

Expanding Compassionate Release Eligibility in a Post-COVID World

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The elderly prison population in the United States is at an all-time high.¹ By 2030, experts estimate that nearly one-third of the national prison population will be 55 years old or older.² Despite this trend, both federal and state prisons are failing to adequately address the needs of an aging prison population.³

An average of 1,700 individuals aged 55+ die in prison each year.⁴ Approximately 97% of these deaths are attributed to natural causes such as illness; but even “natural” deaths in prison are in many ways unnatural when compared to the broader United States population.⁵ It is well-documented that incarceration reduces an individual’s life expectancy and accelerates the

¹ Over the past thirty years, the number of incarcerated individuals in the United States aged 55+ has increased threefold. Emily Widra, *The aging prison population: Causes, costs, and consequences*, PRISON POL’Y INITIATIVE (Aug. 2, 2023), <https://www.prisonpolicy.org/blog/2023/08/02/aging/>.

² Derek Cantu, *Though nearly all Midwest states allow for compassionate release of elderly, terminally ill incarcerated residents, obstacles often stand in the way*, CSG MIDWEST (Dec. 15, 2022), <https://csgmidwest.org/2022/12/15/though-nearly-all-midwest-states-allow-for-compassionate-release-of-elderly-terminally-ill-incarcerated-residents-obstacles-often-stand-in-way/>. This growth in the elderly prison population can largely be attributed to increasingly severe sentencing policies. See Widra, *supra* note 1 (explaining that sentence lengths have increased as a result of mandatory minimums, three strikes laws, and truth-in-sentencing laws); Megan Horner, *Broken and Underutilized: Understanding Compassionate Release Programs for Older Adult Prisoners*, 44 A.B.A. BIFOCAL 48, 48 (Jan. 2023) (noting that nearly half of the incarcerated individuals serving life without parole sentences in the United States are over 50 years old).

³ Widra, *supra* note 1 (arguing that prisons are “gearing up to become nursing homes, but without the proper trained staff and adequate financial support”).

⁴ See *id.* (explaining that between 2001 and 2018, over 30,500 individuals aged 55+ died in prison).

⁵ Studies estimate that each year an incarcerated individual spends in prison takes two years off their life expectancy. National Institute for Health Care Management, *Incarceration: A Public Health Crisis* (Aug. 29, 2023), <https://nihcm.org/publications/incarceration-a-public-health-crisis>.

physiological signs of aging.⁶ Older adults are especially at risk of illness in prison due to inadequate medical resources, staffing, and training.⁷

The COVID-19 pandemic drew national attention to failures by federal and state prisons to protect inmate health and safety—especially with regard to older inmates.⁸ Prisons quickly became “disease incubators” during the pandemic on account of overpopulation and high inmate turnover rates.⁹ The health and safety risks posed by the COVID-19 pandemic increased pressure on both federal and state lawmakers to expand inmates’ access to compassionate release processes.¹⁰

⁶ Leah Wang & Wendy Sawyer, *New data: State prisons are increasingly deadly places*, PRISON POL’Y INITIATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ (“[B]eing sick or old in prison is not quite what it is on the outside. Incarceration can add 10 or 15 years to someone’s physiology, and take two years off of their life expectancy per year served.”); Widra, *supra* note 1 (“A robust body of research shows that incarceration itself accelerates aging: people face more chronic and life-threatening illnesses earlier than we would expect outside of prison, and physiological signs of aging occur in people younger than expected.”).

⁷ See Horner, *supra* note 2, at 48 (noting that prison healthcare is inadequate at responding to the medical needs of older adults, especially those with neurocognitive conditions such as dementia).

⁸ Kathryn Nowotny et al., *Age and COVID-19 Mortality in the United States: A Comparison of the Prison and General Population*, 19 INT’L J. PRISON HEALTH 35, 41 (2022) (noting that 39.9% of COVID-19 deaths in prison occurred among incarcerated individuals aged 50 to 64).

⁹ Kristin Samuelson, *High incarceration rates fuel COVID-19 spread and undermine U.S. public safety*, NORTHWESTERN NOW (Sept. 2, 2021), <https://news.northwestern.edu/stories/2021/september/incarceration-covid-19-spread-public-safety/> (stating that between March 2020 and September 2021 over 661,000 cases of COVID-19 were documented in United States prisons); Wang, *supra* note 6 (reporting that over 2,600 incarcerated individuals died in prison during the first eighteen months of the COVID-19 pandemic); Jennifer E. James et al., *COVID-19 and the reimagining of compassionate release*, 19 INT’L J. PRISON HEALTH 20, 24 (2022) (noting that the COVID-19 case rate was 5.5 times higher in U.S. prisons than among the general population during the first months of the pandemic).

¹⁰ See American Bar Association, *Compassionate Release: Changes finally approved* (Apr. 27, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/april-23-wl/sentencing-comm-0423wl/ (discussing the federal sentencing guideline changes approved by the United States Sentencing Commission in April of 2023 that expanded inmates’ access to, and ability to qualify for, compassionate release). See generally Julia Laskorunsky et al., *Risk Averse and Disinclined*, ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE (April 2023), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2023-05/risk_averse_and_disinclined_-_what_covid_prison_releases_demonstrate_about_the_ability_of_the_u.s._to_reduce_mass_incarceration.pdf (highlighting how various states modified compassionate release standards during the COVID-19 pandemic). Significantly, the updated federal compassionate release process allows an inmate to file a motion seeking compassionate release, whereas previously inmates relied on the Federal Bureau of Prisons to file motions on their behalf. See UNITED STATES SENTENCING COMMISSION, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC (Mar. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf; 18 U.S.C. § 3582(c)(1)(A).

Despite these changes, compassionate release is still limited to an extremely small subset of the general prison population.¹¹ The Federal Bureau of Prisons will only grant an incarcerated individual compassionate release for “extraordinary and compelling reasons” such as a terminal illness; a serious medical or physical impairment that diminishes their capacity for self-care or requires long-term, specialized care; or the death or incapacitation of a dependent’s caregiver.¹² Because of these stringent criteria, many elderly and infirm incarcerated individuals do not qualify for compassionate release despite their high-risk indicators.¹³

As the elderly prison population in the United States continues to grow and as pandemics and epidemics become more frequent over the coming years,¹⁴ states should expand their compassionate release eligibility criteria to better protect elderly and infirm incarcerated individuals.¹⁵

Compassionate release is a process that allows incarcerated individuals to seek early release from prison due to extraordinary circumstances¹⁶—most often on account of a serious

¹¹ See United States Sentencing Commission, Guidelines Manual, § 1B1.13 (2024) for a full explanation of the criteria the Federal Bureau of Prisons may consider when deciding to reduce a term of incarceration via compassionate release.

¹² United States Sentencing Commission, Guidelines Manual, §§ 1B1.13(b)(1); 1B1.13(b)(3) (2024). A pandemic or prison disease outbreaks may also qualify as an “extraordinary and compelling reason” for early release. *Id.* at § 1B1.13(b)(1)(D). Old age may also provide a justification for early release. An incarcerated individual who is 70+ years old and has served 30+ years of their sentence may be eligible for a sentence reduction, even absent another “extraordinary and compelling reason” to grant their release. *Id.* at § 1B1.13(a)(1)(B). Further, a defendant who is 65+ years old, has served 10 years or 75% of their sentence, and is experiencing deterioration of their physical or mental health due to incarceration has an “extraordinary and compelling reason” to be released. *Id.* at § 1B1.13(b)(2).

¹³ See, e.g., U.S. Centers for Disease Control and Prevention, *Underlying Conditions and the Higher Risk for Severe COVID-19* (Feb. 6, 2025), <https://www.cdc.gov/covid/hcp/clinical-care/underlying-conditions.html> (noting that COVID-19 poses greater risks for older individuals and individuals with pre-existing conditions).

¹⁴ Abraham Haileamlak, *Pandemics Will be More Frequent*, 32 ETHIOP. J. HEALTH SCI. 228 (2022) (predicting that pandemics and epidemics will become more frequent throughout the twenty-first century).

¹⁵ See generally Laskorunsky, *supra* note 10 (suggesting that compassionate release practices may have the potential to reduce prison populations that have become bloated by mass-incarceration policies); Samuelson, *supra* note 9 (quoting Dr. Eric Reinhart of Northwestern University Feinberg School of Medicine, who believes that implementing national decarceration programs will “benefit long-term U.S. public health and pandemic preparedness”).

¹⁶ See generally Bureau of Prisons, *Program Statement 5050.49, CN-1* (Mar. 25, 2015), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (listing the Bureau’s eligibility criteria for compassionate

physical or medical condition.¹⁷ Compassionate release, as the name suggests, aims to show compassion to incarcerated individuals by preserving their end of life dignity.¹⁸ Yet compassionate release also has more practical purposes: it serves to reduce prison populations by releasing low-risk inmates and, in turn, reduces carceral costs.¹⁹

During the COVID-19 pandemic, the federal government granted significantly more compassionate release requests than in previous years.²⁰ Still, over 80% of federal requests were denied.²¹ On the state level, however, compassionate release numbers stayed relatively the same or even decreased.²² Even in states like Minnesota that adopted special COVID-19 compassionate release protocols, over 90% of requests were denied.²³

release). States vary in their compassionate release eligibility requirements. By and large, however, compassionate release is not available to elderly, low-risk offenders who do not meet stringent medical requirements. *See* Horner, *supra* note 2, at 48–49.

¹⁷ UNITED STATES SENTENCING COMMISSION, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEAR 2023, Table 10 (Mar. 2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY23-Compassionate-Release.pdf>.

¹⁸ Brooke Cooley Webb et al., *Dying in Prison: End-of-Life Care Services in a State Correctional Facility*, 12 J. QUAL. CRIM. 260, 262 (2023) (noting that the goal of palliative care—to provide patients with a “dignified death”—is largely at odds with the putative goals of incarceration). *See also* Horner, *supra* note 2 at 49 (arguing for the ethical importance of protecting the last stages of life).

¹⁹ Horner, *supra* note 2, at 48; *State Prison Health Care Spending*, THE PEW CHARITABLE TRUSTS & JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION 8, 13–14 (July 2014), <https://www.pewtrusts.org/~media/assets/2014/07/stateprisonhealthcarespendingreport.pdf> (noting that correctional healthcare makes up approximately 20% of total prison expenditures, and suggesting that medical or geriatric parole policies will reduce carceral costs).

²⁰ James et al., *supra* note 9, at 25 (reporting that 2,601 federal cases were approved for release in 2020, compared to 165 cases in 2019 and 24 cases in 2018). COVID-19 was cited as a reason for granting relief in over 70% of cases. UNITED STATES SENTENCING COMMISSION, *supra* note 10, at 3.

²¹ UNITED STATES SENTENCING COMMISSION, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, Table 1 (Dec. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf> (indicating that 4,502 federal inmates were granted compassionate release between fiscal years 2020 and 2022, although nearly 28,000 inmates applied); Fred Clasen-Kelly, *Frail people are left to die in prison as judges fail to act on a law to free them*, NPR (Feb. 21, 2023), <https://www.npr.org/sections/health-shots/2023/02/21/1157058152/sick-elderly-people-left-to-die-federal-prison-law-judges> (stating that over 80% of federal compassionate release requests were denied between October of 2020 and September of 2022).

²² James et al., *supra* note 9, at 25–26.

²³ Laskorunsky, *supra* 10, at 37 (noting that 2,292 Minnesota state prisoners filed motions for compassionate release, and only 165 of these were approved). Even further, the Minnesota Department of Corrections attempted to order 158 of these inmates to return to prison in August of 2022 once the severity of the COVID-19 pandemic had waned, but these efforts were dropped as the result of an ACLU lawsuit. *See* Louis Krauss, *State of Minnesota drops effort to get inmates released during the pandemic back into prison*, STAR TRIBUNE (Jan. 5, 2024), <https://www.startribune.com/state-of-minnesota-drops-effort-to-get-inmates-released-during-pandemic-back-into->

If anything can be gleaned from the federal government’s increased reliance on compassionate release during the COVID-19 pandemic, it is that compassionate release is a safe and fiscally responsible alternative to the continued incarceration of the elderly and infirm. Compassionate release does not create a significant public safety risk: the recidivism rate of individuals granted compassionate release is over 10 times lower than that of the general public.²⁴ Expanding prisoners’ access to compassionate release can also improve public health and safety outcomes by reducing the spread of communicable disease.²⁵

In addition to the potential public health benefits, expansive compassionate release processes also promise significant monetary savings. State governments save an average of \$66,294 per year for each aging prisoner they compassionately release.²⁶

Considering the many benefits and limited downsides of compassionate release, states should proactively expand their compassionate release eligibility criteria to prevent state prisons from becoming “disease incubators” for future pandemics.²⁷

[prison/600332764](#); Michelle Griffith, *Department of Corrections won’t order inmates on COVID-19 release to return to prison*, MINNESOTA REFORMER (Jan. 3, 2024), <https://minnesotareformer.com/briefs/department-of-corrections-wont-order-inmates-on-covid-19-release-to-return-to-prison/>; Lynette Kalsenes, *ACLU-MN and Legal Clinics Sue to Stop MDOC From Reincarcerating People at High COVID-19 Risk*, ACLU MINNESOTA (Aug. 9, 2022), <https://www.aclu-mn.org/en/press-releases/mndoc-lawsuit-covid>; *Wagner v. Minnesota Dep’t of Corr.*, No. A23-0031, 2023 WL 5844274 (Minn. Ct. App. Sept. 11, 2023).

²⁴ James et al., *supra* note 9, at 24 (“Compared to the general federal recidivism rate of 41%, . . . [t]he recidivism rate of those granted compassionate release was 3.5%.”).

²⁵ See Samuelson, *supra* note 9.

²⁶ Horner, *supra* note 2, at 48.

²⁷ Samuelson, *supra* note 9.