

Legal Article Updated April 7, 2020 (a similar article was originally published in the FACDL's *Florida Defender* magazine, pages 24-26, Winter 2015)

**INCREASE CONDITIONAL MEDICAL RELEASE**  
**Good for Public Health and Safety, Taxpayers and Inmates**

COVID – 19 has spread to county jails, state and federal prisons, and other detention facilities. Media reports indicate conditional humanitarian, compassionate, elderly, and/or medical releases have been approved, under various emergency declarations and guidelines, by various government entities.

Florida should utilize its existing *conditional medical release* law to release certain non-violent, elderly, seriously ill, and increasingly vulnerable inmates who pose no public safety threat to mitigate the spread of COVID-19. The Florida Department of Corrections (FDOC) and the Florida Commission on Offender Review (FCOR) have the statutory authority and inherent discretion to effectuate such releases. Florida law 947.149<sup>1</sup>, in part, states:

**947.149 Conditional medical release**

1) The commission shall, in conjunction with the department, establish the conditional medical release program. An inmate is eligible for consideration for release under the conditional medical release program when the inmate, because of an existing medical or physical condition, is determined by the department to be within one of the following designations:

(a) **“Permanently incapacitated inmate,”** which means an inmate who has a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a danger to herself or himself or others.

(b) **“Terminally ill inmate,”** which means an inmate who has a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate terminally ill to the extent that there can be no recovery and death is imminent, so that the inmate does not constitute a danger to herself or himself or others.

No inmate has a right to conditional medical release or to a medical evaluation to determine eligibility for such release. Inmates sentenced to death are not eligible.

With 96,000 inmates at 57 major state prisons, there are close to 16,000 inmates over the age of 50 (16%). The reality is there are thousands of older inmates with chronic illnesses. While very serious, most of these illnesses evidently do not rise to the level of having a terminal illness or permanent incapacity.

Of this group there are nearly 8,000 inmates age 60 or older (8%), many which have the most severe age-related medical conditions and are the lowest security risk. Because of their advanced age, the cost of providing medical care to this group is very expensive compared to the general inmate population (FDOC 2018 annual report).

Hundreds of prisoners of all ages die annually of natural causes such as:

- Diseases of the digestive system, including chronic liver disease and cirrhosis, and
- Diabetes, pneumonia, respiratory arrest, multi-system organ failure, kidney disease and infections.

While other inmates died from one of the following:

- Cancer
- Cardiac disease
- Accidents
- HIV
- Homicide
- Suicide

Without further medical and legal research of individual cases, it's impossible to know whether any of these inmates would have qualified for a conditional medical release.

The FDOC should allow families to hire private doctors to examine and diagnose the inmate. While these private clinical reports and recommendations will not be binding on the FDOC or the FCOR, it will provide additional valuable information for consideration at no expense to the state.

Since fiscal year 1996, there have been 346 inmates approved for a conditional medical release.<sup>2</sup> Since 2011, private companies started providing medical care to state inmates.

**Conditional Medical Releases from Fiscal Years 1996 -2020**

<b>FY 1996-97</b>	<b>19</b>
<b>FY 1997-98</b>	<b>9</b>
<b>FY 1998-99</b>	<b>6</b>
<b>FY1999-2000</b>	<b>10</b>
<b>FY 2000-01</b>	<b>16</b>
<b>FY 2001-02</b>	<b>15</b>
<b>FY 2002-03</b>	<b>4</b>
<b>FY 2003-04</b>	<b>9</b>
<b>FY 2004-05</b>	<b>12</b>
<b>FY 2005-06</b>	<b>14</b>
<b>FY 2006-07</b>	<b>8</b>
<b>FY 2007-08</b>	<b>10</b>
<b>FY 2008-09</b>	<b>19</b>
<b>FY 2009-10</b>	<b>8</b>
<b>FY 2010-11</b>	<b>16</b>
<b>FY 2011-12</b>	<b>16</b>
<b>FY 2012-13</b>	<b>7</b>
<b>FY 2013-14</b>	<b>6</b>
<b>FY2014-15</b>	<b>15</b>

<b>FY2015-16</b>	<b>29</b>
<b>FY2016-17</b>	<b>17</b>
<b>FY2017-18</b>	<b>21</b>
<b>FY2018-19</b>	<b>38</b>
<b>FY2019- 20</b>	<b>22</b>
<b>Total</b>	<b>346</b>

### **Current Law Requires A Medical Diagnosis and Referral by the FDOC**

The FDOC doctors and medical staff have the power to diagnose the inmate and make a preliminary determination that an inmate is “permanently incapacitated” or “terminally ill,” and thus qualified for a conditional medical release. FDOC then is supposed to make an actual “referral” to the FCOR which has the sole discretion to approve or deny any release.

The FDOC’s referral must include:

- a clinical report with the complete medical information justifying a release, and
- a verifiable release plan describing the medical care and attention needed.

A case worker working with the doctors usually calls to ask several questions to include in the information in the release plan submitted to the FDOC, including:

- Where will the inmate reside?
- Who will care for the inmate?
- Is the inmate eligible for Social Security? Medicare? Veteran’s Benefits?

Besides Florida law 947.149, six Florida administrative rules<sup>3</sup> describe the specific implementation details regarding:

- Eligibility
- Victim input
- Standard and special conditions
- Postponement and rescission

- Revocation

### **General Guidance (Not specific legal advice)**

Although every case is different, these 17 *how-to* action steps should increase the inmate's chances of being granted a conditional medical release:

#### **Phase #1 – Advocacy to the FDOC**

1. Family members, lawyers and other advocates who best know the inmate's medical condition should visit frequently and keep a diary of observations of medical condition. Photos taken with the inmate can help document declining health for use at a subsequent hearing.
2. Encourage the FDOC to recommend the inmate's release through calls, emails and letters to the warden and classification officer and inmate's case worker.
3. Be persistent, especially if the inmate's medical condition declines.
4. Offer to provide a private doctor to diagnose the inmate.

#### **Phase #2 – Advocacy to the FCOR**

5. An officer will interview the inmate at the inmate's facility. (The inmate may not be informed as to why the interview is occurring.)
6. An officer/private investigator is sent to the home where inmate will reside to inspect the home and interview those living in the home. Officer reports back to the commission with recommendations.
7. Hearing is scheduled and posted to the FCOR website. Check this site daily as a hearing may be scheduled without family or the inmate being informed.

#### **Phase #3 – Advocacy Before and At the Public Hearing**

8. Those planning to speak on the inmate's behalf need to request to speak by calling the number provided on the FCOR website: Request to Appear – (850) 488-1293.
9. If supporters are unable to attend the hearing, they can submit a written statement expressing their support of an inmate. Support letters will be reviewed and considered by the voting commissioners. Supporter letters should be sent via email to: [InmatesSupporter@fcor.state.fl.us](mailto:InmatesSupporter@fcor.state.fl.us).
10. Inmate Supporter Toll Free Access: 1-800-335-3396.
11. Communication with the FCOR via email, mail or hand delivery. Names and email address of the individual commissioners are available online at [www.fcor.state.fl.us](http://www.fcor.state.fl.us).
12. FCOR will attempt to contact any victims. If the victim is a family member or in favor of release, the inmate should provide their contact information to the commission in order to expedite the process.
13. If the inmate could be perceived as a threat to the community, a detailed plan for in-home care and supervision should be provided to the commission. Examples include:
  - List of family members and a detailed schedule of who will reside in the home to care for the inmate.
  - Letters and/or signed agreement by the caretakers stating they will enforce any and all conditions set by the commission.
  - Letters from children or grandchildren agreeing to any conditions set regarding visitation of underage children.
  - Photos of home and a Google Earth snapshot of the neighborhood, showing no daycare, school or church in the immediate area.

14. Prepare and plan to speak at the hearing. Have an outline so that you do not forget any key points. Do not read word for word; eye contact with the panel is important. You may present documents, photos, etc. at the hearing.

*General information on hearings: Most hearings take place in Tallahassee, but some are heard in other Florida cities to be more accessible for victims and law enforcement to participate. You can request an alternate location if it is more convenient for family members.*

Have as many family members as possible attend the hearing and stand with the speaker during the hearing.

A total of 10 minutes is allowed for all speakers in support of an inmate. Any opposition will have the same amount of time to oppose.

Release may be approved, denied, or denied pending additional medical review at a later date. If denied, the case may be heard again. Be persistent, especially if the inmate's health continues to decline.

#### **Phase #4 – Final Action After Approval**

15. FCOR submits a Release Document to the FDOC.

- Classification officer prepares paperwork outlining conditions set by the commission;
- Release officer prepares paperwork for release;
- Medical records outlining all medications are prepared and a 30-day supply of all medications is provided to the inmate;
- Any victims are contacted by phone prior to the inmate's release; and
- A release packet is signed by the Warden.

16. Typically, hearings occur on Wednesday. An inmate may be released as early as Friday.

17. Family should plan accordingly to bring clothing to the prison for the inmate to wear home and be waiting at the prison to take the inmate home. Communication with the release officer during these days will help in planning for pick-up.

Valuable information is available on the commission's website: [www.fcor.state.fl.us](http://www.fcor.state.fl.us).

### **The Florida Senate Expands CMR to Include Elderly, Infirm Inmates:**

Senate Bill 7020<sup>4</sup> by former Criminal Justice Committee Chairman and state senator Greg Evers unanimously passed the Florida Senate during the 2015 regular session. It created a new, third category of eligibility for non-violent inmates age 70 and over defined as an Elderly and infirm inmate:

“Elderly and infirm inmate,” which means an inmate who has no current or prior convictions for capital or first degree felonies, who has no current or prior convictions for sexual offenses or offenses against children, who is over 70 years of age, and who has a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate infirm or physically impaired to the extent that the inmate does not constitute a danger to himself or herself or others.

This legislation would make infirm and other physically impaired inmates who pose no public safety threat eligible to live out their final years with relatives or in community nursing homes. The Senate also approved letting the inmates' families arrange and pay for independent medical evaluations which would save taxpayers money and lead to more conditional medical releases.

During the last several state legislative sessions, proposals to expand CMR have been considered but have not become law.



**REGGIE GARCIA** is an AV-Preeminent-rated lawyer since 2001 by Martindale Hubbell and a Tallahassee state government lobbyist. His client Cherie B. contributed to this article and was instrumental in her father's recent conditional medical release. Mr. Garcia's first book, called *How to Leave Prison Early: Florida Clemency, Parole and Work Release*, has garnered numerous Gold Five-Star customer reviews and is a frequent best seller in Amazon's Criminal Law Procedure category. He graduated from the University of Florida Levin College of Law in 1985 where he was the president of the leadership honorary society Florida Blue Key.

<sup>1</sup> Fla. Stat. 947.149 (2015)

<sup>2</sup> Information received via email on Sept. 18, 2014 from Jennifer Dale, Florida Commission on Offender Review, and updated via email on April 7, 2020 from Paula Bryant.

<sup>3</sup> F.A.C. Rules 23-24.020 through 23-24.060.

<sup>4</sup> *Journal of the Senate*, April 1, 2015, pp. 299-300.