

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

BILL: PCS/CS/SB 556 (906570)

INTRODUCER: Appropriations Subcommittee on Criminal and Civil Justice; Criminal Justice Committee; and Senators Brandes, Perry, and Bracy

SUBJECT: Inmate Conditional Medical Release

DATE: January 31, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cox</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Forbes</u>	<u>Jameson</u>	<u>ACJ</u>	<u>Recommend: Fav/CS</u>
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/CS/SB 556 repeals section 947.149, Florida Statutes, which establishes the conditional medical release (CMR) program within the Florida Commission on Offender Review (FCOR) and creates section 945.0911, Florida Statutes, to establish a CMR program within the Department of Corrections (DOC) with the purpose of determining whether release is appropriate for eligible inmates, supervising the released inmates, and conducting revocation hearings.

The bill provides that an inmate is eligible for consideration for release under the CMR program when the inmate, because of an existing medical or physical condition, is determined by the DOC to be an:

- “Inmate with a debilitating illness,” which is defined to mean an inmate who is determined to be suffering from a significant terminal or nonterminal condition, disease, or syndrome that has rendered the inmate so physically or cognitively impaired, debilitated, or incapacitated as to create a reasonable probability that the inmate does not constitute a danger to herself or himself or to others.
- “Permanently incapacitated inmate,” which is defined to mean 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 to others.

- “Terminally ill inmate,” which is defined to mean an inmate who has a condition caused by injury, disease, or illness that, to a reasonable degree of medical certainty, renders the inmate terminally ill to the extent that there can be no recovery, death is expected within 12 months, and the inmate does not constitute a danger to herself or himself or to others.

As with current law, the bill requires the DOC to identify inmates who may be eligible for CMR based upon available medical information. However, rather than referring the case to the FCOR upon identification, the bill requires the DOC to conduct the entire determination process by referring the inmate to a three-member panel established in the new program for review and determination of release.

As is required in current law, the bill requires notice to be provided to certain victims immediately upon identification of the inmate as potentially eligible for release on CMR and the inmate’s referral to the panel.

The bill requires the director of inmate health services to review specified evidence and provide a recommendation to the three-member panel, who must conduct a hearing within 45 days of the referral to determine whether CMR is appropriate for the inmate. A majority of the panel members must agree that release on CMR is appropriate for the inmate. An inmate who is approved for release on CMR must be released by the DOC to the community within a reasonable amount of time and is considered to be a medical releasee upon release to the community.

The bill creates a process for an inmate who is denied CMR by the three-member panel to have the decision reviewed. The secretary has the final decision about the appropriateness of the release on CMR. Additionally, an inmate who is denied CMR may be subsequently reconsidered for such release in a manner prescribed by rule.

The bill requires that a medical releasee released on CMR be released for a period equal to the length of time remaining on his or her term of imprisonment on the date the release is granted and the medical releasee is required to comply with all reasonable conditions of release the DOC imposes. The bill also provides a specific exception to the requirement to serve 85 percent of a term of imprisonment prior to release.

The bill provides that a medical releasee is considered to be in the custody, supervision, and control of the DOC and provides that this does not create a duty for the DOC to provide medical care to the medical releasee upon release to the community. The bill provides that the medical releasee remains eligible to earn or lose gain-time in accordance with section 944.275, Florida Statutes, and department rule. However, the bill clarifies that the medical releasee may not be counted in the prison system population and the medical releasee’s approved community-based housing location may not be counted in the capacity figures for the prison system.

The bill establishes a specific process for the revocation of CMR which closely parallels the current process provided for in section 947.141, Florida Statutes, and provides that revocation may be based on certain circumstances. The bill provides that a medical releasee may admit to the allegations or elect to have a revocation hearing. The bill specifies a hearing process if the medical releasee elects to proceed with a revocation hearing, provides for the recommitment of a medical releasee whose CMR has been revoked, and permits forfeiture of gain-time in certain instances.

As is provided for with the initial determination, the bill authorizes a medical releasee whose CMR is revoked to have the revocation decision reviewed.

The bill also requires the DOC to notify the family of an inmate who is diagnosed with a terminal condition within 72 hours and allow the family to visit the inmate within 7 days of such diagnosis.

The bill includes language providing that unless otherwise provided by law and in accordance with Article X, section 13 of the Florida Constitution, members of the panel who are involved with decisions that grant or revoke CMR are provided immunity from liability for actions that directly relate to such decisions.

The bill provides legislative findings for the establishment of the program and authorizes the DOC to adopt rules as necessary to implement the act.

The Criminal Justice Impact Conference (CJIC) reviewed the bill prior to the adoption of the PCS for CS/SB 556 on January 27, 2020. The CJIC determined that the bill will likely result in a negative significant prison bed impact (i.e. a decrease of more than 25 prison beds). Additionally, to the extent that the bill increases the number of inmates released on CMR, the bill will likely result in a reduction in the associated inmate healthcare costs.

The bill removes certain functions related to CMR from the FCOR and reestablishes the comparable duties within the DOC. As a result, the bill will result in a workload and cost shift from the FCOR to the DOC. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2020.

II. Present Situation:

Conditional Medical Release

Conditional Medical Release (CMR), outlined in s. 947.149, F.S., was created by the Florida Legislature in 1992,¹ as a discretionary release of inmates who are “terminally ill” or “permanently incapacitated” and who are not a danger to themselves or others.² The Florida Commission on Offender Review (FCOR), which consists of three members, reviews eligible

¹ Chapter 92-310, L.O.F.

² The FCOR, *Release Types, Post Release*, available at <https://www.fcor.state.fl.us/postrelease.shtml#conditionalMedicalRelease> (last visited November 6, 2019).

inmates for release under the CMR program pursuant to the powers established in s. 947.13, F.S.³ In part, s. 947.149, F.S., authorizes the FCOR to determine what persons will be released on CMR, establish the conditions of CMR, and determine whether a person has violated the conditions of CMR and take actions with respect to such a violation.

Eligibility Criteria

Eligible inmates include inmates designated by the DOC as a:

- “Permanently incapacitated inmate,” which is 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; or
- “Terminally ill inmate,” which is 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.⁴

Inmates sentenced to death are ineligible for CMR.⁵

Referral Process for Eligible Inmates

The DOC is required to identify inmates who may be eligible for CMR in accordance with the above-mentioned designations. The DOC uses available medical information as a basis for identifying eligible inmates and refers such inmates to the FCOR for consideration. In considering an inmate, the FCOR may require that additional medical evidence be produced or that additional medical examinations be conducted and may require other investigations to be made as it deems necessary.⁶

An inmate does not have a right to CMR or to a medical evaluation to determine eligibility for such release.⁷ Additionally, the authority and whether or not to grant CMR and establish additional conditions of release rests solely within the discretion of the FCOR, together with the authority to approve the release plan to include necessary medical care and attention.⁸

Certain information must be provided to the FCOR from the DOC to be considered a referral, including:

- Clinical Report, including complete medical information justifying classification of the inmate as “permanently incapacitated” or “terminally ill;” and
- Verifiable release plan, to include necessary medical care and attention.⁹

³ Section 947.149(3), F.S. Section 947.01, F.S., provides that the membership of the FCOR is three-members.

⁴ Section 947.149(1), F.S.

⁵ Section 947.149(2), F.S.

⁶ Section 947.149(3), F.S.

⁷ Section 947.149(2), F.S.

⁸ Section 947.149(3), F.S.

⁹ Rule 23-24.020(1), F.A.C.

The referral must be directed to the Office of the Commission Clerk who may docket the case before the FCOR. A decision will be made by a majority of the quorum present and voting.¹⁰ The FCOR is required to approve or disapprove CMR based upon information submitted in support of the recommendation and review of the DOC file. If additional information is needed, the FCOR must continue the case for verification of the release plan, additional medical examinations, and other investigations as directed. The FCOR is required to instruct staff to conduct the appropriate investigation, which must include a written statement setting forth the specific information being requested.¹¹

Victim Input

If a victim or his or her personal representative requests to be notified, the FCOR must provide victim notification of any hearing where the release of the inmate on CMR is considered prior to the inmate's release.¹² Article I, s. 16 of the Florida Constitution, which was adopted in 2018 by the Florida voters, provides certain rights to victims in the Florida Constitution. In part, Article I, s. 16, of the Florida Constitution, provides that a victim must have the following rights upon request:

- Reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary.
- To be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.
- To be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, any scheduled release date of the offender, and the release of or the escape of the offender from custody.
- To be informed of all postconviction processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender.¹³

The requirement to notify victims was in place prior to the constitutional amendment passage through administrative rule. Rule 23-24.025, F.A.C., provides that a victim, relative of a minor who is a victim, relative of a homicide victim, or victim representative or victim advocate must receive advance notification any time a CMR case is placed on the docket for determination by the FCOR. Notification must be made to the address found in the police report or other criminal report or at a more current address if such has been provided to the FCOR.¹⁴

¹⁰ Rule 23-24.020(2), F.A.C.

¹¹ Rule 23-24.020(3), F.A.C.

¹² Rule 23-24.020(4), F.A.C., further qualifies that this notification occurs when the name and address of such victim or representative of the victim is known by the FCOR.

¹³ Art. 1, s. 16(b)(6)a., b., f., and g., FLA. CONST.

¹⁴ Rule 23-24.025(1), F.A.C.

A victim of the crime committed by the inmate, or a victim's representative, must be permitted a reasonable time to make an oral statement or submit a written statement regarding whether the victim supports the granting, denying, or revoking of CMR.¹⁵ Additionally, other interested parties may also speak on behalf of victims since the FCOR meetings are public meetings.¹⁶ A victim can also request that the FCOR provide notification of the action taken if he or she does not choose to appear at meetings or make a written statement.¹⁷

Release Conditions

The release of an inmate on CMR is for the remainder of the inmate's sentence and requires periodic medical evaluations at intervals determined by the FCOR at the time of release.¹⁸ An inmate who has been approved for release on CMR is considered a medical releasee when released.

Each medical releasee must be placed on CMR supervision and is subject to the standard conditions of CMR, which include:

- Promptly proceeding to the residence upon being released and immediately reporting by mail, telephone, or personal visit as instructed by the CMR officer or within 72 hours of release if no specific report date and time are given.
- Securing the permission of the CMR officer before:
 - Changing residences;
 - Leaving the county or the state; and
 - Posting bail or accepting pretrial release if arrested for a felony.
- Submitting a full and truthful report to the CMR officer each month in writing and as directed by the CMR supervisor.
- Refraining from:
 - Owning, carrying, possessing, or having in his or her constructive possession a firearm or ammunition;
 - Using or possessing alcohol or intoxicants of any kind;
 - Using or possessing narcotics, drugs, or marijuana unless prescribed by a physician;
 - Entering any business establishment whose primary purpose is the sale or consumption of alcoholic beverages; and
 - Knowingly associating with any person engaging in criminal activity, a criminal gang member, or person associated with criminal gang members.
- Securing the permission of the CMR officer before owning, carrying, or having in his or her constructive possession a knife or any other weapon.
- Obeying all laws, ordinances, and statutory conditions of CMR.
- Submitting to a reasonable search of the medical releasee's person, residence, or automobile by a CMR officer.
- Waiving extradition back to Florida if the medical releasee is alleged to have violated CMR.

¹⁵ Rule 23-24.025(2) and (3), F.A.C. See Rule 23-24.025(4), F.A.C., regarding specifics about what is allowed to be submitted or utilized during oral testimony. Rule 23-24.025(7), F.A.C., provides that victims who appear and speak must be advised that any information submitted at FCOR meetings becomes public record.

¹⁶ Rule 23-24.025(3), F.A.C.

¹⁷ Rule 23-24.025(5), F.A.C.

¹⁸ Section 947.149(4), F.S.

- Permitting the CMR officer to visit the medical releasee's residence, employment, or elsewhere.
- Promptly and truthfully answering all questions and following all instructions asked or given by the CMR officer or the FCOR.
- Remaining on CMR for the remainder of the sentence without diminution of such sentence for good behavior.
- Agreeing to submit to random drug or alcohol testing, to be paid for and submitted by the medical releasee, as directed by the CMR officer or the professional staff of any treatment center where treatment is being received.
- Executing and providing authorizations to release records to the CMR supervisor and the FCOR for the purpose of monitoring and documenting the medical releasee's progress.
- Agreeing that, in the event there is an improvement in the medical releasee's medical condition to the extent that he or she is no longer "permanently incapacitated," or "terminally ill," that he or she will, if directed to do so, report for a CMR revocation hearing.¹⁹

Additionally, the FCOR can impose special conditions of CMR.²⁰

Revocation and Recommitment

In part, s. 947.141, F.S., provides for the revocation and recommitment of a medical releasee who appears to be subject to CMR revocation proceedings, including establishing a hearing process and determining whether a medical releasee must be recommitted to the DOC. CMR supervision can be revoked and the offender returned to prison if the FCOR determines:

- That a violation of any condition of the release has occurred; or
- His or her medical or physical condition improves to the point that the offender no longer meets the CMR criteria.²¹

Revocation Due to Improved Medical or Physical Condition

If it is discovered during the CMR release that the medical or physical condition of the medical releasee has improved to the extent that she or he would no longer be eligible for such release, the FCOR may order that the medical releasee be returned to the custody of the DOC for a revocation hearing, in accordance with s. 947.141, F.S. A medical releasee who has his or her CMR revoked due to improvement in medical or physical condition must serve the balance of the sentence with credit for the time served on CMR, but does not forfeit any gain-time accrued prior to release on CMR.²²

Revocation Due to Violation of CMR Conditions

When there are reasonable grounds to believe that a medical releasee who is on CMR has violated the conditions of the release in a material respect the FCOR is authorized to have a

¹⁹ Rule 23-24.030(1), F.A.C.

²⁰ Rule 23-24.030(2), F.A.C.

²¹ Section 947.149(5), F.S.

²² Section 947.149(5)(a), F.S. Additionally, if the person whose CMR is revoked due to an improvement in medical or physical condition would otherwise be eligible for parole or any other release program, the person may be considered for such release program pursuant to law.

warrant issued for the arrest of the medical releasee. A warrant must be issued if the medical releasee was found to be a sexual predator.²³ Further, if a law enforcement officer has probable cause to believe that a medical release who is on CMR supervision has violated the terms and conditions of his or her release by committing a felony offense then the officer must arrest the medical releasee without a warrant and a warrant need not be issued in the case.²⁴

A medical releasee who is arrested for a felony must be detained without bond until the initial appearance of the medical releasee at which a judicial determination of probable cause is made. The medical releasee may be released if the trial court judge does not find probable cause existed for the arrest. However, if the court makes a finding of probable cause, such determination also constitutes reasonable grounds to believe that the medical releasee violated the conditions of the CMR release and the chief county correctional officer must notify the FCOR and the DOC of the finding within 24 hours.²⁵ The medical releasee must continue to be detained without bond for a period not more than 72 hours excluding weekends and holidays after the date of the probable cause determination, pending a decision by the FCOR whether to issue a warrant charging the medical releasee with violation of the conditions of CMR. If the FCOR issues such warrant, the medical releasee must continue to be held in custody pending a revocation hearing.²⁶

Revocation Hearing

The medical releasee must be afforded a hearing which is conducted by a commissioner or a duly authorized representative within 45 days after notice to the FCOR of the arrest of a medical releasee charged with a violation of the terms and conditions of CMR. If the medical releasee elects to proceed with a hearing, the medical releasee must be informed orally and in writing of certain rights, including the medical releasee's:

- Alleged violation; and
- Right to:
 - Be represented by counsel.
 - Be heard in person.
 - Secure, present, and compel the attendance of witnesses relevant to the proceeding.
 - Produce documents on his or her own behalf.
 - Access all evidence used against the releasee and confront and cross-examine adverse witnesses.
 - Waive the hearing.²⁷

The commissioner, who conducts the hearing, is required to make findings of fact in regard to the alleged violation within a reasonable time following the hearing and at least two commissioners must enter an order determining whether the charge of violation of CMR has been sustained based upon the findings of fact presented by the hearing commissioner or

²³ Section 947.141(1), F.S.

²⁴ Section 947.141(7), F.S.

²⁵ Section 947.141(2), F.S., further states that the chief county detention officer must transmit to the FCOR and the DOC a facsimile copy of the probable cause affidavit or the sworn offense report upon which the trial court judge's probable cause determination is based.

²⁶ *Id.*

²⁷ Section 947.141(3), F.S.

authorized representative. The panel may revoke CMR, thereby returning the medical releasee to prison to serve the sentence imposed; reinstate the original order granting the release; or enter such other order as it considers proper.²⁸

If CMR is revoked and the medical releasee is ordered to be returned to prison, the medical releasee is deemed to have forfeited all gain-time or commutation of time for good conduct earned up to the date of release. However, if CMR is revoked due to the improved medical or physical condition of the medical releasee, the medical releasee does not forfeit gain-time accrued before the date of CMR.²⁹ Gain-time or commutation of time for good conduct may be earned from the date of return to prison.

Statistics

The FCOR has approved and released 73 inmates for CMR in the last three fiscal years, including:

- 38 in FY 2018-19;
- 21 in FY 2017-2018; and
- 14 in FY 2016-2017.³⁰

The DOC has recommended 149 inmates for release in the past three fiscal years, including:

- 76 in FY 2018-19;
- 39 in FY 2017-2018; and
- 34 in FY 2016-2017.³¹

Currently, the DOC's only role in the CMR process is to make the initial designation of medical eligibility and to refer the inmate's case to the FCOR for an investigation and final decision.

Gain-time

Gain-time awards, which result in deductions to the court-ordered sentences of specified eligible inmates, are used to encourage satisfactory prisoner behavior or to provide incentives for prisoners to participate in productive activities while incarcerated.³² An inmate is not eligible to earn or receive gain-time in an amount that results in his or her release prior to serving a minimum of 85 percent of the sentence imposed.³³

²⁸ Section 947.141(4), F.S.

²⁹ Section 947.141(6), F.S.

³⁰ Emails from Alexander Yarger, Legislative Affairs Director, Florida Commission on Offender Review, RE: Conditional Medical Release Data and RE: Updated Conditional Medical Release Numbers (attachments on file with the Senate Criminal Justice Committee) (December 15, 2017 and November 1, 2019, respectively). *See also* FCOR Annual Report FY 2017-18, p. 8, available at <https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202018%20WEB.pdf> (last visited November 6, 2019).

³¹ *Id.*

³² Section 944.275(1), F.S. Section 944.275(4)(f), F.S., further provides that an inmate serving a life sentence is not able to earn gain-time. Additionally, an inmate serving the portion of his or her sentence that is included in an imposed mandatory minimum sentence or whose tentative release date is the same date as he or she achieves service of 85 percent of the sentence are not eligible to earn gain-time. Section 944.275(4)(e), F.S., also prohibits inmates committed to the DOC for specified sexual offenses committed on or after October 1, 2014, from earning incentive gain-time.

³³ Section 944.275(4)(f), F.S.

Basic gain-time, which automatically reduced an inmate's sentence by a designated amount each month, was eliminated for offenses committed on or after January 1, 1994.³⁴ The only forms of gain-time that can currently be earned are:

- Incentive gain-time;³⁵
- Meritorious gain-time;³⁶ and
- Educational achievement gain-time.³⁷

The procedure for applying gain-time awards to an inmate's sentence is dependent upon the calculation of a "maximum sentence expiration date" and a "tentative release date." The tentative release date may not be later than the maximum sentence expiration date.³⁸ The maximum sentence expiration date represents the date when the sentence or combined sentences imposed on a prisoner will expire. To calculate the maximum sentence expiration date, the DOC reduces the total time to be served by any time lawfully credited.³⁹

The tentative release is the date projected for the prisoner's release from custody after gain-time is granted or forfeited in accordance with s. 944.275, F.S.⁴⁰ Gain-time is applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, are applied to make the tentative release date proportionately later.⁴¹

The DOC is authorized in certain circumstances, including when a medical releasee has his or her CMR revoked, to declare all gain-time earned by an inmate forfeited.⁴²

Federal First Step Act

In December, 2018, the United States Congress passed, and President Trump signed into law, the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act" or the "FIRST STEP Act" (First Step Act).⁴³ The law makes a number of changes to the federal criminal justice system and procedures applicable to inmates in the Federal Bureau of Prisons (BOP), including, in part, modifying provisions related to compassionate release to:

- Require inmates be informed of reduction in sentence availability and process;

³⁴ Chapter 93-406, L.O.F.

³⁵ Section 944.275(4)(b), F.S., provides that incentive gain-time is a total of up to ten days per month that may be awarded to inmates for institutional adjustment, performing work in a diligent manner, and actively participating in training and programs. The amount an inmate can earn is stable throughout the term of imprisonment and is based upon the date an offense was committed.

³⁶ Section 944.275(4)(c), F.S., provides that meritorious gain-time is awarded to an inmate who commits an outstanding deed or whose performance warrants additional credit, such as saving a life or assisting in recapturing an escaped inmate. The award may range from one day to 60 days and the statute does not prohibit an inmate from earning meritorious gain-time on multiple occasions if warranted.

³⁷ Section 944.275(4)(d), F.S., provides that educational gain-time is a one-time award of 60 days that is granted to an inmate who receives a General Education Development (GED) diploma or a certificate for completion of a vocational program.

³⁸ Section 944.275(3)(c), F.S.

³⁹ Section 944.275(2)(a), F.S.

⁴⁰ Section 944.275(3)(a), F.S.

⁴¹ *Id.* See also s. 944.275(4)(b), F.S.

⁴² Section 944.28(1), F.S.

⁴³ The First Step Act of 2018, Pub. L. No. 115-391 (2018).

- Modify the definition of “terminally ill;”
- Require notice and assistance for terminally ill offenders;
- Require requests from terminally ill offenders to be processed within 14 days.⁴⁴

Specifically, in the case of a diagnosis of a terminal illness, the BOP is required to, subject to confidentiality requirements:

- Notify the defendant’s attorney, partner, and family members, not later than 72 hours after the diagnosis, of the defendant’s diagnosis of a terminal condition and inform the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request for a sentence reduction;
- Provide the defendant’s partner and family members, including extended family, with an opportunity to visit the defendant in person not later than 7 days after the date of the diagnosis;
- Upon request from the defendant or his attorney, partner, or a family member, ensure that BOP employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction; and
- Process a request for sentence reduction submitted on the defendant’s behalf by the defendant or the defendant’s attorney, partner, or family member not later than 14 days from receipt of a request.⁴⁵

The statutory time frames mentioned above begin once the Clinical Director of an institution makes a terminal diagnosis. Once the diagnosis is made, the Clinical Director will inform the Warden and the appropriate Unit Manager as soon as possible so as to ensure requirements are met.⁴⁶

Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.⁴⁷ Article X, s. 13 of the Florida Constitution allows the Legislature to waive this immunity. Further, s. 768.28(1), F.S., allows for suits in tort against the State and its agencies and subdivisions for damages resulting from the negligence of government employees acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct. Section 768.28, F.S., applies only to “injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment”⁴⁸

⁴⁴ Section 603(b) of the First Step Act, codified at 18 USC § 3582. *See also* U.S. Department of Justice, Federal Bureau of Prisons, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. Section 3582 and 4205(g)*, January 17, 2019, p. 3-4, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf (last visited November 12, 2019).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Legal Information Institute, *Sovereign immunity*, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited January 23, 2020).

⁴⁸ *City of Pembroke Pines v. Corrections Corp. of America, Inc.*, 274 So. 3d 1105, 1112 (Fla. 4th DCA 2019) (quoting s. 768.28(1), F.S.).

Section 768.28(5), F.S., limits tort recovery from a governmental entity at \$200,000 per person and \$300,000 per accident.⁴⁹ This limitation does not prevent a judgement in excess of such amounts from being entered, but a claimant is unable to collect above the statutory limit unless a claim bill is passed by the Legislature.⁵⁰

Individual government employees, officers, or agents are immune from suit or liability for damages caused by any action taken in the scope of employment, unless the damages result from the employee's acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.^{51, 52} Thus, the immunity may be pierced only if state employees or agents either act outside the scope of their employment, or act "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."⁵³

Courts that have construed the bad faith prong of s. 768.28, F.S., to mean the actual malice standard, which means the conduct must be committed with "ill will, hatred, spite, [or] an evil intent."⁵⁴ Conduct meeting the wanton and willful standard is defined as "worse than gross negligence,"⁵⁵ and "more reprehensible and unacceptable than mere intentional conduct."^{56, 57}

III. Effect of Proposed Changes:

The bill repeals s. 947.149, F.S., which establishes the CMR program within the FCOR and creates s. 945.0911, F.S., to establish a CMR program within the DOC with the purpose of:

- Determining whether release is appropriate for eligible inmates;
- Supervising the released inmates; and
- Conducting revocation hearings.

The CMR program established within the DOC retains similarities to the program currently in existence within the FCOR, including that the CMR program must include a panel of at least three people. The members of the panel are appointed by the secretary or his or her designee for the purpose of determining the appropriateness of CMR and conducting revocation hearings on the inmate releases.

The bill provides legislative findings for the CMR program.

Eligibility Criteria

The bill provides that an inmate is eligible for consideration for release under the CMR program when the inmate, because of an existing medical or physical condition, is determined by the

⁴⁹ Section 768.28(5), F.S.

⁵⁰ *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

⁵¹ *See Peterson v. Pollack*, 2019 WL 6884887 (Fla. 4th DCA December 18, 2019).

⁵² Section 768.28(9)(a), F.S.

⁵³ *Eiras v. Fla.*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017).

⁵⁴ *See Parker v. State Bd. of Regents ex rel. Fla. State Univ.*, 724 So.2d 163, 167 (Fla. 1st DCA 1998); *Reed v. State*, 837 So.2d 366, 368–69 (Fla. 2002); and *Eiras v. Fla.*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017).

⁵⁵ *Eiras v. Fla.*, 239, *supra* at 50; *Sierra v. Associated Marine Insts., Inc.*, 850 So.2d 582, 593 (Fla. 2d DCA 2003).

⁵⁶ *Eiras v. Fla.*, *supra* at 50; *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123 (Fla. 4th DCA 1987).

⁵⁷ *See also Kastritis v. City of Daytona Beach Shores*, 835 F.Supp.2d 1200, 1225 (M.D. Fla. 2011) (defining these standards).

DOC to be an inmate with a debilitating illness, a permanently incapacitated inmate, or a terminally ill inmate. The bill provides definitions for such terms, including:

- “Inmate with a debilitating illness,” which means an inmate who is determined to be suffering from a significant terminal or nonterminal condition, disease, or syndrome that has rendered the inmate so physically or cognitively impaired, debilitated, or incapacitated as to create a reasonable probability that the inmate does not constitute a danger to herself or himself or to others.
- “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 to others.
- “Terminally ill inmate,” which means an inmate who has a condition caused by injury, disease, or illness that, to a reasonable degree of medical certainty, renders the inmate terminally ill to the extent that there can be no recovery, death is expected within 12 months, and the inmate does not constitute a danger to herself or himself or to others.

The bill provides a specific exception to the 85 percent rule that allows an inmate who meets the above criteria to be released from the custody of the DOC pursuant to the CMR program prior to satisfying 85 percent of his or her term of imprisonment.

Referral Process

The bill requires that any inmate in the custody of the DOC who meets one or more of the eligibility requirements must be considered for CMR. However, the authority to grant CMR rests solely with the DOC, as it currently does with the FCOR. Additionally, the bill provides that an inmate does not have a right to release or to a medical evaluation to determine eligibility for release on CMR pursuant to s. 945.0911, F.S.

The bill requires the DOC to identify inmates who may be eligible for CMR based upon available medical information and authorizes the DOC to require additional medical evidence, including examinations of the inmate, or any other additional investigations it deems necessary for determining the appropriateness of the eligible inmate’s release.

Upon an inmate’s identification as potentially eligible for release on CMR, the DOC must refer such inmate to the three-member panel described above for review and determination of release.

The bill requires the DOC to provide notice to a victim of the inmate’s referral to the panel immediately upon identification of the inmate as potentially eligible for release on CMR if the case that resulted in the inmate’s commitment to the DOC involved a victim and such victim specifically requested notification pursuant to Article I, s. 16 of the Florida Constitution. Additionally, the victim must be afforded the right to be heard regarding the release of the inmate.

Determination of Release

The bill requires the three-member panel established in s. 945.0911(1), F.S., to conduct a hearing within 45 days after receiving the referral to determine whether CMR is appropriate for the

inmate. Before the hearing, the director of inmate health services or his or her designee must review any relevant information, including, but not limited to, medical evidence, and provide the panel with a recommendation regarding the appropriateness of releasing the inmate on CMR. A majority of the panel members must agree that release on CMR is appropriate for the inmate. If CMR is approved, the inmate must be released by the DOC to the community within a reasonable amount of time with necessary release conditions imposed.

The bill provides that an inmate who is granted CMR is considered a medical releasee upon release to the community.

An inmate who is denied CMR by the three-member panel is able to have the decision reviewed. The bill provides that the DOC's general counsel and chief medical officer must review the decision of the three-member panel and make a recommendation to the secretary. The secretary must review all relevant information and make a final decision about the appropriateness of the release on CMR. The bill provides that the appeal decision of the secretary is a final administrative decision not subject to appeal.

Additionally, an inmate who is denied CMR who requests to have the decision reviewed must do so in a manner prescribed in rule and may be subsequently reconsidered for such release in a manner prescribed by department rule.

Release Conditions

The bill requires that an inmate granted release on CMR be released for a period equal to the length of time remaining on his or her term of imprisonment on the date the release is granted. The medical releasee is required to comply with all reasonable conditions of release the DOC imposes, which must include, at a minimum:

- Periodic medical evaluations at intervals determined by the DOC at the time of release.
- Supervision by an officer trained to handle special offender caseloads.
- Active electronic monitoring, if such monitoring is determined to be necessary to ensure the safety of the public and the releasee's compliance with release conditions.
- Any conditions of community control provided for in s. 948.101, F.S.⁵⁸
- Any other conditions the DOC deems appropriate to ensure the safety of the community and compliance by the medical releasee.

The bill provides that a medical releasee is considered to be in the custody, supervision, and control of the DOC. The bill further states that this does not create a duty for the DOC to provide the medical releasee with medical care upon release into the community. The bill provides that the medical releasee remains eligible to earn or lose gain-time in accordance with s. 944.275, F.S., and department rule. However, the bill clarifies that the medical releasee may not be counted in the prison system population, and the medical releasee's approved community-based housing location may not be counted in the capacity figures for the prison system.

⁵⁸ Some examples on community control conditions required under s. 948.101, F.S., include to maintain specified contact with the parole and probation officer; confinement to an agreed-upon residence during hours away from employment and public service activities; mandatory public service; and supervision by the DOC by means of an electronic monitoring device or system.

Revocation of CMR Release and Recommitment to the DOC

The bill establishes a process for the revocation of CMR that very closely parallels current law and for which may be based on two circumstances, including the:

- Discovery that the medical or physical condition of the medical releasee has improved to the extent that she or he would no longer be eligible for release on CMR; or
- Violation of any release conditions the DOC establishes, including, but not limited to, a new violation of law.

Revocation Based on Medical or Physical Improvement

When the basis of the revocation proceedings are based on an improved medical or physical condition of the medical releasee, the bill authorizes the DOC to:

- Order that the medical releasee be returned to the custody of the DOC for a CMR revocation hearing, as prescribed by rule; or
- Allow the medical releasee to remain in the community pending the revocation hearing.

If the DOC elects to order the medical releasee to be returned to custody pending the revocation hearing, the officer or duly authorized representative may cause a warrant to be issued for the arrest of the medical releasee.

The revocation hearing must be conducted by the three-member panel discussed above and a majority of the panel members must agree that revocation is appropriate for the medical releasee's conditional medical release to be revoked. The bill requires the director of inmate health services or his or her designee to review any medical evidence pertaining to the medical releasee and provide the panel with a recommendation regarding the medical releasee's improvement and current medical or physical condition.

A medical releasee whose CMR was revoked due to improvement in his or her medical or physical condition must be recommitted to the DOC to serve the balance of his or her sentence with credit for the time served on CMR and without forfeiture of any gain-time accrued before recommitment. If the medical releasee whose CMR is revoked due to an improvement in her or his medical or physical condition would otherwise be eligible for parole or any other release program, the medical releasee may be considered for such release program pursuant to law.

Revocation Based on Violation of Conditions

The bill provides that CMR may also be revoked for violation of any release conditions the DOC establishes, including, but not limited to, a new violation of law. The bill provides that if a duly authorized representative of the DOC has reasonable grounds to believe that a medical releasee has violated the conditions of his or her release in a material respect, such representative may cause a warrant to be issued for the arrest of the medical releasee.

Further, a law enforcement officer or a probation officer may arrest the medical releasee without a warrant in accordance with s. 948.06, F.S., if there are reasonable grounds to believe he or she has violated the terms and conditions of his or her CMR. The law enforcement officer must

report the medical releasee's alleged violations to the supervising probation office or the DOC's emergency action center for initiation of revocation proceedings.

In contrast to when a revocation is based on improved medical or physical condition, if the basis of the violation of release conditions is related to a new violation of law, the medical releasee must be detained without bond until his or her initial appearance at which a judicial determination of probable cause is made. If the judge determines that there was no probable cause for the arrest, the medical releasee may be released. If the judge determines that there was probable cause for the arrest, the judge's probable cause determination also constitutes reasonable grounds to believe that the medical releasee violated the conditions of the CMR.

The bill requires the DOC to order that the medical releasee subject to revocation for a violation of conditions be returned to the custody of the DOC for a CMR revocation hearing as prescribed by rule. A majority of the panel members must agree that revocation is appropriate for the medical releasee's CMR to be revoked.

The bill provides that a medical releasee who has his or her CMR revoked due to a violation of conditions must serve the balance of his or her sentence in an institution designated by the DOC with credit for the actual time served on CMR. Additionally, the medical releasee's gain-time accrued before recommitment may be forfeited pursuant to s. 944.28(1), F.S. If the medical releasee whose CMR is revoked would otherwise be eligible for parole or any other release program, he or she may be considered for such release program pursuant to law.

The bill provides that a medical releasee whose CMR is revoked and is recommitted to the DOC must comply with the 85 percent requirement discussed above upon recommitment.

Revocation Hearing Process

The bill provides that a medical releasee who is subject to revocation for either of the above-mentioned bases may either admit to the alleged violation of the conditions of CMR or may elect to proceed to a revocation hearing. If the medical releasee subject to revocation for either basis elects to proceed with a hearing, the medical releasee must be informed orally and in writing of certain rights, including the releasee's:

- Alleged basis for the pending revocation proceeding against the releasee.
- Right to:
 - Be represented by counsel.⁵⁹
 - Be heard in person.
 - Secure, present, and compel the attendance of witnesses relevant to the proceeding.
 - Produce documents on his or her own behalf.
 - Access all evidence used to support the revocation proceeding against the releasee and confront and cross-examine adverse witnesses.
 - Waive the hearing.

If the panel approves the revocation of the medical releasee's CMR, the panel must provide a written statement as to evidence relied on and reasons for revocation.

⁵⁹ However, this bill explicitly provides that this does not create a right to publicly funded legal counsel.

Review Process of Revocation Determination

The bill authorizes a medical releasee whose release is revoked based on either basis to have the revocation decision reviewed. The bill requires the DOC's general counsel to review the revocation decision and make a recommendation to the secretary. The secretary must review all relevant information and make a final decision about the appropriateness of the revocation of CMR. In addition to the review by the general counsel, the chief medical officer must also review the revocation decision and make a recommendation to the secretary when the basis is due to an improved medical or physical condition.

The bill provides that any decision of the secretary related to a revocation decision is a final administrative decision not subject to appeal.

Special Requirements of the DOC Related to Terminal Inmate's

The bill also implements provisions similar to those provided for in federal law related to compassionate release of inmate's that have been diagnosed with a terminal illness. The bill requires the DOC to, subject to confidentiality requirements, follow the following procedures related to an inmate who is diagnosed with a terminal medical condition that makes him or her eligible for consideration for release under the "terminally ill" definition discussed above while in the custody of the DOC:

- Notify the inmate's family or next of kin, and attorney, if applicable, of such diagnosis within 72 hours of the diagnosis.
- Provide the inmate's family, including extended family, with an opportunity to visit the inmate in person within seven days upon such diagnosis.
- Initiate a review for CMR immediately upon such diagnosis.

Additionally, the bill provides that an inmate who has mental and physical capacity must consent to release of confidential information for the DOC to comply with these notification requirements.

Sovereign Immunity

The bill includes language providing that unless otherwise provided by law and in accordance with Article X, s. 13 of the Florida Constitution, members of the panel who are involved with decisions that grant or revoke CMR are provided immunity from liability for actions that directly relate to such decisions.

The bill authorizes the DOC to adopt rules as necessary to implement the act.

The bill is effective October 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None Identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) reviewed the bill on January 27, 2020. The CJIC determined that the bill will likely result in a negative significant prison bed impact (i.e. a decrease of more than 25 prison beds).⁶⁰ Additionally, the bill will likely result in a reduction in the associated inmate healthcare costs.

The bill removes any role of determining the appropriateness of an inmate's release on CMR from the FCOR and places such comparable duties within the DOC. In Fiscal Year 2018-2019, FCOR conducted 84 CMR determinations. They report that they spent 804 hours on the investigation/determination, 64 hours on victim assistance, and 433 hours on revocations for CMR. The FCOR reports that this equates to less than 1 FTE.⁶¹

The DOC reports that when the inmate population is impacted in small increments statewide, the inmate variable per diem of \$20.04 is the most appropriate to use to determine the fiscal impact. The variable per diem includes costs more directly aligned

⁶⁰ The CJIC meeting at which this bill estimate was made occurred during a meeting of the Criminal Justice Estimating Conference on January 27, 2020. The meeting is available on video on the Florida Channel at <https://thefloridachannel.org/videos/1-27-20-criminal-justice-estimating-conference/> (last visited January 29, 2020).

⁶¹ The FCOR, CS/SB 556 Agency Bill Analysis, p. 5 (October 24, 2019).

with individual inmate care such as medical, food, inmate clothing, personal care items, etc. The DOC’s FY 17-18 average per diem for community supervision was \$5.47.⁶²

The DOC revised its’ previous analysis regarding staffing needs and raised the projected need from 2 additional staff for the Bureau of Classification Management to oversee, provide guidance, and coordinate the implementation and administration of the CMR program,⁶³ to 9 additional staff and costs, as follows.⁶⁴

1	Correctional Program Administrator	\$90,279 (salary and benefits)	
1	Correctional Services Consultant	\$68,931 (salary and benefits)	
1	Correctional Services Asst. Cons.	\$58,732 (salary and benefits)	
1	Government Oper. Consult. I	\$52,324 (salary and benefits)	
1	Senior Attorney	\$79,073 (salary and benefits)	
4	Correctional Probation Senior Ofcr.	\$246,848 (salary and benefits)	
	Professional travel	\$ 13,512 (recurring)	\$17,716 (non-recurring)
	Expense	\$ 42,275 (recurring)	\$29,795 (non-recurring)
	Human Resources	\$ 2,961 (recurring)	
	Salary Incentive (if applicable)	\$ 4,512 (recurring)	
	Information Technology		\$ 17,400 (non-recurring)
	Total All Funds⁶⁵	\$659,447 (recurring)	\$64,911(non-recurring)

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill creates section 945.0911 of the Florida Statutes.

The bill repeals section 947.149 of the Florida Statutes.

The bill amends the following sections of the Florida Statutes: 316.1935, 775.084, 775.087, 784.07, 790.235, 794.0115, 893.135, 921.0024, 944.605, 944.70, 947.13, and 947.141.

⁶² The DOC SB 574 Analysis, p. 5.

⁶³ The DOC spreadsheet (January 17, 2020) (on file with the Committee on Criminal and Civil Justice Appropriations).

⁶⁴ The DOC spreadsheet (January 30, 2020) (on file with the Committee on Criminal and Civil Justice Appropriations).

⁶⁵ DOC Spreadsheet (January 30, 2019), (on file with the committee on Criminal and Civil Justice Appropriations).

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Recommended CS/CS by Appropriations Subcommittee on Criminal and Civil Justice on January 29, 2020:

The committee substitute:

- Provides legislative findings;
- Provides an exception to the 85 percent rule for inmates released to the CMR program;
- Provides that an inmate who is denied release in the CMR program may request the decision to be reviewed as prescribed by rule;
- Clarifies that the DOC does have a duty to provide medical care for medical releasee's released to the community;
- Clarifies that the DOC may terminate the medical releasee's CMR when he or she has violated the conditions of such release and return the former releasee to the same or another institution designated by the DOC;
- Authorizes a duly authorized representative of the DOC to cause a warrant to be issued if there is a reasonable grounds to believe that the medical releasee has violated the conditions of his or her release in a material way;
- Clarifies that the medical releasee may admit the allegations of the violation of CMR conditions or elect to proceed to a revocation hearing;
- If applicable, requires the panel to provide a written statement as to the evidence relied on and reasons for revocation of CMR; and
- Clarifies that the members of the panel have sovereign immunity as it relates to the decision to release an inmate on CMR or to revoke a medical releasee's CMR.

CS by Criminal Justice on November 12, 2019:

The committee substitute:

- Requires the DOC to:
 - Notify the family of an inmate who has been diagnosed with a terminal condition of such diagnosis within 72 hours;
 - Allow the family of an inmate who has been diagnosed with a terminal condition to have a visit with the inmate within 7 days of such diagnosis; and
 - Immediately begin the referral process for the conditional medical release review upon an inmate's diagnosis of a terminal condition.
- Ensures that the rights provided to medical releasee's during revocation hearing proceedings are afforded to a medical releasee regardless of the basis for the revocation hearing.
- Makes technical changes, including, in part, ensuring consistency with the terms used to describe an inmate who has been approved for conditional medical release and released into the community.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
