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:	SB 92
INTRODUCER:	Senator Joyner
SUBJECT:	Parole for Juvenile Offenders
DATE:	October 28, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

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 consideration for release on parole. The inmate may not be considered for parole until he or she has served at least 25 years of the sentence. The bill includes factors that must be considered by the commission in evaluating whether the inmate has been sufficiently rehabilitated to be paroled.

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 219 inmates were sentenced to life imprisonment for non-homicide offenses committed while they were under 18 years of age.[1] This includes inmates who were sentenced for attempted murder. In Manuel v. State, 48 So.3d 94 (Fla. 2d Dist. 2010), the Second District Court of Appeals held that attempted murder is a non-homicide offense because the act did not result in the death of a human being.

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.[2] 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.

An inmate who is granted parole is allowed to serve the remainder of his or her prison sentence outside of confinement according to terms and conditions established by the commission. Parolees are supervised by department probation officers.

Currently, 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. The parole process begins with the setting of a presumptive parole release date (PPRD) by the commission after a parole examiner reviews the inmate's file and makes an initial recommendation. If the PPRD is more than 2 years after the date of the initial interview, in most cases a parole commission hearing examiner must interview the inmate to review the PPRD within 2 years after the initial interview and every 2 years thereafter. These interviews are limited to determining whether or not information has been gathered which might affect the PPRD. The department assists the commission by providing pertinent information such as current progress reports, psychological reports, and disciplinary reports.[3]

The commission considers the PPRD recommendation in a public hearing held after the initial interview and each re-interview. At this hearing, the commission considers the written recommendation of the parole examiner, documentary evidence, and any testimony presented on behalf of the victim or the inmate. Although the inmate is not entitled to appear at the hearing, he or she may be represented by an attorney. It is common for the victim or victim's representative and law enforcement representatives to appear at the hearing.

The parole examiner conducts a final interview of the inmate within 90 days of the PPRD. The purpose is to establish an effective parole release date and a parole release plan. The commission

[1] Department of Corrections Analysis of Senate Bill 92, September 8, 2011, page 2.
[2] Parole Commission Analysis of Senate Bill 92, September 13, 2011, page 2.
[3] Section 947.174, F.S.

then holds a final public hearing at which it decides whether the inmate's parole release plan is satisfactory and whether to authorize the effective parole release date and enter a release order.

The commission has discretion in determining the terms and conditions of parole. Additionally, there are specific statutory conditions of parole that require the parolee to:

- Submit to random substance abuse testing, if the conviction was for a controlled substance violation (s. 947.18, F.S.);
- Not knowingly associate with other criminal gang members or associates, if the offense involved criminal gang activity (s. 947.18, F.S.)[4];
- Pay any debt due to the state under s. 960.17, F.S., or attorney's fees and costs due to the state under s. 938.29, F.S. (s. 947.18, F.S.);
- Pay victim restitution (s. 947.181, F.S.); and
- Apply for services from the Agency for Persons with Disabilities, if the offender has been diagnosed as mentally retarded (s. 948.185, F.S.).

Most crimes committed by juveniles are dealt with through delinquency proceedings as set forth in ch. 985, F.S.[5] 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.[6]

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.[7]

Youthful Offenders

Classification as a youthful offender is dependent upon an offender's age and the offense that is committed. A court may sentence a defendant as a youthful offender if the defendant:

- Is at least 18 years of age or was prosecuted as an adult pursuant to ch. 985, F.S.;

[4] This condition applies only to offenses committed on or after October 1, 2008.
[5] 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."
[6] Section 985.58, F.S.
[7] 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.

- Has been found guilty of or has pled nolo contendere or guilty to a felony that is not punishable by death or imprisonment for life;
- Is under 21 years old at the time of sentencing; and
- Has not previously been classified as a youthful offender.[8]

Separate institutions and programs exist for youthful offenders that fall into two age groups: age 14 to 18 years old and age 19 to 24 years old.[9] The department must assign an inmate who is less than 18 years old to a youthful offender facility even if he or she was not sentenced as a youthful offender.[10] The department is also required to screen for and may classify as a youthful offender any inmate who is under 25 years old, who has not previously been classified as a youthful offender, and who has not committed a capital or life felony. The department may classify any inmate 19 years of age or younger, except a capital or life felon, as a youthful offender if it determines that the inmate's mental or physical vulnerability would substantially or materially jeopardize his or her safety in a non-youthful facility.[11]

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.

III. Effect of Proposed Changes:

This bill, named the "Graham Compliance Act," amends s. 947.16, F.S., to create the possibility of parole for juvenile offenders who have been sentenced to life imprisonment for a non-homicide offense. The bill defines "juvenile offender" 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.

[8] Section 958.04(1), F.S.
[9] Section 958.11(1), F.S.
[10] Section 944.1905(5)(a), F.S.
[11] Section 958.11(6), F.S.

A juvenile offender with a life sentence must serve twenty-five years of incarceration before becoming eligible for parole consideration. At that time, an initial parole eligibility interview can be held if the offender has not received an approved disciplinary report during the three years preceding the initial eligibility interview.[12]

Ten of the 219 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 two more have served 24 years. Five of the twelve inmates have not had an approved disciplinary report during the last three years.[13]

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

- The wishes of the victim or the opinions of the victim's next of kin;
- 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;
- 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; and
- The results of any mental health assessment or evaluation of the juvenile offender.

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

[12] 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.

[13] *Supra* note 1.

Other Potential Implications:

The bill specifically provides that it applies "notwithstanding any other law to the contrary." Therefore, it allows adolescent offenders to be considered for parole prior to completion of a mandatory minimum sentence or of 85 percent of the term of imprisonment as required by s. 921.002, F.S.

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 crimes that were committed prior to when it becomes law. A change in the statute is presumed to operate prospectively unless there is a clear showing that it is to be applied retroactively. *Bates v. State*, 750 So.2d 6, 10 (Fla. 1999). However, the statement in Section 1 that the act may be cited as the "Graham Compliance Act" indicates that it is intended to address the Supreme Court's decision in *Graham v. Florida.* Arguably, this demonstrates legislative intent to apply the provisions of the bill to offenses committed before the effective date.

If it is determined that the act is intended to be applied retroactively, Article X, section 9 of the Florida Constitution (the "Savings Clause") must be considered. The Savings Clause state: "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). There are a number of decisions indicating that the clause prohibits application of a statutory change lessening the punishment for a crime to an offense that was committed before the change. However, it is not clear that a change in parole eligibility would be precluded by the Savings Clause. The most analogous case may be *State v. Florida Parole Commission*, 624 So.2d 324 (Fla. 1st Dist. 1993). In that case, the court held that the Savings Clause did not prohibit inmates from benefitting due to a statutory change allowing for control release by the Parole Commission even though they were specifically ineligible for control release at the time their offense was committed. Ultimately, the requirements of complying with the Eighth Amendment prohibition against cruel and unusual punishment in the United States Constitution may trump the Savings Clause in the Florida Constitution in this case.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet considered the fiscal impact of this bill on the state prison system. Both the commission and the department indicate that the bill would have an indeterminate, but small, fiscal impact.

VI. Technical Deficiencies:

None.

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.)

None.

B. Amendments:

None.