

Virginia provides compassionate release to eligible incarcerated individuals who are terminally ill through **Conditional Release Based on Terminal Illness**<sup>1</sup> and **Executive Medical Clemency**,<sup>2</sup> and to eligible individuals who are age 60 or older through **Geriatric Conditional Release**.<sup>3</sup>

## **CONDITIONAL RELEASE BASED ON TERMINAL ILLNESS**

### **I. ELIGIBILITY**

**Medical Condition** – Incarcerated individuals who are terminally ill may be eligible for Conditional Release.

- “Terminally ill” is defined as having a chronic or progressive medical condition caused by injury, disease, or illness where the individual is expected to die within 12 months.<sup>4</sup>

**Exclusions** – There is a long list of terminally ill individuals who will not be considered for Conditional Release, including those serving sentences for first or second degree murder, any kidnapping or abduction felony, arson, sexual assault, treason, and certain robbery and carjacking offenses.<sup>5</sup>

### **II. APPLICATION/REFERRAL**

An incarcerated individual who is terminally ill may petition the Virginia Parole Board for Conditional Release by submitting a *Petition for Conditional Release Based on Terminal Illness*.<sup>6</sup>

- The petition form states that an individual’s “institutional counselor” may assist in filling out the form and gathering any necessary information.<sup>7</sup>

### **III. DOCUMENTATION AND ASSESSMENT**

The Parole Board requires an incarcerated individual to submit the following information with the *Petition for Conditional Release Based on Terminal Illness*:

- Identification of health issues, including medical reports;
- Residential plans;
- Family/community support;

- Names and contact phone numbers of “support individuals or groups”; and
- Any other pertinent information.<sup>8</sup>

#### **IV. DECISION-MAKING PROCESS**

**Decision-Maker** – The Virginia Parole Board makes the final decision whether to release terminally ill individuals on Conditional Release.<sup>9</sup>

**Decision** – The Parole Board reviews and considers the petitions that eligible individuals submit and provides written notification of its decisions.<sup>10</sup>

Other than the *Petition for Conditional Release Based on Terminal Illness* form, the Parole Board has not promulgated any rules implementing Conditional Release Based on Terminal Illness, and there is no other information available on the Board’s decision-making process in these cases.<sup>11</sup>

#### **V. POST-DECISION**

Although the statute does not address whether an individual may reapply after a denial, the *Petition for Conditional Release Based on Terminal Illness* includes a box the Parole Board can check to indicate it will not consider a request if the individual previously submitted a petition less than one year ago.<sup>12</sup> There is no other information available about whether the Board will reconsider a petition if an individual’s health has changed or worsened in the interim.

#### **VI. REPORTING/STATISTICS**

The Conditional Release Based on Terminal Illness statute became effective on March 1, 2021, and, as of this memo’s publication, the Parole Board has not issued information indicating that any individuals have been released under the new law.

### **EXECUTIVE MEDICAL CLEMENCY**

The Governor may grant Executive Medical Clemency, also referred to as a Medical Pardon, to incarcerated individuals who are terminally ill.<sup>13</sup>

#### **I. ELIGIBILITY**

**Medical Condition** – An incarcerated individual is eligible for Medical Clemency consideration if the person has a terminal illness with a life expectancy of three months or less.<sup>14</sup>

- Note that this definition of terminal illness is different than the one used in the Conditional Release Based on Terminal Illness law, where terminal illness is defined as being expected to die within 12 months.

The incarcerated individual's treating physician and a second licensed physician, one of whom must be a Department of Corrections (Department) physician, must make the diagnosis.<sup>15</sup>

**Exclusions** – There is no information on any incarcerated individuals being excluded from Medical Clemency consideration.

## **II. APPLICATION/REFERRAL**

**Request/Petition** – Incarcerated individuals, or relatives or friends on their behalf, can submit requests for Medical Clemency to the Office of the Secretary of the Commonwealth.<sup>16</sup>

- For information on how to submit a *Medical Clemency Petition* (also referred to as a *Medical Pardon Petition*), individuals must email the Office of the Secretary of the Commonwealth at [pardons@governor.virginia.gov](mailto:pardons@governor.virginia.gov).

## **III. DOCUMENTATION AND ASSESSMENT**

The only additional information the Department provides on the documentation and assessment process is that the Secretary of the Commonwealth and/or the Parole Board may ask Department “organizational units” for additional information on the incarcerated individual's medical treatment, mental and physical health needs, programming, work history, disciplinary record, interactions with staff and other incarcerated people, cognitive functioning, proposed home plan, and support system.<sup>17</sup>

- **Pre-release Planning** – Although the Department has fairly comprehensive guidance on pre-release planning,<sup>18</sup> it does not appear applicable to incarcerated individuals who are terminally ill. For example, Re-entry Counselors are directed to work on “home plans,” and for people with ongoing medical issues, the Re-entry Counselors must complete a “Problematic Release Plan,” which require extra coordination to facilitate release.<sup>19</sup> This planning process, which includes arranging for medical equipment and needed supplies and beginning the public benefits application process, does not reference incarcerated people who are terminally ill and the stated time frames (up to 12 months to complete some of the paperwork) are unrealistic for individuals who are terminally ill.

## IV. DECISION-MAKING PROCESS

**Decision-Maker** – Only the Governor of Virginia has the power to grant Executive Medical Clemency on the basis of a terminal illness.<sup>20</sup>

**Decision** – At the Governor’s request, the Virginia Parole Board is responsible for investigating Medical Clemency petitions and reporting its recommendations.<sup>21</sup>

**Conditions** – If the Governor grants the request, the Department’s Community Release Unit will create the release authorization, detailing the appropriate reporting instructions for the person’s “release status.”<sup>22</sup>

- As a condition of Medical Clemency, an individual who is terminally ill must agree in writing to have a physician provide updated medical information to the Department whenever requested.<sup>23</sup>

## V. POST-DECISION

**Supervision** – The Governor may direct that an individual granted Medical Clemency be placed under supervision. In that situation, the individual is supervised in the same manner and under the same conditions as individuals released on parole, in addition to any conditions the Governor sets related to the medical condition.<sup>24</sup>

### Medical Follow-Up

- The Department’s Chief Physician (or designee) will communicate with the individual’s physician as needed to gather updated information on the medical condition, level of alertness, whether the individual is ambulatory and eating, and prognosis.<sup>25</sup>
- A Department physician, if necessary, will be allowed to visit and examine any individual released on Medical Clemency.<sup>26</sup>

**Revocation/Termination** – As stated above, a condition of being released under the Medical Clemency rules is that an individual must agree in writing to have a physician provide medical updates to the Department whenever requested. If a request for updated medical information is **not** honored, the Medical Clemency release can be immediately terminated.<sup>27</sup>

## VI. REPORTING/STATISTICS

Each year the Governor submits a report to the Virginia General Assembly providing information on the number of individuals granted pardons, commutations, and other forms of Executive Clemency. According to the most recent reports, in 2019, Governor Ralph Northam granted three terminally ill individuals Executive Clemency in the form

of a Medical Pardon,<sup>28</sup> and in 2020, he granted one terminally ill individual Executive Clemency in the form of a Medical Pardon.<sup>29</sup>

## **GERIATRIC CONDITIONAL RELEASE**

### **I. ELIGIBILITY**

**Age** – Older incarcerated individuals may petition for Geriatric Conditional Release if they are (1) age 60 or older, having served at least 10 years of their sentence, or (2) age 65 or older, having served at least five years of their sentence.<sup>30</sup>

**Exclusions** – Individuals convicted of Class 1 felonies are not eligible for Geriatric Conditional Release.<sup>31</sup>

### **II. APPLICATION/REFERRAL**

**Automatic Consideration** – The Virginia Parole Board automatically reviews individuals incarcerated for felonies committed after January 1, 1995, within a year after they become eligible for Geriatric Conditional Release and annually thereafter.<sup>32</sup>

**Petition** – Any incarcerated individual eligible for discretionary parole may submit a *Petition for Geriatric Conditional Release*, available on the Parole Board’s website, to be considered for release.<sup>33</sup>

- Petitions can be submitted 90 days or less before the date the incarcerated individual meets the minimum age and time served requirements.<sup>34</sup>

### **III. DOCUMENTATION AND ASSESSMENT**

There is no formal documentation or assessment process prior to a *Petition for Geriatric Conditional Release* being submitted directly to the Board.

### **IV. DECISION-MAKING PROCESS**

**Decision-Maker** – The Virginia Parole Board makes all decisions regarding Geriatric Conditional Release.

**Decision Process** – The Parole Board may deny petitions for Geriatric Conditional Release based on a review of the incarcerated individual’s record.<sup>35</sup> Petitions not denied on review are considered through the following procedures:

- Initial Review – Parole Board members review the incarcerated person’s petition, the individual’s “central file,” and any other relevant information.<sup>36</sup>

- If the Board denies Geriatric Conditional Release at this step by a majority vote, the process ends.<sup>37</sup>
- If the Board does **not** deny the request in its initial review, the case automatically advances to the next level, an “assessment review.”<sup>38</sup>
- Assessment Review – A member of the Parole Board, or a designated staff person, conducts personal interviews with those petitioning for release and completes written assessments of their “suitability” for Geriatric Conditional Release. A recommendation to grant (or not grant) release is then made, detailing the supporting reasons.<sup>39</sup>
  - Victim Notification – The Parole Board will notify the Department of Correction’s (Department) Victim Services office as required under Virginia Law, with the victim receiving written notification that an incarcerated person has petitioned for Geriatric Conditional Release.<sup>40</sup> The victim will be given 60 days to provide any comments and concerns,<sup>41</sup> and consideration of any Geriatric Conditional Release is put on hold until that time period has ended.<sup>42</sup>
- Final Vote and Decision – All factors the Parole Board uses in making parole decisions also apply in Geriatric Conditional Release, including victim input.<sup>43</sup> The case is then directed to the other Board members for review and decision.
  - The decision requires the concurrence of at least three Parole Board members. In the cases of individuals serving life sentences, Geriatric Conditional Release will not be granted unless four Board members agree.<sup>44</sup>
  - Once a final decision has been made, the crime victim will be notified of the Parole Board’s action.<sup>45</sup>

### Conditions and Pre-release Planning

- Pre-release Planning – Transition, health care, and mental health staff are directed to complete applications for federal and state benefits that are available to older individuals after they are released. Those include veterans, Medicaid, and Supplemental Security Income (SSI) benefits.<sup>46</sup> Note that the Department has a “Memorandum of Understanding” with the Social Security Administration covering pre-release SSI application procedures.<sup>47</sup>
- Conditions – The Parole Board sets the Geriatric Conditional Release terms and conditions, which are similar to those for general parole.<sup>48</sup> However, the Board can impose additional special conditions it feels are appropriate.<sup>49</sup>

## V. POST-DECISION

**Denials and Appeal Rights** – An individual may resubmit a *Petition for Geriatric Conditional Release* on an annual basis for the Parole Board’s review.<sup>50</sup>

**Effect of Conditional Release Request on Other Release Eligibility** – An incarcerated individual may receive only one “consideration for release” (either discretionary parole or conditional release) in any 12-month period.<sup>51</sup>

**Supervision** – The Parole Board establishes the period of supervision for the formerly incarcerated person, with supervision provided by the Department’s Division of Community Corrections.<sup>52</sup>

**Revocation/Termination** – If the individual violates one or more terms of the Geriatric Conditional Release, the Board may order an arrest and reincarceration.<sup>53</sup>

## VI. REPORTING/STATISTICS

The Parole Board publishes the number of individuals granted Geriatric Conditional Release as part of its monthly parole reports.<sup>54</sup>

In 2019, the Parole Board considered 664 people for Geriatric Conditional Release, granting it to just 24 individuals – less than 4%. The age range of those granted release was 60 to 77 years old.

- Of the 24 people granted Geriatric Conditional Release, 23 were men and one was a woman; 18 individuals were Black and six were white.
- Of the 640 people denied Geriatric Conditional Release, 621 were men and 19 were women; 326 were white, 307 were Black, five were Asian American/Pacific Islander, and two were American Indian/Alaska Native.

In 2020, the Parole Board considered 940 people for Geriatric Conditional Release but only granted it to 79 individuals, ages 60 to 83. The percentage granted – 8.4% – is still relatively low but twice as high as the previous year.

- Of the 79 people granted Geriatric Conditional Release in 2020, 73 were men and six were women; 51 individuals were Black, 27 were white, and one was Asian American/Pacific Islander. Of the 79, four were also considered “dual eligibles,” meaning they were eligible for both Geriatric Conditional Release and general parole.
- Of the 861 people denied Geriatric Conditional Release in 2020, 841 were men and 20 were women; 451 individuals were white, 406 were Black, three were Asian American/Pacific Islander, and one was American Indian/Alaska Native.

## **VIRGINIA COMPASSIONATE RELEASE**

### **PRIMARY LEGAL SOURCES**

#### **CONDITIONAL RELEASE BASED ON TERMINAL ILLNESS**

##### **Statute**

Virginia Code, § 53.1-40.02 (2021), available through the Virginia General Assembly, <https://law.lis.virginia.gov/vacode/title53.1/chapter2/section53.1-40.02/>.

##### **Agency Policy/Publications**

Virginia Parole Board, *Petition for Conditional Release Based on Terminal Illness* (2021), <https://vpb.virginia.gov/files/1193/vpb-pb29-petition-for-terminal-illness-release.pdf>.

Virginia Department of Corrections, Operating Procedure 820.02-Inmate Reentry Planning (May 1, 2021), §§ XI (A) (2) and (C), <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-820-2.pdf>.

#### **EXECUTIVE MEDICAL CLEMENCY**

##### **Statute**

Virginia Code, §§ 53.1-229 and 53.1-231, available through the Virginia General Assembly, <https://law.lis.virginia.gov/vacode/title53.1/chapter12/>.

##### **Agency Policy/Publications**

Secretary of the Commonwealth Kelly Thomasson, Pardons webpage, <https://www.commonwealth.virginia.gov/judicial-system/pardons/conditional-pardons/>.

Virginia Department of Corrections, Operating Procedure 820.2-Inmate Reentry Planning (May 1, 2021), §§ XI (B) and (C), <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-820-2.pdf>.

Virginia Department of Corrections, Operating Procedure 050.3 (Nov. 1, 2020), § II (E) (6), <https://www.vadoc.virginia.gov/files/operating-procedures/050/vadoc-op-050-3.pdf>.

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## VIRGINIA COMPASSIONATE RELEASE PRIMARY LEGAL SOURCES

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### GERIATRIC CONDITIONAL RELEASE

#### Statute

Virginia Code, § 53.1-40.01, available through the Virginia General Assembly, <https://law.lis.virginia.gov/vacode/title53.1/chapter2/section53.1-40.01/>.

#### Agency Policy/Publications

Virginia Parole Board, Policy Manual (2006), § II.B, <https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf>.

Virginia Parole Board, Administrative Procedures Manual, Administrative Procedure 1.226-Conditional Release of Geriatric Inmates (2001), <https://vpb.virginia.gov/files/1108/vpb-procedure-manual.pdf>.

Virginia Parole Board, *Petition for Geriatric Conditional Release* (March 1, 2021), <https://vpb.virginia.gov/files/1093/vpb-pb27-petition-for-geriatric-release.pdf>.

Virginia Department of Corrections, Operating Procedure 820.2-Inmate Reentry Planning (May 1, 2021), §§ XI (A) (1) and (C), <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-820-2.pdf>.

## NOTES

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\* *Id.* means see prior note.

<sup>1</sup> Va. Code Ann. § 53.1-40.02; Virginia Department of Corrections Operating Procedure (DOC-OP) 820.2, § XI (A) (2). See also Virginia Parole Board, *Petition for Conditional Release Based on Terminal Illness*. Note that the program is referred to as both “Conditional Release of Terminally Ill Prisoners” and “Conditional Release Based on Terminal Illness.”

<sup>2</sup> Va. Code Ann. §§ 53.1-229 and 53.1-231; DOC-OP 820.2, § XI (B) and DOC-OP 050.03, § II (E) (6). See also Secretary of the Commonwealth Kelly Thomasson, Pardons webpage.

<sup>3</sup> Va. Code Ann. § 53.1-40.01; Virginia Parole Board Policy Manual, § II (B); Virginia Parole Board Administrative Procedure (Parole Board Procedure) 1.226-Conditional Release of Geriatric Inmates; DOC-OP 820.2, § XI (A) (1).

<sup>4</sup> Va. Code Ann. § 53.1-40.02 (A); DOC-OP 820.2, § XI (A) (2) (a).

<sup>5</sup> Va. Code Ann. §§ 53.1-40.02 (B) and (C); DOC-OP 820.2, § XI (A) (2) (c).

<sup>6</sup> DOC-OP 820.2, § XI (A) (2) (b); Virginia Parole Board, *Petition for Conditional Release Based on Terminal Illness (Terminal Illness Petition)*.

<sup>7</sup> *Terminal Illness Petition*, 2.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> Va. Code Ann. § 53.1-40.02 (B).

<sup>10</sup> *Terminal Illness Petition*, 2.

<sup>11</sup> The statute specifically states that the Parole Board must promulgate regulations to implement the new Conditional Release Based on Terminal Illness law. Va. Code Ann. § 53.1-40.02 (D). Note that the Virginia Parole Board's Policy Manual and Administrative Procedures Manual have not been updated since 2006.

<sup>12</sup> *Terminal Illness Petition*, 2.

<sup>13</sup> Va. Code Ann. § 53.1-229; DOC-OP 820.2, § XI (B). See also Secretary of the Commonwealth Kelly Thomasson, Pardons webpage. Note that although the Department uses the term "Medical Clemency," the Governor's website refers to it as "Medical Pardon."

<sup>14</sup> DOC-OP 820.2, § XI (B) (2).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at (B) (3). See also Secretary of the Commonwealth Kelly Thomasson, Pardons webpage.

<sup>17</sup> *Id.* at (C).

<sup>18</sup> *Id.* at §§ I through XII.

<sup>19</sup> *Id.* at § VI (D) (2)

<sup>20</sup> Va. Code Ann. § 53.1-229; DOC-OP 820.2, § XI (B) (1)

<sup>21</sup> Va. Code Ann. § 53.1-231; Virginia Parole Board, Policy Manual § VII (B).

<sup>22</sup> DOC-OP 820.2, § XII (A) (1).

<sup>23</sup> DOC-OP 820.2, § XI (B) (4); DOC-OP 050.3, § II (E) (6).

<sup>24</sup> Virginia Parole Board, Policy Manual § VII (C), referencing Va. Code Ann. § 53.1-136 (5).

<sup>25</sup> DOC-OP 050.3, § II (E) (6) (b).

<sup>26</sup> *Id.* at (6) (d).

<sup>27</sup> DOC-OP 820.2, § XI (B) (4), referencing DOC-OP 050.3.

<sup>28</sup> Office of the Governor, List of Pardons, Commutations, Reprieves and Other Forms of Clemency, to the General Assembly of Virginia, Senate Document No. 2, (2020), <https://rga.lis.virginia.gov/Published/2020/SD2/PDF>.

<sup>29</sup> Office of the Governor, List of Pardons, Commutations, Reprieves and Other Forms of Clemency, to the General Assembly of Virginia, Senate Document No. 2, (2021), <https://rga.lis.virginia.gov/Published/2021/SD2/PDF>.

<sup>30</sup> Va. Code Ann. § 53.1-40.01; Parole Board Procedure 1.226; DOC-OP 820.2, §§ XI (A) (1) (a) and (A) (1) (b).

<sup>31</sup> Va. Code Ann. § 53.1-40.01; Parole Board Procedure 1.226, Policy; DOC-OP 820.2, § XI (A) (1) (b). Class 1 felonies are the most serious crimes, including those punishable by death or life imprisonment. See Va. Code Ann. § 18.2-9.

<sup>32</sup> DOC-OP 820.2, § XI (A) (1) (c) (i). The Parole Board procedures do not reference automatic consideration for Geriatric Conditional Release. Note that although the Department procedures say that the Parole Board will review an individual eligible for Geriatric Conditional Release “annually,” they also state that after the initial review the Parole Board can defer the “next review” for up to three years. *Id.*

<sup>33</sup> *Id.* at (A) (1) (c) (ii).

<sup>34</sup> *Id.* at (A) (1) (c) (iii).

<sup>35</sup> Parole Board Procedure 1.226, Policy.

<sup>36</sup> *Id.* at Application, Initial Review.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at Application, Assessment Review.

<sup>40</sup> *Id.* at Application, Initial Review. See also Va. Code Ann. § 53.1-155 and Parole Board Procedure 1.225.

<sup>41</sup> Parole Board Procedure 1.226, Application, Assessment Review. Comments can be provided in writing or by phone.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> DOC-OP 820.2, § X (C). Supplemental Security Income (SSI) provides income benefits for low-income individuals who are disabled and/or age 65 or older. Note that SSI applications for age-based claims may not be submitted more than 30 days prior to release. *Id.* at § X (B) (1) (b).

<sup>47</sup> DOC-OP 820.2, § X (B) (1).

<sup>48</sup> Parole Board Procedure 1.226, Application, Conditions of Release. See Virginia Parole Board Policy Manual, § IV (A) for general conditions of parole.

<sup>49</sup> Parole Board Procedure 1.226, Application, Conditions of Release.

<sup>50</sup> DOC-OP 820.2, § XI (A) (1) (c) (iv).

<sup>51</sup> Parole Board Procedure 1.226, Application.

<sup>52</sup> Id. at Application, Conditions of Release. Note that the Division of Community Corrections is still referred to as the “Division of Probation and Parole” in some Department documents.

<sup>53</sup> Id. Note, however, that an individual whose Geriatric Conditional Release is revoked may file a new petition and be considered again “at the discretion of the Board.” Id. at Application, Review Following Revocation of Conditional Release.

<sup>54</sup> Virginia Parole Board, Parole Decisions, <https://vpb.virginia.gov/parole-decisions/>.