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BY HAND

August 24, 2018

Maura S. Doyle, Clerk
Supreme Judicial Court for the County of Suffolk
John Adams Courthouse, 1st Floor
One Pemberton Square, Suite 1300
Boston, MA 02108-1707

Re: Benjamin LaGuer v. Thomas A. Turco, III, et. al.


Dear Ms. Doyle:

Enclosed is the Petitioner Benjamin LaGuer's "Petition in The Nature of Certiorari," pursuant to G.L. c.249, §4, with administrative record. Mr. LaGuer is a terminally ill inmate at NCCI Gardner who is filing for relief from the denial of his petition for medical parole, pursuant to G.L. c.127, §119A.

Also enclosed is Petitioner's Motion to Waive Filing Fee with supporting Affidavit of Counsel & Notice of Appointment of Counsel.

As the petitioner is terminally ill, counsel anticipates filing a motion for immediate relief. Thank you for your kind attention to this matter.

Sincerely,


Jeffrey G. Harris
Attorney for Mr. LaGuer

Encl. (2)

CC: Nancy White, General Counsel for the Department of Correction
Superintendent of NCCI, Colette Goguen
Secretary of EOPSS, Daniel Bennett

Commonwealth of Massachusetts
Supreme Judicial Court of Suffolk County

Suffolk, ss.

SJ No. _____
Trial Ct. No. WOCR83-03391-4

Benjamin LaGuer,
Petitioner,

v.

Thomas A. Turco, III,
Commissioner of the Massachusetts
Department of Corrections

Collette Goguen,
Superintendent of North Central Correctional Institute

Daniel Bennett,
Secretary of the Executive Office of
Public Safety and Security
Respondents.

Petition in the Nature of Certiorari

Introduction

1. This is a petition for relief in the nature of certiorari, filed by a terminally ill inmate, pursuant to G.L. c. 249, §4, and G.L. c. 127, §119A (the medical parole statute), challenging certain decisions, failures and orders of Thomas A. Turco, III, the Commissioner of the Massachusetts Department of Corrections; Colette Goguen, the Superintendent of NCCI; and Daniel Bennett, the Secretary of the

Executive Office of Public Safety and Security, which were not according to the course of the common law.

2. This case is particularly appropriate for resolution by this Court because: (A) according to doctors, the petitioner is likely to die soon in prison. As there has not yet been any judicial interpretation of the provisions of the medical parole statute, regardless of the disposition of this case in the lower court, the aggrieved party will likely seek further review and the case would not be resolved during the petitioner's lifetime, thus frustrating the purpose of the medical parole statute; and (B) this case raises an issue of substantial public importance.

Parties

3. The Petitioner, Benjamin LaGuer, is a 55-year-old man who has been incarcerated in Massachusetts since being convicted of rape that occurred in 1983. He currently resides at NCCI Gardner in Gardner, Massachusetts, Worcester County.
4. Thomas A. Turco, III, is the commissioner of the Department of Correction, an agency of the Commonwealth of Massachusetts with its principal office at 50 Maple Street in Milford, Massachusetts.
5. Colette Goguen is the superintendent of North Central Correctional Institution (NCCI), a Massachusetts Correctional Facility located at 500 Colony Rd. in Gardner, Massachusetts.
6. Daniel Bennett is the secretary of the Executive Office of Public Safety and Security (EOPSS), a department of the Commonwealth of Massachusetts, located at 1 Ashburton Place, Suite 2133, in Boston, Massachusetts.

Jurisdiction & Venue

7. The Petitioner brings his claims under G.L. c. 249, § 4, pursuant to G.L. c. 127, § 119A(g), under Articles 1, 10 & 12 of the Massachusetts Declaration of Rights, and under the Fourteenth Amendment to the United States Constitution.
8. Venue for this action lies in the Supreme Judicial Court pursuant to G.L. c. 249, §4.

The Medical Parole Statute

9. On April 13, 2018, Governor Baker signed into law a provision allowing prisoners in the Massachusetts Department of Correction (DOC) to petition a facility superintendent for medical parole. See G.L. c. 127, §119A. By its terms the law went into immediate effect. 2017 Mass. SB 2371. To date, the statute has not been interpreted by any appellate court.
10. Under this new law, prisoners “may be eligible for medical parole due to a terminal illness or permanent incapacitation.”

As relevant here, section 119A(c) provides:

The superintendent of a correctional facility shall consider a prisoner for medical parole upon a written petition by the prisoner, the prisoner’s attorney, the prisoner’s next of kin, a medical provider of the correctional facility or a member of the department’s staff. The superintendent shall review the petition and develop a recommendation as to the release of the prisoner. *Whether or not the superintendent recommends in favor of medical parole*, the superintendent shall, not more than 21 days after receipt of the petition, transmit the petition and the recommendation to the commissioner. The superintendent *shall* transmit with the

recommendation: (i) a medical parole plan; (ii) a written diagnosis by a [licensed] physician ... ; and (iii) an assessment of the risk for violence that the prisoner poses to society.

Section 119A(e) further provides:

If the commissioner determines that a prisoner 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, the prisoner *shall be released* on medical parole. *The parole board shall impose terms and conditions for medical parole* that shall apply through the date upon which the prisoner's sentence would have expired.

Procedural & Factual Background

11. On February 17, 1984, Benjamin LaGuer was convicted of aggravated rape and sentenced to life in prison. His convictions were affirmed by the Appeals Court and further appellate review was denied by the SJC. *Commonwealth v. LaGuer*, 20 Mass. App. Ct. 965 (1985); *Commonwealth v. LaGuer*, 396 Mass. 1103 (1985). He has been incarcerated ever since.
12. In 2015, Mr. Laguer was denied parole with another hearing to be held in 2020. In September of 2017, and again in January of 2018, Mr. LaGuer asked the Massachusetts Parole Board ("Parole Board") to reconsider its decision to put off his parole hearing until 2020, asking that he be given a parole hearing sooner, while he is still alive. The Parole Board denied both requests.
13. In June of 2017, Mr. LaGuer was diagnosed with terminal cancer of the liver that has now spread throughout his body. See AR 16 (Letter of Dr. Rawad Elias of the Boston Medical Center, dated September

7, 2017).¹ Mr. LaGuer is terminally ill and permanently incapacitated. Doctor Kevan Hartshorn of Boston Medical Center's Solomont Center for Hematology and Medical Oncology is a licensed physician who has seen Mr. LaGuer many times over the last few years. He has determined that Mr. LaGuer is suffering from a terminal illness. He writes:

Mr. LaGuer is a patient I have followed for the last two years for advanced liver cancer (hepatocellular carcinoma). He was treated with procedures to directly ablate tumors in his liver (called microwave ablation) but unfortunately the cancer has spread now beyond his liver and he also has advanced cirrhosis with a history of serious bleeding from esophageal varices and also ascites (fluid build up in the abdomen requiring periodic removal of fluid). We are continuing our efforts to try to treat his cancer. He will be getting radiation to a large lymph node in the near future. He is quite weak and is not a candidate any more for any curative therapy due to progression of the cancer outside the liver. He has been losing weight and having steady pain in the abdomen as well as fluid build up in the abdomen. He is on an oral chemotherapy drug which has caused frequent diarrhea also. I suspect his survival can now be measured in months rather than years. I think it would be appropriate to

¹ Filed herewith is a copy of the administrative record in this case, as provided by the Department of Corrections, which was provided to the Petitioner on August 15, 2018. This record is cited to as Administrative Record ("AR").

consider him for compassionate release from prison given his limited survival at this point.

AR 12 (November 8, 2017, letter from Dr. Kevan Hartshorn). *See also* AR 14 (April 20, 2018, email exchange between Dr. Hartshorn and counsel) (confirming that as for Mr. LaGuer's life expectancy, a "ballpark of 6 months is probably pretty accurate."); AR 16 (September 7, 2017, Letter from Dr. Rawad Elias); AR 17 (BMC Medical Records documenting history of liver cancer); AR 24 (letter to NCCI Gardner denying Mr. LaGuer's request for a liver transplant due to late-stage cancer); AR 29 (August 24, 2017, letter from Dr. Hartshorn).

14. On April 27, 2018, Mr. LaGuer filed a petition for medical parole with exhibits, pursuant to the medical parole statute, G.L. c. 127, § 119A. AR 5, 112. The petition included evidence that Mr. LaGuer is "terminally ill or permanently incapacitated such that if he is released, he 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.127A, §119A(e).
15. Mr. LaGuer satisfied the requirements of G.L. c.127 §119A, by filing a written petition for medical parole, accompanied by medical evidence that he suffers from both a "terminal illness" and a "permanent incapacitation" as those terms are defined in G.L. c.127 §119A(a).
16. On April 30, 2018, the Sex Offender Treatment Program at NCCI Gardner accepted Mr. LaGuer. AR 83.
17. On May 2, 2018, the medical staff at NCCI Gardner referred to Mr. LaGuer as a patient with "6 month or less life expectancy." AR 146-47. *See also* AR 149 (listing ailments, including memory problems and chronic pain).

18. On May 11, 2018, Mr. LaGuer supplemented his petition for medical parole with a progress note dated April 21, 2018, written by Anna Sawczuk, a licensed mental health clinician on the prison staff at NCCI. AR 112. In this report, Ms. Sawczuk reports on her recent interaction with Mr. LaGuer and notes that Mr. LaGuer “does not present at the increased risk for harm to self or others.” AR 114.
19. On June 18, 2018, ADA Sandra Hautenan of the Worcester County District Attorney’s office submitted a letter to Commissioner Turco, explaining that although she did not dispute that Mr. Laguer was suffering from a terminal illness as defined in the statute, she believes he still poses a threat to public safety. AR 118-119.
20. ADA Hautenan’s letter cites to the fact that Mr. LaGuer “appears to be walking around, taking care of himself and engaged in normal activity.” AR 119. This letter also faulted the petitioner and the petition for failing to “address security concerns” or propose a “medical parole plan.” AR 119.²
21. On June 25, 2018, Colette Goguen, the Superintendent at NCCI, where Mr. LaGuer is held, sent a letter to Commissioner Turco recommending denial of Mr. Laguer’s petition for medical parole. AR 2-4.
22. As a basis for her recommendation, Superintendent Goguen cited reasons given by the Parole Board, his refusal to engage in sex offender programming, and her determination that Mr. LaGuer’s

² This fault is misplaced. Under the new statute, the Superintendent was obligated to transmit a medical parole plan regardless of whether she recommended medical parole. §119A(c)(1). The statute also provides that, as with any other parole, “the [Massachusetts] parole board shall impose terms and conditions for medical parole that shall apply through the date upon which the prisoner’s sentence would have expired.” G.L. c.127, §119A(e).

health status was not “so debilitating that the prisoner does not pose a public safety risk.” AR 4.

23. Superintendent Goguen noted that the DOC deems Mr. LaGuer a “low” risk of recidivism, and a “low” risk of violence. AR 3, 83.
24. Superintendent Goguen failed to fulfill the mandatory requirements of §119A(c)(1), by failing to provide with her recommendation (i) a medical parole plan, (ii) a written diagnosis by a physician licensed to practice in the Commonwealth (other than the one provided by Mr. LaGuer).³
25. Pursuant to the statute, the superintendent is required to provide all such materials regardless of her recommendation but failed to do so.⁴
26. On June 26, 2018, Commissioner Turco denied Mr. LaGuer’s petition for medical parole. AR 158-62. As a basis for this denial, the Commissioner cited,
 - (1) that Mr. LaGuer “does not require a walker or other assistive device to ambulate short distances;”
 - (2) that “Mr. LaGuer has received numerous disciplinary reports throughout his incarceration;”
 - (3) that he continues to maintain his innocence and refuses to participate in sex offender treatment programming (SOTP);

³ Counsel for the DOC request an “updated clinical review” and the staff at NCCI did requested a “medical review” for Mr. LaGuer on May 2, 2018. AR 156.

⁴ Mr. LaGuer’s petition for medical parole was the first such petition that Superintendent Goguen had received. AR 157.

(4) that he committed fraud on the court by “tampering with his saliva sample before trial and filing a false letter” with the court, suggesting consciousness of guilt;

(5) that he (or counsel) did “not provided a suitable medical parole plan with the petition for medical parole;” and finally,

(6) the “powerful written statements received from the Worcester County District Attorney’s (DA) Office and victim’s family, adamantly opposing medical parole for Mr. LaGuer.”

27. The actions taken by the defendants as described above, constitute critical violations of the petitioner’s constitutional rights under Articles 1, 10 & 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution, warranting exercise of this Court’s G.L. c.249, §4 powers to correct these proceedings.

28. Furthermore, the written decision of Commissioner Turco was arbitrary and capricious and unsupported by substantial evidence in that it cited irrelevant and pretextual reasons for denial, failed to provide sufficient reasons for denying medical parole to Mr. LaGuer, ignored the fact that Mr. LaGuer is accepted into SOTP, and ignored the DOC’s own medical experts and risk assessment tools, which have determined and predicted that Mr. LaGuer does not present a risk of danger to the public. This was a violation of the medical parole statute and the due process rights of the petitioner.

29. The law directs “The secretary [of EOPSS] *shall* promulgate rules and regulations necessary for the enforcement and administration of this section.” G.L. c.127, §119(h)(emphasis added). The Secretary of EOPSS has failed to promulgate such rules and regulations, thereby violating the medical parole statute and the due process rights of the petitioner.

30. The Petitioner has no other available remedies at law.

31. The Petitioner is suffering immediate and irreparable harm.

Claims for Relief

Count 1: Violations of G.L. c.127, §119A.

32. The Petitioner incorporates as if restated here all allegation set forth in the preceding paragraphs.

Chapter 127, §119A affirmatively requires the defendants to follow certain procedures. By failing to follow these procedures and by denying him medical parole, the defendants have violated the Petitioner's rights established under Chapter 127, §119A.

Count 2: State Due Process Violations.

33. The Petitioner incorporates as if restated here all allegations set forth in the preceding paragraphs.

Articles 1, 10, and 12 of the Massachusetts Declaration of Rights guarantees the right to due process of law. By their actions and omissions, the defendants have violated the petitioner's due process rights under Articles 1, 10, and 12 of the Massachusetts Declaration of Rights.

Count 3: Federal Due Process Violations.

34. The Petitioner incorporates as if restated here all allegation set forth in the preceding paragraphs.

The Fourteenth Amendment guarantees the right to due process of law. By their actions and omissions, the defendants have violated the petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

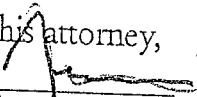
Prayer for Relief

Wherefore, the Petitioner respectfully requests that the Court grant the following relief:

1. Set aside the Commissioner's decision and remand the matter for entry of an order granting the Petitioner medical parole;
2. Enter judgment in favor of the Petitioner; and
3. Order such other and further relief as this Court may deem just and proper.

Respectfully submitted,
Benjamin LaGuer

By his attorney,


Jeffrey G. Harris
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Certificate of Service

I, Jeffrey G. Harris, hereby certify that the above petition was served on the Respondents by mailing a copy via certified first-class mail, postage prepaid, to:

General Counsel Nancy White
Massachusetts Department of Correction
50 Maple Street
Milford, Massachusetts