WHY AM I HERE: REDEFINING COMPASSIONATE RELEASE TO ADDRESS THE DEMENTIA CRISIS IN PRISONS

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Our prison population is increasing and aging at a rate that will undoubtedly require shifts in policy. One component of this crisis is how we will manage elderly prisoners who are suffering from dementia. This paper will demonstrate how prison settings are currently failing at adequately addressing the needs of inmates with dementia and will explore the retributive nature of the criminal justice system and how that negatively interacts with the unique circumstances of a dementia diagnosis. Through an Eighth Amendment lens, this paper will explore legal frameworks for compassionate release and reduced sentencing as it relates to dementia. To account for the lack of compassionate release reform, this paper will also recommend holistic approaches to enhancing care within the prison system for people struggling with dementia.

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I. Introduction

The elderly prison population has grown faster than any other age group in prison *and* the population of non-incarcerated older Americans.[2] One study shows that from 1999 to 2016, the number of state and federal prisoners aged 55 and older increased 280%.[3] Another study shows that between 2007 and 2010 the number of state and federal prisoners aged 65 and older grew at a rate 94 times the overall prison population, making it the fastest growing demographic.[4] The extraordinary size of the United States' jail and prison population reflects the inevitable consequences of more than three decades of "tough on crime" policies like mandatory minimum sentences and "three strikes" laws, in which the punishments for repeat offenders severely ratchet up.[5] For instance, the Violent Crime Control and Law Enforcement Act of 1994, commonly known as the 1994 Crime Bill, incentivized states to build more prisons and keep people in those prisons for a longer percentage of their sentences.[6] These policies largely contribute to why many people who went to prison decades ago are still there.[7]

Compounding this already overburdened system is the fact that many aging prisoners are at risk of developing dementia. "Dementia" is a meaningful decline in neurocognitive ability as a result of illness or injury.[8] An estimated 6.2 million Americans aged 65 and older currently have dementia and that number is projected to increase to 13.8 million by 2060.[9] As the U.S. population ages and rates of dementia increase, the prevalence of dementia among persons involved in the criminal legal system can also be expected to increase. It is projected that between 70,341 and 211,020 of the estimated 400,000 incarcerated elderly in 2030 will develop dementia.[10] No national study has been done to estimate the current prevalence of dementia among the U.S. prison population,[11] but one study found that 8% of the older prison population in the United Kingdom has suspected dementia or mild cognitive impairment.[12] A senior officer at the Federal Medical Center Devens in Massachusetts, which houses federal prisoners who require medical care, estimates that 90% of the men he oversees don't know what they did or why they are there; one example being that an inmate is convinced he is actually the warden of the institution.[13] Moreover,

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[2] Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, J. Am. Geriatrics Soc'y 1150, 1157 (2012).
[3] Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew Trusts (Feb. 20, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs. Emily Widra, *The aging prison population: Causes, costs, and consequences*, Prison Policy Initiative (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/) ("Younger inmates did not grow at this same rate, resulting in older inmates growing from 3 percent of the total prison population to 15 percent from 1991 to 2021.")
[4] *Old Behind Bars: The Aging Prison Population in the United States*, Hum. Rts. Watch (Jan. 27, 2012), https://www.hrw.org/report/2012/01/28/old-behind-bars/aging-prison-population-united-states.
[5] *Id.*
[6] Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, Brennan Ctr. for Just. (Sept. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice.
[7] Human Rights Watch, *supra* note 4.
[8] *About Dementia*, Ctr. for Disease Control (Aug. 17, 2024), https://www.cdc.gov/alzheimers-dementia/about/index.html.
[9] *2021 Alzheimer's disease facts and figures*. Alzheimers Dement. (March 23, 2021), https://pubmed.ncbi.nlm.nih.gov/33756057/.
[10] Rachel E. Lopez, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 Fed. Sent'g Rep. 264, 264 (2020).
[11] Tina Maschi et al., *Mental health, trauma, and stress among older adults in the criminal justice system: a review of the literature with implications for social work*, 54 J. Gerontological Soc. Work 390, 393 (2011).
[12] Katrina Forsyth et al., *Dementia and mild cognitive impairment in prisoners aged over 50 years in England and Wales: a mixed-methods study*, Health Serv. and Delivery Rsch., June 2020, at 14, https://www.journalslibrary.nihr.ac.uk/hsdr/hsdr08270#/abstract.
[13] Katie Engelhart*, I've Reported on Dementia for Years, and One Image of a Prisoner Keeps Haunting Me*, N.Y. Times (Aug. 11, 2023), https://www.nytimes.com/2023/08/11/opinion/dementia-prisons.html.

only 9% of social service organizations in the United States that provide support for older adults have programs for older prisoners; suggesting that our approach to elderly care in prison is nevertheless lacking.[14] Given these alarming numbers, the American Bar Association adopted a resolution specifically calling for government agencies to address the issue of people involved in the criminal justice system who are living with dementia.[15]

Prisons will soon, if not already, be filled with elderly inmates who do not even understand why they are there. Even outside of the prison setting, it is challenging to provide equitable care for people living with dementia.[16] But the prison setting introduces unique hurdles to managing dementia including confinement, behavioral issues, and simply giving and following proper directions. This crisis calls for a pause and deep dive into the Eighth Amendment implications of holding people in prison who can no longer remember the purpose of their punishment or what they did to result in the punishment. Keeping people who are struggling with their daily reality due to cognitive impairment in prison does nothing for a system focused on rehabilitation or deterrence.

This paper begins with an overview of current trends in the aging prison population and cognitive decline generally. The paper outlines current compassionate release (or conditional medical release) policies, focusing on Florida as a case study. The discussion then turns to an examination of whether the Eighth Amendment can provide a basis for redefining compassionate release and whether current compassionate release policies ignore crucial Eighth Amendment jurisprudence. I argue that the Eighth Amendment requires compassionate release statutes to include a dementia diagnosis as a reason permitting conditional medical release. Moreover, elderly inmates who otherwise qualify for compassionate release but remain in prison due to a lack of resources run up against Eighth Amendment jurisprudence. The paper then covers how dementia intersects with Eighth Amendment arguments and sentencing. The paper concludes by outlining ways in which prison systems must be enhanced, including improving hospice care and dementia care within prison walls.

II. Accelerated Aging in Prison & Cognitive Decline

Not only is our prison population rapidly aging, but time spent in prison is significantly more costly for one's body. Incarcerated life accelerates the aging process, such that many longtime prisoners appear more than a decade older than their chronological ages. In fact, each year spent in prison takes two years off an individual's life expectancy.[17] For example, despite full retirement age being considered 67 by the Social Security Administration[18], Florida Statute § 944.02 defines people in prison as elderly if they are 50 years of age or older. And research suggests the average 59-year-old inmate presents geriatric conditions similar to non-inmates 75 or older.[19]

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[14] *Supporting America's Aging Prison Population: Opportunities & Challenges for Area Agencies on Aging*, NAT'L ASS'N OF AREA AGENCIES ON AGING (Feb. 23, 2017), https://www.ncchc.org/ wp-content/uploads/n4a_AgingPrisoners_23Feb2017REV-2.pdf.

[15] *ABA House adopts host of new policies, including support for ethics code for U.S. Supreme Court*, A.B.A. (Feb. 6, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/midyear-house-actions-recap/.

[16] *2021 Alzheimer's disease facts and figures*, *supra* note 9.

[17] Emily Widra, *Incarceration shortens life expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.

[18] *Retirement Benefits 2024*, SOC. SEC. ADMIN., (2024), https://www.ssa.gov/pubs/EN-05-10035.pdf.

[19] Jesse Scheckner, *Recidivism, elderly health problems among inmates are serious issues in Florida. This nonprofit is offering solutions*, FLA. POL. (Oct. 18, 2023), https://floridapolitics.com/archives/640044-recidivism-elderly-health-problems-among-inmates-are-serious-issues-in-florida-this-nonprofit-is-offering-solutions/(citing Thomas Baker, *Addressing the Elderly Prison Population in Florida: Reducing Correctional Costs and Improving Lives*, FLA. POL'Y PROJECT(Oct 2, 2023), https://floridapolicyproject.com/wp-content/uploads/2023/11/Report-FPP-Elderly-Report_Final10.15.23.pdf.

It may seem obvious that one's quality of life in prison is drastically different from the outside, but older prisoners face an unusually harsh reality. Adjustment to and life within prison is more challenging for older inmates for several reasons. Older inmates have very different needs than the rest of the prison population and often require more orderly conditions, emotional feedback, and familial support than younger inmates.[20] To compound these issues, most prisons were not designed to house older inmates or inmates who struggle with mobility and are, therefore, physically setup in very dysfunctional ways for someone who struggles with walking or might get lost if all of the hallways look similar .[21]

There are also many psychosocial and economic ways in which aging prisoners experience disadvantages. One unique way in which older prisoners experience a much different prison environment is with visitation. "Visitation while in prison is one of the few opportunities inmates have for direct contact with their outside social networks, and its benefits for improving behavior and reducing some of the stressors associated with prison life have been well documented."[22] However, older people are less likely to be visited during their time in prison.[23] This decreased social interaction can exacerbate cognitive decline. This also limits elderly prisoners in finding and communicating with trusted agents to assist in planning and carrying out necessary advance health care and estate planning documents, a privilege that elders outside of prison can engage in and that is highly recommended for aging gracefully and autonomously.[24] Moreover, holistic estate planning enhances the ability of families to pass down generational wealth.[25] The inability to plan for aging disadvantages lower-income families and often results in title issues which further deprive families from realizing the benefits of their ancestor's labor during their lifetime.[26]

Overall, older adults in prison are much more costly to taxpayers than younger adults in prison given the significant health care issues which arise with age.[27] "Facilities that house more people over 50 spend on average five times more on medical care and 14 times more on prescription drugs."[28] "Older adults use more prison healthcare services than younger adults and are commonly treated in outside community hospitals for costly acute events related to chronic disease."[29] The National Institute of Corrections estimates that the annual cost of incarcerating elders with chronic conditions is two to three times the cost of other incarcerated age groups.[30] And in 2013, the Federal Bureau of Prisons (BOP) spent 19% of its total budget to incarcerate older adults.[31] Moreover, from 2001 to 2018, over 30,500 elderly people died in prison, 97% of

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[20] Jessica Rich & Julie N. Brancale, *Behind the gray walls: an examination of prison visitation among older inmates*, 5 J. CRIME AND JUST., 662, 662 (2024).
[21] *Id.* at 663
[22] *Id.*
[23] *Id.*
[24] *See* The Miller Elder Law Firm, The Future of Aging Gracefully is Life Care Planning, YOUTUBE (Apr. 14, 2023), https://www.youtube.com/watch?v=5GAxZwsoWPQ
[25] *See generally* Danaya C. Wright, *Trapped Between the URPTODA and the UPHPA: Probate Reforms to Bridge the Gap and Save Heirs Property for Modest-Wealth Decedents*, 127 PENN ST. L. REV. 749, 757 (2023).
[26] *Id.* at 756.
[27] Tina Chiu, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*, VERA INST. OF JUST., (April 2010), https://www.vera.org/downloads/publications/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.
[28] Thomas Baker, *Addressing the Elderly Prison Population in Florida: Reducing Correctional Costs and Improving Lives,* FLA. POL'Y PROJECT (Oct. 2, 2023), https://floridapolicyproject.com/wp-content/uploads/2023/11/Report-FPP-Elderly-Report_Final10.15.23.pdf (citing U.S. DEP'T OF JUST.,*The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, OFFICE OF THE INSPECTOR GENERAL, https://oig.justice.gov/reports/2015/e1505.pdf. (Feb. 2016)).
[29] Williams, *supra* note 2, at 1150.
[30] McKillop & Boucher, *supra* note 3, at 5.
[31] *Id.*

which were due to illnesses that are undoubtedly exacerbated within the prison setting.[32] Overwhelmed prisons paired with inadequate medical care lead to situations like those outlined in the quote below, from an older prisoner.

> When I had my last surgery in prison, um, there was a 93-year-old man, white guy, he was a nice guy. He was in there, I believe, for, um, assault. He's been in there for like 17 years or 18 years, but this guy is in a hospital. He can't even hold his bowels, so I'm like what is a guy like this going to do? What is he going to do? He can't, he can barely walk. He's been in a hospital, in a hospital or infirmary, for a year. What is he going to do? You'll see guys in there that just sit there staring into space.[33]

While the health care implications of aging in prison are costly enough, time spent in prison also directly increases the possibility of developing dementia.[34] Prison provides an overall lack of stimulation and generally poor quality of life, factors that increase the likelihood of cognitive decline.[35] This puts elderly prisoners more at risk because having dementia makes one more vulnerable to abuse and bullying, including sexual abuse, in part due to the erratic and unpredictable behavior that encompasses the condition.[36] The inability to follow rules and directions often aggravates other prisoners and staff in an environment that is already tense. If inmates become aggressive toward staff, they're more likely to be reprimanded.[37] Confused behavior associated with dementia may often appear as though one is acting out, resulting in reprimand or punishment. An elderly prisoner with dementia is more likely to be noncompliant with correctional rules and directions (as simple as not wearing slippers outside of the cell block), but that noncompliance is likely to be treated as a "disciplinary issue rather than a medical issue."[38] Moreover, many behaviors related to dementia (such as not being able to follow directions) coupled with a "highly volatile prison environment may place persons at risk of becoming victims or perpetrators of violence."[39]

Often, vulnerabilities within the prison setting lead to individuals being placed in solitary confinement or isolated.[40] It is estimated that "more than 44,000 people 45 and older experience solitary confinement in state prisons each year."[41] Solitary confinement conditions "shorten lives and can be detrimental to physical, mental, and emotional health."[42] This is often one of the worst

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[32] E. Ann Carson, *Mortality in State and Federal Prisons, 2001-2018 – Statistical Tables*, U.S. DEP'T OF JUST. at 3-4, 12 (April 2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf.
[33] Tini Maschi & Keith Morgen, *Aging Behind Prison Walls: Studies in Trauma and Resilience*, COLUM. U. PRESS (2021), http://www.jstor.org/stable/10.7312/masc18258.
[34] Bryce Stoliker et al., *Older People in Custody in a Forensic Psychiatric Facility, Prevalence of Dementia, and Community Reintegration Needs: An Exploratory Analysis,* 10 HEALTH AND JUST. 4 (January 24, 2022),https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-022-00168-8.
[35] *Id.* at 6.
[36] Tina Maschi et al., *Forget Me Not: Dementia in Prison*, 52 THE GERONTOLOGIST 441, 444 (2012).
[37] *Id.*
[38] A.B.A. Comm'n on Law & Aging et al., *Persons Living with Dementia in the Criminal Legal System,* A.B.A 27 (2022), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-dementia-crim-just-rpt.pdf.
[39] Maschi, *supra* note 36, at 444.
[40] *Id.*
[41] Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POLICY INITIATIVE (August 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/#:~:text=Aging%20throughout%20the%20criminal%20legal%20system&text=Meanwhile%2C%20older%20people%20make%20up,%25%20to%20a%20whopping%2015%25.
[42] *Id.*

solutions for someone struggling with dementia because it will likely increase paranoia. Extensive research shows that one of the most fruitful activities for elders struggling with dementia is something that involves creativity and socialization.[43] The BOP does not provide programming specifically focused on elderly inmates and elderly inmates often struggle to become involved in regular programming due to having already completed most of the eligible programs.[44] This leads to elderly inmates being more idle and often not participating in any activities or programs at all.[45]

Proper treatment for dementia is especially challenging inside prison settings.[46] And detection is very difficult, resulting in many cases going unnoticed. Moreover, environmental influences, like the stress of living in prison, can easily exacerbate symptoms of dementia.[47] Federal prisons do not routinely screen older people for Alzheimer's disease and other forms of dementia unless they exhibit symptoms, which the rigidity and monotony of institutional life can often aid in masking.[48] In order to diagnose and treat dementia, health care workers evaluate an individual's activities of daily living (ADLs). These include activities relating to personal care and include bathing or showering, dressing, getting in and out of bed or a chair, walking, using the toilet, and eating.[49] It is extremely difficult to properly assess ADLs within a prison setting because of the constraints on daily life.[50] And failing many of these ADLs may more often be seen as a reason for punishment rather than a requirement for proper treatment. For example, people with dementia often wander[51] and "experience changes in how they respond to sex, be inappropriate or aggressive, mistake a person for someone else, or behave sexually in public."[52] These kinds of actions will often lead to punishment within the prison setting if not seen as a symptom of disease.

One common band-aid for dementia is medication. This is true of both long-term care facilities outside of the prison setting as well as within prisons.[53] For example, in nursing homes, people are given antipsychotic drugs despite requesting not to be placed on them, and often without the informed consent of family members.[54] This lack of informed consent is no-doubt exacerbated in a carceral setting.[55] Moreover, many common nonpharmacological treatments for dementia, such as behavior modification, scheduled toileting, and massage are all much more difficult to administer within a prison setting.[56]

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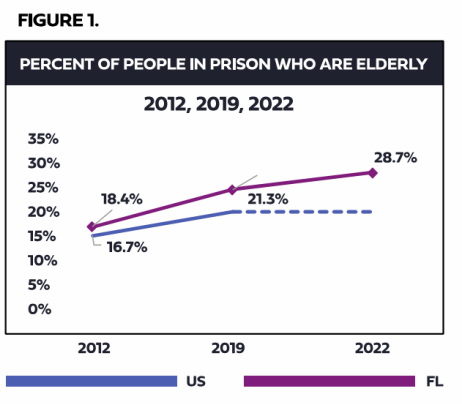
[43] *See* Opening Minds Through Art, *Research-Backed,* https://scrippsoma.org/.
[44] U.S. DEP'T OF JUST., *supra* note 28, at 31.
[45] *Id.*
[46] *See* Anne Feczko, *Dementia in the incarcerated elderly adult: Innovative solutions to promote quality care*, 26 J. AM. ASS'N NURSE PRACT. 640 (2014).
[47] *Repetition*, ALZHEIMER'S ASS'N., https://www.alz.org/help-support/caregiving/stages-behaviors/repetition (last visited Sept. 14, 2024).
[48] Engelhart*, supra* note *13.*
[49] *Activities of Daily Living (ADLs): Activities of daily living are activities related to personal care*, CTR. FOR MEDICARE & MEDICAID SERVS. (2008), https://www.cms.gov/research-statistics-data-and-systems/research/mcbs/downloads/2008_appendix_b.pdf.
[50] Feczko, *supra* note 45, at 642.
[51] Maura Ewing, *When Prisons Need to Be More Like Nursing Homes*, THE MARSHALL PROJECT (Aug. 27, 2015), https://www.themarshallproject.org/2015/08/27/when-prisons-need-to-be-more-like-nursing-homes.
[52] *Dementia and Challenging Sexual Behavior*, ALZHEIMER'S SOC'Y, https://www.alzheimers.org.uk/get-support/daily-living/challenging-sexual-behaviour-dementia (last visited Sept. 14, 2024.)
[53] *US: Nursing Homes Misuse Drugs to Control Residents*, HUM. RIGHTS WATCH (Feb. 5, 2018), https://www.hrw.org/news/2018/02/05/us-nursing-homes-misuse-drugs-control-residents#:~:text=The%20use%20of%20antipsychotic%20drugs%20without%20permission%20from%20the%20resident,informed%20consent%20for%20these%20medications.
[54] *Id.*
[55] *How Nursing Homes in the United States Overmedicate People with Dementia*, HUM. RIGHTS WATCH (Feb. 5, 2018), https://www.hrw.org/report/2018/02/05/they-want-docile/how-nursing-homes-united-states-overmedicate-people-dementia.
[56] *Id.*

Seeking proper screening and treatment for dementia while in prison presents numerous hurdles. For example, experts recommend an MRI of the head for suspected dementia patients.[57] This means that patients likely have to be transported off-site by escorts, and administration will have to work around standard prison procedures like head counts, wrist restraints, and waist chains.[58] Further, any metal restraints would need to be removed or replaced by plastic devices for the MRI.[59] Prison administration would likely question the necessity of this hassle considering the time, expense, and safety risks involved.[60] But if such procedures are standard practice outside of the prison setting and are recommended by clinicians, does not following them result in an Eighth Amendment violation?[61]

III. Florida Compassionate Release as a Case Study

The combination of a rapidly increasing elderly prison population and a lack of access to adequate health care has led to a crisis within Florida's prison systems, whose elderly prison population is growing even faster than the national rate (Figure 1).[62] Florida has the third largest correctional system in the United States, behind only Texas and California, but leads the nation in the number of older inmates.[63] Florida also effectively abolished parole in 1983.[64] The abolishment of parole, along with many tough-on-crime laws, has led to Florida having an incarceration rate of 795 per 100,000 people, locking up a higher percentage of people than any democratic country on Earth.[65]



[66]

As of 2022, approximately 29% of Florida prisoners are considered elderly.[67] Moreover, "healthcare accounts for over 20% of the daily costs of housing people in Florida's prisons or about $18 per elderly inmate per day."[68] In contrast, California, which runs multiple prison facilities that

[57] Feczko, *supra* note 46, at 644-45.
[58] *Id.* at 645.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Thomas Baker, *Addressing the Elderly Prison Population in Florida: Reducing Correctional Costs and Improving Lives*, FLA. POL'Y. PROJECT (Oct. 15, 2023), https://floridapolicyproject.com/wp-content/uploads/2023/11/Report-FPP-Elderly-Report_Final10.15.23.pdf, Figure 1.
[63] *Annual Report Fiscal Year 2021-2022*, FLA. DEP'T. OF CORRECTIONS (2022), https://www.floridaoig.com/library/Annual_rpts/2021-2022/2021-22-FDC-Annual%20Report.pdf.
[64] *Release Types,* FLA. COMM'N. ON OFFENDER REV., https://www.fcor.state.fl.us/release-types.shtml (last visited Sep. 14, 2024).
[65] *Florida Profile*, PRISON POL'Y INITIATIVE (2023), https://www.prisonpolicy.org/profiles/FL.html.
[66] Baker, *supra* note 62, at 3 Figure 1.
[67] *Id.*
[68] Baker, *supra* note 62, at 4.

specifically address the needs of elderly inmates, expects to spend about $26,000 per inmate in their specialized facilities next year, which house inmates experiencing cognitive decline.[69]

Prisons in the United States were not designed for short-term placement, rather, they were designed to deter those that committed offenses from committing future crimes.[70] This principle completely unravels in the context of elderly prisoners suffering from dementia. Research has conclusively shown that long before age 50, most people have outlived the years in which they are most likely to commit crimes.[71] Older inmates are also significantly less likely to reoffend, according to a July 2022 U.S. Sentencing Commission study, which found older offenders' recidivism rates sat at 21% compared to 53% for those under 50.[72] And recidivism rates in Florida are lowest for the 60 and up population.[73]

Given Florida's unique position, one may expect increased attention toward developing policies which address the aging prison population. However, many systems which other states have revised and supported, like compassionate release statutes and hospice programs within prisons, are lacking in Florida.[74] While elderly inmates, on average, cost far more to take care of than younger inmates, adequately addressing dementia care requires a whole host of resources outside of simple things like just providing adequate medical care and making facilities more accessible for elderly inmates with ramps and handrails. Holistic care requires prison employees who are trained in dementia awareness and management systems which address the cognitive hurdles of navigating a day while experiencing dementia. People running prisons are usually the first to point out that they desperately need more funding to retrofit current facilities to meet these demands, and that hiring appropriately trained staff for adequate wages has become a huge issue.[75] Therefore, solving this issue in Florida requires much more than simply updating statutes and regulations. It requires resources and direct funding.

Florida currently incarcerates over 8,600 people 60 or older.[76] Releasing even a fraction of the people over 60 could result in millions of dollars in savings for Florida taxpayers with minimal risk to public safety considering recidivism rates for the elderly.[77] However, it is difficult to ensure that the compassionate release systems which are in place are adequately followed because there is little oversight of the process, and policies vary widely. [78]

Florida's Conditional Medical Release (CMR) statute has not undergone substantial change since its creation in 1994. Unlike conditional release, conditional *medical* release specifically addresses the challenge of release for medically vulnerable individuals.[79] As it currently stands, Florida's CMR statute does not include language specific to dementia or cognitive decline, but

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[69] Sharon Bernstein, *California deals with dementia among aging inmates*, REUTERS (June 19, 2018), https://www.reuters.com/article/business/healthcare-pharmaceuticals/california-deals-with-dementia-among-aging-inmates-idUSKBN1JF1XH/.
[70] Maschi, supra note 36*, at* 443.
[71] *See* Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 558–59 (1983).
[72] Kristin M. Tennyson et al., *Older Offenders in the Federal System*, U.S. SENT'G COMM'N at 5 (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Older-Offenders.pdf.
[73] Baker, *supra* note 62, at 6.
[74] *See infra* Pt .VI. b. for a discussion on policies in California, New York, and Massachusetts.
[75] Meg Anderson, *The U.S. Prison Population is Rapidly Graying. Prisons Aren't Built for What's Coming*, NPR (Mar. 11, 2024), https://www.npr.org/2024/03/11/1234655082/prison-elderly-aging-geriatric-population-care.
[76] Baker, *supra* note 62, at 9.
[77] *Id.*
[78] Margaret Holland et. al., *Access and utilization of compassionate release in state departments of corrections,* MORTALITY 49, 58 (April 2020).
[79] FLA. COMM'N. ON OFFENDER REV., *supra* note 64.

such medical issues are not necessarily barred from being raised under the statute.[80] The CMR statute also fails to provide a reliable and consistent procedure to ensure eligible inmates are being identified and recommended for release consideration. The statute authorizes the Florida Commission on Officer Review (FCOR) sole discretionary power to deny, grant, or revoke an inmate's conditional medical release.[81] Three commissioners currently sit on FCOR.[82] Further, the statute only permits the Florida Department of Corrections (DOC) to refer an inmate for conditional medication release.[83] However, the statute lacks specificity regarding who within DOC has the power to identify and refer inmates for consideration. Due to the lack of specificity, DOC promulgated an administrative code designating the "Chief Health Officer of an institute" as the DOC employee who must identify a potentially eligible inmate.[84] The Chief Health Officer then refers the inmate to the "Director of Health Services."[85] Then, the Director of Health Services has the discretion to reject the recommendation, defer the referral until further investigation, or refer the inmate for consideration by FCOR.[86] This creates a double-tier discretionary regime in which an eligible inmate must first be subjectively identified and preliminarily screened by DOC prior to being referred to FCOR for full and complete consideration. Under the statute, inmates do not have the right to conditional medical release, to a medical evaluation to determine eligibility, or to appeal a denial of release. [87]

Typically, the process of a CMR hearing goes as follows: the moderator identifies the eligible candidate by name, any parties in support of the inmate's medical release have ten minutes to offer any testimony, then any parties in opposition of the inmate's medical release have ten minutes to offer any testimony. Then each commissioner states their ruling, and in the event the release is granted, one of the commissioners in favor of release details the conditions of the inmate's release.[88] There is no opportunity to offer a rebuttal argument.[89]

Moreover, the chances of finding yourself in front of FCOR are extremely low. Over the past five years, FCOR on average grants CMR to half the inmates who are referred, with an average of 68 inmates being referred per year.[90] It is not uncommon to go before the board multiple times and still be denied CMR.[91] The low referral numbers are also inconsistent with the elderly

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[80] FLA. STAT. § 947.149 (2024).
[81] *Id.* at § 947.149(3).
[82] *Organization*, FLA. COMM'N ON OFFENDER REV. (last visited Sept. 13, 2024), https://www.fcor.state.fl.us/overview.shtml).
[83] FLA. STAT. § 947.149(3).
[84] FLA. ADMIN. CODE §§ 33-401.201(2) (2002).
[85] *Id.*
[86] *Id.*
[87] FLA. STAT. § 947.149(2) (2024).
[88] Telephone call: Florida Commission on Offender Review Vote (Feb. 21, 2024) (on file with author). All commission voting schedules are publicly available and anyone can call in to a hearing(https://fpcweb.fcor.state.fl.us/Schedule.aspx.)
[89] *Id.*
[90] This average is taken from FCOR 2018–19 to 2022–23 Annual Reports. FCOR grants a certain inmates release from those who were referred, each year is as follows: FY 2018–2019 38/76 granted CMR; FY 2019–2020 35/65 granted CMR; FY 2020–2021 46/79 granted; FY 2021–2022 26/65; FY 2022–2023 28/57; for an average of 35/68 inmates being granted CMR. https://www.fcor.state.fl.us/reports.shtml.
[91] Tina Maschi et al., *Analysis of United States Compassionate and Geriatric Release Laws: Towards a Rights-Based Response for Diverse Elders and Their Families and Communities*, FORDHAM U., 35 (May 9, 2015).
Jules Sauvageau, a 59-year-old man in prison for attempted murder:

> I started stealing when I was 15. I robbed banks. I always worked alone. In 1994, I was caught for attempted murder. I had mixed booze and medications. Eighth months ago I got married to a woman my age and it's going well. That's why I want my release, to live with her. In 1996 I got lung cancer. Now, I'm getting treated but they won't release me. They're waiting for me to die. I lost 50 pounds since October 1999. I regret committing the crime that sent me here, but I think the system isn't fair for the situation I'm living in now.

population in prisons. Part of this may be a result of the decision to recommend an inmate to FCOR resting with the Chief Health Care Officer and Director of Health Services.[92] An inmate's family can only encourage DOC to recommend the inmates release through calls, emails, and letters.

The exclusive responsibility of identifying eligible inmates, and a lack of awareness of the program in general, prevents eligible individuals from making a direct recommendation of an inmate to FCOR. For example, Bob, an inmate serving the remainder of his 5-year sentence at Jefferson Correctional Institute in Monticello, Florida (C.I.), works as a medical orderly and emergency response assistant at the institute's medical center. [93] Bob explained that the vast majority of the inmates currently occupying beds on the medical unit are elderly suffering from dementia or are stroke victims, and that rarely does the unit see a younger inmate.[94] Only 12 beds make up this medical unit, two of which are isolation beds for inmates in administrative confinement or who otherwise pose a threat but still require medical attention.[95] Currently, some patients on the unit include a patient who suffers from repeated seizures, a paraplegic patient with Multiple Sclerosis, a stroke victim who lost the use of one arm, and two patients with portable defibrillators.[96] When asked about conditional medical release, Bob stated he heard about the program but did not know any details regarding eligibility or the process.[97]

While simple statutory modifications can be seen as a straightforward remedy, the reality of a successful whole-scale amendment to Florida's CMR system is likely years away. During the 2024 legislative session, Rep. Dianne Hart introduced a general bill that revised the definition of "permanently incapacitated inmate" to include physical disability, disability, impairment, or handicap.[98] Upon enactment, this revision would broaden the scope of who can be considered a "permanently incapacitated inmate," thereby allowing a wider range of inmates to be eligible for consideration, including a dementia diagnosis. Unfortunately, this bill died in the Senate Criminal Justice Subcommittee.[99] Nevertheless, it is important to note that several components of Florida's CMR statute can be easily improved to better address the rapidly increasing elderly population in Florida's prisons.

a. Expand Referrals

First, the statute should permit non-DOC employees to formally refer eligible inmates. Then FCOR can make the final determination on "whether or not to grant conditional medical release and establish additional conditions" of release.[100] Illinois has adopted such an approach and has experienced a shift from institution referrals to inmate-filed referrals, which enhances

> There should be improvements. Especially when someone has cancer. They should let them go live with their family. I was twice refused conditional release.

[92] REGGIE GARCIA, HOW TO LEAVE PRISON EARLY: FLORIDA CLEMENCY, PAROLE, AND WORK RELEASE 33 (2015).
[93] Interview with anonymous inmate.
[94] *Id.*
[95] FLA. ADMIN. CODE. ANN. r. 33-602.220 (2022). "Administrative Confinement – refers to the temporary separation of an inmate from inmates in general population in order to provide for security and safety until such time as a more permanent inmate management decision process can be concluded, such as a referral to disciplinary confinement, close management, protective management, or a transfer."
[96] Interview with anonymous inmate.
[97] *Id.*
[98] H.B. 233, 2024 Leg., Reg. Sess. (Fla. 2024).
[99] HB 233: Treatment of Inmates, FLA. SENATE (Mar. 8, 2024), https://www.flsenate.gov/Session/Bill/2024/233/?Tab=BillHistory.
[100] FLA. STAT. 947.149(3) (2023).

inmate autonomy.[101] Moreover, by allowing more parties to recommend an inmate, Florida could alleviate the burden shouldered by the Chief Health Officer of an institute. The Chief Health Officer is responsible for all inmates in their institute and must ensure that each inmate receives a current medical, dental, and mental assessment.[102] Unencumbered from having to make the medical determination of eligibility and a risk-assessment of the inmate's dangerousness, the Chief Health Officer can focus on his or her primary responsibilities.[103]

b. Include Dementia and Cognitive Decline Factors for CMR Eligibility

Second, although Florida amended the CMR statute in 2015 to include an elderly and infirm eligibility definition,[104] the statute should also address release for geriatric inmates suffering from non-terminal illnesses, like dementia. An inmate is determined to be "terminally ill" when he or she has a condition caused by injury, disease, or illness that "renders them terminally ill to the extent there can be no recovery and death is imminent."[105] Language narrowly construing what is considered terminally ill significantly reduces the number of inmates eligible for conditional medical release who are otherwise suffering in prison for no retributive purpose.

Florida should expand the eligibility criteria to include inmates who are suffering from a permanent, debilitating, non-terminal illness to broaden the pool of eligible inmates and formally include diagnosable medical conditions such as dementia, recurrent strokes, and severe permanent medical or cognitive disability as a third category of eligibility.[106] The new eligibility requirement could be titled "chronically ill" to specifically permit elderly inmates an avenue for requesting medical release.[107] In conjunction with an added eligibility category, Florida should define "imminent" in order to establish a governing timeframe for assessment and decision-making.[108] A defined time frame will afford DOC, or any initiating individual, adequate time to initiate the referral process. Further, the approach of a generous time frame will likely result in eliminating the possibility that an inmate will pass away prior to FCOR consideration.

c. Reporting

Third, the CMR statute should provide guiding considerations and mandate reporting of FCOR's determinations. The Florida Sunshine Laws establish a basic right of access to most meetings of "boards, commissions, and other governing bodies of state and local governmental agencies or authorities."[109] These statutes are construed in favor of public access and are comprehensive but require no specific information to be provided by individual agencies.[110] FCOR

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[101] *Joe Coleman Act 2022 Annual Report*, ILL. PRISONER REV. BD.(2022), https://prb.illinois.gov/content/dam/soi/en/web/prb/documents/22JCanlrpt02.pdf.
[102] *Health Services*, FLA. DEP'T CORR. https://fdc.myflorida.com/org/health.html (last visited Sep. 15, 2024).
[103] FLA. STAT. § 947.149(1) (2023).
[104] Reggie Garcia, *Prison Conditional Medical Release: Good for Public Health and Safety, Taxpayers and Inmates*, 2020, FLA. DEFENDER 18, 20.
[105] FLA. STAT. § 947.149(1) (2023).
[106] 730 III. COMP. STAT. 5/3-3-14 (2023).
[107] Families Against Mandatory Minimums, *Special Needs Parole*, FAMM COMPASSIONATE RELEASE (Mar. 2022) https://famm.org/wp-content/uploads/2018/06/Colorado_Final.pdf. This portion is modeled after Colorado's Special Needs Parole statute since neither Illinois nor Florida adequately provide for exclusive release criteria for elderly inmates.
[108] Families Against Mandatory Minimums, *About Us*, FAMM (2024), https://famm.org/about/.
[109] Office of Attorney General Ashley Moody, *The "Sunshine" Law*, MY FLA. LEGAL, https://www.myfloridalegal.com/open-government/the-quotsunshinequot-law (last visited August 15, 2024).
[110] *Id.*

publishes an Annual Report that reports the number of inmates granted or denied conditional medical release for that fiscal year. [111] However, unlike, for example, the Illinois Prisoner Review Board, FCOR does not have to detail under which eligibility criteria the inmate was granted relief.[112] Creating guidelines for how FCOR determines eligibility for cognitive decline would assist all parties involved in having a better idea of how to navigate the CMR system and how individuals can best advocate for their loved ones. Providing guidelines will encourage the review board to evaluate each inmate's recommendation according to the same factors, leading to more consistent results.

However, even if statutory changes are adopted, this does not solve the resource issue of ensuring that inmates who are released are properly taken care of given their significant medical needs. As discussed below, the Eighth Amendment provides a framework for this further analysis.

IV. Dead Time Incarceration & Compassionate Release

Even people with dementia who do obtain early release may still find themselves stuck in prison due to a lack of resources outside the prison setting and an inability to find appropriate housing and medical care.[113] DOC is tasked with developing a "release plan" for each individual, and such a plan cannot be developed without outside resources.[114] This becomes an impossible task for DOC because many elder prisoners have lost contact with family members and don't have anyone on the outside able to provide or fund round-the-clock care.[115] And nursing homes are often unwilling to house people on compassionate release.[116] It is clear that CMR may be inappropriate for an inmate with severe medical needs if that person has no family home, nursing home, or other care facility to go to because prison may be the only place where their needs can be adequately met. DOC has expressed that they are eager to utilize the CMR statute when appropriate, but that a majority of folks eligible for release are forced to stay in prison because they have nowhere else to go and DOC cannot simply release them with no place to sleep that night or to a home that does not contain adequate medical equipment to care for their needs.

This lack of resources results in extended periods of incarceration for elderly prisoners suffering from dementia or other severe medical conditions. In other contexts, scholars have characterized this extended period of incarceration due specifically to the lack of a suitable post-release residence as "dead time" incarceration.[117] For example, Christopher B. Scheren has analyzed dead time incarceration in the context of convicted sex offenders, who experience a host of locational prohibitions when it comes to finding housing due to their criminal status.[118] Scheren argues that the Eighth Amendment prohibits forcing those convicted of sex offenses to remain in prison after they have served their entire sentence when they cannot find approved housing for reasons of indigency due to the extreme lack of affordable and accessible housing for this unique

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[111] *See 2023 Annual Report*, Fla. Comm'n on Offender Rev. (2023), https://www.fcor.state.fl.us/docs/reports/Annual%20Report%20%2022-23%20-%20Final.pdf.
[112] Fla. Stat. 947.149(1) (2024).
[113] Engelhart, *supra* note 13.
[114] Michael Manguso & Deborrah Brodsky, *Florida's Aging Inmate Population*, Project on Accountable Just. 19 (Mar. 27, 2015), https://www.splcenter.org/sites/default/files/florida_aging_prisoners_march_27_2015_-_project_on_accountbale_justice.pdf.
[115] Engelhart, *supra* note 13.
[116] *Id.*
[117] Christopher B. Scheren, Note, *Sentence Served and No Place To Go: An Eight Amendment Analysis of "Dead Time" Incarceration*, 118 Nw. U. L. Rev. 1167, 1170 (2024).
[118] *Id.* at 1167.

group.[119] Scheren's Eighth Amendment argument is based on *Robinson v. California*, in which the Supreme Court held that punishment based on "status" violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.[120] Under Scheren's analysis, the "status" of being a sex offender results in the unique punishment of having to remain in prison due to a lack of resources.[121] Similarly, the status of being an elderly prisoner suffering from dementia and eligible for compassionate release results in the specific punishment of having to remain in prison due to a lack of resources.

In *Robinson v. California*, the defendant was convicted under a California statute that prescribed a jail sentence for being "addicted to the use of narcotics."[122] The defendant was arrested based on his appearance of being an addict given various scabs and needle marks, despite police not witnessing the defendants use of narcotics and the defendant denying such use.[123] The defendant was convicted based on his "condition or status" of being an addict.[124] The Supreme Court subsequently held that punishment for the status of being an addict was unconstitutional and specifically analyzed the status of being an addict as a disease, rationalizing that criminalizing someone based on their health status was cruel and unusual.[125]

While *Robinson* established that forms of disease are a status that one cannot be punished based on, the Court has been less reluctant to extend the Eighth Amendment's ban on status-based punishment to include economic status, such as indigency or homelessness, which in many cases is a determining factor for people eligible for compassionate release.[126] However, The Fourth and Ninth Circuits recently issued rulings that laws directed toward homeless individuals are unconstitutional under the Eighth Amendment because the unavoidable effects of involuntary homelessness cannot be criminalized.[127] Moreover, the Northern District of Illinois has, on three occasions, acknowledged an Eighth Amendment violation when the state continued to incarcerate indigent people convicted of sex offenses who have completed their sentence, but who have not been released due to their inability to find and secure an appropriate residence.[128] And courts in New York have addressed similar scenarios but have failed to find an Eighth Amendment violation based on the facts presented, despite adopting the principle that punishing someone for the unavoidable results of his or her status is unconstitutional.[129]

Academic discussions and legal arguments on "dead time" incarceration have primarily focused on those convicted of sex offenses.[130] I posit that a "dead time" incarceration lens is ideal for analyzing the experience of elderly prisoners otherwise eligible for compassionate release. Dead time incarceration for convicted sex offenders is similar to when people eligible for compassionate release face extended incarceration because they cannot find appropriate housing.

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[119] *Id.* at 1170-71.
[120] *Id.* at 1167. (citing Robinson v. California, 370 U.S. 660, 666-67 (1962)).
[121] *Id.* at 1192.
[122] 370 U.S. at 660.
[123] *Id.* at 661-62.
[124] *Id.* at 662-63.
[125] *Id.* at 666-67; *see also* Powell v. Texas, 392 U.S. 514 (1968) (refining *Robinson* to make it clear that the Court viewed punishment of one's status, rather than one's actions, as unconstitutionally cruel and unusual).
[126] Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status* 4 CONCORDIA L. REV. 1, 19 (2019).
[127] Scheren, *surpra* note 118, at 1188-1189 (citing City of Martin v. Boise, 920 F.3d 584, 617 (9th Cir. 2019), and Manning v. Caldwell, 930 F.3d 264, 283 (4th Cir. 2019)).
[128] *See* Murphy v. Raoul, 380 F. Supp. 3d 731, 738 (N.D. Ill. 2019); Barnes v. Jeffreys, 529 F. Supp. 3d 784, 787 (N.D. Ill. 2021); Stone v. Jeffreys, No. 21 C 5616, 2022 WL 4596379, at *1 (N.D. Ill. Aug. 30, 2022).
[129] Scheren, *surpra* note 118, at 1196-97.
[130] *See, e.g.*, *Barnes*, 529 F. Supp. 3d at 791 (after completing a prison sentence, plaintiff spent more than 18 months of "dead time" in prison because of his inability to find an acceptable host site due to his sex offender status.).

When the government's response to a lack of adequate services is to continue to incarcerate those people on "dead time", this violates the Eighth Amendment by inflicting punishment on people who simply have the dire combination of a severe medical status and a lack of funds to maintain their health. This essentially results in punishment for being poor or because nursing facilities refuse to take them specifically due to their criminal status despite any ability to pay.

Scholars have suggested that the original purpose of the Eighth Amendment focused on treating like-offenders equally, a view which would require a lack of community housing upon release to not affect time spent in prison.[131] Continuing to incarcerate people otherwise qualified for compassionate release due to their inability to secure approved housing is unconstitutional under the Eighth Amendment. This is because their status in prison rests on the fact that they are indigent; someone who has the financial means to find a residence which meets their medical needs would be eligible for release.

According to the 2022 American Bar Association report, compassionate release is rarely used and many federal prisoners will die over the months it takes for applications to be reviewed.[132] Compassionate release is even more rare for prisoners struggling with dementia because the Federal Bureau of Prisons has interpreted the statute as applying only to prisoners who are terminally ill or close to death.[133] This is where the next component of a holistic approach comes in: hospice and dementia care in prisons.

V. Dementia & Sentencing Under the Eighth Amendment

Correctional institutions have a constitutional obligation to provide an acceptable level of health care to inmates, which includes care specifically for the elderly.[134] In *Estelle v. Gamble*, the U.S. Supreme Court recognized that the "deliberate indifference to serious medical needs of prisoners constitutes 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[135] The Court stated that the "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."[136]

Where does dementia care fall on the scale of medical care? Surely people struggling with dementia are also going through much mental pain and suffering, as well as physical anguish connected to their cognitive decline. Does a lack of proper dementia care in prison rise to the level of an Eighth Amendment violation if gone unaddressed? Should dementia be a factor in sentencing reductions? The rumblings of related questions are starting to find their way into Eighth Amendment jurisprudence.

a. The Eighth Amendment

While *Estelle* requires a certain level of general medical services, no such case law exists supporting the same minimum standard of care specifically for geriatric services or dementia services. In 2000, only 4% of state institutions provided any type of geriatric-specific health care

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[131] Scheren, *surpra* note 118, at 1183 (citing Laurence Claus, *The Anti-Discrimination Eighth Amendment*, 28 HARV.. J.L. & PUB. POL'Y 119, 121-122 (2004)).
[132] Engelhart, *supra* note 13.
[133] *Id.*
[134] Estelle v. Gamble, 429 U.S. 97, 108 (1978).
[135] *Id.* at 103 (citing Gregg v. Georgia, 428 U.S. 153, 172 (1976)).
[136] *Id.*

services.[137] No data was available for federal facilities in more recent years.[138] If the criminal system's organizational management of geriatric or dementia care is vague, legal challenges involving dementia in prison will inevitably take longer to find their way through the courts.

Although death is different for the purposes of sentencing and release when it comes to cognitive issues, case law still suggests that the Eighth Amendment could influence sentencing and compassionate release policies when it comes to elderly prisoners struggling with dementia. For example, in the capital context, the U.S. Supreme Court, in *Ford v. Wainwright*, held that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing.[139] Years later, in *Panetti v. Quarterman*, the Court then set out the appropriate competency standard: a State may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution."[140] The *Panetti* standard focuses on whether a mental disorder has had a particular *effect*, not on the cause of any particular disorder.[141]

While the *Ford* and *Panetti* jurisprudence focuses more acutely on psychotic delusions associated with incompetency and does not directly address dementia, the U.S. Supreme Court recently found this precedent instructive and clarified that dementia *may* preclude an execution under the Eighth Amendment in *Madison v. Alabama*.[142] The Court noted that a "prisoner's inability to rationally understand his punishment" removes the "retributive purpose" from a prisoner's execution.[143] The Court, in *Madison*, articulated that "*Ford* and *Panetti* hinge on the prisoner's '[in]comprehension of why he has been singled out' to die, and kick in if and when that failure of understanding is present, irrespective of whether one disease or another is to blame."[144]

The Court clarified that the Eighth Amendment does not forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime "because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence."[145] The Eighth Amendment applies similarly to a prisoner suffering from dementia as it does to one experiencing psychotic delusions because either condition may "impede the requisite comprehension of his punishment."[146] The principles from *Panetti* indicate how to identify prisoners whom the State may execute, but the critical question is whether a "prisoner's mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution."[147] The difference is whether a person has a "rational understanding" and not whether they have any particular memory.[148]

The *Panetti* standard concerns not the diagnosis of illness, but the consequence of illness.[149] Because dementia comes in many forms, some resulting in complete disorientation and some which allow a person to preserve the understanding of consequences, the Court explained that the Eighth Amendment may, but does not automatically, require a bar on execution.[150]

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[137] Maschi, *supra* note 36, at 448.
[138] *Id.* at 449.
[139] Ford v. Wainwright, 477 U.S. 399, 406 (1986).
[140] Panetti v. Quarterman, 551 U.S. 930, 958-959 (2007).
[141] Madison v. Alabama, 139 S. Ct. 718, 721 (2019).
[142] *Id.* at 718 (citing *Ford*, 477 U.S. at 39; *Panetti*, 551 U.S. at 930).
[143] *Id.* at 728.
[144] *Id.* at 721 (citing *Ford*, 477 U.S. at 409).
[145] *Madison*, 139 S. Ct. at 722.
[146] *Id.* at 722.
[147] *Id.* at 723 (*quoting Panetti, 551 U.S.* at 958–959)
[148] *Madison*, 139 S. Ct. at 727.
[149] *Id.* at 728.
[150] *Id.*

Many plaintiffs suffering from dementia are also likely to have other significant cognitive issues, like in *Madison*, which makes it difficult to keep cases focused specifically on Eighth Amendment claims, as they relate narrowly to dementia. Moreover, courts have recognized that cognitive disorders are "difficult to identify and diagnose"[151] and many cases have remanded or simply not addressed issues when they felt evidence was insufficient that the plaintiff had dementia.[152] But issues involving dementia are not uncommon in the criminal context, despite not always being the center of litigation. For example, if a prisoner is diagnosed with dementia, improper medications may lead to an Eighth Amendment violation because proper health care might not be administered.[153]

b. Sentenced for Life

There is no national consensus against sentencing those with dementia to life imprisonment or what role dementia should play in sentencing.[154] Several jurisdictions, including the Ninth Circuit Court of Appeals and the Superior Court of Pennsylvania, have held that it is not cruel or unusual to sentence an elderly defendant with infirmities to either death or life imprisonment.[155]And the Court of Appeals of Washington has held that "sentencing a defendant diagnosed with dementia to mandatory life imprisonment is not cruel punishment."[156] The Washington Court disagreed with the argument that those diagnosed with dementia should be treated similarly to juveniles, who are categorically barred from being sentenced to life imprisonment without the possibility of parole in Washington State, due to their difficulty with regulating behavior.[157] This argument was rejected by the court because it failed to demonstrate that those who suffer from dementia have diminished culpability in the same way that a child might.[158]

Other jurisdictions, like the Court of Appeals of Oregon, have held that dementia *should* be considered in sentencing. In *State v. Sanderlin*, a defendant appealed a first-degree conviction for sodomy and sexual abuse.[159] On appeal, he contended the sentence imposed violated the Eighth Amendment because, prior to the conduct at issue, he had suffered brain damage and multiple strokes that resulted in "dementia, impaired intellectual function, compromised judgment, and a reduced ability to control his impulses."[160] The Court remanded the case to determine the proportionality of the sentence because the lower court had not properly considered the defendant's diminished capacity.[161]

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[151] Wilson v. Adams, 901 F.3d 816, 821 (7th Cir. 2018).
[152] *See Wilson*, 901 F.3d at 822; Hart v. Sennah, No. 2:21-cv-01127-DGE-JRC, 2022 WL 3973678, at *4 (W.D. Wash. Aug. 3, 2022).
[153] Hart v. Sennah, No. 221CV01127DGEJRC, 2022 WL 3973678, at *9 , *report and recommendation adopted*, No. 2:21-CV-01127-DGE, 2022 WL 3926601 (W.D. Wash. Aug. 31, 2022); Abernathy v. Myers, No. 3:19-CV-01062-MAB, 2023 WL 3285443, at *4, 5 (S.D. Ill. May 5, 2023), *appeal dismissed*, No. 23-2271, 2023 WL 9054664 (7th Cir. Oct. 27, 2023).
[154] State v. Moen, 4 Wn. App. 2d 589, 601 (2018).
[155] *Id.* (citing Allen v. Ornoski, 435 F.3d 946, 954 (9th Cir. 2006) (holding that the Eighth Amendment does not forbid execution of "elderly and infirm" death-row inmates); Commonwealth v. Green, 406 Pa. Super. 120 (1991) (holding that sentencing an elderly defendant who suffers from a number of infirmities to life imprisonment does not violate the prohibition against cruel and unusual punishment)).
[156] *Id.*
[157] *Id.* at 602.
[158] *Id.*
[159] State v. Sanderlin, 276 Or. App. 574, 575 (2016).
[160] *Id.*
[161] *Id.* at 576.

Some courts have even specifically held that dementia requires a reduction in sentence. For example, the United States District Court for the Eastern District of Michigan, in *United States v. Miller*, held that a 67-year-old defendant who suffered from dementia was entitled to a reduction of sentence to a period of probation specifically because he was unable to relate his imprisonment to the conduct for which he was convicted and was no longer physically or mentally capable of perpetrating crimes at issue.[162] The Court reasoned that "[w]here a defendant suffers dementia to such a degree that he is unable to appreciate the reasons for his incarceration, imprisonment fails to serve any useful purpose."[163]

Further, in *United States v. Dreyer,* the defendant, a licensed psychiatrist, began providing prescriptions of oxycodone and hydrocodone to patients outside of the usual course of professional practice and had suffered from dementia for years but went undiagnosed for many of those.[164] He was indicted on charges related to his participation in a conspiracy to possess and distribute controlled substances due to his providing of prescriptions like oxycodone and hydrocodone to patients outside his usual course of practice.[165] Although the defendant had difficulty recognizing or admitting that his actions were inconsistent with professional standards of conduct, he pleaded guilty to two counts of the thirty-count indictment.[166] In 2013, the Ninth Circuit Court of Appeals held that the court erred by not evaluating competency and ordered a hearing *sua sponte.*[167]

Other defendants have had success in arguing that dementia qualifies as a compelling reason for a sentence reduction. For example, in 2020 in *United States v. Lochmiller*, the United States District Court for the District of Colorado held that "there is no reason to believe that granting compassionate release to someone with advanced dementia who is 100 months into a 405-month sentence will fail to provide general deterrence."[168] The defendant's medical records indicate that he has suffered from dementia since at least 2014 and that his dementia was severe and worsening, qualifying it as a serious medical condition, which the state sentencing commission noted can qualify as a reason to reduce a defendant's sentence. [169] Moreover, the Court noted that the defendant was not a danger to the safety of any other person or the community and granted a sentence reduction.[170] The Court further noted that the defendant "lacks the mental capacity to perpetrate the type of crimes he was convicted of" and struggled with many things people take for granted, "such as making telephone calls or speaking in complete sentences."[171] The Court even referenced that "he was seen tearing up a photograph of he and his wife. When asked why he did it, he responded that the man in the picture is not him and he did not know 'the lady.'"[172]

The Court then went on to note that the most important factor was "the need for a sentence that provides 'just punishment for the offense,'" and that continued incarceration did not "serve a punitive purpose if [the defendant] does not know that he is being punished or why."[173] In reasoning that reducing the sentence is sufficient, but not greater than necessary, to accomplish the goals of sentencing, the Court noted the following:

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[162] United States v. Dreyer, 705 F.3d 951, 953 (2013).
[163] *Id.*
[164] *Id.* 957.
[165] *Id.*
[166] *Id.* at 957-58.
[167] *Id.* at 957.
[168] United States v. Lochmiller, 473 F. Supp. 3d 1245, 1248 (2020).
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 1248-49.
[173] *Id.* at 1249 (citing *Madison*, 139 S. Ct. at 728; quoting 18 U.S.C § 3553).

> At the time Mr. Lochmiller was sentenced, the Court found that he deserved a sentence of over 33 years, which, for a 64-year-old man, was in all likelihood a life sentence. Now, however, Mr. Lochmiller's mental condition has dramatically changed. When committing his crimes, Mr. Lochmiller could look a retiree in the eye and take her life savings, knowing she would never get them back. Today, Mr. Lochmiller looks at his own face in a photograph and does not recognize himself. Courts considering compassionate release have acknowledged that a prisoner's severe medical conditions can outweigh the purposes of continued incarceration, even for serious offenses. *See United States v. Gray*, 416 F. Supp. 3d 784, 790 (S.D. Ind. 2019) (granting compassionate release to seriously ill defendant despite the seriousness of his conduct because "further incarceration in his condition would be greater than necessary to serve the purposes of punishment"). Here, the Court is not persuaded that the continued incarceration of Mr. Lochmiller in his condition promotes respect for the law, provides just punishment, or affords deterrence to criminal conduct.[174]

c. Is Release the Best Option?

Although it should be more easily available and administered consistently, compassionate release may not be the ideal solution for an across-the-board fix considering that re-entry resources are scarce for people with significant medical issues and a large number of elder inmates are in prison due to serious, violent felonies.[175] Concerns surrounding victim advocacy and inmates feigning symptoms are also relevant public policy factors to consider when building the most comprehensive approach to this crisis.

For many opponents of expansive compassionate release, "the desire to keep individuals confined may trump all other considerations."[176] In particular, Florida's countervailing state interest in public safety is apparent in the statute's language, which conditions eligibility on the inmate's lack of dangerousness.[177] In other states, like Illinois, dangerousness is but a consideration weighed by the decision-making body.[178] Arguments in favor of dead time incarceration in the sex offender context focus on the need for public safety, but this concern is not present in the conditional medical release context wherein people would not be eligible for release if public safety was still a concern.[179] With safety being a lessened concern, opponents may turn to victim advocacy as an argument against more expansive compassionate release. However, given the age of many inmates suffering from dementia, crimes may have been committed so long ago that the victims have had more time to heal, or they may no longer be alive. Victim's rights are always at play when developing criminal policies, but many such concerns are significantly diminished in the context of compassionate release.

Feigning symptoms is also a serious concern if we are to adopt across-the-board changes making compassionate release more accessible. It is extremely unlikely that inmates will be successful at getting to the compassionate release stage if symptoms are not supported by significant medical evidence. Courts have recognized that cognitive disorders are "difficult to

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[174] *Id.*
[175] McKillop & Boucher, *supra* note 3, at 5.
[176] Chiu, supra, at 8-9.
[177] *Id.* at 9.
[178] 730 III. COMP. STAT. § 3-3-14(f) (2022).
[179] *Id.* § (f)(iv).

identify and diagnose"[180] and many cases have opted to remand or simply not address issues when they felt evidence was insufficient that the plaintiff had dementia.[181] The heightened standard that the court system requires when it comes to proving medical conditions will likely keep a majority of these concerns at bay.

VI. Holistic Care in Prison

Although simple, changes to the current compassionate release regime are unlikely. But what if holistically developed programs in prison would take better care of many individuals than life on the outside would anyway?[182] How can we prepare our prisons for this crisis outside of expanded release options? Holistic programs within carceral settings are also necessary to develop a system which treats older prisoners humanely and addresses our increasing prison population which will inevitably suffer from hosts of medical issues spanning cognitive decline to cancer. Especially if dead time incarceration for elderly inmates suffering from dementia is going to continue, the system needs to adapt to an appropriate caretaking model that respects the Eighth Amendment.

a. Hospice Care

Many older prisoners may receive a death by imprisonment sentence, making end-of-life care crucial. "The first formal prison hospice program in the United States was initiated in 1987 by a pair of inmates at the United States Medical Center for Federal Prisoners (MCFP) in Springfield, Missouri."[183] The inmates then recruited eight other inmate volunteers, creating a model for prison hospice that "has since proliferated nationwide in scores of state and federal prisons and jails."[184] Programs like these "can become a transformational experience for both the caregiver and the one receiving the aid."[185]

Lesley Sharp, a medical anthropologist, has done extensive studies on how volunteer prison hospice programs affect attitudes and perceptions of dying in prison, a fate that many elderly inmates are forced to grapple with. She underscores the significant "fear[s] associated with dying in prison, especially among those who have always hoped for the reward of parole, a pardon, or completing their sentence, followed by release . . . death in prison is the greatest failure imaginable for an incarcerated man."[186] She goes on to explain that, "[s]et against a backdrop of health care

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[180] *Wilson*, 901 F.3d at 821.

[181] *Id.* (The Seventh Circuit Court of Appeals affirmed the district court's dismissal of a prisoner's Eighth Amendment claims and state-law negligence claim. The court held that insufficient evidence was presented, both in the medical records and in the form of expert testimony, to determine that the defendants had been deliberately indifferent or negligent in their treatment of the prisoner's mental and physical health).

[182] Engelhart, *supra* note 13, at 7. ("On the day I visited the unit, a few of the medical staff members told me that they previously worked in community nursing homes and that the M.D.U. prisoners are probably receiving better care than they would on the outside, in whatever Medicaid-subsidized beds they were likely to find themselves. Behind bars, the men have easy access to psychologists, social workers and a pharmacist with a specialty in geriatrics.")

[183] Lesley A. Sharp, *Death and Dying in Carceral America: The Prison Hospice as an Inverted Space of Exception*, 36 MED. ANTHRO. Q. 177, 181 (2022).

[184] *Id.*; *Our Work*, HUMANE PRISON HOSPICE PROJECT, https://humaneprisonhospiceproject.org/ (last visited Sept. 15, 2024); Open Society Foundations, *Angola Prison Hospice: Opening the Door*, YOUTUBE (Sept. 8, 2011), https://www.youtube.com/watch?v=mMLjANwBRDk.

[185] *Humane Prison Hospice Project Is Transforming the Way Terminally Ill People in Prison Die*, COMPASSION & CHOICES (Nov. 17, 2023), https://compassionandchoices.org/news/humane-prison-hospice-project-is-transforming-the-way-terminally-ill-people-in-prison-die/.

[186] Sharp, *supra* note 184, at 182.

neglect, punitive medicine, and the soft violence of aging on the inside, hospice volunteers fashion and protect an inverted space of exception for dying men. Through empathetic acts of patience, kindness, non-judgmental care, and simply staying the course, volunteers work to facilitate, at the very least, possibilities for a 'death without indignity.'[187] If our aging prison population continues to steadily increase, funding for programs to support older people after release from prison continues to be lacking, and compassionate release statutes are not updated to respond to the expanding population, hospice care within prisons will be the least we can do to respond to this policy crisis and optimize care for aging prisoners.[188] When facilities do invest in holistic care for elderly inmates, the number of doctor visits and medication taken by elderly inmates significantly decreases.[189] Investing in holistic care may include ensuring better lighting and windows, access to the outdoors, and more comfortable social spaces.[190] Having specifically trained interdisciplinary staff also enhances health outcomes for elderly inmates.[191]

b. Dementia Care Units

While hospice can address the health care needs during the end-of-life, not all elderly inmates suffering from dementia are in end stages. A dementia diagnosis often means a shortened lifespan (on average people live between three and eleven years after diagnosis), but some people live as long as twenty years after a diagnosis.[192] This is where developing programs which specifically meet the needs of inmates struggling with dementia must come into play. California, New York, and Massachusetts are examples of states that have prisons with specific dementia units set up that take into account the complexities of dementia behavior.[193] Because of these units, a prisoner who behaves in a way that would normally get them in trouble, such as batting away a doctor's hand during an injection, are not penalized when they act out behaviors as a result of their disease.[194] In a normal prison facility, an inmate who exhibited such behavior would be handcuffed, lose privileges, or even be sent to an isolation unit.[195]

Inside the dementia unit at California's main prison medical facility in the San Joaquin Valley, physicians and nurses are specifically trained to work with elderly prisoners who are experiencing cognitive decline.[196] About 500 prisoners are being treated for dementia or Parkinson's Disease in California prisons.[197] The beginning of these specialized facilities in California started with the AIDS crisis, which resulted in hospice facilities being set up decades ago.[198] California's unique history with health care in prisons may still be influencing their ability to divert funding to more holistic dementia care units. In *Plata v. Brown*, the U.S. Supreme Court

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[187] *Id.* at 191 (quoting Peter Allmark, *Death with Dignity*, 28 J. of MED. ETHICS, 255, 256 (2002)).
[188] Amanuel K. Hagos et al., *Optimizing the Care and Management of Older Offenders: A Scoping Review,* 62 THE GERONTOLOGIST, 508, 509 (2022).
[189] Maschi, *supra* note 36, at 445.
[190] *Id.*
[191] *Id.*
[192] *Alzheimer's stages: How the disease progresses*, MAYO CLINIC (June 7, 2023), https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/in-depth/alzheimers-stages/art-20048448#:~:text=On%20average%2C%20people%20with%20Alzheimer's,of%20progression%20of%20Alzheimer's%20disease.
[193] Lay Kodama et al., *Prioritizing Diversion and Decarceration of People With Dementia*, 25 AMA J. OF ETHICS 783, 785 (2023).
[194] Bernstein, *supra* note 69, at 4.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*

affirmed a district court order requiring California to remedy its longstanding constitutional deficits in prison medical and mental health care by reducing prison crowding, holding that a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.[199] At the time of the decision, the California prison system housed approximately twice as many inmates as the facilities could handle, resulting in widespread Eighth Amendment violations.[200] "As a result, the California Department of Corrections and Rehabilitation (CDCR) worked to redistribute inmates and parolees safely and decrease the overall population to the mandated levels."[201] The Court, in *Plata*, held that a court-mandate population limit was necessary to remedy Eighth Amendment violations.[202] Therefore, the current dementia-focused programs available in California may be an alternative approach to a statutory regime to enhance the care available to elder prisoners.

Although so few state institutions offer programs specifically aimed at aging or dementia, some programs, like California's, have proven to be incredible examples of a holistic (and cost-saving) approach to the aging prison population.[203] Programs such as that at the California Men's Colony in San Luis Obispo, where prisoners with dementia are housed separately and inmates are given opportunities to become trained on dementia-awareness in order to help their fellow inmates, have shown reduced overall agitation among inmates and reduced behavioral problems.[204]

Similarly, in Massachusetts, the Memory Disorder Unit at F.M.C. Devens, which opened in 2019 and was designed to resemble a memory care facility, offers an alternative path for such a prisoner.[205] "Its correctional officers have received training from the National Council of Certified Dementia Practitioners and currently supervise around two dozen men with an average age of 72."[206] Many prisoners in this unit are weak and don't remember doing the act that placed them in prison.[207] The unit is different from a typical prison facility in many ways, some big and some small. For example, the walls are pink because it is seen as a noncombative color and aids in dementia care.[208] A more complex difference is that the staff members "maintain a binder with profiles of the prisoners, including information on how to soothe them."[209] The binder entry for one man advises officers to reference Tom Brady if the man is ever upset, a tactic that often brings him from screaming to calm and conversational.[210]

If we are going to keep elders in prison, we need to create a system that addresses the root philosophies of criminal justice and one that is not just a more restricted version of a nursing home. Prison facilities need to have staff trained in evaluating disciplinary actions based on the cognitive awareness of the inmate,[211] which research has shown that prison staff themselves benefit from.[212] From intake to release, there must be systems in place which specifically address the needs of older

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[199] Plata v. Brown, 563 U.S. 493,510 (2011).
[200] W.J. Newman & C.L. Scott, *Brown v. Plata: prison overcrowding in California*, 40 J. AM. ACAD. PSYCHIATRY L. 547, 547-52 (2012).
[201] *Id.*
[202] *Plata*, 563 U.S. at 538.
[203] GeriPal – A Geriatrics and Paliative Care Podcast, *Hospice in Prison Part 1: An Interview with Michael DiTomas and Keith Knauf,* YOUTUBE, (June 22, 2023), https://www.youtube.com/watch?v=EDN01FC3Z-E..
[204] Feczko, *supra* note 46, at 646.
[205] Engelhart, *supra* note 13.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] Engelhart, *supra* note 13.
[212] Samantha Treacy et al., *Dementia-friendly prisons: a mixed-methods evaluation of the application of dementia-friendly community principles to two prisons in England,* BMJ OPEN, July 2019, at 9, https://bmjopen.bmj.com/content/9/8/e030087.

inmates and facilities that are prepared to screen for dementia independently of screening for general mental health concerns.[213] Lynn Biot-Gordon, of the National Council of Certified Dementia Practitioners, points out that moral education is impossible for a person who cannot be educated, so incarceration for someone with dementia does not fit within the rehabilitation framework of our criminal justice system.[214] Many of the people in the Devens unit are not being assisted in rehabilitation, but rather managed until their sentence comes to an end.

VII. Conclusion

Across the country, sentencing laws and practices governing the administration of criminal justice should be revised to account for the degeneration of brain function that occurs later in life, and the rapid degeneration that specifically occurs as a result of living in prison. If we fail to adopt these changes as our prison population continues to age, society will pay for it not only in additional health care costs but also with a moral cost. We must provide education about person-centered care that will engage elder prisoners with dementia in a process of making choices, fostering personal agency or recovery of lost agency, and improving quality of life. Caring for our elders should be of utmost importance, regardless of where they are forced to lay their heads at night.

This paper provides a holistic path forward for developing a response to dementia in prison. Through updated compassionate release laws and increased focus on creating prison settings which are attuned to the unique issues with geriatric and hospice care, we can better manage the dementia crisis in prisons. Practitioners should all be questioning whether we should be punishing people with dementia if they can no longer remember the crime they committed and are otherwise deprived of the mental capabilities to understand the system they are placed in.[215] Why would society continue seeking out punishment for elder prisoners when recidivism rates drop to nearly zero for people over 65?[216] This paper has explored a few of the key points to consider in adapting our criminal system to address this crisis, but much more must be done.

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[213] *Id.* at 11.
[214] Engelhart, *supra* note 13.
[215] *See generally*, Jeffery Howard, *Punishment, Socially Deprived Offenders, and Democratic Community,* 7 CRIM. L. & PHIL., 121–36 (2013), https://doi.org/10.1007/s11572-012-9179-4.
[216] Rebecca Silber et al., *Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations*, VERA INST. OF JUST. (2017), https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf.