SJC-12961

ROBERT MALLOY & another[1] vs. DEPARTMENT OF CORRECTION & another.[2]

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

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.[3]

Parole. Imprisonment, Parole. Commissioner of Correction. Moot Question. Practice, Civil, Moot case, Action in nature of mandamus. Mandamus.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 6, 2020.

The case was heard by Kafker, J., and questions of law were reported by him.

Ruth Greenberg for the plaintiffs.
Christopher Gaskill (Darcy Currey also present) for Department of Correction.
Randall E. Ravitz, Assistant Attorney General, for Parole Board.

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[1] Raymond Vinnie.

[2] Parole Board.

[3] Justices Wendlandt and Georges participated in the deliberation on this case.

David Milton & Michael J. Horrell, for Prisoners' Legal Services of Massachusetts, amicus curiae, submitted a brief.
Sharon L. Sullivan-Puccini, for James Carver, amicus curiae, submitted a brief.

KAFKER, J. The plaintiffs, Robert Malloy and Raymond Vinnie, are two prisoners recently released under the medical parole statute, G. L. c. 127, § 119A. After they were granted medical parole, but before their actual release from incarceration, they sought relief from a single justice of this court, arguing that the Department of Correction (DOC) illegally kept them in custody after a final decision on their petitions for medical parole had been made by the Commissioner of Correction (commissioner). They contended that the statute imposes an absolute time deadline for release of sixty-six days that allows no exceptions. The DOC argued that the statute contains no such deadline and that the timing of the release is entirely up to their discretion. Malloy was eventually released 114 days after he filed his written petition for release on medical parole. Vinnie was released 103 days after he filed his petition.

The single justice denied the plaintiffs' request for relief and, separately, reported two questions to this court regarding the requirements of finding a suitable placement for a prisoner who is granted medical parole, and the timing of a prisoner's release after medical parole is granted. The

plaintiffs have also appealed from the single justice's denial of their request for relief.

We dismiss the plaintiffs' appeal as moot, as the prisoners were released before they even filed their notice of appeal. We focus instead on the two questions reported by the single justice. In answer to these questions, we conclude that after medical parole is granted the DOC must act proactively to finalize the comprehensive plan that it prepared within twenty-one days of the filing of a petition, which was to include a proposed course and site of treatment. We also recognize that the proposed course and site of treatment was subject to multiple contingencies beyond the DOC's control arising at the conclusion of the sixty-six day evaluation and planning process, including the availability of beds in private facilities, changes in the health care needs of the prisoner, delays caused by the COVID-19 pandemic, and conditions of parole. Although time is clearly of the essence, and the statute seeks to ensure the petitioner's timely release after the sixty-six day process is completed, we conclude that reasonable short-term delays are acceptable where they are outside the control of the DOC and necessary to ensure appropriate care and placement for the

petitioner and compliance with the terms and conditions of parole.[4]

1. Statutory provisions. To answer the reported questions, we first review the basic provisions of the medical parole statute.

In April 2018, Massachusetts joined the majority of States in adopting a medical parole statute.[5] See St. 2018, c. 69, § 97. General Laws c. 127, § 119A, the medical parole statute, prescribes a detailed procedure under which committed offenders who are terminally ill or permanently mentally or physically incapacitated may apply for release on parole. See generally Buckman v. Commissioner of Correction, 484 Mass. 14 (2020). The process is initiated when a written petition for release on medical parole is submitted by or on behalf of a prisoner to the superintendent of the prison in which he or she is incarcerated.

[4] We acknowledge the amicus briefs submitted by Prisoners' Legal Services of Massachusetts and James Carver.

[5] See National Conference of State Legislatures, State Medical and Geriatric Parole Laws (Aug. 27, 2018), https://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx [https://perma.cc/2XWX-5FR4]; Brennan Center For Justice, Reducing Jail and Prison Populations During the COVID-19 Pandemic (Oct. 23, 2020), available at https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/YA2L-JP7S].

See G. L. c. 127, § 119A (c) (1).[6] Within twenty-one days of receiving the petition, the superintendent must create a medical parole plan for the prisoner's placement and treatment if released, obtain a written medical diagnosis and prognosis by a physician, and arrange an assessment of the risk to the community if the prisoner were to be released. See Buckman, supra at 17, 28-29. At the end of the twenty-one day period, the superintendent must transmit the petition to the commissioner, accompanied by a recommendation as to whether it should be granted and three supporting documents: a medical parole plan; a written diagnosis by a physician; and an assessment of the risk for violence that the prisoner poses to society. G. L. c. 127, § 119A (c) (1).

The medical parole plan is the only one of the supporting documents that is defined in the statute. See G. L. c. 127, § 119A (a). It consists of

> "a comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to: (i) the proposed course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii) documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and (iv) the financial program in place to cover the cost of

[6] General Laws c. 127, § 119A (d), creates a virtually identical procedure for petitions to be submitted to a county sheriff by prisoners who are being held in houses of correction or jails. We refer only to superintendents in discussing the statute, with the understanding that essentially the same requirements apply to sheriffs.

> the plan for the duration of the medical parole, which shall include eligibility for enrollment in commercial insurance, Medicare or Medicaid or access to other adequate financial resources for the duration of the medical parole."

Id. A medical parole plan "shall include specific information as to . . . the level of care required and proposed site for any continuing medical treatment and post-treatment care (e.g., private home, skilled nursing care facility, hospice)." 501 Code Mass. Regs. § 17.03(4) (2019).[7]

Within forty-five days of receiving the superintendent's recommendation, the commissioner must issue a written decision allowing or denying the petition and explaining the reasons for the decision. If the commissioner determines that the prisoner is "terminally ill or permanently incapacitated" such that, if released, he or she "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." G. L. c. 127, § 119A (e).[8]

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[7] Revisions to the regulations implementing medical parole were mandated following our decision in Buckman, which invalidated several of the existing regulations. In September 2020, a public hearing was conducted on proposed new language, but, at this point, no new language has taken effect. In any event, the language quoted here does not differ in the two versions, although the language of the current (invalidated) version places responsibility for development of the medical parole plan on the petitioner.

[8] The statute also requires the commissioner to notify the district attorney of the jurisdiction of the offense's location

In conjunction with this release, the parole board must take steps to prepare for adequate supervision of the prisoner. Specifically, the parole board must "verify suitability of . . . all proposed residences" for "supervision purposes," "make efforts to confirm availability of bed space," and "determine whether the medical parole plan is consistent with the medical treatment needs of the prisoner." 501 Code Mass. Regs. § 17.10(1) (2019). The parole board must then "conduct a risk/needs assessment" and "set all appropriate terms and conditions of release." 501 Code Mass. Regs. § 17.09(4) (2019). See G. L. c. 127, § 119A (e) ("parole board shall impose terms

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and the victim or victim's family (pursuant to the act concerning rights of victims and witnesses of crimes, G. L. c. 258B) upon receipt of a petition for medical parole. See G. L. c. 127, § 119A (c) (2), (d) (2). These parties may make timely written statements to the commissioner. Id. See 501 Code Mass. Regs. § 17.07(4) (2019). "[U]pon request, the relevant district attorney may receive a copy of the medical parole petition, the medical parole plan, and all supporting documents; the victim, or the victim's family, may receive a copy of the medical parole petition and 'the most recent clinical assessment of the prisoner prepared by the [d]epartment's or [s]heriff's medical provider.'" Buckman, 484 Mass. at 23, quoting 501 Code Mass. Regs. § 17.07(3). If the prisoner was convicted of and is serving a sentence for murder, the district attorney or the victim's family may request a hearing regarding the petition. See G. L. c. 127, § 119A (c) (2), (d) (2). Not less than twenty-four hours before the date of the prisoner's release on medical parole, the commissioner must notify the appropriate district attorney, the department of State police, the police department where the petitioner will reside, and, if applicable pursuant to G. L. c. 258B, the victim or victim's family of the release and terms and conditions of parole. G. L. c. 127, § 119A (e).

and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired").[9]

The DOC must include financial coverage for medical services in its proposed plan. G. L. c. 127, § 119A (a). For prisoners without independent coverage, the DOC must seek health insurance through Affordable Care Act or Senior Affordable Care Act applications.[10] This can be a time-consuming process, with the ultimate decisions regarding an inmate's health insurance coverage being made by MassHealth and not the DOC.

In January 2020, following a reservation and report by the single justice raising numerous issues in the medical release process, this court issued its decision in Buckman, 484 Mass.

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[9] The required terms and conditions of parole may include, but are not limited to,

> "the setting or waiving of any work requirements for the prisoner; a determination in the parole officer's discretion whether electronic monitoring is necessary; supervision for drugs and alcohol as necessary; the requirement that the prisoner report to his or her assigned Field Parole Officer on the day of release or that the Parole Officer visit him or her; establishment of any no contact or association requirements with the victim's family and/or any witnesses for the Commonwealth; the prisoner's execution of all medical parole forms on a continuing basis; and the requirement that the prisoner make himself or herself available for intake and follow the treatment recommendations of the medical providers."

501 Code Mass. Regs. § 17.09(4).

[10] The specific procedure for securing health insurance depends on whether a guardianship is in place and the prisoner's age, level of needed care, and assets.

at 14, 29, explaining the burdens on the various entities involved in medical release planning. We clarified that the superintendent, and not the inmate petitioner, was responsible for drafting the medical release plan, obtaining a medical diagnosis for the individual seeking release, and making a safety assessment. In Buckman, supra at 26, we further explained that "a superintendent must consider a written petition for medical parole regardless of his or her view of the completeness or adequacy of the petition."

2. Background. a. Index offenses and medical conditions. In 2002, Malloy was sentenced to eight concurrent life sentences, with the possibility of parole, for multiple rapes and sexual abuse of his then-adult daughters committed over a period of years when they were children. He is currently seventy-six years old and wheelchair bound; several portions of his feet are amputated, and his hands are atrophied so that he has no functional ability to grasp objects. He suffers from cardiac and kidney disease, neuropathy, vision and hearing deficits, and memory loss.

Vinnie was convicted of murder in the first degree in 1993 and sentenced to life in prison without the possibility of parole. The victim, then sixteen, was the son of a woman that Vinnie had dated, and Vinnie shot him after he and his mother asked Vinnie to leave the premises. Following an apparent

stroke in September 2019, Vinnie was transferred to a hospital for rehabilitation. While there, he experienced severe bleeding problems, which resulted in the permanent need for a catheter and a feeding tube, although he could eat and drink small amounts. Vinnie is currently seventy-four years old. He is completely dependent on others for activities of daily living such as feeding, dressing, and bathing. He also suffers from severe arterial disease. Despite months of physical therapy to assist with Vinnie's sitting, transferring to a wheelchair, and balance, a DOC physician opined that Vinnie is likely to remain essentially bed bound, and also likely to die within eighteen months.

b. Petitions for medical parole. Malloy submitted a petition for medical parole on February 4, 2020; it was received by the superintendent of the facility where he was being held on February 7, 2020. Less than two weeks later, on February 19, 2020, the superintendent recommended that the petition be denied; the superintendent noted that, despite a physician's assessment that Malloy was wheelchair bound and had less than eighteen months to live, he was able to undertake tasks of daily living, such as eating and dressing on his own, and therefore might pose a risk to public safety if he were to be released. One paragraph of the letter, under the heading, "Medical Parole Plan," stated:

> "[The petitioner's attorney] states that if released on medical parole, Mr. Malloy would be willing to live any place that is agreeable to the Department of Corrections. Mr. Malloy has been accepted to handicapped accessible section 8 housing in Worcester and has documentation for it. His financial source of payment would be through Masshealth Medicare."

Although the superintendent's letter of recommendation included a number of attachments from Malloy's file, this paragraph appears to be the entirety of the medical parole plan submitted to the commissioner.

On February 29, 2020, Vinnie petitioned the superintendent of the prison where he was incarcerated for medical parole. On March 20, 2020, the superintendent recommended that Vinnie's petition be allowed, because he was permanently incapacitated within the meaning of 501 Code Mass. Regs. § 17.02 (2019) and would remain dependent on others for help in dressing, feeding, and bathing. The superintendent noted as well that, according to the DOC physician, Vinnie was at risk of a second stroke. The superintendent's letter of recommendation stated that Vinnie wished to reside either with his sister in Massachusetts or with his daughters in Georgia, and that a member of the superintendent's staff had contacted his daughters. The letter discussed in some detail what was learned about the home in Georgia where Vinnie might live, as well as his support network and access to healthcare in Georgia.

c. Commissioner's decisions. As an initial matter, we note that the superintendent's letter to the commissioner recommending denial of Malloy's petition is dated February 19, 2020. The commissioner's decision refers to this letter as having been received nine days later, on February 28, 2020; that date is the limit of the twenty-one day period in which the superintendent must make a recommendation. The commissioner's April 13, 2020 decision was made forty-five days after the superintendent's deadline of February 28, 2020. In Vinnie's case, the date on the superintendent's letter is twenty days after the submission of the petition, and the commissioner describes this date as the date of receipt for purposes of calculating her own forty-five day deadline.

Turning to the substance of the decisions, on April 13, 2020, the commissioner granted Malloy's petition and allowed his release "conditional on a suitable home care plan." According to the commissioner, Malloy did not, at the time of her decision, have a home care plan. The possibility of Malloy living with his sister in New Hampshire had been discussed, and the commissioner concluded that release to her home would be "an appropriate placement," but DOC staff believed that interstate transfers of parolees were then suspended, and that Malloy also had a pending application for admission to a Massachusetts facility, but had not yet been accepted. After litigation in

this matter was begun in the county court, and with persistent efforts between the Massachusetts parole board, the New Hampshire parole board, the DOC, and Malloy's counsel, the interstate transfer ultimately was approved, and Malloy was released from custody to his sister's house in New Hampshire on May 28, 2020.

With respect to Vinnie's petition, on May 4, 2020, the commissioner issued a decision stating that she had "reviewed the proposed medical parole plan" and approved Vinnie for release "on the condition that he is placed in an appropriate [long-term care] facility that can meet his medical needs." The commissioner did not mention Vinnie's daughters or the possibility of a placement in one of their homes, although, at that point, the DOC had information that interstate transfers were suspended due to the COVID-19 pandemic. She did mention an outstanding $5,500 fine from a 1993 perjury conviction in Georgia, which DOC officials had asserted (inaccurately) meant that there was an outstanding warrant for his arrest should he return to Georgia. After Vinnie's release was approved, the DOC pursued an admission to the Farren Care Center, while Vinnie's counsel acquired further information that Georgia indeed was accepting interstate transfers, subject to approval. On June 11, 2020, over DOC medical staff objections that he needed a greater level of medical care, Vinnie was released to his

daughter's home in Georgia. His counsel states that his daughters transported him from Massachusetts to Georgia, and then found a hospital placement for him there.

d. Proceedings before the single justice. On May 6, 2020, after both plaintiffs had been granted medical parole, but had yet to be released from custody, they jointly filed a complaint in the county court, seeking relief in the nature of mandamus ordering the DOC to prepare adequate plans that would ensure their safety, and to release them according to such plans. On May 15, 2020, the single justice issued an initial interim order, requesting further information and argument by the parties. In a second interim order on May 22, 2020, the single justice denied the relief sought on the ground that extraordinary relief was not warranted, as it appeared that both plaintiffs in fact would be released soon.

With respect to Malloy, the single justice noted that the parole board had at that point begun the process of seeking to transfer him to New Hampshire, but that obtaining the necessary permissions and finalizing the transfer could take an additional forty-five to sixty days. Meanwhile, the DOC had sought a placement for Malloy at the Farren Care Center in the Commonwealth, where Malloy's admission "appear[ed] to be imminent." As to Vinnie, the DOC represented that an application for placement at the Farren Care Center was

underway. The DOC further asserted that the placement with his daughters in Georgia contemplated in the superintendent's letter was not possible, because Vinnie had an outstanding warrant in that State that local officials would enforce to collect the outstanding $5,500 fine from the 1993 perjury conviction, and because DOC medical contractors believed that his daughters would be unable to care for him if he continued to need a feeding tube.

While denying individual relief to the two plaintiffs, the single justice separately reported two questions to this court:

> "1. What requirements are imposed on the DOC, its [c]ommissioner, and the [p]arole [b]oard to find suitable placement for a prisoner whose petition for medical parole has been granted, including any requirements as to the timing of such efforts, and
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> "2. What restrictions, if any, the statutory and regulatory scheme places on the length of time for which a prisoner may remain in custody once his or her petition for medical parole has been granted, and the sixty-six days referenced in G. L. c. 127, § 119A, have expired?"

The single justice also ordered that the parole board be joined as a necessary party, and requested factual information from the parties on a range of related topics, including the number of prisoners who have applied for medical parole since the statute was enacted, the number whose petitions have been granted, the number released, the length of time between decision and release in each case, the types of issues that prevent timely release, and steps being taken to prevent delays.

On May 28, 2020, forty-five days after the allowance of his petition for medical parole, Malloy was released from custody, not, as the DOC had been pursuing, to the Farren Care Center, but to his sister's home in New Hampshire. Vinnie continued to pursue the litigation. He moved for reconsideration of the single justice's decision, disputing the DOC's factual claims concerning the infeasibility of a home placement in Georgia. At a hearing before the single justice, the DOC clarified that, while Vinnie did not face an outstanding warrant in Georgia,[11] the $5,500 fine was still pending, and that, while home care was "technically possible" for Vinnie, he would require specialized professional attention. The single justice denied the motion for reconsideration, and then denied a second such motion. On June 11, 2020, thirty-eight days after his petition for medical parole had been allowed, Vinnie was released. Despite the fact that they had already been released, the plaintiffs nonetheless appealed from the various rulings by the single justice to this court, and successfully moved to consolidate that appeal with the questions reported by the single justice.

[11] The issue actually had been explained in the commissioner's decision, in which she stated that, while the fine was outstanding, "there are no active warrants as this is not something for which [Georgia officials] would ask for rendition."

3. Discussion. a. Mootness. There are two distinct aspects of the case before us: (1) the plaintiffs' appeal and (2) the two questions that the single justice reported. As a preliminary matter, given that both of the plaintiffs have now been released on medical parole, we address the question of mootness.

"Ordinarily, litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976). Because the plaintiffs in this case have achieved the outcome that they sought in their complaint, the dispute between the parties is now moot and the plaintiffs' appeal will be dismissed for that reason.[12] We therefore focus exclusively in this opinion on the reported questions, which, although no longer significant to Malloy's or Vinnie's circumstances, were reported because they are novel and will be of considerable significance in similar cases in the future.

b. Reported questions generally. The reported questions relate to timing and the tail end of the medical parole process: how quickly a prisoner must be released after a final decision granting medical parole, and what must be done once parole is

[12] The author of this opinion did not participate in the decision to dismiss the separate appeal as moot. An order will be issued today by the six other Justices on the quorum dismissing the separate appeal.

granted. The delay of release for Malloy and Vinnie was approximately one to one and one-half months. Data from the DOC suggest that while many successful medical parole petitioners are released promptly, delays such as those experienced by the plaintiffs are not uncommon.

According to information supplied by the DOC in response to the single justice's questions, 337 inmates at DOC facilities and county houses of correction have applied for medical parole since it became possible to do so in early 2018. Thirty-four of those applications, or approximately ten percent, were successful. The time between the allowance of the application and the prisoner's release varied widely, from zero to 210 days. In thirteen cases, the time elapsed was less than one week; in ten cases, it was more than one month. For one-half of the thirty-four successful petitions, release was to a private home in Massachusetts, presumably the simplest scenario if a prisoner is fortunate enough to have family members who are able and willing to undertake the task of caring for him or her, and in the majority of these cases the delay was under a week.[13]

For terminally ill prisoners entitled to spend their final days in freedom, each day is critical. Delaying release deprives prisoners granted medical parole the opportunity to

[13] The numbers supplied by the DOC are as of the time of briefing.

spend their remaining time with their families or friends. At the same time, release or death is often imminent for medical parole applicants, so these cases quickly become moot, as they ultimately did for Malloy and Vinnie, and evade judicial review. The number of similar cases arising in the future can only be expected to expand exponentially given that, as of January 1, 2020, close to 1,000 elderly prisoners were incarcerated in DOC facilities.

c. Responsibility for securing placement. The first question reported by the single justice concerns the particular responsibilities placed on the DOC, the commissioner, and the parole board, and the timing of these actions, to find a suitable placement for a prisoner whose application for medical parole has been granted.

General Laws c. 127, § 119A (c) (1), requires that within twenty-one days of a petition for medical parole, a prison superintendent must submit a recommendation to the commissioner accompanied by a medical parole plan. The statutory scheme and regulations require the medical parole plan to include a financial coverage plan, documentation regarding the medical providers' qualifications, and specific information regarding a proposed course and site of treatment and posttreatment care. G. L. c. 127, § 119A (a). 501 Code Mass. Regs. §§ 17.02, 17.03(4).

Although we previously addressed the burden imposed by G. L. c. 127, § 119A, in Buckman, we have not yet specifically addressed the meaning of "proposed" plans and what must be done in regard to those proposed plans once the petition has been granted. In the statute and regulations, the placement is referred to as "proposed," and not as final or confirmed, thereby recognizing that it may not be possible at that point to secure admission to a particular facility. There are a number of practical problems that complicate the realization of such plans after the petition has been granted and thus render them only "proposed plans." As one affidavit from the DOC notes, when an inmate requires care in a skilled nursing home or long-term care facility, there are causes for delay that are beyond the DOC's control. Specifically, many long-term care facilities will not undertake the evaluation process for admission and commit to taking in the inmate until the inmate is granted medical parole, which will usually not occur until the end of the sixty-six day statutory period. As explained supra, because roughly ninety percent of medical parole petitions are ultimately denied, facilities cannot leave beds open on an indefinite basis for petitioners who will not be released. Moreover, because the medical conditions of critically ill patients are often rapidly changing, evaluations need to be undertaken immediately prior to, or at least very close to, the

date of admission to a placement facility in order to accurately determine the inmate's treatment requirements. Finally, in these uncertain times, a COVID-19 outbreak at the inmate's correctional institution or the proposed long-term care facility could prevent the inmate's immediate release. Due to the COVID-19 pandemic, all care facilities now require a negative COVID-19 test, with some facilities requiring the negative test to have been administered within the last forty-eight hours.

As evidenced by the timeline set out by the statute, it is certainly true that the DOC is required by the Legislature to be proactive, to identify a proposed suitable placement or placements in a petitioner's medical parole plan, and not to go searching for such placements indiscriminately at the end of the sixty-six day period.[14] At least for inmates without family home-care options, the DOC must identify an appropriate proposed site or sites for such placement, which may require not just individual locations but also a system monitoring available beds for prisoners seeking medical parole and the criteria for admission for each of those beds, so that appropriate

[14] The DOC's response here reflects such indiscriminate activity. As the DOC acknowledges in its brief, it applied to and was rejected by numerous hospitals and nursing homes that do not accept inmates who were convicted of murder, sex offenses, or even any felony. The inability to find a suitable placement for inmates at these facilities would have been readily apparent to the DOC had it been proactively evaluating potential placements during the sixty-six day statutory period.

alternative sites may be identified quickly if the location proposed in the superintendent's plan is unavailable at the conclusion of the sixty-six day process. While the plan must be "comprehensive," setting out the proposed course and site or sites of treatment, there are obvious circumstances beyond the DOC's control, particularly at the very end of the process, when a prisoner's petition has been granted.

In addition, an inmate's release can be affected or delayed by the imposition and satisfaction of various terms and conditions pertaining to parole itself. The parole board is expressly required to verify the suitability of the proposed residence of the prisoner for supervision purposes, thereby potentially providing for a change in a proposed plan. See 501 Code Mass. Regs. § 17.09(4). General Laws c. 127, § 119A (e), also provides that upon a grant of medical parole, the parole board "shall impose terms and conditions," which may include a determination whether electronic monitoring, supervision for drugs and alcohol, visitation by parole officers, and no-contact orders to protect victims or witnesses are necessary. 501 Code Mass. Regs. § 17.09(4). These conditions are added at the tail end of the sixty-six day period, and they are deemed necessary by the parole board, an entity independent of the DOC, to protect public safety or prevent the violation of the law. Thus, these conditions may also require a reconsideration of the

placement alternative or alternatives proposed in an inmate's medical parole plan.

In sum, the statute, the regulations, and our decision in Buckman set out an expedited process for evaluating whether a prisoner is entitled to medical parole and developing a medical care plan that will provide the prisoner with appropriate care in an appropriate setting outside of prison. The proposed plan developed by the DOC in this expedited process must be comprehensive, but is subject to multiple contingencies at the conclusion of this process when medical parole is granted, including changes in the medical condition of the prisoners, availability of beds in care facilities, and conditions imposed by the parole board. COVID-19 also complicates the conclusion of this process.

d. Timing of release. The second question reported by the single justice asks how long, if at all, a prisoner may continue to be held in custody after his or her petition for medical parole has been granted. As explained infra, we conclude that the statute as written envisions an expeditious release, but allows for short periods of delay, provided the delays are necessary to ensure an appropriate placement of the inmate, compliance with the terms and conditions of his or her parole, and the statutory notice provisions. Such short-term delays must not be the product of failures on the part of the DOC to

proactively meet the particular requirements imposed on it during the sixty-six day statutory period, but delays that result from the contingencies discussed supra that are beyond the DOC's control.

With respect to conditions of parole and notifications to certain individuals, the relevant portion of G. L. c. 127, § 119A (e), provides:

> "The commissioner shall issue a written decision not later than [forty-five] days after receipt of a petition, which shall be accompanied by a statement of reasons for the commissioner's decision. 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. Not less than [twenty-four] hours before the date of a prisoner's release on medical parole, the commissioner shall notify, in writing, the district attorney for the jurisdiction where the offense resulting in the prisoner being committed to the correctional facility occurred, the department of state police, the police department in the city or town in which the prisoner shall reside and, if applicable . . . , the victim or the victim's family of the prisoner's release and the terms and conditions of the release."

The question we must address is whether this portion of the statute envisions that the release of a prisoner on medical parole will immediately follow the commissioner's issuance of a written decision granting medical parole. The plaintiffs argue that the mandate that "[i]f the commissioner determines" that

medical parole is appropriate then the prisoner "shall be released" means that the DOC has no authority to hold a prisoner after the issuance of the commissioner's decision. The sixty-six day deadline, they argue, is absolute and applies not only to the commissioner's decision, but also to the prisoner's release. The DOC, by contrast, argues that neither the medical parole statute nor due process mandate any specific deadline for the release of a prisoner, and that the release date should therefore be completely within its discretion.

In interpreting a statute, we look not only to the specific words at issue but also to other sections, and "construe them together . . . so as to constitute an harmonious whole consistent with the legislative purpose." Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 240 (1985). "If a statute is simply silent on an issue, we interpret the provision in the context of the over-all objective the Legislature sought to accomplish" (quotations and citation omitted). Charbonneau v. Presiding Justice of the Holyoke Div. of the Dist. Court Dep't, 473 Mass. 515, 519 (2016). We must interpret the statute in a manner that "render[s] the legislation effective, consonant with reason and common sense" (citation omitted), Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 648 (2012), and we will not construe a statute such that "the consequences . . . are absurd or

unreasonable," Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 336 (1982).

We begin with the text of the statute, which states that the prisoner "shall be released" on medical parole. G. L. c. 127, § 119A (e). Unlike other provisions that precede it, the statute does not expressly state the date upon which the release shall occur. Compare G. L. c. 127, § 119A (c) (1) ("superintendent shall, not more than [twenty-one] days after receipt of the petition, transmit the petition and the recommendation to the commissioner"); G. L. c. 127, § 119A (e) ("The commissioner shall issue a written decision not later than [forty-five] days after receipt of a petition . . . . Not less than [twenty-four] hours before the date of a prisoner's release on medical parole, the commissioner shall notify, in writing" district attorney and victim). The release provision also does not state that the release will occur immediately. In contrast, the language of immediacy is employed in the very next subsection of the statute in a different context. See G. L. c. 127, § 119A (f) (stating parole officer "shall immediately" arrest and bring prisoner before parole board if prisoner fails to comply with medical parole conditions or becomes ineligible for medical parole due to improved health). Cf. Plumb v. Casey, 469 Mass. 593, 598 (2014) (interpreting term "shall" in "a directive sense, rather than in a mandatory sense, where doing

so is necessary to effectuate the primary purpose of the statute"). "[W]here the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present" (citation omitted). Souza v. Registrar of Motor Vehicles, 462 Mass. 227, 232 (2012).

The release provision must, however, be read in the context of the Legislature's purpose. The Legislature established a sixty-six day time frame for this complex, comprehensive evaluation and planning process to occur. It did so to ensure the expedited release of prisoners on medical parole so that they can spend their final days outside of prison. Timely release was clearly of great importance to the Legislature. Buckman, 484 Mass. at 25-26. Accordingly, the Legislature certainly did not contemplate, as the DOC argues, that the timing of an inmate's actual release is left entirely to the DOC's discretion. Delaying release indefinitely, subject to the DOC's discretion, would defeat the Legislature's intent.

We conclude, therefore, that any delays beyond the sixty-six days must be necessary to serve other purposes set out in the statute, and caused by conditions beyond the DOC's control. We emphasize that the statute does not just provide for release; it provides for release with appropriate care in an appropriate setting. If the prisoner cannot be released with such care and

in such a setting, the critically ill prisoner cannot simply be released. This is not what the Legislature intended, as it would leave a critically ill prisoner unprotected.

In evaluating the failure to secure appropriate care in an appropriate setting within sixty-six days, we focus on the contingencies outside the DOC's control, particularly those that must occur in the very final days of the sixty-six day process. These include the evaluation by skilled nursing facilities for admission, if that is the only placement available, as may be the case where there is no willing or capable family placement. Such evaluations must take into account the health conditions of the prisoner at the time of release and, during the COVID-19 pandemic, the risk of exposure for both the facility and the prisoner. The MassHealth decision-making process regarding a prisoner's health insurance application may extend beyond the sixty-six days even if the DOC is proactive in seeking coverage soon after receipt of a petition. These contingencies may justify short-term delays.

Other contingencies beyond the DOC's control are necessary to protect the public. These include parole conditions imposed at the tail end of the process deemed necessary to ensure public safety. See 501 Code Mass. Regs. § 17.09(4) (authorizing parole board to verify suitability of proposed residence, conduct risk/needs assessment, and set all appropriate terms and

conditions of release). The implementation of a parole plan is further complicated when a prisoner will be released to an out-of-State placement, a process that is managed in part by a separate agency, the Interstate Commission for Adult Offender Supervision (ICAOS). If parole conditions require a change in placement, or if the parole finalization is delayed by another entity, these circumstances may also justify a short delay in release.[15]

In sum, the statute contemplates an expedited release of prisoners to an appropriate setting with appropriate care. Such

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[15] The commissioner must also comply with statutory requirements to notify the district attorney and victim or victim's family in writing of the decision to release. See G. L. c. 127, § 119A (e). As the commissioner is required to notify these persons upon initial receipt of the petition, see G. L. c. 127, § 119A (c) (2), (d) (2), the location of the victim must occur in the beginning of the process. Tracking down the victim may be difficult given the great passage of time between conviction and release of many of these prisoners. Given the importance of the victim notification responsibility, we emphasize that the DOC must be proactive in its initial location and notification of victims. As this is to occur at the beginning of the sixty-six day process, it should not be a justification for delay in release. We do note, however, that the news of a prisoner's actual release at the end of the sixty-six day process may nonetheless be traumatic to victims, requiring that such notification be undertaken carefully and sensitively. The statutory requirement that a victim be notified of the terms and conditions of release contemplates that this final notification will be made only when the full details of the conditions of release are available. G. L. c. 127, § 119A (e). Therefore, final victim notification, like the release itself, is contingent on finalization of the terms and conditions of parole, another critical responsibility imposed at the very end of the sixty-six day process.

releases are intended to occur within the sixty-six day time frame set out in the statute, but reasonable delays may be justified by contingencies beyond the DOC's control, particularly those that occur in the final days of the evaluation and planning process that are necessary to protect the prisoner or the public as set out in the statute.

Recognizing these contingencies, the statute does not impose an absolute release requirement, regardless of the circumstances. Cf. Massachusetts Gen. Hosp. v. C.R., 484 Mass. 472, 482 (2020) ("expedited, emergency process" interpreted to provide for reasonable delays absent express language to contrary). There are at least three components to a release on medical parole: it must be timely, it must provide appropriate care in an appropriate setting, and it must comply with conditions of parole. The DOC cannot simply release prisoners somewhere on the sixty-sixth day regardless of these other requirements. Cf. id. at 484 (hospitals "understandably concerned about simply releasing [mentally ill] patients, as they fear being sued if harm befalls such patients or the public"). Nor should the DOC be in any way required or encouraged to do so, as it would endanger the prisoners themselves, and possibly the public. The statute must therefore be interpreted to impose reasonable, not absolute, time requirements for release.

That is not to say that anything longer than a reasonable, short-term delay would be justified.[16] In enacting the medical parole statute, the clear objective of the Legislature was to release the parolee as soon as possible. We also recognize that the deadlines set out in the statute do not mean that, if a decision can be made earlier about medical parole and appropriate care upon release, such decisions should be delayed at any stage of the process. Indeed, to do so is contrary to the purpose and intent of the medical parole statute, which proposes an expedited time schedule to allow prisoners granted medical parole to spend their final days appropriately cared for, and not behind bars.

Finally we emphasize, consistent with the Legislature's intent, that the timely release of these critically ill inmates to safe and appropriate placements ultimately depends upon a highly collaborative process involving not only the DOC and the prisoner and his or her family and representatives, but also the parole board, ICAOS, MassHealth, and the numerous private sector nursing and long-term care facilities. See Buckman, 484 Mass. at 29 ("by enacting § 119A, the Legislature intended to trigger a collaborative process"). Without such collaboration, the

[16] Based on the record before us, seven out of ten inmates who were placed in skilled nursing or long-term care facilities were released within an average of twenty-one days following the grant of medical parole.

medical parole process envisioned by the Legislature will be inevitably disrupted and delayed.

4. Conclusion. Because Malloy and Vinnie were released on medical parole before they filed their notice of appeal, an order will issue today dismissing their appeal as moot. See note 12, supra. With respect to the two questions reported by the single justice, we answer as follows:

1. The medical parole statute requires the DOC -- in particular, the superintendent -- to develop comprehensive plans that include a proposed course of treatment, a proposed site for treatment, and proposed financial coverage during the first twenty-one days of the sixty-six day window within which a decision on the petition must be made. The proposed plan must provide for appropriate care in an appropriate setting, but is subject to multiple contingencies at the conclusion of the sixty-six day window beyond the control of the DOC, including changes in the medical condition of the prisoners, availability of beds in care facilities, conditions imposed by the parole board, and the COVID-19 pandemic.

2. Once a final, favorable decision by the commissioner has been issued allowing release on medical parole, the DOC must be proactive in working to release the prisoner expeditiously. However, reasonable short-term delays are acceptable where they are outside the control of the DOC, and necessary to ensure

appropriate care in an appropriate setting and compliance with the terms and conditions of parole.

So ordered.

GAZIANO, J. (concurring, with whom Budd, C.J., and Georges, J., join). In this case, the court confronts two questions reserved and reported by the single justice concerning the interpretation of the medical parole statute, G. L. c. 127, § 119A. The questions relate, first, to the requirements imposed on the Department of Correction (DOC) and the parole board to find a suitable placement for a prisoner who applies for medical parole,[1] and, second, to the length of time a prisoner may be kept in custody after medical parole has been granted.[2] The second questions asks, specifically, "[w]hat restrictions, if any, the statutory and regulatory scheme places on the length of time for which a prisoner may remain in custody

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[1] General Laws c. 127, § 119A (c) (1), provides that "the superintendent shall, not more than [twenty-one] 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 physician licensed to practice medicine . . . ; and (iii) an assessment of the risk for violence that the prisoner poses to society." General Laws c. 127, § 119A (d) (1), contains a virtually identical provision for sheriffs.

[2] General Laws c. 127, § 119A (e), states that the "commissioner shall issue a written decision not later than [forty-five] days after receipt of a petition, which shall be accompanied by a statement of reasons for the commissioner's decision. 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."

once his or her petition for medical parole has been granted, and the sixty-six days referenced in G. L. c. 127, § 119A, have expired."

With respect to the first question, the court concludes that the medical parole plan[3] to be attached to the recommendation sent to the Commissioner of Correction (commissioner) actually is one of a series of "proposed plans" to be created both before submission to the commissioner and after the commissioner has approved the petition for release on medical parole. Ante at . Among other things, these conclusions, including the timeline, appear to be inconsistent with the statutory language and the mandates of Buckman v. Commissioner of Correction, 484 Mass. 14, 25-26, 28-29 (2020).

With respect to the second question, on the existence of any time restrictions after medical parole has been granted before release must take place, the court apparently concludes that the answer is "none." Notwithstanding the sixty-six days

[3] A "medical parole plan" is defined in G. L. c. 127, § 119A (a), as "a comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to: (i) the proposed course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii) documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and (iv) the financial program in place to cover the cost of the plan for the duration of the medical parole, which shall include eligibility for enrollment in commercial insurance, Medicare or Medicaid or access to other adequate financial resources for the duration of the medical parole."

clearly specified in the statute, the court states that "the statute must . . . be interpreted to impose reasonable, not absolute, time requirements for release," ante at , and to require "practical" solutions, thus permitting "short-term delays" in response to "contingencies outside the DOC's control," id. at , , so long as the "short-term" delays are not due to a failure by the DOC to be "proactive" in its efforts, id. at . This, too, is contrary to this court's prior holding in Buckman, 484 Mass. at 26 (discussing "speedy process enshrined in the statute," and rejecting process that would add "months" to creation of medical parole plan, thus "frustrating the very purpose of the statute").

In my view, to allow the release of severely, often terminally, ill prisoners to be delayed indefinitely -- as long as the delays can be characterized as "reasonable," "practicable," "short-term," or beyond the control of the DOC -- is to impose too lax a standard for compliance with the statute's strict timelines. This lack of any defined standard likely will propagate further delay and produce arbitrary results. Although I share my colleagues' concerns about the complexities involved in implementing releases on medical parole for seriously ill individuals, their open-ended interpretation of the statute will frustrate the intent of the Legislature in creating the opportunity for release on medical parole. See

Buckman, 484 Mass. at 19-22. The limitless, discretionary time the court envisions in which the DOC will create the actual medical parole plan, obtain conditions of release from the parole board, arrange medical insurance, and update the documents on the appropriate facility needed to handle the individual's deteriorating medical condition, all after some form of medical parole plan has been approved by the commissioner, cannot be what the Legislature intended when it said that a medical parole plan, a written diagnosis by a licensed physician, and a recommendation by the superintendent "shall" be transmitted to the commissioner, along with the petition, within twenty-one days of receipt of the petition; the commissioner "shall" make a written decision on those documents within forty-five days of receipt; and, if the commissioner determines that the petitioner meets the statutory requirements, the individual "shall be released on medical parole." G. L. c. 127, § 119A (c) (1)-(2), (d) (1)-(2), (e).

I agree with the court that the medical parole statute imposes a clear sixty-six day deadline for a decision by the commissioner on a petition for medical parole. See G. L. c. 127, § 119A (c), (e). I also agree with my colleagues that "[f]or terminally ill prisoners entitled to spend their final days in freedom, each day is critical." Ante at . At the same time, I agree that the burden on the DOC and the sheriffs

to implement release on medical parole is enormously complex and subject to factors sometimes beyond their control. And, naturally, the DOC cannot be required by law to do the impossible. I reject, as does the court, the plaintiffs' understanding of the statute, according to which under absolutely no circumstances may the DOC hold successful medical parole petitioners beyond the sixty-six day limit, such that, as the plaintiffs' counsel suggested at oral argument, prisoners who have been granted medical parole but are without a suitable placement at the time of the statutory deadline would have to be summarily deposited at the nearest emergency room. Such a reading is incompatible with the compassionate purpose of the medical parole statue. See Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019), quoting Matter of E.C., 479 Mass. 113, 118 (2018) ("When interpreting a statute, our primary duty is to 'effectuate the intent of the Legislature in enacting it'"); Commonwealth v. Mogelinski, 466 Mass. 627, 633 (2013), quoting Wright v. Collector & Treas. of Arlington, 422 Mass. 455, 457-458 (1996) ("Of course, this meaning must be reasonable and supported by the purpose and history of the statute").

Fundamentally, however, in light of the Legislature's purpose in enacting the medical parole statute, it would make little sense to establish a detailed, and carefully constrained, timeline for consideration of a petition for medical parole by

an incapacitated or terminally ill prisoner, but then give the DOC essentially full discretion, with no guidance, as to when a petitioner actually should be released from incarceration. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019) ("Specific provisions of a statute are to be understood in the context of the statutory framework as a whole, which includes the preexisting common law, earlier versions of the same act, related enactments and case law, and the Constitution," such that court "avoid[s] any construction of statutory language which leads to absurd result, or that otherwise would frustrate the Legislature's intent" [quotations and citations omitted]). Rather than permit delays as long as they are "reasonable" and due to "factors beyond" the DOC's or the sheriffs' control, I would allow brief delays in release only in truly extraordinary circumstances.

The court already applies such a standard in a variety of other contexts. For instance, with respect to the sixty-day commitment and evaluation period to determine whether someone is a sexually dangerous person (SDP), G. L. c. 123A, § 13 (a), if temporary commitment for evaluation exceeds sixty days, the Commonwealth must dismiss its petition "unless there are extraordinary circumstances justifying an extremely brief delay." Commonwealth v. Parra, 445 Mass. 262, 265 (2005). In that case, the court noted that the SDP statute contained no

special exceptions to the sixty-day limit; the court therefore rejected the view that different violations should be viewed on a "sliding scale." Id. at 265-266. See Commonwealth v. Blake, 454 Mass. 267, 268 (2009) (verdicts in jury-waived trials under SDP statute must be rendered within thirty days "absent extraordinary circumstances"); Mailer v. Mailer, 387 Mass. 401, 406 (1982) (excusable neglect of procedural rules requires "unique or extraordinary circumstances").

Such a standard would provide workable guidance for corrections officials and for courts in considering whether a particular delay in the release of a prisoner granted medical parole rose to the level of a statutory violation, rather than leaving them rudderless in the face of unbridled discretion. "Extraordinary circumstances" do not include issues that typically or frequently arise in the process of obtaining a suitable placement for an individual seeking medical parole. One example of a situation in which "extraordinary circumstances" indeed might arise is the COVID-19 pandemic, which struck Massachusetts with particular severity during precisely the period in which the plaintiffs in this case were seeking release on medical parole. By contrast, many of the obstacles cited by the DOC -- for instance, logistical issues in securing the admission of a prisoner to a long-term care facility, obtaining health insurance through MassHealth, and

setting conditions of parole by the parole board -- would not count as "extraordinary circumstances." Undoubtedly, such obstacles are real and significant. But if they are acceptable grounds for delay, as the opinion of the court would permit, delays in release will be likely to occur in virtually every case.

Even given the acknowledged complexities in implementing a release on medical parole, the DOC could do much to make timely release a reality and not, as the court would have it, begin to address numerous statutory requirements "at the tail end of the process deemed necessary to ensure public safety," ante at , because that is how such petitions ordinarily have been handled by the DOC. The difficulty in securing placements in long-term care facilities likely would be mitigated by earlier investigation of possible placements for issues such as whether they accept individuals convicted of particular offenses, and determination of any obstacles, such as, here, an interstate transfer compact. In particular, if release seems "likely," under the DOC's regulations, the commissioner is to refer the entire petition to the parole board within thirty days of receiving it, 501 Code Mass. Regs. § 17.09(1)-(3) (2019), so that the parole board can determine appropriate conditions of release within fifteen days of receipt of the referral, 501 Code

Mass. Regs. § 17.09(4) (2019), and thus before the sixty-six day statutory deadline.

Indeed, the approach taken in the regulations suggests that the simplest avenue for the DOC to comply with the terms of the statute would be to expedite the process of deciding whether to grant medical parole. In the cases before the court, for example, the commissioner's decision to approve medical parole for Malloy was issued precisely sixty-six days after submission of the petition and her decision with respect to Vinnie was issued sixty-five days after submission of his petition, where both Malloy and Vinnie were being treated for terminal illnesses at DOC facilities and had been certified to be terminally ill by day twenty-one after the filing of their petitions.[4] Otherwise put, the deadline to issue a decision on a petition for medical parole should be considered an outer limit rather than a goal, given the often dire condition of the petitioners.

[4] The DOC states in its brief that 337 inmates have submitted petitions for medical parole since the statute was adopted in 2018, and, as of September 2020, thirty-four of those petitions have been approved, a success rate of approximately ten percent. Where, as the DOC asserts, petitions present illnesses such as allergies, asthma, or acid reflex, even though the DOC is required to prepare a medical parole plan, G. L. c. 127, § 119A (c) (1), it need not tarry long in seeking out potential institutional placements among scarce institutional beds if a petitioner's medical condition is neither incapacitating nor terminal, and should be able to make a recommendation to the commissioner within the twenty-one day period.

Data from the DOC suggest that almost one-third of prisoners granted medical parole experience delays in release of more than one month. The approach taken in the opinion of the court risks permitting this state of affairs, at best, to continue uninterrupted.