

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 574

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

SUBJECT: Conditional Aging Inmate 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>Jameson</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 574 creates section 945.0912, Florida Statutes, to establish a conditional aging inmate release (CAIR) program within the Department of Corrections (DOC) with the purpose of determining whether such 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 CAIR program when the inmate has reached 65 years of age and has served at least 10 years on his or her term of imprisonment. The bill prohibits an inmate from being considered for release through the CAIR program if he or she has ever been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or has been adjudicated delinquent for committing specified offenses.

The DOC must identify inmates who may be eligible for CAIR and, upon such identification, the DOC must refer such inmate to a panel, appointed by the Secretary for review and determination of release.

The panel must conduct a hearing to determine, by a majority, whether CAIR is appropriate for the inmate within 45 days after receiving the referral. The bill creates a process for an inmate who is denied CAIR by the panel to have the decision reviewed. The Secretary has the final decision about the appropriateness of the release on CAIR. If CAIR is approved, the inmate must

be released by the DOC to the community within a reasonable amount of time and is considered an aging releasee upon release to the community.

The bill requires that an inmate granted CAIR 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 to comply with all 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 an aging 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 aging releasee upon release to the community. The bill provides that the aging 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 aging releasee may not be counted in the prison system population and the aging 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 an aging releasee and provides that revocation may be based on the violation of any release conditions the DOC establishes, including, but not limited to, a new violation of law. Additionally, the bill authorizes the aging releasee to be detained when it is alleged that he or she has violated the conditions of the release. The bill provides that an aging releasee may admit to the allegations or elect to have a revocation hearing. The bill specifies a hearing process if the aging releasee elects to proceed with a revocation hearing, provides for the recommitment of an aging releasee whose CAIR has been revoked, and permits forfeiture of gain-time in certain instances.

As is provided for with the initial determination, the bill authorizes an aging releasee whose CAIR is revoked to have the revocation decision reviewed.

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 CAIR 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 on January 27, 2020. The CJIC determined that the bill will likely result in a negative insignificant prison bed impact (i.e. a decrease of 10 or fewer prison beds). See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2020.

II. Present Situation:

Aging Population Statistics

In 2016, 49 million adults in the United States, or 15 percent of the population, were 65 or older.¹ It is estimated that the number will rise to approximately 98 million by 2060, which corresponds to approximately 25 percent of residents of the United States. The “baby boomers” generation² and post baby-boom generations will all be of advanced age by 2029, which is often defined as 55 years of age or older. A report published by the Institutes of Medicine in 2012 asserted that, by 2030, the population of adults over the age of 65 will reach 72.1 million. The report also estimated that approximately one in five persons in the elder population has a mental health or substance abuse disorder, such as depression, dementia, or related psychiatric and behavioral symptoms. Incarcerated men and women typically have physiological and mental health conditions that are associated with people at least a decade older, a phenomenon known as “accelerated aging.” Therefore, an incarcerated person who is 50 or 55 years of age would exhibit health conditions comparable to a person who is 60 or 65 in the community. The occurrence of accelerated aging in the prison system is a result of many factors, including inadequate access to medical care before incarceration, substance abuse, the stress of incarceration, and a lack of appropriate health care during incarceration.³

Special Health Considerations for Aging Inmates

Similarly to aging persons in the community, aging inmates are more likely to experience certain medical and health conditions, including, in part, dementia, impaired mobility, loss of hearing and vision, cardiovascular disease, cancer, osteoporosis, and other chronic conditions.⁴ However, such ailments present special challenges within a prison environment and may result in the need for increased staffing levels and enhanced officer training.⁵ Such aging inmates can also require structural accessibility adaptations, such as special housing and wheelchair ramps. For example, in

¹ The Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, *Promoting Health for Older Adults*, September 13, 2019, available at <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/promoting-health-for-older-adults.htm> (last visited December 5, 2019).

² The “baby boomer” generation is generally defined as persons born from 1946 through 1964. See Senior Living, *The Baby Boomer Generation*, available at <https://www.seniorliving.org/life/baby-boomers/> (last visited December 5, 2019).

³ Yarnell, S., MD, PhD, Kirwin, P. MD, and Zonana, H. MD, *Geriatrics and the Legal System*, Journal of the American Academy of Psychiatry and the Law, November 2, 2017, p. 208-209, available at <http://jaapl.org/content/jaapl/45/2/208.full.pdf> (last visited December 5, 2019).

⁴ McKillop, M. and McGaffey, F., The PEW Charitable Trusts, *Number of Older Prisoners Grows Rapidly, Threatening to Drive Up Prison Health Costs*, October 7, 2015, available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/10/07/number-of-older-prisoners-grows-rapidly-threatening-to-drive-up-prison-health-costs> (hereinafter cited as “PEW Trusts Older Prisoners Report”); See also Jaul, E. and Barron, J., *Frontiers in Public Health, Age-Related Diseases and Clinical and Public Health Implications for the 85 Years Old and Over Population*, December 11, 2017, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5732407/>; HealthinAging.org, *A Guide to Geriatric Syndromes: Common and Often Related Medical Conditions in Older Adults*, available at <https://www.healthinaging.org/tools-and-tips/guide-geriatric-syndromes-common-and-often-related-medical-conditions-older-adults> (all sites last visited December 5, 2019).

⁵ The PEW Charitable Trusts Older Prisoners Report.

Florida, four facilities serve relatively large populations of older inmates, which help meet special needs such as palliative and long-term care.⁶

Aging Inmate Statistics in Florida

The DOC reports that the elderly inmate⁷ population has increased by 353 inmates or 1.5 percent from June 30, 2017 to June 30, 2018 and that this trend has been steadily increasing over the last five years for an overall increase of 2,585 inmates or 12.5 percent.⁸

The DOC further reports that during Fiscal Year 2017-18, there were 3,594 aging inmates admitted to Florida prisons, which was a 2.8 percent decrease from Fiscal Year 2016-17. The majority of such inmates were admitted for violent offenses, property crimes, and drug offenses. The oldest male inmate admitted was 92 years of age with a conviction of manslaughter and the oldest female inmate admitted was 77 years of age with a conviction of drug trafficking.⁹

As the population of aging inmates continues to increase, the cost to house and treat such inmates also substantially increases. The DOC reports that the episodes of outside care for aging inmates increased from 10,553 in Fiscal Year 2008-09 to 21,469 in Fiscal Year 2017-18 and further provided that outside care is generally more expensive than treatment provided within a prison facility.¹⁰ The DOC reports that the cost of health care for the aging inmate population is very high compared to other inmates for many reasons, including, in part that aging inmates:

- Account for a majority of inpatient hospital days; and
- Have a longer length for an inpatient hospital stay than seen with younger inmate patients.¹¹

Constitutional Requirement to Provide Healthcare to Inmates

The United States Supreme Court has established that prisoners have a constitutional right to adequate medical care. The Court determined that it is a violation of the Eighth Amendment prohibition against cruel and unusual punishment for the state to deny a prisoner necessary medical care, or to display “deliberate indifference” to an inmate’s serious medical needs.¹²

Before the 1970s, prison health care operated without “standards of decency” and was frequently delivered by unqualified or overwhelmed providers, resulting in negligence and poor quality.¹³ By January 1996, only three states had never been involved in major litigation challenging conditions in their prisons. A majority were under court order or consent decree to make

⁶ *Id.*

⁷ Section 944.02(4), F.S., defines “elderly offender” to mean prisoners age 50 or older in a state correctional institution or facility operated by the DOC or the Department of Management Services.

⁸ The DOC, *2017-18 Annual Report*, p. 19, available at http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf (last visited December 5, 2019).

⁹ *Id.*, at p. 20.

¹⁰ *Id.*, at p. 21.

¹¹ *Id.*

¹² *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹³ The PEW Charitable Trusts, Urahn, S. and Thompson, M., *Prison Health Care: Costs and Quality*, October 2017, p. 4, available at https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf (last visited December 5, 2019) (hereinafter cited as “The PEW Trusts Prison Health Care Cost Report”).

improvements in some or all facilities.¹⁴ The development of the correctional health care in Florida has been influenced by a class action lawsuit filed by inmates in 1972. The plaintiffs in *Costello v. Wainwright*¹⁵ alleged that prison overcrowding and inadequate medical care were so severe that the resulting conditions amounted to cruel and unusual punishment. The overcrowding aspect of the case was settled in 1979, but the medical care issue continued to be litigated for years.¹⁶

The legal standard today for inmate medical care must be at “a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards” and “designed to meet routine and emergency medical, dental, and psychological or psychiatric care.”¹⁷ Prisoners are entitled to access to care for diagnosis and treatment, a professional medical opinion, and administration of the prescribed treatment and such obligation persists even if some or all of the medical services are provided through the use of contractors. This is also the standard for state prisoners who are under the custody of private prisons or local jails. Recent cases have reinforced states’ constitutional obligations.¹⁸

The DOC’s Duty to Provide Health Care

The DOC is responsible for the inmates of the state correctional system and has supervisory and protective care, custody, and control of the inmates within its facilities.¹⁹ The DOC has the constitutional and statutory imperative to provide adequate health services to state prison inmates directly related to this responsibility.²⁰ This medical care includes comprehensive medical, mental health, and dental services, and all associated ancillary services.²¹ The DOC’s Office of Health Service (OHS) oversees the delivery of health care services and handles statewide functions for such delivery. The OHS is led by the Director of Health Services, who reports to the Secretary.²²

The DOC contracts with the Centurion of Florida, LLC (Centurion) to provide comprehensive statewide medical, mental health, dental services, and operates the department’s reception medical center. The care provided is under a cost plus model. All inmates are screened at a DOC reception center upon arrival from the county jail. The purpose of this intake process is to determine the inmate’s current medical, dental, and mental health care needs, which is achieved

¹⁴*Id.* See also McDonald, D., *Medical Care in Prisons*, Crime and Justice, Vol. 26, 1999, p. 431, available at <https://www.journals.uchicago.edu/doi/abs/10.1086/449301> (last visited December 5, 2019); See also *Newman et al. v. Alabama et al.*, 349 F. Supp. 278 (M.D. Ala. 1972).

¹⁵ 430 U.S. 325 (1977).

¹⁶ *Id.* The Correctional Medical Authority, FY 2017-18 Annual Report and Update on the Status of Elderly Offender’s in Florida’s Prisons, p. 1 (on file with the Senate Criminal Justice Committee). The Correctional Medical Authority was created in response to such federal litigation.

¹⁷ The PEW Trusts Prison Health Care Cost Report, p. 4.

¹⁸ *Id.*

¹⁹ Sections 945.04(1) and 945.025(1), F.S.

²⁰ *Crews v. Florida Public Employers Council 79, AFSCME*, 113 So. 3d 1063 (Fla. 1st DCA 2013); See also s. 945.025(2), F.S.

²¹ The DOC, Office of Health Services, available at <http://www.dc.state.fl.us/org/health.html> (last visited December 5, 2019).

²² *Id.*

through assessments, in part, for auditory, mobility and vision disabilities, and the need for specialized mental health treatment.²³

After the intake process is completed, inmates are assigned to an institution based on their medical and mental health needs and security requirements. The Centurion provides primary care using a staff of clinicians, nurses, mental health, and dental professionals and administrators within each major correctional institution. The health services team provides health care services in the dorms for inmates who are in confinement.²⁴

Aging Inmate Discretionary Release

Many states, the District of Columbia, and the federal government authorize discretionary release programs for certain inmates that are based on an inmate's age without regard to the medical condition of the inmate.²⁵ The National Conference of State Legislatures (NCSL) reports such discretionary release based on age has been legislatively authorized in 17 states.²⁶ The NCSL also reports that such statutes typically require an inmate to be of a certain age and to have served either a specified number of years or a specified percentage of his or her sentence. The NCSL reports that Alabama has the lowest age for aging inmate discretionary release, which is 55 years of age, whereas most other states set the limit somewhere between 60 and 65. Additionally, some states do not set a specific age.²⁷

Most states require a minimum of 10 years of an inmate's sentence to be served before being eligible for consideration for aging inmate discretionary release, but some states, such as California, set the minimum length of time served at 25 years.²⁸ Other states, such as Mississippi and Oklahoma, provide a term of years or a certain percentage of the sentence to be served.²⁹

Inmates who are sentenced to death or serving a life sentence are typically ineligible for release. Some states specify that inmates must be sentenced for a non-violent offense or specify offenses which are not eligible for release consideration.

Florida does not currently address discretionary release based on an inmate's age alone.

²³ *Id.* See also The DOC Annual Report, p. 19.

²⁴ *Id.*

²⁵ The National Conference of State Legislatures (NCSL), *State Medical and Geriatric Parole Laws*, August 27, 2018, available at <http://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx> (hereinafter cited as "The NCSL Aging Inmate Statistics"); Code of the District of Columbia, *Section 24-465 Conditions for Geriatric Release*, available at <https://code.dccouncil.us/dc/council/code/sections/24-465.html>; Section 603(b) of the First Step Act, codified at 18 USC s. 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. 6-7, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf (all sites last visited December 5, 2019).

²⁶ The NCSL Aging Inmate Statistics. Also, the NCSL states that at least 16 states have established both medical and aging inmate discretionary release programs legislatively and that Virginia is the only state that has aging inmate discretionary release but not medical discretionary release.

²⁷ *Id.*

²⁸ *Id.*

²⁹ The NCSL Aging Inmate Statistics.

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.”³⁰ The law makes a number of changes to the federal criminal justice system and procedures applicable to inmates in the Federal Bureau of Prisons, including, in part, modifying provisions related to compassionate release, which applies to the conditional release of medical inmates and aging inmates, to require inmates be informed of reduction in sentence availability and process.³¹

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

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

³⁰ The First Step Act of 2018, Pub. L. No. 115-391 (2018).

³¹ Section 603(b) of the First Step Act, codified at 18 USC s. 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 December 5, 2019).

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.

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.

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 to declare all gain-time earned by an inmate forfeited.⁴²

Victim Input

In 2018, the Florida voters approved Amendment 6 on the ballot, which provided 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.⁴³

Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.⁴⁴ 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

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

⁴⁴ Legal Information Institute, *Sovereign immunity*, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited January 23, 2020).

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”⁴⁵

Section 768.28(5), F.S., limits tort recovery from a governmental entity to \$200,000 per person and \$300,000 per accident.⁴⁶ This limitation does not prevent a judgment 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.⁴⁷

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.^{48, 49} 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.”⁵⁰

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.”⁵¹ Conduct meeting the wanton and willful standard is defined as “worse than gross negligence,”⁵² and “more reprehensible and unacceptable than mere intentional conduct.”^{53, 54}

III. Effect of Proposed Changes:

The bill creates s. 945.0912, F.S., which establishes a conditional aging inmate release (CAIR) program within the DOC for the purpose of:

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

The CAIR program must include a panel of at least three people appointed by the Secretary for the purpose of determining the appropriateness of CAIR and conducting revocation hearings on the inmate releases.

⁴⁵ *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.).

⁴⁶ Section 768.28(5), F.S.

⁴⁷ *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

⁴⁸ *See Peterson v. Pollack*, 2019 WL 6884887 (Fla. 4th DCA December 18, 2019).

⁴⁹ Section 768.28(9)(a), F.S.

⁵⁰ *Eiras v. Fla.*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017).

⁵¹ *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).

⁵² *Eiras v. Fla.*, 239, *supra* at 50; *Sierra v. Associated Marine Insts., Inc.*, 850 So.2d 582, 593 (Fla. 2d DCA 2003).

⁵³ *Eiras v. Fla.*, *supra* at 50; *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123 (Fla. 4th DCA 1987).

⁵⁴ *See also Kastritis v. City of Daytona Beach Shores*, 835 F.Supp.2d 1200, 1225 (M.D. Fla. 2011) (defining these standards).

The bill provides legislative findings for the CAIR program.

Eligibility Criteria

An inmate is eligible for consideration for release under the CAIR program when the inmate has reached 65 years of age and has served at least 10 years on his or her term of imprisonment.

An inmate may not be considered for release through the CAIR program if he or she has ever been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or has been adjudicated delinquent for committing:

- Any offense classified as a capital felony, life felony, or first degree felony punishable by a term of years not exceeding life imprisonment;
- Any violation of law that results in the killing of a human being;
- An offense that requires registration as a sexual offender on the sexual offender registry in accordance with s. 943.0435, F.S; or
- Any similar offense committed in another jurisdiction which would be an offense included in this list if it had been committed in violation of the laws of Florida.

The bill also prohibits an inmate who has previously been released on any form of conditional or discretionary release and who was recommitted to the DOC as a result of a finding that he or she subsequently violated the terms of such conditional or discretionary release to be considered for release through the CAIR program.

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 CAIR 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 is eligible must be considered for the CAIR program. However, the authority to grant CAIR rests solely with the DOC and an inmate does not have a right to release on CAIR pursuant to s. 945.0912, F.S.

The DOC must identify inmates who may be eligible for CAIR. In considering an inmate for the CAIR program, the DOC may require the production of additional evidence or any other additional investigations that the DOC deems necessary for determining the appropriateness of the eligible inmate's release.

Upon an inmate's identification as potentially eligible for release on CAIR, the DOC must refer such inmate to the 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 CAIR 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 panel to conduct a hearing within 45 days after receiving the referral to determine whether CAIR is appropriate for the inmate. A majority of the panel members must agree that release on CAIR is appropriate for the inmate. If CAIR 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 CAIR is considered an aging releasee upon release to the community.

An inmate who is denied CAIR by the panel may have the decision reviewed by the DOC's general counsel, who must make a recommendation to the Secretary. The Secretary must review all relevant information and make a final decision about the appropriateness of release on CAIR. The decision of the Secretary is a final administrative decision not subject to appeal.

Additionally, an inmate who is denied CAIR that 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 CAIR must 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 aging releasee must comply with all reasonable conditions of release the DOC imposes, which must include, at a minimum:

- 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.
- Any other conditions the DOC deems appropriate to ensure the safety of the community and compliance by the aging releasee.

The bill provides that an aging 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 aging releasee with medical care upon release into the community. The bill provides that the aging 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 aging releasee may not be counted in the prison system population, and the aging releasee's approved community-based housing location may not be counted in the capacity figures for the prison system.

Revocation Based on Violation of Conditions

The bill provides that CAIR may be revoked for a violation of any release conditions the DOC establishes, including, but not limited to, a new violation of law. The DOC may terminate the

aging releasee's CAIR and return him or her to the same or another institution designated by the DOC.

The bill provides that if a duly authorized representative of the DOC has reasonable grounds to believe that an aging 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 aging releasee. Further, a law enforcement officer or a probation officer may arrest the aging 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 CAIR. The law enforcement officer must report the aging releasee's alleged violations to the supervising probation office or the DOC's emergency action center for initiation of revocation proceedings.

If the basis of the violation of release conditions is related to a new violation of law, the aging 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 aging releasee may be released. If the judge determines that there was probable cause for the arrest, the judge's probable cause determination constitutes reasonable grounds to believe that the aging releasee violated the conditions of the CAIR.

The bill requires the DOC to order that the aging releasee subject to revocation for a violation of conditions be returned to the custody of the DOC for a CAIR revocation hearing as prescribed by rule. An aging releasee may admit to the alleged violation of the conditions of CAIR or may elect to proceed to a revocation hearing. A majority of the panel must agree that revocation is appropriate for the aging releasee's CAIR to be revoked.

The bill provides that an aging releasee who has his or her CAIR revoked due to a violation of conditions must serve the balance of his or her sentence with credit for the actual time served on CAIR. Additionally, any gain-time accrued before recommitment may be forfeited pursuant to s. 944.28(1), F.S. If the aging releasee whose CAIR 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.

Revocation Hearing Process

If the aging releasee is subject to revocation and elects to proceed with a hearing, the aging releasee must be informed orally and in writing of certain rights, including the releasee's:

- Alleged violation with which he or she is charged.
- Right to:
 - Be represented by counsel.⁵⁵
 - 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.

⁵⁵ However, this bill explicitly provides that this does not create a right to publicly funded legal counsel.

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

Review Process of Revocation Determination

The bill authorizes an aging releasee whose CAIR 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 CAIR.

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

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 CAIR 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 amends ss. 316.1935, 775.084, 775.087, 784.07, 790.235, 893.135, 921.0024, 944.605, and 944.70, F.S., conforming these provisions to changes made by 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 insignificant prison bed impact (i.e. a decrease of 10 or fewer prison beds).⁵⁶ However, this was prior to the bill being amended to lower the age criteria from 70 to 65. Accordingly, the change in the age criteria will increase the pool of potential inmates who could be considered for the program.

The DOC reports that the overall fiscal impact of the bill is indeterminate because release will be at the discretion of the DOC.⁵⁷ The DOC reports that as of October 18, 2019, there were a total of 1,849 inmates age 70 or older in its custody, and, based on the criteria set forth in the bill, only 168 of these inmates would meet the eligibility criteria for consideration for CAIR. The DOC reported that an additional 291 inmates were projected to become eligible based on the 70 years of age threshold over the next five years.⁵⁸ This data was provided based on the age threshold contained in CS/SB 574. However, PCS/CS/SB 574 lowers the age threshold for eligibility to 65 years of age and also expands the offenses which preclude eligibility for release under the program. Therefore, PCS/CS/SB 574 may expand the pool of inmates who are eligible for consideration of CAIR release.

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

⁵⁶ 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).

⁵⁷ The five highest occurring offenses of incarceration for these inmates are first or second degree murder (s. 782.04, F.S.), sexual battery on a victim under 12 (s. 794.011, F.S.), lewd or lascivious molestation on a victim under 12 (s. 800.04, F.S.), and robbery with a gun or deadly weapon (s. 812.13, F.S.). The DOC, *SB 574 Agency Analysis*, p. 1 and 4 (December 6, 2019)(on file with the Senate Criminal Justice Committee) [hereinafter cited as “The DOC SB 574 Analysis”].

⁵⁸ The DOC, *SB 574 Agency Analysis Updated*, p. 2 and 4 (January 29, 2020)(on file with the Senate Appropriations Subcommittee on Civil and Criminal Justice) [hereinafter cited as “The DOC SB 574 Updated Analysis”].

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 \$5.47.⁵⁹

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 CAIR program, to 9 additional staff and associated costs, as follows.

| | | |
|---|-------------------------------------|---------------------------------|
| 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 Funds⁶⁰ \$659,447 (recurring) \$64,911(non-recurring)

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 945.0912 of the Florida Statutes.

This bill substantially 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, and 944.70.

⁵⁹ The DOC SB 574 Analysis, p. 5.

⁶⁰ 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;
- Modifies the age of eligible inmates from 70 years of age to 65;
- Expands the list of enumerated offenses that precludes an inmate from consideration to include:
 - Any offense classified as a capital felony, life felony, or first degree felony punishable by a term of years not exceeding life imprisonment;
 - Any violation of law that results in the killing of a human being;
 - An offense that requires registration as a sexual offender on the sexual offender registry in accordance with s. 943.0435, F.S; or
 - Any similar offense committed in another jurisdiction which would be an offense included in this list if it had been committed in violation of the laws of Florida;
- Prohibits an inmate whose previous conditional release status was subsequently revoked from being considered for the CAIR program;
- Provides an exception to the 85 percent rule for inmates released to the CAIR program;
- Provides that an inmate who is denied release in the CAIR program may request the decision to be reviewed as prescribed by rule;
- Clarifies that the DOC does not have a duty to provide medical care for aging releasee's released to the community;
- Clarifies that the DOC may terminate the aging releasee's CAIR release when he or she violates the conditions of such release and return him or her 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 aging releasee has violated the conditions of his or her release in a material way;
- Clarifies that the aging releasee may admit the allegations of the violation of CAIR or elect to proceed to a revocation hearing;
- If applicable, requires the panel to provide written statement as to the evidence relied on and reasons for revocation; and
- Clarifies that the members of the panel have sovereign immunity as it relates to the decision to release an inmate on CAIR or to revoke an aging releasee's CAIR.

CS by Criminal Justice on December 10, 2019:

The committee substitute:

- Ensures that an inmate granted CAIR is released into the community within a reasonable amount of time;
- Makes some technical changes, including, in part, ensuring consistency with the terms used to describe an inmate who has been approved for CAIR and released into the community;

- Amends a number of relevant sections to ensure the changes made by the act are incorporated; and
- Makes the effective date October 1, 2020.

B. Amendments:

None.

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