PAUL DEWOLFE
PUBLIC DEFENDER
KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER
MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT
KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION
ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: SB 562 Correctional Services – Geriatric and Medical Parole

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: February 23, 2022

The parole system in Maryland is broken. SB 562 is a bill that aims to improve two areas of that system, parole for persons who should be released due to their medical condition and persons who should be released based on their age. The Maryland Office of the Public Defender urges a favorable report from this Committee on SB 562 based on its improvements to the medical parole system and articulating necessary geriatric parole requirements.

1. Medical Parole

Under current law, those eligible to apply for medical parole must be "so chronically debilitated or incapacitated by a medical or mental health condition, disease, or syndrome as to *be physically incapable of presenting a danger to society*." There are many problems with both this standard and the processes implementing it:

a) Too few applicants qualify for medical parole under the existing stringent standard.

Between 2015 and 2020, the Parole Commission granted a mere 1/3 of the 339 medical parole applications it received, relegating far too many terminally ill and physically incapacitated inmates—who are simply too ill to pose any risk to public safety—to die behind prison walls, separated from their loved ones and with less than optimum medical and palliative care compared to what is available outside of prison.

SB 562 expands the scope of eligibility by including those inmates who are "so chronically debilitated or incapacitated "*as to require medical management that would be better*

provided by specialized community services." Not only is it the humane thing to do to release inmates whose medical needs exceeds the capacity of the prison health care system, the exorbitant cost savings to the taxpayers makes this a "win-win."

b) Under the current medical parole statute, the applicant is not afforded a hearing.

SB 562 allows the applicant, within 30 days of his request for medical parole, to request a meeting with the Parole Commission. The Commission must then meet with the inmate, his representative, and/or a member of the inmates' family within 30 days. The decision whether to grant medical parole cannot be made before such a meeting takes place, where one has been requested. Providing the Parole Commission with a more comprehensive picture of the inmate, his medical condition(s) and, if applicable, his family situation enables the Commission to render a more informed and reasoned decision whether to grant medical parole.

c) Under present law, medical parole candidates are evaluated using the Karnofsky Performance Status Scale, an outdated and inadequate assessment instrument for determining functional impairment.

SB 562 provides for an updated, dynamic medical assessment that more effectively and holistically demonstrates a medical parole candidate's degree of debilitation and specific medical needs. The new assessment also takes into account the future risk to public safety if the individual is released and whether the correctional system can adequately provide necessary medical care and rehabilitation if parole is denied.

d) The current medical evaluation requirements are inadequate

The current medical parole statute does not require a medical examination of the individual seeking parole. Instead, a doctor merely reviews existing medical information, assigns a "Karnofsky score," and then makes a recommendation to the Parole Commission. The Commission need not adopt that recommendation.

SB 562 provides that, if the inmate requests a medical evaluation by an independent medical professional, "the Commission shall place priority consideration on the findings of the evaluation and any medical condition detailed in the evaluation in considering whether to grant medical parole." This addition to the law appropriately acknowledges the informative nature of a medical

evaluation and assigns greater weight to it than the numerous other factors to be considered by the Commission in determining whether to grant medical parole.

Finally, the existing medical parole statute contemplates the return of the medical parolee to the Division of Correction in the event the Parole Commission "has reason to believe" he is no longer "so debilitated or incapacitated as to be physically incapable of presenting a danger to society." SB 562 removes the threat of re-incarceration.

In short, SB 562 takes critical steps to improve Maryland's medical parole process and in doing so will ensure that Maryland's ill, debilitated, and extraordinarily vulnerable incarcerated persons will have a chance at the relief they desperately need.

2. *Geriatric Parole*

In addition to better protecting its terminally ill and physically incapacitated incarcerated persons, Maryland must improve its parole system for the oldest incarcerated persons. SB 563 aims to do so.

Across the country, elderly populations within prison systems are increasing.[1] Since 2003, the fastest growing age group in the prison system has been persons aged 55 and older.[2] The Maryland Department of Public Safety and Correctional Services reports that as of fiscal year 2019, 18,244 people were housed within the Division of Correction.[3] Of those, 2,362 were between the ages of 51 and 60 and 962 were over 60. *Id.* For numerous reasons, it is both ineffective and unnecessary to continue to incarcerate many of Maryland's oldest persons currently confined in the Division of Corrections. SB 562 acknowledges these flaws and aims to create a way for these persons to access parole hearings where the parole commission may consider the many special circumstances faced by, and created by, elderly inmates.

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[1] Brie A. Williams, *et al*., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 45 J. Am. Geriatric Soc. 1150-56, author manuscript at *3 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/pdf/nihms363409.pdf (citing U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Prisoners Series 1990 – 2010*, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=40).

[2] U.S. Dep't of Justice, Bureau of Justice Statistics, *Aging of the State Prison Population, 1993-2013* (May 2016), https://www.bjs.gov/content/pub/pdf/aspp9313.pdf.

[3] Maryland Department of Public Safety and Correctional Services, Division of Correction, *Operations*, 41 (Nov. 14, 2019), http://dlslibrary.state.md.us/publications/Exec/DPSCS/DOC/COR3-207(d)_2019.pdf.

First, elderly inmates' health needs are more complex than those of younger inmates. Elderly persons in prison are more likely to be living with chronic health conditions than their younger counterparts.[4] "On average, older prisoners nationwide have three chronic medical conditions and a substantially higher burden of chronic conditions like hypertension, diabetes and pulmonary disease than both younger prisoners and older non-prisoners."[5]

Research suggests a correlation between prison life and decline in health. In a 2007 study, researchers interviewed 51 incarcerated men in prison in Pennsylvania with an average age of 57.3 years as well as 33 men in the community with an average age of 72.2.[6] The researchers compared the rates of high cholesterol, high blood pressure, poor vision, and arthritis between the two groups, finding that the data suggested that the health of male inmates was comparable to men in the community who were 15 years older. *Id.* A similar study published in 2018 of 238 participants similarly found that "[a]mong older adults in jail with an average age of 59, the prevalence of several geriatric conditions was similar to that found among community[-]dwelling adults age 75 or older."[7]

Second, elderly incarcerated persons, particularly those with elevated health concerns, are exceedingly vulnerable. They "are at an elevated risk for physical or sexual assault victimization, bullying, and extortion from other prisoners or staff compared to their younger counterparts."[8] Older prisoners also report higher stress and anxiety than their younger counterparts, "including the fear of dying in prison and victimization or being diagnosed with a severe physical or mental illness."[9] Correctional institutions struggle to meet elderly prisoners' health needs. "Prisons

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[4] Tina Maschi, Deborah Viola, & Fei Sun, *The High Cost of the International Aging Prisoner Crisis: Well-Being as the Common Denominator for Action*, 53 The Gerontologist 543-54 (2012), https://academic.oup.com/gerontologist/article/53/4/543/556355.

[5] Brie A. Williams, *et al.*, *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, J. Am. Geriatric Soc. 1150-56, author manuscript at *3 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/pdf/nihms363409.pdf.

[6] Susan J. Loeb, Darrell Steffensmeier, & Frank Lawrence, *Comparing Incarcerated and Community-Dwelling Older Men's Health*, West J. Nurs. Res. 234-49 (2008), https://pubmed.ncbi.nlm.nih.gov/17630382/.

[7] Meredith Greene, *et al.*, *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions*, Health & Justice (2018), author's manuscript at *4, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733/pdf/40352_2018_Article_62.pdf .

[8] Maschi, *supra*, at 545 (citing Stan Stocovic, *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse*, 19 J. of Elder Abuse & Neglect 97-117 (2008)). https://www.tandfonline.com/doi/abs/10.1300/J084v19n03_06.

[9] *Id.* (citations omitted); *see also* Stephanie C. Yarnell, Paul D. Kirwin & Howard V. Zonana, *Geriatrics and the Legal System*, 45 J. of the Am. Academy of Psychiatry & the L. Online 208-17 (2017), http://jaapl.org/content/jaapl/45/2/208.full.pdf.

typically do not have systems in place to monitor chronic problems or to implement preventative measures."[10]

The COVID-19 pandemic exacerbates these health concerns. People living in prisons are especially vulnerable to COVID-19. The CDC has cautioned that "[c]orrectional and detention facilities are high-density congregate settings that present unique challenges" to effective COVID-19 testing, mitigation, and treatment.[11] Prisons are closed spaces in which detainees sleep, eat, recreate, and share hygiene facilities in close proximity to each other and do not have the freedom to distance themselves from their peers. Under these conditions, communicable diseases like COVID-19 spread more readily through touch inside correctional facilities.[12] As of June 2021, there have been **398,627** COVID-19 cases reported among incarcerated persons across state and federal prisons.[13]

COVID-19 is especially dangerous for incarcerated **seniors**. The CDC cautions that "[t]he risk for severe illness with COVID-19 increases with age, with older adults at highest risk."[14] "An analysis of more than 114,000 COVID-19 associated deaths during May – August 2020, found that 78% of the people who died were aged 65 and older[.]" *Id.* Those with underlying medical conditions, which seniors are more likely to have, are also at increased risk of severe illness with COVID-19.[15] The mortality rate for persons with COVID-19 and certain comorbidities are significantly higher than the mortality rate among those without these comorbidities.

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[10] *At America's Expense: Mass Incarceration of the Elderly*, Am. Civil Liberties Union, 28-29 (2012), https://www.aclu.org/report/americas-expense-mass-incarceration-elderly.

[11] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited Dec. 8, 2020).

[12] Dan Morse & Justin Jouvenal, *Inmates Sharing Sinks, Showers and Cells Say Social Distancing in Impossible in Maryland Prisons*, The Washington Post (Apr. 10, 2020), https://www.washingtonpost.com/local/public-safety/inmates-sharing-sinks-showers-and-cells-say-social-distancing-isnt-possible-in-maryland-prisons/2020/04/10/5b1d5cf8-7913-11ea-9bee-c5bf9d2e3288_story.html.

[13] *A State-By-State Look at Coronavirus in Prisons*, The Marshall Project, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last visited February 23, 2022)

[14] *COVID-19 Guidance for Older Adults*, Centers for Disease Control and Prevention, https://www.cdc.gov/aging/covid19-guidance.html (last visited Dec. 16, 2020).

[15] *People with Certain Medical Conditions*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited Dec. 16, 2020).

Third, there are lower recidivism rates among elderly persons released from prison. The United States Sentencing Commission examined 25,431 federal offenders released in 2005, using a follow-up period of eight years for its definition of recidivism.[16] For the eight years after their release, the Commission calculated a rearrest rate of 64.8% for the released persons younger than 30, 53.6% for the released persons between the ages of 30 and 39, 43.2% for the released persons between 40 and 49, 26.8% for the released persons between 50 and 59, and 16.4% for the released persons older than 59. *Id.*

The Commission's data shows that the recidivism rate drops off most sharply after the age of 50. Moreover, before age 50, released persons are most likely to be re-arrested for assault. *Id.* After age 50, they are most likely to be re-arrested for a comparatively minor public order offense like public drunkenness. *Id.* The American Civil Liberties Union has also compiled data collected nationally and from various states demonstrating that older incarcerated persons across the country have a "lower propensity to commit crimes and pose threats to public safety."[17]

Fourth, it is more expensive to incarcerate elderly persons than their younger counterparts. At the national level, "[b]ased on [the Bureau of Prisons'] cost data, [the Office of the Inspector General] estimate[s] that the [Bureau of Prisons] spent approximately $881 million, or 19 percent of its total budget, to incarcerate aging inmates in [fiscal year] 2013."[18] "According to a National Institute of Corrections (NIC) study from 2004, taxpayers pay more than twice as much per year to incarcerate an aging prisoner than they pay to incarcerate a younger one."[19] These outsized costs are in large part due to the increased healthcare costs associated with elderly persons in prison.[20] Maryland feels this economic strain more acutely than many other states do. From 2010 to 2015, the national median spending per inmate on healthcare was $5,720

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[16] Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

[17] *At America's Expense: Mass Incarceration of the Elderly*, American Civil Liberties Union (2012), https://www.aclu.org/report/americas-expense-mass-incarceration-elderly.

[18] Dep't of Justice, Office of the Inspector Gen., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, i (Feb. 2016), https://oig.justice.gov/reports/2015/e1505.pdf.

[19] *At America's Expense: Mass Incarceration of the Elderly*, Am. Civil Liberties Union, 27 (2012) (citing B. Jaye Anno *et al*., U.S. Dep't of Justice, Nat'l Inst. of Corr., *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, 10 (2004)).

[20] *Id*.; Zachary Psick, *et al*., *Prison Boomers: Policy Implications of Aging Prison Populations*, Int. J. Prison Health, 57-63 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5812446/pdf/nihms940509.pdf.

per fiscal year, while the state of Maryland spent $7,280 per fiscal year.[21] From 2001 to 2008, per-inmate healthcare spending rose 103% in Maryland from $3,011 per fiscal year to $5,117 per fiscal year. *Id.*

Finally, the public policy interest in retribution has been satisfied by the many years most elderly persons have already spent in prison. Expanding options for parole release for seniors in prison is the right thing to do. Seventeen states have already recognized the importance of such parole programs, Maryland should join them.[22] We have the opportunity to reduce mass incarceration, save the state millions of dollars, contribute to safer communities, and allow Maryland's incarcerated seniors the opportunity they deserve to live their twilight years with dignity, breathing free air. SB 562 takes an important step in this direction.

For these reasons, the Maryland Office of the Public Defender respectfully requests this Committee to issue a favorable report on Senate Bill 562.

Submitted by: **Government Relations Division of the Maryland Office of the Public Defender.**

[21] Pew Charitable Trusts, *Prison Health Care Costs and Quality* (Oct. 18, 2017), https://www.pewtrusts.org/en/research-and-analysis/reports/2017/10/prison-health-care-costs-and-quality.
[22] Essex, Amanda, and Karen McInnes. *State Medical and Geriatric Parole Laws*, National Conference of State Legislators, 27 Aug. 2018, https://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx.