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 Criminal Justice Committee

BILL: CS/SB 212

INTRODUCER: Criminal Justice Committee and Senator Oelrich

SUBJECT: Parole for Juvenile Offenders

DATE: February 9, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.			CF	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

This bill makes inmates who were sentenced to life imprisonment for a nonhomicide offense committed when they were less than 18 years old eligible for resentencing after serving at least 25 years of the sentence. The bill includes factors that must be considered in evaluating whether the inmate has been sufficiently rehabilitated to be placed on probation for a minimum of five years.

This bill substantially amends section 947.16 of the Florida Statutes.

II. Present Situation:

In 2010, the United States Supreme Court held that it is unconstitutional for a minor who does not commit homicide to be sentenced to life imprisonment without the possibility of parole. The case was Graham v. Florida, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), which originated from crimes committed in Jacksonville. The Court's opinion stated:

> "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham

> some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance."

As explained below, any recent sentence to life imprisonment is a sentence to life without parole. Because the Court referred to release by executive clemency as a "remote possibility," provisions for executive clemency apparently do not satisfy the requirement that there be a "realistic opportunity to obtain release."

The Department of Corrections (department) reports that 198 inmates were sentenced to life imprisonment for nonhomicide offenses committed while they were under 18 years of age.[1] This includes inmates who were sentenced for attempted murder.[2] Ninety-three of these inmates also had a homicide for which they were separately sentenced.

Most crimes committed by juveniles are dealt with through delinquency proceedings as set forth in ch. 985, F.S.[3] However, the law provides a mechanism for juvenile offenders to be tried and handled as adults. A juvenile who commits a crime while 13 years old or younger may only be tried as an adult if a grand jury indictment is returned. A juvenile who is older than 13 may be tried as an adult for certain felony offenses if a grand jury indictment is returned, if juvenile court jurisdiction is waived and the case is transferred for prosecution as an adult pursuant to s. 985.556, F.S., or if the state attorney direct files an information in adult court pursuant to s. 985.557, F.S. Regardless of age, a grand jury indictment is required to try a juvenile as an adult for an offense that is punishable by death or life imprisonment.[4]

Parole

Parole is a discretionary prison release mechanism administered by the Florida Parole Commission. Eligibility for parole has been abolished in Florida, but 439 offenders are currently on parole and 5,360 inmates are still eligible for parole consideration.[5] These are inmates who:

- Committed an offense other than capital felony murder or capital felony sexual battery prior to October 1, 1983;
- Committed capital felony murder prior to May 25, 1994; or
- Committed capital felony sexual battery prior to October 1, 1995.

Inmates who were sentenced as adults for offenses committed prior to reaching 18 years of age are eligible for parole on the same basis as other inmates. An inmate who is granted parole is allowed to serve the remainder of his or her prison sentence outside of confinement according to

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[1] Email from Department of Corrections dated February 7, 2012, updating statistics in the department's Analysis of Senate Bill 92, September 8, 2011, page 2. Email is on file with the Senate Committee on Criminal Justice.

[2] In Manuel v. State, 48 So.3d 94 (Fla. 2d Dist. 2010), the Second District Court of Appeals held that attempted murder is a nonhomicide offense because the act did not result in the death of a human being.

[3] Section 985.03(6), F.S., defines juvenile as "any unmarried person under the age of 18 who has not been emancipated by order of the court and who has been found or alleged to be dependent, in need of services, or from a family in need of services; or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years."

[4] Section 985.58, F.S.

[5] Parole Commission Analysis of Senate Bill 92, September 13, 2011, page 2.

terms and conditions established by the commission. Parolees are supervised by department probation officers.

A January 2008 Blueprint Commission and Department of Juvenile Justice report, "Getting Smart about Juvenile Justice in Florida," included a recommendation that juveniles who received more than a 10 year adult prison sentence should be eligible for parole consideration. Florida Tax Watch also recommended parole consideration for inmates who were under 18 when they committed their offense, have served more than 10 years, were not convicted of capital murder, have no prior record, and demonstrated exemplary behavior while in prison.[6]

Clemency

Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or part of the punishment for a crime. The power of clemency is vested in the Governor pursuant to Article IV, Section 8(a) of the Florida Constitution. All inmates, including those who are not eligible for parole, can apply for clemency.

The governor and members of the Cabinet are collectively the Clemency Board. The governor has discretion to deny clemency at any time for any reason and, with the approval of at least two members of the Cabinet, may grant clemency at any time and for any reason. There are several types of clemency, including pardon, commutation of sentence, remission of fines and forfeitures, restoration of authority to possess firearms, and restoration of civil rights. The Rules of Executive Clemency provide that a person is not eligible for commutation of sentence unless at least two years have elapsed since conviction and he or she has served at least one-third of any minimum mandatory sentence. However, the governor may waive these requirements in cases of extraordinary merit and compelling need.

The Parole Commission provides investigatory and administrative support to the Clemency Board, but the clemency process is independent of the parole process.

Resentencing as a Result of Graham Decision

In the absence of legislative or executive direction, some inmates who fall under the *Graham* decision have already petitioned for and received a resentencing hearing. There appears to be no consolidated source for obtaining the results of these resentencing hearings. However, the results of some resentencing hearings are known from news reports. These include:

- An inmate sentenced to life for the 2005 rape of a young girl when he was seventeen years old was resentenced to a split sentence of 7 years in prison followed by 20 years of probation.[7]
- An inmate sentenced to four life sentences for armed robberies committed in 2004 and 2005 when he was 14 and 15 years old was resentenced to a term of 30 years.[8]

[6] Report and Recommendations of the Florida Tax Watch Government Cost Savings Task Force to Save More than $3 Billion," Florida Tax Watch, March 2010, p.47.
[7] "Rapist who was serving life sentence will get second chance," August 30, 2011, last viewed on November 7, 2011 at http://www2.tbo.com/news/breaking-news/2011/aug/30/3/rapist-who-was-serving-life-resentenced-to-seven-y-ar-254096/.
[8] "Man who served 11 years fails to persuade Hillsborough judge to set him free," October 6, 2011, last viewed on November 7, 2011 at http://www.tampabay.com/news/courts/criminal/man-who-served-11-years-fails-to-persuade-hillsborough-judge-to-set-him/1195464.

- An inmate sentenced to life for sexual battery with a weapon or force committed in 2008 when he was 14 was resentenced to a term of 65 years.[9]

III. Effect of Proposed Changes:

This bill, named the "Graham Compliance Act," amends s. 947.16, F.S., to create an opportunity for juvenile offenders who have been sentenced to life imprisonment for a non-homicide offense to have a resentencing hearing. "Juvenile offender" is defined as an inmate who committed a non-homicide offense when he or she was less than 18 years of age. Consistent with the opinion in *Manuel v. State,* "non-homicide offense" is defined as an offense that did not result in the death of a human being.

A juvenile offender with a life sentence must be incarcerated for 25 years before becoming eligible for resentencing under the provisions of the bill. In addition, the offender must not have received an approved disciplinary report during the three years preceding the resentencing hearing.[10] If a juvenile offender meets these criteria, the department must request the court of original jurisdiction to hold a resentencing hearing.

Nine of the 198 inmates who are serving a life sentence for committing a non-homicide offense when they were less than 18 years old have already served 25 years and one more has served 24 years. Six of the ten inmates have not had an approved disciplinary report during the last three years.[11]

The court is required to consider a number of factors in deciding whether a juvenile offender has demonstrated maturity and reform and should be resentenced. These factors are:

- Whether the juvenile offender poses the same risk to society as at the time of original sentencing;

- The wishes of the victim or the opinions of the victim's next of kin, with specific direction that the absence of the victim or next of kin at the hearing may not be a factor in the decision;

- Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or domination of another person;

- Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense;

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[9] "Teenage rapist Jose Walle resentenced to 65 years in prison," November 18, 2010, last viewed on November 7, 2011 at http://www.tampabay.com/news/courts/criminal/teenage-rapist-jose-walle-re-sentenced-to-65-years-in-prison/1134862.

[10] A disciplinary report is a document that initiates the process of disciplining an inmate for a violation of department rules. Upon receiving a disciplinary report, the inmate must be afforded administrative due process before the report is approved. The inmate's due process rights include further investigation, a hearing to determine guilt or innocence and appropriate punishment, and final review by the warden or the regional director of institutions to approve, disapprove, or modify the result of the hearing. The department's rules concerning disciplinary reports and the inmate disciplinary process are found in Chapter 33-601.301 – 33-601.314, Florida Administrative Code.

[11] *Supra* note 1.

- Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected her or his behavior;

- Whether the juvenile offender, while in the custody of the department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates;

- Whether the juvenile offender has successfully completed any General Educational Development or other educational, technical, work, vocational, or self-rehabilitation program;

- Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before she or he committed the offense;

- The results of any mental health assessment or evaluation of the juvenile offender;

- The facts and circumstances of the offense, including its severity;

- Any factor that the initial sentencing court may have taken into account in relation to all other listed considerations which may be relevant to the court's determination.

The resentencing court must determine whether the juvenile offender can reasonably be believed to be fit to reenter society. If so, the court must issue an order modifying the sentence and placing the juvenile offender on probation for a minimum of 5 years. If the offender violates probation, the court can revoke the probation and impose any sentence that might have originally been imposed. In addition, a juvenile offender whose probation is revoked after resentencing will no longer be eligible for resentencing consideration pursuant to the provisions of the bill.

The bill provides that a juvenile offender who is not resentenced will be eligible for a resentencing hearing 7 years after the date of the denial and every 7 years thereafter. This 7 year interval is consistent with reinterview intervals for inmates who are currently eligible for parole for similar offenses. The requirement that the juvenile offender be free of disciplinary reports for 3 years prior to the first resentencing hearing does not appear to apply to subsequent resentencing hearings.

If passed, the bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill does not state whether it is intended to apply to sentences that were imposed for crimes that were committed prior to when it becomes law. A change in a statute is presumed to operate prospectively unless there is a clear showing that it is to be applied retroactively and its retroactive application is constitutionally permissible. *Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So.2d 494, 499 (Fla. 1999); *Bates v. State,* 750 So.2d 6, 10 (Fla. 1999). There are indications that this bill is intended to apply to sentences that have already been imposed. The fact that the original bill was to be cited as the "Graham Compliance Act," arguably demonstrates legislative intent that the bill was to apply retroactively to provide a "meaningful opportunity for review" for offenders affected by the *Graham* decision. The bill in its current form applies to *Graham* defendants as well as others who received significant sentences for crimes committed when they were less than eighteen years old.

If it is determined that the bill is intended to be applied retroactively, the second step of the analysis is to determine whether retroactive application of the statute is constitutionally permissible. Article X, section 9 of the Florida Constitution (the "Savings Clause") provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This means that the criminal statutes in effect at the time an offense was committed apply to any prosecution or punishment for that offense. *See State v. Smiley*, 966 So.2d 330 (Fla. 2007).

The Savings Clause prevents retroactive application of a statute that affects prosecution or punishment for a crime, but does not prohibit retroactive application of a statute that is procedural or remedial in nature. Both categories are represented by elements of the bill:

(1) The aspect of the bill that provides for a resentencing hearing is procedural or remedial in nature. Therefore, it can be applied retroactively to the extent that it allows resentencing to a punishment that would have been permissible under the law in effect at the time the offense was committed.

(2) The bill also includes a clause that could affect the punishment for a crime: "Notwithstanding any other law, a juvenile offender may be eligible for a reduced or suspended sentence under this section." Absent the Savings Clause, this would allow imposition of a sentence that was not permissible when the offense was committed (such as sentencing to less than a statutory minimum mandatory sentence). However, it is well-established that the Savings Clause prohibits application of a statutory reduction in the maximum sentence for a crime to be applied to an offense that was committed before the change. *See, e.g., Castle v. Sand*, 330 So.2d 10 (Fla. 1976) (reduction of maximum sentence for arson from 10 years to 5 years could not be applied to benefit defendant who committed offense before statutory change).

Therefore, it appears that the provision for a resentencing hearing can be applied to offenses committed before the effective date of the bill. However, the Saving Clause would prevent a reduction of sentence below what was permissible at the time of the offense.[12]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

C. Government Sector Impact:

The Criminal Justice Impact Conference reviewed the impact of substantively-identical House Bill 5 on the state prison population and determined that it would result in an insignificant savings.

VI. Technical Deficiencies:

It is recommended that the bill be amended to clarify whether it is to apply retroactively.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on February 9, 2012:
Provides for a resentencing hearing by the sentencing court and potential release on probation rather than consideration for parole by the Parole Commission.

B. Amendments:

None.

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

[12] It does not appear possible for a minor who commits a nonhomicide offense to be subject to a mandatory sentence to life without the possibility of parole. However, in the case of a *Graham* defendant it can be anticipated that the courts would determine that the federal constitutional requirements under the Eighth Amendment would trump Florida's Savings Clause.