

**ACLU** Kansas  
Hot Topics Series

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Terminal  
Medical  
Release



# Terminal Medical Release

Across Kansas, there are people in the custody of the Kansas Department of Corrections that are terminally ill. They, and their families, suffer as their health declines and they are left to live out their final days in custody, without adequate comfort care measures and away from the people they love. But it doesn't have to be this way.

Early release for people suffering from terminal medical conditions affords people compassion, fairness, and dignity. Often called “compassionate release” or, here in Kansas, “terminal medical release,” this process allows the Department of Corrections (KDOC) to release someone from incarceration before the end of their sentence because of a medical condition likely to cause death within a certain amount of time. In Kansas, terminal medical release is only available if a person is within thirty days of death. In other words, KDOC may release a terminally ill person early—but only if they are right at death's door, and only after a lengthy, cumbersome review process.

Kansas can and should do better by these families by extending the timeframe and improving this medical release process.

## Current Kansas Law and Process

Currently under Kansas law, the prison review board may grant release to any individual who has been diagnosed as facing death within 30 days by a licensed doctor.<sup>1</sup> Terminal medical release is distinct from “functional incapacitation” release, in which an individual is released after they are deemed to be physically unable to pose a threat to the public.<sup>2</sup> Functional incapacitation release does not require imminent death and therefore lacks the time-sensitive element that is present for those who qualify for terminal medical release.

However, the Kansas Department of Corrections (KDOC) internal policies establish the same lengthy process for approval for terminal medical release due to imminent death as for functional incapacitation release.<sup>3</sup> Review and approval for either type of release must go through various layers of approval, including by the prison's counselors, unit manager, deputy warden, and warden, then through victim services and prosecutors, secretary of corrections, and finally the Prisoner Review Board. Unfortunately, as with many administrative processes, these multiple steps of paperwork and various signatures move slowly, seemingly without consideration for the

terminally ill person whose remaining days continue to dwindle.

The ACLU of Kansas saw this in the painfully real example of our client Christopher McIntyre. Chris first began experiencing pain in September of 2020 at the Hutchinson Correctional Facility, but it was not until November that the prison medical provider found cancer masses that, by then, were in numerous parts of Chris's body. KDOC moved Chris to El Dorado Correctional Facility, but Chris received no treatment for weeks. By the time the ACLU of Kansas filed an application on Chris's behalf for functional incapacitation release in January 2021,

<sup>1</sup> Kan. Stat. Ann. § 22-3729.

<sup>2</sup> Kan. Stat. Ann. § 22-3728; Kan. Admin. Regs. § 45-700-1.

<sup>3</sup> *Internal Management Policy and Procedure (IMPP) 11-1110*, KAN. DEPT. OF CORRECTIONS, <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-11/11110.pdf> (last visited Jan. 11, 2022).

Chris was using a wheelchair, had lost 50 pounds, and was suffering from constant nausea and weakness. It was not until April 12, 2021 – four months after his request for early release and six months after his grave diagnosis – that KDOC finally released Chris from prison.<sup>4</sup> He is one of three people who have been granted release due to functional incapacitation such release by KDOC in five years.<sup>5</sup> Importantly, at the time of his release, Chris still did not qualify for terminal medical release, because he was not within thirty days of death. However, two months after his release, he passed away at home, surrounded by his family.

There have been and still are many other ill Kansans in prison who should spend their last months at home but who do not fit within the law's current, strict 30-day window.

## **Cost Considerations – and Human Ones**

Terminal medical release is one part of the broader landscape of the cost of mass incarceration to our state and our communities. Aging and sick prisoners tend to suffer from chronic health issues, most often related to their lengthy prison terms. An ACLU analysis found that where it costs \$34,135 per year to house an average-aged prisoner, it costs \$68,270 per year to house a prisoner age 50 and older.<sup>6</sup> On average, accounting for increased parole, housing, public benefits (including healthcare), emergency room costs to the state, and any increased tax revenue, states will save anywhere from \$28,362 up to \$66,294 per year for each released aging prisoner.

While we do not have exact data on how many Kansas prisoners are suffering from serious health problems, the contract with former prison healthcare provider Corizon, Health, Inc. cost the state \$73,401,837 in FY 2020.<sup>7</sup> Healthcare is the costliest of all

programs in the KDOC's operations budget at \$78.9 million of \$221.5 million in FY 2020 and \$77.4 million of \$210 million in FY 2021, or about 36%.<sup>8</sup>

Continuing to house terminally ill patients is expensive for the state, which further exacerbates the already astronomical amount Kansas spends on corrections each year due to our draconian sentencing laws. Kansas prisoners have all been subjected to our state's disproportionately harsh sentencing laws for nonviolent and violent offenses alike. Kansas is a "truth in sentencing" state "requiring prisoners to serve 85% of what are already extremely long and disproportionate sentences, [which] further cements our draconian system of punishment into the criminal justice system."<sup>9</sup> As Kansas policymakers and the people of Kansas continue to consider where to intervene in our criminal punishment system, we must center the humanity of those impacted, who have likely served many years for their crimes and are the least likely to reoffend.<sup>10</sup>

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<sup>4</sup> ACLU of Kansas wins rare, KDOC release of Christopher McIntyre, ACLU of Kan., Apr. 13, 2021, <https://www.aclukansas.org/en/press-releases/aclu-kansas-wins-rare-kdoc-release-christopher-mcintyre>.

<sup>5</sup> Luke Nozicka, Kansas man battling cancer dies 2 months after rare release from prison, ACLU says, THE KANSAS CITY STAR, Jun. 16, 2021, <https://www.kansascity.com/article252102978.html>

<sup>6</sup> At America's Expense: The Mass Incarceration of the Elderly, Am. Civil Liberties Union, Jun. 2021, <https://www.aclu.org/report/americas-expense-mass-incarceration-elderly?redirect=criminal-law-reform/report-americas-expense-mass-incarceration-elderly> at 26. <sup>7</sup> Annual Report: Fiscal Year 2020, Kan. Dept. of Corrections, [www.doc.ks.gov/publications/Reports/fy-2020-annual-report](http://www.doc.ks.gov/publications/Reports/fy-2020-annual-report) pg. 54

<sup>8</sup> FY 2021 Agency Budget Summaries, Kan. Leg. Research Dept., Feb. 2020, <http://www.kslegresearch.org/KLRD-web/Publications/BudgetBookFY21/2021BudgetSummaries/DOC.pdf> at 75. <sup>9</sup> At America's Expense: The Mass Incarceration of the Elderly, Am. Civil Liberties Union, Jun. 2021, <https://www.aclu.org/report/americas-expense-mass-incarceration-elderly?redirect=criminal-law-reform/report-americas-expense-mass-incarceration-elderly> at 41. <sup>10</sup> Ibid, at 21.

## The First Step Act

Kansas' restrictive standards for this type of medical release for the sick or elderly are a stark contrast to current law for people incarcerated in federal prisons. Terminal medical release for those under the care of the federal Bureau of Prisons (BOP) became even more expansive under the First Step Act, which was signed into law in 2018 following bipartisan support.

Under that law, a person incarcerated with BOP can directly request terminal medical release, and if denied, directly appeal that decision directly with a court. Early release is available for those who have a terminal medical condition with a life expectancy of 18 months, or other debilitated medical condition in there is an incurable progressive illness or injury without hope of recovery. Unlike in Kansas, the BOP's program under the First Step Act does not require a specific set of days left to live in order to qualify for release.<sup>11</sup> Notably, the BOP's Program Statement also requires notifying a prisoner's family within 72 hours of a diagnosis of a terminal illness and visitation within seven days<sup>12</sup>—a measure of compassion not currently afforded to people in KDOC custody.

For every Kansas family that must endure their loved one unable to die at home with dignity, there is an entire community that bears the impact. The continued incarceration of our ill and elderly prisoners fails to make our communities safer, perpetuating the cycle of harm wrought by our prison system.

Reforming KDOC's early release procedures, starting with expanding the window for terminal medical release, is a moral, financial, and humanitarian necessity.

## Proposed Changes

Senate Bill 7 and House Bill 2030, introduced in the 2021 Kansas legislative session,<sup>13</sup> proposed extending the current 30-day requirement for terminal medical release to 120 days. KDOC testified in support of these bills.<sup>14</sup> Under the bills' terms, KDOC would continue to maintain wide discretion in the assessment of those who qualify for release according to specified criteria. KDOC testified that if these changes are enacted, 9-10 people per year would be eligible for consideration.<sup>15</sup>

Additional reforms can and should include revising the procedure in IMPP 11-1110 to create a more streamlined review process. The multiple layers of review mean that people often must wait months for a decision to be reached on their application for early release – time that they do not have to spare. Streamlining the process to include clear criteria for evaluating a person for early release and limiting review to only those who are truly necessary to make a decision will make the process more efficient, timely, fair, and humane.

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<sup>11</sup> Compassionate Release and the First Step Act: Then and Now, FAMM, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf>.

<sup>12</sup> U.S. Dep't of Just., Fed. Bureau of Prisons, Program Statement: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C., Jan. 17, 2019, [https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf).

§§ 3582 and 4205(g)[https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf) at 4.

<sup>13</sup> [SUPPORT] SB 7 – Extending Terminal Medical Release to Inmates, ACLU of Kan., Jan. 26, 2021, <https://www.aclukansas.org/en/legislation/support-sb-7-extending-terminal-medical-release-inmates>.

<sup>14</sup> Scott M. Schultz, Proponent Testimony – SB 7, Kansas Sentencing Commission, Jan. 26, 2021, [http://kslegislature.org/li/b2021\\_22/committees/cte\\_s\\_jud\\_1/documents/testimony/20210126\\_11.pdf](http://kslegislature.org/li/b2021_22/committees/cte_s_jud_1/documents/testimony/20210126_11.pdf)

<sup>15</sup> Ibid.