procedural and Factual Background**

#### **Medical Parole Petition**

18. Ms. [REDACTED] petitioned for medical parole in June of 2023 on the grounds that she suffered from a host of chronic medical conditions that were debilitating, not likely to improve, and that in aggregate rendered her permanently incapacitated.

19. The petition cited records from the DOC’s healthcare vendor, Wellpath, indicating that Ms. [REDACTED] suffers from congestive heart failure, atrial fibrillation, obesity, chronic

kidney disease, hypertension, hyperlipidemia, hyperparathyroidism, anemia, restless leg syndrome, arthritis, uterine prolapse, vaginal atrophy, urinary incontinence, bilateral lower extremity edema, recurrent dislocations of her right hip, moderately severe hearing loss, cataracts, chronic dental decay, and chronic back and leg pain. She also had both her hips and knees surgically replaced, which resulted in chronic pain, leg length disparity, and gait disturbances.

20. The petition noted Ms. [REDACTED] had suffered multiple falls since the beginning of 2022, had medical restrictions forbidding her from using stairs or a top bunk, and was reliant on a wheelchair, walker, and assistant to move or leave the Health Services Unit.

21. The petition cited Ms. [REDACTED]'s inability to complete activities of daily living, as demonstrated by the medical records indicating medical staff helped her wrap her legs, assisted her with getting dressed, and helped her shower. Exhibit A to the petition included 65 pages of medical records, which were highlighted to show instances in which medical staff had documented helping Ms. [REDACTED] with her activities of daily living.

22. Ms. [REDACTED] was also unable to sleep on a flat bed due to severe muscle spasms, which require her to sleep in a recliner with pillows for support.

23. The petition also noted that in early March 2023, Ms. Brousseau was transported by ambulance to MetroWest hospital where she was admitted for several days due to hypoxic respiratory failure and congestive heart failure.

24. The petition asserted that Ms. [REDACTED]'s release would not be a risk to public safety because she suffered from extensive physical debilitation. Additionally, her institutional history—including disciplinary history, program plan, and classification report, which were

submitted as Exhibit B to her medical parole petition—supported that her release would not pose a risk to public safety and would be compatible with the welfare of society.

25. Despite entering DOC custody in the early 1990s, Ms. [REDACTED] had received just seven disciplinary reports, the most recent of which was in 2015. The few reports she had received were all for alleged minor, non-violent rule infractions—lending property to other prisoners, possession of non-weapon contraband, refusing an order to clean, and smoking a cigarette inside at a time when smoking was only allowed in the yard. Most of the tickets were closed administratively, dismissed, or continued without a finding.

26. According to Ms. [REDACTED]'s August 2020 personalized program plan compiled by the DOC, her standardized Pathways to Change assessment indicated that she presented a low risk of violence and a low risk of recidivism. Both the Pathways to Change assessment and a TCU Drug Screen also found her to be a low risk for substance abuse.

27. At the time of her medical parole petition, Ms. [REDACTED]'s most recent classification report indicates the only factor weighing in favor of higher security was the nature of her index crime. All other factors—recent convictions, history of escapes, history of institutional violence, disciplinary history, age, and program participation—weighed in favor of lower security. The report's preliminary custody level recommendation was that Ms. [REDACTED] be housed in a minimum or lower security facility, but she remains at MCI-Framingham, a medium security facility, because of DOC override codes due to her life sentence and the fact that she needs 24-hour healthcare coverage for her medical needs.

28. The classification report indicated that Ms. [REDACTED] maintained a positive adjustment to prison life, and that while she had participated in a number of programs and jobs over the years, her program participation had been put on hold since 2016 due to her medical

issues. The report also noted that she “resides in HSU due to medical needs with limited mobility.”

29. Lastly, the petition noted research concluding that aging is correlated with a sharp decline in recidivism risk. A 2020 Massachusetts DOC research report found that formerly incarcerated people “55 and older, both male and female, recidivated at the lowest rates, consistent with research on age and recidivism.”<sup>1</sup> A 2017 Vera Institute of Justice report also noted that “early-release policies are also supported by recidivism research, which demonstrates that age is significant predictor of re-offending: arrest rates drop to just more than 2 percent in people ages 50 to 65 years old and to almost zero percent for those older than 65.”<sup>2</sup> At age 71, Ms. [REDACTED] was part of this latter category, which supported the conclusion that her release would not pose a risk to public safety and would be compatible with the welfare of society.

#### Dr. Rosenfeld Assessments and Written Statement

30. In response to the petition, on June 30, 2023, Dr. Joyce Rosenfeld, a physician employed by DOC’s medical provider, wrote a medical parole assessment of Ms. [REDACTED]. In that assessment, she summarized her medical history, including congestive heart failure, hypercholesterolemia, atrial fibrillation, hypertension, chronic renal insufficiency – stage III, hyperparathyroidism, osteoporosis, prolapsed uterus, occasional urinary retention, PTSD from past physical and emotional abuse, and surgical replacement of both hips and knees.

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<sup>1</sup> 1 MA Executive Office of Public Safety and Security DOC, MA DOC THREE-YEAR RECIDIVISM RATES: 2015 RELEASE COHORT 9 (2020), available at <https://www.mass.gov/doc/three-year-recidivism-rates-2015-release-cohort/download>.

<sup>2</sup> Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations 3, VERA INSTITUTE OF JUSTICE (2017), available at <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf>.

31. Dr. Rosenfeld also listed a multitude of medical orders by her and her staff, including that Ms. [REDACTED] be provided with a reclining chair, rolling walker with seat cushion, transport by wheelchair van, bottom bunk, compression stockings and ace wrappings for her legs, elbow wrap, orthopedic pillow, exercise peddler, and hearing aids.

32. In her summary, she wrote that Ms. [REDACTED] “resides in our HSU largely because of moderate to severe physical limitations” and had a “significant exacerbation of congestive heart failure in March 2023” that required hospitalization. After a consultation with the cardiology team at Lemuel Shattuck Hospital, “it was decided that maximizing her medications to treat [congestive heart failure] was the only avenue she could tolerate. She declines going out for cardiac catheterization or other tests as she would have to allow for CPR and other resuscitative efforts. She expressed overwhelming dread over the possibility of rib fractures if resuscitated as she’s had many inflicted upon her with past abuse. There remains uncertainty for prognosis, as she remains at risk of sudden death with her advanced heart disease while not pursuing further interventions.”

33. In light of Dr. Rosenfeld’s June 30, 2023 assessment, Ms. [REDACTED] submitted a written statement to the commissioner pursuant to G.L. c. 127 § 119A(c)(2) requesting to be granted medical parole on the additional basis of terminal illness because, as Dr. Rosenfeld determined, she was “at risk of sudden death” despite pursuing “the only avenue [of treatment] she could tolerate.”

34. Dr. Rosenfeld completed an additional assessment of Ms. [REDACTED] on August 30, 2023, where she wrote that she did “not have data that can predict life expectancy for [Ms. [REDACTED]], however, given that she has dyspnea with mild exertion, peripheral edema, and transient chest pain, a 6 month period has been cited in some literature.”

## Denial

35. Former DOC Commissioner Carol Mici denied Ms. [REDACTED]'s petition for medical parole on September 1, 2023.

36. As grounds for the denial, Commissioner Mici cited the fact that Ms. [REDACTED] was able to complete "all activities of daily living on her own," despite the 65 pages of highlighted medical records to the contrary submitted with the petition. She also found Ms. [REDACTED] could "ameliorate" her "risk for possible sudden death" by "following the medical provider's recommendation that she receive cardiac catheterization," despite the conclusion of Dr. Rosenfeld and the cardiology team that Ms. [REDACTED]'s current course of treatment was "the only avenue she could tolerate."

## Request for Reconsideration and Dr. Eisenberg Assessment

37. On February 15, 2024, Ms. [REDACTED] submitted a request for reconsideration, asking that the commissioner reconsider her denial.

38. The request asserted Ms. [REDACTED] was physically incapacitated by her long list of ailments, which were confirmed by the assessments of Dr. Rosenfeld, as well as an additional independent medical assessment from Dr. Mark Eisenberg.

39. Dr. Eisenberg is a licensed and board-certified internal medicine physician on the faculty at Harvard Medical School and the Massachusetts General Hospital. He sought and was granted permission from the DOC to bring medical equipment into MCI Framingham to perform an independent assessment of Ms. [REDACTED] for medical parole. Based on that in-person assessment on November 30, 2023, and his review of approximately 200 pages of medical records, Dr. Eisenberg concluded that Ms. [REDACTED] "is permanently incapacitated due to [multiple] irreversible, chronic and debilitating medical conditions, which seriously impair her

strength and ability to perform activities of daily living ('ADLs'), minimizing her ability to commit a crime if released on medical parole.” Specifically, he cited her musculoskeletal disease that impaired her ability to independently walk, use the toilet, dress herself, shower, or lift her arms past 60 degrees; kidney disease that had resulted in two hospital admissions over the past year and which would inexorably lead to debilitating dialysis in the next several years; cardiac disease that leaves her short of breath and requiring a wheelchair; and failing vision and hearing that limit her mobility and put her at increased risk for falls, of which she had suffered multiple over past several years requiring emergency transport to a hospital. In his summary, he wrote that Ms. [REDACTED] “will not be able to live independently and will need to live in a nursing home or assisted living facility” and that he “consider[s] her permanently incapacitated without hope of any meaningful improvement[.]”

40. In addition to Dr. Eisenberg’s assessment, the request for reconsideration again cited the multiple instances of Ms. [REDACTED] requiring assistance with ADLs included in the previously submitted medical records, as well as 100 additional instances in several hundred pages of updated medical records from the previous year where medical staff at the DOC documented Ms. [REDACTED] requiring assistance with basic activities of daily living, including putting on her clothes, bandages, and compression socks; showering; cleaning; and using the toilet.

41. Lastly, the request again emphasized DOC’s own standardized assessments of Ms. [REDACTED], her classification score, her minimal disciplinary history, and the effect of age on recidivism in asking the commissioner to reconsider her conclusions that Ms. [REDACTED] would not live at liberty without violating the law and that her release would be incompatible with the welfare of society.

#### Updated Dr. Rosenfeld Assessment

42. Dr. Rosenfeld completed an additional medical parole assessment on February 29, 2024, which was consistent with Dr. Eisenberg's and indicated that Ms. [REDACTED]'s overall condition was declining. Specifically, the assessment noted that Ms. [REDACTED] had been hospitalized twice for kidney failure since her assessment in August 2023 and was suffering from "worsening [shortness of breath] on exertion and is no longer able to walk in the yard as was her routing. She also developed left knee pain that limited her further. She was not able to ambulate to the commode or tolerate showering." The assessment also noted a left ankle sprain, for which Ms. [REDACTED] declined "formal PT" but was given exercises to do. The summary continued that Ms. [REDACTED]'s "mobility has declined" and she was limited "to wheelchair now rather than rolling walker. She requires help to dress, bathe. She had been a full assist to the commode but now is a bit improved, furniture in the room was adjusted for a shorter transfer." Dr. Rosenfeld also noted that Ms. [REDACTED]'s kidney and heart disease were "chronic and progressive with risks of end stage organ failure and may be terminal illnesses" and that she "remain[s] at risk for a sudden cardiopulmonary event."

#### Second Denial

43. On April 19, 2024, Interim Commissioner Shawn Jenkins denied Ms.

[REDACTED]'s request for reconsideration for medical parole.

44. As a justification for the denial, Defendant Jenkins repeated verbatim a sentence from Commissioner Mici's original denial—"While Ms. [REDACTED] remains at risk for possible death due to her various medical problems, this risk is something that Ms. [REDACTED] can ameliorate by following the medical provider's recommendation that she receive cardiac

catheterization”—despite the fact that the request for reconsideration was based upon permanent incapacitation and not terminal illness.

45. The denial also stated that “Ms. [REDACTED] can likewise ameliorate her mobility issues by participating in formal PT,” despite the fact that the mention of physical therapy in Dr. Rosenfeld’s assessment concerned only Ms. [REDACTED]’s ankle sprain and not her large constellation of severe mobility issues, and no physician has suggested that physical therapy could lead to meaningful improvement in Ms. [REDACTED]’s mobility. To the contrary, Dr. Eisenberg concluded that Ms. [REDACTED] suffers from irreversible physical incapacitation without any meaningful hope of improvement, but his declaration was not discussed or even mentioned in Defendant Jenkins’s denial.

46. While Defendant Jenkins no longer incorrectly claimed that Ms. [REDACTED] could perform all activities of daily living on her own as Commissioner Mici did in her original denial, he still concluded that Ms. [REDACTED]’s release would present a public safety risk because her “ability to conduct some activities of daily living, such as using the commode, has recently improved” and she “is able to leave the Health Services Unit with the help of an incarcerated individual who is hired to push her wheelchair,” despite the fact that there is no rational connection between public safety and Ms. [REDACTED]’s slightly improved ability to transfer to the toilet after staff rearranged the furniture or her ability to be pushed in a wheelchair.

47. The denial also stated that Defendant Jenkins was “not confident” that Ms. [REDACTED], if released, “will leave and remain at liberty without violating the law and that release will not be incompatible with the welfare of society,” but there was no reason given for this conclusion.

### **Claim for Relief**

#### **Count I - Certiorari Review of Medical Parole Petition (G.L. c. 249, §4 and G.L. c. 127, §119A)**

48. Plaintiff incorporates and realleges each and every allegation contained in the previous paragraphs of this Complaint as if fully alleged herein.

49. Defendant's decision denying Plaintiff's medical parole petition filed pursuant to G.L. c. 127, § 119A was arbitrary and capricious. The decision lacks any rational explanation that a reasonable person might support and was made without consideration and in disregard of facts and circumstances presented in the record. The decision denying Plaintiff medical parole contains substantial and material errors, including:

- a. The Defendant's failure to appropriately consider the assessment of Ms. [REDACTED] by Dr. Mark Eisenberg;
- b. The Defendant's substitution of his own medical opinion for those of licensed physicians in contravention of the medical parole statute's plain language and his professional competence; and
- c. The Defendant's conclusions that Ms. [REDACTED] poses a public safety risk, would not live and remain at liberty without violating the law, and that her release would not be compatible with the general welfare despite the overwhelming and undisputed record evidence to the contrary.

50. Certiorari relief is necessary because the errors in the Commissioner's decision resulted in manifest injustice to Plaintiff for which she is without another available remedy.

#### **Count II – Declaratory Judgment (G.L. c. 231A, § 1)**

51. Plaintiff incorporates and realleges each and every allegation contained in the previous paragraphs of this Complaint as if fully alleged herein.

52. Under the medical parole statute, where a licensed physician has determined that a medical parole petitioner is terminally ill and/or permanently incapacitated, and there is no determination by a licensed physician to the contrary, the Commissioner of Correction cannot substitute his judgment for that of the physician and conclude the opposite.

53. Ms. [REDACTED] is permanently incapacitated within the meaning of the medical parole statute.

### **Prayer for Relief**

WHEREFORE, the Plaintiff respectfully request that this Court grant the following relief:

- a. Set aside the Defendant's decision as arbitrary and capricious;
- b. Remand the matter to the Defendant with instructions that he reconsider Ms. [REDACTED] for medical parole in accordance with the requirements of the statute and regulations, and render a new decision within seven days;
- c. Issue a declaratory judgment against the Defendant declaring that where a licensed physician has determined that a medical parole petitioner is terminally ill and/or permanently incapacitated, and there is no determination by a licensed physician to the contrary, it is a violation of G.L. c. 127, §119A for the Commissioner of Correction to substitute his opinion to the contrary and decide that the medical parole petitioner is not terminally ill and/or permanently incapacitated;
- d. Issue a declaratory judgment that Plaintiff is permanently incapacitated, as defined in G.L. c. 127, §119A;
- e. Order such other and further relief as this Court deems just and proper; and
- f. Enter judgment in favor of the Plaintiff.

Dated: June 17, 2024

Respectfully submitted,

Plaintiff,

██████████ ██████████

By her attorney,

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