COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. DAR No. _____

WAYNE HICKS,
PETITIONER/APPELLANT

v.

CAROL A. MICI,
COMMISSIONER OF THE DEPARTMENT OF CORRECTION,
&
NELSON ALVES,
SUPERINTENDENT, MCI-NORFOLK,
RESPONDENTS/APPELLEES.

APPLICATION FOR DIRECT APPELLATE REVIEW

Respectfully Submitted,
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REQUEST FOR DIRECT APPELLATE REVIEW

This case should be heard on Direct Appellate Review because the Commissioner for and the Department of Correction (DOC) Superintendents have repeatedly disregarded the statute's requirements regarding the risk assessment and medical assessment performed by a licensed physician. In fact, since Mr. Hicks' petition and appeal, there was a change in the accompanying regulation, 501 CMR 17.00[1], now requiring, as part of the risk of violence assessment, a standardized assessment tool that measures "clinical prognosis." Additionally, this Court should provide guidance on the Commissioner's incorrect application of the medical parole statute's "permanent incapacitation" and "debilitating condition," which has resulted in the denial of medical parole to inmates despite objective evidence to the contrary.[2] The Commissioner's decisions to date are inconsistent and inaccurately apply the standards required for release on medical parole. Finally, there are no appellate court decisions to date providing guidance about how much deference should be afforded to the Commissioner. Unlike discretionary parole, medical parolees who meet the qualifications require release. Accordingly, direct appellate review is necessary to clarify these important issues.

[1] This regulation is being challenged by Martin McCauley in No. SJC-13296 that was taken by this Court sua sponte.

[2] Judges have found the Commissioner's findings and conclusions to be unreasonable, arbitrary, capricious, and an abuse of discretion. See e.g. Adrey v. Dep't of Correction, Suffolk No. 2019CV3786H; Mahdi v. Mici, Norfolk No. 2019CV1064; Lazarre v. Mici, Suffolk No. 2184CV02333; Emma v. Mici, Suffolk No. 2184CV1061; Emma v. Mass. Parole Board, 448 Mass. 449 (2021). See also remanded cases Stote v. Dep't of Correction, Suffolk No. 2184CV1966H; SJ-2022-0048; Figueroa v. Dep't of Correction, Suffolk No. 2184CV01623 (**these opinions were provided to the Court in the application for direct appellate review filed and allowed by James Carver, No. DAR-28710)**; Vasquez v. Carol A. Mici et al, 2184CV00854 (Attachment A).

STATEMENT OF PRIOR PROCEEDINGS[3]

On May 26, 2021, Wayne Hicks filed his request for release on medical parole pursuant to G. L. c. 127, § 119A to Superintendent Nelson Alves ("Superintendent"). (Ex. B) On June 16, 2021, Superintendent Alves sent his recommendation against medical parole to Commissioner Carol A. Mici ("Commissioner"). (Ex. F) The Essex County District Attorney's Office opposed Mr. Hicks's release on medical parole on June 23, 2021. Id. On July 30, 2021, Commissioner denied Mr. Hicks's petition for medical parole. Id. The Commissioner determined that Mr. Hicks "is not terminally ill or permanently incapacitated as defined in G. L. c. 127, § 119A." Id. The Commissioner reached this conclusion because "it is hard to predict the outcome of Mr. Hicks' health status at this point." Id. Additionally, the Commissioner determined that "Mr. Hicks is able to perform daily living activities unassisted and is able to ambulate with the assistance of a wheelchair." Id. Finally, the Commissioner found that "Mr. Hicks is not likely to live and remain at liberty without violation of the law, and that his release would be incompatible with the welfare of society." Id. She based this decision on Mr. Hicks's underlying crime, prior institutional history including his disciplinary reports, and prior involvement in a "escape plot." Id.

On September 22, 2021, Mr. Hicks filed an appeal from the denial of his medical parole with the Suffolk County Superior Court, Docket No. 2184CV2160. (Ex. D; C) The claim was in the nature of certiorari pursuant to G. L. c. 249, § 4. On November 23, 2021, Mr. Hicks file a motion to amend the complaint and a

[3]The addendum, filed separately, is referred to as (Add.).

motion for judgment on the pleadings. (Ex. E; G) A notice to appear was sent to the parties on December 1, 2021, for a hearing on December 10, 2021. (Ex. C) On December 9, 2021, the respondents filed an opposition to the petitioner's motion for judgment on the pleadings and cross motion for judgment on the pleadings. (Ex. H) On December 10, 2021, an assented to amended complaint was filed by Mr. Hicks. (E) On December 16, 2021, the respondents filed its answer to the amended complaint, the administrative record (AR). (Ex. F) A hearing was conducted in person on December 10, 2021, with Mr. Hicks appearing via Zoom from MCI-Norfolk. (Ex. C) Judge Sanders issued her memorandum and decision on January 6, 2022[4], denying Mr. Hicks's motion for judgment on the pleadings and allowing the respondents' cross-motion for judgment on the pleadings. (Ex. J) Mr. Hicks timely appealed. (Ex. C)

STATEMENT OF THE FACTS

Hicks's Petition for Medical Parole

In his petition, Mr. Hicks (age 84 then now 85) presented a myriad of chronic medical conditions, including type II diabetes, arthritis, hyperlipidemia, and hypoglycemia. (Ex. B) In December of 2020, Mr. Hicks, like many prisoners before him, contracted COVID-19 that impacted his already immunocompromised system and required outside hospitalization. Id. Mr. Hicks required outside hospitalization again in March of 2021 for unspecified pneumonia. Id. Medical records available to the Commissioner detailed Mr.

[4] Notice was not sent via first-class mail until January 14, 2022, and undersigned counsel received notice on January 25, 2022. The decision and order were docketed on January 26, 2022.

Hicks's continued deteriorating condition and inability to perform daily living activities. Id. Mr. Hicks cannot live in general population because of his advanced age and medical conditions, he must live in the Clinical Stabilization Unit (CSU). Id. Additionally, Mr. Hicks is confined to a wheelchair and assigned a companion who must escort him around the facility. Id. Finally, Mr. Hicks is assigned a specific ground diet due to concerns about his aspirating his food. Id.

Superintendent Alves's Recommendation

In recommending against medical parole, Superintendent Alves outlined Mr. Hicks' underlying crime, his thirteen (13) disciplinary reports since he began his life sentence in 1974, and a suspected escape attempt on July 10, 1981, for which Mr. Hicks was found not guilty. (Ex. F) He reported that, according to a correctional officer in the unit where Mr. Hicks resides, he can "ambulate by wheelchair, eats, dresses, shaves, showers and toilets unassisted." Id. However, Superintendent Alves outlined that the medical evaluation states that Mr. Hicks is housed a special unit "where he receives assistance with transfers, ambulation, and monitoring of meals due to high risk of aspiration." Id. Superintendent Alves recommended against release on medical parole because in his opinion "Mr. Hicks' condition is not so debilitating that he does not pose a risk to public safety." Id.

June 14, 2021, Medical Assessment

The medical assessment, conducted by nurse practitioner Diala Tawk and co-signed by Dr. John Straus, outlined Mr. Hicks' chronic medical conditions as follows: hyperlipidemia, high blood pressure, type II diabetes, atrial fibrillation,

peripheral vascular disease, altered mental status/cognitive decline. (Ex. F) It further stated, "Mr. Hicks' chronic diseases are progressing and resulting in complications and hospitalizations." Id. While the assessment opines it is difficult to determine the outcome of his health, "he is at high but unpredictable risk due to his advanced age in combination with his known medical conditions in the next 18 months. Id. Finally, he must reside in the CSU where "he receives assistance in his activity of daily living." Id.

The Commissioner's Denial

On July 30, 2021, the Commissioner denied Mr. Hicks' request for medical parole. (Ex. F) The Commissioner found that Mr. Hicks "is not terminally ill or permanently incapacitated as defined in G.L. c. 127, § 119A." Id. Additionally, the Commissioner found that "Mr. Hicks is not likely to live and remain at liberty without violation the law, and that his release would be incompatible with the welfare of society." Id. The Commissioner stated that Mr. Hicks' conditions do not qualify for release because "it is hard to predict the outcome of Mr. Hicks' health status at this point." Id. She relied upon the correctional officer's statement that "Mr. Hicks is able to perform daily living activities unassisted and is able to ambulate with the assistance of a wheelchair." Id. Finally, that "Mr. Hicks has had multiple behavioral issues while in the custody of the DOC, for which he has received multiple disciplinary reports in prison, including for his involvement in an escape plot." Id. According to the Commissioner the disciplinary reports provided by the Superintendent "indicate to me that [Mr. Hicks] continues to pose a risk to public safety, would not live in

accordance with the law if released, and that his release would be incompatible with the welfare of society at this time." Id.

ISSUES OF LAW RAISED AND PRESERVED

1. Whether the Commissioner, Superintendents, and DOC can ignore the statutory requirements for a "risk of violence" assessment and a licensed medical physician to conduct the medical assessment?
2. Whether the Commissioner wrongly applied "permanent incapacitation" and "debilitating condition" in deciding whether to release Mr. Hicks?
3. How much deference should be given to the Commissioner whose job is to maintain order within an institution, not evaluate public safety risk in society?

ARGUMENT

I. THE SUPERIOR COURT SHOULD HAVE REMANDED TO THE COMMISSIONER WITH AN ORDER TO CONDUCT A MEDICAL ASSESSMENT BY A LICENSED PHYSICIAN AND A RISK FOR VIOLENCE ASSESSMENT AS STATUTORILY REQUIRED.

Mr. Hicks is serving life sentence without the possibility of discretionary parole. However, medical parole is available to any prisoner, no matter their crime or sentence. "Medical Parole is not discretionary. It is not about remorse or the type of rehabilitation that might animate traditional parole." Adrey v. Depart. of Correction et al., 2020 WL 4347617 *5 (June 19, 2020) In Adrey, the Superior Court found that the Superintendent and Commissioner "applied the wrong legal standard each time they failed to follow the statute's requirement to consider certain factors, including the risk of violence plaintiff presents if release and a medical parole plan that addresses the issues articulated in the statute." Adrey,

2020 WL 4347516 *7. Here, there was no medical evaluation conducted by a licensed physician or a "risk assessment for violence" as statutorily required. Without such evaluation and risk assessment, the Commissioner's decision to deny medical parole was an abuse of discretion. Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 729 (2016)(reviewing standard is whether a "decision is arbitrary and capricious such that it constitutes an abuse of discretion")

a. A Medical Assessment Conducted by a Nurse Practitioner and Not a Licensed Physician is a Substantial Error of Law that Adversely Affected Mr. Hicks' Material Rights.

As required by the medical parole statute the Commissioner relies upon "a written diagnosis by a physician license to practice medicine under section 2 of chapter 112." G.L. c. 127, § 119A(c)(2). G.L. c. 112, § 2 outlines the requirements to register as a licensed medical doctor in Massachusetts. First, an individual must graduate medical school, obtain a Doctor of Medicine, M.D, receive the appropriate supervised clinical training, and pass examination. A nurse practitioner (N.P.) is not a licensed doctor. According to the American Association of Nurse Practitioners, to become a N.P. an individual must have a Bachelor of Science in Nursing, complete a nurse practitioner focused graduate program and pass examination. See https://www.aanp.org/news-feed/explore-the-variety-of-career-paths-for-nurse-practitioners Here, the medical assessment was created by a Nurse Practitioner and not a licensed medical doctor as required. (Ex. F) As such, this was a substantial error of law, and the Commissioner could not have relied upon such to reach her decision. McCarthy v. Civil Serv. Com., 32

Mass. App. Ct. 166, 170-172(1993)(reviewing Superior Court's interpretation of a statute on G.L. c. 249, § 4 review).

b. Any Decision Without a Proper Risk for Violence Assessment is Arbitrary and Capricious.

Mr. Hicks maintains that there was a not a "risk of violence assessment" conducted. The accompanying regulation, in effect at the time of Hicks' petition and appeal, 501 CMR 17.05: Risk for Violence Assessment (Add. 14), outlined several factors that the Superintendent "shall take into consideration..." including the following:

> "(a) the prisoner's terminal illness/permanent incapacitation and prognosis;
> (b)the prisoner's current housing situation (e.g., placement in general population, institutional infirmary, Lemuel Shattuck Hospital, or outside hospital);
> (c) clinical management of the prisoner's terminal illness/permanent incapacitation;
> (d) assessment for mobility, gait and balance, specifically, whether the prisoner is bed0ridden, wheelchair bound, uses a walker, or can walk with assistance;
> (e) the medically prescribed and required durable medical equiemtn or other assistive devices for the prisoner including, but not limited to, wheelchairs (manual or electric), hospital beds, traction equipment, cans, crutches, walkers, kidney machines, ventilators, oxygen, montiors, pressure mattresses, and/or lifts;
> (f) the prisoner's ability to manage Activities of Daily Living (ADL);
> (g) psychological assessment;
> (h) advanced directives/DNR; and
> (i) the prisoner's height, weight, ability to eat or if the prisoner is fed intravenously.

See 501 CMR 17.05. However, this "Risk for Violence Assessment" did not require any evaluation using a standardized assessment tool. The Judge found that those factors were considered based on the documentation provided, including a "recent classification report, a synopsis of Mr. Hicks' institutional history,

disciplinary reports, the TCU drug screen, and a Personalized Program Plan." (Ex. J) While the Judge acknowledged that the director of classification failed to provide a "Risk or Needs Assessment" due to Mr. Hicks' first-degree life sentence, the Court determined that the information complied with the Medical Parole Statute. Id.

When the regulations were amended on June 10, 2022, the "risk for violence assessment" became incorporated with 501 CMR 17.04: Processing Petitions for Medical Parole for Prisoners Committed to the Custody of the Department (Add. 24), rather than remaining a standalone regulation. In amending the regulation, the agency recognized the need for a standardized assessment tool to determine a prisoner's "Risk for Violence." Specifically, the new regulation states the following:

> (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;"

See 501 CMR 17.04(2)(d) (Add. 24).

Prior to the amendments it was the responsibility of the Multidisciplinary Review Team (MRT) to provide information about the prisoner's suitability for medical parole to the Superintendent using standardized assessment tools such as LS/CMI or COMPAS. (Add. 14) This was not done in Mr. Hicks' case. This standardized assessment tool is the same used for those prisoners approaching their discretionary parole eligibility date. Rather than a "risk of violence assessment," it is a "risk and needs assessment" See G.L. c. 127, § 130. In fact, the Parole Board, the agency created with the legislative mandate to assess

whether it is safe to release a prisoner, created a policy to address this "risk and needs assessment." See 120 PAR 112; (Add. 30-44). This standardized assessment tool was not performed and not provided to the Commissioner in reaching her conclusion that Mr. Hicks was not a suitable candidate for medical parole.

II. THE SUPERIOR COURT SHOULD HAVE ORDERED HICKS' RELEASE ON MEDICAL PAROLE BECAUSE THE COMMISSIONER'S INTERPRETATION OF "PERMANENT INCAPACITATION" AND "DEBILITATING CONDITION" WAS INCORRECT, HER FINDINGS AND CONCLUSIONS WERE CONTRARY TO THE OBJECTIVE EVIDENCE MAKING HER DECISION ARBITRARY, CAPRICIOUS THAT IT CONSTITUTED AN ABUSE OF DISCRETION

The medical parole statute presents two issues to the Commissioner: (1) does the prisoner qualify for medical parole based on his or her medical conditions? and if so, (2) does the prisoner pose a "public safety risk?" With respect to the first question, the Commissioner must determine whether the prisoner has a terminal illness or is permanently incapacitated as defined by G.L. c. 127, § 119A(a). Both require that the prisoner's condition be is so debilitating that the prisoner does not pose a public safety risk. See G.L. c. 127, § 119A(a). If the requirements are met, release is mandatory. Emma v. Parole Board & another, 448 Mass. 449 (2021)("[t]he plain language of the provision mandates that a prisoner be released on medical parole when the statutory requirements have been met..")

a. Hicks is Permanently Incapacitated

Mr. Hicks is a now an 85-year-old feeble man with several chronic, irreversible conditions which requires him to reside in a special stabilization unit,

eat a special diet, and get around by a wheelchair with a supervising/pushing companion. Permanent incapacitation is defined by the medical parole statute as "a physical or cognitive incapacitation that appears irreversible as determined by a licensed physician, and that is so debilitating that the prison does not pose a public safety risk." See G.L. c. 127, § 119A(a). Mr. Hicks' medical assessment outlines his chronic diseases that "are progressing and resulting in complications and hospitalizations." This includes an "altered mental status, cognitive decline." These medical conditions put Mr. Hicks "at high but unpredictable risk due to his advanced age in combination with his known medical conditions in the next 18 months."

Next, a debilitating condition, while not defined by statute, is defined by the accompanying regulation 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 CMR 17.02 In Mr. Hicks' medical assessment, medical providers acknowledge that he requires residing in a specialized unit "where he receives assistance in his activity of daily living," i.e. he cannot care for himself. (Ex. F) Contrary to the Commissioner's decision that Mr. Hicks "ambulates by wheelchair," "ambulatory" is defined as "able to walk." *Ambulatory*, Black's Law Dictionary (3rd ed. 2006). In fact, the regulations defining debilitating condition

acknowledge that it is the interference with "walking" not "ambulating," that needs to be evaluated. Mr. Hicks is **unable to walk on his own at all**.

The Judge found that the Commissioner's decision about whether Hicks was "permanently incapacitated" noted that "Hicks was still capable of performing daily living activities." (Ex. J) "Based on the information provided, Hicks is capable of eating, toileting, and bathing on his own and his mobile with the assistance of a wheelchair and walker." Id. The Judge found the Commissioner's explanation as "one that reasonable persons might support, particularly in light of how the regulations define what it means to be debilitated." Id. She further reiterated that there was a lack of evidence that Mr. Hicks required a specialized facility due to his condition based on Mr. Hicks' proposed release plan. Id. While Mr. Hicks may propose a release plan, the burden remains on the DOC to provide a comprehensive release plan that would be approved by the Parole Board. Buckman v. Commissioner of Correction, 484 Mass. 14, 29 (2020)(striking down the regulation that placed the burden on the prisoner because it "...would place that formidable burden on someone who claims to be permanently incapacitated or terminally ill, and who may suffer from dementia, mental illness, or cognitive limitations"). In fact, Mr. Hicks provided alternatives to either live with his daughter or that he may have a bed available at "Home at Last," which is a specialized medical facility. In fact, when evaluated by the Multidisciplinary Review Team (MRT) it was noted, "[h]e does not have a home plan and would need housing to accommodate medical needs." (Ex. F.)

The definitions of "permanent incapacitation" and "debilitating condition" have yet to be reviewed by a higher court. The medical parole statute does not require total incapacitation without any independent functioning. Brookline v. Comm'r of the Dept. of Environment Quality Eng'g, 398 Mass. 404 410 (1986)(agent's interpretation of own regulations will be overturned where "the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious"). In fact, there is no need to define the term further through a regulation as the definition of "permanent incapacitation" is contained within the medical parole statute. G.L. c. 127, § 119A(a)("so debilitating that the prison does not pose a public safety risk"). The medical assessment alone will provide the necessary information to the Commissioner so long as it is to "determined by a licensed physician." G.L. c. 127, § 119A(a). The medical assessment shows that Mr. Hicks met the first prong for release on medical parole because he was and remains permanently incapacitated. (Ex. F) Accordingly, to the extent that the accompanying regulation limits the number of prisoners who may seek medical parole it should be struck down. Harmon v. Commissioner of Correction, 487 Mass. 470, 477 ("reject any interpretation by an agency that does not give effect to the Legislative intent"). Even accepting the regulation as the bar, the medical records and assessments provide objective evidence to the contrary of the Commissioner's decision showing that Hicks has "significant and serious impairment of strength or ability to perform daily life functions." See 501 CMR 17.02; (Add. 11) Accordingly, the Commissioner's "decision [to deny medical parole was] arbitrary and capricious such that is constitutes an abuse of

discretion." Frawley v. Police Commissioner of Cambridge, 473 Mass. 716, 729 (2016).

b. Hicks is Not a Safety Risk and His Release is Not Incompatible with the Welfare of Society

Where the medical parole statute does allow some exercise of judgement by the Commissioner, is determining whether a prisoner poses a public safety risk. Here, the Judge gave "considerable deference" to the decision of the Commissioner, citing appellate parole board precedent. Doucette v. Massachusetts Parole Bd., 86 Mass. App. 531, 540-541 (2014)(finding a judicial remedy is available to correct "substantial error of law apparent on the record adversely affecting material rights"). However, the degree of deference to an agency's findings and conclusions should be tailored to the legislative grant of authority in that field. The Commissioner's experience is one based in a career in corrections and determining the maintenance and order within an institution not whether someone's release will pose a safety risk in the community.

The Commissioner relied heavily upon Mr. Hicks' underlying crime and prior criminal history, including a sentence for an escape charge. (Ex. F) The Commissioner stated that "Mr. Hicks has had multiple behavioral issues while in the custody of the DOC, for which he has received multiple disciplinary reports in prison, including for his involvement in an escape plot". Id. However, the documents provided show that Mr. Hicks' classification score is a 2, or low risk, which would permit him to be transferred to minimum security if not for his underlying conviction. Id. The sentence for which Mr. Hicks served for an escape was leaving a work crew in 1957 in Florida where he was sentenced to three (3)

months of hard labor. Id. He has not had a disciplinary report in over twenty (20) years. Id. Of the total of thirteen (13) disciplinary reports, many involved the use of substances, disobeying orders, or department rules like allowing another inmate use of his personal radio or being disrespectful to staff. Id. The "escape plot" that the Commissioner relies upon from 1981 was an incident for which Mr. Hicks was found not guilty. Id. These are not the kind of incidents that should be relied upon to show that Mr. Hicks' poses a public safety risk. Many relate to the orderly administration of a prison and do not reflect how one would behave if released with parole supervision for life.

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is appropriate here because there are important questions that need clarification about: (1) the need for the Commissioner and DOC Superintendent's to follow the statutory requirements related to a medical assessment conducted by a licensed physician and a "risk for violence" assessment; and (2) the Commissioner's misapplication and interpretation of "permanent incapacitation" and "debilitating condition," leading to inconsistent decisions for prisoner's seeking release on medical parole. Answering these questions will impact current medical parolees seeking release.

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By his attorney

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CERTIFICATE OF COMPLIANCE

I, Kelly M. Cusack, hereby certify pursuant to Mass.R.App.P. 11 that this application for Direct Appellate Review complies with the Rules of Appellate Procedure, pertaining to the filing of briefs (written in Times New Roman, 12 point and created with Microsoft Word, with less than ten (10) pages in the parts of the brief required as counted using the word count feature of Microsoft Word 2016.

/s/ Kelly M. Cusack

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d) I certify, under the pains and penalties of perjury, that on July 15, 2022 copies of this Application for Direct Appellate Review, Motion for Leave to File Application Late and Affidavit were served on DOC Legal Counsel, Connor Tarr, by email at connor.tarr@state.ma.us.

/s/ Kelly M. Cusack

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Kelly M. Cusack, Esq.

ATTACHMENTS

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