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THE CASE FOR COMPASSIONATE RELEASE

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Between 1983 and 2018, Delaware’s prison population increased by 275%.¹ For decades, the First State incarcerated unprecedented numbers of adults, many of whom are serving long sentences that may result in death behind bars. One of the consequences of this over-incarceration is a “silver tsunami” of our aging prison population whose medical needs exponentially increase over time, potentially costing taxpayers millions of dollars. The ACLU of Delaware seeks a *solution* to spare the state from cruelly and unnecessarily incarcerating older adults in order to promote justice, equity, and humanity throughout our state.

The average incarcerated person can be considered aging by 50.2² years old depending on their background and the effects of imprisonment on their overall health. According to the 2021 Delaware Department of Correction (DOC) Annual Report, 815 of our state’s 3976 incarcerated persons (over 20%) were categorized as 51 years of age and older. Another 778 were aged 41-50, and will soon age into this cohort.³

A massive body of empirical literature shows that most individuals age out of criminality. In fact, age accounts for more variation in recidivism statistics than any other demographic or criminogenic variable,⁴ and people released after decades of imprisonment have among the lowest recidivism rates for all crimes, including murder.⁵ Offering compassionate release to these older individuals is the right thing to do constitutionally,⁶ it preserves public safety, and has the added benefit of saving taxpayer dollars. We *must* rethink the costly practice of keeping these people, who pose little to no risk to public safety, in prison.

¹ See *Incarceration Trends in Delaware*, THE VERA INSTITUTE OF JUSTICE (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-delaware.pdf>.

² See *The Impact of the Aging Inmate Population on the Federal Bureau of Prisons*, OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUST. (Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

³ See *Delaware Department of Corrections FY2021 Annual Report* at 37 (Mar. 31, 2022) https://doc.delaware.gov/assets/documents/annual_report/DOC_2021AnnualReport.pdf [hereinafter *Annual Report*].

⁴ See Sarah Rakes, Stephanie Grace Prost, & Stephan J. Tripodi, *Recidivism Among Older Adults: Correlates of Prison Re-entry*, JUST. POL’Y J., Spring 2018, at 7 https://www.cjcr.org/media/import/documents/recidivism_among_older_adults_correlates_of_prison_reentry.pdf.

⁵ See Leonardo Antenangeli & Matthew R. Durose, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008-2018)*, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., at 4-11 (Sept. 2021) https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs

⁶ Aging prisoners have claimed 8th Amendment violations due to the cruel and unusual nature of incarcerating the elderly, infirm, and disabled. See *Madison v. Ala.*, 139 S. Ct. 718, 722 (2019). Per Human Rights Watch, “Some elderly inmates are being unnecessarily held in prison despite the fact their continued incarceration does little to serve the principal purposes of punishment For prisoners who no longer pose a public safety risk because of age and infirmity, and who have already served some portion of their prison sentence, continued incarceration may constitute a violation of their right to a just and proportionate punishment.” *Old Behind Bars: The Aging Prison Population in the United States*, HUM. RTS. WATCH, at 10 (Jan. 2012).

The cost of caring for these individuals is *staggering*. According to its own estimates, the DOC spends approximately \$75k per year to incarcerate each individual,⁷ not including the constitutionally required expenses of food and medical care. While the average incarcerated individual's medical expense exceeds \$17k these costs increase steeply with age. A report by the Urban Institute calculates that the costs of incarcerating people over age 50 are triple to those under 50.⁸ To apply this to our state, nearly 40% of our prison population will be in a demographic group that costs *three times more* to care for by 2030. Because prisons are not designed to accommodate aging, infirm, and disabled peoples, this often necessitates enhanced measures with enhanced costs, from additional medical or behavioral specialists to entire hospice units inside existing institutions.⁹ The enhanced needs of older prisoners also strain corrections staff, who often must perform the additional duties of home health aides and nurse assistants—usually with no training and no increase in compensation.¹⁰ Delaware's prison facilities are not prepared to address these extreme needs and the steep costs taxpayers already pay for incarceration will only increase over time.

The clear solution to this problem is compassionate release. Currently, most policies under this banner require individuals to be of advanced age and have extreme chronic illness or disabilities, but there is no reason to limit this to such a small population. Even those few who are currently eligible for compassionate release must navigate a maze of administrative barriers. In Delaware, current eligibility for medical parole stipulates a “serious” physical or mental condition that the DOC cannot furnish the required treatment for—but provides no examples of qualifying conditions and there exists no application or referral process.¹¹ Between 2019 and 2022, our state entertained fewer motions for compassionate release than any other state, only 4 of which were approved.¹²

⁷ See *Annual Report*, *supra* note 3, at 53.

⁸ See KiDeuk Kim & Bryce Peterson, *Aging Behind Bars: Trends and Implications of Graying Prisoners in the Federal Prison System*, THE URB. INST. at #17 (Aug. 2014) <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF>.

⁹ See Rebecca Silber, Alison Shames, and Kelsey Reid, *Aging out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations*, THE VERA INSTITUTE OF JUSTICE at #7 (Dec. 2017) <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf>.

¹⁰ See Kim, *supra* note 8, at 4.

¹¹ DEL. CODE tit. 11 § 4346(e) (2020); Delaware Board of Parole Rules § 7 (2007).

¹² U.S. Sentencing Commission *Compassionate Release Data Report*, U.S. SENT'G COMM'N at #5 (Sept. 2022) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf>.

We charge our Parole Board and other state leaders, including the Department of Correction, the Governor's Office and state legislators, to institute and support the following remedies:

- Expand conditional release for aging incarcerated individuals who pose little safety risk. Advanced age brings with it a host of physical, psychological, and cognitive challenges that are serious in nature, and evidence demonstrates that these individuals pose little risk to communities. Given that aging individuals often require treatment outside of prison and that aging constitutes a serious condition under the circumstances of incarceration, eligibility for medical release of aged prisoners should be expanded.
- Utilize and expand medical parole beyond those who are terminally ill or physically incapacitated. The vague definition of eligibility and lack of a clear process to seek compassionate release ensures that the majority of aging incarcerated individuals, who pose little threat to public safety, remain needlessly behind bars.
- Increase the accountability and transparency of the parole board. Delaware should be issuing clear probation and parole guidelines and require that the rationale behind the boards' decisions be explained in writing. These hearings should be open to the public, so that family members can attend to aid and answer questions pertaining to release, and an appeals process should be instituted.
- Utilize and expand compassionate release and medical parole for placement in the community, providing more opportunities for the individual's families to care for their aging family members.

Forcing older adults, many who have already spent decades in prison, to die in our correctional institutions serves no legitimate purpose, *and* imposes a financial burden on the state that could easily be alleviated through judicious use of compassionate release of these individuals to go back into their families and communities. Once individuals have advanced so far in age or become so infirm that re-offense becomes a near impossibility, continuing to hold them behind bars is simply an act of senseless cruelty upon an individual nearing the end of their life. Capital punishment was abolished in Delaware, and we have

not conducted an execution in over a decade; yet on average, some 15 people a year die during their incarceration, with aged individuals making up the great majority.¹³

We would ask that the state of Delaware show mercy, and in doing so, do right not only by incarcerated individuals and their families, but the taxpayers and correctional staff of our state.

¹³ E. Ann Carson, *Mortality in State and Federal Prisons, 2001-2019 - Statistical Tables*, U.S. Department of Justice, BUREAU OF JUST. STATS., U.S. DEPT OF JUST. at #14
<https://bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf>.

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