

South Dakota provides compassionate release through its **Compassionate Parole** law to eligible incarcerated individuals who are (1) age 65 or older with terminal illnesses and (2) age 70 or older who have served a specified portion of their sentences.¹ In addition, eligible individuals with certain medical conditions may also be released through an **Extension of Confinement**.²

COMPASSIONATE PAROLE

I. ELIGIBILITY

Medical Condition/Age – An incarcerated individual may be considered for Compassionate Parole by meeting any of the following medical or age eligibility criteria:³

- Being seriously ill and not likely to recover;
- Requiring extensive medical care or significant chronic medical care;
- Having a terminal illness;
- Being age 65 or older, having been convicted of a Class 3 felony or below,⁴ having served at least 10 consecutive years of the sentence, and having medical care needs that are at least double the average annual medical cost for incarcerated individuals; or
- Being age 70 or older and having served at least 30 consecutive years of the sentence.

Additional Eligibility Criteria – An incarcerated individual may **not** be released on Compassionate Parole if “medically indigent,” defined as a person who requires “medically necessary” hospital services for which no public or private third-party coverage is available.⁵

- To be released on Compassionate Parole, an incarcerated individual’s release plan must ensure that either the person or a third-party payer (such as Medicare, Medicaid, Indian Health Service, Department of Veterans Affairs, or private insurance) will pay the health care expenses.⁶

Exclusions – An individual sentenced to death, also referred to as a “capital punishment sentence” in South Dakota law, is not eligible for Compassionate Parole.⁷

II. APPLICATIONS

The Warden in each correctional facility is responsible for referring potentially eligible individuals to the Secretary of Corrections (Secretary) for Compassionate Parole consideration. Health care providers may also make referrals, but those must first go to the Warden for review before being forwarded to the Secretary.⁸

III. DOCUMENTATION AND ASSESSMENT

Referral: Warden – The referral for Compassionate Parole must specify which eligibility category and criteria an incarcerated individual meets. It must also include (1) the individual’s diagnosis, level of incapacitation, and prognosis; (2) a release plan that describes the person’s specific medical needs; and (3) information on how the cost of medical care will be covered.⁹ The Warden adds all required supplemental information (such as the person’s crime, sentence, and number of years incarcerated) and any relevant comments¹⁰ and sends the referral to the Secretary.

Review and Preliminary Determination: Secretary of Corrections – When the Secretary determines that an incarcerated individual meets the Compassionate Parole criteria, the next step is to look at the release plan, relevant victim information, and other available information to decide whether the individual may “pose a detriment” to self, the victim, or the community to which the person will be released.¹¹

- If the Secretary denies a referral for Compassionate Parole at this step, the decision is final and not subject to appeal or any other administrative remedy.¹²
- If the Secretary approves the referral, it then goes to the Board of Pardons and Paroles (Board) for a Compassionate Parole hearing.¹³

Subsequent Requests – Note that Department of Corrections (Department) policy states that the Warden or health care provider may only submit a Compassionate Parole referral for a specific individual once a year; however, if there is a “significant increase” in the person’s care requirements or a significant deterioration in health, a referral may be submitted sooner.¹⁴

Medical Improvement Before a Hearing – If an incarcerated person is referred for Compassionate Parole but a hearing has not been held and the individual’s medical condition improves to the point where the Compassionate Parole criteria is no longer met, the health care provider or Warden must notify the Secretary. The Secretary may then remove the individual from Compassionate Parole consideration.¹⁵

IV. DECISION-MAKING PROCESS

Decision-Maker – The Board of Pardons and Paroles makes all final decisions regarding Compassionate Parole requests. Note that a decision to grant or deny Compassionate Parole requires a majority vote of Board members.¹⁶

Decision Process

- Hearings – The Executive Director of the Board must schedule a “discretionary” Compassionate Parole hearing within three months of receiving a referral.¹⁷
- Decision Factors – The Board must consider the following factors¹⁸ when deciding to grant or deny an individual’s Compassionate Parole request:
 - Assessed risk level;
 - Conduct in prison and, if applicable, conduct while on Extension of Confinement;
 - Sentence served and the sentence still remaining;
 - Offense and “chronicity” of criminal behavior;
 - Medical prognosis and incapacitation level;
 - Compliance with health care ordered by a health care provider;
 - Release plan, including provisions for health care;
 - Input, if any, of the sentencing judge, the prosecuting attorney, and the victim;
 - Whether the care and supervision required or anticipated can be provided in “a more medically appropriate or cost effective manner” than what the Department can provide;
 - “Allowing a geriatric or terminally ill person to live at a location outside of prison prior to death;”¹⁹ and
 - The ability to adequately monitor the individual after release to ensure public safety.

In addition, the Secretary and the Board must find that, if released, the individual is unlikely to pose a “detriment” to self, the victim, or the community.²⁰

Conditions – As a condition of supervision, any person released on Compassionate Parole must comply with medical care recommendations and “maintain responsibility for health care expenses through self pay or third party payer.”²¹

V. POST-DECISION

Denial and Appeals – The Board’s decision regarding Compassionate Parole release is final.²² When the Board denies Compassionate Parole, it sets a date for the next time it will consider a request, and that date cannot be more than one year from the date of its decision.²³ Note that based on the individual’s condition, the Board can choose to review a new request sooner than one year.²⁴

Effect on Other Parole and Release Eligibility

- Eligibility for General/Discretionary Parole – Once an individual reaches the initial or general parole eligibility date, the person is ineligible for Compassionate Parole consideration but will be considered under any other relevant parole provisions.²⁵
- Eligibility for Extension of Confinement – The Compassionate Parole rules do not affect the Secretary’s or a Warden’s ability to place someone on an Extension of Confinement, either permanently or pending Compassionate Parole consideration.²⁶
- Eligibility for Earned Discharge Credits – An incarcerated individual released under Compassionate Parole is ineligible for “earned discharge credits” until the person reaches an initial parole date or an initial parole eligibility date.²⁷

Supervision – An individual released on Compassionate Parole is subject to the general parole provisions related to supervision.²⁸

Revocation/Termination – The general parole rules on revocation apply to an individual released on Compassionate Parole.²⁹

- Note that when an individual released on Compassionate Parole is compliant with the terms of supervision, an improved medical condition does **not** constitute grounds for revocation.³⁰
- When an individual released under Compassionate Parole reaches the initial parole date or parole eligibility date and is paroled subject to the relevant South Dakota laws, the person is no longer subject to the Compassionate Parole law and rules.³¹

VI. REPORTING AND STATISTICS

The Compassionate Parole statute does not include any reporting requirements, and there are no publicly available statistics on how many individuals have been released on Compassionate Parole.

- In response to a request for information from FMM, the Department stated that since 2018 (the year the Compassionate Parole law went into effect), it has referred three individuals to the Board, and all three requests were ultimately granted. Two individuals were approved for Compassionate Parole in 2018 and one was approved in 2020.³²

EXTENSION OF CONFINEMENT

In addition to Compassionate Parole, incarcerated individuals with certain medical conditions may be eligible for an **Extension of Confinement**, allowing them to reside in a private home/residence or a residential facility to address medical treatment and care needs.³³

I. ELIGIBILITY

Medical Condition – An incarcerated individual with a diagnosed medical and/or mental health condition may be eligible for an Extension of Confinement.³⁴

Exclusions – An individual who does not meet the following criteria is excluded from consideration for release under the Extension of Confinement rules:³⁵

- In minimum custody;
- Within six months of the initial parole date;
- Currently serving time for a nonviolent offense;
- Not serving time for a hit and run with injury, vehicular homicide, vehicular battery, sex offense, or simple assault on a police officer;
- No more than three felonies and no unresolved holds, detainers, or warrants;
- Agreement with all program participation conditions, Extension of Confinement and Global Positioning System (GPS) requirements, and terms of the “Escape Acknowledgement” form; and
- An approved release plan that says the individual will remain in South Dakota.

II. APPLICATION/REFERRAL

There is no application form for an Extension of Confinement. The Department of Corrections (Department) recommends and identifies potentially eligible individuals:

- Recommendations – A Warden can recommend to the Secretary that a specific individual be released from custody and placed in the community under the Extension of Confinement rules.³⁶
- Identification – Department policy says that potentially eligible individuals can be identified through (1) a monthly Department-generated list of individuals who meet the eligibility criteria³⁷ and (2) Department case managers.³⁸

III. DOCUMENTATION AND ASSESSMENT

Review: Warden and Secretary of Corrections – The Warden and Secretary will review the documentation for incarcerated individuals identified for possible release to Extension of Confinement. If they deny someone at this step, designated Unit Staff document that the individual was considered but denied.³⁹

Contact: Unit Staff – When the Warden and Secretary decide specific individuals are eligible, Unit Staff contact those individuals to find out whether they (1) want to be considered for release under the Extension of Confinement rules and (2) agree to all the required conditions.⁴⁰

Review and Plan: Health and Behavioral Services Staff – Health Services and Behavioral Health Staff review each individual's current and projected medical and treatment needs and develop a plan for referral, necessary medical services, medications and/or medication management, and access to providers.⁴¹

- Incarcerated individuals released through the Extension of Confinement rules are responsible for all health care costs, including treatment, medications, and medical insurance co-payments.⁴²

Release Plan: Parole Agent – A parole agent is assigned to review proposed release plans for all individuals being considered for release to Extension of Confinement, including the proposed plans for meeting medical needs.⁴³

IV. DECISION-MAKING PROCESS

Decision-Maker – The Extension of Confinement statute states that the Warden is the ultimate decision-maker; however, the relevant Department policy says that the Warden makes “recommendations” to the Secretary of Corrections that individuals be allowed to serve a portion of their sentences in the community through an Extension of Confinement.⁴⁴

Conditions – Incarcerated individuals released to private homes must be on GPS monitoring.⁴⁵

V. POST-DECISION

Supervision – A parole agent supervises all individuals released through an Extension of Confinement.⁴⁶ The Department assigns each person a level of “community risk” based on medical and behavioral health issues, any special needs, mobility, the residential or institutional setting, and any other relevant factors.⁴⁷

Rescission/Termination – Supervising parole agents have authority to issue violation reports for formerly incarcerated people who fail to follow their Extension of Confinement agreements and to order their detention or return to custody.⁴⁸ Note that the Department’s website includes a statement that an unauthorized absence from an Extension of Confinement placement is considered an escape, which is a felony punishable by an additional prison sentence.⁴⁹

VI. REPORTING/STATISTICS

There are no Extension of Confinement reporting requirements. The Department issues annual reports, but it does not include information on how many individuals were released on Extension of Confinement due to medical conditions or terminal illnesses.⁵⁰

- In response to a request for information from FMM, the Department stated that as of April 30, 2021, there were currently 30 individuals (17 men and 13 women) on Extension of Confinement.⁵¹

SOUTH DAKOTA COMPASSIONATE RELEASE

PRIMARY LEGAL SOURCES

COMPASSIONATE PAROLE

Statute

South Dakota Codified Laws, §§ 24-15A-55 through 24-15A-68 (2021), available through the South Dakota Legislature, https://sdlegislature.gov/Statutes/Codified_Laws/2049333.

Agency Policy

South Dakota Board of Pardons and Paroles, Policy 8.1.A.16-Compassionate Parole (2020), <https://doc.sd.gov/documents/8.1.A.16CompassionateParole9172020.pdf>.

South Dakota Department of Corrections, Policy 1.5.G.12-Inmate Compassionate Parole (2019), <https://doc.sd.gov/documents/Inmate%20Compassionate%20Parole8152019.pdf>.

EXTENSION OF CONFINEMENT

Statute

South Dakota Codified Laws, § 24-2-25 (2016), available through the South Dakota Legislature, https://sdlegislature.gov/Statutes/Codified_Laws/2049402.

Agency Policy

South Dakota Department of Corrections, Policy 1.4.G.7, Extension of Confinement (2019), <https://doc.sd.gov/documents/Extension%20of%20Confinement1162019.pdf>.

NOTES

* *Id.* means see prior note.

¹ S.D. Codified Laws §§ 24-15A-55 through 24-15A-68; South Dakota Department of Corrections Policy (DOC Policy) 1.5.G.12; South Dakota Board of Pardons and Paroles Policy (Board Policy) 8.1.A.16.

² S.D. Codified Laws § 24-2-25; DOC Policy 1.4.G.7, § III-Definitions, Services Release. There are also nonmedical reasons for which the Extension of Confinement rules can be used, but for incarcerated individuals with serious medical and/or mental health conditions, the Extension of Confinement rules function as a form of compassionate release.

³ S.D. Codified Laws § 24-15A-55; DOC Policy 1.5.G.12, § IV (2) (A); Board Policy 8.1.A.16 (IV) (A).

⁴ See S.D. Codified Laws § 22-6-1 for the nine categories of felonies in South Dakota.

⁵ S.D. Codified Laws § 24-15A-58, referencing S.D. Codified Laws § 28-13 [1.3]. See also DOC Policy 1.5.G.12, §§ IV (2) (B) and (C); Board Policy 8.1.A.16 (IV) (B) and (C). Given how long it can take to be found eligible for some publicly funded health benefits such as Medicaid, it seems this could be a barrier for incarcerated individuals who are terminally ill and require expedited consideration.

⁶ Id.

⁷ S.D. Codified Laws § 24-15A-55 (6); DOC Policy 1.5.G.12, § IV (2) (A) (6); Board Policy 8.1.A.16 (IV) (A) (6).

⁸ S.D. Codified Laws § 24-15A-56; DOC Policy 1.5.G.12, §§ IV (1) (A) and (1) (B); Board Policy 8.1.A.16 (III).

⁹ DOC Policy 1.5.G.12, § IV (1) (C) and Attachment 1, *Compassionate Parole Referral Form*.

¹⁰ Id.

¹¹ S.D. Codified Laws § 24-15A-56; DOC Policy 1.5.G.12, § IV (1) (D).

¹² DOC Policy 1.5.G.12, § IV (1) (D).

¹³ S.D. Codified Laws § 24-15A-56; DOC Policy 1.5.G.12, § IV (1) (D).

¹⁴ DOC Policy 1.5.G.12, § IV (1) (D).

¹⁵ S.D. Codified Laws § 24-15A-59; DOC Policy 1.5.G.12, § IV (3) (C); Board Policy 8.1.A.16 (IV), Board Consideration, Subparagraphs (C) and (D). Anyone removed from Compassionate Parole consideration may still be considered under the applicable general parole eligibility provisions. Id.

¹⁶ Board Policy 8.1.A.16 (IV), Eligibility For Compassionate Parole, Subparagraph E.

¹⁷ S.D. Codified Laws § 24-15A-56; DOC Policy 1.5.G.12, § IV (1) (E); Board Policy 8.1.A.16 (III).

¹⁸ S.D. Codified Laws § 24-15A-57; DOC Policy 1.5.G.12, § IV (3); Board Policy 8.1.A.16 (IV), Board Consideration, Subparagraph A.

¹⁹ This factor is repeated verbatim here, but it is not clear what it means.

²⁰ S.D. Codified Laws § 24-15A-62; DOC Policy 1.5.G.12, § IV (3) (E); Board Policy 8.1.A.16 (IV), Board Consideration, Subparagraph (F).

²¹ S.D. Codified Laws § 24-15A-67; DOC Policy 1.5.G.12, § IV (4) (B); Board Policy 8.1.A.16 (IV), Supervision and Revocation of Compassionate Parolees, Subparagraph (B).

²² S.D. Codified Laws § 24-15A-62.

²³ S.D. Codified Laws § 24-15A-59; DOC Policy 1.5.G.12, § IV (3) (B); Board Policy 8.1.A.16 (IV), Board Consideration, Subparagraph (B) (1).

²⁴ Id.

²⁵ S.D. Codified Laws § 24-15A-60 and DOC Policy 1.5.G.12, § IV (2) (D), both referencing S.D. Codified Laws §§ 24-15-5 and 24-15A-32. However, if an individual previously referred by the Secretary for Compassionate Parole continues to meet the eligibility criteria, those factors are to be considered in any subsequent discretionary parole release decision. *Id.*

²⁶ S.D. Codified Laws § 24-15A-63; DOC Policy 1.5.G.12, § IV (3) (F).

²⁷ S.D. Codified Laws § 24-15A-65, referencing S.D. Codified Laws §§ 24-15A-32 and 24-15-5; DOC Policy 1.5.G.12, § IV (4) (C).

²⁸ DOC Policy 1.5.G.12, § IV (4) (A) and Board Policy 8.1.A.16 (IV), Supervision and Revocation of Compassionate Parolees, Subparagraph (A), both referencing S.D. Codified Laws §§ 24-13, 24-15, and 24-15A.

²⁹ S.D. Codified Laws § 24-15A-61, DOC Policy 1.5.G.12, § IV (4) (A), and Board Policy 8.1.A.16 (IV), Supervision and Revocation of Compassionate Parolees, Subparagraph (A), all referencing S.D. Codified Laws § 24-13, 24-15, and 24-15A.

³⁰ S.D. Codified Laws § 24-15A-59; DOC Policy 1.5.G.12, § IV (3) (D).

³¹ S.D. Codified Laws § 24-15A-68 and DOC Policy 1.5.G.12, § IV (4) (E), both referencing S.D. Codified Laws Chapters 24-15 and 24-15A and, specifically, §§ 24-15A-32 and 24-15-5.

³² Correspondence from Mike Leidholt, South Dakota Department of Corrections, to Famm (May 10, 2021) (on file with Famm, Office of the General Counsel).

³³ S.D. Codified Laws § 24-2-25; DOC Policy 1.4.G.7, § III-Definitions, Pre-Release. Note that DOC policy also refers to this type of release as a “services” release. See DOC Policy 1.4.G.7, § III, Definitions, Services Release. There are also nonmedical reasons for which the Extension of Confinement rules can be used, but for incarcerated individuals with serious medical and/or mental health conditions, Extension of Confinement functions as a form of compassionate release.

³⁴ DOC Policy 1.4.G.7, § III, Definitions, Services Release.

³⁵ *Id.* at §§ IV (1) (B) and (2) (A) (1) through (A) (9).

³⁶ *Id.* at § IV (1) (A).

³⁷ *Id.* at § IV (2) (B).

³⁸ *Id.*

³⁹ *Id.* at § IV (2) (D) (1).

⁴⁰ *Id.* at § IV (2) (F).

⁴¹ *Id.* at § IV (2) (H).

⁴² *Id.*

⁴³ *Id.* at § IV (2) (I).

⁴⁴ S.D. Codified Laws § 24-2-25; DOC Policy 1.4.G.7, § IV (1) (A).

⁴⁵ DOC Policy 1.4.G.7, § IV (4) (A). Note that previously incarcerated individuals are generally responsible for all Extension of Confinement GPS fees. *Id.* at (4) (D).

⁴⁶ *Id.* at § IV (3) (A).

⁴⁷ *Id.* at § IV (3) (C).

⁴⁸ *Id.* at § IV (3) (I).

⁴⁹ South Dakota Department of Corrections information sheet (2017), <https://doc.sd.gov/documents/EC%20Information.pdf>.

⁵⁰ See the South Dakota Department of Corrections publications page at <https://doc.sd.gov/about/publications/>.

⁵¹ Correspondence from Mike Leidholt, South Dakota Department of Corrections, to FMM (May 10, 2021) (on file with FMM, Office of the General Counsel).