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A stepwise guide for healthcare professionals requesting compassionate release for patients who are incarcerated

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Abstract

Purpose ——Compassionate release is a process that allows for the early release or parole of some incarcerated people of advanced age, with life-limiting illness, complex medical care needs or significant functional decline. Despite the expansion of State and Federal compassionate release programs, this mechanism for release remains underutilized. Health-care professionals are central to the process of recommending compassionate release, but few resources exist to support these efforts. The purpose of this paper is to provide a guide for health-care professionals requesting compassionate release for patients who are incarcerated.

Design/methodology/approach ——This study is stepwise guide for health-care professionals requesting compassionate release for patients who are incarcerated.

Findings ——This study describes the role of the health-care professional in requesting compassionate release and offers guidance to help them navigate the process of preparing a medical declaration or request for compassionate release.

Originality/value ——No prior publications have created a step-wise guide of this nature to aid health-care professionals through the compassionate release process.

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Keywords

Prison; Aging; COVID-19; Compassionate release; Advanced care planning; Medical release

Introduction

The US prison population has aged significantly over the past two decades in the setting of profoundly long sentences and an era of mass incarceration (Williams *et al.*, 2021). Between 1993 and 2003, the number of people aged 55 or older in state prisons grew by 400% (Vera Institute of Justice, 2018). Incarcerated older adults experience high rates and an early onset of chronic disease and geriatric conditions at relatively younger ages compared with the non-incarcerated population (Greene et al., 2018; Maruschak *et al.*, 2015; Psick et al., 2017). These medical conditions also put incarcerated older adults at an elevated risk of poor outcomes due to COVID-19 infection (Prost *et al.*, 2021). As a result, incarcerated people aged 50years or older experienced the highest rates of COVID-19 infections, hospitalizations, intensive care unit (ICU) admissions and deaths (Centers for Disease Control and Prevention, 2021; Chin *et al.*, 2021). The combination of an aging prison population and the COVID-19 pandemic has resulted in an exponential rise in the number of incarcerated people who die each year from medical illness (Prost *et al.*, 2021; Rorvig and Williams, 2021a).

Even before the COVID-19 pandemic, the Federal Bureau of Prisons and virtually all state departments of corrections had enacted policies and/or procedures that allow for the early release or parole of some incarcerated people of advanced age, with life-limiting illness or profound functional impairment (Holland *et al.*, 2020). Such policies are generally referred to as “compassionate” or “medical” release, and “medical” or “elder” parole (herein all referred to as “compassionate release policies”). In recent years, an increasing number of states as well as the federal government have introduced legislation to expand compassionate release policies. In 2018 the federal First Step Act increased access to federal compassionate release by expanding the eligibility criteria for compassionate release, giving people who are incarcerated the right to initiate their own compassionate release requests, and permitting people to appeal denials (Families Against Mandatory Minimums [FAMM]). Yet, despite a growing number of motions for compassionate release (FAMM), little if any formal guidance exists to help healthcare professionals navigate the compassionate release process.

During the COVID-19 pandemic, there has been increased interest in compassionate release programs (Office of the Attorney General, 2020) and compassionate release requests increased markedly, mainly due to increased eligibility resulting from COVID-related vulnerability and morbidity (Blakinger and Neff, 2021; Prost and Williams, 2020). For example, in 2019, the Bureau of Prisons received 1,735 requests for compassionate release for people incarcerated in federal prisons (Blakinger and Neff, 2021); as of September 2021, over 30,000 requests had been submitted since the COVID-19 pandemic began (Blakinger and Neff, 2021). But just approximately 1% of these requests were approved, and the vast majority of approvals were granted by federal judges after applications were initially denied by the Bureau of Prisons (Blakinger and Neff, 2021). State prison systems have also been

described as failing to use compassionate release mechanisms to the maximum of their potential (FAMM; Vera Institute of Justice, 2018).

Overcoming barriers to the use of compassionate release policies requires a multidisciplinary analysis and multidisciplinary solutions, as has been discussed elsewhere (Prost and Williams, 2020; Williams *et al.*, 2011). One practical, critical need is to ensure that health-care professionals are aware that they can initiate a petition for compassionate release for their patients. It is also crucial that health-care professionals receive the guidance needed to refer their patients for compassionate release in an effective and compelling manner. Therefore, in this article, we describe the role of the health-care professionals in requesting compassionate release, and a systematic approach for healthcare professionals to follow when preparing a medical declaration for compassionate release based on our clinical experiences and professional backgrounds.

The role of health-care professionals in requesting compassionate release

The eligibility criteria and application process for compassionate release can be complex and differs between each state correctional system and the federal prison system. In the federal prison system, after a request for compassionate release is submitted, it is reviewed by the prison warden. The warden considers input from multiple sources, including medical professionals, before making a decision. If the warden approves the request, the case is sent to the general counsel (Chief Legal Officer) for approval, and subsequently, the Beaurea of Prisons Director for approval before it is reviewed by the court that sentenced the individual (FAMM). Given that each state prison system has a different workflow and process for compassionate release, FAMM has developed a resource for health-care professionals to learn about the requirements for compassionate release programs in each state (DiTomas and Williams, 2021; Price, 2018).

The uniting factor across all jurisdictions is that a health-care professional must attest to the patient's medical diagnosis, care needs and prognosis. Health-care professionals in prisons or in community hospitals can generate requests for compassionate release, a process that generally includes medical record review, consultation with correctional health-care leadership, occasional consultation with the patient's legal counsel and the drafting of medical declarations (described in more detail below). Health-care professionals who practice in correctional settings can assume the additional role of proactively identifying incarcerated patients who may qualify for compassionate release, for example by reviewing the records of any patient who develops a new, life-limiting medical diagnosis or who has reached very advanced age (Vera Institute of Justice, 2018). For all health-care professionals, providing a prognostic and a compelling narrative that describes the patient's medical eligibility and corresponding health-care needs is a critical component in the compassionate release process.

A systematic approach for health-care professionals to follow when preparing a medical declaration for compassionate release

The goal of a medical declaration is to communicate critical information about a patient's current medical conditions and their expected medical trajectory to a lay audience

(usually with a background in corrections and/or law) so that that audience can factor the patient's health status and medical conditions into their determination about the patient's appropriateness for compassionate release. As a result, these declarations should avoid medical jargon, describe the patient's functional status clearly, explain the patient's prognosis (sometimes touching on the scientific evidence for that prognosis), describe the community standard of care for a patient with these medical conditions and note the engagement of the patient in discussions about advance care planning. See Appendix 1 and 2 for sample letters to guide requests including during COVID-19. Samples were developed by a prison culture change initiative, Amend, at the University of California San Francisco Medical School (amend.us). More information on and the rationale for each recommended step is listed below:

- *Avoid medical jargon:* The patient's medical conditions should be listed in an easy-to-understand language without the use of medical jargon. People who are responsible for reviewing, assessing and approving a motion for compassionate release may include parole board members, prison administrators and judges, many of whom may have limited to no familiarity with medical terminology. Using clear and descriptive language can help the reviewer understand the rationale behind the request for compassionate release. Even people with high literacy often describe having difficulty understanding health-care terminology and jargon, only 12% of American adults have been found to have proficient health literacy (Kutner *et al.*, 2006). To account for differences in medical literacy, declarations should include clear and simple messages, define all medical terms in clear language and provide explanations for any medical procedures or conditions. For example, clinical terms such as "ischemic heart disease" should be explained in lay language [e.g., "narrowing of the blood vessels bringing oxygen to the heart which can cause heart attacks and/or heart failure (reduced heart function)"], and medical interventions such as "BiPAP" should be described in simplified terms, for example, "a device that uses pressure to push air into the lungs and is necessary for medical conditions involving seriously impaired breathing."
- *Describe the patient's functional status:* Studies show that narratives are easier to process and recall and are more engaging than traditional scientific communication (nonnarrative, expository or descriptive writing) (Dahlstrom, 2014; Green, 2006; Moore, 1999). Narratives also provoke stronger emotional reactions (Nelson *et al.*, 2009) and are more successful in persuading an otherwise reluctant audience (Moyer-Gusé and Nabi, 2010). For this reason, health-care professionals should take care to comment on the patient's functional status, the presence of physical limitations, their use of mobility devices and whether they require assistance with activities of daily living (such as eating, bathing, dressing, toileting or transferring). As compassionate release decision-makers often do not meet the person who is requesting compassionate release, a clear description of patient characteristics such as these can help them construct a visual image, their present circumstances and the medical supports they require in prison.

- *Discuss prognosis and the scientific basis for arriving at that prognosis:* Compassionate release policies are – at a basic level – designed to allow some patients to die outside of prison. Prognosis is usually the core feature that reviewers are searching to understand. This can create tension with health-care professionals as studies show that health-care professionals often report being ill-prepared to render a prognosis or are uncomfortable with the inexact science of prognostication (Williams *et al.*, 2017). Fortunately, there is a substantial body of research available that can be used by health-care professionals to guide their prognostication, and several tools can help to inform the prognostication process on a practical level (Yourman *et al.*, 2012). When describing a prognosis, health-care professionals should avoid "probability language" that may be hard for lay readers to understand (e.g. "low likelihood of survival" or "probably won't survive"). Instead, health-care professionals should consider offering more detailed information that describes the patient's prognosis in the context of the scientific state of knowledge about the patient's particular condition may develop over time. For example, rather than saying "Mr. Smith has a poor prognosis," one might instead write "Mr. Smith has a 12-month prognosis, or expected survival of less than 12 months. This prognosis is based on medical research describing the normal trajectory of amyotrophic lateral sclerosis (ALS) at this stage of its progression." The writer could also consider including a short list of studies and/or prognostic models used to arrive at this prognosis. This information should be followed with a description of what the reader can expect about the patient's health trajectory over the given timeframe, so that the reader does not erroneously interpret the prognosis to mean that either the patient will have died or been cured within the year. For example, "ALS is a terminal, progressive condition with no cure. Over the next 12 months, Mr. Smith is likely to either die or to be close to death with little or no ability to swallow or speak, and to be dependent on a full-time caregiver for most movement, feeding, toileting and other activities of daily living."
- *Identify community standard of care:* It is important for the writer to include a description of the community standard of care for each medical condition discussed. In *Estelle v Gamble* (Estelle v. Gamble, 1976), the U.S. Supreme Court determined that deprivation of health care represents cruel and unusual punishment under the eight amendment to the U.S. Constitution and established a legal right to health care for incarcerated patients. Litigation following *Estelle* has since required correctional institutions provide a minimum "community standard of care" for incarcerated patients (Greifinger, 2007). For this reason, it is important that the medical declaration include a description of any financial and structural limitations that the prisons may face, which could undermine its ability to provide community standard of care to the petitioner (Chettiar et al., 2012; Henrichson and Delaney, 2012; The Pew Charitable Trusts, 2008). Writers should describe the community standard of care for a patient with such medical conditions, including expected resource utilization (e.g. frequency of dialysis, provision of around-the-clock or hospice-level nursing care or treatment options such as daily radiation and chemotherapy). Palliative care is the community

standard of care for many serious or terminal illnesses, and when appropriate, it may be helpful to explain why incarceration creates barriers to effective palliative care owing to separation from loved ones and surrogate decision-makers, limited access to opioids, etc.

- *COVID-19 accelerated release:* Letters that are written for COVID-19 accelerated release should follow similar principles but might include additional information about the factors that place the individual patient at heightened risk for hospitalization, ICU level care and mortality. Such factors include advanced age (>60), high-risk comorbid conditions (cardiovascular disease, chronic lung disease, diabetes, hypertension, obesity, liver disease and immunosuppression), recent hospitalizations and functional status (Centers for Disease Control and Prevention, 2020).

- *Advance care planning:* It is important to note that patients who meet criteria for compassionate release also merit discussion and documentation of their advance care plans. Advance care planning is a process that supports adults at any age or stage of health to understand and share their personal values, life goals and preferences regarding future medical care (Rorvig *et al.*, 2020). Although incarcerated patients have lost their physical liberty, they retain their autonomy regarding medical decision-making, including end-of-life decisions. Yet, even with a rapidly growing aging prison population, advance care planning discussions often do not occur; one study found that just 1% of incarcerated patients had discussed advanced care planning with a provider (Levine, 2005).

  Health-care professionals in correctional settings should integrate advanced care planning into their health-care practice, particularly if they are already considering a patient's eligibility for compassionate release. Community health-care professionals may find themselves caring for patients transferred from correctional health-care facilities because of acute health-care needs. While some patients may be admitted with advanced care planning documentation already completed, community health-care professionals can and should review the patient's health-care wishes, code status and surrogate decision-maker as he or she would for any other patient they admit to the hospital (Rorvig and Williams, 2021b). Including information about advanced care planning on all health-care documents regarding a patient with serious or life-limiting illness is important for enhanced documentation and communication amongst caregivers. For this reason, including information about a patient's ACP (including their next of kin, goals of care and requests they have related to CPR) should be documented in the letter requesting compassionate release.

- *Discharge plan:* It is typically required that a discharge plan be identified prior to submission of an application. With the patient's permission, health-care teams including medical social workers and chaplains can and should reach out to families to determine their ability to care for their loved ones should they be released. Relevant health-care support systems including insurance enrollment, home care services and hospice services should be explored at the same time

that a request for compassionate release is being written. If a safe transition to family or friends cannot be ensured, community placement should be considered. It is critical that correctional systems develop relationships with long-term care facilities in the community and work toward breaking down barriers to enrollment of formerly incarcerated people.

Conclusion

Despite the passage of legislation such as the First Step Act of 2018, compassionate release policies continue to be underutilized in many prison systems throughout the USA. Health-care spending dramatically increases with age, with one quarter of Medicare expenditures occurring in the last year of life (Hogan *et al.*, 2001; Lubitz and Riley, 1993). The care of incarcerated older adults, many of whom have high rates of chronic disease and disability, has generated rising prison health-care costs and strained prison health-care infrastructures (Ahalt *et al.*, 2013). Used effectively, compassionate release policies hold the promise of reducing the cost of keeping people of advanced age or with serious, life-limiting illness incarcerated at the end of life, and simultaneously allow people who meet eligibility criteria to spend the end of life in the community with family and friends. Moreover, many Americans have an incarcerated loved one, including 1 in 4 women with a family member behind bars and 1 in 12 children who have experienced parental incarceration (Essie Justice Group; Gotsch, 2018). Allowing friends and family to be with their loved one at the end of life could help prevent their risk of developing complicated grief. Furthermore, despite even the best efforts made to mitigate the transmission of COVID-19 within carceral settings, early release remains a critical method for decompressing crowded settings and taking people at heightened risk of poor outcomes out of this high-risk setting (Barsky *et al.*, 2021; Wang *et al.*, 2021).

Unfortunately, there are many barriers to optimal use of compassionate release policies, ranging from the individual to the systems level (Prost and Williams, 2020). Health-care professionals play an important and central role in the compassionate release application process by providing medical declarations for their patients. Organizations such as FAMM (https://famm.org) have developed easy ways for health-care professionals to volunteer their expertise to support compassionate release efforts (see the FAMM Compassionate Release Clearinghouse https://crclearinghouse.org). Taking a stepwise, methodical approach to developing an accurate, compelling and easy-to-understand narrative of a patient's condition and health-care needs is critical to this effort (Figure 1).

Appendix 1

Sample: COVID-19 Accelerated Release Leer

The following leer documents the medical raonale for recommending this paent's immediate release in response to the risks posed by the ongoing COVID-19 pandemic. A copy has been forwarded to the appropriate authority and is included in the paent's medical record.

Mr. A is a 54-year-old man with severely reduced heart funcon resulng from mulple heart aacks in the past. His heart is extremely weak and he uses oxygen. He also has diabetes. He

has been hospitalized in the past 6 months for heart failure. He spends most of his me in bed or in a wheelchair due to shortness of breath and fague, and he uses a walker. He is short of breath even when at rest.

Mr. A's overall medical vulnerability and his medical condions mean he is at extremely high risk of crical care need and mortality if he contracts COVID-19. Studies have shown that cardiac disease alone and diabetes alone each carry a significantly increased risk of death or ICU admission from COVID-19 and we esmate Mr. A's risk to be substanally higher given that he carries both of these diagnoses and his heart failure is parcularly advanced.

Of note: our facility has 4 medical beds for paents in need of crical care, all of which are currently occupied. The contracted community hospital in our county has only 4 ICU beds and cases of COVID-19 have been idenfied in our surrounding communies.

Mr. A poses a high risk of requiring a medical bed or transfer to outside medical care even if he does not contract COVID-19. In his current stable status, Mr. A requires a weekly clinic appointment, close monitoring of his weight, frequent adjustment of medicaons, and twice monthly labs. Managing Mr. A's health requires significant medical resources from the correconal and community healthcare staff. These crical resources could be reallocated to the expected surge in COVID-19 cases upon Mr. A's release from custody.

Mr. A has expressed fear and increased anxiety related to a possible COVID-19 infecon to his healthcare providers and appears to have changed his behavior, refusing to come out of his cell for recreaon or day room and missing pill call while increasing the frequency of sick calls. These behavioral changes both elevate his risk of worsening health and/or death and increase healthcare staff me spent caring for Mr. A.

For these reasons, the healthcare team strongly recommends Mr. A's immediate release, pending an appropriate housing and medical discharge plan.

Appendix 2

Template: COVID-19 Accelerated Release Leer [*fill-in / check box where indicated*]

The following leer documents the medical raonale for recommending this paent's immediate release in response to the risks posed by the ongoing COVID-19 pandemic. A copy has been forwarded to the appropriate authority and is included in the paent's medical record.

Based on current knowledge, AGE is the greatest risk factor for ICU need and mortality from COVID-19. *[Paent name]* is a *[age]*-year-old who falls into the following high-risk category [*choose one*]:

Age 60 – 69

Age 70–79

Age 80 years or older**

**As currently understood, age 80 years or older confers the greatest risk of ICU need or death among all known risk factors. Being age 60 – 79 also substanally increases risks (risk increasing as age increases). Risks may also be elevated for those age 50–59.

Based on current knowledge, the following comorbid condions substanally increase risks for ICU need and mortality. This paent has the following high-risk comborbid condions:

Cardiovascular disease

Chronic lung disease (including COPD and asthma)

Diabetes

Hypertension Obesity

Liver disease

Immunosuppression

Other major medical condions that likely increase risk of serious illness, hospitalizaon, and/or mortality in the event of COVID-19 infecon: [*list other major medical condions such as chronic kidney disease, cancer, etc.]*

This paent is also male, which confers addional risk for severe illness due to COVID-19. *[include if appropriate]*

This paent has / has not *[circle one]* been hospitalized in the past year for:

Due to his/her poor health, this paent requires the following:

wheelchair walker

supplemental oxygen

assistance with basic funcons, such as bathing, dressing, feeding, transferring, and/or toileng other: *list* any other special needs the paent may have

In his/her current health status, this paent requires significant medical resources, including:

medical appointments weekly / monthly / every 2 months *[circle one]*

frequent adjustment of medicaons and/or laboratory evaluaon (e.g. at least once a month) frequent specialty care (e.g. at least every two months)

Given the above health factors, this paent poses a high risk of of crical care need and mortality if s/he contracts COVID-19. Our facility has _____ *[enter brief descripon of number of medical beds at your facility, if any].* If s/he were living in the community, this paent would be able to shelter-in-place and pracce appropriate physical distancing, which would significantly decrease his/her risk of contracng COVID-19. Such

physical distancing is not feasible in our instuon, *parcularly given that our facility has dormitory style housing units [include if appropriate].*

Of note, the nearest community hospital has _____ *[fill in number if known; can also write "<5" or "<10" if only an approximate number is known]* ICU beds *and cases of COVID-19 have been idenfied in our surrounding communies [include if appropriate].*

[If paent has changed his/her behavior in any way out of fear of COVID-19, enter a narrave descripon here.]

Managing this paent's health requires significant medical resources from correconal and community healthcare staff. Upon this paent's release from custody, these crical resources could be reallocated to care for the expected surge in paents affected by COVID-19.

For these reasons, the healthcare team strongly recommends this paent's immediate release, pending an appropriate housing and medical discharge plan.

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Further reading

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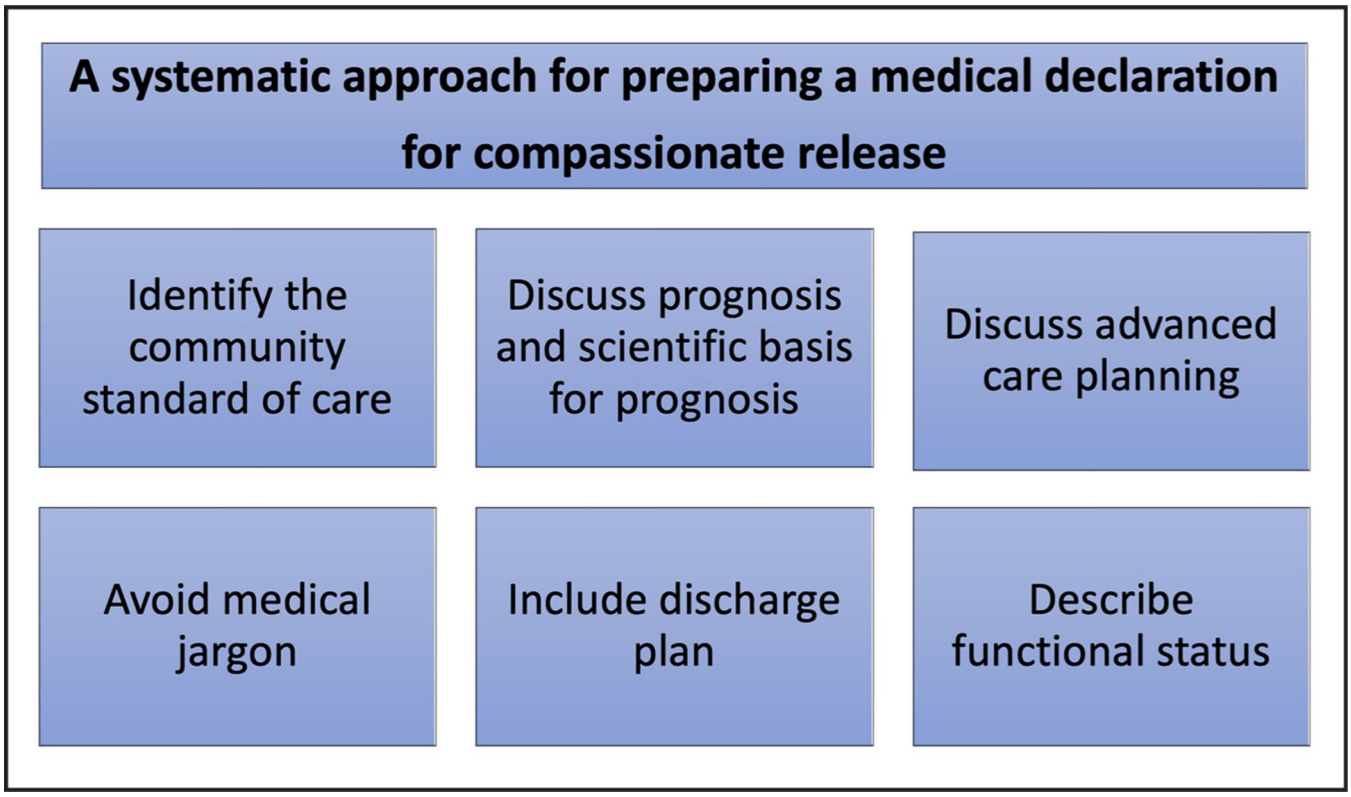

Figure 1.
Summary of recommendations for preparing a medical declaration for compassionate release