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TESTIMONY ON SENATE BILL 2248 SD 2
RELATING TO PUBLIC SAFETY

by

Jodie F. Maesaka-Hirata, Director
Department of Public Safety

House Committee on Public Safety and Military Affairs
Representative Henry J.C. Aquino, Chair
Representative Ty Cullen, Vice Chair

Committee on Labor and Public Employment
Representative Karl Rhoads, Chair
Representative Kyle T. Yamashita, Vice Chair

Thursday, March 15, 2012; 9:00 A.M.
State Capitol, Conference Room 309

Chairs Aquino and Rhoads, Vice Chairs Cullen and Yamashita, and Members of the Committees:

The Department of Public Safety (PSD) has reviewed Senate Bill (SB) 2248 SD2 and appreciates the Legislature's concerns with regards to providing a statutory compassionate release process in the best interest of our ill, geriatric, and disabled inmates. The Department presently provides for a similar "compassionate release" recommendation process and supports the intent of SB 2248 SD2, but strongly opposes the measure in its present form.

The Department requests the following amendments to the measure:

1. **Page 4 (line 11)** – Delete "~~cease~~ or"
2. **Page 4 (line 14)** - Replace "may" with "shall"
3. **Page 4 (line 15)** – Delete "~~, an inmate or the inmate's representative~~"

4. **Page 4 (line 16)** - Replace subsection (c) with "Requests for medical release shall contain the following information:"
5. **Page 6 (line 3)** – Delete subsection (d), "~~(d) "If a request is made by an inmate or the inmate's representative, the request shall state the grounds for the requested release and shall contain a statement as to where the inmate will reside if released, who will care for the inmate, and how the inmate plans to obtain medical care.~~"

~~All requests initiated by an inmate shall be referred to the director immediately. Within twenty days of receiving the request the department shall submit a medical release report to the paroling authority containing the information under subsection (c)."~~
6. **Page 6 (line 13)** – Relabel section (e) to section (d) "The paroling authority..."
7. **Page 6 (line 16 through 18)** – Delete "~~The inmate and the inmate's representative shall be permitted to participate in the hearing and submit medical and other evidence in support of the request.~~"
8. **Page 7 (line 6)** – Relabel section (f) to section (e) "The paroling authority..."
9. **Page 7 (line 8)** – Relabel section (g) to section (f) "A denial of..."
10. **Page 7 (line 14)** – Relabel section (h) to section (g) "The director..."
11. **Page 7 (line 18)** – Relabel section (i) to section (h) "The department..."
12. **Page 8 (line 1)** – Relabel section (j) to section (i) "The department ..."

Persons in the custody of the Department become the patients of the Department and whose health care needs is provided by its physicians. As such, the Department's physicians become these patients' Primary Care Providers (PCP) and provide services in the best interest of their patient irregardless of the patients' criminology. Medical release recommendations are presently made in the best interest of these patients and their families and are based on medical evidence provided by the PCP. The medical release criteria as defined by this measure will

Chair Aquino and Rhoads
Vice Chair Cullen and Yamashita
SB 2248 SD2
March 15, 2012
Page 3

broaden the types of medical, geriatric, and disability cases that would receive Departmental recommendations.

SB 2248 SD2 provides the inmate or inmate's representative with a formal compassionate release recommendation process, which will result in many recommendations that exaggerate and misrepresent the patient's condition to satisfy the medical release criteria. The formal inmate recommendation process as defined in this measure, would greatly increase the administrative costs and duties for both the Department and the Hawaii Paroling Authority (HPA). The process as defined in this measure will mandate the Department to consider recommendations without merit and force the Department to divert its health care resources to deal with these recommendations. These resources should be best utilized by providing direct patient care.

Thank you for the opportunity to present this testimony.

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
HAWAII PAROLING AUTHORITY
1177 ALAKEA STREET, GROUND FLOOR
Honolulu, Hawaii 96813

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No. _____

TESTIMONY ON SENATE BILL 2248, SD2
RELATING TO PUBLIC SAFETY

BY

HAWAII PAROLING AUTHORITY
Bert Y. Matsuoka, Chairman

House Committee on Public Safety and Military Affairs
Representative Henry J.C. Aquino, Chair
Representative Ty Cullen, Vice Chair

Thursday, March 15, 2012; 9:00a.m.
State Capitol, Conference Room 309

Chair Aquino, Vice Chair Cullen, and Members of the Committee:

The Hawaii Paroling Authority (HPA) supports the intent of SB 2248, SD2, but has concerns regarding several areas of this measure and requests the following amendments:

1. **Page 2 (Line 12 through Line 14)** – The department shall assess and refer inmates to the Hawaii Paroling Authority for possible medical release **pursuant to the jointly established medical release program developed by the two agencies as provided in.....”**

A medical release program can be provided for in Department of Public Safety and HPA policies. Also, a medical release administrative hearing is an expedited parole consideration hearing process similar to that of a request for a reduction of an offender’s minimum sentence(s), and not a separate program that needs to be enacted into law.

2. **Page 3 (Line 20 through Line 22)** – (a) An inmate in the custody of the department of public safety shall be eligible to be considered for medical release **as determined by the department of public safety medical director and endorsed by the director** if the inmate:.....

3. **Page 4 (Line 13 through Line 15)** – (b) All requests for medical release shall be in writing and shall be made to the Hawaii paroling authority. Requests may be made by the director of public safety [~~or by an inmate or the inmate's representative~~].

The department should determine the eligibility criteria and it is the department that should make the recommendation to the Hawaii paroling authority.

4. **Page 4 (Line 16)** – [~~H~~] **When** a request for medical release of an inmate is made.....

5. **Page 6 (Line 3 through 12)** – (d) Delete entire subparagraph.

The department should make all medical release recommendations to the Hawaii paroling authority. It is the department that is solely responsible for the custody and care of the inmate and the department's medical doctors are the primary care physicians of the inmate.

6. **Page 6 (Line 13 through Line 14)** – (e) The Hawaii paroling authority shall conduct [a] **an administrative** hearing on all requests **received from the director of the department of public safety** for medical release. The hearing shall be held within [~~ten~~] **thirty** days of receiving a medical release report from the department of public safety.

The Hawaii paroling authority is required by HRS §706-670 and HAR §23-700-31 to provide the department of public safety, the department of the prosecuting attorney, the victim(s) and/or the victim(s) surviving family member(s), the inmate and the inmate's attorney with reasonable written notice prior to conducting a hearing to consider reducing the minimum term of an inmate or to consider an inmate for release on parole. As written, the ten day hearing requirement is neither feasible nor practical.

7. **Page 6 (Line 16 through 18)** - Delete the entire sentence [~~The inmate and the inmate's representative shall be permitted to participate in the hearing and submit medical and other evidence in support of the request.~~]

The review process for medical releases would be an administrative process similar to requests for early parole hearings and/or requests for reduction of minimum term(s) of imprisonment as outlined in HAR 23-700-26 and 23-700-29, which do not require a full hearing, but rather are conducted during the parole board's administrative hearings sessions conducted each month. During administrative hearings, no inmates, legal council, prosecutors, etc. are present as the parole board reviews all appropriate records, requests, justifications, etc. and discuss each case prior to rendering a decision. In all such cases, the HPA is required to provide appropriate notification to all concerned parties pursuant to HRS §706-670 and HAR §23-700-31.

8. **Page 7 (Line 14 through 17)** - (h) Delete the entire sentence [~~The director shall appoint an advocate for any inmate who requests medical release and is unable because of incapacitation or debilitation to advocate on the inmate's own behalf.~~]

This is not needed as the primary care physicians and the department's health care staff effectively advocate for their patients. Also, the health care staff work with inmate and family members to ensure that the inmate's needs are being met and when appropriate, powers of attorney are sought by the family members to advocate and act on the inmate's behalf. Further, there may be serious legal issues arising out of any requirement for the department to appoint an advocate for the inmate.

The HPA believes the recommended amendments to this measure addresses needed technical changes while simultaneously clarifies the affected areas as they relate to the HPA. The HPA defers to the department of Public safety on all matters that affect that agency that arise out of SB 2248, SD2 as it is currently written.

Thank you for this opportunity to provide testimony on this matter.



SB2248 SD1
RELATING TO PUBLIC SAFETY
House Committee on Public Safety & Military Affairs

March 15, 2012

9:00 a.m.

Room 309

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB2248 SD1, which would clarify the medical release program for terminally ill inmates.

OHA's 2010 report, "The Disparate Treatment of Native Hawaiians in the Criminal Justice System," indicated that there are deficiencies in the operation of the criminal justice system in Hawai'i. Recently, OHA worked with advocate Robert Merce to assist Delbert Wakinekona, a beneficiary in dire need of medical release.

Years of neglect and inadequate medical treatment brought Mr. Wakinekona to the brink of death. In what should have been a straight forward process, Robert Merce had to struggle with endless bureaucratic barriers to obtain basic information on Mr. Wakinekona's condition and what was needed to obtain his medical release. OHA supports SB2248 SD1's effort to improve the medical release process and facilitate compassionate release for suffering individuals like Mr. Wakinekona.

Mahalo for the opportunity to testify on this important measure. OHA urges the committee to review Mr. Merce's testimony on this matter and PASS SB2248 SD1.

COMMUNITY ALLIANCE ON PRISONS

76 North King Street, Honolulu, HI 96817

Phone/E-Mail: (808) 533-3454 / kat.caphi@gmail.com



COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Rep. Henry Aquino, Chair

Rep. Ty Cullen, Vice Chair

Thursday, March 15, 2012

9:00 a.m.

Room 309

STRONG SUPPORT SB 2248 SD2 – COMPASSIONATE RELEASE

Aloha Chair Aquino, Vice Chair Cullen and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 6,000 Hawai'i individuals living behind bars, always mindful that almost 1,800 individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SD 2248 SD2 requires the department of public safety to assess and refer inmates to the Hawaii paroling authority (HPA) for possible medical release. Provides that an inmate in the custody of the department shall be eligible to be considered for medical release if the inmate meets specified criteria under certain procedures. Requires HPA to set reasonable conditions on an inmate's medical release. Requires the HPA to promptly order an inmate returned to custody of the department to await a revocation hearing if the HPA receives credible information that an inmate has failed to comply with any reasonable condition set upon the inmate's release.

Community Alliance on Prisons is in strong support of compassionate release as is the medical community, research organizations, and the Bureau of Justice.

The Annals of Internal Medicine¹

"Compassionate release consists of two entwined but distinct elements: eligibility (based on medical evidence) and approval (based on legal and correctional evidence) (4). We argue that the medical eligibility criteria of many compassionate-release guidelines are clinically flawed because of their reliance on the inexact science of prognostication, and additional procedural barriers may further limit rational application. Given that early release is politically and socially charged and that eligibility is based largely on medical evidence, it is critical that such medical evaluation be based upon the best possible scientific evidence and that the medical profession help minimize medical-related procedural barriers."

¹ Balancing Punishment and Compassion for Seriously Ill Prisoners. Brie A. Williams, MD; Rebecca L. Sudore, MD; Robert Greifinger, MD; and R. Sean Morrison, MD
<http://www.annals.org/content/early/2011/05/31/0003-4819-155-2-201107190-00348.full>

Human Rights Watch²

"Life in prison can challenge anyone, but it can be particularly hard for people whose bodies and minds are being whittled away by age. Prisons in the United States contain an ever growing number of aging men and women who cannot readily climb stairs, haul themselves to the top bunk, or walk long distances to meals or the pill line; whose old bones suffer from thin mattresses and winter's cold; who need wheelchairs, walkers, canes, portable oxygen, and hearing aids; who cannot get dressed, go to the bathroom, or bathe without help; and who are incontinent, forgetful, suffering chronic illnesses, extremely ill, and dying."

Bureau of Justice Statistics³

The Bureau of Justice Statistics reports found that between 1995 and 2010, the number of state and federal prisoners age 55 or older nearly quadrupled (increasing 282 percent), while the number of all prisoners grew by less than half (increasing 42 percent). There are now 124,400 prisoners age 55 or older.

Our prisons and those with whom we contract are not equipped to handle this aging or ill population. We know of cases where inmates have been denied wheelchairs and have had to crawl to receive medication. This is absolutely inhumane and should be intolerable.

The California prison system recently opened a prison hospice in Vacaville because of the number of aging and chronically ill incarcerated individuals serving sentences. This is part of the reason that their prison health care system was under consent decree from the federal government.

National Public Radio⁴

A January 30, 2012 public radio story reported in a story entitled, "End To California Prison Healthcare Receivership In Works"

"SACRAMENTO, Calif. (AP) — The court-appointed receiver overseeing California's prison health care system said Friday **the state must keep its promise to spend more than \$2 billion for new medical facilities before the federal courts can end an oversight role that has lasted six years.**

California has committed to spending \$750 million to upgrade existing medical facilities, building a new medical center and converting juvenile lockups. So far, only the new medical center in Stockton is being built. ..."

Department of Public Safety Compassionate Release Statistics⁵

37 Compassionate Releases Recommended

22 Compassionate Releases Approved

14 Actual Compassionate Releases

Community Alliance on Prisons sees compassionate release for chronically ill or geriatric individuals as something that should happen before they are on life-support. We have heard many heart-breaking stories about the treatment some terminally ill individuals have received in our prison infirmaries.

² OLD BEHIND BARS The Aging Prison Population in the United States, January 2012, http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf

³ Bureau of Justice Statistics, Prisoner Series, 1995-2010. Based on number of sentenced prisoners under jurisdiction of federal and state correctional authorities with sentences of more than one year.

⁴ "End To California Prison Healthcare Receivership In Works"

<http://www.capradio.org/articles/2012/01/30/end-to-california-prison-healthcare-receivership-in-works>

⁵ Department of Public Safety 2009 -2011 Compassionate Release Statistics

We have also been told that there are some elderly inmates in one of our prisons who have been paroled yet are still incarcerated because they have nowhere else to go since their families are all deceased and there are no community facilities willing to take them.

Community Alliance on Prisons respectfully asks the committee to pass SB 2248 SD2.

Mahalo for this opportunity to testify.



Committee: Committee on Public Safety & Military Affairs
Committee on Labor & Public Employment
Hearing Date/Time: Thursday, March 15, 2012, 9:00 a.m.
Place: Room 309
Re: Testimony of the ACLU of Hawaii in Support of S.B. 2248, SD2, Relating to Public Safety

Dear Chairs Aquino and Rhoads and Members of the Committees on Public Safety & Military Affairs and Labor & Public Employment:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of S.B. 2248, SD2, which seeks to require the Hawaii Paroling Authority to establish a medical release program for inmates.

This smart and compassionate program could provide relief to a prison system dealing with an increasingly older population subject to more medical issues and higher treatment costs. Releasing those inmates who are found to be no-risk to public safety could save the state millions of dollars in health care costs, relieve prison overcrowding, and offer a more dignified and more humane death to those who would otherwise die in prison.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

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TELEPHONE (808) 533-0275**

TESTIMONY IN SUPPORT OF SB 2248, COMPASSIONATE RELEASE

**COMMITTEE ON PUBLIC SAFETY
Representative Henry Aquino, Chair
Representative Ty Cullen, Vice Chair
Thursday, 3-15-12
9:00 a.m., Room 209**

Dear Chair and Vice Chair and Committee Members:

My name is Daphne Barbee-Wooten and I am an attorney in private practice in Hawaii. I very much support compassionate release of inmates who are disabled, permanently infirm and have a debilitating illness or disease. SB 2248 seeks to streamline and define the conditions for compassionate release which is much needed in Hawaii. Other States have compassionate release for ill and disabled and elderly inmates and have successfully used the releases. See attached news articles. However, unchecked discretion to the Dpt. Of Public Safety and or Hawaii Paroling Authority, and inability to appeal and or to obtain an independent medical exam are a concern. I urge you to add provisions allowing an appeal or for an independent medical exam. If an inmate's request for compassionate release is denied, there should be an explanation and an ability to appeal or reconsider.

I am familiar with inmates who are suffering debilitating illnesses requiring dialysis and chemotherapy who are at Halawa Correctional Facility. I also know of inmates from Hawaii who are suffering serious illnesses such as cancer at Saguaro Correctional Facility. I also am aware of inmates who are elderly. Inmates are disabled in wheelchairs, bedridden and unable to care for themselves without medications, injections of insulin, chemotherapy, dialysis and other forms of life sustaining medical needs.

There should be checks and balances to ensure the decision to grant or deny compassionate release is done by persons with medical knowledge about the illness and how debilitating it is on the inmate. For example, how many lay persons know the affect dialysis has on the body or chemotherapy. Doctors specialize in various medical conditions. There is nothing in this bill that states a doctor who specializes in the specific disease or medical condition should be consulted. An inmate should be able to select a physician of their choosing as an Independent Medical Examiner if the DPS doctor opines that the medical condition is not debilitating. Please add provisions for independent medical exam and appeal process for inmates who apply for compassionate release in this bill. I am aware of inmates whose compassionate release requests have been recommended by physicians only to be turned down by DPS non doctors. There should be an appeal process to allow for the Hawaii Paroling Authority to hear these cases. Thank you. Please pass this bill.


Daphne Barbee-Wooten, Atty.
Attachments

AMERICA: Land of the Free, Home of the Incarcerated

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Lake Co. convict wins California's first medical parole

15 Jun

[Marisa Lagos, Chronicle Staff Writer](#)

A man sentenced to a 68-year prison sentence for a 2006 home-invasion robbery has become the first person in California granted parole under a new law authorizing the release of medically incapacitated inmates to save the state millions of dollars.

Craig Lemke, 48, poses no threat to public safety due to his medical condition, a two-member panel of the state Board of Parole Hearings found today during a hearing at the Pleasant Valley State Prison in Coalinga. The Lake County convict's medical condition was not disclosed for privacy reasons.

He was the second inmate to be considered for medical parole under a law authored by Sen. Mark Leno, D-San Francisco, that went into effect this year. The law states that inmates who are "permanently medically incapacitated with a medical condition" that makes them "unable to perform activities of basic daily living" may be released if they do not pose a threat to public safety.

A spokeswoman for the court-appointed medical receiver in charge of California's prison health care praised the board's decision, saying it will save the state up to \$750,000 a year in guarding costs, and an untold amount on Lemke's medical care.

"We're pleased the board found he met the criteria," Nancy Kincaid said. "We are continuing to look for more individuals that could meet the criteria... There are a total of 40 (inmates) on the list, and we are always working to identify more."

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States using early release of prisoners to save money

MONDAY, 01 MARCH 2010 20:15

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BY JOHN GRAMLICH

STATELINE.ORG

For Floyd Prozanski, it makes perfect sense to give some prisoners a chance to reduce their time behind bars, provided they complete educational or vocational programs and behave while they are incarcerated.

"You and I on the outside, we have a chance of getting a raise or promotion," says Prozanski, a Democratic state senator from Eugene, Ore. "What better way to teach (prisoners) that there are incentives for them to do well inside the walls?"

Prozanski, chair of the Senate Judiciary Committee, last year helped craft a law that lets some Oregon inmates trim as much as 30 percent from their sentences through expanded "earned-time credits," which are awarded to prisoners who finish coursework, gain work experience or otherwise work to improve their lives behind bars. Created to save the state money in extremely lean fiscal times, the law has moved up release dates for about 3,500 prisoners, including about 950 who have already been released from prison an average of 55 days ahead of schedule.

But a recent backlash over Oregon's law serves as a reminder of the political pitfalls that can accompany changes in criminal justice policy, particularly when those changes open prison doors earlier for some inmates. California, Colorado, Illinois, Kentucky, Michigan and Wisconsin are among the other states that have recently accelerated prisoner releases or are considering doing so.

Victims' advocates groups have attacked Oregon's law as a threat to public safety, airing a statewide radio ad that paints an ominous picture about the releases' effect on crime rates. Prosecutors and the Democratic state attorney general say the law goes too far and that inmates should be able to shave no more than 15 percent off their sentences through credits, the same percentage the federal government allows. Generating even more opposition is a loophole that lawmakers acknowledge should never have found its way into the law, making some serious criminals eligible for accelerated releases.

"This has been extremely hurtful, and extremely traumatic for crime victims," Steve Doell, president of the group Crime Victims United of Oregon, said during testimony about the law earlier this month.

As to whether accelerated-release programs lead to more crime by those who are released,

research shows otherwise. A review by the National Council on Crime and Delinquency of at least 12 studies, for example, found unchanged or lower recidivism rates among prisoners who benefited from accelerated-release programs in states including Illinois, Wisconsin and Florida.

Amid mounting public pressure, Oregon lawmakers last week suspended the earned-time program until 2011 while the state evaluates it. They also made changes to ensure that serious criminals no longer will be eligible for 30 percent sentence reductions when the program resumes. Democratic Governor Ted Kulongoski signed the revisions into law over the objections of Republicans, who wanted to repeal the program altogether.

Budget-driven efforts to speed prisoner releases and save states money have touched off political debates elsewhere this year, a major election year in which lawmakers in 46 states face reelection and no candidate wants to be labeled "soft on crime." The debates have raged even in places where inmates have been released just days earlier than they ordinarily would have been.

Illinois Governor Pat Quinn nearly lost a Democratic primary this month against the state comptroller, Dan Hyman, who repeatedly attacked him over a program that allowed about 1,700 inmates to get out of prison an average of 37 days early. The initiative came under fire because the state awarded "good-time credits" — which are based on behavior behind bars, rather than participation in programs — to prisoners who had spent most of their sentences in county jails, without being sufficiently monitored by the state. Quinn has called the program a "mistake," and lawmakers have hastily approved changes that would prevent similar releases from happening again.

In California, lawmakers last year approved an expansion of good-time credits that, since the law took effect in January, has allowed at least 2,000 inmates to leave prison ahead of schedule. But the law has sown confusion at the local level over whether it applies to jail inmates as well as state prisoners. Some counties have released hundreds of prisoners early, while law enforcement agencies elsewhere have sued to block the releases, which could become an issue in a governor's race expected to feature Democratic Attorney General Jerry Brown.

In Michigan, Republicans are attacking a proposal by Democratic Governor Jennifer Granholm to reinstate good-time credits, which lawmakers have phased out, and grant earlier releases to about 7,500 prisoners in an effort to save up to \$130 million in the coming fiscal year. "We reject the idea that you can solve the budget problem by depopulating the prisons," Republican Senate Majority Leader Mike Bishop told the Detroit Free Press, calling Granholm's proposal "insanely shortsighted."

Granholm pushed back in an interview with StateLine.org last week, referring to the fact that Michigan is one of only a handful of states — along with Georgia, Hawaii, Idaho, Montana and Utah, according to a 2008 survey — that have no good-time credits whatsoever. She rejected the assertion that doing what most other states already do will result in a public safety threat.

"If we don't address that issue, then we're going to continue to plow taxpayer dollars into a corrections system when the states around us that have fewer prisoners and shorter lengths of stay don't have higher crime rates," Granholm, a former prosecutor and state attorney general, said.

Indeed, often lost in the debate over accelerated prison releases is that they are relatively common. Besides the 44 states that allow inmates to earn good-time credits, at least 31 also provide some form of earned-time credits for those who enroll in educational or other programs, according to a study last year by the National Conference of State Legislatures. Nevada, for example, allows some inmates to reduce their time by 60, 90 or 120 days if they complete a certificate, diploma or degree while behind bars. In many other states, correctional authorities can grant "compassionate releases" to sick or dying inmates.

In 2003, lawmakers in Washington state passed a law giving some nonviolent drug and property offenders the chance to reduce their sentences by as much as 50 percent in one of the nation's most aggressive expansions of earned-time credits. A 2009 study by the



Nation

Is an embryo a 'person'? Mississippi set to Christian Science Monitor - 47 minutes ago
Initiative 20, a Mississippi ballot measure, asserts that 'personhood' begins at conception. The proposed state constitutional amendment, which challenges the 1973 Roe v. Wade abortion ruling, goes to voters

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Independent Washington State Institute for Public Policy found that the program has resulted in lower recidivism rates among those who have been released ahead of schedule. But it also found an increase in property crimes after the change went into effect.

The institute's finding on recidivism has made Washington a model for lawmakers in other states that have sought accelerated prisoner releases, and is frequently mentioned by criminologists.

"Length of stay has nothing to do with the recidivism rate," Todd Clear, the incoming dean of the School of Criminal Justice at Rutgers University in New Jersey, says. "If I let someone out (early), I'm not increasing the chances of them committing a crime. I'm just changing the date."

Despite the studies, politicians and corrections officials are keenly aware that a single, well-publicized crime by an inmate who has been granted accelerated release can call entire programs into question, virtually overnight. In California, for instance, outrage over the state's good-time credits has been exacerbated by the early release of a Sacramento County inmate who was arrested in connection with an attempted rape less than 24 hours after walking free.

For that reason, Clear believes, early-release initiatives are a recipe for political disaster. "The minute you let a bunch of people out early, you own everything they do," he says — a point acknowledged by Granholm.

"I think any changes in the corrections system can certainly be exploited by political gain by those who want to do so," Granholm says. "And it's true in every state in the country."

— *Stateline.org* staff writer *Melissa Maynard* contributed to this report.

HUMAN
RIGHTS
WATCH

Old Behind Bars

The Aging Prison Population in the United States

Human Rights Watch presents in this report new statistics that testify unequivocally to the aging of the US prison population. Among our findings:

- Between 2007 and 2010, as noted above, the number of sentenced state and federal prisoners age 65 or older increased by 63 percent, while the overall population of sentenced prisoners grew only 0.7 percent in the same period. There are now 26,200 prisoners age 65 or older.
- Between 1995 and 2010, the number of state and federal prisoners age 55 or older nearly quadrupled (increasing 282 percent), while the number of all prisoners grew by less than half (increasing 42 percent). There are now 124,400 prisoners age 55 or older.
- As of 2010, 8 percent of sentenced state and federal prisoners are age 55 or older, more than doubling from 3 percent in 1995.
- One in ten state prisoners is serving a life sentence.
- Eleven percent of federal prisoners age 51 or older are serving sentences ranging from 30 years to life.

Using data from the United States Bureau of Justice Statistics (BJS), Human Rights Watch calculates that the number of sentenced federal and state prisoners who are age 65 or older grew an astonishing 94 times faster than the total sentenced prisoner population between 2007 and 2010. The older prison population increased by 63 percent, while the total prison population grew by 0.7 percent during the same period.

Some older men and women in prison today entered when they were young or middle-aged; others committed crimes when they were already along in years. Those who have lengthy sentences, as many do, are not likely to leave prison before they are aged and infirm. Some will die behind bars: between 2001 and 2007, 8,486 prisoners age 55 or older died in prison.

This report is the first of two that Human Rights Watch plans to issue on the topic of elderly prisoners in the US.⁴ It presents new data on the number of aging men and women in prison; provides information on the cost of confining them; and based on research conducted in nine states where prisons vary significantly in size, resources, and conditions, offers an overview of some ways that prison systems have responded to them. The report tackles some policy considerations posed by incarcerating elderly inmates, and raises the human rights concerns that must be addressed if sound policies are to be developed for the criminal punishment and incarceration of older prisoners, both those who grow old in prison and those who enter at an advanced age.

Prison officials are hard-pressed to provide conditions of confinement that meet the needs and respect the rights of their elderly prisoners. They are also ill-prepared—lacking

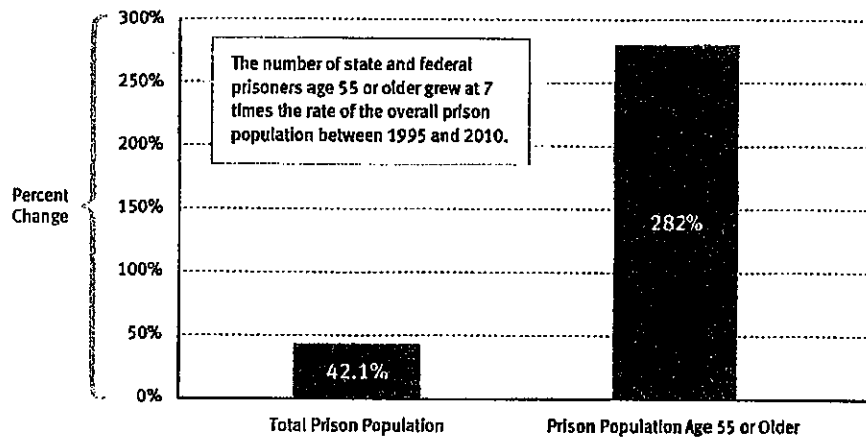
the resources, plans, commitment, and support from elected officials—to handle the even greater numbers of older prisoners projected for the future, barring much needed changes to harsh “tough on crime” laws that lengthened sentences and reduced or eliminated opportunities for parole or early release.

It is increasingly costly for correctional systems to respond to the needs of their geriatric populations, including their need for medical and mental health care. According to information gathered by Human Rights Watch, including previously unpublished data, annual medical expenditures are three to eight times greater for older state prisoners than for others. Since federal health insurance programs do not cover medical care for men and women behind bars, states shoulder the entire burden for their inmates. Taxpayers also bear the financial burden of expensive prison security and control measures for those individuals who, due to their age and infirmities, pose a negligible safety risk.

Providing medical care to older prisoners comes with a steep price tag because of their greater medical needs. Older prisoners are more likely than younger ones to develop mobility impairments, hearing and vision loss, and cognitive limitations including dementia. Older prisoners are also

⁴ In this report we use the terms old, older, elderly, aging, and geriatric interchangeably to refer to people whose physical capabilities and mental acuity are markedly diminished by advancing age, wholly apart from any diseases which may have limited their physical or mental abilities. Nevertheless, because age, illness, and physical and mental disabilities so often overlap, we also use the former terms interchangeably with such terms as “old and infirm.” Similarly, we use the terms incarcerated persons, prisoners, offenders, and inmates interchangeably.

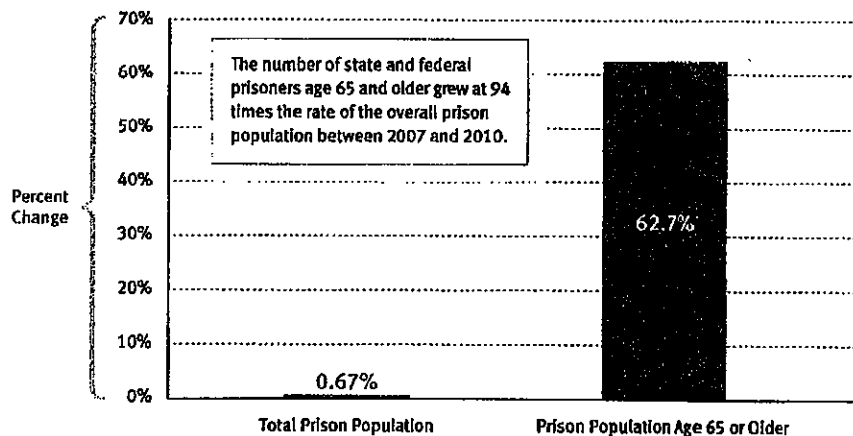
GROWTH IN STATE AND FEDERAL PRISON POPULATION, BY AGE, 1995-2010



Source: Bureau of Justice Statistics, Prisoner Series, 1995-2010

Note: Based on number of sentenced prisoners under jurisdiction of federal and state correctional authorities with sentences of more than one year.

GROWTH IN STATE AND FEDERAL PRISON POPULATION, BY AGE, 2007-2010



Source: Bureau of Justice Statistics, Prisoner Series, 1997 to 2010

Note: Based on number of sentenced prisoners under jurisdiction of federal and state correctional authorities with sentences of more than one year.

more likely to have chronic, disabling, and terminal illnesses. Prisoners who continue to age behind bars will eventually require assisted living and nursing home levels of care while incarcerated. Prison officials look at the projected increase in aging prisoners in their systems and realize in the very near future they will need to operate specialized geriatric facilities; some already do.

Corrections officials must respect the human rights of all prisoners, and what is required to respect those rights can vary according to the needs and vulnerabilities of the individual prisoner.

For an old and frail person, the right to safe conditions of confinement means not having to live in a dorm with younger persons prone to violence and extortion; the right to decent

expressly for the purpose of ensuring housing for ex-offenders whose past crimes make them difficult to place in private nursing homes.

Release and Public Safety

Older people can and do commit crimes, including older people who have been released from prison.¹⁸⁸ Nevertheless, violent crime by older former prisoners is relatively rare. It is often said that “crime is a young person’s game” and the likelihood a person will commit serious crimes declines with age.¹⁸⁹

Despite the many challenges of reentry, older inmates who are released to the community are far less likely to recidivate—to be rearrested, reconvicted, or returned to prison with or without new sentences—than younger inmates.¹⁹⁰

A recent study by the Florida Department of Corrections revealed strikingly lower recidivism rates for offenders released when they are 50 years of age or older, and particularly for those released at 65 years or older, compared to younger inmates. The report concludes that age at release may be the single most important factor predicting lower recidivism.¹⁹¹ In Colorado, offenders released at 50 years or older were also less likely to be returned to prison within three years of release than younger offenders.¹⁹²

Many studies of recidivism do not distinguish between returns to prison for technical parole violations—failure to meet with a parole officer, for example—and returns because of the

¹⁸⁸ In a rather unusual example, a 69-year-old man tried to rob a bank using a knife the day after he was released from prison. James Barron, “Ex-Convict Is Shot After Failed Holdup,” *The New York Times*, October 15, 2011, <http://www.nytimes.com/2010/10/15/nyregion/15penn.html> (accessed November 29, 2011).

¹⁸⁹ Hoelter, “Imprisoning Elderly Offenders,” citing Michael Gottredson and Travis Hilschi, “The True Value of Lambda Would Appear to be Zero: An Essay on Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics,” *Criminology*, vol. 24, issue 2, 1986, pp. 223-233.

¹⁹⁰ Patrick A. Langan and David J. Levin, Bureau of Justice Statistics, “Recidivism of Prisoners Released in 1994,” June 2002, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=1134> (accessed November 29, 2011), Table 8. The Bureau of Justice Statistics study lumps all offenders 45 or over together as do some more recent studies, for example, Kyung Yon Jhi and Hee-Jong Joo, “Predictors of Recidivism Among Major Age Groups of Parolees in Texas,” *Justice Policy Journal*, Spring 2009, www.cjcj.org/files/predictors_of.pdf (accessed November 29, 2011). Other studies identify age as a strong, significant predictor of recidivism, but do not provide data breaking the released inmates into discrete age groups. See, for example, Beth M. Huebner and Mark T. Berg, “Examining the Sources of Variation in Risk for Recidivism,” *Justice Quarterly*, vol. 28 no. 1, February 2011, pp. 146-173.

¹⁹¹ Florida Department of Corrections, “2009 Florida Prison Recidivism Study: Releases from 2001 to 2008,” March 2010, www.dc.state.fl.us/secretary/press/2010/RecidivismStudy.pdf (accessed July 11, 2011), p. 16.

¹⁹² Data provided to Human Rights Watch by Maureen O’Keefe, Colorado Department of Corrections, March 23, 2011.

commission of a new crime. From a public safety perspective, the latter is obviously more important. Data that disaggregates reasons for the return to prison shows older inmates are far less likely to commit new crimes after release from prison than younger inmates.

In New York, data on releases from 2000 to 2006 reveals that inmates who were under 55 at the time of release were at least twice as likely to return to prison within three years of release with a new offense than prisoners released at age 55 and over. For example, in 2006, 10.9 percent of offenders released at an age less than 55 years returned to prison within three years with a new offense compared to 5.4 percent of those released at age 55 or older.¹⁹³ Not only were New York's older former prisoners less likely to recidivate, they rarely recidivated by committing violent offenses. No offenders who were 65 or older when released in 2006 were returned to prison in three years for committing a violent felony; and only 3.4 percent of those who were between 55 and 64 when released were returned to prison in that time period for committing a violent felony.

In a 2010 Ohio study, 26.7 percent of former prisoners commit new crimes within three years of their release from prison. But only 5.6 percent of offenders released between ages 65 and 69 commit new crimes, and only 2.9 percent do who are between age 70 and 74 when released. None of the 19 inmates released at age 75 and over committed new crimes; nor, for that matter, did any of them violate the conditions of their parole.¹⁹⁴

The low probability that released prisoners well on in years will commit new crimes suggests that their continued incarceration adds little to public safety. The possible risk of crime posed by individual prisoners cannot, of course, be determined solely by age; other factors must be considered as well, including their physical and mental condition and recent conduct behind bars. Nevertheless, available data suggests that as a general matter public safety does not require the continued incarceration of geriatric prisoners, especially if they are infirm or incapacitated.

¹⁹³ Unpublished data obtained through Freedom of Information Act request by Human Rights Watch in email correspondence with New York Department of Corrections and Community Supervision, July 11, 2011. Older prisoners were also significantly less likely to be returned to prison for violating the conditions of release. For example, 31.2 percent of the offenders who were younger than 55 when released in 2006 were returned to prison within three years for parole violations compared to 17.4 percent of those released at age 55 and older.

¹⁹⁴ Data provided to Human Rights Watch in email correspondence with Steve Vandine, Ohio Department of Corrections, July 14, 2011. See also, Matthew Makarios, Benjamin Steiner, and Lawrence F. Travis, III et al., "Examining the Predictors of Recidivism among Men and Women Released from Prison in Ohio," *Criminal Justice and Behavior*, vol. 37 no. 12, December 2010, (age is a significant predictor of recidivism).

Death

As the number of older prisoners increases, so too does the number of men and women dying of natural causes behind bars.¹⁹⁵ Some grow old and die in prison. Some enter prison in such poor health they will die before they have completed their sentence. For those who are already elderly at the time of admission, even a short sentence may be a sentence to death in prison.

Correctional systems are providing medical care to ever growing numbers of terminally ill prisoners and are trying to expand their ability to provide palliative care for the dying that is consistent with community standards, including through the creation of hospices. Each death is difficult for other inmates as well as staff.

Not surprisingly, older men and women account for a disproportionate and growing share of prison deaths. Nationwide, in 2001, offenders age 55 and over comprised 33.9 percent of deaths in state prisons nationwide; by 2007 the number had grown to 45.7 percent.¹⁹⁷ In the years 2001-2007, 8,486 men and women age 55 or over died behind bars. Data from individual states further illuminates the relationship between age of prisoners and mortality in prison:

- Although older inmates were 16 percent of the June 30, 2010 Florida prison population, they represented 38 percent of all inmates expected to die in prison. Within the age cohort of all Florida inmates over age 50, almost

Alan Gage, 82 years old, is in prison in Washington state, convicted of assault of a child with a deadly weapon. He was not sure how long he had been in prison when interviewed by Human Rights Watch, but knew that his sentence goes to 2024, when he will be 95. He spends most of the day sleeping and reading, and rarely goes to the yard. He says he cannot participate in things as much as he used to when he was younger. He knows he is likely to die behind bars. "I don't like the notion of dying in prison, although I don't think much about it. Because you're away from everyone, out of the stream, far from those who care about you, who would come together and mourn you."¹⁹⁶

¹⁹⁵ Nellis and King, "No Exit."

¹⁹⁶ Human Rights Watch interview with Alan Gage (pseudonym), Coyote Ridge Corrections Center, Connell, Washington, August 8, 2011.

¹⁹⁷ Margaret Noonan, Bureau of Justice Statistics, "Deaths in Custody: State Prison Deaths 2001-2007 - Statistical Tables," Oct. 28, 2010, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&lid=2093> (accessed January 12, 2012), Table 5. Illness and AIDS consistently account for almost all prisoner deaths, including those of inmates aged 55 and over.

one-third (4,819 of 16,386) are expected to die in prison, and more than half of all inmates over age 70 (297 of 408) will die in prison.¹⁹⁸

- In New York, inmates 65 years and older comprise 1 percent of the inmate population, but account for 15 percent of deaths; inmates aged 55 to 64 account for 4 percent of the population and 23 percent of the deaths.¹⁹⁹
- In Ohio, inmates 55 years and older comprised 6.5 percent of the state's prison population in 2009, but they accounted for 48.5 percent of deaths in 2008 and 2009.²⁰⁰

Many prison systems have created hospices to respond to the emotional as well as physical needs of the dying.²⁰¹ Others do not yet have licensed hospices, but are attempting to provide palliative care nonetheless. Normal prison visitation rules are typically relaxed in prison hospices so that family members can sit at the relative's bedside seven days a week and are permitted to repeatedly hug and touch their loved one, something not usually permitted in prison. Human Rights Watch visited the 17-bed hospice at California Medical Facility, which we were told was the first licensed hospice in the country. Chaplain Keith Knauf, the director of the program, says his goal is to attend to the physical, emotional, and spiritual needs of the inmates to "make sure they can die with dignity and respect." The average stay in the hospice is six months. Shortly before Human Rights Watch visited the hospice, an 87-year-old inmate who had dementia and heart and lung problems had died there. We visited with a 67-year-old inmate who had been in prison for 30 years, serving a 15-to-life sentence, and who has advanced metastatic throat cancer. While he was pleased with the care he was given in the hospice, he was hopeful

¹⁹⁸ State of Florida Correctional Medical Authority, "2009-2010 Annual Report and Report on Aging Inmates," p. 54.

¹⁹⁹ New York Department of Correctional Services (now New York State Department of Corrections and Community Supervision), "Inmate Mortality Report: 2005-2008," http://www.doc.state.ny.us/Research/Reports/2010/Inmate_Mortality_Report_2005-2008.pdf (accessed November 29, 2011), pp. 8-9.

²⁰⁰ Data on deaths provided to Human Rights Watch in email correspondence with Steve Vandine, Ohio Department of Corrections, July 20, 2011. Percentage of prison population by age in 2009 from Ohio Department of Rehabilitation and Correction, "Institution Census 2009," January 2009, <http://www.drc.ohio.gov/web/Reports/InstitutionCensus/Institution%20Census%202009.pdf> (accessed December 13, 2011).

²⁰¹ See generally, John F. Linder and Frederick J. Meyers, "Palliative and End-of-Life Care in Correctional Settings," *Journal of Social Work in End-of-Life & Palliative Care*, vol. 5 issue 1-2, 2009, pp. 7-33; National Hospice and Palliative Care Organization, "Quality Guidelines for Hospice and End-of-Life Care in Correctional Settings," 2009, <http://www.nhpco.org/files/public/access/corrections/CorrectionsQualityGuidelines.pdf> (accessed December 13, 2011). Extensive information about prison hospices can be found on the website of the National Prison Hospice Association, <http://npha.org>. The hospice at Angola Prison has received considerable national attention. Descriptions of Angola's hospice and a video about it can be found at the National Prison Hospice Association website. See also, Carol Evans et al., "The Louisiana State Penitentiary: Angola Prison Hospice," *Journal of Palliative Medicine*, vol. 5 no. 4, 2002, pp. 553-558.

nonetheless that he would be able to secure compassionate release so that he would be able to go home to die with his family. In the hospice, inmate volunteers who receive 50 hours of training, as well as ongoing training as the need arises, sit vigil with the dying round-the-clock so they do not have to die alone. The volunteers read to the dying, talk and pray with them, write letters for them, and assist the nursing staff with certain basic tasks such as preparing the bath and changing diapers. Chaplain Knauf is extremely proud of the cadre of over 300 volunteer inmates who have worked at the hospice over the years.

He says that those who have paroled from prison hardly ever return.²⁰² The redemptive impact for inmates who work in hospices can be extremely powerful.²⁰³

Bernadette Thornton, 66 years old, is serving a three-year sentence in Colorado for vehicular manslaughter. She's on oxygen because of emphysema and a bad heart. She knows she's dying, and says she's struggling to get out of prison so she doesn't die there. She told Human Rights Watch, "Dying here scares me," and began to cry. She was offered hospice but did not want to go because that "is where you go to die." She is in constant pain, but the strongest pain medication she receives is Tylenol 3. The last pill is at 5:30 pm, and she receives nothing until the following morning at 7 am. "That's a long time between pills," she told us. She was housed in the infirmary, which she found very restrictive because she had only hour a day out of her room. She goes in a wheelchair to the pill line to get her medicine, even in the cold or when it is raining, and may have to wait outside like everyone else. She had to buy extra blankets for the cold because the department would not give them to her. She says her cell is really hot in summer, cold in winter. In the summer, an officer "let me prop the door open even though it's against the rules...I have a fan to help, but my oxygen machine generates a lot of heat." She says, "Some officers treat you with respect. A few don't."²⁰⁴

²⁰² One study has suggested that hospices not only have a powerful positive influence on inmates who work in them but also enhance respect, dignity, and compassion among prison staff and prisoners more generally. Kevin N. Wright and Laura Bronstein, "Creating Decent Prisons: A Serendipitous Finding about Prison Hospice," *Journal of Offender Rehabilitation*, vol. 44 no. 4, 2007, pp. 1-16. See also, Art Beeler, "Palliative Care volunteers: A Program of Compassion," *Corrections Today*, July 2006, p. 38.

²⁰³ Kurt Streeter, "Amid ill and dying inmates, a search for redemption," *Los Angeles Times*, November 20, 2011, <http://www.latimes.com/news/local/la-me-1120-prison-hospice-html,0,6904576.htmlstory> (accessed November 22, 2011).

²⁰⁴ Human Rights Watch interview with Bernadette Thornton (pseudonym), Denver Women's Correctional Facility, Denver, Colorado, March 23, 2011.

crime. Nevertheless, while a prison term may have been proportionate at the time imposed, increasing age and infirmity may change the calculus against continued incarceration and in favor of some form of conditional release.

Take the following men confined in state prisons: Homer Edmunds (pseudonym), age 87, has been in prison for 27 years, and for the past two decades he has been in a special unit because of his severe cognitive impairments. Louis Sparrow (pseudonym), age 68, has been incarcerated for 10 years and is blind, has diabetes and leukemia, and is completely paralyzed except for one arm. Thomas Viceroy (pseudonym) is a 65-year-old man who has been in prison 25 years and is dying of stage 4 metastasized esophageal cancer. Each of these men was convicted of a violent crime and received lengthy sentences. Each has already been in prison a long time.

It is hard to see how their continued incarceration meaningfully serves any of the purposes for which their sentences were originally imposed. The main purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation. Retribution has been furthered by their time behind bars and could be further served if they were released from prison by restrictions on their liberty in the community and parole supervision. Incapacitation and deterrence are not necessary, given that these prisoners are not likely to endanger public safety if no longer behind bars but again, if there were a possibility of wrongful conduct, it could be prevented by the conditions of their release. Finally, further imprisonment is unlikely to advance rehabilitation. In these circumstances, continued incarceration would seem to be a disproportionately severe punishment.

Disproportionality and the Purposes of Punishment

Disproportionately lengthy prison terms may violate the prohibition on cruel and inhuman punishment.²⁰⁹ They may also constitute arbitrary deprivations of liberty in violation of the

²⁰⁹The prohibition of what are variously described as cruel, unusual, inhuman, or degrading punishments found in many national constitutions as well as in international and regional human rights treaties is the primary basis for prohibitions of grossly disproportionate sentences. Dirk van Zyl Smit and Andrew Ashworth, "Disproportionate Sentences as Human Right Violations," *The Modern Law Review*, vol. 67 no. 4, July 2004, p. 543. Article 7 of the International Covenant on Civil and Political Rights provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The European Court of Human Rights has recognized that disproportionately severe sentences can be incompatible with the prohibition on inhuman punishment in Article 3 of the European Convention on Human Rights. For a discussion of proportionality in US constitutional jurisprudence addressing the length of sentences, see Richard S. Frase, "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: 'Proportionality' Relative to What?" *Minnesota Law Review*, vol. 89, February 2005, p. 571.

right to liberty.²¹⁰ In either case, they are inconsistent with respect for human dignity. As the South African Constitutional Court has noted:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.²¹¹

Imprisonment is an extremely severe punishment that should only be used as a last resort when no lesser sanction suffices.²¹² Assuming it is warranted, however, the question of proportionality turns then on the length of the sentence. Prison sentences should be no greater than that which would be proportionate to the crime itself, taking into account the seriousness of the offense and the culpability of the offender. Within the boundaries set by proportionality to the crime, the sentence may be shortened if shorter sentences are adequate to further such goals as promoting public safety or rehabilitation.²¹³ The principle of parsimony is included in the concept of proportionality: the least severe sanction necessary to achieve the purposes of punishment should be the one used.²¹⁴

²¹⁰ ICCPR, art. 9. Article 9 protects individuals against undue or arbitrary deprivations of liberty, which can include unjust sentences of imprisonment. In a number of cases challenging discretionary life sentences, the European Court of Human Rights has recognized that sentences which are arbitrary or disproportionately lengthy can violate Article 5 of the European Convention on Human Rights, although it did not find violations in the cases before it. See for example, *Weeks v. United Kingdom*, (1987) 10 EHRR 293, March 2, 1987; *V v. United Kingdom*, App. No 24888/94, European Court of Human Rights (1999), December 16, 1999.

²¹¹ *S. v. Dodo*, 2001 (3) SA 382 (CC) 303, opinion of Ackerman J writing for unanimous Constitutional Court of South Africa, quoted in van Zyl Smit and Ashworth, "Disproportionate Sentences as Human Right Violations," p. 541.

²¹² See, for example, van Zyl Smit and Snacken, *Principles of European Prison Law and Policy*, chapter 2 (principle that deprivation of liberty should only be used as a last resort increasingly prominent in European penal policies and human rights standards). For discussion of European human rights jurisprudence on lengthy sentences, see van Zyl Smit and Snacken, *Principles of European Prison Law and Policy*, pp. 91-97. See also, Dirk van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?" *Federal Sentencing Review*, vol. 23, October 2010, p. 39. As discussed in van Zyl Smit, there is growing trend in Europe to consider life sentences without the possibility of release to be inherently inhuman.

²¹³ The American Law Institute, "Model Penal Code: Sentencing, Tentative Draft No. 1," April 19, 2007, sec. 1.02(2).

²¹⁴ See Frase, "Excessive Prison Sentences"; van Zyl Smit, "Outlawing Irreducible Life Sentences."

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March 13, 2012

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Rep. Henry J.C. Aquino, Chair

Rep. Ty Cullen, Vice Chair

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Rep. Karl Rhoads, Chair

Rep. Kyle T. Yamashita, Vice Chair

Thursday, February 2, 2011

Conference Room 309

9:00 a.m.

SB2248 SD2

Strongly Support "Compassionate Release"

Dear Chairs Aquino and Rhoads, Vice Chairs Cullen and Yamashita, and committee members:

My name is Robert Merce. I practiced law in Hawai'i for more than 25 years before retiring in 2007. Last year I worked with several other attorneys to obtain compassionate release for a 67-year old Native Hawai'ian man who had been in prison for 41 years and was suffering from end stage liver disease. The process took almost six months (from May 12, 2011 to October 28, 2011) and was completely dysfunctional. It quickly became apparent that some of the Department of Public Safety's policies were in direct conflict with the Hawai'i Paroling Authority's administrative rules and that corrections administrators did not agree with paroling authority administrators on how the process was supposed to work. There were no time limits within which administrators had to act, and as a result, delays were commonplace. And because there were no clear-cut rules to guide administrators, they were pretty much free to do whatever they wanted, whenever they wanted. It was abundantly clear that the process did not serve the best interest of inmates, the government, or the people, and that a medical or "compassionate" release statute was needed to correct the problem.

SB2248 SD2 is a clear, sensible and well thought out medical release bill. It will save the state money by releasing inmates who do not pose a risk to society and who are in need of intensive and costly end of life care. It addresses all of the problem I encountered last year in the compassionate release process and institutes a fair and transparent process that will serve the interest of the public, the government and inmates. Most importantly, as Senate Standing Committee Report No. 2494 notes, the bill and its underlying purpose are "pono", meaning good, upright, just, the right thing to do.

Let me highlight a few of the most important provisions of the bill:

1. In May 2011 a group of distinguished physicians co-authored an article on compassionate release that was published in the *Annals of Internal Medicine*, the journal of the American College of Physicians¹. It was the first time in many years that compassionate release was treated in-depth from the perspective of the medical community. After reviewing relevant literature, examining state and federal statutes, *and acknowledging the failure of almost all of the presently existing laws to function in a manner that serves the interest of society or prisoners*, the authors made several key recommendations:

1. Compassionate release procedures should be evidence based;
2. There should be a completely transparent compassionate release process
3. An advocate should be appointed to help inmates navigate the process and represent incapacitated prisoners;
4. There should be a “fast-track” option for the evaluation of rapidly dying prisoners; and
5. There should be a well-described and well-disseminated application procedure.

SB2248 SD2 incorporates all of the foregoing recommendations and to my knowledge is the first medical release bill in the nation to do so.

2. SB2248 SD2 sets out a process by which the Department of Public Safety evaluates all compassionate release requests and makes a written recommendation to the Hawai‘i Paroling Authority. The Authority then decides whether or not the inmate should be released. The HPA makes its decision after a hearing in which the inmate can present evidence of his own. This ensures that the process is completely transparent, that all sides are heard, and that all relevant evidence is considered.

3. The process set out in SB2248 SD2 provides that physicians determine whether an inmate meets the *medical* criteria for compassionate release, and correctional officials determine whether the inmate *poses a danger to society*. Health and safety are evaluated separately by the professionals who have the knowledge, training and experience to make sound judgments. Under SB2248 SD2 if a physician determines that an inmate meets the **medical criteria** for release, that inmate would still have to be evaluated by correctional officials to determine whether he poses a risk to public safety. If he poses a risk to public safety he would not be

¹ BA Williams, RL Sudore, R Greifinger, and RS Morrison. Balancing Punishment and Compassion for Seriously Ill Prisoners. *Ann Intern Med*. 2011;155:122-126.

released, irrespective of his medical condition.

The most important provision of SB2248 SD2 is that the Hawai'i Paroling Authority decides **all** medical release requests, not just those referred to it by the Department of Public Safety. Let me explain why this is so important.

Currently, the only person who can initiate compassionate release is the inmate's attending physician (i.e. the prison doctor). *See* Dept. Pub. Safety Policy COR. 10.1G.11, *Compassionate Release for the Terminally Ill* (February 2, 2011). If the attending physician makes a mistake regarding the inmate's prognosis and/or whether he or she meets the criteria for compassionate release, there is absolutely nothing the inmate, his family, or his lawyer can do about it. There is no appeal process and no review by an independent third party.

And I know for a fact that attending physicians make mistakes because one occurred in the case I worked on. Our client had cirrhosis of the liver secondary to chronic hepatitis C and clearly met the diagnostic criteria for refractory ascities (an accumulation of fluid in the tissues that is resistant to treatment). The medical literature plainly states that 50% the patients who have refractory ascites die within 6 months and 75% die within one year, and therefore our client positively met the Department of Public Safety's medical criteria for compassionate release. Yet the prison doctor at Saguaro refused to initiate the compassionate release process. That error of judgment almost precluded our client from being released. Fortunately, we obtained a letter from an outside expert (Dr. Robert G. Gish of the University of California at San Diego who is widely regarded as one of the country's leading authority of Hepatitis) and the Department of Public Safety wisely decided to bring our client back to Hawai'i and have him examined by Dr. Steven DeWitt, the physician at the Halawa Correctional Facility. Fortunately, Dr. DeWitt immediately recognized that our client had an extremely poor prognosis and initiated the compassionate release process.

We were lucky. But the point is that attending physicians make mistakes, and under the present system there is no mechanism to correct them. That is why is absolutely critical that inmates have an opportunity to appeal to the Paroling Authority and persuade them that a mistake has been made and that they do in fact qualify for compassionate release. The Paroling Authority should not become a rubber stamp for the limited number of cases that successfully wind their way through the Department of Public Safety's badly flawed compassionate release system.

The process set out in SB2248 SD2 will not result in a flood of frivolous medical release claims. In most cases the DPS will initiate timely medical release requests for inmates who meet the medical release criteria, and those individuals will be referred to the HPA just as they are now and be released as a matter of course.

I is difficult to imagine that many inmates who are healthy or have minor medical problems will contend that they are profoundly incapacitated or dying, but if they do, the DPS will simply have to write a very short report-- probably no more than a few sentences - stating that the inmate is healthy or has one or more benign medical conditions that do not meet the criteria for medical release and forward it to the HPA. Unless there is contrary evidence, the HPA hearing on that type of request would be extremely brief. The only cases that will take a little time are those

where there are genuine issues regarding the inmate's condition, and those cases deserve whatever time is required to resolve them properly.

In conclusion, SB2248 SD2 provides a fair and open process for terminally ill and profoundly disabled inmates to be compassionately released while at the same time protecting the public from an unreasonable risk of harm. It is a good bill and I urge you to pass it without amendments.

Thank you for allowing me to testify.

Robert K. Merce

PBMtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 13, 2012 12:03 PM
To: PBMtestimony
Cc: ewelsh@metcalconstruction.com
Subject: Testimony for SB2248 on 3/15/2012 9:00:00 AM

Testimony for PBM 3/15/2012 9:00:00 AM SB2248

Conference room: 309
Testifier position: Support
Testifier will be present: No
Submitted by: Erin Welsh
Organization: Individual
E-mail: ewelsh@metcalconstruction.com
Submitted on: 3/13/2012

Comments:

I am in strong support of this measure. This is a no-brainer. Please pass this bill. Thank you.

PBMtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 13, 2012 9:13 PM
To: PBMtestimony
Cc: mattrifkin28@gmail.com
Subject: Testimony for SB2248 on 3/15/2012 9:00:00 AM

Testimony for PBM 3/15/2012 9:00:00 AM SB2248

Conference room: 309
Testifier position: Support
Testifier will be present: No
Submitted by: Matthew Rifkin
Organization: Individual
E-mail: mattrifkin28@gmail.com
Submitted on: 3/13/2012

Comments:

Prisons are overcrowded as it is, and this bill would help that problem and show compassion to elder prisoners who pose no threat to the community.

This is a good bill and should move forward.

PBMtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 14, 2012 12:34 PM
To: PBMtestimony
Cc: maukalani78@hotmail.com
Subject: Testimony for SB2248 on 3/15/2012 9:00:00 AM

Testimony for PBM 3/15/2012 9:00:00 AM SB2248

Conference room: 309
Testifier position: Support
Testifier will be present: No
Submitted by: elaine funakoshi
Organization: Individual
E-mail: maukalani78@hotmail.com
Submitted on: 3/14/2012

Comments:

Dear Chair Aquino, Vice Chair Cullen, and Committee Members:

I support SB2248, SD2.

As the general public is aging, so are those incarcerated at a greater rate; and like so many of us, some not so gracefully and are in need of medical help beyond what the prisons can offer. Others have just reached a point in their lives where they need to be among family members to spend time with before they leave this planet.

Most of us have aging parents and many of us give up working to care for them. If they were incarcerated, we cannot give them the care that every human being deserve.

Hawai`i is a state full of compassion and love for their kupunas. May the committee consider passage of this bill.

Thank you for opportunity to submit my late testimony.

Mahalo and Aloha,
elaine funakoshi