

Florida's Aging Prisoner Problem

SEPTEMBER 2014





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September 9, 2014

Dear Fellow Taxpayer,

Florida's prison population is among the largest in the United States, and disproportionately large, given the state's population. Furthermore, estimates show that the population will continue to grow much faster than other similar states in the foreseeable future. As the state's prison population rises, it will be accompanied by ballooning costs, especially health care costs, that are already overwhelming the Florida Department of Corrections (DOC), and creating crippling costs for taxpayers.

Previous Florida TaxWatch research has produced constructive policy recommendations that would safely reduce the prison population. These policies have been shown to be effective at reducing costs in other states without jeopardizing public safety, and, if implemented by the Legislature and Governor, would help address many of the issues facing Florida's taxpayers.

However, the sheer number of inmates is not the only concern. As prisoners age, they put a severe strain on the state budget, largely due to the high costs of providing health care to long-term, elderly, and infirmed inmates. Florida's current criminal justice policies tie the hands of the DOC and keep the taxpayers of Florida financially responsible for housing and caring for infirmed inmates incarcerated after they are no longer a threat to public safety.

Once again, other states and the federal government have faced similar issues and forged policy solutions. The path they have laid can be followed to benefit Florida taxpayers.

Florida TaxWatch has examined options for the DOC to reduce the costs of the existing system and providing increased security for our communities by reducing crime and recidivism rates, all without harming public safety. Past recommendations have included examining sentencing reform, vocational, educational and lifestyle training, and reentry and reintegration programs. To solve the current health care spending concern, this Florida TaxWatch report analyzes this cost driver and provides recommendations to reduce the elderly prisoner population, saving taxpayers' hard-earned money without compromising the safety of Florida communities.

Sincerely,

A handwritten signature in black ink that reads "Dominic M. Calabro".

Dominic M. Calabro
President & CEO

Introduction

Florida passed very tough crime laws in the 1990s. Drug wars, tourist murders, and the shooting deaths of law enforcement officers spurred legislators to adopt strict sanctions for crime which removed parole; required 85 percent sentence completion; added mandatory minimum sentences for drugs and violent crimes; lengthened sentences for habitual offenders; imposed 10/20/Life punishments for gun crimes; and added involuntary civil commitment for convicted sex predators. Life felonies, which previously included parole review hearings, now carry life without parole (LWOP) sentences. This development is particularly important in Florida, one of three states where a jury of six, instead of 12, can sentence a convicted felon to Life Without Parole (LWOP).¹

These strict criminal justice policies had immediate and long-term consequences on corrections issues in Florida. The general prison population shot up dramatically, the length of sentences increased, and the number of prisoners with LWOP sentences rose to the highest in America. Elderly prisoners, no longer paroled when advancing age renders them a low risk, remain in prison cells.

These changes have brought to the forefront urgent issues that must be addressed for Florida's taxpayers. As the average age of the prison population rises and the number of elderly prisoners multiplies, the cost of lengthy sentences and prisoner healthcare needs threaten a substantial rise in Florida's Corrections budget; however, there are options for reform that may help keep costs from overwhelming taxpayers.

¹ Florida law permits a jury of six to impose a LWOP sentence. Connecticut and Utah are the only other states to allow six-member juries to sentence to LWOP. See, "Bill Would Double Jury Size for Life Felonies," *The Florida Bar News*, April 4, 2014. See also, Senate Bill 98 "Bill Analysis and Fiscal Impact Statement," February 11, 2014.

Florida's Prison Population

OVERALL POPULATION

Defined in *Florida Statutes* as those prisoners within the Florida Department of Corrections (FDOC) system over the age of 50, the elderly prisoner count increases every year, by an average of greater than 1,000 prisoners. The tables to the right show that between 2000 and 2014, the elderly prison population grew from 5,605 to 21,002, at an average increase of 9.9 percent per year, a rate more than three times higher than the general prison population.

Furthermore, the chart shows that while the overall prison population growth in Florida has steadied out during the last 5 years at about 100,000–102,000 prisoners, the elderly prison population has grown by more than one third (38 percent) in the same time frame, and has yet to find a ceiling.²

Historical Florida Prison Population
Including Specific Age Groups²

Year	Prison Pop	50-59	60+	Total 50+
2000	71,233	4,243	1,362	5,605
2001	72,007	4,720	1,452	6,172
2002	73,553	5,299	1,553	6,852
2003	77,316	5,928	1,763	7,691
2004	81,974	6,759	1,937	8,696
2005	84,901	7,724	2,159	9,883
2006	88,576	8,727	2,451	11,178
2007	92,844	9,825	2,833	12,658
2008	98,192	10,946	3,197	14,143
2009	100,894	11,671	3,530	15,201
2010	102,232	12,491	3,895	16,386
2011	102,319	13,179	4,313	17,492
2012	100,527	13,675	4,693	18,368
2013	100,884	14,469	5,131	19,600
*2014	102,467	15,308	5,694	21,002

* Data from 2014 taken from June 10, 2014 estimates.

As of June 2014, the data show that Florida has 5,694 prisoners at least 60 years of age, 1,091 prisoners at least 70 years old, 130 octogenarians, and 10 nonagenarians.³ Among the octogenarians, 40 percent were sentenced to terms of years as opposed to life without parole, and 19 have release dates in the next 3 years. Florida also has two prisoners aged 92, who rank at the top of the oldest prisoners in the US.⁴

Further evidence of the graying of Florida's prisons is demonstrated by analysis of the average age of prisoners (chart, next page). From 1996 to 2013, the median and mean ages have both increased significantly, and the mean age has increased more than the median age, indicating a shift to an increasingly older population.

² Corrections Offender Network: Offender Information Search, Florida Department of Corrections, June 10, 2014.

³ *Ibid.*

⁴ Drayton Curry, 92, Nation's Oldest Federal Prisoner: Obama AWOL on Clemency Request," *The Village Voice*, Sep 2011.

Average and Median Age of Florida Prisoners

Year	Average Age	Median Age
1996	33.3	32.3
1997	33.2	32
1998	33.7	33
1999	34.1	33
2000	34.4	34
2001	34.8	34
2002	35.2	34
2003	35.5	35
2004	35.8	35
2005	36.2	35
2006	36.6	36
2007	39.9	36
2008	36.9	36
2009	36.9	36
2010	37.0	36
2011	37.2	36
2012	37.7	36
2013	38.0	36

Source 2009-2013: "Agency Statistics: Inmate Population - Current Inmate Age", Florida Department of Corrections, June 30th estimates, 2009-2013.

Source 1996-2008: "Annual Report: Inmate Population on June 30th - Current Inmate Age", Florida Department of Corrections, 1996-2008.

COMPARISON TO OTHER STATES

To gain a full grasp of the prison population explosion in Florida from a population and prison count, a comparison to New York is appropriate. Going back to 2000, Florida's total population was just under 16 million, while New York's was just under 19 million.⁵ Both had equivalent prison populations of about 70,000.⁶

Fourteen years later, Florida and New York have nearly identical total populations, but Florida's prison population is 102,467, while New York's prison population is 54,600;⁷ and there are 9,200 elderly prisoners in New York compared to 20,680 in Florida, all of which is directly attributable to different philosophies on criminal justice.⁸

A 2012 study by The Sentencing Project reported that Florida leads the country with almost 8,000 prisoners sentenced to Life Without Parole (LWOP),⁹ and no other state is close.

By comparison, Texas had 538, and New York only 246. By June 2013 the number of prisoners in Florida with death or life sentences stood at 12,667. As would be expected, the increase in life sentences and terms of years is keeping prisoners behind bars into their senior years, leading to the substantial increase in elderly prisoners shown above.

It is not just the increased life sentences which are driving prison populations up. As a result of Florida's tough-on-crime laws, the length of prison sentences in Florida has increased more than any other state.¹⁰

5 Population Distribution and Change:2000 to 2010. U.S. Census Bureau 2010 and Census 2000.

6 State of Recidivism: The Revolving Door of America's Prisons, Pew Center on the States, April 2011.

7 New York State Department of Corrections and Community Supervision Announces prison Reforms That Will save Taxpayers more than \$30M Following Decline in Crime rate and Inmate Population," July 26, 2013.

8 "If the Risk is Low, Let them Go": Efforts to Resolve the Growing Numbers of Aging Behind Bars, Truthout January 19, 2014.

9 "Life Goes On: The Historic Rise in Life Sentences in America," The Sentencing Project 2013.

10 Time Served: The High Cost, Low Return of Longer Prison Terms, PEW Study June 2012.

FLORIDA'S AGING PRISONER PROBLEM

Average prison time served in Florida has grown by 166 percent, meaning that a typical felon now serves 22 months longer than they would have served two decades earlier. The Sentencing Project study stated that Florida “sticks out like a sore thumb” and has done little to “rein in their sentencing and corrections costs.”

For context purposes, the elderly prison population nationwide constitutes 16 percent of the 2.5 million prisoners in the US. In Florida, that percentage has now reached over 20 percent, which makes Florida the state with the greatest percentage of elderly prisoners in the nation. Prison in Florida is no longer simply a detention facility for young people, it is largely becoming a repository for elderly prisoners serving extended sentences.

Healthcare Costs Threaten State Budget

The fiscal consequences of a rapidly aging prison population pose an ominous threat to Florida taxpayers. Not only will it cost hundreds of millions of dollars per year to pay for medical costs of prisoners who pose little threat to public safety, but it will also distract from the corrections mission, divert needed resources, and reduce public safety.

FDOC provides the following comments in their *2012 Annual Report* regarding the elderly prison population and projected health care costs:

“Although Florida does not track health care costs by age, utilization data shows that elderly inmates account for a disproportionate share of hospital services. In FY 2011-2012, elderly inmates accounted for 46.6% of all episodes of care and 49% of all hospital days...The dramatic increase in the elderly population, and the related cost of care for this population, presents one of the biggest challenges for FDOC over the next 15-20 years.”

The potential fiscal consequences of providing health care to a large elderly prison population are staggering. The National Institute of Corrections estimates that states spend on average \$70,000 per year to incarcerate someone age 50 or older, nearly three times what it costs to house a younger prisoner, largely because of the difference in health-care costs.¹¹ Other studies are in accord, including a 2012 comprehensive analysis by the American Civil Liberties Union, which concluded the annual average cost to house a prisoner is \$34,135, but rises to \$68,270 if the prisoner is age 50 and older.¹²

¹¹ “State Initiatives to Address Aging Prisoners”, Kevin McCarthy and Carrie Rose, Office of Legislative Research (OLR), March 4, 2013.

¹² “At America’s Expense: The Mass Incarceration of the Elderly” ACLU 2012

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These studies point out that arthritis, diabetes, hepatitis C, cancer, hypertension, ulcer disease, AIDS, dementia, Alzheimer's disease, and prostate problems are common chronic ailments among elderly prisoners. The treatment and medicines for these illnesses are very expensive, and the bill goes directly to Florida taxpayers. Florida prisons, built to insulate law-abiding citizens from dangerous and aggressive felons, are being transformed into intensive care units and hospices.

The federal government, which also has a significant elderly prison population, recognizes the gravity of the situation, as demonstrated by this excerpt from a Department of Justice Inspector General (DOJ IG) Report:

"While the Department has taken initial steps to address its reduced budget, the Department must also have in place an innovative and transparent strategic vision for how to fulfill its mission in the long term without requiring additional resources. Nowhere is this problem more pressing than in the federal prison system, where the Department faces the challenge of addressing the increasing cost of housing a continually growing and aging population of federal inmates and detainees."¹³

The report from the DOJ IG went on to proclaim that "we are on an unsustainable path," and also found that, like Florida, the Federal Bureau of Prisons does not track the costs related to the care for aging and sick inmates.

Extrapolating the cost of elderly health care from published FDOC information is possible. FDOC reports that elderly patients accounted for 49 percent of all hospital days in 2012. Assuming hospitalization days are representative of overall prison health care costs, the elderly prison population was responsible for approximately half of the \$408 million prisoner healthcare costs in 2012, which averages to \$11,000 per year solely for the health care of elderly prisoners. The remaining 82,209 prison population is under the age of 50, and their health care costs average approximately \$2,500 per prisoner.

This rough analysis indicates that elderly prisoners cost four times as much as non-elderly prisoners. Furthermore, this estimate is very likely a conservative one, as a "hospital day" for an elderly patient likely requires more doctor and nurse supervision, more drugs, more physical therapy, and more tests than younger prisoners.

These estimates are congruent with medical costs estimates from prison studies conducted around the country, and from medical experts regarding prison healthcare costs for the

¹³ "Cost Savings and Efficiencies at the Department of Justice", Statement of Michael E. Horowitz, Office of the Inspector General, United States Department of Justice, April 10, 2013.

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elderly (see text box, right). These experts report elderly prisoners create cost multipliers of 2-8 times that of prisoners below 50 years of age.

Other studies suggest the costs to imprison elderly felons are even higher. The American Civil Liberties Union released a detailed report in 2012 which offered a low estimate of \$28,362; a middle estimate of \$66,294; and a high estimate of \$104,436.¹⁴ A Louisiana report found that the Angola Prison houses a group of elderly prisoners with annual medical costs exceeding \$100,000 per inmate.¹⁵ This led the Warden of Angola, Burl Cain, to say: "When I came here and saw the elderly population, I said why are they here? Our name is Corrections to correct deviant behavior, but there's nothing to correct in these guys; they're harmless."¹⁶

A recent study from the Michigan Department of Corrections reported a 65 year old prisoner with \$316,420 in medical bills in 2013.¹⁷ According to this report, the top 10 prisoners with the highest health care costs averaged more than \$220,000 per prisoner for health care or mental health care treatment. There is no reason to believe these types of high-cost elderly patients are not present in every state prison system, and even more pronounced in Florida because of its substantial elderly population.

FDOC's annual reports contain additional information about corrections budgets and prisoner health care costs. The table on the next page shows the overall FDOC budget, with specific line item for healthcare costs, since 2000.

Examples of Annual Elderly Prisoner Health Care Costs in Other States

A Virginia study in 2012 found elderly prison costs were \$5,372 compared to \$795 for those less than 50 years of age, a 6 times cost multiplier.¹

A 2008 Georgia study found that care for those 65 and older costs \$8,565 compared to \$961 for those under 65.²

A 2010 Texas study reported health care costs of \$4,853 per elderly prisoner, and \$795 for younger prisoners.³

A 2010 Michigan study found elderly care was \$11,000 annually, and more than 4 times that of an offender in their twenties.⁴

1 Virginia Department of Corrections, "Older Inmate Population: Managing Geriatric Issues" October 2011.

2 "Government Explores Early Release for More Aging Prisoners," LA Times November 12, 2013.

3 "Elderly inmates are putting a burden on Texas taxpayers," Houston Chronicle, May 16, 2011.

4 "Michigan's Prison Health care: Costs in Context," Michigan Senate Fiscal Agency, November 2010.

14 "At America's Expense: The Mass Incarceration of the Elderly," American Civil Liberties Union Report 2012.

15 "Aging Prisoners Costs Put Systems in Nationwide in a Bind," USA Today, July 11, 2013.

16 "At America's Expense: The Mass Incarceration of the Elderly," American Civil Liberties Union Report 2012.

17 "Michigan gets serious about high cost of prisons," The Center for Michigan, April 15, 2014.

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The FDOC budget has grown by \$560 million (35 percent) from 2000-2012. Health care costs have grown by \$176 million, or 76 percent, in that same period. Health care costs are growing at more than twice the rate of overall corrections spending.

How much will FDOC budgets rise to meet the necessary costs to incarcerate elderly prisoners? That will depend specifically on two variables, both of which are also escalating.

The first factor is the increasing cost of health care and mental health treatments for the types of ailments most common to aging prisoners. Medical costs for treating hepatitis C alone could swamp FDOC budgets, as a new treatment for the disease is projected to cost upwards of \$100,000 per patient (see case study on next page). Additionally, mental health treatment is a particular problem in Florida, where it is estimated that minimum care for one mentally ill prisoner costs more than \$60,000.¹⁸

A second factor determining health care costs will be the longevity of prisoners. Life expectancy in the U.S., now 81 for women and 76 for men, has steadily increased over time.¹⁹

Must Florida provide expensive medical, mental and drug treatments to prisoners? Executive, legislative and judicial leaders will have to answer these controversial questions, but an imposing hurdle will be the 8th amendment ban on cruel and unusual punishments, which the U.S. Supreme Court has interpreted to mean that state prison care cannot show “deliberate indifference to serious medical needs” of prisoners.²⁰ The Illinois precedent will speak loud, and it is hard to imagine state and federal courts permitting a state to withhold from an afflicted prisoner a treatment capable of curing a life-threatening disease.

Corrections Budget in Florida vs. Healthcare Costs

Year	DOC Budget	Reported Healthcare Costs
2000	\$1.58 b	\$232 m
2001	\$1.63 b	\$246 m
2002	\$1.62 b	\$257 m
2003	\$1.68 b	\$280 m
2004	\$1.79 b	\$307 m
2005	\$1.88 b	\$315 m
2006	\$2.06 b	\$340 m
2007	\$2.13 b	\$373 m
2008	\$2.29 b	\$424 m
2009	\$2.24 b	\$394 m
2010	\$2.30 b	\$414 m
2011	\$2.39 b	\$409 m
2012	\$2.14 b	\$408 m
2013	\$2.07 b	\$295 m

Source: Florida Department of Corrections. Annual Reports: Agency Statistics: Budget, 2000-2013.

18 “From Prisons to Hospitals-and Back: The Criminalization of the Mental Illness,” Prison policy initiative

19 US Life Expectancy Map 2013, National Geographic.

20 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

CASE STUDY - SOVALDI

A new antiviral drug treatment for hepatitis C, known as Sovaldi, was approved in early 2014 for the treatment of this life-threatening, blood-borne infection common in prisons because it can be passed by needles used for drug injections, tattoos and body-piercing.¹ The number of prisoners in Florida with hepatitis C is not reported, but national estimates indicate anywhere from 16–41 percent of prisoners carry this disease, and 12–35 percent are chronically infected.² Sovaldi is very expensive, approximately \$1,000 per pill, and it takes months of treatment with the cost ranging from \$65,000 to \$170,000.³ Sovaldi has a cure rate in some clinical studies of 95 percent, which is significantly higher than all other available treatments for hepatitis C.

Prior to 2014, state prison systems had not prescribed this medicine for prisoners. This is beginning to change. The Federal Bureau of Prisons began making Sovaldi available in February 2014,⁴ and New York has begun using Sovaldi for prisoners with the most serious cases. Washington and Wisconsin are also beginning to use Sovaldi, and California is revising its prison health care policies to incorporate the use of the new drug.

Illinois corrections officials estimate the treatment will cost \$61,000-\$122,000 per prisoner, and they have as many as 3,750 prisoners who will need the drug. Cost estimates are \$61 million in the first year. Illinois is facing great budget challenges, aggravated by these new corrections costs. A temporary tax has been requested, and if not granted, reports are as many as 15,500 inmates would be released to offset the cost of corrections.⁵ The total prison population in Illinois is 49,154, or approximately half that of Florida.⁶

If Florida makes these drugs available to those afflicted with hepatitis C, health care costs will explode. Using the Illinois estimates leads to a cost of \$122 million to treat hepatitis C in Florida prisons, and if higher national estimates are applied, there could be as many as 7,000 prisoners in Florida suffering from chronic hepatitis C, and needing the new costly treatments.

Such estimates lead to treatment costs in the \$1 billion range. That is more than double the entire FDOC budget for prison health care.

1 "State approves prison hepatitis C drug, likely to cost millions," Herald-Review, April 22, 2014.

2 "Correctional Facilities and Viral Hepatitis," Centers for Disease Control and Prevention, April 22, 2014.

3 "Should Prisoners Get Expensive Hepatitis C Drugs?," The Pew Charitable Trusts, March 26, 2014.

4 "New Hepatitis Drugs Vex Prisons," Wall Street Journal, April 24, 2014.

5 "Illinois prisons to use costly hepatitis C drug," The Kansas City Star, April 18, 2014.

6 "Illinois Corrections numbers show record prison population," Journal Star, Sep 18, 2012.

Setting the Sovaldi issue aside, the final years of incarceration are the most expensive to taxpayers, so at more than \$11,000 per year per prisoner, the addition of 2,500 elderly prisoners per year will add \$30 million per year in health care costs. If the national average of \$68,270 per year estimate is used, the annual cost to Florida taxpayers to incarcerate 20,750 elderly prisoners is \$1.5 billion, or almost three-fourths of the current FDOC budget. These numbers become astronomical, and unsustainable, if new medical treatments and mental health requirements are added to cost spreadsheets.

Projections for Florida

As the statistics demonstrate, the elderly prison population has gone up every year since 2000 by an average of more than 1,000 prisoners per year, and exhibits a growth rate significantly exceeding that of the general prison population. The Florida Criminal Justice Estimating Conference (CJEC), which uses relevant real-time criminal justice data such as arrests, felony filings, and convictions to assess future prison population growth, projected in early 2014 that the total prison population in Florida in 2018 will be 104,960.²¹ This constitutes minor prisoner increases over the next four years, and shows the rapid growth from the last decade has now steadied. CJEC does not estimate the elderly prison population subset within the total prison population projection, nor does the FDOC, but estimates can be extrapolated from existing data.

The variables below can be used to estimate where the elderly prison population will be at the end of FY2014-15:

- *Current prisoners aging up to 50:* The 35-49 age group presently housed in Florida prisons consists of 36,048 prisoners. Within this group, 4,452 prisoners are 48-49 years old. A quick survey of the first 200 names in the 48-49 age group reveals 23 percent have release dates in 2014 and 2015. Assuming this sample is representative, one fourth will be released in the next 20 months, leaving approximately 3,200 current prisoners who will remain imprisoned and join the elderly prisoner category by the end of 2015.
- *New elderly prisoner admissions in 2014-2015:* The FDOC annual report shows there were 3,349 elderly admissions in 2012; 3,452 in 2011; and 3,448 in 2010. A fair expectation from these statistics is about 3,400 elderly prisoner admissions per year in 2014 and 2015. Conservatively, this will add more than 6,000 new elderly prisoners by the end of 2015.

²¹ Criminal Justice Estimating Conference: Held November 20, 2013.

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- *Elderly prisoner releases.* A quick survey of the first 200 names in the 50+ category shows 26 percent will be released in 2014-2015. Again assuming this sample is representative, approximately 5,100 elderly prisoners will leave the prison system by the end of FY2014-15.
- *Summing up:* The 20,750 elderly prison population in Florida today will gain approximately 6,000 new admissions by the end of 2015, age up about 3,200 prisoners, and release 5,100 prisoners. That equals a net gain of 4,100 elderly prisoners by the end of FY2014-15, or an increase of 200 elderly prisoners per month.

The addition of 4,100 elderly prisoners to the current population of 20,750 will take Florida to 24,850 elderly prisoners by the end of 2015. Assuming no interim policy changes to manage the elderly prison population, the number will further climb to 30,000 by 2018. Comparing this to national average predictions from the Wall Street Journal, which reports that “at current rates a third of all prisoners will be 50 or older by 2030,”²² Florida will achieve this dubious distinction 10 years ahead of the rest of the nation.

Solutions/Options

The dilemma of expanding elderly prison populations and their high healthcare costs is not unique to Florida, but it is a relatively recent problem. Parole and compassionate release programs existed in Florida prior to 1995. That all changed, however, when Florida enacted a new law which removed parole, substituting in its place of a system requiring prisoners serve 85 percent of the sentence imposed. Life sentences from that point on were “for the rest of their natural lives, unless granted pardon or clemency.”²³ All flexibility in Florida corrections has been removed, and there are no exceptions.

Federal, state and foreign jurisdictions are enacting early release programs for prisoners based on age, offense, medical condition, time served and public safety assessments. These initiatives, known by such terms as “geriatric parole,” “compassionate release,” “elderly parole,” “medically recommended Intensive supervision,” and “humanitarian release” have become the most common way for states to avoid enormous health care costs for aging prisoners by releasing aging and ailing prisoners who pose no risk to the public. Some advocates of early release programs also point to the compassionate aspects of releasing terminally ill and physically disabled prisoners in their last stage of life.

²² “Care for Aging Inmates Puts Strain on Prisons,” Wall street Journal, January 27, 2012.

²³ Florida Statutes 944.275

The policy rationale for releasing nonviolent elderly prisoners is clear. Elderly prisoners cost the most to incarcerate, but pose the least danger to public safety. The potential savings available are substantial, as a 1 percent reduction in Florida's prison population gained through early release of elderly prisoners could result in annual savings of \$67 million. A five percent reduction would save more than \$300 million.

UTILIZING CLEMENCY POWERS

One method for reducing prison sentences for the elderly is through executive clemency powers. Although this administrative prerogative is generally used sparingly by the President and Governors to prevent injustice or correct errors, it can be accessed to reduce sentences. President Obama recently announced his willingness to use his clemency authority to focus on federal felons serving long terms for drug offenses.

Under the revised clemency program, eligible prisoners would be those who have served at least 10 years, with no significant criminal history, that are non-violent low level offenders not associated with gangs, and with a good conduct record in prison.²⁴ The clemency office will be beefed up to allow quick review and action on those prisoners who meet the guidelines adopted. It is estimated that this could result in the release of thousands of non-violent drug offenders, and save hundreds of millions of dollars.²⁵

The administrative requirements surrounding President Obama's decision to use his clemency power to reduce certain federal drug sentences does serve to remind state governors that while they could institute similar guidelines and reduce the sentences of specific classes of prisoners, like those very old or terminally ill, it remains highly unlikely. States do not have the legal assets of the Department of Justice to review large numbers of clemency requests, and clemency cannot become a de facto parole board in a state that has abolished parole.²⁶ However, clemency could be used for unique cases of very old and ailing prisoners, to show them compassion, and save costs, at the end stages of life.

CREATING AN EARLY RELEASE PROGRAM

Assuming clemency is, at best, a limited option for the early release of aging and ailing prisoners, can Florida create a broad elderly prisoner release program under existing state law to review and grant meritorious requests for release prior to 85 percent sentence completion? In order to be consistent with state law, the elderly release program would

24 "DOJ announces clemency overhaul, allows release for some after 10 years," Fox News, April 23, 2014.

25 "President Obama Could grant Clemency to Thousands of Non-Violent drug Offenders," Think Progress, April 21, 2014.

26 The only current avenue to reduce a sentence in Florida is through executive pardon and clemency. The Clemency Board does not typically grant nor revoke parole or probation, but there are examples of this power being used to reduce a sentence.

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have to be specially tailored so that it does not offend the *"end, terminate or expire"* statutory language of mandating 85 percent completions.

The federal government provides an ideal road map on how to proceed, because the United States Federal Sentencing Guidelines enacted in 1987 also discontinued parole.²⁷ Like Florida, federal prisoners serve 85 percent of their sentences. The sentencing regime in the federal criminal justice system is very similar to Florida with one exception: the federal government has a Compassionate Release/Reduction in Sentence program which permits a prisoner to request early release in special circumstances which include advanced age, terminal medical conditions, other extreme and chronic physical limitations, and family hardships.²⁸

A request for Compassionate Release goes to the Federal Bureau of Prisons (BOP), and if supported, the request is submitted to a federal court, given unfettered discretion to approve the request.

In 2013, the BOP sought to reinvigorate the program with new guidelines for Compassionate Release/Reduction in Sentence, based on the detailed criticisms and recommendations from the DOJ IG.

These guidelines now permit Compassionate Release/Reduction in Sentence for the following:

- Prisoners with terminal medical conditions, defined as life expectancy of 18 months or less;
- Prisoners with a debilitating medical condition, which is an incurable progressive illness or injury which renders the prisoner confined to a hospital bed or unable to care for themselves;
- Prisoners 70 or older who have served 30 years of their sentence;
- Prisoners 65 or older who have served 10 years, or 75 percent of their sentence; and/or
- Prisoners 65 and older who have served 50 percent of their sentence and suffer from a deteriorating mental or physical health condition which diminishes the prisoners ability to function.

²⁷ Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. 3582 and 4205

²⁸ The Federal Bureau of Prisons Compassionate Release Program, U.S. Department of Justice Office of the Inspector General, April 2013

What should be the criteria for an elderly prisoner release program in Florida? The federal program outlined previously is a good place to start, but variables commonly included in state plans center on the following:

- **Age.** This is the factor with the widest range of options. The age selected determines how large the eligible pool will be, and also determines how much risk will be accepted. Research studies and criminologists have consistently found that age is one of the most significant predictors of criminology. Ninety percent of those convicted of felons are under 50 at the time of admission to prison, and only 1.8 percent are 60 or older.²⁹

States have chosen to consider prisoners for early release as young as 45 in Louisiana; progressing to 55 (Alabama); 60 (Virginia, Wisconsin, Oklahoma); 65 (Colorado, Washington DC, Maryland, North Carolina, New Mexico); and 70 in the federal system.³⁰

Recidivism rates for elderly prisoners shed further light on age selection. FDOC did a 7-year study on recidivism by age groups using statistics from 2003-2010,³¹ and found that the lowest recidivism rates occur among those aged 65 and older. The 50 to 64 year group also falls well below the average recidivism rates.

Age profiles for prison admissions report similar age group distinctions. FDOC reports the 50-59 year group amounted to 8.6 percent of those admitted in 2012, 8.2 percent in 2011, and 7.8 percent in 2010. The number of prisoners aged 60 and over admitted to prison constituted 1.8 percent in 2012, 1.7 percent in 2011, and 1.5 percent in 2010.

- **Medical Condition.** The health criteria for early release consideration should be dependent on medical opinions regarding terminal illness, the progressive state of disease, treatment costs, chronic pain levels, and difficulty of care. Obviously, the graver the illness, the more cost to the taxpayer, and less danger to the public. Illness and physical disability can serve to incapacitate as readily as incarceration.

29 FDOC Annual Report 2012, page 31.

30 Federal: "Early Release for Federal Inmates: Fact Sheet", Nathan James, Congressional Research Service, February 3, 2014.

All other cited states: "It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release", Tina Chiu, Vera Institute of Justice, April 2010.

31 2011 Florida Prison Recidivism Report: Releases from 2003-2010. April 2012, Bureau of Research and Data Analysis.

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- **Offense Committed.** Some classes of crimes should be excluded from consideration for early release in the interest of public safety. Those who commit murder, sexual predators and rapists, offenses against children, and all other capital felonies should not be considered for early release in the interest of public safety.
- **Time served.** The amount of time served by the elderly prisoner should also be a consideration. Some states use a percentage ranging from 33–75 percent; others require 10–30 years.
- **Risk Assessment.** Risk assessment is a very important consideration in all prison release programs. Age-based recidivism rates are instructive, but a prisoner's individual factors are equally germane. The specific facts of the offense committed, as well as the prisoner's record while incarcerated, family and community support, restitution, and all other relevant facts should be considered.
- **Type of Decision-Making Forum.** The state of Florida has a Parole Commission, designed to ensure public safety through the post prison release process. The Commission is comprised of three Commissioners who are appointed to six year terms by the Governor, and confirmed by the Senate. Currently, the role of the Parole Commission is diminishing as prisoners sentences under the old philosophy disappear from the system.

Recommendations

The rising cost of health care for elderly prisoners is a national dilemma, creating budgetary headaches for the federal government and most states. Nowhere is this looming crisis more acute than in Florida. Florida's elderly prisoner population is now over 20,000, and on its way to 30,000 by 2018. By 2020, one out of every three prisoners in Florida will be elderly. This rate will be double the 16 percent national average, and impose huge and unsustainable fiscal burdens on Florida taxpayers.

Florida TaxWatch recommends that Florida implement the following measures designed to identify, assess, and manage the exploding aging prison population in Florida:

Report the Current Cost of Elderly Prison Health Care

Florida TaxWatch recommends that Florida collect and report the health care costs of the elderly prison population. Understanding the current costs for elderly health care, the average cost per year to incarcerate an elderly prisoner, and the highest cost prisoners, are vital to the analysis and understanding of correction costs. Additionally, cost figures identifying current costs are necessary, so that cost projections can be determined and evaluated.

Report the Projected Growth of the Elderly Prison Population in Florida

The data is available for the state to project the growth in elderly prison populations. FDOC reports elderly statistics for the overall prison population, and the age groups of new prison admissions each year. The FDOC offender database also permits searches of those currently incarcerated by age. This provides sufficient data to project elderly prison population growth.

The state can use these projections, as it does to estimate future prison population totals, and make annual prison population projections for elderly prisoners. While prior year statistics show an elderly prison population which has grown from 5,605 in 2000, to 20,750 in 2014, the important information for decision-makers is if/when this growth will stop.

Consider clemency option for unique cases of elderly and ailing prisoners

Some cases cannot wait for FDOC and legislators to implement an early release program for elderly and infirm prisoners in Florida. As an example, there are currently 27 prisoners over 80 years of age who have been incarcerated for decades, and have release dates in the next 5 years. Three of these prisoners are in their nineties. They are feeble and harmless to the general public. There are also prisoners with life-threatening diseases in the end stages of life.

FLORIDA'S AGING PRISONER PROBLEM

These prisoners should be considered for release, and clemency is the only way this can be done in adequate time to allow a more compassionate death outside of prison walls.

Implement an Elderly Prisoner Release Program

The Florida Legislature should reexamine the fundamental purposes and goals of prison and sentencing, which are to punish, incapacitate, deter future crimes, and rehabilitate. Prisons are not intended to be senior citizen retirement communities or hospice centers for prisoners with terminal diseases. Old age, life-threatening medical conditions, loss of physical mobility, and degradation of sensory and memory recall can incapacitate as surely and effectively as prison cells, watchtowers, and barbed wire.

In order to stop runaway spending on health care for elderly prisoners, a program should be created in Florida to review aging and ill prisoners for release to community medical clinics and hospices. The program can be modeled on the federal Compassionate Release/Reduction in Sentence program, and other geriatric release programs implemented by sister states. Criteria would likely be based on age, offense, medical status, prison record, public safety assessment and humanitarian factors, but should not be automatic based on any of those factors.

The recommendations made by the U.S. DOJ IG report after thorough review of the federal Compassionate Release/Reduction in Sentence program in 2013 are germane and should be carefully analyzed. The DOJ IG report found the process so encumbered with review layers, and the criteria for eligibility so tightly structured and interpreted, that the program was mired in red tape and ineffective.

Florida should look to this program as a model, and borrow the best practices from state programs discussed in this study, when creating appropriate criteria for elderly prisoner early release.

ABOUT THE AUTHOR



Dan McCarthy is a Miami native and a graduate of the United States Naval Academy. He also has a law degree from Duke University and an LLM from George Washington.

Before joining TaxWatch, Dan spent three decades as a naval officer where he served as a legal advisor to the Secretary of the Navy and was in command of all Naval trial offices in the Southeast and Caribbean. He has also worked at the law firm of Holland & Knight, served as the Director for Military and Veterans Affairs for the City of Jacksonville, was the Chief Assistant State Attorney for the 4th Circuit, and was a Director at Wounded Warrior Project.

ABOUT FLORIDA TAXWATCH

As an independent, nonpartisan, nonprofit taxpayer research institute and government watchdog, it is the mission of Florida TaxWatch to provide the citizens of Florida and public officials with high quality, independent research and analysis of issues related to state and local government taxation, expenditures, policies, and programs. Florida TaxWatch works to improve the productivity and accountability of Florida government. Its research recommends productivity enhancements and explains the statewide impact of fiscal and economic policies and practices on citizens and businesses.

Florida TaxWatch is supported by voluntary, tax-deductible donations and private grants, and does not accept government funding. Donations provide a solid, lasting foundation that has enabled Florida TaxWatch to bring about a more effective, responsive government that is accountable to the citizens it serves for the last 34 years.

THE FLORIDA TAXWATCH CENTER FOR SMART JUSTICE

The Center for Smart Justice is centered on the belief that public safety is paramount, and because of the magnitude of this responsibility, there truly is no room for inefficiency. The Center's research focuses on evidence-based reforms to Florida's criminal and juvenile justice systems that ensure less crime, fewer victims, and no wasted tax dollars.

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This independent *Report* was made possible by the generous financial support of Florida TaxWatch donors.

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