SJC-12876
SJC-12895

RAYMOND HARMON vs. COMMISSIONER OF CORRECTION.

BRIAN RACINE vs. COMMISSIONER OF CORRECTION & others.[1]

Suffolk. October 5, 2020. - May 19, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Parole. Commissioner of Correction. Pretrial Detention. Regulation. Moot Question. Imprisonment, Parole. Practice, Civil, Moot case, Action in nature of certiorari.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on April 8, 2019.

Following transfer to the Superior Court Department, a motion to dismiss was considered by Robert L. Ullmann, J.

The Supreme Judicial Court granted an application for direct appellate review.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on December 23, 2019.

The case was reported by Lenk, J.

Ruth Greenberg for Raymond Harmon & another.

[1] Department of Correction; superintendent, Massachusetts Correctional Institute, Norfolk.

Richard E. Gordon (Bradley A. Sultan also present) for Commissioner of Correction & others.

The following submitted briefs for amici curiae:

Mark H. Bluver for John Stote.

David Milton & Michael J. Horrell for Prisoners' Legal Services of Massachusetts.

Rosemary Curran Scapicchio for Dennis Daye.

Edward B. Gaffney for Damien Lockhart.

Sharon L. Sullivan-Puccini for James Carver.

Valerie A. DePalma for Kenneth Junier.

GAZIANO, J. The plaintiffs in these cases were prisoners at Commonwealth correctional facilities who applied for release under the medical parole statute, G. L. c. 127, § 119A. Both of their petitions were denied by the Commissioner of Correction (commissioner). Raymond Harmon sought judicial review of the commissioner's decision, but died while his case was pending in the Superior Court; his attorney then commenced an appeal in the Appeals Court. Brian Racine requested, because of his worsening health, that the commissioner reconsider her decision; he passed away four days after the commissioner denied this request.

We allowed Harmon's motion for direct appellate review. At approximately the same time, Racine's attorney filed a complaint in the nature of certiorari in the county court, and the single justice then reported the case to this court to address three questions. The questions were, first, whether the death of a prisoner renders judicial proceedings stemming from a denial of a petition for medical parole moot; second, whether the regulations promulgated by the Department of Correction (DOC) to

implement the medical parole statute allow a prisoner whose request has been denied to submit a subsequent petition; and, third, whether the medical parole statute applies only to committed offenders or also is applicable to pretrial detainees.[2]

For the reasons to be discussed, we conclude that claims for a writ of certiorari due to the denial of a petition for medical parole under G. L. c. 127, § 119A, become moot on the death of the petitioner. In particular circumstances, however, where the proceedings raise an issue that is of public importance, worthy of decision by an appellate court, and is capable of repetition yet evading review, a court may in its discretion choose to decide the case. Further, because the regulation restricting the ability of prisoners to file a subsequent petition for medical parole after one has been denied, 501 Code Mass. Regs. § 17.14(4) (2019), conflicts with the language of the medical parole statute and the legislative intent, it is void. In addition, while G. L. c. 127, § 119A, applies only to committed offenders serving a sentence, detainees awaiting trial may seek release due to a terminal illness or physical or mental incapacity by moving for a modification of bail.

[2] We acknowledge the amicus briefs submitted by Prisoners' Legal Services of Massachusetts, John Stote, Dennis Daye, Damien Lockhart, James Carver, and Kenneth Junier.

1. Background. a. Statutory provisions. The medical parole statute was enacted in 2018 to allow for the release of prisoners who are terminally ill or permanently incapacitated. See generally Buckman v. Commissioner of Correction, 484 Mass. 14 (2020). The process prescribed by the statute begins when a petition for release on medical parole is submitted by or on behalf of a prisoner to the superintendent of the prison in which the individual is incarcerated. See G. L. c. 127, § 119A (c) (1). Within twenty-one days of receiving a petition, the superintendent "shall review the petition and develop a recommendation as to the release of the prisoner." Id. The superintendent then "shall" transmit the petition and a recommendation on whether it should be granted to the commissioner, along with a medical parole plan, a medical diagnosis, and an assessment of the risk of violence by the prisoner if he or she were to be released to the community. Id.

Within forty-five days of receiving the petition and recommendation, the commissioner in turn "shall issue a written decision" as to whether "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." G. L. c. 127, § 119A (e). If these conditions are met, "the prisoner shall be released on medical

parole," on terms and conditions imposed by the parole board. Id.

The statute further provides that a "prisoner, sheriff or superintendent aggrieved by a decision denying or granting medical parole" may seek relief in the nature of a writ of certiorari pursuant to G. L. c. 249, § 4. See G. L. c. 127, § 119A (g).

b. Plaintiffs' submissions to the DOC. The facts are drawn from the parties' statement of agreed facts, supplemented occasionally by other undisputed facts in the record.

i. Harmon. In 1987, Harmon was convicted of murder in the first degree and armed robbery and sentenced to the statutorily mandated term of life in prison without the possibility of parole. See Commonwealth v. Harmon, 410 Mass. 425, 426 (1991). In February 2019, he filed a petition seeking medical parole.[3] Although he was an inmate assigned to a maximum security facility, at the time of filing he was receiving medical care for pancreatic cancer in the locked wing of Lemuel Shattuck Hospital; his petition requested that he be "moved to the free

[3] The initial petition submitted by Harmon's attorney on February 19, 2019, prior to our decision in Buckman v. Commissioner of Correction, 484 Mass. 14 (2020), was deemed incomplete because it did not include a release plan. On March 13, 2019, Harmon's attorney submitted a second document, entitled "Ray Harmon Compassionate Release Plan." A nurse practitioner also filed a separate petition.

side" of the facility. As of early March 2019, his cancer had not been eradicated, but he had declined to continue with chemotherapy and was refusing artificial nutrition. His body weight was ninety-six pounds.

On March 13, 2019, the superintendent of the facility where Harmon was assigned recommended to the commissioner that Harmon's petition be denied. On April 1, 2019, after a hearing at which relatives of Harmon's victim testified, the commissioner denied the petition; she concluded that, although Harmon was terminally ill, he continued to pose a risk to public safety. On April 8, 2019, Harmon filed a petition for certiorari in the county court; a single justice ordered the petition transferred to the Superior Court. On May 6, 2019, Harmon passed away, and, shortly thereafter, a Superior Court judge dismissed the case as moot. Harmon's attorney then appealed on his behalf, and we allowed her petition for direct appellate review.

ii. Racine. Racine was convicted in 2011 of indecent assault and battery on a child under fourteen (subsequent offense). He was sentenced to from fifteen to twenty-five years in prison. During trial and throughout his incarceration, Racine was facing pending charges on 2009 indictments for rape of a child by force, assault to rape, and indecent assault and battery on a child.

On November 15, 2018, Racine filed a petition for medical parole on the ground that he was suffering from heart failure. On December 5, the superintendent of the prison where Racine was incarcerated recommended against his release. On January 18, 2019, the commissioner denied the petition, stating that there was insufficient evidence that Racine was terminally ill or permanently incapacitated, as required by the medical parole statute.

In August and September of 2019, Racine's attorney wrote to the superintendent of the facility where Racine was incarcerated to explain that Racine's health was deteriorating. In the first letter, received on August 19, 2019, the attorney expressed concern that there "appears to be no time assigned to the making of a medical parole plan for inmates who apply for reconsideration due to deteriorating health," and requested that the superintendent "advise" the attorney of the superintendent's "time frame." The second letter, received on September 16, 2019, was styled as a "second petition" for release and requested that the superintendent forward a recommendation with supporting materials to the commissioner within twenty-one days "per statute." Clinical examinations in August and September confirmed that Racine's condition indeed was declining.

On December 18, 2019, the commissioner denied Racine's request for reconsideration. She stated that, while she was

persuaded by the medical experts that Racine had less than eighteen months to live, she was not convinced that he would not be a threat to public safety if released. The commissioner referred to Racine's still-pending indictments and noted, "Resolution of these pending criminal charges must occur before I can make a determination as to Mr. Racine's eligibility and suitability for release on medical parole."

Racine passed away on December 22, 2019. The next day, his attorney filed a petition for a writ of certiorari in the county court. The single justice reserved and reported the matter to the full court. She asked the parties, in addition to any other issues they cared to raise, to address the following three questions:

> "1. Whether, where the [commissioner] has denied a prisoner's petition for medical parole made pursuant to G. L. c. 127, § 119A, and where the prisoner seeks judicial review of the decision pursuant to [G. L. c. 127, § 119A (g)], the prisoner's death renders the judicial proceedings moot.
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> "2. Whether [501 Code Mass. Regs. § 17.14(4)], and 103 DOC § 603.11, which provide that where the [c]ommissioner has denied a prisoner's petition for medical parole the prisoner may seek reconsideration if he or she suffers a material decline in health, preclude a prisoner from submitting a new petition for medical parole rather than a request for reconsideration.
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> "3. Whether G. L. c. 127, § 119A, applies only to committed offenders serving a sentence of imprisonment or whether it also applies to individuals held in pretrial custody."

2. Discussion. We answer in turn each of the questions reported by the single justice.

a. Mootness. "It is the general rule that courts decide only actual controversies" and that "normally we do not decide moot cases." Matter of Sturtz, 410 Mass. 58, 59 (1991), and cases cited. Generally, an issue is moot when the parties "would no longer be personally affected by the resulting decision." Commonwealth v. Walters, 479 Mass. 277, 280 (2018). That undoubtedly is the case here. Both plaintiffs are now dead: Harmon passed away after his petition for a writ of certiorari had been filed, but before his case had been decided, while Racine died after the denial of his request for reconsideration but before his action for a writ of certiorari was filed in any court. Neither can be personally affected any longer by a judicial decision in their pending cases.

Courts at times may decide questions in moot cases where the harms involved concern issues of public importance, and are "capable of repetition, yet evading review," because the "life expectancy" of the dispute is shorter than the time typically required to obtain a judicial decision (citation omitted). See Lockhart v. Attorney Gen., 390 Mass. 780, 783 (1984). "An issue apt to evade review is one which tends to arise only in circumstances that create a substantial likelihood of mootness prior to completion of the appellate process." First Nat'l Bank

of Boston v. Haufler, 377 Mass. 209, 211 (1979). That, too, certainly applies in the context of medical parole, where the metaphor of "life expectancy" may be all too apt in dealing with petitions by prisoners who often are in the final stages of terminal illness.

We previously have exercised our discretion to decide moot claims even where they became moot as a result of the death of the party who originally filed the action, see, e.g., Noe, Sex Offender Registry Bd. No. 5340 v. Sex Offender Registry Bd., 480 Mass. 195, 196 n.1 (2018), and indeed reviewing courts may conclude that there is a need to exercise their discretion to consider specific medical parole cases where a petitioner has died. Nonetheless, while we do so here, not every medical parole case where the petitioner has died may merit such review. Compare Vazquez v. Superintendent, Mass. Correctional Inst., Norfolk, 484 Mass. 1058, 1058-1059 (2020) (concluding that single justice did not abuse her discretion in dismissing petition for medical release as moot because petitioner had been released by time case was placed before single justice with argument that issues were capable of repetition yet evading review).

b. Multiple petitions for medical parole. The medical parole statute gives the DOC authority to "promulgate rules and regulations necessary for the enforcement and administration" of

the statute. See G. L. c. 127, § 119A (h). The Executive Office of Public Safety and Security, which oversees the DOC, accordingly has adopted regulations, including the following language referenced by the single justice, codified at 501 Code Mass. Regs. § 17.14(4) (with substantially identical language at 103 DOC § 603.11):

> "No subsequent petitions may be submitted following the [c]ommissioner's denial of medical parole, unless the prisoner experiences a significant and material decline in medical condition. Should such a decline occur, the [c]ommissioner may simply reconsider his or her previous decision on the petition without requiring a new petition to be submitted."

The single justice asked the court to consider whether this language would "preclude a prisoner from submitting a new petition for medical parole rather than a request for reconsideration." Thus, we must confront a question -- the legality of the regulation -- that we explicitly declined to reach in Buckman, 484 Mass. at 32.

"Duly promulgated regulations of an administrative agency are presumptively valid . . . ." Pepin v. Division of Fisheries & Wildlife, 467 Mass. 210, 221 (2014). "[R]egulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 613 (1997), quoting Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595 (1992).

Nonetheless, "[a]n agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts." Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000).

In evaluating the legality of an agency's regulations, we employ a two-step test. Goldberg v. Board of Health of Granby, 444 Mass. 627, 632–633 (2005). First, we examine the statutory language. "If we conclude that a statute is unambiguous, we will reject any interpretation by an agency that does not give effect to the Legislative intent . . . ." Franklin Office Park Realty Corp. v. Commissioner of the Dep't of Envtl. Protection, 466 Mass. 454, 460 (2013). If the language of the statute proves ambiguous or incomplete, on the other hand, we inquire whether there is any way to reconcile the regulation with the legislative mandate, giving due deference to the agency's expertise. Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 759 (2010). " [P]rinciples of deference, however, are not principles of abdication," Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd., 421 Mass. 196, 211 (1995), and if such reconciliation is not possible, the regulation will be invalidated, see Smith, 431 Mass. at 646.

Here, we need reach only the first step, as the regulation's restriction of the right to submit a new petition to cases in which a prisoner has experienced "a significant and

material decline in medical condition" is contrary to the plain meaning of the medical parole statute. See 501 Code Mass. Regs. § 17.14(4). The broad, mandatory language of the statute, according to which the "superintendent of a correctional facility shall consider a prisoner for medical parole upon a written petition" by certain specified parties (emphasis added), G. L. c. 127, § 119A (c) (1), does not permit the DOC to impose a rule precluding consideration of most subsequent petitions and, in particular, those submitted for any reason other than a serious decline in health.

The regulation also is contrary to the purpose of the statute, which we identified in Buckman, 484 Mass. at 21-22, as dual, 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. Given this legislative purpose, the statute should be interpreted so as to favor the expeditious granting of medical parole whenever the statutory criteria are met.

We note that it is reasonable, and compatible with the statutory purpose, for the DOC to seek to reduce its administrative burden by offering the use of a streamlined procedure for reconsideration in cases where a prior decision has been issued and only certain discrete factors have changed or are disputed. In any event, if a prisoner elects to request

reconsideration rather than submitting a new petition, it is vital that the DOC act on the request in a timely manner, at a minimum within the sixty-six day window established by the medical parole statute for final decisions by the commissioner on full petitions.

In its brief, the DOC agrees that requests for reconsideration should be subject to the statutory timeline, and states that it has proposed new regulations to that effect. This salutary intention, however, apparently was formed only after the commissioner had decided Racine's request for reconsideration, where, notwithstanding his worsening health and frequent inquiries by his counsel, no decision was issued on the request for reconsideration for at least ninety-three days. This inexplicable delay effectively eliminated Racine's opportunity to seek judicial review before his death, four days after the denial.[4]

[4] Stringent application of the sixty-six day deadline to requests for reconsideration makes it important to decide when such a request has been made. In Buckman, 484 Mass. at 26, we stated with respect to initial petitions that "the Legislature intended to make the petition process as accessible as possible" and therefore that "[a]s long as the petition is written and is unambiguously a petition for medical parole for a particular prisoner, signed by a person authorized to make such a petition, the superintendent must accept and review the petition upon its receipt." The same applies to requests for reconsideration. The period of ninety-three days mentioned supra was calculated starting from the second letter, received on September 16, 2019, from Racine's attorney, as her first letter, received on August 19, 2019, was equivocal as to whether it was a new petition or a

c. Pretrial detainees. The last question reported by the single justice asks whether the medical parole statute applies only to committed offenders serving a sentence of incarceration, or also to individuals who are being held in custody before trial. The question is applicable to Racine's circumstances to the extent that the commissioner apparently viewed Racine's long-pending indictments, for which cash bail previously had been set, as preventing her from making a determination on his "eligibility and suitability for release on medical parole." This question arises in large part due to the use of the ambiguous word "prisoner" throughout the medical parole statute.

To resolve this question, we turn first to the plain language of the statute. "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

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request for reconsideration of the denial of Racine's first petition.

Where the statutory language is "clear and unambiguous and leads to a workable result, we need look no further." Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 392 Mass. 407, 415 (1984). For terms that are not "technical," we construe statutory words and phrases in their "common and approved usage." Id., quoting United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 601 (1984). If the plain language is ambiguous, however, we turn to extrinsic sources, and other sections of the statute, to resolve the legislative intent. See Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3, 458 Mass 155, 162 (2010).

General Laws c. 127, § 119A (b), provides, in relevant part, "[n]otwithstanding any general or special law to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation." The ambit of the term "prisoner" for purposes of medical parole is not defined elsewhere in this section, nor in the definitions section, G. L. c. 127, § 1, nor in any of the other statutory provisions. See Casseus v. Eastern Bus Co., 478 Mass. 786, 795 (2018) ("When the meaning of any particular section or clause of a statute is questioned, it is proper, no doubt, to look into the other parts of the statute; otherwise the different sections of the same statute might be so construed as to be repugnant, and the

intention of the [L]egislature might be defeated" [citation omitted]). Indeed, certain portions of the general definitions in G. L. c. 125, § 1, which are applicable throughout the chapter, tend to exacerbate the ambiguity of the word "prisoner." General Laws c. 125, § 1 (m), defines a "prisoner" as "a committed offender and such other person as is placed in custody in a correctional facility in accordance with law." Although we have held that this definition includes those "awaiting trial," we also have declined to employ that understanding where "the context otherwise requires." Commonwealth v. Gillis, 448 Mass. 354, 358-359 (2007), quoting G. L. c. 125, § 1 (applying narrower definition of "prisoner" in interpreting statute allowing confinement of sexually dangerous persons). Accordingly, we consider which meaning the Legislature intended in the context of medical parole.

The most important term in the medical parole statute, which appears far and away the most frequently, is not "prisoner" but, rather, "parole." The ordinary meaning of "parole" is the "conditional release of a prisoner from imprisonment before the full sentence has been served." Black's Law Dictionary 1345 (11th ed. 2019). The Legislature's use of the term "parole" suggests that the medical parole statute should be read as applying to the same prisoners eligible for ordinary parole. Indeed, we have said that G. L. c. 127, "is

primarily, if not exclusively, devoted to sentenced prisoners." McNeil v. Commissioner of Correction, 417 Mass. 818, 823 (1994). The language of the medical parole statute makes the connection to ordinary parole explicit where it mandates that a "prisoner granted release under this section shall be under the jurisdiction, supervision and control of the parole board, as if the prisoner had been paroled pursuant to [G. L. c. 127, § 130]." G. L. c. 127, § 119A (f).[5]

The object that the Legislature sought to accomplish in enacting the medical parole statute is not frustrated by limiting its application to committed offenders. The Legislature apparently was concerned by an aging prison population whose only recourse for release was an executive clemency process that "proved to be almost invariably an exercise in futility." See Buckman, 484 Mass. at 20. Those held in pretrial detention who develop terminal or debilitating medical issues, by contrast, have another avenue by which to seek relief, namely a request for reconsideration of bail or a petition for review of a denial of bail. See G. L. c. 276,

[5] The understanding that pretrial detainees are not eligible for medical parole also is codified in the governing regulations, which define "prisoner" as "[a] committed offender serving a sentence. Persons who are awaiting trial and persons civilly committed pursuant to [G. L.] c. 123A shall not be deemed prisoners for purposes of 501 [Code Mass. Regs. §§] 17.00." 501 Code Mass. Regs. § 17.02 (2019).

§ 58. See, e.g., Vasquez v. Commonwealth, 481 Mass. 747, 748-749 (2019); Brangan v. Commonwealth, 477 Mass. 691, 706-710 (2017).

Finally, we note that G. L. c. 127, § 119A (b), contains the opening language "[n]otwithstanding any general or special law to the contrary." That phrase commonly is employed by the Legislature when it intends "to displace or supersede related provisions in all other statutes." See Camargo's Case, 479 Mass. 492, 498 (2018). In the medical parole statute, this language ostensibly operates to establish possible eligibility for medical parole for all offenders serving sentences of incarceration. Prisoners, such as Racine, who have been convicted and sentenced on certain charges, while still facing other pending charges, thus might be eligible for medical parole even if they would be required to undertake a parallel proceeding under the bail statute to ensure their release on bail on the pending charges.

Although the commissioner therefore was incorrect in assuming that Racine's pending charges barred her from granting his request for medical parole, she properly could have considered the unadjudicated criminal charges as a factor in making a determination whether Racine would "live and remain at liberty without violating the law and that the release [would] not be incompatible with the welfare of society." G. L. c. 127,

§ 119A (e). It is not clear from her decision whether she indeed considered the pending charges also for this proper purpose.

3. Conclusion. We answer the reported questions as follows:

1. The death of a prisoner renders judicial proceedings stemming from the denial of a petition for medical parole moot. In those unusual circumstances where the proceedings raise an issue that is of public importance, and is capable of repetition yet evading review, a court nonetheless may use its discretionary authority to decide the case.

2. To the extent that the DOC's regulations limit the ability of prisoners to submit subsequent petitions for medical parole after one has been denied or not acted upon, the regulations are incompatible with the statute and thus void. In particular, 501 Code Mass. Regs. § 17.14(4) is inconsistent with the statutory language and purpose, and, accordingly, is void.

3. The medical parole statute, G. L. c. 127, § 119A, applies only to committed offenders serving a sentence, and not to pretrial detainees, who may seek modification of bail based on changed circumstances in the event that they are suffering from a terminal illness or physical or mental incapacity.

So ordered.