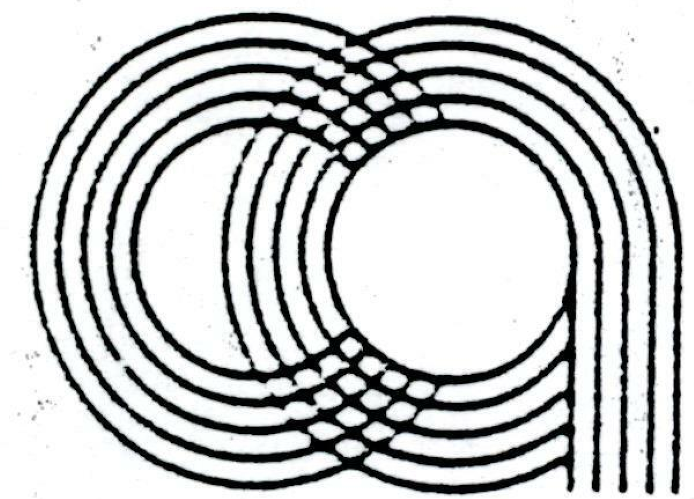

AIDS IN PRISON PROJECT UPDATE:
A MEDICAL RELEASE PROPOSAL

A Report by

The Correctional Association of New York

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Since 1984, the Association has been monitoring the situation of HIV infection/illness in the New York State prison system. In May 1988, we released our publication, AIDS In Prison: A Crisis in New York State Corrections, a study focusing on the lack of adequate AIDS education and prevention training for prisoners and staff and insufficient medical and psychosocial care for prisoners as well as the issues of segregation of inmates with HIV and the early release of prisoners with AIDS. We made specific recommendations for addressing these problems.

Since 1981, over 920 people have died of AIDS while in the custody of New York's prison system. Almost 90% of the decedents were African American and Latino, most were from New York City, were intravenous drug users and had been convicted of "money-seeking" crimes related to drug abuse. In addition, most female AIDS decedents were solely responsible for the care of an average of two children each.

Currently there are nearly 55,000 inmates in New York's prisons. Approximately 17-20% are infected with HIV. Of the 10,000 or so HIV seropositive prisoners, more than 800 are symptomatic.

Early release generally refers to the release of prisoners prior to their serving their sentence in a determinate sentencing system or prior to completion of their minimum sentence in an indeterminate sentencing system. In the case of jail systems, early release, sometimes called "compassionate release", refers to detainees whose bails are reduced to amounts that they can afford or who are released on their own recognizance. It is important to understand that many prisoners with AIDS spend their last days in prison isolated and alone, far from their family and loved ones. For many, a diagnosis of AIDS is tantamount to a death sentence.

I. EARLY RELEASE OF TERMINALLY ILL PRISONERS WITH AIDS IS IMPORTANT

The Family:

Our experience working with families and loved ones of terminally ill prisoners with AIDS in New York State is applicable to other prison systems throughout the country. In partnership with the American Baptist Church of Metropolitan New York, the Correctional Association operates the Health Support Network, a support and referral program for families and friends of prisoners and releasees with HIV/AIDS. Despite often rocky familial relationships over the years, families/partners of prisoners with AIDS frequently contact the Network inquiring about ways that a sick incarcerated loved one can return home or, at a minimum, to a hospital in New York City. The New York State Commission of Correction, a governmental agency responsible for monitoring state and local correctional facilities, has documented that over 90% of the prisoners with an AIDS diagnosis are from New York City. For many, a diagnosis of AIDS is a time when families try to reconcile differences. The distance and often remote location of state prisons make it very difficult for loved ones to visit inmates and to engage in this emotionally healing process.

One of our clients living in New York City wrote:

"My son is suffering from AIDS. He is in an isolation room [at a prison near Buffalo]....I am a mother that suffers so much for my son. I have decided to write to you to beg you to ....transfer my son to a place close to me. I am a sick woman with diabetes. I had a brain operation and I suffer dizzy spells. On occasion I loose my sight. I get blind many times I go places and I get lost.

For me to see my son is almost impossible. One because he is so far and second because I have to pay lots of money that I don't have."

The woman's son died in an upstate prison two months after she wrote this letter.

Another Network client, Ms. Sanchez,[1] wanted her son, who was gravely ill and in a hospital in Plattsburgh, moved to a hospital in New York City. At the time she contacted us, two of Ms. Sanchez' four children had already died of AIDS and the other two were seropositive. She had custody of seven grandchildren, ranging in age from 1 1/2 to 17 years. The youngest two were seropositive. Her social worker wrote the following:

> "....It is very painful for Ms. Sanchez and her family to find her son so far from home, thereby limiting the frequency of visits she can make to lend him emotional support and to obtain some consolation for herself during this very difficult time. She is a caring mother and grandmother, and would simply like to have her son closer to home...."

Two months after this letter was written, Ms. Sanchez's son died in a Plattsburgh hospital.

There are many other cases we could refer to; they all cry out for redress: people who are struggling in New York City to keep their families together and at the same time trying to provide emotional support to a loved one during the last months of his/her life. The pain that our clients feel in knowing that a loved one is dying alone, isolated and far away while they cannot be there to hold, feed, or talk to him/her is

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[1]Not her real name.

something that none of us will ever really know unless we are in their place. Early release would provide some measure of compassionate relief to such families.

Lack of Services to Adequately Attend to Seriously Ill Prisoners with AIDS:

Most prison systems neither have the facilities nor the staff to provide the sophisticated and intensive nursing care and the psychosocial support services to adequately tend to the dying. It would be far better for both the Departments of Correction and the prisoners if the inmates were cared for in a more appropriate setting, such as a hospital, hospice or family residence with home nursing care.

Early Release Will Save Money:

Early release could result in substantial savings to the states. As early release is practiced now, it does not affect large numbers of inmates; nonetheless, it does cut local expenses. It is estimated that it costs around $40,000 per year to treat a person with HIV, not to mention the additional millions of dollars per year in security costs to guard prisoners receiving medical care in those prison systems that utilize outside hospitals. When a prisoner is under the custody of a state Department of Correction, the state must bear the entire cost. However, once a prisoner is released to parole supervision, s/he is eligible for federal medicaid, relieving the state of 50% of the total medical expense.

II. A NATIONAL PERSPECTIVE ON EARLY RELEASE MECHANISMS

Because of the dearth of information on early release mechanisms that exist nationally, we conducted a telephone survey of five states with large numbers of prisoners with HIV (California, Florida, New Jersey, New York and Texas), the federal

system and New York City's jail system to learn which types of early release mechanisms exist and whether or not they are being applied to terminally ill prisoners with AIDS. Our survey reveals that except for New York City, the states and federal system are not doing enough to adequately address early release. Our findings are as follows:

Executive Clemency:

All of the states included in our survey have a provision in their state constitutions giving the governor the authority to grant a commutation of a prisoner's sentence. In all but one (California) of the five states surveyed, the governors have granted executive clemency to prisoners suffering from a terminal illness when such release was consistent with public safety. However, only the governors from the states of New Jersey and Texas have granted clemency to prisoners with AIDS.

According to the New Jersey Governor's Office, over the last five years, one or two applications for executive clemency were granted to prisoners with AIDS. Clemency is based upon two major factors: how seriously ill the applicant is and the severity of the crime committed.

Pursuant to State Constitutional Amendment, Article IV, Section II and the Texas Code of Criminal Procedure, Article 4212, Subchapter 3, 143.31 - 143.35, the Texas Board of Pardons and Paroles has the authority to consider and recommend to the governor indefinite emergency medical reprieves "in instances of terminal illness, total disability, or for needed medical care which cannot be provided by the medical facilities of the Texas Department of Corrections." Since 1987 until March of 1990, 145 cases have been processed, of which 15% were prisoners with AIDS. Sixty percent of these 145 cases have been denied, of which 5% consisted of prisoners with AIDS, and 40% were approved, of which 10% were AIDS prisoners.

According to a Pardons and Paroles Division official, prisoners with AIDS tend to deteriorate faster while incarcerated than when they are outside receiving emotional support from their families. Therefore, unlike non-AIDS prisoners who are not eligible for emergency medical reprieve if ambulatory, AIDS prisoners can be ambulatory but should have a life expectancy of less than one year. In addition, all eligible inmates have generally not been convicted of an assaultive crime.

Despite the fact that the health of some of the AIDS prisoners released had improved, there has not been a problem of recidivism. A Pardons and Paroles Division official could only recall one prisoner who was reincarcerated and that was not because he committed a new crime but because he left the hospital and returned home without permission.

Resentencing Statutes:

Pursuant to 18 U.S.C. 4205(g) (which was superseded this year by 3582(c) under the new Federal Sentencing Guidelines), at any time the Bureau of Prisons (BOP) may motion the court to "reduce any minimum term to the time the defendant has served." According to the General Counsel's Office of BOP, since 1987 until August of 1990, 16 out of 23 applications have been approved for prisoners with serious illnesses. Unfortunately, BOP does not have any statistics on whether or not these cases included prisoners with AIDS. It should be noted that section 4205(g) applies to all prisoners sentenced prior to 1990 when the new federal sentencing guidelines went into effect. While on its face the new section's language appears more restrictive than that of the old, BOP counsel reported that it has not altered its criteria in deciding whom should approve or disapprove.

Section 1120(d) of the California Penal Code allows a judge to recall a sentence of incarceration and resentence a prisoner. If the inmate makes a motion to the court four months after the imposition of the sentence, the court cannot consider the motion unless the Department of Correction recommends to the judge that the prisoner be released. Allison Hardy of the Prison Law Office at the University of California at Davis has submitted 12 motions on behalf of terminally ill prisoners with AIDS, of which two have been released by the court under section 1120(d).

Pursuant to R. 3:21-10, at any time a New Jersey trial court may amend a prior custodial sentence to permit a defendant's release "because of illness or infirmity." According to Division of Health, Department of Correction officials, no one with AIDS has been released under this statute. However, according to the office of the New Jersey Department of the Public Advocate, several AIDS inmates have been released under this statute (at this time we do not know which information is accurate). It is the Department of Correction's policy to seek executive clemency when it is unable to provide treatment -- which the Department claims it is able to do with respect to the prisoners with AIDS -- or when a patient is in imminent danger of death. (See <u>State v. Wright</u> 221 N.J. Super. 123 (1987)).

<u>Temporary Release:</u>

In many states, the Departments of Correction have the authority to grant a prisoner temporary release or a medical leave of absence in order to undergo medical care which the Department is unable to provide. It appears that where early release mechanisms are not being utilized or are under utilized, the Departments will use their temporary release authority to release a prisoner terminally ill with AIDS to an outside hospital.

For instance, in New York State, where executive clemency is the only mechanism available for releasing prisoners prior to completion of their minimum sentence and the governor has not granted clemency to any prisoner with AIDS, a medical leave of absence is one way to get a terminally ill prisoner <u>temporarily</u> out of the custody of corrections and into an outside hospital. Pursuant to Section 851 of the Correction Law, the Commissioner of the Department of Correctional Services (DOCS) may grant a "leave of absence" to an inmate to undergo surgery or receive medical treatment only if it is "deemed absolutely necessary to the health and well-being of the inmate". According to DOCS officials, in 1989, 51 applications out of 56 were approved and in 1990 through the end of July, 84 out of 86 applications were approved. DOCS officials reported that prisoners with AIDS have been released to outside hospitals, but no statistics are kept specifically regarding participation of AIDS inmates in this program.

<u>Compassionate Release Programs</u>:

New York City was the only jurisdiction surveyed which has an early release program in place for the terminally ill and actively identifies and seeks the release of detainees, sentenced inmates or parole violators who have a limited life expectancy as the result of AIDS and who do not pose a threat to community safety. Since November 1987, approximately 125 inmates with AIDS have been released under this program.

The following factors are considered in determining the eligibility of an inmate or detainee to participate in this program: A physician is required to describe the inmate's physical condition, but is not required to make any predictions regarding the ability of the inmate to commit another crime or life expectancy within a specified time frame. Information about an inmate's prior record, present charge or conviction in conjunction with the medical information is evaluated. Generally inmates who have committed crimes that caused personal injury or have a propensity for violence are screened out.

The ultimate decision to release someone from custody is made by the court for detainees (CPL 210.40, motion to dismiss indictment in furtherance of justice or bail reduction applications) and for sentenced inmates (Correction Law, Art. 12, 272 - 275, conditional release or bail applications pending appeal) and the Division of Parole for parole violators.

For the last three years in New York State, a medical parole bill, which would affect a small number of terminally ill prisoners with AIDS, has been considered by the state legislature. It looked as though it might quietly be passed during the past legislative session, but it was not. This bill would have enabled a terminally ill prisoner who has not served his/her minimum term but who is so debilitated and incapacitated as to be physically incapable of presenting a danger to society to be released on medical parole. It was the only hope that dying prisoners and their loved ones have had for early release since the governor is not expected to grant clemency to any prisoner with AIDS.

The defeat of the medical parole bill had nothing to do with the merits of the issue. Rather, early release has become a political football with neither the Democrats nor the Republicans willing to carry the ball. Because of the political fall-out from the notorious Willie Horton case during the 1988 presidential campaign, most policymakers still refuse to support early release programs, even for the terminally ill.

In addition, California has a similar bill pending, but local advocates do not expect it to go anywhere and if it does, they believe the governor will veto it.

III. RECOMMENDATIONS REGARDING EARLY RELEASE

It is unfortunate that many of our state officials who have the authority do not have the courage to provide some compassionate relief to the people who are dying

of AIDS and to their loved ones. There are no valid reasons for a person who is seriously ill with AIDS and is deemed to pose no danger to society if released to remain in prison. For many persons with AIDS, further incarceration is tantamount to a death sentence.

We recommend that the following policies be adopted:

1) Governors who have the authority to commute a prisoner's sentence should be encouraged to use it with respect to eligible seriously ill prisoners with AIDS.

2) Seriously ill prisoners with AIDS should have a streamlined, expeditious mechanism other than executive clemency which would enable them to apply for parole supervision before completion of their minimum sentences. This mechanism should include some of the following elements:

a) Any seriously ill prisoner who has been diagnosed with a terminal illness such as AIDS and who if released would be very unlikely to pose a danger to society should be eligible for early release.

b) Decisions regarding whether to release early should be made by the Division of Parole (or its equivalent) which has ample experience making very difficult decisions regarding the release of a prisoner.

c) Parolees should be released to a hospital, hospice, the residence of a family member, or any other housing accommodation deemed appropriate by Parole.

d) No one should be released without an adequate discharge plan.

e) The Division of Parole (or its equivalent) should decide the appropriate amount of supervision an early release parolee needs.

Special Note:

Some policymakers have recommended that anyone who is released early due to a debilitated condition as a result of HIV illness should be returned to prison if his/her health improves. In other words, the releasee should be punished if s/he gets better. It is unconscionable to revoke parole and to reincarcerate the releasee on the sole basis that his/her health has improved. Only if the parolee's conduct warrants revocation under the normal conditions of parole (e.g. commits a new offense) should s/he be removed from parole supervision.

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