3 Main Approaches to Seeking Release of Older, Ill and At-Risk Prison Populations During COVID-19

1. Existing Compassionate Release Mechanisms
2. Political Pressure and Oversight
3. Litigation

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1. **Compassionate Release**

- Compassionate Release is the colloquial name for the process by which persons are released from incarceration due to terminal illness, advanced age, sickness, debilitation, or extreme family circumstances.
  - Nearly every state (except for Iowa), the District of Columbia, and the federal government all have some form of compassionate release
  - Despite its presence in the majority of US jurisdictions, compassionate release is rarely utilized. The program is hindered by many layers of review and unduly strict eligibility criteria
  - The federal system is currently the model for Compassionate Release:
    - Congress passed The First Step Act in 2018, giving prisoners the right to go to court and file a motion for compassionate release if they failed to convince the Bureau of Prisons to release them
- Though compassionate release is traditionally difficult to obtain, FAMM is beginning to see increased receptivity to compassionate release petitions; Judges are considering arguments of those that may not traditionally fit the requirements of compassionate release and are responding favorably to COVID-19 vulnerability arguments
  - For successful release during this pandemic, petitioners must push the bounds of ordinary compassionate release programs by layering traditional compassionate release arguments with the compounding special circumstances of COVID-19
- The two greatest barriers to obtaining compassionate release are:
  1. The rigidity of federal criteria
    - A person must be terminally ill or debilitated, or must have a serviced a certain amount of time and be of a certain age
    - The presence of COVID-19 does not inherently broaden the scope of those that meet these criteria, so petitioners advocating for compassionate release should be creative in their briefing of these arguments
  2. Procedural barriers
    - Prisoners must apply for compassionate release with the Prison Warden and wait 30 days for a response. If the warden denies their request, they must go through a generally futile exhaustion process, appealing the denial at various levels.
FAMM is asking courts to excuse traditional exhaustion due to the emergency situation

- These creative arguments may or may not work. The hope that is they will be used to expand the scope of compassionate releases permanently into the future
- FAMM has created a Compassionate Release Clearing House – they have reached out to 40,000 incarcerated persons to see if they meet the criteria for compassionate release

2. Political Pressure on the NYC Jail System

- Attempts at using persuasive methods to convince political actors to reduce prison populations
- The NYC Board of Corrections (“BOC”) has oversight authority over the Department of Corrections (“DOC”), which extends to the medical providers in NYC Jail System, of which Correctional Health Services (“CHS”) is a part
  - Traditionally the BOC provides oversight on the conditions of confinement, medical care, mental health care, restrictive housing, punitive segregation, and more
- The BOC has adopted a 3-pronged approach for monitoring the conditions of confinement amidst the COVID-19 pandemic:
  1) The BOC is advocating for the release of persons at high risk of infection.
  2) The BOC is pushing the DOC and CHS to be more public about their specific response to the epidemic.
  3) The BOC is monitoring general operations of the facilities
- To increase public transparency, the BOC is publicly releasing data from DOC and CHS with daily updates on the number of confirmed COVID-19 persons in NYC jails and prisons
- As part of their oversight mandate, the BOC is monitoring complaints from those in custody, their families, and staff in the facilities in order to identify systematic issues

3. Litigation in Washington State

- Columbia Legal Services filed a lawsuit on March 24, 2020 against Washington Governor Jay Inslee and Secretary of DOC Steven Sinclair seeking the release of prison groups most vulnerable to serious illness and death due to COVID-19
- The petition specifically requests commutation of the sentences of:
  - Incarcerated persons over the age of 50
  - Incarcerated persons with serious medical conditions that put them at risk of serious harm or death from COVID-19
    - Vulnerable populations include those with underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease, diabetes, epilepsy, compromised immune systems (cancer, HIV, etc.), and pregnancy
  - Incarcerated persons with early release dates within the next 18 months, or those currently on work release
Petitioners filed a writ of mandamus in the Washington Supreme Court, requesting the court find original jurisdiction over this action. Petitioners also filed a motion for accelerated review
  o Both actions were taken to ensure this suit could be heard as soon as possible in the highest court of the state
Petitioners gathered a significant number of declarations from prisoners, scientists, and infectious disease specialists, all in support for the urgent release of prisoners
  o Petitioners garnered declarations from the former medical director of DOC and the former secretary of DOC, each supporting the release of incarcerated groups
  o Declarations from experts were hugely helpful in garnering the Supreme Court’s decision that they have original jurisdiction
  o Having scientists advocate for release shows the court system that there is agreement among differing groups of professionals regarding the dangers of this pandemic within the prison system
  o These declarations can be found on Columbia Legal Services’ website
The suit was filed after Columbia Legal Services could not reach an agreement with Governor Jay Inslee and Secretary of DOC Steven Sinclair regarding the COVID-19 response. Columbia Legal Services advocated for access to hand sanitizer and soap for incarcerated persons, the release of vulnerable groups of incarcerated persons, and a halt on arrests for probation violations and other minimal violations
All information and filings regarding the litigation are on Columbia Legal Service’s website
  o https://columbialegal.org/policy_reforms/covid-19/

Other approaches to securing release:

4. Clemency
   The Governor of California issued an order to move the clemency process forward more quickly by permitting video appearances
     o All governors should have the power to encourage quicker resolution of clemency petitions
     o Continue to press governors – they have powers in states of emergency that enable them to act in ways they are usually unable to

5. Federal back-end releases
   At the federal level, Attorney General Barr encouraged the Bureau of Prisons to include the presence of COVID-19 as relevant in considering back-end releases to home confinement
   Currently the ability of a warden to release someone to home confinement is limited to persons with 6 months or less left, or persons in the last 10% of their imposed term of imprisonment, whichever is less
The CARES Act grants the power to make a proclamation to extend these limits beyond 6 months and 10%, but Attorney General Barr has yet to make this finding.

- Attorney Barr’s mandate has actually placed more restrictions on top of the ones already existing; there is now a new risk and needs assessment program which has been shown to have a racially disparate impact over who will be considered for home-confinement.

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Additional Notes of Interest and Importance

1. Compassionate Release
   - Though the passing of The First Step Act gives individual prisoners the ability to file motions in court, it is critical they be represented by counsel.
     - Pro-se prisoners are usually opposed by the government.
     - FAMM’s Compassionate Release Clearing House, has secured a number of releases they do not believe would have been obtained in pro-se representation.

2. Political Pressure on the NYC Jail System
   - The NYC jail population is currently around 4,500 persons which is low historically for the NYC system.
     - This is due to previous ongoing efforts to drive down prison populations.
     - This should allow for more social distancing – there is more space and high staffing ratios.
   - The DOC has the ability to increase the amount of space in jail facilities for social distancing, and have recently opened a facility that was previously closed.
   - The BOC is continuing to advocate for constant updates regarding the response plan from the DOC.
     - Currently contact visits are suspended and the DOC is working to find ways to give inmates more opportunities to use phones and video-visitaiton.

3. Other Notes
   - Individual representation is good process by which to secure release, but it is a slow way to get at-risk people out of incarceration. Issuing blanket releases – such as was done by the state of Kentucky – is a more efficient path towards ensuring the safety of prison populations.
   - When advocating for release at this time there is an enhanced ability to argue that age alone is enough to justify release. It is itself a risk-factor for the disease and for serious or extreme manifestations of the disease.
   - It is imperative to push the narrative that we are only as healthy as the least healthy of us all, including incarcerated persons. This message must get to governors, wardens, judges, and the like.
If large prison populations become ill, it will happen quickly and will contribute substantially to the overload of the medical systems – it is in everyone’s interest to keep prisons and jails as safe as possible

- Partnering with public health officials can be the decisive factor in this advocacy – it lends legitimacy and increases the sense of urgency for releases
  - Public health officials generally want to work with prison advocacy groups, as it is part of their call to keep all people safe
- When advocating for release, focus on the stories of incarcerated persons and their families. These are the most relatable and most impactful
- Though many are trying to make the argument that prisons are safer for incarcerated people and the public alike, courts are not buying it; they are seeing the higher rates of contracting and death in jail facilities and agreeing the facilities are unsafe

4. Other ways to help and get involved
   - Continue to increase awareness of these issues by being vocal on social media and sharing stories or posts on to these issues
   - The panelists are happy to hear from volunteers and lawyers interested in getting involved. Please reach out directly.