

Hospice and Palliative Care for the Incarcerated: Clinical, Ethical, Legal, and Policy Considerations

Ben A. Rich, J.D., Ph.D.
Kandyce Powell, RN, MSN

“Incarceration Nation”--the Data

- U.S.A. has 5% of world’s population and 25% of world’s “known” prison population
 - Almost 1 out of every 100 Americans incarcerated
 - Does US simply have more criminals than other nations?
 - Are other nations soft on crime and punishment?
- Almost half of current state prison population convicted of non-violent crimes
- Over last decade number of older prisoners increased by 75% nationwide
- Typical inmate population exhibits physiological characteristics 10 years older than non-incarcerated group of same chronological age
 - W.W. Berry III. Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release. *Maryland Law Review* 2009, 350-888.

... Incarceration Data ...

- Between 1980 and 2010 U.S. prison population > 11X faster than general population
 - General population > 36%
 - Prison population > 400%
- Presently 246, 600 elderly (50 or older) behind bars
- In 1981 there were 8,853 state and federal prisoners age 55 or older, presently 124,900
 - Projected to be > 400,00 by 2030
 - ACLU Report. *At America's Expense: The Mass Incarceration of the Elderly* 2012

... Incarceration Data ...

- 79% of 3,278 prisoners serving life without parole (LWOP) were sentenced to die in prison for nonviolent drug crimes
- Examples of drug offenses for which LWOP was imposed in individual case
 - Possession of a crack pipe
 - Acting as go-between in sale of \$10.00 of marijuana to undercover officer
 - Possession of collection of over-the-counter decongestant pills that could be manufactured into methamphetamine
 - Possession of 32 grams of marijuana with intent to distribute

... Incarceration Data ...

- Examples of nonviolent property crimes resulting in LWOP sentences (cont.)
 - Attempting to cash stolen check
 - Possession of stolen wrenches
 - Siphoning gasoline from a truck
 - Shoplifting two jerseys from an athletic store
- Racial disparities
 - 65.4% prisoners serving LWOP for nonviolent offenses in US are Black
 - % of Black nonviolent LWOP prison population: 91.4% LA, 79%MS, 70%IL, 68%SC, 60%FL, 60%Federal
 - ACLU Report. *A Living Death: Life without Parole for Nonviolent Offenses*. 2013

Explaining the Data

- “The criminal justice system has taken on a very cold edge.”
- Crime and punishment viewed as moral rather than utilitarian issue
- Debate on punishment shift from utilitarian concerns and individuation of punishment to public moral outrage at crime and demands for unwavering retribution and just deserts
- Mercy as topic for public policymakers (e.g., legislators, prosecutors) virtually nonexistent
 - Misner, R.L. *A Strategy for Mercy*. *William and Mary L. Rev.* 2000, 41: 1303-1400.

Sequelae

- Proliferation of sentencing guidelines
- Mandatory minimum sentences
- "Three strikes" laws
- Expanded prosecutorial discretion
- Public humiliation of some offenders
- Increasing intolerance of juvenile crime
- Demise of parole
- Renewed dedication to capital punishment

Classical Theories of Punishment



- Retribution
- Rehabilitation
- Deterrence
- Incapacitation

The Punitive Sentiments . . .



- "The state's death penalty is an outdated, flawed and expensive system of punishment that needs to be replaced with a rock-solid sentence of life imprisonment with no chance of parole."
- Editorial, *Sacramento Bee*, September 9, 2012.

. . . The Punitive Sentiments

- "We take this position not because we sympathize with death row inmates or feel any sense of mercy toward them. They were convicted of committing heinous crimes and barring any new evidence of their innocence or prosecutorial misconduct, they are deserving of the harshest of sentences."
- Editorial, *Sacramento Bee*, September 9, 2012

The Rise in Life Sentences

- Every state except Alaska provides for life sentences w/out parole
- Idea of "whole life" sentences (no parole -- LWOP) advanced during 1972-76 Supreme Court ban (*Furman v. Georgia*) of death sentence
- As of 2012 there were 159,520 people serving life sentences, nearly 12% > from 2008
 - 1 in every 9 incarcerated individuals sentenced to life
- 22.2% >LWOP sentences since 2008
 - 10,000 of 49,081 convicted of nonviolent offenses
 - >10,000 inmates with life sentences convicted of crimes that occurred before they were 18 years old
 - Nearly 1 in 4 sentenced to LWOP
 - Nearly 50% of those serving life sentences are African American
 - The Sentencing Project Report: LIFE GOES ON: The Historic Rise in Life Sentences in America. Washington, D.C. 2013.

Federal Compassionate Release Provision . . .

- Rarely used provision of *Sentencing Reform Act of 1984* permits Director of Bureau of Prisons to file motion on behalf of a prisoner to secure immediate release when circumstances deemed "extraordinary and compelling"
 - 18 U.S.C. § 3582(c) (1) (A) 2006
- Commentary for Sentencing Guidelines provides that such circumstances may include (1) terminal illness, (2) debilitating physical conditions preventing inmate self-care, (3) death or incapacitation of only family member able to care for minor child
 - U.S. Sentencing Guidelines Manual § 1B1.12 cmt. (2008)

... Federal Compassionate Release: A Bureaucratic Labyrinth

- Warden of inmate's institution conducts first review of petition by investigating prisoner's request and deciding whether to refer request to Regional Director
- If Regional Director finds worthy then s/he must submit written recommendation to General Counsel of Bureau of Prisons
- If General Counsel views favorably then must seek opinion of either Medical Director or Assistant Director of Correctional Programs Division
- If that review favorable then the petition forwarded to Director for final decision
- If Director grants request then s/he must contact U.S. Attorney in district where inmate sentenced to advise of plan to move sentencing court to reduce minimum sentence to time served
- Only when sentencing court issues order granting compassionate release motion may warden release inmate
 - 28 C.F.R. §§ 571.60-571.64 (2008).

You Are Here



Federal Compassionate (CR) Release: The Data

- Most requests for compassionate release denied
- Denial by either General Counsel or Director of Bureau of Prisons constitutes final administrative decision and cannot be appealed through Administrative Remedy Procedure
- No court has ever failed to uphold the Director's exercise of discretion concerning compassionate release petition
- Between 1990 and 2000 an average of 21 prisoners per year (0.01%) were granted CR
 - William W. Berry III. Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release. 68 Md. L. Rev. 850, 866-868.

... Federal CR: The Data ...

- In 2008, 399 deaths occurred in Federal Bureau of Prisons and 27 requests for compassionate release approved
- 6 petitioners died during final review process
- Review process in both state and federal systems can extend from months to years
- Eligibility guidelines reflect clinical flaws concerning prognostic accuracy and predictability of functional decline
 - Williams BA, Sudore, RL, Greifinger R, Morrison, RS. Balancing Punishment and Compassion for Seriously Ill Prisoners. *Ann Intern Med* 2011; 155: 122-126.

...Federal CR: The Data...

- Findings of U.S DOJ OIG 2013 Report assessing Federal Bureau of Prisons (BOB) performance re compassionate release:
 - BOP has no clear standards on when CR warranted resulting in *ad hoc* decision making
 - BOP has no formal timeliness standards for reviewing requests for CR and timeliness standards for inmate appeals not consider special circumstances of medical CR requests
 - BOP not have effective procedures to inform inmates of CR program (only 8 of 111 prison inmate handbooks contain CR information)

...Federal CR Data

- BOP has no system to track CR requests, timeliness of review process or whether decisions by wardens and regional directors consistent with each other or BOP policy
- Release of inmates through CR program provides cost savings for BOP and assists BOP with prison population management
- Only small percentage of inmates rearrested after being released under CR program
- Report includes 11 recommendations that address each of the findings and if implemented would expand CR program to cover both medical and non-medical conditions for inmates who pose no threat to community and present minimal risk of recidivism

Compassionate Release in State Prisons: Myth or Reality? . . .

- Alan Rogers (MI) inmate dying from metastatic CA
 - Attorney file motion for reduction of sentence
 - Sentencing judge refused to hear testimony on Rogers' condition and denied motion
 - *Detroit Free Press* ran story and public pressure motivated then-Governor Blanchard to "invite" application for commutation of sentence
 - Rogers' attorney faxed letter of application to governor's office which denied application within one hour
 - Rogers bedridden and intermittently unconscious with life expectancy < 1 month when his attorney obtained permission from director of Dept. Corrections for medical furlough albeit under armed guard
 - Rogers died several days later

...Compassionate Release ...

- Bernard Ocasio in advanced stages of AIDS in 1992 when sister sought his release under N.Y. medical parole law
- Delay in review of application because ("lost") then subjected to other bureaucratic delays
- While application pending and Ocasio's condition deteriorating he was inexplicably transferred to another facility 6 hours farther from his family
- By time application deemed ready for review by parole board Ocasio had died
 - His medical parole granted following week

Model Compassionate Release Policy

- Hallmark should be expeditious and objective processing of requests
- Procedural provisions characterized by simplicity and transparency
- All terminally ill prisoners should be eligible for compassionate release
 - Medical (palliative) considerations primary
 - Penal considerations secondary
- Final decision vested with parole board – perhaps with delegation to special panel
 - M.P. Russell. Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners – Is the Cure Worse than the Disease? *Widener Journal of Public Law* 1994, 3: 799-836.

Society of Correctional Physicians Position Statement . . .

- Encourages responsible prison and jail physicians to take leading role in initiating and shepherding medical release process for possible candidates
- Physicians requesting medical releases should limit their consideration to diagnosis, prognosis, and functional status of inmate in determining eligibility
- Integral part of process is consideration of environment where individual will be placed and for continuity of care
- Terminally ill patients not released may require special health services to provide comfort, pain relief, counseling and support to optimize function and anticipate death

... Correctional Physicians Position Statement

- Care of terminally ill incarcerated requires:
 - Medical providers with knowledge of all aspects of EOL care, with special concern for assessing and managing pain and symptom distress
 - Multidisciplinary care of terminal patient including external resources such as faith counselors and community-based hospice workers
 - Balance of needs of correctional system with need to provide medically appropriate care setting and visitation by loved ones
 - Facilitation and documentation of discussions with patient re level of care and proxy decisionmaking
 - Posted Aug. 13, 2009. Available at: http://www.cordocs.org/documents/CompassionateRelease_0509.pdf. Accessed June 27, 2012

Ethics of EOL Care for Prisoners ...

- Are punishment and care incompatible?
- Reality of societal and professional inattention, indifference, even hostility toward providing inmates with quality EOL care
 - Shields KE, deMoya, D. Correctional Health Care Nurses Attitudes Toward Inmates. *Journal of Correctional Health Care* 1997; 4: 37-59.
- "Deliberate indifference to the serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain ... proscribed by Eighth Amendment."
 - Estelle v. Gamble, 429 U.S. 97, 104-5 (1976).

. . . Ethics of Inmate EOL Care

- Perception that offenders do not deserve special health care services [e.g., pain management, palliative care] persists -- especially when persons in general population do not have access to similar levels of health services
- Fear of political and/or public disapproval or loss of support places prison administrators in difficult position
 - Cohn F. The Ethics of End-of-Life Care for Prison Inmates. *Journal of Law, Medicine & Ethics* 1999, 27: 252-258.
- American Correctional Association Task Force on Health Care in Corrections declared that health services in prisons should be consistent with community health care standards
 - ACA. Public Correctional Policy on Correctional Health Care. Ratified by ACA Delegate Assembly in 1987 and reviewed and amended 1996.

Exploring the Intriguing Relationship Between Justice and Mercy . . .

- The quality of mercy is not strain'd;
It droppeth as the gentle rain from heaven
Upon the place beneath:
It is twice blest:
It blesseth him that gives
and him that takes:



... Justice and Mercy ...

- 'Tis mightiest in the mightiest; it becomes
The thrownd monarch better than his crown;
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this scepter'd sway, --
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice.

▫ Portia, *The Merchant of Venice*, Act 4, scene 1

... Justice and Mercy



- No ceremony that to great ones 'longs,
Not the king's crown,
nor the deputed sword,
The marshall's truncheon, nor the judge's robe,
Becomes them with one half so good a grace
As mercy does.

▫ Isabella, *Measure for Measure*, Act 2

A Question of Mercy – From a Religious Perspective

- "Blessed are the merciful for they shall obtain mercy"
 - Matthew, Ch. 5, verse 7, *King James Version*
- Then shall the King say unto them: Come ye blessed of my Father, "inherit the kingdom prepared for you from the foundation of the world . . . **For I was sick and you visited me; I was in prison and you came unto me.**"
- And the King shall say unto them: Verily I say unto you, "inasmuch as you have done it unto the least of these my brethren, you have done it unto me."
- And so also verily I say unto you, "inasmuch as you did it not do it to one of the least of these, you did it not to me."
 - Matthew, Ch. 25, verses 35-46, *King James Version*

Are Justice and Mercy Compatible?



- St. Anselm's Paradoxes
 - How can judgment and salvation emanate from same (divine) source?
 - *Proslogium IX*
 - How can one reconcile selective dispensation of mercy with justice (equal treatment)?
 - *Proslogium XI*

The Skeptical View . . .

- Mercy has no legitimate role in the criminal justice system
- Mercy is intrinsic to the very concept of doing justice, particularly in the impartial administration of criminal justice system
- Mercy as a discrete and autonomous virtue is the product of “a morally dangerous sentimentality.”

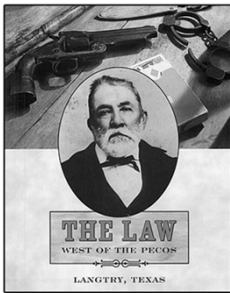
◦ Murphy, J.G., Hampton, J. *Forgiveness and Mercy*. New York: Cambridge University Press, 1988, p.167

. . . The Skeptical View

- Introducing a doctrine of mercy into the legal system fails to give individuals the respect they are due
 - Deprives them of full moral agency and hence responsibility
- Taking into account an individual's perhaps unfortunate personal biography and invoking that as a basis upon which to “temper justice [deserved punishment] with mercy [leniency]” denies that person responsibility for their very selves.

◦ Bennett, C. *The Limits of Mercy*. *Ratio* 2004, 17: 1-11.

The Relationship between Law and Justice



THE LIFE AND TIMES OF JUDGE ROY BEAN

“Trust in my judgment of the [law] book. Besides, you’re going to hang no matter what it says in there, ‘cause I am the law and **the law is the handmaiden of justice. Get a rope.**”

An Ethic of Mercy (Charity) and an Ethic of Justice: Are They Compatible?

- Mercy as an example of charity and a form of benevolence (in contrast to beneficence)
 - Concern is that by showing mercy to inmates we undermine sanctions properly imposed by the criminal justice system
- One argument for mercy toward offenders is based on following conditions:
 - 1) Otherwise offender made to suffer more than s/he deserves
 - 2) S/he would then be worse off than those who stand to benefit from exercise of right to punish individual

• Card C. On Mercy. *The Philosophical Review* 1972; 81: 182-207.

Understanding the Nature of Mercy . . .

- Both mercy (charity) and justice are moral principles
 - If principle(s) of justice guide and constrain the practice of punishing then mercy might also be considered a virtue of the practice of punishing
 - Captured in admonition to “temper justice with mercy”
- To be characterized as “merciless” is to be criticized on moral grounds
 - Institutions as well as individuals are properly subject to such a critique

. . . Nature of Mercy

- Showing mercy is not a matter of favoritism or evidence of a lack of resolve to do justice
- There is no moral right to mercy *per se*, yet doing justice (in cosmic sense) to those whom we have the right and authority to punish may at times require that we show mercy
- Obligation to show mercy arises only in sense that a just penal system requires fairness – that those equally “deserving” of mercy receive it

Does Mercy Require a Showing of Special Circumstances?

- May not require convincing evidence of repentance or reform of offender
 - Suffering from terminal illness exacerbates punishment of incarceration beyond bounds of justice delineated by conviction and sentence, regardless of character of inmate
- Collateral question: May justice be served when mercy conferred by state rather than those harmed by actions of perpetrator of offense?
 - What if those harmed by perpetrator of crime actively oppose showing mercy?

Light at the End of the Tunnel?



- 6/9/13 A Conservative Case for Prison Reform
 - *Wall Street Journal*
 - Richard Viguerie, Chair Conservative HQ.com
- 8/12/13 Attorney General Holder's address to American Bar Association
 - Reduce invocation of mandatory minimum sentencing for minor drug offences
 - Expand drug treatment programs as alternative to prison sentences

Prison Hospice v. Compassionate Release

- "Don't Let Me Die in Prison" – a plea for compassionate release or for quality palliative care?
 - J.F. Linder, F.J. Meyers. Palliative Care for Prison Inmates: "Don't Let Me Die In Prison." *JAMA* 2007; 298: 894-901.
- Query: In what circumstances might palliative care in prison be considered preferable to compassionate release for care at home or other community setting?

Prison Hospice

- Standards of Practice and Operational Guidelines for Prison Hospice
 - National Prison Hospice Association
 - Guiding Responsive Action for Corrections in End-of-Life (GRACE) Project
 - Interdisciplinary teams
 - Inmates of varying security classification levels
 - Inmates as caregivers
 - Hospice-specific training to caregivers, professionals, and correctional officers
 - Frequent visits by family members
 - Hoffman HC, Dickinson GE. Characteristics of Prison Hospice Programs in the U.S. *Am J Hospice & Palliative Medicine* 2011; 28: 245-52

EOL Care Standards of Practice for Inmates in Correctional Settings

- Palliative care available to every inmate diagnosed with terminal illness
- Needs of patient and family met through individualized and holistic care
- Interdisciplinary team (IDT) assesses patient's needs and plans, delivers, and evaluates each patient's care and services
- Patient-centered plan of care developed and maintained by (IDT) in collaboration with patient
- Palliative care available to terminally ill inmates regardless of security level, custody classification, crime committed, behavioral history, disability, etc.
 - Developed by Guiding Responsive Action for Corrections in EOL (GRACE) Project of RWJ Foundation. Available at: <http://www2.edc.org/lastacts/archives/archivesmay00/standards.asp>. Accessed June 27, 2012

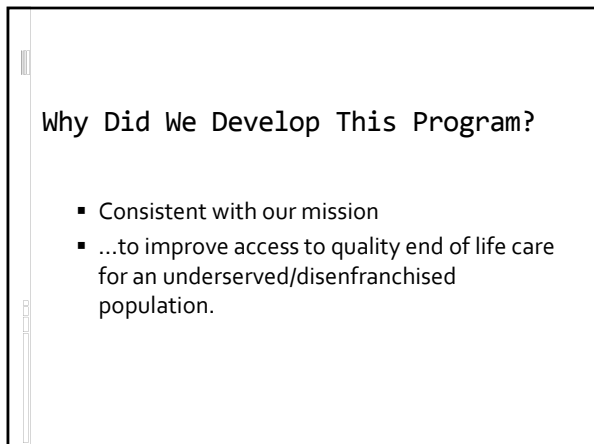
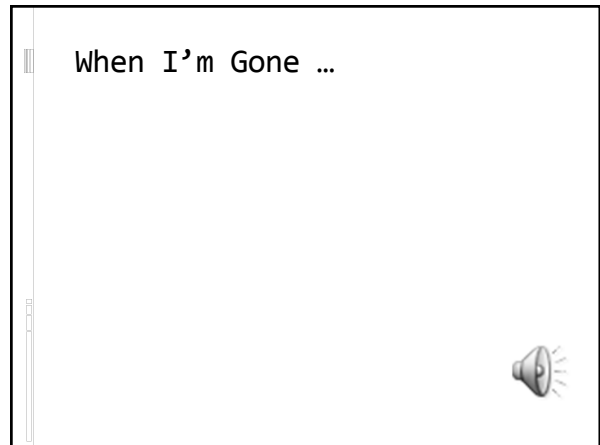
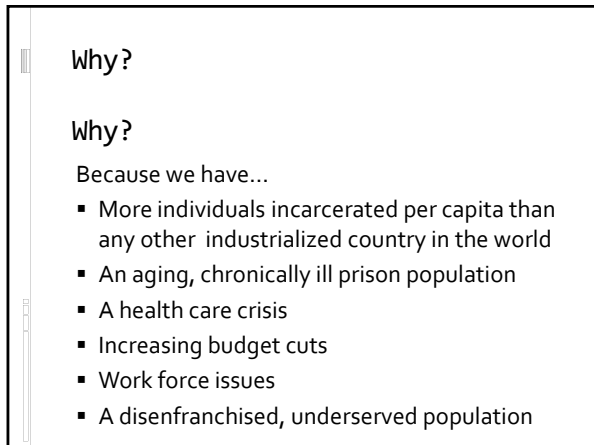
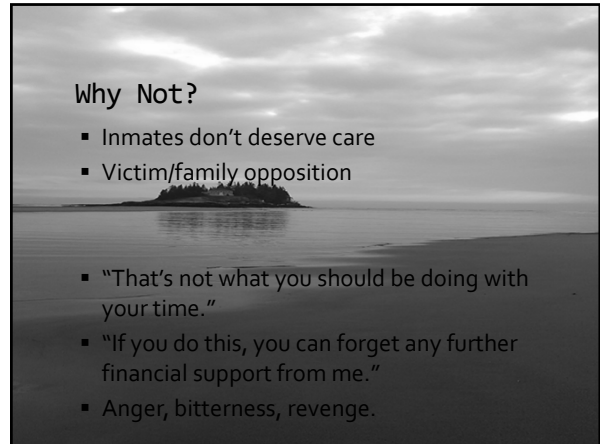
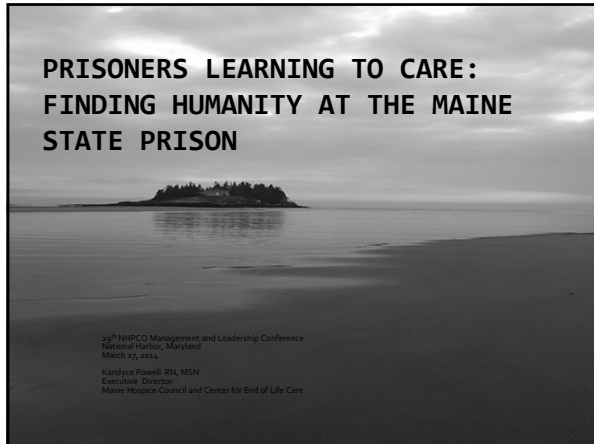
Caring Transformations

Prison hospice volunteers

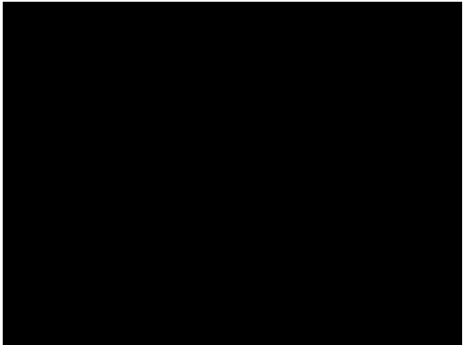


Lessons Learned

- Inmate volunteers attest to the remarkable transformative effect of hospice work
- Prison hospice workers observe personal qualities of openness, honesty, and tenderness in patients and volunteers
- "It is worth examining why, in aggressive and predatory prison environments, inmates are choosing to work together, without recognition or material reward, to care for one another and to build a civil community"
 - Ira Byock, *Dying Well in Corrections: Why Should we Care?* Available at: <http://www.dyingwell.org/jchcoz.htm>



Letting Go ...



History

- An article, an idea and a phone call.
- Fourteen years of patience, perseverance and tenacity.
- Partners
- Strategy
- Vision
- Process
- Rules!
- Security

Strategy

- Awareness
- ...data
- ...best-practice models
- ...precedent
- Partnerships
- Funding
- Outcomes
- Growth
- Assessment
- Trust

...provide hope and opportunities for healing.

Five Years Ago

- First Volunteer training program
- Code of Ethics
- Participants selected.
- Intense training
- Graduation
- A proud moment
- Only the beginning!

Code of Ethics

- I will keep the patient's best interests foremost and give compassionate care.
- I will be respectful of the patient and his dignity, wants, needs and privacy.
- I will be respectful of the staff with whom I work as a volunteer.
- I will honor confidentiality regarding information I obtain from or about patients and only share it with the hospice team.

Code of Ethics cont...

- I will strive to be responsible in caring out my commitment to this program.
- I will abide by security regulations in the course of my hospice work.
- I appreciate the importance of trust in my volunteer role and will be honest in my dealings with patients and others involved in their care.

Code of Ethics cont...

- I will be mindful that it is an honor and privilege to be selected for this program and will do my best to assure the integrity of this program.
- If in doubt about how to handle a situation, I will seek appropriate guidance from available hospice staff and fellow volunteers.
- I agree to participate in continued education programs to keep current in my hospice knowledge and skills.

Since then...

- Dedicated Hospice room in the infirmary
- Second training program
- Application process
 - written application
 - screening
 - interviews

Hospice Room



Graduation

- January 2012
- Ten inmate volunteers
- Many faculty, administrative representatives, staff, law enforcement, family and friends in attendance
- Graduation cake, diplomas, t-shirts, photos
- The "Sounds of Comfort"

Successes

- Care shown to dying inmates
- Personal growth
- New leadership model
- Pride and increased self-esteem
- Change in attitudes throughout prison
- Increased interest of foundations and other funding organizations
- Annual Statewide conferences
- CD release / release concert
- PSS training
- Extensive media coverage

Quotes

- "In a nutshell, I'm a better person because of you. Thank you for including me into your world". -RP
- "Thank you for everything you're doing for the program. You've shown us what it is to be a compassionate person". -SH

Quotes cont ...

- "Thank you for this beautiful gift you have given me ..." - KK
- "Thank you for all you have done for us. The time I spent with the Hospice Group has been some of the best times I've had". -JS

Next steps

- Periodic updates to DOC administration
- Continued media coverage
- Hour-long documentary for MPBN
- On-going discussions with policymakers
- Weekly Hospice classes and debriefing for inmate volunteers
- One-on-one counseling for inmate volunteers

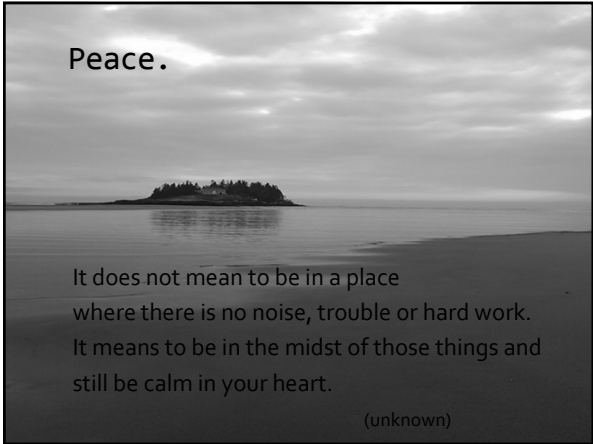
Next steps continued...

- Music therapy
- Training programs every two years
- Writing/publishing/speaking
- Geriatric pod
- Annual Statewide Conference s

The Future

- Prison population continues to increase
- Incarceration rate of those over 55 quadrupled between 2005-2010.
- Increased incidence of dementia and other chronic illnesses
- More prisoners dying while incarcerated
- State budgets continue to decrease

Peace.



It does not mean to be in a place where there is no noise, trouble or hard work. It means to be in the midst of those things and still be calm in your heart.

(unknown)



Some of the most profound work I have ever experienced...



Thank you