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# Chapter 405: The Time No Longer Needs to Fit the Crime for Dying Inmates

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## Chapter 405: The Time No Longer Needs to Fit the Crime for Dying Inmates

*Kendra Bertschy*

### *Code Sections Affected*

Penal Code §§ 2065, 3550 (new).

SB 1399 (Leno); 2010 STAT. Ch. 405.

### I. INTRODUCTION

Inmate Y is suffering from end-stage lung disease.<sup>1</sup> He relies on a ventilator to survive.<sup>2</sup> He is unable to talk, swallow, or move on his own.<sup>3</sup> “He has no bladder control and has very little apparent cognitive function.”<sup>4</sup> Inmate Y requires twenty-four hour nursing care.<sup>5</sup> Regardless of his extreme limitations, the state has two correctional officers guarding him at all times, courtesy of California taxpayers.<sup>6</sup> In approximately eighteen months, Inmate Y cost California taxpayers over \$500,000 in medical bills.<sup>7</sup>

Chapter 405 grants medical parole to inmates like Inmate Y, who are the “sickest of the sick.”<sup>8</sup> Audits of the prison system discovered that 39% of prison health care costs are spent caring for inmates, like Inmate Y, who make up only one-half of 1% of the prison population.<sup>9</sup> Because of their illness, these inmates are medically or physically incapacitated and no longer pose a threat to society.<sup>10</sup>

1. Press Release, Office of Senator Mark Leno, Senator Leno Proposes Medical Parole for Severely Incapacitated Inmates (Mar. 17, 2010), available at [http://dist03.casen.govoffice.com/index.asp?Type=B\\_PR&SEC={F0DFD1A5-1C7B-4F09-9F09-C48A423D1072}&DE={53BFAC97-9787-48A8-858B-BA910122AE63}](http://dist03.casen.govoffice.com/index.asp?Type=B_PR&SEC={F0DFD1A5-1C7B-4F09-9F09-C48A423D1072}&DE={53BFAC97-9787-48A8-858B-BA910122AE63}) (on file with the *McGeorge Law Review*). This paragraph is based on a fictional inmate Y that Senator Leno indicates is an example of an inmate who would qualify for medical parole.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 6 (June 29, 2010) (“Does it make sense for the state to pay for two correctional officers to guard an inmate 24-hours-a-day as the inmate lies comatose or in a permanent vegetative state in a hospital bed?”).

7. Press Release, *supra* note 1.

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 8 (June 29, 2010).

9. Susan Ferriss, *Advocates: Prison Health Audit Boosts Case for Medical Parole*, SACBEE.COM (May 18, 2010, 5:11 PM), <http://blogs.sacbee.com/capitolalertlatest/2010/05/audit-on-prison.html> (on file with the *McGeorge Law Review*).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10 (June 29, 2010).

By reducing the need for round the clock guards, California will save millions in custody and transportation costs.<sup>11</sup>

## II. LEGAL BACKGROUND

### A. *Inmate Constitutional Considerations*

In *Estelle v. Gamble*, the United States Supreme Court determined that the government must provide medical care to individuals while they are incarcerated.<sup>12</sup> In *Estelle*, an inmate sued the prison for inadequate medical care.<sup>13</sup> The Eighth Amendment to the Constitution expressly precludes the use of cruel or unusual punishment.<sup>14</sup> The Court held that any “deliberate indifference to serious medical needs of prisoners constitutes” a violation of the Eighth Amendment.<sup>15</sup> When a state incarcerates an inmate, it has a duty to provide the inmate with any necessary health care.<sup>16</sup>

### B. *Inmate Healthcare Costs*

The state of California spends billions on incarcerated prisoners each year.<sup>17</sup> In total, the California Department of Corrections and Rehabilitation (CDCR) spent \$9.6 billion to run the prison system.<sup>18</sup> This spending increases an average of 8% per year due to rising costs for providing constitutionally mandated inmate medical care.<sup>19</sup> In 2009 alone, California taxpayers paid nearly \$2.5 billion in health care costs for state prisoners.<sup>20</sup> Former California Governor Arnold Schwarzenegger recently demanded that J. Clark Kelso, the federally appointed receiver who oversees the California prison health care system, reduce inmate health spending by approximately \$811 million.<sup>21</sup>

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11. *Id.* at 8.

12. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

13. *Id.* at 101.

14. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

15. *Estelle*, 429 U.S. at 104.

16. *Id.* at 116-17 n.13.

17. CALIFORNIA PRISON HEALTH CARE SERVICES, FACT SHEET: SB 1399—SENATOR LENO 2 (2010) [hereinafter FACT SHEET] (on file with the *McGeorge Law Review*).

18. *Id.*

19. *Id.*

20. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 7 (June 29, 2010).

21. Don Thomas, *Calif. Prison Receiver Seeks Release of Ill Inmates*, Mar. 16, 2010, VENTURA COUNTY STAR, available at <http://www.vcstar.com/news/2010/mar/16/calif-prison-receiver-seeks-release-of-ill/?print=1> (on file with the *McGeorge Law Review*).

The CDCR must ensure that it does not violate a prisoner's due process rights when he or she needs medical attention.<sup>22</sup> The prison health care system is "blamed for killing an average of one inmate each week through neglect or malpractice."<sup>23</sup> In 2009, the CDCR spent \$2.5 billion, 26% of its budget, on inmate health care.<sup>24</sup> This amount did not include the custody costs of transporting inmates to the health care facilities.<sup>25</sup>

Inmate health care costs are also increasing at alarming rates.<sup>26</sup> The CDCR estimates that health care costs for 2009-2010 will rise an additional 32%.<sup>27</sup> This translates to an increase of \$424 million from the previous year.<sup>28</sup> Supplying adequate health care costs approximately \$16,000 for the average inmate.<sup>29</sup> For less healthy inmates, the price rises substantially.<sup>30</sup> California pays more than \$41 million a year in medical bills for thirty-two inmates with the highest needs.<sup>31</sup>

### C. Correctional Officer Costs at Healthcare Facilities

Prior to Chapter 405, the state required two correctional officers to watch over a hospitalized inmate twenty-four hours a day, regardless of how incapacitated the inmate was.<sup>32</sup> "According to the State Auditor, between 2003 and 2008, medical guard time accounted for 24% of the prison system's total guard overtime."<sup>33</sup> It costs \$2,317 per day for two correctional officers to guard a single inmate at an outside medical facility.<sup>34</sup> The cost of guarding the inmate is "nearly equal to the actual cost of the medical care . . ."<sup>35</sup> This additional cost doubles the taxpayer burden for an inmate's cost of incarceration.<sup>36</sup>

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22. See generally *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that inmates have constitutional rights and the State is in charge of maintaining those rights).

23. Thomas, *supra* note 21.

24. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 7 (June 29, 2010).

25. FACT SHEET, *supra* note 17, at 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See *id.* (noting that 1,300 "high cost inmates" have medical bills totaling over \$100,000 annually).

31. *Id.*

32. *Id.* at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

#### D. Prior California Legislation

California previously implemented a compassionate release system in an attempt to release its incapacitated prisoners.<sup>37</sup> In 2007, Chapter 740 established a procedure of compassionately releasing inmates when they were “‘permanently medically incapacitated.’”<sup>38</sup> However, this law failed to increase medical releases.<sup>39</sup> In 2009, only two inmates had their sentences amended via this procedure.<sup>40</sup> The CDCR employees and physicians found the definition for determining eligible inmates “‘very difficult to apply.’”<sup>41</sup> Further, after a prisoner was approved, the prisoner would be resentenced by a judge and released from the CDCR’s control.<sup>42</sup> If a prisoner’s health improved, the CDCR would be unable to return that individual to prison.<sup>43</sup> The fact that a prisoner would remain free if their condition improved was a “‘significant inhibiting factor.’”<sup>44</sup>

Senator Leno introduced Chapter 405 to address the problems with this program.<sup>45</sup> California is now among thirty-six other states to have implemented some form of medical release to assist with the financial burden of inmate health care.<sup>46</sup>

### III. CHAPTER 405

Chapter 405 establishes a medical parole program for California.<sup>47</sup> A prisoner is eligible for medical parole if the Chief Medical Officer finds that the prisoner suffers from a “‘condition that renders [the prisoner] permanently unable to perform activities of basic daily living . . . .’”<sup>48</sup> This condition requires that the inmate receive twenty-four hour care, and that the inmate did not suffer from the condition at the time of his or her sentencing hearing.<sup>49</sup>

37. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 15 (Apr. 14, 2010).

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 15-16 (“[T]he CDCR . . . ha[s] to find the prisoner is either terminally ill with less than six months to live or permanently medically incapacitated . . . [and] that incapacitation did not exist at the time of the original sentencing.”).

42. *Id.* at 16.

43. *Id.*

44. *Id.* (“This very fact was cited as grounds for a veto the first time this approach was proposed. . . and would appear to act as an inhibiting factor for the numerous decision-makers all the way through the application process.”).

45. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10 (Apr. 14, 2010).

46. *Id.*; *see also* Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes’ Overblown Promises*, 90 CAL. L. REV. 257, 287 (2002) (reviewing FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001)) (noting that Louisiana passed similar legislation by also presenting “economic; rather than humanitarian arguments”).

47. CAL. PENAL CODE § 3350 (enacted by Chapter 405).

48. *Id.* § 3350(a) (enacted by Chapter 405).

49. *Id.*

Additionally, the prisoner's physician must complete a parole plan.<sup>50</sup> At a minimum, this includes the prisoner's plan for residency and medical care.<sup>51</sup> A two-person panel conducts a medical parole hearing and reviews the plan.<sup>52</sup> The Board of Parole Hearings (BPH) will grant medical parole if it finds that the prisoner does not pose a threat to society.<sup>53</sup> The BPH can require the parolee to accept reasonable conditions, including but not limited to, wearing an electronic monitoring device.<sup>54</sup>

Furthermore, the CDCR must ensure that the prisoner has applied for federal assistance when an inmate has been medically paroled.<sup>55</sup> The State of California is to assume responsibility as the last resort for those parolees who are not eligible for public insurance or are unable to pay.<sup>56</sup> The State shall reimburse providers for medical treatment until the parolee can pay.<sup>57</sup> Additionally, the CDCR shall reimburse the county for the cost of providing a public guardian for any prisoner granted medical parole.<sup>58</sup>

The BHP may request a physician to examine the parolee.<sup>59</sup> If the parolee's medical condition substantially improves, the BPH may revoke the parole and return the person to custody.<sup>60</sup>

#### IV. ANALYSIS

The Legislature passed Chapter 405 as one of the four bills that Kelso introduced to address cuts in prison health care spending.<sup>61</sup> Kelso emphasized, "this is a budget issue, not compassionate release."<sup>62</sup> He indicates that the focus of Chapter 405 is on its cost-effectiveness and not on the people.<sup>63</sup>

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50. *Id.* § 3550(c) (enacted by Chapter 405).

51. *Id.* § 3550(b)-(c) (enacted by Chapter 405) (stating that the placement of the prisoner must comply with the "Victim's Bill of Rights Act of 2008: Marsy's Law").

52. *Id.* § 3550(f) (enacted by Chapter 405). The panel consists of at least one commissioner; if there is a tie vote, the BPH will hear the case *en banc*. *Id.*

53. *Id.* § 3550(a) (enacted by Chapter 405).

54. *Id.* § 3550(h) (enacted by Chapter 405).

55. *Id.* § 3550(i) (enacted by Chapter 405). The CDCR must file documents with the Social Security Administration and the State Department of Health Care Services on behalf of the parolee for benefit claims and pay the state of California's Medi-Cal costs for inmates. *Id.* § 2065(b)-(c) (enacted by Chapter 405).

56. *See id.* § 2065(d) (enacted by Chapter 405) (listing the State Department of Health Care Services' duties if a medical parolee does not qualify for Medi-Cal).

57. *Id.*

58. *Id.*

59. *Id.* § 3550(h) (enacted by Chapter 405).

60. *Id.*

61. Thomas, *supra* note 21.

62. *Id.*

63. *Id.*

A. *Saving State Spending on Incapacitated Inmates*

Inmates, as a population, are generally unhealthy<sup>64</sup> and prison administrators in California have struggled to find a cost-effective solution for providing adequate medical care to inmates.<sup>65</sup> This dilemma stems from the conflict between the high cost of providing health care to inmates and the need to maintain security amidst California's budget crisis.<sup>66</sup> Aging of the current prison population only exacerbates the problem.<sup>67</sup>

Chapter 405 relieves California of the burden as the sole provider of funding the medical costs for the most expensive and unhealthy inmates.<sup>68</sup> Once released, it is unlikely that the prisoners will be able to pay for health insurance on their own.<sup>69</sup> However, the released prisoners will become eligible for federal aid.<sup>70</sup> Even though the state will be paying for some of the inmate's health care, it will be able to share the cost with the federal government.<sup>71</sup>

The state will also save money by not having to pay two correctional officers to stand guard over inmates who do not pose a threat to society.<sup>72</sup> Guards can return to performing more integral parts of their duties.<sup>73</sup> Supporters estimate the new system will save approximately \$200 million each year.<sup>74</sup> Governor Schwarzenegger indicated that Chapter 405 would save money without impairing public safety.<sup>75</sup> While this process will potentially place a burden on the parole system, there is no indication of how much of a financial burden it could become.<sup>76</sup>

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64. RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* 88 (2003).

65. *See id.* at 87-88 ("Research has shown that health-care expenditures have become the most pressing problem facing correctional administrators.").

66. *See generally Schwarzenegger Signs Bill Allowing Medical Parole*, ASSOCIATED PRESS, Sept. 29, 2010, available at [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100929/A\\_NEWS/100929828](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100929/A_NEWS/100929828) (on file with the *McGeorge Law Review*) (noting Governor Schwarzenegger stated, Chapter 405 "could save the cash-strapped [California] an estimated \$200 million in annual prison health care costs without compromising public safety").

67. *See id.* ("There is a strong relationship between aging and the need for assistance with activities of daily living . . .").

68. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 9 (June 29, 2010).

69. *Id.* at 10.

70. *Id.* at 9.

71. *Id.*

72. *Id.*

73. Timm Herdt, *A Medical Parole Classification Could Save State Money*, VENTURA COUNTY STAR, July 17, 2010, available at <http://www.vcstar.com/news/2010/jul/17/nxxfcprisons18/?print=1> (on file with the *McGeorge Law Review*).

74. *Id.*

75. *Schwarzenegger Signs Bill*, *supra* note 66.

76. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1399, at 3-4 (Aug. 4, 2010) (discussing the fiscal effect of the bill without discussing how much it costs to have a prisoner in the parole system).

B. *Is Chapter 405 Overbroad?*

The Crime Victims United of California (CVUC) and the Taxpayers for Improving Public Safety opposed Chapter 405 because they found the criteria for eligibility overbroad.<sup>77</sup> They fear that inmates with non-life threatening illnesses, such as “high blood pressure, diabetes, rheumatoid arthritis and more,” would satisfy the requirements for medical parole.<sup>78</sup> The Legislature amended Chapter 405 during bill negotiations to eliminate this concern.<sup>79</sup>

Chapter 405 narrows the parole requirements to “condition[s] that render[] [the prisoner] permanently unable to perform activities of basic daily living.”<sup>80</sup> Tina Chiu, a representative of the VERA Institute of Justice, researched release programs and found the proposed system of Chapter 405 very restrictive. She considers the “threshold for being incapacitated [to be] very high.”<sup>81</sup> Senator Leno argues this concern does not have merit.<sup>82</sup> He notes that medical parole works, and points to the thirty-six other states that have successfully implemented similar programs for proof that Chapter 405 will also succeed.<sup>83</sup>

C. *Constitutional Implications*

Chapter 405 not only addresses issues regarding a prisoner’s due process right to access appropriate health care, but it also addresses the issue of prison overcrowding.<sup>84</sup> Prior to Chapter 405, the California Supreme Court required the release of certain dangerous inmates due to prison overcrowding.<sup>85</sup> Kelso has already identified eleven prisoners who qualify for medical parole.<sup>86</sup> Chapter 405 will keep the more dangerous inmates in jail while releasing the “sickest of the sick” and freeing up the prison hospital beds.<sup>87</sup>

Opponents of Chapter 405, however, are concerned with the cost that releasing inmates will have on victims and their families.<sup>88</sup> The CVUC indicated that prior to Chapter 405, the laws were already unjust to victims because of the

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77. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 12 (June 29, 2010).

78. *Id.* at 12-13.

79. Herdt, *supra* note 73.

80. CAL. PENAL CODE § 3350(a) (enacted by Chapter 405).

81. Herdt, *supra* note 73.

82. *Schwarzenegger Signs Bill*, *supra* note 66.

83. *Id.*

84. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10-11 (June 29, 2010).

85. *Id.* at 12.

86. *Id.* at 8.

87. *Id.* at 10, 12.

88. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1399, at 8 (Aug. 4, 2010).



various ways in which inmates are able to reduce their sentences.<sup>89</sup> For example, there are programs that provide inmates an ability to reduce their sentences to 50% of the original time.<sup>90</sup> This reduction of sentences robs “[v]ictims and their families [of] be[ing] able to feel a sense of justice that the time served by the inmate for his or her crime(s) is not only reflective of the sentence imposed but of the crime committed.”<sup>91</sup>

#### D. Implications on the Parole System

The CVUC also criticizes Chapter 405 because parole officers are not required to return parolees to prison if the parolee’s condition improves.<sup>92</sup> Rather, their return is merely discretionary.<sup>93</sup> The CVUC is concerned that including this provision indicates a likelihood that prisons will release inmates knowing their condition has the possibility of improving.<sup>94</sup> Senator Dave Cogdill voiced this concern, indicating a lack of preventative measures to ensure that if an inmate recovers, they will return to prison.<sup>95</sup>

### V. CONCLUSION

Chapter 405 allows California to spend its limited resources on education rather than incapacitated inmates.<sup>96</sup> In 2010, California faced a \$20 billion budget shortfall and pressure to drastically lower the prison population.<sup>97</sup> Chapter 405 will save California money by sharing the cost of healthcare with other organizations, including the federal government, for the sickest inmates.<sup>98</sup> More importantly, the state will save millions of dollars on not having to pay correctional officers to stand guard over a comatose inmate.<sup>99</sup> However, Chapter 405 does not automatically release anyone; rather it provides the BPH with authority to grant medical parole.<sup>100</sup> Thus, the BPH must parole some prisoners in

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89. *Id.*

90. *Id.*

91. *Id.*

92. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 13 (June 29, 2010).

93. *Id.*

94. *See id.* (“The fact that this provision [of allowing for the parole to be revoked if the person’s condition improves] is included raises concern about what offenders would be eligible is [sic] the opportunity for their condition to improve.”).

95. Julie Small, *Bill to Parole Medically Incapacitated Prisoners in California Advances*, SCPR.COM Apr. 20, 2010, <http://www.scpr.org/news/2010/04/20/Medical-parole/> (on file with the *McGeorge Law Review*).

96. Herdt, *supra* note 73.

97. *Id.*

98. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 9-10 (June 29, 2010).

99. *Id.* at 9.

100. CAL. PENAL CODE § 3350(a) (enacted by Chapter 405).

order to save California money.<sup>101</sup> The Legislature should revisit this issue if the BPH only paroles a handful of inmates, as this would indicate that Chapter 405 has failed to increase medical releases like its predecessor, Chapter 740.<sup>102</sup>

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101. *Id.*

102. *See generally* Jack Dolan, *Despite Medical Parole Law, Hospitalized Prisoners are Costing California Taxpayers Millions*, L.A. TIMES, Mar. 2, 2011, available at <http://www.latimes.com/news/la-me-prisons-20110302,0,4396507,full.story> (on file with the *McGeorge Law Review*) (noting that as of March 2, 2011, not a single inmate has had a parole hearing for medical parole).