

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT No. 2384CV01352

[REDACTED]
Plaintiff

v.

CAROL MICI
Commissioner of the Massachusetts Department of Correction
Defendant

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Plaintiff, [REDACTED] pursuant to Superior Court Standing Order 1-96 and Mass. R. Civ. P. 12(c), hereby brings this motion for judgment on the pleadings. In support, as more fully detailed in the accompanying memorandum, Ms. [REDACTED] states that Defendant's denials of her petition for medical parole and subsequent request for reconsideration constituted an abuse of discretion and were arbitrary and capricious. Defendant's decisions failed to properly follow the requirements of the medical parole statute, failed to make use of standardized assessment tools, disregarded substantial and uncontradicted evidence of Ms. [REDACTED]'s permanent cognitive incapacitation, and overly relied on details of Ms. Sliech-Brodeur's conviction predating her incapacitating conditions in violation of the medical parole regulations and statute. Defendant's wrongful denials were based on substantial and material errors and have resulted in manifest injustice to Ms. [REDACTED], and she has no remedy apart from certiorari review. Accordingly, Ms. Sliech-[REDACTED] asks that this Court grant this motion and remand to Commissioner Mici for a decision consistent with the evidence of eligibility.

Dated: July 28, 2023

Respectfully submitted,
Plaintiff,

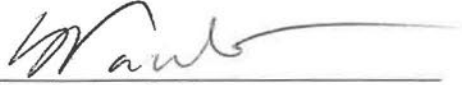

By her attorney,



Sarah Nawab, BBO #707546
Prisoners' Legal Services of Massachusetts
50 Federal Street, 4th Floor
Boston, MA 02110
617-482-2773
snawab@plsma.org

CERTIFICATION UNDER SUPERIOR COURT RULE 9A(d)(1)

I hereby certify that I served this motion on Defendant's counsel, Tonya Rutherford, Esq., by electronic mail.

A handwritten signature in dark ink, appearing to read 'Nawab', with a long horizontal flourish extending to the right.

Sarah Nawab, Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT No. 2384CV01352

██████████ SLIECH-BRODEUR
Plaintiff

v.

CAROL MICI
Commissioner of the Massachusetts Department of Correction
Defendant

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION FOR JUDGMENT
ON THE PLEADINGS**

Plaintiff ██████████ is a 78-year-old woman in the custody of the Massachusetts Department of Correction ("DOC") who is cognitively incapacitated and has significant physical impairments, making her eligible for medical parole under G.L. c. 127 § 119A. Commissioner of Correction Carol Mici denied her December 2, 2022 petition requesting medical parole and her request for reconsideration of March 2, 2023, despite overwhelming evidence of eligibility.

Pursuant to Superior Court Standing Order 1-96 and Mass. R. Civ. P. 12(c), Ms. Sliech-Brodeur seeks judgment on the pleadings. In denying Ms. ██████████'s request for reconsideration, Commissioner Mici committed the following errors: (1) she failed to obtain "a determination by a licensed physician as to whether the prisoner suffers from a debilitating condition" in violation of the requirements of 501 CMR 17.04(2)(b); (2) she failed to obtain a current assessment of the risk for violence posed by Ms. ██████████ as required by G.L. c. 127, § 119A(c)(1)(iii) and 501 CMR 17.04(3) and 17.04(4)(c); (3) she failed to obtain a current risk assessment based on standardized objective factors in violation of the requirements in 501 CMR 17.04(2)(d); (4) she failed to rationally consider the factors relevant to evaluation of

cognitive incapacitation recently identified by the Supreme Judicial Court (“SJC”) in *McCauley v. Superintendent et al.*, 491 Mass. 571, 590-92 (2022); and (5) she ignored the unanimous opinions of multiple licensed physicians regarding the degree of Ms. [REDACTED]’s serious cognitive and physical conditions. These errors rendered the Commissioner’s decision arbitrary and capricious, an abuse of discretion, and contrary to the medical parole statute and regulations.

PROCEDURAL AND FACTUAL BACKGROUND

[REDACTED] is a 78-year-old woman who has been incarcerated since 2004 at MCI-Framingham. A.R. 72. She is the oldest person incarcerated at MCI-Framingham. A.R. 310. DOC and its medical provider, Wellpath, have permanently housed her in the MCI-Framingham Health Services Unit (“HSU”) due to the functional impairments caused by her cognitive incapacitation. A.R. 17, 19-22. She is serving a life with parole sentence for Murder in the Second Degree for the murder of her husband and has served 19 consecutive years in prison. A.R. 71.

I. Medical Parole Petition

On December 2, 2022, Plaintiff submitted a medical parole petition (“December 2022 petition”) to Commissioner Mici and MCI-Framingham Superintendent, Kristie Marchand, requesting medical parole based on cognitive incapacitation and serious physical impairments. A.R. 300. The petition included a declaration from Dr. William Weber, a licensed physician practicing at the Beth Israel Deaconess Medical Center, A.R. 250, affirming Ms. Sliech-Brodeur’s cognitive incapacitation. A.R. 306.

On December 22, 2022, Superintendent Marchand submitted to Commissioner Mici her recommendation against granting Ms. [REDACTED] medical parole. A.R. 292. Her recommendation included as addenda a December 12, 2022 medical assessment signed by

Wellpath physician Dr. Joyce Rosenfeld, A.R. 320; a June 2, 2022 Classification Report, A.R. 321; and the results of an October 14, 2015 “Pathways to Change” risk assessment from Ms.

██████████'s Personalized Program Plan, A.R. 369. Superintendent Marchand later submitted a second medical assessment signed by Dr. Rosenfeld, dated December 30, 2022, with a January 3, 2023 addendum describing a visit to MetroWest Medical Center, and a third medical assessment signed by Dr. Rosenfeld, dated January 23, 2023. A.R. 285-87. Although Dr. Rosenfeld described Ms. ██████████'s medical condition in detail, she expressed no opinion as to whether she was “permanently incapacitated” or suffered from a “debilitating condition.”

Id.

On January 30, 2022, Plaintiff supplemented her December 2022 petition with information from medical records regarding her cognitive incapacitation and serious physical impairments and three recent stays at MetroWest Medical Center: (1) on December 7, 2022 for unresponsiveness; (2) on December 30, 2022 for dehydration; and (3) on January 3, 2023 for abdominal pain. A.R. 270. On February 2, 2022, Plaintiff further supplemented her medical parole petition with information regarding MCI-Framingham’s decision to permanently house Ms. ██████████ in the HSU and examples of confusion and need for assistance with activities of daily living (“ADLs”) resulting from her cognitive incapacitation. A.R. 272. On February 6, 2023, Commissioner Mici denied Ms. ██████████’s December 2022 petition. A.R. 257.

II. Request for Reconsideration

On March 2, 2023, Plaintiff submitted a request for reconsideration of the denial of medical parole (“March 2023 request for reconsideration”), providing additional documentation of eligibility. A.R. 73. This included a declaration from Dr. Nicole Mushero, a licensed physician

with board certifications in internal medicine and geriatric medicine, A.R. 241, affirming Ms.

██████████'s Alzheimer's disease diagnosis and cognitive incapacitation. A.R. 236.

On March 8, 2023, Superintendent Marchand submitted an updated medical assessment signed by Dr. Joyce Rosenfeld, A.R. 58, and a June 2, 2022 classification report, A.R. 59, but no updated recommendation as to whether Ms. ██████████ should be released and no risk assessment. On April 12, 2023, Commissioner Mici held a hearing ("April 2023 hearing") on the March 2023 request for reconsideration, at which Plaintiff's undersigned counsel; MCI-Framingham Deputy Lynn Lizotte; Wellpath physician Dr. Johvonne Claybourne; three registered victims; and Hampden County Assistant District Attorney Jennifer Fitzgerald testified. A.R. 5-44. Ms. ██████████ was not permitted to attend this telephonic hearing. A.R. 6.

On April 14, 2023, Commissioner Mici denied Ms. ██████████'s March 2023 request for reconsideration of her medical parole petition. A.R. 1. Although Commissioner Mici did not express any disagreement with the judgments of the medical professionals, she nonetheless concluded:

Where she is still able to function independently with prompting, does not suffer from a serious medical condition, and has a history of manipulative and violent behavior with no indication that she is not capable of the same, I do not believe that if released, Ms. Sliech-Brodeur would live and remain at liberty without violating the law, or that her release would be compatible with the welfare of society. A.R. 4.

ARGUMENT

In a certiorari action following a non-adjudicatory proceeding, a reviewing court examines whether the decision was arbitrary or capricious, or if it constituted an abuse of discretion. *McCauley*, 491 Mass. at 572; *City of Revere v. Massachusetts Gaming Comm'n*, 476

Mass. 591, 605 (2017). A decision is arbitrary and capricious if it is taken “without consideration and in disregard of facts and circumstances” or if it “lacks any rational explanation that reasonable persons might support.” *Hercules Chem. Co. v. Dep’t of Envtl. Prot.*, 76 Mass. App. Ct. 639, 643 (2010) (citations omitted); see also, *Frawley v. Police Comm’r*, 473 Mass. 716, 729 (2016). “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) (internal quotations omitted), quoting *Firearms Records Bureau v. Simkin*, 466 Mass. 168, 180 (2013).

I. Commissioner Mici’s determination that Ms. [REDACTED] is not permanently incapacitated is arbitrary and capricious because the Commissioner failed to comply with mandatory provisions of the medical parole regulations.

The Massachusetts medical parole statute requires a prisoner to be released upon a determination that she 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[.]” G.L. c. 127 § 119A(e). To qualify for medical parole based on permanent incapacitation, a prisoner must have “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).

The medical parole statute also requires the Secretary of Public Safety to promulgate regulations “necessary for the enforcement and administration of this section.” G. L. c. 127, § 119A(h). These regulations expand upon the statute’s mandate by requiring that the Commissioner’s exercise of discretion be informed by consideration of a set of specific factors, assessments and evaluations. See 501 CMR 17.04. Among other things, the regulations require the convening of a Multidisciplinary Review Team (“MRT”) to provide certain information to the Superintendent to assist her in forming her recommendation to the Commissioner. 501 CMR

17.04(2). The information provided by the MRT “shall include but need not be limited to: (a) a written diagnosis by a licensed physician; (b) a determination by a licensed physician as to whether the prisoner suffers from a debilitating condition. . . . and (d) a risk for violence assessment, which 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.” In addition, 501 CMR 17.04(3) sets forth a list of specific factors that the Superintendent must take into consideration as part of the risk for violence assessment.

Like all properly promulgated regulations, the medical parole regulations “ha[ve] the force of law... and must be accorded all the deference due to a statute.” *Borden, Inc. v. Comm’r of Pub. Health*, 388 Mass. 707, 723 (1983) (citations omitted). Further, “[o]nce an agency has seen fit to promulgate regulations, it must comply with those regulations.” *Haas v. Comm’r of Correction*, No. 22-P-435, 2023 WL 4552322, at *4 (Mass. App. Ct. July 17, 2023), quoting *Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983) (internal quotations omitted).

A. Commissioner Mici violated her obligation under 501 CMR 17.04(2)(b) to obtain a determination from a licensed physician as to whether Ms. Sliech-Brodeur suffers from a “debilitating condition” as defined by 501 CMR 17.02.

The medical parole regulation mandates that the MRT provide “a determination by a licensed physician as to whether the prisoner suffers from a debilitating condition.” 501 CMR 17.04(2)(b). The regulations define a “debilitating condition” as:

A physical or cognitive condition that appears irreversible and which causes an inmate 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 inmate’s ability to commit a crime if released on medical parole, and requires the inmate’s

placement in a facility or a home with access to specialized palliative or medical care.

501 CMR 17.03.

Because the physician must address whether the medical condition impairs the prisoner's strength or ability to perform ADLs such that it would minimize their ability to commit a crime if released, this requirement is critical to a rational assessment of both Ms. [REDACTED]'s medical condition and any risk she may pose to the public. The SJC recognized this nexus in *McCauley*, stating that, "those who suffer from conditions that prevent or hinder their performance of certain activities of daily living are objectively less likely to pose a public safety risk." *McCauley*, 491 Mass. at 590.

Commissioner Mici's denial of both the December 2022 petition and the March 2023 reconsideration failed to comply with the requirement of the regulations regarding the critical question of whether Ms. [REDACTED] has a "debilitating condition." Although the record contains opinions from multiple licensed Wellpath physicians concerning Ms. [REDACTED]'s cognitive limitations, A.R. 19-22, 58, 83-88, none articulated the requisite "debilitating condition" determination. *Id.* There is also no mention of this question in the Superintendent's recommendation. A.R. 292-297. Indeed, the record does not contain any indication that the Superintendent even convened the required MRT, nor did Commissioner Mici seek out the requisite physician's determination in writing or at the hearing. *See generally*, A.R. Despite the abundance of physician statements supporting the conclusion that Ms. [REDACTED] has a debilitating condition, and the total absence of any physician statement to the contrary, Commissioner Mici took on for herself the role of making medical judgments that the Legislature specifically reserved for licensed physicians, stating in her April denial that, "I am in agreement with the Hampden County District Attorney's Office that Ms. [REDACTED]'s

medical condition does not meet the medical criteria established in the medical parole statute.”

A.R. 3.

The Commissioner's exercise of discretionary judgment, uninformed by the mandated determination by a physician as to whether Ms. [REDACTED] has a “debilitating condition,” is not a substitute for an evaluation that takes into consideration the medical determination required by the regulation. Cf. *Tartarini v. Department of Mental Retardation*, 82 Mass. App. Ct. 217, 222-224 (2012) (department failed to follow statutory mandate to specify clinical authorities upon which eligibility decisions were made; clinician’s judgment not grounded in clinical authorities was deficient). Thus, even though the “debilitating condition” determination is only one relevant factor that the Commissioner must consider before making a decision, her failure to comply with the governing regulation means her decision cannot stand. “A court ‘cannot acquiesce’ to DOC’s failure to do what is ‘required by the regulation.’” *Haas, supra* at *4, citing *McCauley*, 491 Mass. at 598 (2022).

B. Commissioner Mici failed to obtain the risk for violence assessment required by G.L. c. 127, § 119A(c)(1) and 501 CMR 17.04(2) and (3).

To assess a petitioner’s risk to public safety, the statute and regulations are clear about what specific information the Commissioner must obtain and consider. The statute requires that the Superintendent provide the Commissioner with “an assessment of the risk for violence that the prisoner poses to society” that must be transmitted to the Commissioner along with Superintendent’s recommendation as to whether the petitioner should be granted medical parole. G.L. c. 127, § 119A(c)(1)(iii); 501 CMR 17.04(4)(c). The regulations further specify that the risk for violence assessment:

shall take into consideration: (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. 501 CMR 17.04(3).

The administrative record contains one recommendation from the Superintendent as to the release of Ms. [REDACTED] on medical parole, A.R. 292-297, submitted to Commissioner Mici in response to the December 2022 petition. No updated Superintendent's recommendation was submitted for the March 2023 request for reconsideration, either in writing or orally at the Commissioner's hearing. In the December recommendation, Superintendent Marchand wrote, "I have conducted an 'assessment of the risk for violence that the prisoner poses to society' pursuant to G.L. c. 127, § 119A(c)." A.R. 293. The remainder of the section titled Risk Assessment Pursuant to G.L. c. 127, § 119A(c) is described as "a synopsis of Ms. Sliech-Brodeur's criminal and institutional history." A.R. 293-295.

The risk for violence assessment required by the regulations is not synonymous with the Superintendent's recommendation to the Commissioner, but a separate assessment that must consider and address the specific factors listed in 501 CMR 17.04(3). Nowhere in Superintendent Marchand's recommendation, A.R. 292-297, Deputy Lizotte's testimony at the hearing, A.R. 16-

18, or anywhere else in the record, is there any statement about the Superintendent's conclusion about what risk of violence is posed by Ms. [REDACTED], nor how her assessment considered the factors required by the regulations. *See* 501 CMR 17.04(2)(d) and (3). As the SJC held in *McCauley*, the documentation required by the statute and regulations are mandatory, not discretionary, and the Commissioner's failure to obtain the required information cannot be excused and compels a remand. *See McCauley*, 491 Mass. at 597.

C. Commissioner Mici violated her obligation under 501 CMR 17.04(2)(d) to obtain "a risk for violence assessment based upon the results of a standardized assessment tool that measures clinical prognosis."

The regulations specify that the MRT must provide the Superintendent a risk for violence assessment that is "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). Here, Commissioner Mici failed to obtain a current standardized risk assessment of the risk for violence. The only arguably standardized risk assessment in the record is an outdated "Pathways to Change" risk assessment from 2015, A.R. 369-70, which does not reflect Ms. [REDACTED]'s increased age or the deterioration in recent years of her cognitive and physical ability. It therefore does not comply with the regulatory requirement that "the risk for violence assessment must be based upon the results of a standardized assessment tool that measures clinical prognosis." 501 CMR 17.04(2)(d) (emphasis added). Since Ms. [REDACTED] did not have Alzheimer's disease in 2015, the assessment does not even purport to measure her clinical prognosis. In *McCauley*, the SJC held that even though the Commissioner had a recommendation from the superintendent, and "other documentation that comprehensively catalogued the plaintiff's medical condition, his substance use concerns, his convictions, and his disciplinary history, the absence of the standardized risk assessment required by the regulation compels us to

remand the petition for reconsideration after such an assessment is conducted.” *McCauley*, 491 Mass. at 598. The same result is necessary here.

Notably, however, even if the “Pathways to Change” risk assessment qualified as a standardized assessment tool, it showed that Ms. [REDACTED] already posed a low risk for recidivism, violence, and substance abuse even before she developed Alzheimer’s disease. A.R. 369-70. Therefore, the Commissioner’s decision that Ms. [REDACTED] presents a risk to public safety disregards the findings of that assessment without explanation, rendering the decision arbitrary and capricious.

II. Commissioner Mici’s determination that Ms. [REDACTED] is not permanently incapacitated and poses a risk to public safety is arbitrary and capricious independent of her failure to comply with the medical parole regulations.

A. Commissioner Mici’s findings that Ms. [REDACTED] does not meet the medical criteria in the medical parole statute is arbitrary and capricious because she disregarded overwhelming evidence of her cognitive incapacitation.

In denying Ms. [REDACTED]’s March 2023 request for reconsideration, Commissioner Mici stated that she found “no reason to alter [her] determination that Ms. [REDACTED] is neither ‘terminally ill’ nor ‘permanently incapacitated’ as defined in G.L. c. 127, § 119A.” A.R. 2. However, multiple licensed physicians assessed Ms. [REDACTED] and described in detail the severely debilitating nature of her conditions resulting in her permanent incapacitation and inability to independently perform her ADLs. Ms. [REDACTED] also presented corroborative evidence from her medical records describing her permanent incapacitation.

i. Commissioner Mici improperly disregarded the required opinions of licensed physicians that Ms. Sliech-Brodeur is incapacitated despite no record evidence contradicting those opinions.

Multiple physicians from Wellpath, DOC’s own medical contractor, have stated facts on the record that support the conclusion that Ms. [REDACTED] is permanently cognitively incapacitated. On January 13, 2023, Wellpath psychologist Dr. Susan Mascoop evaluated Ms.

██████████ using a MoCA test of cognitive functioning on which she scored 9/30 points, indicating “severe cognitive impairment.” A.R. 87. Based on this, Dr. Mascoop gave Ms. Sliech-Brodeur a diagnosis of “probable Major Neurocognitive Disorder due to Alzheimer’s Disease.” A.R. 88. Dr. Mascoop further stated that Ms. ██████████ “has difficulty figuring out how to put on her clothes and requires prompts to do so correctly.” A.R. 85. On February 9, 2023, Wellpath psychiatrist, Dr. Susan Richardson, examined Ms. ██████████ and determined that: (1) she has a neurocognitive disorder due to Alzheimer’s disease; (2) no current medication for Alzheimer’s disease can improve cognition; and (3) given her advanced age and frailty, she is medically contraindicated from taking medication for treating Alzheimer’s disease. A.R. 83. Given these findings, Dr. Richardson opined that Ms. ██████████ “would be much better served in a nursing home setting on a dementia unit where the facility is designed to manage patients with dementia and the staff are specially trained to care for these very challenging patients.” *Id.* Further, in both the December 30, 2022 and March 8, 2023 medical assessments by Dr. Rosenfeld, she stated that “there seems to have been a decline in [Ms. ██████████] abilities to perform activities of daily living in terms of needing to be heavily prompted.” A.R. 58, 285.

During the April 2023 hearing, Wellpath representative Dr. Johvonne Claybourne testified that she met with and evaluated Ms. ██████████ on Tuesday April 11, 2023, and “found her to be very anxious and confused.” A.R. 19. Dr. Claybourne stated that Ms. Sliech-Brodeur was very focused on being late for church because she goes every Sunday, and that she was unable to report the proper year or the proper day of the week. *Id.* She knew her birth date but did not know her age. *Id.* Dr. Claybourne also spoke with staff on the unit who explained that they frequently find rotting food in Ms. ██████████’s cell because she hoards food and

forgets to eat it; that she needs prompting to shower, brush her teeth, and do her laundry; and that staff now utilize a chart to try to keep track of when she showers because she forgets to do so.

A.R. 20. Further, when she is in the shower, without prompting to use soap or to wash her hair, Ms. [REDACTED] will simply stand there, and will sometimes put on her soiled underwear after she has cleaned herself. *Id.* Dr. Claybourne also testified that, according to the nursing staff, DOC rules prevent staff from going into Ms. [REDACTED]'s cell to remove her clothes and help her sort through dirty and clean clothes, even though the nursing staff feel that she needs more care. *Id.* Staff also explained Ms. [REDACTED] needs to be escorted at all times because she gets lost when she is moving out of the unit. A.R. 21. When Commissioner Mici asked Dr. Claybourne what level of care in the community Ms. [REDACTED] would need if she were to be medically paroled, Dr. Claybourne testified that she would need to live in a nursing home with a memory unit. A.R. 22.

The record also includes declarations by qualified non-Wellpath physicians confirming Ms. [REDACTED]'s cognitive incapacitation. The December 2022 petition included a declaration by Dr. Weber, who on November 10, 2022 evaluated Ms. [REDACTED] using a Rowland Universal Dementia Assessment Scale (RUDAS). A.R. 307. Ms. [REDACTED] scored 17 out of 30 points on this assessment, where any score below 23 indicates cognitive impairment. *Id.* Dr. Weber opined, based on his examination, that Ms. [REDACTED]'s memory issues are incapacitating and affect her basic judgment skills. A.R. 310. The March 2023 request for reconsideration included a declaration by Dr. Mushero, who conducted a thorough review of Ms. [REDACTED]'s medical records. A.R. 237. Based on this review, Dr. Mushero opined that Ms. [REDACTED] has a diagnosis of Alzheimer Dementia, which alone is a disabling, irreversible, progressive disease that renders her permanently incapacitated at this stage, and that

patients with a moderate level of dementia require significant assistance or oversight of activities of daily life given challenges remembering to perform or how to perform basic tasks such as bathing, dressing, and eating, and often lack personal safety awareness. A.R. 239.

Despite the abundance of physician statements supporting the conclusion that Ms. [REDACTED] is permanently cognitively incapacitated and the complete lack of physician statements to the contrary, Commissioner Mici irrationally concluded that she is not medically eligible for medical parole.

ii. Commissioner Mici disregarded all the other evidence of incapacitation.

Ms. [REDACTED] provided evidence from her Wellpath medical records of cognitive incapacitation. DOC's own medical records regularly refer to Ms. [REDACTED]'s dementia, Alzheimer's disease, cognitive debilitation, chronic confusion, and altered thought process. A.R. 79-235. Ms. [REDACTED]'s medical records indicate that she seems to be experiencing delusions about her family living in the Laurel Unit, a housing unit at MCI-Framingham, stating that "her Aunts and relatives were at Laurel," that she "[h]opes to get back to Laurel tonight before Mom and Dad show up," and that she "put a deposit on a room in Laurel and that her son would be moving in with her." A.R. 79-80. Medical records also regularly state that Ms. Sliech-Brodeur presents a nutrition risk for consuming less than her bodily requirement, and that she often needs prompting to remember to eat, A.R. 79-235, 319-20. She was hospitalized on December 30, 2022, for dehydration. A.R. 270.

Notably, in her decision denying Ms. [REDACTED] medical parole, Commissioner Mici focuses heavily on the fact that DOC has assigned someone to regularly bring Ms. Sliech-Brodeur to the Laurel Unit where she lived before being housed in the HSU, and credits Deputy Lizotte's assertions that Ms. [REDACTED] is not in the HSU for medical reasons. A.R. 1-4. The

fact that Ms. [REDACTED] looks forward to being wheeled to a familiar place where she sees people she recognizes does not support the conclusion that she is not incapacitated or is able to independently manage daily activities. Additionally, Deputy Lizotte testified that “[w]e have [Ms. [REDACTED]] in HSU to protect her from anyone in general population that would take advantage of her. For instance, steal from her, and we wanted to protect her and keep her in HSU.” A.R. 17. The fact that Ms. [REDACTED] is housed in the HSU to protect her from others indicates an inability to care for herself. Further, Ms. [REDACTED]'s delusions regarding her family living in the Laurel Unit, A.R. 79-80, as well as Dr. Claybourne and Dr. Richardson's statements that Ms. [REDACTED] would require a level of care in the community available on a memory care or dementia unit, A.R. 22, 83, show that DOC and Wellpath recognize that Ms. [REDACTED] is debilitated by her cognitive impairment.

Finally, Ms. [REDACTED] presented evidence of her serious physical impairments. She has severe mobility impairments, illustrated by the fact that Wellpath has prescribed her a walker and a wheelchair with an assistant who pushes her wheelchair. A.R. 58. She also presents a fall risk due to her physical instability. A.R. 79-235. She is extremely frail, so much so that Wellpath denied Ms. [REDACTED] medication to slow the progression of her Alzheimer's disease because her frailty and small stature put her at risk of side effects so severe that they would outweigh any benefit of the medication. A.R. 83. Her frailty is worsened by her failure to eat, which is a result of her Alzheimer's disease. A.R. 319-20. Dr. Rosenfeld's March 8, 2023 medical evaluation listed the following additional medical restrictions for Ms. [REDACTED]: She is not permitted to use the stairs and has an elevator pass; she uses bilateral wrist splints; she must use a medical mattress; she must be housed on the bottom tier; she must take her meals in her cell; and she must go to the front of the line during medication distribution. A.R. 58.

B. Commissioner Mici failed to properly consider the effect of Ms. Sliech-Brodeur's diagnosed Alzheimer's disease on whether she is incapacitated or poses a risk to public safety.

In *McCauley*, the SJC considered how to apply the definition of a “debilitating condition” set forth in 501 CMR 17.02 to a cognitive impairment and opined that “[c]onsideration of other daily life functions, such as thinking, planning, concentrating, and working, may be more applicable when examining prisoners who are cognitively incapacitated” than physical limitations, noting that such cognitive functions “may have an impact on the daily life functions that explicitly are indicated in the regulations, such as ability to breathe, eat, or walk on one’s own.” *McCauley*, 491 Mass. at 590. The Court advised the Commissioner to “analyze each petition individually, and to consider all activities of daily living, including those that could be implicated by cognitive incapacitation, not just those enumerated in the regulation as examples.” *Id.* Additionally, the SJC observed that “[t]he plain reading of the regulation is consistent with the legislative purpose of the statute to show compassion to those individuals who are least likely to offend, considering the poor health and age of the prisoner, while also considering savings in costs of health care for those who need serious care. The plain language of the regulation does not require that a prisoner be incapable of performing all daily life functions, but some daily life functions.” *McCauley*, 491 Mass. at 586 (emphasis included). Contrary to the clear directive of the SJC, Commissioner Mici denied Ms. S [REDACTED]’s reconsideration request, despite the powerful and uncontroverted medical assessments describing the devastating consequences of her dementia, because she can physically accomplish activities of daily living, albeit with heavy prompting from staff.¹ A.R. 1-2, 58, 285. Her reliance on others to guide her through her ADL’s

¹ The SJC noted in *McCauley* that, in two previous medical parole decisions, Commissioner Mici “specifically noted that despite needing prompting, the petitioners still were able to perform all or most physical activities of daily living independently but released them nonetheless due to their cognitive incapacities.” *McCauley*, 491 Mass. at 590. Therefore, it appears that Commissioner Mici’s conclusion here that Ms. [REDACTED] does not suffer from a

indicates she is unable to think or plan well enough to function independently. Given that Ms. [REDACTED] is cognitively debilitated due to Alzheimer's disease, A.R. 88, consideration of her ability to think, plan, and concentrate was essential to a rational evaluation of both her medical incapacitation and her risk to public safety. Yet Commissioner Mici did not consider it at all in either analysis.

C. Commissioner Mici improperly over-relied on the conviction of record and disregarded record evidence that Ms. [REDACTED] has neither the cognitive nor physical ability to perpetrate violence or commit a crime.
Commissioner Mici's denial of Ms. [REDACTED]'s March 2023 request for

reconsideration stated that Ms. [REDACTED] "has a history of manipulative and violent behavior with no indication that she is not capable of the same;" concluding that, if released, Ms. [REDACTED] would not "live and remain at liberty without violating the law;" and that her release would not "be compatible with the welfare of society." A.R. 4. In making these assertions, Commissioner Mici relied entirely on the details of Ms. [REDACTED]'s crime 19 years ago and bald assertions by the District Attorney's Office and registered victims that she is manipulative. A.R. 1-4.

Though the Commissioner can consider the facts of the underlying conviction when determining if the person presents a public safety risk, *McCauley*, 491 Mass. at 600, those facts cannot by themselves establish a risk substantial enough to deny medical parole, or the statute's explicit application to all prisoners regardless of their conviction would be rendered meaningless. *See Lazarre v. Mici*, Civil Action No. 2184CV02333, 9 (Mass. Super. Jan. 12, 2022) (opining that "the index offense alone, without more, cannot be the basis for finding someone a public

serious medical condition is inconsistent with previous decisions. Commissioner Mici provides no explanation as to why she interprets this petitioner's need for prompting to complete ADLs differently than for previous petitioners, *see generally*, A.R., rendering it arbitrary and capricious.

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.”).

Additionally, in the medical parole context, any rational consideration of such static factors as conviction and disciplinary history requires that those factors be given an appropriate weight based on their recency, *see McCauley*, 491 Mass. at 606 (Budd, J., concurring), and whether the person’s current debilitation would permit them to repeat such actions. Here, even the Superintendent acknowledges that Ms. [REDACTED] presents a low risk of violence and recidivism. A.R. 295. Additionally, the record evidence could not support a conclusion that Ms. [REDACTED], in her current physical or cognitive condition, would have the strength, attention, or planning capability to repeat the actions she was convicted of taking nearly two decades ago nor any other acts posing risk to the public. It is “arbitrary and capricious for the [Commissioner] to rest her decision on... [an] unsupported opinion that runs counter to all objective, verifiable evidence that is contained in the record.” *Lazarre*, Mass. Super. at 8-9.

Here, Commissioner Mici acted arbitrarily and capriciously when she erroneously relied nearly exclusively on static criminal record factors that predate Ms. [REDACTED]’s current incapacitated state (the details of her offense 19 years ago and the registered victims’ and District Attorney’s unsupported assertions that Ms. [REDACTED] is manipulative. A.R. 3, 23, 25-27, 32, 48-49, 269. There is not a shred of evidence in the record suggesting that Ms. [REDACTED] has engaged in any manipulative behavior at MCI-Framingham. *See generally*, A.R. Contrary to the Commissioner’s conclusion that there is “no indication that she is not capable of the same” behavior that she engaged in at the time of her crime, A.R. 4, Ms. [REDACTED]’s Alzheimer’s disease, severe mobility issues, extreme frailty, and malnourishment, A.R. 73-76, all render her incapable of committing an offense similar to what she committed 19 years ago.

Commissioner Mici erroneously ignored reliable evidence that Ms. [REDACTED] presents a negligible risk of violence based on her current age, behavior, and serious physical impairments, including that Ms. [REDACTED]'s conviction occurred before she became permanently incapacitated, A.R. 71; that she has a classification score of only 2, meaning that she would qualify for minimum security but for the overrides in place for her conviction and her health needs, A.R. 59; that she has not been disciplined in the last five years and has never been disciplined for violence during her 19 years of incarceration, A.R. 61, 65-66; and that she has severe mobility limitations, is extremely frail, malnourished, and has a number of medical restrictions in place A.R. 73-76. Commissioner Mici's finding is arbitrary and capricious because she made it "without consideration and in disregard of facts and circumstances." *See Hercules Chem. Co.* 76 Mass. App. Ct. at 643.

III. Releasing Plaintiff on Medical Parole Would Achieve the Cost Saving Purpose of the Medical Parole Statute

In *Harmon v. Commissioner of Correction*, the SJC opined that "[t]he purpose of the [medical parole] statute [is] both to reduce significant health care expenditures for aging and ill prisoners who are unlikely to reoffend and to show compassion to sick and disabled prisoners." 487 Mass. 470, 477 (2021). In this case, Ms. [REDACTED] is permanently assigned to a medical unit bed, which are among the most expensive beds in the DOC, and the record indicates that she has taken relatively frequent trips to MetroWest Medical Center. A.R. 270. DOC regulation 103 DOC 604.04-06 outlines the requirements for transporting prisoners to hospitals, which include both transportation and a security detail, (including a minimum of two officers around the clock), both of which are costly. Granting Ms. [REDACTED] release on medical parole would serve the fiscal purposes the state Legislature and SJC have articulated, while still not presenting a risk to the public.

CONCLUSION

For all of the foregoing reasons Plaintiff asks this Court to set aside the Commissioner's decision and remand the matter for (1) a finding by a licensed physician pursuant to 501 CMR 17.04(2)(b) as to whether Ms. [REDACTED] has a debilitating condition; (2) a current risk for violence assessment pursuant to 501 CMR 17.04(2)(d); (3) a risk of violence assessment that includes all the factors required by 501 CMR 17.04(2); an expedited decision that appropriately considers all the evidence establishing that Ms. [REDACTED] is cognitively incapacitated under G.L. c. 127 § 119A and does not pose a risk to public safety; and (5) such other and further relief as this Court deems just and proper.

Dated: July 28, 2023

Respectfully submitted,
Plaintiff,

[REDACTED]

By her attorney,

A handwritten signature in cursive script, appearing to read 'Nawab', followed by a horizontal line.

Sarah Nawab, BBO #707546
Prisoners' Legal Services of Massachusetts
50 Federal Street, 4th Floor
Boston, MA 02110
617-482-2773
snawab@plsma.org

CERTIFICATION UNDER SUPERIOR COURT RULE 9A(d)(1)

I hereby certify that I served this motion on Defendant's counsel, Tonya Rutherford, Esq., by electronic mail.



Sarah Nawab, Esq.