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COMMONWEALTH OF MASSACHUSETTS
WORCESTER, S.S. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * *
BENJAMIN LAGUER * Docket No. 1885CV01431
v. *
THOMAS A TURCO, III, *
COMMISSIONER OF THE *
MASSACHUSETTS DEPARTMENT OF *
CORRECTION, et al. *
* * * * *

MOTION HEARING
BEFORE THE HONORABLE JAMES G. REARDON, JR.

APPEARANCES:

For the Plaintiff, Benjamin LaGuer:
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Third Floor
Boston, Massachusetts 02110
By: Jeffrey Harris, Esq.

For the Defendants, Thomas A Turco, III, Commissioner of The
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Department of Correction
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Worcester, Massachusetts
Courtroom 25
November 20, 2018

Proceedings recorded by Court Personnel.
Transcript produced by Approved Court Transcriber
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1 (Court called to order.)

2 (2:05 p.m.)

3 THE COURT OFFICER: Court is now in session. You may be
4 seated.

5 THE CLERK: Good afternoon, your Honor. May I proceed?

6 THE COURT: Yes.

7 THE CLERK: First matter is Benjamin LaGuer v. Turco,
8 201885CV1431. Counsel, could you please identify yourselves for
9 the record?

10 MR. RENTSCH: Good afternoon, your Honor. David Rentsch
11 for the Respondents.

12 THE PLAINTIFF: Benjamin LaGuer, 8-0 (sic), at North
13 Central Correctional Institution.

14 THE COURT: Good afternoon, Mr. LaGuer. This is Judge
15 Reardon. Can you hear me?

16 THE PLAINTIFF: Can hear you, your Honor.

17 THE COURT: All right.

18 THE PLAINTIFF: Thank you.

19 THE COURT: All right. So we're going to proceed with this
20 hearing. And again, I'm allowing you to listen, but you're not
21 a direct participant, because you're represented by counsel.
22 You understand that, correct?

23 THE PLAINTIFF: I do, your Honor.

24 THE COURT: All right. Thank you.

25 THE PLAINTIFF: Thank you.

1 THE COURT: Thank you. All right. So we have cross-
2 motions for a judgment on the pleadings. I have read them. I'm
3 obviously familiar with the matter, as we've been going over it
4 now for a few months. I did also read the case submitted by the
5 Petitioner, Roby v. Superintendent. I had seen it when it first
6 came down, but then they brought it to my attention again, and
7 as I understand it the Respondents didn't have any objection to
8 that case being brought to my attention.

9 So that being said, I guess I'll let the Petitioner go
10 first, since the Petitioner filed first, obviously, and filed
11 their motion. And you don't need to go through every point.

12 I will say to both counsel, the matter is very well briefed
13 and very well outlined, which I appreciate. It's rather
14 interesting, which is not always pleasant, a matter that's come
15 before me to try to resolve, but try, if you can, to highlight
16 what you think are your major points, because again, it's a
17 well-briefed matter, and I'm not sure there's a lot more to
18 elucidate beyond your briefs. I'm not limiting you in any way,
19 but I think the issues are well presented. All right?

20 So I'll hear from you.

21 MR. HARRIS: Thank you, your Honor. Jeff Harris for Mr.
22 LaGuer. I could start just asking if your Honor has any
23 particular questions, areas that you'd like me to address?

24 THE COURT: Well, I -- so I have a question initially,
25 which I guess both parties I'll hear from you on. The standard

1 of review, it seems to be that the parties may agree on that, or
2 indicate that they both, sort of, feel it's arbitrary and
3 capricious. So that's going to be a question.

4 And then another question, I know the parties disagree on
5 this, is what is my authority to do? Can I issue -- can I rule
6 in favor of medical parole, either under certiorari or under the
7 plain language of the statute? So that's -- and that's a
8 consideration.

9 And the third thing that's on my mind is even if I were to
10 find, and I have not, in any way, found this, but supposing,
11 hypothetically, I were to find that the medical parole plan
12 submitted by Mr. LaGuer is sufficient, and the DOC refusing to
13 participate or saying that they have no participation in the
14 medical parole plan has, essentially, waived their right to
15 object to that in any way. Does that preclude me, in any way,
16 from getting to the second element, which could be, even as
17 Respondent argues, even if the medical parole plan were
18 sufficient, or even if they didn't oppose it, or even if I were
19 to find it sufficient, I would still have to get to the second
20 item, which is is he so debilitated that he does not present a
21 danger to society?

22 So even if I found that the medical parole plan was
23 complete, or if I were to find that it's incomplete but that the
24 Respondent has essentially waived a right to object to it,
25 wouldn't we get to the second point anyway, which may, in fact,

1 in terms of importance, be the first point? Maybe the first
2 part of the statute is a qualification and the second part of
3 the statute is a determination or a judgment call?

4 So those are the kind of issues that I've been thinking
5 about as I go through it. And I guess I would like both sides
6 to address those issues.

7 MR. HARRIS: Okay. Fair enough. I'll start with the
8 question of remedy. I think that the Department of Correction's
9 best case, and I think it's an important case, obviously, is the
10 Diatchenko case, where they specifically say that in the context
11 of Diatchenko that vacatur and remand is appropriate. And that
12 makes perfect sense in the context where you have a parole
13 hearing. You have determinations of credibility below. And you
14 have a situation where the Court is not in the same position as
15 the adjudicator below.

16 Here, you have the Commissioner studying the same cold
17 record as the Court, and you do not have a parole case like you
18 have in Diatchenko. And you have plenty of examples from the
19 SJC, as I'm sure you've seen. The Frawley (phonetic) case, the
20 Simkin case, the City of Gloucester case, not to mention the
21 Superior Court cases -- LeMay, et cetera, and the one that
22 LeMay cites where the Court endorses the Superior Court giving
23 injunctive relief.

24 So I don't see -- I agree that Diatchenko is something that
25 the Court has to contend with, but I don't think it limits the

1 Court, because it's very specific to juvenile homicide offender
2 hearings, and of course there you have to listen to -- it
3 wouldn't do just to read the transcript.

4 Moving on to -- I think I need to address the six ways in
5 which I think there have been abuses of discretion here. The
6 first is what I would say is just a general failure of curiosity
7 on the question of Mr. LaGuer's sickness. I think that the
8 record shows that in June of '17 the cancer had spread, that by
9 November of '17 he was considered to be quite weak, that by
10 March of this year they had to use increased narcotics on him to
11 manage his pain. He had problems with nutrition, problems with
12 swallowing, bathing. He had confusion. He had an abscess. By
13 April he had decreasing platelets. By May he lost 40 pounds.
14 By June he had what the doctor considered increasing weakness.
15 The DOC had put him on feed-in status, and he was in soft
16 restraints.

17 So you have this record. What the DOC considered, and what
18 the DA adopted -- I'm sorry. What the DA considered, and what
19 the DOC adopted, was something that came from, essentially, July
20 of 2017. The Dr. Rawad Elias letter, that said he had three
21 years to live.

22 That just doesn't capture the whole -- the year that really
23 mattered, which was July of '17 to June of 2018.

24 THE COURT: Let me say this. The record clearly indicates
25 that he's a very sick person and terminally ill, and I don't

1 think the parties disagree that he's terminally ill. As I
2 understand, the Respondent's argument is he's still able to
3 ambulate. He still has his faculties about him. He still
4 understands what's going on. So, I guess, spin out some
5 hypothetical from their perspective, what prevents him from
6 hiring an Uber, or interacting with somebody else, or convincing
7 somebody else to engage in some sort of joint enterprise or
8 conspiracy or whatever? And they have this argument that he's
9 written a letter to the former prosecutor that could be
10 interpreted as threatening. So although he doesn't have the
11 ability to walk X number of miles, or probably even a mile, he
12 still has some ability to be dangerous.

13 And they cite some statutes from other jurisdictions which
14 seem to indicate that maybe he's not -- and I'll be asking them
15 certainly -- he's not quite at death's door, so there's some
16 leeway here for them to say he's not as debilitated as the
17 statute requires.

18 MR. HARRIS: Well, I think the DOC has essentially set up a
19 straw man by saying well, he can go wherever he wants, and he
20 can take an Uber or something along those lines. There are
21 conditions that are imposed on a parolee. Certainly there would
22 be conditions.

23 The Petitioner understands, and I have offered in my
24 petition, should he stay at Mr. Archer's house? Should he be on
25 GPS? Could there be a curfew?

1 Even if he was able to go offsite -- maybe he can go
2 offsite during the day. I don't know what conditions the Parole
3 Board would find important. But I think it, sort of, buries
4 one's head in the sand to say well, there would be no
5 conditions, so he would just walk off. That misses the whole
6 point of parole conditions, okay?

7 As for this letter, I'll say two things. First of all, the
8 letter was not offered, nor was it considered. It was not
9 offered by the DOC in the record, and it couldn't have been
10 considered by the Commissioner, because it's not in the record.
11 So I'm willing to stipulate to it being part of the record,
12 because I've seen the -- no, I'm not going to speak beyond the
13 record, but I don't think --

14 THE COURT: Listen. Let's not -- let's not add to the
15 record right now.

16 MR. HARRIS: I'm sorry. But I think that your Honor cannot
17 take a negative inference from something that wasn't offered
18 into the record. All they're doing is insinuating that it's
19 threatening, and that's easy to do without actually presenting
20 it.

21 Finally, your question gets to the question of
22 dangerousness, and that is another way in which I think there's
23 been an abuse of discretion, which is all of the -- they've
24 elevated their subjective feelings about Mr. LaGuer over what
25 appeared to be the only objective evidence that there is. I'm

1 sorry. The only evidence about dangerousness that there is
2 which is objective, which is the COMPAS from 2010 showing that
3 he is as low as he can be on risk of recidivism, as low as he
4 can be on risk of violence. He has no record as a juvenile. He
5 has no record since the crime was committed in 1984.

6 Now, the DOC says well, he hasn't been out in public, so he
7 can't commit a crime. But the DOC knows as well as I do that
8 people are committing crimes -- people do commit crimes in
9 prison, and they are often prosecuted for them. So I think you
10 can take a lot from the fact that there's no record either as a
11 juvenile or as an adult. That is really objective evidence
12 about dangerousness. Not the DOC's only subjective opinion that
13 a letter was threatening, or that possession of some illicit
14 material or other things that frankly, don't really go to
15 dangerousness.

16 Him maintaining his innocence? That is not a basis for
17 finding someone is dangerous. It may be, arguably, finding
18 someone's not rehabilitated, but --

19 So I'd like to address the SOTP question, because I think
20 that is --

21 THE COURT: All right. That Roby, kind of, speaks to.

22 MR. HARRIS: Yes. I think Roby is a recognition that the
23 courts now understand that the DOC was putting sex offenders who
24 maintained their innocence in a very difficult position for
25 years and years and years by essentially forcing them to admit

1 their guilt if they wanted to participate in SOTP, and if they
2 didn't want to participate in SOTP, sex offender treatment
3 program, then they face all kinds of repercussions.

4 And most cases, and not just that case, but the Butler case
5 and the case before that, basically said it would be a Fifth
6 Amendment violation, essentially, to require that they take
7 that.

8 So he has no other -- he had no recourse prior to 2015.
9 Now that they don't require that anymore, he has signed up for
10 it. And sure there was a delay, and maybe it didn't filter
11 through the innocent sex offender community that you could take
12 this, and they probably would still be understandably extremely
13 concerned about doing therapy that essentially admits to a crime
14 that they say they didn't do.

15 So what I think is really important about that is that the
16 Parole Board said in 2015 that the primary reason for not
17 paroling him was that he refused to do the sex offender
18 treatment program. And they were predicating that on his, sort
19 of, intransigence about not doing that prior. And now the DOC
20 said -- well, first the DA, then the Superintendent, and then
21 the Commissioner all pointed to his intransigence with respect
22 to SOTP as a basis for him being dangerous. And that is not --
23 that just isn't founded, because it doesn't mean that he doesn't
24 want to follow the rules. It means that, like anyone who is
25 innocent, if they're convinced of their innocence, and I'm not

1 trying to say anything about his innocence, but if they're -- he
2 has a right to stick to his innocence. Anyone would not do sex
3 offender treatment if it required you admitting to guilt. It
4 doesn't say anything about whether or not he would like to do
5 programming if it was offered to him.

6 I would like to point out that the failure to -- requiring
7 Mr. LaGuer, on his own, to present a medical parole plan itself
8 should be considered an abuse of discretion. Not because there
9 was a misunderstanding about who should do it, but because they
10 faulted him for it. And they said that it was -- the DA and the
11 Superintendent and the Commissioner all said this is something
12 that he really should have done, and we're really going to take
13 something from the fact that he didn't do it. We're going to
14 find that he doesn't consider -- he can't be rehabilitated,
15 because he doesn't even understand the conditions that he should
16 be placed under. And that's not fair, because that's not in the
17 statute.

18 And worse, there was error upon error, because they also
19 faulted him for not addressing security concerns, which isn't
20 even in the statute. There's no argument for why that should be
21 in there. Plus the DOC's regulations can account for that.
22 Plus the statute itself says that Parole should handle it.

23 So I think that yes, it's a, kind of, a technical argument,
24 but they didn't make it a technical -- the DOC didn't make it a
25 technical argument. They actually held it against him in the

1 decision. And that, to me, is an abuse of discretion.

2 I'd just like to make a couple of more points. I'd like,
3 your Honor, if I could, to ask you to read the Simkin case,
4 because in that case they talk specifically, and that is cited
5 in my brief, but I hadn't cited it for this purpose, which is
6 they talk specifically about the fact that an agency can be
7 found to have abused their discretion in the way that I was
8 describing.

9 The DOC has claimed that the fact that they didn't
10 promulgate regulations properly can't -- we can't honestly argue
11 that that would have had an effect on Mr. LaGuer's substantial
12 rights. But the Simkin case says that the failure to promulgate
13 regulations can be an abuse of discretion exactly for what
14 happened here, that the adjudicator is not given any kind of
15 guidelines. Like they certainly would not have held it against
16 him that he didn't present a medical parole plan. So I'd just
17 like you to recognize that.

18 THE COURT: What about the question --

19 MR. HARRIS: Sure.

20 THE COURT: -- which seems to be -- not seems to be, but is
21 an important one, about can I order him paroled on this record,
22 because the Respondents argue that no matter what ever happens,
23 no Superior Court judge can order him or anybody else paroled
24 under this statute?

25 MR. HARRIS: I'd like to see the authority for that. I

1 mean, Diatchenko is close, because Diatchenko talks about, in a
2 juvenile lifer parole setting, and arguably this is a parole
3 context. I mean, it is called the medical parole statute. But
4 this is far from having a parole hearing. There was no hearing
5 below.

6 THE COURT: Right.

7 MR. HARRIS: Now, this would be a closer call if this was
8 one of the situations where there was a hearing. But in this
9 situation you're relying on the same facts as the DOC. So I'm,
10 sort of, going back to the same argument I already made.

11 THE COURT: Well, you say on page 25 of your brief, a
12 portion of the statute. It reads,

13 "A prisoner, sheriff, or superintendent aggrieved by a
14 decision denying or granting medical parole made under this
15 section may petition for relief pursuant to Section 4 of Chapter
16 249."

17 So that's certiorari. And then,

18 "A decision by the court affirming or reversing the
19 commissioner's grant or denial of medical parole shall not
20 affect a prisoner's eligibility for any other form of release
21 permitted by law."

22 So what does that language mean? Can I grant parole, or am
23 I limited not just -- and the certiorari argument is a separate
24 argument. What general authority I have under certiorari is
25 something I have to determine. I know the Respondents say I

1 don't have that authority.

2 But what concerns me is this is a statute. And as you've
3 just indicated, this is fundamentally different from reviewing a
4 parole hearing. There hasn't been any parole hearing. There is
5 an administrative record. It is presented to the Court. And
6 there is an argument to be made that because we have terminally
7 ill people who, by definition, are likely to die within 18
8 months, the purpose of the statute is not to have the back-and-
9 forth that the Respondents argue will occur inevitably. So does
10 this statute somehow take it out of the normal parole review
11 procedure?

12 MR. HARRIS: Well, it's certainly not within the normal
13 parole procedure. There's no authority for that. And I think
14 that what your Honor has pointed to is that the statute
15 contemplates a reversal. How could that could be any simpler?
16 It says --

17 THE COURT: It says it contemplates "reversing the
18 commissioner's grant or denial of medical parole".

19 MR. HARRIS: Yes. It contemplates reversing the denial.
20 That would be granting.

21 That seems to me very straightforward. I know the DOC has
22 made an argument about statutory destruction, that the second
23 clause would be superfluous. I don't see how that is. It would
24 still apply if there's any kind of denial, so it's not
25 superfluous.

1 And I'm sorry. What was the rest of the question?

2 THE COURT: Well, no, I mean -- and that was basically it.
3 And then, I mean, I think you hit most of the highpoints that --
4 most of the issues that I'm concerned about.

5 I know you ask for relief under declaratory judgment
6 mandamus and possibly a 30A petition. So if you want to address
7 that briefly I'll hear you. But essentially I think I have the
8 points.

9 Do I have the authority to grant declaratory judgment under
10 the petition that's been filed before me?

11 MR. HARRIS: I think both parties thought you did.

12 THE COURT: All right.

13 MR. HARRIS: And it seems particularly appropriate where
14 there's a question of the legality of the regulations here.

15 THE COURT: All right. And my other question is just
16 whether DOC had promulgated regulations. I mean, Mr. LaGuer's
17 petition was probably the first or second, and the statute was
18 brand new, so I don't know that they would have been able to
19 have regulations up and running that quickly. But can't I
20 decide this case on the merits, whatever the regulations are or
21 aren't at this point?

22 MR. HARRIS: Yes. I think this goes right back to the
23 first time we met. Yes. I think you don't need to be concerned
24 about what the parole policy that came out in August was and
25 whether -- frankly, I'm not that concerned about whether or not

1 they promulgated regulations, except for to the extent that it
2 prejudiced my client --

3 THE COURT: Right.

4 MR. HARRIS: -- because he didn't --

5 THE COURT: Right.

6 MR. HARRIS: He wasn't able to make the arguments --

7 THE COURT: He didn't have the benefit of them.

8 MR. HARRIS: -- that would have gotten him parole. And I
9 see this --

10 Now, I will stand down --

11 THE COURT: Okay. That's fine.

12 MR. HARRIS: -- after this. But I see this as a
13 frustration of the statute on so many levels that the real abuse
14 of discretion is basically not coming to this process with the
15 purpose of the statute in mind, which is to make some -- have
16 some good faith affirmative steps to figure out how sick someone
17 is -- to help them, if they need it, to come up with a parole
18 plan. And ultimately we're going to have to come together and
19 come up with a plan at some point, because the man's going to
20 die soon.

21 So it's, sort of, at this point, what's the point in
22 arguing about whether or not it's appropriate? It's not whether
23 it's appropriate. It's when it's appropriate. And under what
24 conditions.

25 THE COURT: All right.

1 MR. HARRIS: Thank you, your Honor.

2 THE COURT: Thank you. Attorney Rentsch.

3 MR. RENTSCH: Yes.

4 THE COURT: I'll hear from you. Let me just -- and you can
5 pick up on whatever you want to pick up, because I think I've
6 indicated what I'm most focused on. But I do want to go back to
7 this initial question from the language that I just cited on
8 page 25 of Petitioner's brief.

9 "A decision by the court affirming or reversing the
10 commissioner's grant or denial of parole."

11 So it seems to me under the statute I have the right to
12 reverse the denial of parole, and that seems to me to be pretty
13 clear that that's the same as granting parole.

14 MR. RENTSCH: Well, your Honor, no, and this comes --

15 THE COURT: I mean, I know you say I can't, but the context
16 of the statute, that language in the statute, the fact that it
17 isn't a parole hearing, the fact that it's required to have a
18 complete record, and the fact that we have somebody who, by
19 definition, is going to die within 18 months, all seems to
20 indicate that the rational interpretation of that clause is that
21 I have the authority to grant parole.

22 MR. RENTSCH: Your Honor is correct. It's not a parole
23 hearing, but it is parole. It's medical parole.

24 THE COURT: Right.

25 MR. RENTSCH: That's what the legislature --

1 THE COURT: Right.

2 MR. RENTSCH: -- titled it.

3 THE COURT: To grant medical parole. That's what I mean.

4 MR. RENTSCH: So --

5 THE COURT: Not parole itself but medical parole under the
6 statute.

7 MR. RENTSCH: Correct. It is parole. So that phrase that
8 you're referring to from the statute, if the Court reverses the
9 Commissioner's denial, it would go back to the Commissioner to
10 reconsider whatever errors the Court --

11 THE COURT: Well, it doesn't say remand. It says reverse.

12 MR. RENTSCH: Correct. But --

13 THE COURT: So the decision of a guilty finding is
14 reversed. The person is innocent. We don't reverse it and send
15 it back for remand. We reverse it.

16 MR. RENTSCH: But if -- and the reason I highlighted that
17 phrase in my brief was that if the statute does allow the Court
18 to grant the medical parole, then there'd be no reason -- then
19 Mr. LaGuer would be on the street. There'd be no reason for --

20 THE COURT: Well, no, because under the statute it goes
21 back to the parole board to determine the circumstance of his
22 parole. It always goes back to them to determine the
23 circumstances or the conditions under which he'll be paroled.
24 That's another part of the statute.

25 MR. RENTSCH: Right. But --

1 THE COURT: It isn't that he ends up on the street just
2 with nothing. It's that I determine, or some other judge
3 determines, that he's entitled to medical parole, and then the
4 Parole Board determines the parameters under which that'll
5 happen.

6 MR. RENTSCH: But under --

7 THE COURT: Isn't that another part of the statute?

8 MR. RENTSCH: Under that interpretation of the statute
9 though, your Honor, the phrasing -- it would be redundant,
10 because, again, Mr. LaGuer would be paroled. There'd be no
11 reason for the Court to consider his future eligibility for
12 medical parole.

13 THE COURT: Right, but that's another clause. If he's
14 denied, a decision by this Court, which means if he's -- if we
15 affirm the Commissioner's denial of medical parole, "shall not
16 preclude a prisoner's eligibility for medical parole in the
17 future". I'm just looking at that as res judicata, collateral
18 estoppel, issue preclusion, or one of those terms. It's just
19 because he was denied now doesn't mean he's denied forever.
20 It's not a permanent judgment on the facts.

21 MR. RENTSCH: Well, again, but the inverse of that is this.
22 If the parole is allowed now by the Court, then there'd be no
23 reason for the Court to consider his future eligibility, because
24 he would be paroled.

25 THE COURT: Right. But if it's denied, another Court might

1 consider it in the future.

2 MR. RENTSCH: Right.

3 THE COURT: So there is a -- I can harmonize the
4 interpretation of the statute that way.

5 MR. RENTSCH: Okay. Well, let me -- can I emphasize the
6 main --

7 THE COURT: Sure.

8 MR. RENTSCH: Our main argument here, your Honor, is that
9 there's no right to medical parole. There's a right to petition
10 for it. But I think the framework that the Petitioner is
11 suggesting to the Court is that there's a right to medical
12 parole in all cases; as soon as the person petitions, that the
13 Department has to find a way to plan for his release and to
14 release him on medical parole. But there is no right to that.

15 In fact, the reason that the courts are allowed to review
16 these is that the legislature contemplated --

17 THE COURT: It's discretionary.

18 MR. RENTSCH: -- that some petitions would be denied.

19 THE COURT: Yes.

20 MR. RENTSCH: So not all petitions are going to be allowed
21 under the statute. It's a very subjective test, and the
22 legislature has granted to the Commissioner of Correction the
23 authority to decide if a person should be granted medical parole
24 as far as --

25 THE COURT: Right. And I assume it's an arbitrary

1 capricious standard. I haven't seen anything else, so --

2 MR. RENTSCH: Correct.

3 THE COURT: And I know --

4 MR. RENTSCH: I think the parties agree on that.

5 THE COURT: Right.

6 MR. RENTSCH: And it's a very high standard for the
7 Petitioner to meet, this arbitrary and capricious. And he has
8 to show that there's -- Commissioner's decision lacks any
9 rational explanation that reasonable persons might support. So
10 that's a very high standard.

11 And the Court cannot substitute its judgment either. It's
12 the judgment of the Commissioner, who has wide discretion in
13 making this determination in terms of what risk this person will
14 pose to society if granted medical parole.

15 THE COURT: And I acknowledge that there's a logical
16 interpretation which supports your view of the law. My concern
17 when I look at it is procedurally, if all a judge can ever do
18 with a record that is supposed to be complete with a medical
19 parole plan is send it back to DOC, then DOC, by definition, has
20 the keys to the kingdom. They can always prevent someone from
21 being paroled. They can always say that on review or remand
22 there's not enough done or something else is wrong or some
23 condition changed. So that DOC, under your interpretation of
24 the statute, has the final say under whether anybody is ever
25 released, because it will just yo-yo back and forth --

1 MR. RENTSCH: What --

2 THE COURT: -- between the courts and DOC forever.

3 MR. RENTSCH: Your Honor, I --

4 THE COURT: And that seems to be contrary to a rational
5 interpretation of the purpose of the statute. It may be true.
6 It's a statute of first impression, and it's internally
7 inconsistent, in my opinion. All right? I'm not blaming the
8 legislature. I'm sure they're trying to do an important thing.
9 And it is an important thing. But there seems to be these
10 inconsistencies built into it, and the position that the DOC
11 takes is that the DOC will always, always, always have the final
12 say on whether somebody's paroled, and if that is just delayed
13 long enough, by definition the inmate will always expire before
14 being paroled.

15 MR. RENTSCH: Well, unless the Commissioner does grant
16 medical parole in the future.

17 THE COURT: Right. Unless the Commissioner grants him
18 parole.

19 MR. RENTSCH: Right.

20 THE COURT: So under your interpretation of this statute,
21 the Court can never order someone paroled no matter how
22 egregious the Commissioner's interpretation, misinterpretation,
23 misapplications of the facts, or misciting of the record may be.
24 Do you agree with that?

25 MR. RENTSCH: Your Honor, I absolutely agree with your

1 proposition.

2 THE COURT: Okay.

3 MR. RENTSCH: It is the final call of the Commissioner.
4 The Court does not have authority to make that determination.
5 It's a function of the executive --

6 THE COURT: You may be correct, but I just -- I'm trying to
7 make clear that's one of the things that I'm struggling with.

8 MR. RENTSCH: Okay. Yes. And it is a function of the
9 executive branch to determine parole. And in the world of
10 parole and judicial review of parole decisions, the court never
11 can grant parole. And the case law is very clear on this. It's
12 cited in our brief.

13 THE COURT: But this statute is different from other
14 statutes dealing with parole, is it not? It's a separate
15 statute. So presumably it has a separate purpose.

16 MR. RENTSCH: Well, it is a separate statute, but it's
17 still parole. It's medical parole. And the review is
18 certiorari, which is what the review is for regular parole
19 cases.

20 The Diatchenko case that my brother cited, or referred to,
21 that case makes absolutely clear that the court does not get to
22 parole someone, that it has to go back. If there's an error of
23 law, the case goes back to the parole board, or, in this case,
24 it would go back to the Commissioner to correct the error and to
25 make another determination.

1 In fact, there's a very interesting dissent in the
2 Diatchenko case by Justice Cordy, which talks about how the
3 court would never be able to order someone paroled. It would
4 always be -- I mean, the Court used the phrase yo-yo. Justice
5 Cordy didn't use that phrase, but it does --

6 THE COURT: Well, that's probably why he's Justice Cordy
7 and I'm sitting here.

8 MR. RENTSCH: So again, our main point, your Honor, is that
9 it's the Commissioner who gets to make that judgment call in the
10 exercise of his professional judgment.

11 THE COURT: Let me ask you this, because I think whatever I
12 interpret the law to be, I understand the factual argument that
13 Mr. LaGuer is still dangerous, all right? And that's clearly a
14 matter of some review.

15 So you have that he's able to ambulate and he's able to
16 walk. And I know you cite cases -- you cite similar statutes
17 from other jurisdictions, which have, perhaps, more expansive
18 definitions of what a terminally ill person is. But it is true
19 that the DOC's own interpretations or own evaluations show that
20 he's low risk for recidivism and low risk for violence? So
21 isn't it, kind of, you're just assuming or guessing that he's
22 going to be violent, because the DOC records doesn't seem to
23 indicate that?

24 MR. RENTSCH: Right. That is one test, that 2010 COMPAS
25 was one --

1 THE COURT: Yes.

2 MR. RENTSCH: -- objective test. But there was always in
3 the record both the superintendent and the commissioner talked
4 about how Mr. LaGuer refused sex offender treatment programming,
5 which increased his risk to reoffend in the future.

6 THE COURT: All right. And --

7 MR. RENTSCH: That's a very logical and reasonable
8 inference.

9 THE COURT: And I understand that. The Roby case doesn't
10 completely eliminate that.

11 MR. RENTSCH: Well, let --

12 THE COURT: That's a kind of personality or obedience kind
13 of a question, who's not going to obey regulations. So if he's
14 released, he may not obey the restrictions put on him.

15 MR. RENTSCH: Well, let me talk about the Roby case for a
16 second.

17 THE COURT: Yes.

18 MR. RENTSCH: Because that case, the Appeals Court noted
19 that the Department of Correction changed its policy in April of
20 2015 so that inmates no longer had to admit guilt.

21 THE COURT: They no longer have to admit guilt in order to
22 participate --

23 MR. RENTSCH: Right.

24 THE COURT: -- in the program.

25 MR. RENTSCH: Right. But that doesn't explain why Mr.

1 LaGuer declined sex offender treatment programming after that
2 policy was modified. In fact, the record shows that he declined
3 to participate in sex offender treatment programming in May --
4 May 26 of 2015, so after the policy had changed. That's in the
5 record on page 83 and page 95. So again, if --

6 THE COURT: Yes. I understand, and I agree it's a valid
7 point, that he allegedly fiddled with a DNA sample. He hasn't
8 acknowledged this crime that he's been convicted of, and that
9 he's -- there's an implication there that he's dishonest and
10 that he's not going to obey restrictions put on him on a release
11 plan. He's not going to go obey a curfew or some other thing,
12 because there's this sense of dishonesty to him. And then I --

13 MR. RENTSCH: Right.

14 THE COURT: I understand why that's being taken into
15 account, but you do agree that the COMPAS evaluation, which was
16 what, 2010? So eight years ago, and before he became terminally
17 ill, found him to be likely nonviolent and a low risk for
18 recidivism.

19 MR. RENTSCH: Right. Well, that's just one factor in the
20 Commissioner's determination of whether he poses a risk to
21 society.

22 And let me address, too, the -- I think the point was made
23 that this letter to the Prosecutor was not in the record. But
24 what Mr. LaGuer was found guilty of, and it is in the record,
25 that he disobeyed an order. He was ordered not to write to

1 Judge Lemire. And so he disobeyed that order, which showed that
2 he had a tendency or a proclivity to disobey lawful orders. So
3 whether or not the letter was a threatening letter or not it
4 really doesn't matter, because it shows that he disobeyed an
5 order.

6 So the Commissioner -- there's plenty of support in the
7 record for the Commissioner's decision that the Petitioner's
8 condition was not so debilitating that he did not pose a risk to
9 public safety and also the reason that the Commissioner wasn't
10 convinced that he would live and remain at liberty without
11 violating the law, which is also from the statute.

12 Then we get to the -- the issue of the medical parole plan
13 is really an ancillary reason why the petition was denied. So
14 the Court doesn't really even have to reach that issue to uphold
15 or affirm --

16 THE COURT: Yes, that's the question. I mean, how do I --
17 am I supposed to leapfrog over the medical parole plan simply
18 because somebody looks dangerous and so -- let me --

19 MR. RENTSCH: Well --

20 THE COURT: Let me ask you this.

21 MR. RENTSCH: Well --

22 THE COURT: If this wasn't a medical parole plan, why did
23 the Commissioner submit it to the --

24 MR. RENTSCH: The Superintendent submitted it to the --

25 THE COURT: Right. Why did -- I'm sorry. Why did the

1 Superintendent --

2 MR. RENTSCH: Right.

3 THE COURT: -- submit it if -- if the Superintendent
4 doesn't believe it's a medical parole plan, why did you forward
5 it?

6 MR. RENTSCH: Well, I think the Superintendent did believe
7 it was a medical parole plan. I mean --

8 THE COURT: Okay. But you're saying it isn't, but it is.

9 MR. RENTSCH: Well --

10 THE COURT: But it isn't, but it is.

11 MR. RENTSCH: No. No, we're saying it was a substantially
12 complete medical parole plan.

13 THE COURT: All right.

14 MR. RENTSCH: It was a plan to live with Mr. Archer in
15 Danvers.

16 THE COURT: Right. Who has experience with hospice and has
17 known --

18 MR. RENTSCH: Right.

19 THE COURT: -- Mr. LaGuer for a period of time.

20 MR. RENTSCH: And I think the parties all understood that
21 that was the plan. Whether they called it a medical parole plan
22 or release plan, that's really a matter of semantics.

23 THE COURT: Well, I understand on one level it is, but
24 we're trying to comply with a statute, a brand-new statute that
25 says a medical parole plan, so it's important for me, on the

1 record -- and I think DOC is -- I think you just said it, and I
2 think you've sort of said it in your motion for reconsideration,
3 that this is a medical parole plan. We don't think it's
4 perfect, but we're not -- you didn't deny his petition for
5 medical parole based on the plan. He doesn't call it a plan.
6 He calls it a release plan or something else. But the plan that
7 was submitted, DOC is not claiming is an insufficient medical
8 parole plan.

9 MR. RENTSCH: Right. I think the Commissioner called it
10 un -- it was not a suitable plan. But again, I think the Court
11 doesn't --

12 THE COURT: You did say in your motion for reconsideration,
13 I think, that it was not denied based upon the plan. That was
14 not a reason for denying his medical parole.

15 MR. RENTSCH: Well --

16 THE COURT: It was not the plan that was submitted.

17 MR. RENTSCH: All right. Maybe I should modify that. That
18 was not the primary reason. That was -- there were -- the two
19 reasons before that was the fact that he was a danger to society
20 and the Commissioner didn't think that he would remain at
21 liberty without violating the law.

22 THE COURT: Right.

23 MR. RENTSCH: So those --

24 THE COURT: Right. And those are --

25 MR. RENTSCH: Those were the primary reasons.

1 THE COURT: And I understand those are significant reasons.
2 Those are the reasons that come, at least in terms of the
3 statute, they come after the medical parole plan.

4 MR. RENTSCH: Right.

5 THE COURT: There's a medical parole plan. Then we look at
6 these other issues.

7 MR. RENTSCH: Right. So again, I don't think the Court
8 needs to reach that issue. At most, I mean, if there was an
9 error that it was a harmless error. There's no prejudice to the
10 Petitioner. And review on certiorari is only to correct
11 substantial errors, not mere technical errors that are in the
12 record.

13 And if the Court does reach the issue, I mean, I've briefed
14 the reasons why we feel that the medical parole plan is the
15 Petitioner's responsibility. And we'll rest on my brief as
16 to --

17 THE COURT: All right.

18 MR. RENTSCH: -- as to those arguments.

19 THE COURT: All right. Well, thank you, counsel. As I
20 said, we've had several meetings about this. I think the briefs
21 make the issues very clear. They're well done, and I appreciate
22 the arguments. I'll take it under advisement, and I'll try to
23 issue a decision expeditiously.

24 MR. RENTSCH: Thank you.

25 THE COURT: All right?

1 MR. HARRIS: Thank you, your Honor.

2 THE COURT: Thank you.

3 (Hearing concluded at 4:45 p.m.)

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