COST SAVINGS IN STATE CORRECTIONS: MEDICAL TREATMENT IN THE COMMUNITY FOR VERY ILL OFFENDERS

Report to the Legislature
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State of Washington

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Executive Summary

The Sentencing Reform Act of 1981 has been amended numerous times to strengthen or increase sanctions for selected felony offenses, resulting in longer periods of confinement for many convicted felons. The prospect of a "graying" prison population gave rise to a directive from the 1998 Legislature to the Sentencing Guidelines Commission to study the feasibility and desirability of allowing infirm offenders to be released from confinement for the purpose of receiving medical treatment provided with resources other than state funds.

In response to the Legislature's mandate, the Commission established a Workgroup on Aged and Infirm Offenders. Over a six month period, the Workgroup conducted research, consulted with the Department of Corrections and with the Department of Social and Health Services and deliberated on various options for releasing very ill offenders for medical treatment that would result in cost savings to the state. The Workgroup reported its findings to the full Commission, which recommended that they be reported to the Legislature.

A pool of offenders who would be potential candidates eligible for release was identified, including inmates suffering from serious illnesses, serious disabilities and terminal illnesses. Of the 30 such candidates identified, one third are under the jurisdiction of the Indeterminate Sentence Review Board. Of all the candidates, the Commission found that only three offenders would currently qualify for release, due to their medical condition or their being classified as "low risk." As a matter of public policy, the Commission also concluded that offenders serving death sentences or sentences of life without the possibility of release could not be eligible for release under any circumstances.

The Commission considered all possible release options for eligible offenders, including the current policy and procedures for extraordinary release, as well as other alternatives such as community custody, furloughs and leaves of absence. None of the existing options were deemed viable for the purpose of releasing very ill offenders for costly medical treatment. The Commission devised a new release option called "extraordinary medical release."

The "extraordinary medical release" option would entail comprehensive medical screening and risk evaluation for very ill offenders who could be released, establishment of reliable treatment plans for those offenders and a final release decision by the Secretary of Corrections. Any offender could be returned to confinement if the medical condition improved, if resources for treatment became unavailable or if cost savings would no longer result to the state. Cost savings for offenders currently eligible for release are estimated at $60,729 per year, but the amount of cost savings could fluctuate substantially from year to year depending upon the health status of each offender and resources available to cover health costs. A number of statutory changes are necessary to effect this new policy, and legislation is recommended for enactment in the 1999 legislative session.

Introduction and Background

Since its enactment in 1981, the Sentencing Reform Act (SRA) has been amended numerous times to strengthen or increase sanctions against felony offenders. For instance, recent legislation such as the "Hard Time for Armed Crime" initiative has imposed mandatory sentence enhancements for crimes committed with a deadly weapon or firearm. In addition to the foregoing example, the Legislature has enhanced sentences for selected felonies in nearly each successive legislative session since the implementation of the SRA in 1984. These frequent modifications to the SRA have resulted in increased commitments to state prison, as opposed to county jails, and in longer periods of confinement for convicted felons. As a consequence, the number of offenders serving longer sentences in total confinement has steadily increased. Thus, state prisons are increasingly becoming responsible for a "graying" population.

In absolute terms, and as a percentage of the total Washington state prison population, the number of prison inmates over the age of 50 has consistently increased over the past several years.[1] As of June 30, 1998, there were 1,115 inmates age 50 and over incarcerated in the state prison system.[2] New prison admissions for these older inmates are projected to increase by 242 percent, from 57 in 1998 to 195 in 2007.[3] As the prison population continues to age, the state will be compelled to deal with the accompanying health-related problems that are associated with such an elderly population. In addition, the state must carry the burden of providing extensive and costly medical care to terminally ill offenders. Although inpatient prison medical care is less than the cost of community inpatient hospital care, the cost of providing medical care and treatment to the terminally ill offender is substantially higher than the cost of maintaining an "ordinary" inmate.[4] For instance, it has been reported that an "ordinary" offender could be maintained at a cost of $63.29 per day, whereas the per day cost of an infirmary bed is currently estimated at $270.[5]

Concern over these and other issues resulted in a mandate by the 1998 Legislature, directing the Sentencing Guidelines Commission to "study the

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[1] "Older Offender Briefing Paper." Washington State Department of Corrections. May 1998.

[2] Client Characteristics and Population Movement Report for Fiscal Year 1998. Department of Corrections Planning and Research Section, State of Washington.

[3] "Projection of Population 50 and Over in Year." Department of Corrections Planning and Research Section, State of Washington. November 17, 1997.

[4] Marjorie P. Russell, "Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners – Is the Cure Worse than the Disease?," Widener Journal of Public Law, Vol. 3, 1994.

[5] According to the Washington State Department of Corrections, the average annual cost per offender is currently calculated at $23,100. The infirmary bed cost of $270 per day assumes that the inmate would receive all treatment within prison. This daily rate would increase when it is necessary to obtain care not available within the institution.

feasibility and desirability of allowing certain older or physically infirm offenders to be released from institutional confinement, with the assumption that these released offenders would remain on community custody for the remainder of their length of confinement."[6] As enacted, the measure explicitly required the Commission to identify:

1. Groups who would be potential candidates for such a program;
2. How offenders in these groups could be screened to maintain public safety;
3. How these offenders, if released, would be supervised in such a way to maintain public safety;
4. What statutory changes would be necessary to implement such a program;
5. How much savings such a program would generate; and
6. Any other items the Commission deems relevant.

In response to the Legislature's directive, the Commission created an Aged and Infirm Offender Workgroup (See Appendix B), which met from August through December of 1998. In addition, the Commission staff formed an advisory workgroup with the Washington State Department of Corrections (DOC) to develop recommendations, to coordinate details with the Washington State Department of Social and Health Services (DSHS) and the United States Department of Health and Human Services' Health Care Financing Administration (HCFA), and to collect relevant data and information. The Aged and Infirm Offender Workgroup met frequently prior to advising the Commission on the release of very ill offenders.

This report examines the current policy and procedures in place for managing aged and infirm offenders, outlines a variety of alternative policy options and provides recommendations to the Legislature for the release of certain ailing offenders along with an estimate of the cost savings of such a program.

Current Policy and Procedures for Extraordinary Release

Under current law, an offender under the jurisdiction of the Department of Corrections (DOC) may receive an extraordinary release from the Governor,

[6] Chapter 346, Laws of 1998. (Engrossed Substitute Senate Bill 6108, Section 221. See Appendix A for the complete text of this section.)

upon a recommendation from the Clemency and Pardons Board, for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts or other extraordinary circumstances.[7] An offender may also temporarily leave a correctional facility pursuant to an authorized furlough or leave of absence.[8] However, in the case of the terminally ill or medically incapacitated offender, the extraordinary release policy is the only mechanism that would potentially transfer medical costs to an entity other than the state – treatment currently provided under an escorted leave is paid for by DOC.

In accordance with this process, DOC developed a set of policies and guidelines for recommending the early release of offenders for medical reasons.[9] This policy does not apply to offenders serving mandatory minimum terms or to those inmates under the jurisdiction of the Indeterminate Sentence Review Board (ISRB). Under this policy, DOC identifies eligible offenders, by means of an elaborate screening process, and forwards a recommendation to the Clemency and Pardons Board. In order for an offender to be considered under this policy, he or she must have a serious or terminal illness, be senile or have a serious disability. The offender must be housed in an infirmary or inpatient unit operated by DOC, or in an inpatient health care facility in the community. Furthermore, both an authorized physician and classification staff must conclude that the offender presents a "low risk" to reoffend, if placed in a community setting, based upon the inmate's behavior and medical condition. Additional criteria require that the offender receive adequate care once placed in the community (i.e., a post-release plan) and that the offender undergo a comprehensive medical, psychological and psychiatric evaluation. If all of the specified criteria are met, the extraordinary release request is processed through various points within DOC. If approved, the Secretary of Corrections may recommend a candidate for release to the Clemency and Pardons Board, which may in turn approve or disapprove a recommendation to the Governor, with whom the final release decision resides.

This release procedure is unnecessarily complex and has resulted in only four sentence commutations for medical reasons since 1993.[10] Oftentimes, the offender expired during the actual review process, because the Clemency and Pardons Board only meets on a quarterly basis. The process is needlessly

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[7] See RCW 9.94A.150(4).

[8] For example, RCW 72.66.018(2) allows an offender to seek a furlough to obtain medical care not available in a facility maintained by DOC.

[9] See Department of Corrections Extraordinary Release Policy, effective April 20, 1998 (Policy No. 350.275 as described in Appendix C).

[10] According to DOC, there were approximately 39 medical clemency cases from 1993 until 1998. Of the cases reviewed by DOC, 13 were supported and referred to the Clemency and Pardons Board for further action – with four ultimately approved by the Governor. The remaining cases were either denied or closed, and were therefore dismissed from further review by DOC and the Clemency and Pardons Board.

cumbersome and is inappropriate for handling the release of terminally ill offenders, many of whom may only have six to twelve months left to live. An expedited and effective streamlined process would ensure that such offenders be discharged in a timely fashion and that the state realize a cost savings from their release.

Eligible Candidates for Release

In order to identify groups who would be potential candidates for a medical release program, the Commission's advisory workgroup developed criteria for various illnesses and disabilities in an attempt to identify a pool of potential candidates for release. The criteria conformed to DOC's current eligibility standards for considering offenders for release under its extraordinary release policy.[11] The inmate would have to suffer from a serious illness, serious disability or terminal illness. As defined by the DOC policy, a serious illness would include any chronic disease or illness which singularly, or in combination with others, is characterized by one or more of the following:

1. Not amenable to treatment;
2. Debilitating in nature;
3. Pain and suffering are not easily managed, except by continued use of controlled drugs; and/or
4. Terminal illness (as defined in the DOC policy).

To be considered as a "serious disability," a disability must have resulted from a physical or mental condition that renders an offender permanently unable to perform unassisted activities of daily living. A "terminal illness" is defined as an incurable, progressive disease that demonstrates a lack of response to medical intervention. (The offender's death would be likely to occur within 12 months, based on an assessment by physicians employed or contracted with DOC.)

Applying the criteria outlined above, DOC has identified 30 potential future candidates for medical release (See Table 1), approximately one-third of whom would be under the jurisdiction of the ISRB.

[11] Department of Corrections Policy Number 350.275.

Table 1. Profile of Potential Candidates for Medical Release[12]

Most Serious Current Offense	N	Mean Age	Mean Number of Priors
Burglary 1	1	58.00	4.0
Child Molestation 1	4	62.75	0.5
Harassment	1	39.00	5.0
Indecent Liberties	1	59.00	1.0
Kidnapping 1 <attempt>	1	21.00	0.0
Murder 1	10	59.00	3.2
Murder 2	1	60.00	0.0
Rape of a Child 1	2	37.00	1.5
Rape of a Child 2	1	67.00	17.0
Rape of a Child 3	1	55.00	0.0
Robbery 1	2	36.50	3.5
Unlawful Possession of Firearm 1	1	42.00	8.0
VUCSA*	4	44.00	3.5

*Violation of the Uniform Controlled Substances Act.

Of these potential candidates for release, one-third are serving sentences for murder, another third have been sentenced for sex offenses and 13 percent have been sentenced for drug offenses. Of this group, 83 percent are male. Only eight offenders are over the age of 65, and offenders are roughly evenly divided between medium and minimum custody inmate status. Most of the potential candidates have upcoming release dates or are up for parole consideration within the next two to three years. Ailments afflicting some of these offenders include liver dysfunction, blindness, senile dementia, human immunodeficiency virus (HIV), pancreatitis, cancer, renal failure and various cardiac or cardiovascular problems.

Only three inmates out of the 30 inmates that were originally identified as potential candidates for a release program have been deemed as acceptable for release ("low risk") following a classification screening. This is in part due to the stipulation that the offender's medical condition has to be severe enough to render the offender incapable of committing a future offense. Another ten inmates have been identified as possible future candidates, but have been excluded since their medical condition has not deteriorated sufficiently enough to merit the "low risk" classification. However, as their medical condition continues to decline they would become viable candidates for the program from both a medical and classification perspective.

Consideration of Alternative Release Options

[12] Source: Department of Corrections and Sentencing Guidelines Commission.

The Commission's Workgroup on Aged and Infirm Offenders considered a variety of options for releasing very ill offenders for medical treatment in the community. Among others, these options included placing medically ill offenders on community custody, granting a medical furlough or granting a medical leave of absence. Although these alternatives were thoroughly considered, various components of each of these options prevented them from being accepted as viable.

The first option, placing aged and infirm offenders on community custody, would most likely accomplish the post-release supervision requirements required by the study mandate. However, such placement would be restricted to offenders sentenced under the SRA, and would neglect the aging population under the jurisdiction of the ISRB, who make up approximately one-third of identified release-eligible candidates. Other regulatory and logistical limitations that would negate a cost savings were also noted. For example, placing an offender on community custody would potentially create an obstacle in returning the offender to confinement (i.e., violation) due to an improvement in health or lack of funding for medical care.

The Commission's Workgroup on Aged and Infirm Offenders also considered amending the furlough statute[13] to accomplish the goals set forth in ESSB 6108. However, it has been a matter of DOC policy not to grant such furloughs, except as a means of transitioning an inmate (who has already demonstrated a "low risk") to back into the community (e.g., work, education, job interviews, etc.). Furthermore, any amendments made to the furlough statute would further complicate this section of Washington law and possibly create an ambiguity in the distinction between a medical furlough granted under a new release program, and a furlough granted for medical purposes under current law.[14] Similar complications were noted by the Aged and Infirm Offender Workgroup when considering expanding DOC's authority to grant a leave of absence.[15] In addition, both programs currently include certain minimum time served and classification requirements.

Each of these options presented a variety of impediments to effectuating the timely release of very ill offenders or cost savings to the state. The most viable alternative considered was the creation of a new and separate release option – "extraordinary medical release."

Legislative Recommendation: Extraordinary Medical Release

[13] RCW 72.66.

[14] RCW 72.66.018(2).

[15] RCW 9.94A.150(3).

After considering the alternatives outlined above, the Commission developed the “extraordinary medical release” option, which would be comprised of comprehensive medical screening, risk assessment, intensive medical evaluation, a community treatment plan and cost evaluation (See Figure 1). Under this model, an inmate would be required to meet certain minimum threshold requirements – the goal of which would include both fiscal savings to the state and the continued maintenance of public safety. The latter would be realized when an offender’s health condition has deteriorated to such a point that he or she no longer poses a threat to society due to physical incapacitation.

The Commission identified a number of prerequisites in order for an offender to be eligible for an extraordinary medical release. First, eligibility would only be extended to offenders serving a sentence other than a death sentence or other than life without possibility of release (or parole). Inmates under the jurisdiction of the ISRB would be eligible for release under this option. In addition, statutory exceptions would be available for those inmates serving a mandatory minimum term of confinement. Eligibility would be limited to those offenders with a medical condition that requires costly care or treatment. Candidates for an extraordinary medical release would have to meet the medical criteria outlined under DOC policy. These criteria may include offenders who are:

- Seriously ill, having an illness or disease that is not amenable to treatment, is debilitating in nature, or is terminal; or

- Seriously disabled, either physically or mentally and rendering the offender permanently unable to engage in activities of daily living without assistance, perform gainful employment or participate in criminal behavior.

Upon receiving a referral that meets the specified medical and fiscal criteria, the offender would undergo a comprehensive risk assessment and screening to determine the offender's likelihood of reoffending, given both the inmate's mental and physical condition. A mental health professional would also be asked to provide an objective opinion as to the offender's capability or willingness to reoffend. This opinion would have to be supported by the findings from the evaluation. At this juncture, a tentative release plan would be developed.

If the offender passes the risk assessment, DOC would proceed with a centralized and coordinated screening that would include an intensive medical evaluation, community plan development and cost evaluation. The cost evaluation would entail a cost/benefit analysis to determine the potential savings of a community-based care setting. If the review of the plan is favorable, Corrections staff would secure funding resources and identify placement sites appropriate for the level of care necessary. DOC would also perform an end-of-sentence review and perform any perfunctory victim or witness notification. The referral would be forwarded to the Secretary of Corrections for final approval.

Once the offender is placed in a community care setting, DOC community corrections staff would review the case as frequently as determined in the community plan. This review would include phone calls and visits to the community care setting. DOC headquarters staff would also review the case to assess and monitor any change in the offender's health status. If the offender's condition changes or any event occurs altering the assumptions upon which the release was approved (e.g., "spontaneous" medical recovery or loss of outside financial or medical resources), DOC may determine that the offender must return to institutional confinement, in which case the Secretary of Corrections would revoke the extraordinary medical release.

The Commission recommends that the Secretary of Corrections report annually to the Legislature on the number of offenders considered for an "extraordinary medical release," the number of offenders who were granted such a release, the number of offenders who were denied such a release, the length of time between initial consideration and the decision to release for each offender who was released, the number of offenders who were granted extraordinary medical release who were subsequently returned to total confinement, and the cost savings realized to the state.

The Commission identified several statutory and regulatory changes necessary to effectuate an extraordinary medical release program. The following amendments to the SRA, Title 9 RCW, Title 46 RCW, Title 69 RCW and Title 72 RCW are suggested:

- Amend RCW 9.94A.150 to provide an exception to the general requirement that no offender may be released prior to the expiration of the imposed

sentence. The Secretary of Corrections may authorize the "extraordinary medical release" of an offender if three threshold conditions are met:

1. The offender's medical condition requires costly care or treatment;

2. The offender's risk to public safety is negligible, due to physical incapacitation; and

3. Cost savings would result to the state.

Offenders sentenced to death or to life imprisonment without the possibility of release would not be eligible for the "extraordinary medical release" under any circumstances.

- Amend RCW 9.94A.120(4) to provide exceptions for offenders who are normally required to serve mandatory minimum sentences, allowing such offenders to be granted an "extraordinary medical release."

- Amend RCW 9.94A.310(3)(e) and (4)(e) to provide exceptions for offenders who are normally required to serve in total confinement the entire period of a sentence enhancement for firearms, allowing such offenders to be granted an "extraordinary medical release."

- Amend RCW 9.95.040 to permit the Secretary of Corrections to authorize an "extraordinary medical release" for offenders who are under the jurisdiction of the Indeterminate Sentence Review Board and also provides an exception for such offenders from having to serve any mandatory minimum sentences if an "extraordinary medical release" is authorized.

- Amend RCW 46.61.5055(8) to provide exceptions for drunk-driving offenders who are normally required to serve mandatory minimum sentences, allowing such offenders to be granted an "extraordinary medical release." Where such sentences are often served in jails, the jail administrator would have the authority to grant the release.

- Amend RCW 69.50.410 to provide exceptions for offenders imprisoned for controlled substance violations for which mandatory minimum sentences are required, allowing such offenders to be granted an "extraordinary medical release."

- Create a new section, added to RCW Chapter 72.09, requiring the Secretary of Corrections to report annually to the Legislature on the number of offenders considered for an "extraordinary medical release," the number of offenders who were granted such a release, the number of offenders who were denied such a release, the length of time between initial consideration and the decision to release for each offender who was released, the number of offenders who were granted extraordinary medical release who were

subsequently returned to total confinement, and the cost savings realized to the state.

Estimated Cost Savings

In order to estimate the cost savings to the state from the new "extraordinary medical release" program, it is necessary to determine the number of offenders that may have been released under the program. DOC conducted a retrospective review of 33 inmate deaths that occurred in fiscal year 1998. Five offenders from this group were identified as meeting the criteria outlined previously, and as potential candidates for this program had it been in place in FY 1998. [16]

The Commission estimates that if the extraordinary medical release program had been implemented in FY98, the Department of Corrections would have saved approximately $94,930, or approximately $18,878 per offender released. Some of this savings, $90,372, would have been saved because the Department of Corrections would not have been responsible for the purchase of care rendered in the community for two of the offenders identified as potential candidates for this program. The additional $4,558, would have been saved as a result of reduced length of stay in prison. If the five offenders referred to above had been eligible for Medical Assistance Administration funds and the home hospice benefit as provided by this program under the Department of Social and Health Services, an estimated potential savings of $60,729 could have been realized by the state general fund.

The above savings estimate is limited to costs related to the direct provision of health care for the five cases referred to above. It does not consider the indirect costs incurred by DOC, or by the Department of Social and Health Services, to develop and execute policies and procedures necessary to implement the release option. This cost savings estimate also assumes a direct savings to the state as opposed to a simple cost transference from DOC to the Department of Social and Health Services.

These estimated savings are based on these five specific cases. The realized savings for any given case would fluctuate depending on the level of care required by any individual offender. If any of these offenders had required placement in a nursing facility the estimated savings may have been reduced. If any of these offenders had health care coverage from a private insurance company, the Veteran's Administration, or Medicare, the estimated savings to the state would have increased, as the state would have realized a 100 percent

[16] Of the remaining 28 inmates, a number of factors were found to preclude them from release consideration (e.g., sudden onset of illness/injury, followed quickly by death; failure to meet "low" risk classification screening requirements; and/or specific sentencing requirements that preclude the inmate from release).

savings. In addition, due to the nature of medical illnesses, the actual number of offenders deemed eligible for extraordinary medical release could fluctuate substantially from year to year.

Conclusion

Having considered all possible options for releasing very ill offenders to receive medical care provided by resources other than state funds, the Sentencing Guidelines Commission, in consultation with the Department of Corrections and the Department of Social and Health Services, recommends that the Legislature enact legislation to authorize the Secretary of Corrections to grant "extraordinary medical releases" for eligible offenders, as outlined above. This release option has been crafted and will be implemented in such a way as to realize cost savings to the state while not compromising public safety.

APPENDIX A

APPENDIX B

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