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 Committee on Criminal Justice

BILL:	SB 232
INTRODUCER:	Senator Brandes
SUBJECT:	Criminal Justice
DATE:	February 2, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Jones	CJ	**Pre-meeting**
2.			ACJ	
3.			AP	

I. Summary:

SB 232 addresses several areas of the criminal justice system in the state. The bill requires custodial interrogations to be electronically recorded, with some exceptions; revises the circumstances under which a juvenile offender may have his or her sentence reviewed and establishes a sentence review process for young adult offenders; establishes a conditional medical release (CMR) program and a conditional aging inmate release (CAIR) program within the Department of Corrections (DOC); and repeals the existing conditional medical release program within the Florida Commission on Offender Review (FCOR).

Specifically, the bill requires a custodial interrogation relating to a covered offense (specified in the bill) that is conducted at a place of detention be electronically recorded in its entirety. If the custodial interrogation at the place of detention is not electronically recorded by the law enforcement officer, he or she must prepare a written report explaining the reason for not recording it. The bill provides exceptions to the general recording requirement. The bill further provides:

- If a custodial interrogation is not recorded and no exception applies, a court must consider "the circumstances of an interrogation" in its analysis of whether to admit into evidence a statement made at the interrogation;
- If the court decides to admit a statement made during a custodial interrogation that was not electronically recorded, the defendant may require the court to give a cautionary jury instruction regarding the officer's failure to comply with the recording requirement;
- If a law enforcement agency "has enforced rules" adopted pursuant to the bill which are reasonably designed to comply with the bill's requirements, the agency is not subject to civil liability for damages arising from a violation of the bill's requirements; and
- Requirements relating to electronic recording of a custodial interrogation do not create a cause of action against a law enforcement officer.

In regards to juvenile and youthful offenders, the bill:

- Modifies the list of enumerated offenses that exclude juvenile offenders convicted of capital murder from a sentence review hearing in accordance with s. 921.1402, F.S., enacted subsequent to the *Graham v. Florida* and *Miller v. Alabama* cases, to only murder.
- Retroactively applies the above modification to limit the prior offenses that serve as a bar for certain juvenile offenders to have a sentence review hearing to only murder.
- Provides that juvenile offenders who are no longer barred from a sentence review hearing due to the change to the list of enumerated prior offenses and who have served 25 years of the imprisonment imposed on the effective date of the bill must have a sentence review hearing conducted immediately.
- Provides all other juvenile offenders who are no longer barred from a sentence review hearing due to the change to the list of enumerated prior offenses must be given a sentence review hearing when 25 years of the imprisonment imposed have been served.
- Establishes a sentence review process similar to that created for juvenile offenders pursuant to s. 921.1402, F.S., for "young adult offenders."
- Defines the term "young adult offender."
- Allows certain young adult offenders to request a sentence review hearing with the original sentencing court if specified conditions are met, specifically:
  - A young adult offender convicted of a life felony offense, or an offense reclassified as such, who was sentenced to 20 years imprisonment may request a sentence review after 20 years; and
  - A young adult offender convicted of a first degree felony offense, or an offense reclassified as such, who was sentenced to 15 years imprisonment may request a sentence review after 15 years.

In regard to conditional release programs, the bill:

- Repeals s. 947.149, F.S., which establishes the CMR program within the FCOR and creates s. 945.0911, F.S., to establish a CMR program within the DOC.
- Provides definitions and eligibility criteria for the CMR program.
- Provides a process for the referral, determination of release, and revocation of release for the CMR program.
- Establishes a CAIR program within the DOC.
- Provides eligibility criteria for the CAIR program.
- Provides a process for the referral, determination of release, and revocation of release for the CAIR program.

The bill is effective October 1, 2021.

II. Present Situation:

Refer to Section III. Effect of Proposed Changes for discussion of the relevant portions of current law.

III. Effect of Proposed Changes:

Custodial Interrogation (Section 1)

Constitutional Protections and Court Decisions Interpreting and Applying Those Protections

The Fifth Amendment of the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] Similarly, the Florida Constitution extends the same protection.[2]

Custodial Interrogation Legal Requirements

Whether a person is in custody and under interrogation is the threshold question that determines the need for a law enforcement officer to advise the person of his or her *Miranda* rights.[3] In *Traylor v. State*, the Florida Supreme Court found that "to ensure the voluntariness of confessions, the Self–Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court…."[4]

The test to determine if a person is in custody for the purposes of his or her *Miranda* rights is whether "a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest."[5]

An interrogation occurs "when a person is subjected to express questions, or other words or actions, by a state agent that a reasonable person would conclude are designed to lead to an incriminating response."[6]

Waiver of the Right to Remain Silent

A person subjected to a custodial interrogation is entitled to the protections of *Miranda*.[7] The warning must include the right to remain silent as well as the explanation that anything a person says can be used against them in court. The warning includes both parts because it is important for a person to be aware of his or her right and the consequences of waving such a right.[8]

Admissibility of a Defendant's Statement as Evidence

The admissibility of a defendant's statement is a mixed question of fact and law decided by the court during a pretrial hearing or during the trial outside the presence of the jury.[9] For a defendant's statement to become evidence in a criminal case, the judge must first determine whether the statement was freely and voluntarily given to a law enforcement officer during the

[1] U.S. Const. amend. V.
[2] "No person shall be . . . compelled in any criminal matter to be a witness against himself." FLA. CONST. article I, s. 9.
[3] In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court established procedural safeguards to ensure the voluntariness of statements rendered during custodial interrogation.
[4] 596 So.2d 957, 965-966 (Fla. 1992).
[5] *Id.* at 966 n. 16.
[6] *Id.* at 966 n. 17.
[7] *See Miranda v. Arizona,* 384 U.S. 436, 444 (1966).
[8] *Sliney v. State*, 699 So.2d 662, 669 (Fla. 1997), *cert. den.*, 522 U.S. 1129 (1998).
[9] *Nickels v. State*, 90 Fla. 659, 668 (Fla. 1925).

custodial interrogation of the defendant. The court looks to the totality of the circumstances of the statement to determine if it was voluntarily given.[10]

The court can consider testimony from the defendant and any law enforcement officers involved, their reports, and any additional evidence such as audio or video recordings of the custodial interrogation.

As previously discussed, the courts use a "reasonable person" standard in making the determination of whether the defendant was in custody at the time he or she made a statement.[11] The court considers, given the totality of the circumstances, whether a reasonable person in the defendant's position would have believed he or she was free to terminate the encounter with law enforcement and, therefore, was not in custody.[12] Among the circumstances or factors the courts have considered are:

- The manner in which the police summon the suspect for questioning;
- The purpose, place, and manner of the interrogation;
- The extent to which the suspect is confronted with evidence of his or her guilt; and
- Whether the suspect is informed that he or she is free to leave the place of questioning.[13]

The court will also determine whether the defendant was made aware of his or her *Miranda* rights and whether he or she knowingly, voluntarily, and intelligently elected to waive those rights and give a statement.[14]

Even if the court deems the statement admissible and the jury hears the evidence, defense counsel will be able to cross-examine any witnesses who testify and have knowledge of the circumstances surrounding the defendant's statement. Additionally, counsel may argue to the jury in closing argument that the statement was coerced in some way by a law enforcement officer.

Interrogation Recording in Florida

Currently, 26 states and the District of Columbia record custodial interrogations statewide.[15] These states have statutes, court rules, or court cases that require law enforcement to make the recordings or allow the court to consider the failure to record a statement in determining the admissibility of a statement.[16] Although Florida is not one of these states, 58 Florida law

[10] *Supra* n. 8 at 667.
[11] *Supra* n. 5.
[12] *Voorhees v. State*, 699 So.2d 602, 608 (Fla. 1997).
[13] *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999).
[14] *Supra* n. 5 at 668.
[15] *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, January 2019, National Association of Criminal Defense Lawyers, p. 7, available at https://www.nacdl.org/getattachment/581455af-11b2-4632-b584-ab2213d0a2c2/custodial-interrogations-compendium-january-2019-.pdf (last visited January 21, 2021).
[16] *See Stephan v. State*, 711 P.2d 1156 (AK 1985); Ark. R. Crim. P. 4.7 (2012); Cal. Pen. Code s. 859.5 and Cal. Wel. & Inst. Code s. 626.8 (2013); CO. Rev. Stat. 16-3-601 (2016); CT Gen. Stat. s. 54-1o (2011); D.C. Code ss. 5-116.01 and 5-116.03 (2006); Hawaii was verified by the four departments that govern law enforcement in the state; 705 IL Comp. Stat. Ann. 405/5-401.5; 725 ICSA 5/103-2.1 (2003, 2005, 2013); Ind. R. Evid. 617 (2009); Kan. Stat. s. 22-4620 (2017); 25 ME Rev. Stat. Ann. s. 2803-B(1)(K) (2007); MD Code Ann., Crim. Proc. ss. 2-402 and 2-403 (2008); MI Comp. Laws ss. 763.7 – 763.11 (2012)**;** *State v. Scales*, 518 N.W.2d 587 (MN 1994); MO Rev. Stat. ss. 590.700 and 700.1 (2009 and 2015); MT Code Ann. ss. 46-4-406 – 46-4-410 (2009); NE Rev. Stat. Ann. ss. 29-4501 – 29-4508 (2008); NJ Court Rules, R. 3:17

enforcement agencies have been identified as recording custodial interrogations, voluntarily, at least to some extent.[17]

Effect of the Bill

The bill creates s. 900.06, F.S., which creates a statutory requirement, and exceptions to that requirement, that a law enforcement officer conducting a custodial interrogation must electronically record the interrogation in its entirety.

The bill provides the following definitions for terms used in the bill:

- "Custodial interrogation" means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and which occurs under circumstances in which a reasonable individual in the same circumstances would consider himself or herself to be in the custody of a law enforcement agency;
- "Electronic recording" means an audio recording or an audio and video recording that accurately records a custodial interrogation;
- "Covered offense" means any of the following criminal offenses:
  - Arson.
  - Sexual battery.
  - Robbery.
  - Kidnapping.
  - Aggravated child abuse.
  - Aggravated abuse of an elderly person or disabled adult.
  - Aggravated assault with a deadly weapon.
  - Murder.
  - Manslaughter.
  - Aggravated manslaughter of an elderly person or disabled adult.
  - Aggravated manslaughter of a child.
  - The unlawful throwing, placing, or discharging of a destructive device or bomb.
  - Armed burglary.
  - Aggravated battery.
  - Aggravated stalking.
  - Home-invasion robbery.
  - Carjacking.
- "Place of detention" means a police station, sheriff's office, correctional facility, prisoner holding facility, county detention facility, or other governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual; and
- "Statement" means a communication that is oral, written, electronic, nonverbal, or in sign language.

(2005); NM Stat. Ann. s. 29-1-16 (2006); NC Gen. Stat. s. 15A-211 (2007, 2011); N.Y. Crim. Proc. Law s. 60.45 (McKinney 2018); OR Rev. Stat. s. 133.400 (2010); RI PAC, Accreditation Standards Manual, s. 8.10 (2013); Tex. Crim. Proc. Code ss. 2.32 and 38.22; Tex. Fam. Code s. 51.095; Utah R. Evid. Rule 616 (2015); 13 V.S.A. s. 5585 (2014); *State v. Jerrell*, 699 N.W.2d 110 (WI 2005); and WI Stat. ss. 968.073 and 972.115 (2005). *See also supra* n. 15 at p. 8.

[17] *Supra* n. 15 at pp. 40-41.

The bill requires a custodial interrogation relating to a covered offense that is conducted at a place of detention be electronically recorded in its entirety. The recording must include:

- The giving of a required warning;
- The advisement of rights; and
- The waiver of rights by the individual being questioned.

If a custodial interrogation at a place of detention is not recorded by the law enforcement officer, he or she must prepare a written report explaining the reason for the noncompliance.

If a law enforcement officer conducts a custodial interrogation at a place other than a place of detention, the officer must prepare a written report as soon as practicable. The report must explain the circumstances of the interrogation in that place and summarize the custodial interrogation process and the individual's statements.

This recording requirement does not apply if:

- There is an unforeseen equipment malfunction that prevents recording the custodial interrogation in its entirety;
- A suspect refuses to participate in a custodial interrogation if his or her statements are electronically recorded;
- An equipment operator error prevents the recording of the custodial interrogation in its entirety;
- The statement is made spontaneously and not in response to a custodial interrogation question;
- A statement is made during the processing of the arrest of a suspect;
- The custodial interrogation occurs when the law enforcement officer participating in the interrogation does not have any knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed a covered offense;
- The law enforcement officer conducting the custodial interrogation reasonably believes that electronic recording would jeopardize the safety of the officer, individual being interrogated, or others; or
- If the custodial interrogation is conducted outside of the state.

Unless a court finds that one or more of the enumerated exceptions applies, the court must consider the officer's failure to record all or part of the custodial interrogation as a factor in determining the admissibility of a defendant's statement made during the interrogation. If the court admits the statement into evidence, the defendant may request and the court must give a cautionary jury instruction regarding the officer's failure to comply with the recording requirement.

Finally, if a law enforcement agency has enforced rules that are adopted pursuant to the bill and such rules are reasonably designed to comply with the bill's requirements, the agency is not subject to civil liability for damages arising from a violation of the bill's requirements. The bill does not create a cause of action against a law enforcement officer.

Sentence Review Hearings for Specified Offenders (Sections 2-4)

Juvenile Offenders Convicted of Offenses Punishable by Life without Parole

In recent years, the U.S. Supreme Court issued several decisions addressing the application of the Eighth Amendment's prohibition against cruel and unusual punishment as it relates to the punishment of juvenile offenders.[18] The first of these was *Roper v. Simmons*,[19] in which the Court held that juvenile offenders cannot be subject to the death penalty for any offense. More recently, the Court expanded juvenile sentencing doctrine in *Graham v. Florida*[20] and *Miller v. Alabama*.[21]

Graham v. Florida

In *Graham*, the U.S. Supreme Court held that a juvenile offender may not be sentenced to life in prison without the possibility of parole for a non-homicide offense. More specifically, the Court found that if a non-homicide juvenile offender is sentenced to life in prison, the state must "provide him or her with some realistic opportunity to obtain release before the end of that term."[22] Because Florida abolished parole[23] and the possibility of executive clemency was deemed to be remote,[24] the Court held that a juvenile offender in Florida could not be given a life sentence for a non-homicide offense without a meaningful opportunity to obtain release.[25]

Graham applies retroactively to previously sentenced offenders because it established a fundamental constitutional right.[26] Therefore, a juvenile offender who is serving a life sentence for a non-homicide offense that was committed after parole eligibility was eliminated is entitled to be resentenced to a term less than life.

The U.S. Supreme Court did not give any guidance as to the maximum permissible sentence for a non-homicide juvenile offender other than to exclude the possibility of life without parole. Prior to the 2014 Legislative Session, there were conflicts in the case law regarding whether a term of years could be deemed to equate to a life without parole sentence. The Florida First District Court of Appeal held that a lengthy term of years is a *de facto* life sentence if it exceeds

[18] The term "juvenile offender" refers to an offender who was less than 18 years of age at the time the offense was committed for which he or she was sentenced. Most crimes committed by juveniles are dealt with through delinquency proceedings as set forth in ch. 985, F.S. However, the law provides a mechanism for juveniles 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 years 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, s. 985.58, F.S., requires a grand jury indictment to try a juvenile as an adult for an offense that is punishable by death or life imprisonment.
[19] 125 S.Ct. 1183 (2005).
[20] 130 S.Ct. 2011 (2010).
[21] 132 S.Ct. 2455 (2012).
[22] *Graham* at 82.
[23] Parole was abolished in 1983 for all non-capital felonies committed on or after October 1, 1983, and was completely abolished in 1995 for any offense committed on or after October 1, 1995.
[24] *Graham* at 70.
[25] *Graham* at 75.
[26] *See, e.g., St. Val v. State*, 107 So.3d 553 (Fla. 4th DCA 2013); *Manuel v. State*, 48 So.3d 94 (Fla. 2d DCA 2010).

the juvenile offender's life expectancy.[27] On the other hand, the Florida Fourth and Fifth District Courts of Appeal strictly construed *Graham* to apply only to life sentences and not to affect sentences for a lengthy term of years.[28]

On March 19, 2015, the Florida Supreme Court issued opinions on two cases that had been certified for it to resolve, *Gridine v. State*, 89 So.3d 909 (Fla. 1st DCA 2011) and *Henry v. State*, 82 So.3d 1084 (Fla. 5th DCA 2012). The Court held that a sentence proscribing a lengthy term of years imprisonment, such as a 70-year sentence as was pronounced in *Gridine* or the 90-year sentence pronounced in *Henry* that does not provide a meaningful opportunity for release is a de facto life sentence that violates the Eighth Amendment to the U.S. Constitution and the holding in *Graham*.[29]

Miller v. Alabama

In *Miller*, the U.S. Supreme Court held that juvenile offenders who commit homicide may not be sentenced to life in prison without the possibility of parole as the result of a mandatory sentencing scheme. The Court did not find that the Eighth Amendment prohibits sentencing a juvenile murderer to life without parole, but rather that individualized factors related to the offender's age must be considered before a life without parole sentence may be imposed. The Court also indicated that it expects few juvenile offenders will be found to merit life without parole sentences.

The majority opinion in *Miller* noted mandatory life without parole sentences "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[30]

CS/HB 7035 (2014)

In response to the above-mentioned cases, the 2014 Legislature passed and the Governor signed into law CS/HB 7035 (2014),[31] ensuring Florida had a constitutional sentencing scheme for juvenile offenders who are convicted of offenses punishable by a sentence of life without parole.

CS/HB 7035 (2014) amended s. 775.082, F.S., *requiring* a court to sentence a juvenile offender who is convicted of a homicide offense[32] that is a capital felony or an offense that was reclassified as a capital felony (capital felony homicide) and where the person actually killed, intended to kill, or attempted to kill the victim to:

- Life imprisonment, if, after conducting a sentencing hearing in accordance with the newly created s. 921.1401, F.S., the court concluded that life imprisonment is an appropriate sentence; or

[27] *Adams v. State*, 2012 WL 3193932 (Fla. 1st DCA 2012). The First District Court of Appeal has struck down sentences of 60 years (*Adams)* and 80 years (*Floyd v. State*, 87 So.3d 45 (Fla. 1st DCA 2012)), while approving sentences of 50 years (*Thomas v. State*, 78 So.3d 644 (Fla. 1st DCA 2011)) and 70 years (*Gridine v. State*, 89 So. 3d 909 (Fla. 1st DCA 2011)).
[28] *See Guzman v. State*, 110 So.3d 480 (Fla. 4th DCA 2013)*; Henry v. State*, 82 So.3d 1084 (Fla. 5th DCA 2012). It also appears that the Second District Court of Appeal may agree with this line of reasoning: *see Young v. State*, 110 So.3d 931 (Fla. 2d DCA 2013).
[29] *Gridine v. State*, 175 So.3d 672 (Fla. 2015) and *Henry v. State*, 175 So.3d 675 (Fla. 2015).
[30] *Miller* at 2467.
[31] Chapter 201-220, L.O.F.
[32] Section 782.04, F.S., establishes homicide offenses.

- A term of imprisonment of not less than 40 years, if the judge concluded at the sentencing hearing that life imprisonment is not an appropriate sentence.[33]

The court *may* sentence a juvenile offender to life imprisonment or a term of years equal to life imprisonment, if, after conducting a sentencing hearing in accordance with s. 921.1401, F.S., the court finds such sentence appropriate and the juvenile offender is convicted of a:

- Life or first degree felony homicide where the person actually killed, intended to kill, or attempted to kill the victim;[34]
- Capital, life, or first degree felony homicide offense where the person did not actually kill, intend to kill, or attempt to kill the victim;[35] or
- Nonhomicide offense.[36]

Section 775.082(1)(b)1., F.S., requires the court to impose a minimum sentence (40 years) only in instances where the court determines that life imprisonment is not appropriate for a juvenile offender convicted of a capital felony homicide where the person actually killed, intended to kill, or attempted to kill the victim.[37]

Section 775.082(1) and (3), F.S., also provides that all juvenile offenders are entitled to have their sentence reviewed by the court of original jurisdiction after specified periods of imprisonment. However, a juvenile offender convicted of a capital felony homicide, where the person actually killed, intended to kill, or attempted to kill the victim, is not entitled to review if he or she has previously been convicted of a list of enumerated offenses, or conspiracy to commit one of the enumerated offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence for the capital felony homicide.[38]

Sentencing Proceedings for Juvenile Offenders Sentenced to Life Imprisonment

CS/HB 7035 (2014) created s. 921.1401, F.S., which authorized the court to conduct a separate sentencing hearing to determine whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence for a juvenile offender convicted of one of the above-described homicide or nonhomicide offenses that was committed on or after July 1, 2014.[39] When determining whether such sentence is appropriate, the court is required to consider factors relevant to the offense and to the juvenile offender's youth and attendant circumstances, including, but not limited to the:

- Nature and circumstances of the offense committed by the juvenile offender;
- Effect of crime on the victim's family and on the community;
- Juvenile offender's age, maturity, intellectual capacity, and mental and emotional health at time of offense;

[33] Section 775.082(1)(b)1., F.S.
[34] Section 775.082(3)(a)5. and (b), F.S.
[35] Section 775.082(1)(b)2., F.S.
[36] Section 775.082(3)(c), F.S.
[37] Section 775.082(1)(b)1., F.S.
[38] *See* s. 775.082(1) and (3), F.S., providing that reviews of sentences will be conducted in accordance with s. 921.1402, F.S.
[39] Section 921.1401(1), F.S.

- Juvenile offender's background, including his or her family, home, and community environment;
- Effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the juvenile offender's participation in the offense;
- Extent of the juvenile offender's participation in the offense;
- Effect, if any, of familial pressure or peer pressure on the juvenile offender's actions;
- Nature and extent of the juvenile offender's prior criminal history;
- Effect, if any, of characteristics attributable to the juvenile offender's youth on the juvenile offender's judgment; and
- Possibility of rehabilitating the juvenile offender.[40]

This sentencing hearing is mandatory when sentencing any juvenile offender for a capital felony homicide offense where the offender actually killed, intended to kill, or attempted to kill the victim. The hearing is not required in any of the other above-described offenses, but must be conducted before the court can impose a sentence of life imprisonment or a term of years equal to life imprisonment.

Sentence Review Proceedings

CS/HB 7035 (2014) also created s. 921.1402, F.S., which entitles certain juvenile offenders to a review of the sentence by the court of original jurisdiction after specified periods of time. The sentence review hearing is to determine whether the juvenile offender has been rehabilitated and is deemed fit to re-enter society.

Section 921.1402(1), F.S., defines "juvenile offender" to mean a person sentenced to imprisonment in the custody of the DOC for an offense committed on or after July 1, 2014, and committed *before* he or she was 18 years of age.

A juvenile offender convicted of a capital felony homicide offense where the person actually killed, intended to kill, or attempted to kill the victim is entitled to a sentence review hearing after 25 years.[41] However, a juvenile offender is not entitled to review if he or she has previously been convicted of one of the following offenses, or conspiracy to commit one of the following offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence for which he or she was sentenced to life:

- Murder;
- Manslaughter;
- Sexual battery;
- Armed burglary;
- Armed robbery;
- Armed carjacking;
- Home-invasion robbery;
- Human trafficking for commercial sexual activity with a child under 18 years of age;
- False imprisonment under s. 787.02(3)(a), F.S.; or

[40] Section 921.1401(2), F.S.
[41] Section 775.082(1)(b)1., F.S.

- Kidnapping.[42]

A juvenile offender convicted of a life felony or first degree felony homicide offense where the person actually killed, intended to kill, or attempted to kill the victim, is entitled to a sentence review hearing after 25 years, if he or she is sentenced to a term of imprisonment for more than 25 years.[43]

A juvenile offender convicted of a capital felony, life felony, or first degree felony homicide offense where the person did not actually kill, intend to kill, or attempt to kill the victim is entitled to have the court review the sentence after 15 years, if he or she is sentenced to a term of imprisonment of more than 15 years.[44]

A juvenile offender convicted of a nonhomicide offense is entitled to have the court review the sentence after 20 years if the juvenile is sentenced to a term of imprisonment of more than 20 years. The juvenile offender is eligible for one subsequent review hearing 10 years after the initial review hearing.[45]

The juvenile offender must submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The DOC must notify a juvenile offender of his or her eligibility to request a sentencing review hearing 18 months before the juvenile offender becomes entitled to such review. Additionally, an eligible juvenile offender is entitled to be represented by counsel at the sentence review hearing, including a court appointed public defender, if the juvenile offender cannot afford an attorney.[46]

Section 921.1402(6), F.S., requires the original sentencing court to consider any factor it deems appropriate during the sentence review hearing, including all of the following:
- Whether the offender demonstrates maturity and rehabilitation;
- Whether the offender remains at the same level of risk to society as he or she did at the time of the initial sentencing;
- The opinion of the victim or the victim's next of kin;[47]
- Whether the offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person;
- Whether the offender has shown sincere and sustained remorse for the criminal offense;
- Whether the offender's age, maturity, and psychological development at the time of the offense affected his or her behavior;

[42] Section 921.1402(2)(a), F.S.
[43] Section 921.1402(2)(b), F.S.
[44] Section 921.1402(2)(c), F.S.
[45] Section 921.1402(2)(d), F.S.
[46] Section 921.1402(3)-(5), F.S.
[47] Section 921.1402(6)(c), F.S., further states that the absence of the victim or the victim's next of kin from the resentencing hearing may not be a factor in the court's determination. The victim or victim's next of kin is authorized to appear in person, in writing, or by electronic means. Additionally, if the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentence review hearings.

- Whether the offender has successfully obtained a general educational development certificate or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available;
- Whether the offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense; and
- The results of any mental health assessment, risk assessment, or evaluation of the offender as to rehabilitation.[48]

If a court, after conducting a sentence review hearing, finds that the juvenile offender has been rehabilitated and is reasonably fit to reenter society, the court must modify the offender's sentence and impose a term of probation of at least five years. If the court determines that the juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court must issue an order in writing stating the reasons why the sentence is not being modified.[49]

These sentencing provisions are limited to the juvenile offenders that fall under the strict findings in *Graham* and *Miller*.[50] Thus, the sentence review hearings do not currently apply to persons who were convicted and sentenced to very similar offenses and who are close in age to the juvenile offenders who have received sentence review hearings because of *Graham* and *Miller*.

Case Law Subsequent to CS/HB 7035 (2014)

Valid Sentence Options for *Miller* Offenders

Subsequent to the U.S. Supreme Court's holdings in *Roper* and *Miller*, the options for permissible sentences under Florida law for juveniles who were convicted of such capital and life offenses punishable by life imprisonment without the possibility of parole became unclear. The Florida Fifth District Court of Appeal in *Horsley v. State*,[51] held that the principal of statutory revival should be applied mandating that the last constitutional sentence, life with the possibility of parole after 25 years, should be imposed for convictions of such juveniles. However, in 2015, the Florida Supreme Court heard and overturned this decision in *Horsley*,[52] holding that the proper remedy for such juveniles convicted of offenses classified as capital offenses is to apply the sentencing provisions enacted by CS/HB 7035 (2014), which codified the above-mentioned ss. 775.082, 921.1401, and 921.1402, F.S., rather than utilize statutory revival principles and impose a sentence of life with the possibility of parole after 25 years.[53]

Retroactive Application of *Miller*

Another outstanding question at the time CS/HB 7035 (2014) was implemented was whether *Miller* applied retroactively in the same manner that *Graham* did. Other state and federal courts had issued differing opinions as to whether *Miller* applies retroactively. The question has turned on whether *Miller* is considered to be a procedural change in the law that does not apply

[48] Section 921.1402(6), F.S.
[49] Section 921.1402(7), F.S.
[50] *See Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
[51] 121 So.3d 1130 (Fla. 5th DCA 2013).
[52] 160 So.3d 393 (Fla. 2015).
[53] Life with the possibility of parole after 25 years is the penalty for capital murder under the 1993 version of s. 775.082(1), F.S., the most recent capital murder penalty statute that was constitutional under *Miller* when applied to a juvenile offender.

retroactively to sentences that were final before the opinion was issued or an opinion of fundamental significance, similar to *Graham*.

The Florida Supreme Court decided this issue in *Falcon v. State*.[54] The Court held that *Miller* applied retroactively because the ruling is a development of fundamental significance. The Court held that given that *Miller* invalidated the only statutory means for imposing a sentence of life without the possibility of parole on juveniles convicted of a capital felony it dramatically impacted the ability of Florida to impose a nondiscretionary sentence of life without parole on a juvenile convicted of a capital felony. Therefore, *Falcon* ensured that juvenile offenders whose convictions and sentences were final prior to the *Miller* decision could seek collateral relief based on it.[55]

Impact of Parole or Conditional Release Options for Juvenile Offenders

The U.S. Supreme Court further distinguished the *Graham* and *Miller* progeny of cases with *Virginia v. LeBlanc*, which denied habeas corpus relief for the juvenile offender holding that release programs for prisoners that consider factors in a similar manner as parole, such as Virginia's geriatric release program, did not violate *Graham* or *Miller* because it provides a juvenile offender a meaningful opportunity for release. In *LeBlanc*, the Court reasoned that Virginia's geriatric release program considered individualized factors of the offender, such as the individual's rehabilitation and maturity, history and conduct before and during incarceration, his or her inter-personal relationships with staff and inmates, and development and growth in attitude toward himself, herself, and others.[56]

The Florida Supreme Court has held that the *Graham* and *Miller* rules do not apply to juvenile offenders sentenced to life or lengthy terms of years equal to life, but who are eligible for parole.[57]

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.

[54] 162 So.3d 954 (Fla. 2015).
[55] *Falcon v. State*, 162 So.3d 954, 961 (Fla. 2015).
[56] *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017).
[57] *See Franklin v. State*, 258 So.3d 1329 (Fla. 2018); *Carter v. State*, 283 So.3d 409 (Fla. 3d DCA 2019); *Brown v. State*, 283 So.3d 424 (Fla. 3d DCA 2019).

- 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.[58]

Effect of the Bill

Juvenile Offenders

As discussed above, a juvenile offender sentenced to a sentence of life without parole for a capital felony[59] where a finding was made that he or she actually killed, intended to kill, or attempted to kill the victim is entitled to a review of his or her sentence after 25 years if he or she has never previously been convicted of a specified enumerated felony.[60] The bill amends the list of enumerated offenses that bar such juvenile offenders from having a sentence review hearing to only include murder. Therefore, a juvenile offender is only prohibited from having a sentence review hearing if he or she has previously been convicted of committing or conspiracy to commit murder, if the murder for which the person was previously convicted was part of a separate criminal transaction or episode than the murder that resulted in the sentence.

The bill also creates s. 921.14021, F.S., providing for the retroactive application of the above mentioned amendment. The bill requires that a juvenile offender is entitled to a review of his or her sentence after 25 years or, if 25 years on the term of imprisonment has already been served by October 1, 2021, the sentence review hearing must be conducted immediately. The bill provides legislative intent related to the retroactive application of such provisions.

Because the bill expressly provides for retroactive application of the changes the bill makes, the bill has provided a legislative exception to the default position of prospectively.

Young Adult Offenders

The bill creates s. 921.1403, F.S., expanding the sentence review hearing process created by CS/HB 7035 (2014) for juveniles in response to the *Graham* and *Miller* cases to persons convicted of similar offenses, but who were not entitled to a sentence review hearing.

The bill defines the term "young adult offender" to mean a person who committed an offense before he or she reached 25 years of age and for which he or she is sentenced to a term of years in the DOC, regardless of the date of sentencing. The bill also specifies that the provisions allowing sentence review hearings of young adult offenders applies retroactively.

The sentence review procedures and hearing process are substantively identical to those in place for juvenile offenders in accordance with s. 921.1402, F.S., and discussed above. However, the eligibility criteria for a young adult offender to have a sentence review hearing is different.

[58] Art. 1, s. 16(b)(6)a., b., f., and g., FLA. CONST.
[59] In violation of s. 782.04, F.S.
[60] *See* ss. 775.082(1)(b)1. and 921.1402, F.S.

Eligibility

The bill provides that a young adult offender who is convicted of an offense that is a:
- Life felony or that was reclassified as a life felony, and who is sentenced to more than 20 years[61] is entitled to a review of his or her sentence after 20 years.[62]
- First degree felony or that was reclassified as a first degree felony and who is sentenced to more than 15 years[63] is entitled to a review of his or her sentence after 15 years.

The bill prohibits a young adult offender from a sentence review hearing if he or she has previously been convicted of committing, or of conspiring to commit murder, if such prior murder was part of a separate criminal transaction or episode than the murder that resulted in the sentence under s. 775.082(3)(a)1., 2., 3., 4., or 6. or (b)1., F.S.[64]

Procedures for Initiating the Sentence Review Hearing Process

Similar to the process developed in s. 921.1402(3), F.S., applicable to a juvenile offender, the bill provides that the DOC must notify a young adult offender in writing of his or her eligibility to request a sentence review hearing:
- 18 months before the young adult offender is entitled to a sentence review hearing if such offender is not eligible when the bill becomes effective; or
- Immediately if the offender is eligible as of October 1, 2021.

A young adult offender seeking a sentence review must submit an application to the original sentencing court requesting that the court hold a sentence review hearing. The bill provides that such court retains jurisdiction for the duration of the sentence for this purpose. The bill also provides that a young adult offender who is eligible for a sentence review hearing may be represented by an attorney, who must be appointed by the court if the young adult offender cannot afford an attorney.

Sentence Review Hearing

The bill requires the court to hold a sentence review hearing to determine whether to modify the young adult offender's sentence upon receiving an application for such hearing. The court is required to consider any factor it deems appropriate to determine the appropriateness of modifying the young adult offender's sentence, including, but not limited to, the following:
- Whether the young adult offender demonstrates maturity and rehabilitation.
- Whether the young adult offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.
- The opinion of the victim or the victim's next of kin.[65]

[61] Pursuant to s. 775.082(3)(a)1., 2., 3., 4., or 6., F.S.
[62] The bill provides that this does not apply to a person who is eligible for sentencing under s. 775.082(3)(a)5., or s. 775.082(3)(c), F.S., which only applies to an offender who committed certain life offenses before attaining the age of 18.
[63] Pursuant to s. 775.082(3)(b)1., F.S.
[64] Each of these citations includes different sentence terms based upon the degree of offense or the date of commission of the offense.
[65] The bill states that the absence of the victim or the victim's next of kin from the hearing may not be a factor in the determination of the court. The court must allow the victim or victim's next of kin to be heard in person, in writing, or by electronic means. Finally, if the victim or the victim's next of kin chooses not to participate in the hearing, the court may

- Whether the young adult offender was a relatively minor participant in the criminal offense or whether he or she acted under extreme duress or under the domination of another person.
- Whether the young adult offender has shown sincere and sustained remorse for the criminal offense.
- Whether the young adult offender's age, maturity, or psychological development at the time of the offense affected his or her behavior.
- Whether the young adult offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.
- Whether the young adult offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.
- The results of any mental health assessment, risk assessment, or evaluation of the young adult offender as to rehabilitation.[66]

Terms of Release for Young Adult Offenders Resentenced Pursuant to s. 921.1403, F.S.

The terms that a young adult offender must comply with if he or she is resentenced under the bill are similar to those that a juvenile offender must comply with if resentenced in accordance with s. 921.1402, F.S.

Upon conducting the sentence review hearing, the court may modify the young adult offender's sentence if the court makes a determination that the young adult offender is rehabilitated and is reasonably believed to be fit to reenter society. The court must modify the sentence to a term of probation for at least:

- Five years, if the young adult offender was originally sentenced for a life felony, or an offense reclassified as a life felony; or
- Three years, if the young adult offender was originally sentenced for a first degree felony or an offense reclassified as a first degree felony.

However, the bill prohibits the court from resentencing a young adult offender if the court determines that he or she has not demonstrated rehabilitation or is not fit to reenter society and requires the court to issue a written order stating the reasons why the sentence is not being modified.

Subsequent Reviews

The bill allows a young adult offender to have one subsequent sentence review hearing after five years if he or she is not resentenced at the initial sentence review hearing. The bill requires the young adult offender seeking a subsequent sentence review hearing to submit a new application to the original sentencing court to request a subsequent sentence review hearing.

consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or previous sentencing review hearings.

[66] These enumerated factors mirror the criteria used for the sentence review hearings conducted for juvenile offenders in accordance with s. 921.1402(6), F.S.

Conditional Release for Specified Inmate Populations (Sections 5-19)

Aging Population Statistics

In 2018, 52.4 million adults in the United States were 65 or older and it is estimated that the number will rise to approximately 94.7 million by 2060.[67] The "baby boomers" generation which is generally defined as persons born from 1946 through 1964, will all be 65 and older by 2030.[68] 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.[69] The report also estimated that approximately 14 to 20 percent of the elder population has a mental health or substance abuse disorder, such as depression, dementia, or related psychiatric and behavioral symptoms.[70] Studies estimate that 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."[71] 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.[72]

Special Health Considerations for 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.[73] However, such ailments present special challenges within a prison environment and may result in the need for increased staffing levels and enhanced officer training.[74] Such aging or ill inmates

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[67] U.S. Department of Health and Human Services, Administration for Community Living, *2019 Profile of Older Americans*, May 2020, p. 4., available at https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf (last visited January 22, 2021).

[68] United States Census Bureau, *By 2030 All Baby Boomers Will Be Age 65 or Older, 2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, December 10, 2020, available at https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html (last visited January 30, 2021).

[69] Eden, J., et al., THE MENTAL HEALTH AND SUBSTANCE USE WORKFORCE FOR OLDER ADULTS (2012), p. 1, available at https://www.ncbi.nlm.nih.gov/books/NBK201410/?report=reader#!po=16.6667 (last visited January 22, 2021).

[70] *Id*. at 4.

[71] Yarnell, S., MD, PhD, Kirwin, P. MD, and Zonana, H. MD, *Geriatrics and the Legal System*, J 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 January 22, 2021).

[72] *Id*.

[73] 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 January 22, 2021).

[74] The PEW Charitable Trusts Older Prisoners Report.

can also require structural accessibility adaptions, such as special housing and wheelchair ramps. For example, in Florida, four facilities serve relatively large populations of older or ill inmates, which help meet special needs such as palliative and long-term care.[75]

Aging Inmate Statistics in Florida

The DOC reports that the elderly inmate[76] population has increased by 608 inmates or 2.6 percent from June 30, 2018 to June 30, 2019 and that this trend has been steadily increasing over the last five years for an overall increase of 2,326 inmates or 10.8 percent.[77] The DOC further reports that during FY 2018-19, there were 3,956 aging inmates admitted to Florida prisons. The majority of elderly inmates in prison on June 30, 2019, are serving time for violent offenses, property crimes, and drug offenses.[78]

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 FY 2008-09 to 18,319 in FY 2018-19, and further provided that outside care is generally more expensive than treatment provided within a prison facility.[79] 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.[80]

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.[81] The National Conference of State Legislatures (NCSL) reports such discretionary release based on age has been legislatively authorized in 17 states.[82] 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

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[75] *Id*.
[76] 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.
[77] The DOC, *2018-19 Annual Report*, p. 19, available at http://www.dc.state.fl.us/pub/annual/1819/FDC_AR2018-19.pdf (last visited January 22, 2021).
[78] *Id*. at p. 21.
[79] *Id*. at. p. 19.
[80] *Id*.
[81] 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 January 22, 2021).
[82] The NCSL Aging Inmate Statistics. In addition, 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.

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.[83]

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.[84] Other states, such as Mississippi and Oklahoma, provide a term of years or a certain percentage of the sentence to be served.[85]

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 that are not eligible for release consideration.

Florida does not currently address discretionary release based on an inmate's age alone, but as discussed below Florida has discretionary release based on an inmate's medical condition.

Conditional Medical Release

Conditional Medical Release (CMR), outlined in s. 947.149, F.S., was created by the Florida Legislature in 1992,[86] as a discretionary release of inmates who are "terminally ill" or "permanently incapacitated" and who are not a danger to themselves or others.[87] The Florida Commission on Offender Review (FCOR), which consists of three members, reviews eligible inmates for release under the CMR program pursuant to the powers established in s. 947.13, F.S.[88] In part, s. 947.149, F.S., authorizes the FCOR to determine what persons will be released on CMR, establish the conditions of CMR, and determine whether a person has violated the conditions of CMR and take actions with respect to such a violation.

Eligibility Criteria

Eligible inmates include inmates designated by the DOC as a:

- "Permanently incapacitated inmate," which is an inmate who has a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a danger to herself or himself or others; or
- "Terminally ill inmate," which is an inmate who has a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate terminally ill to the extent that there can be no recovery and death is imminent, so that the inmate does not constitute a danger to herself or himself or others.[89]

Inmates sentenced to death are ineligible for CMR.[90]

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[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] Chapter 92-310, L.O.F.
[87] The FCOR, *Release Types, Post Release*, available at https://www.fcor.state.fl.us/postrelease.shtml#conditionalMedicalRelease (last visited January 22, 2021).
[88] Section 947.149(3), F.S. Section 947.01, F.S., provides that the membership of the FCOR is three-members.
[89] Section 947.149(1), F.S.
[90] Section 947.149(2), F.S.

Referral Process for Eligible Inmates

The DOC is required to identify inmates who may be eligible for CMR in accordance with the above-mentioned designations. The DOC uses available medical information as a basis for identifying eligible inmates and refers such inmates to the FCOR for consideration. In considering an inmate, the FCOR may require that additional medical evidence be produced or that additional medical examinations be conducted and may require other investigations to be made as it deems necessary.[91]

An inmate does not have a right to CMR or to a medical evaluation to determine eligibility for such release.[92] Additionally, the authority and whether or not to grant CMR and establish additional conditions of release rests solely within the discretion of the FCOR, together with the authority to approve the release plan to include necessary medical care and attention.[93]

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

- Clinical Report, including complete medical information justifying classification of the inmate as "permanently incapacitated" or "terminally ill"; and
- Verifiable release plan, to include necessary medical care and attention.[94]

The referral must be directed to the Office of the Commission Clerk who may docket the case before the FCOR. A decision will be made by a majority of the quorum present and voting.[95] The FCOR is required to approve or disapprove CMR based upon information submitted in support of the recommendation and review of the DOC file. If additional information is needed, the FCOR must continue the case for verification of the release plan, additional medical examinations, and other investigations as directed. The FCOR is required to instruct staff to conduct the appropriate investigation, which must include a written statement setting forth the specific information being requested.[96]

Victim Input for CMR

If a victim or his or her personal representative requests to be notified, the FCOR must provide victim notification of any hearing where the release of the inmate on CMR is considered prior to the inmate's release.[97] As discussed above, Art. I, s. 16 of the Florida Constitution, which was adopted in 2018 by the Florida voters, provides certain rights to victims in the Florida Constitution.[98]

[91] Section 947.149(3), F.S.
[92] Section 947.149(2), F.S.
[93] Section 947.149(3), F.S.
[94] Rule 23-24.020(1), F.A.C.
[95] Rule 23-24.020(2), F.A.C.
[96] Rule 23-24.020(3), F.A.C.
[97] Rule 23-24.020(4), F.A.C., further qualifies that this notification occurs when the name and address of such victim or representative of the victim is known by the FCOR.
[98] Art. 1, s. 16(b)(6) FLA. CONST.

The requirement to notify victims was in place prior to the constitutional amendment passage through administrative rule. Rule 23-24.025, F.A.C., provides that a victim, relative of a minor who is a victim, relative of a homicide victim, or victim representative or victim advocate must receive advance notification any time a CMR case is placed on the docket for determination by the FCOR. Notification must be made to the address found in the police report or other criminal report or at a more current address if such has been provided to the FCOR.[99]

A victim of the crime committed by the inmate, or a victim's representative, must be permitted a reasonable time to make an oral statement or submit a written statement regarding whether the victim supports the granting, denying, or revoking of CMR.[100] Additionally, other interested parties may also speak on behalf of victims since the FCOR meetings are public meetings.[101] A victim can also request that the FCOR provide notification of the action taken if he or she does not choose to appear at meetings or make a written statement.[102]

Release Conditions

The release of an inmate on CMR is for the remainder of the inmate's sentence and requires periodic medical evaluations at intervals determined by the FCOR at the time of release.[103] An inmate who has been approved for release on CMR is considered a medical releasee when released. Each medical releasee must be placed on CMR supervision and is subject to the standard conditions of CMR, which, in part, include securing the permission of the CMR officer before changing residences or leaving the county or the state; and permitting the CMR officer to visit the medical releasee's residence, employment, or elsewhere.[104] Additionally, the FCOR can impose special conditions of CMR.[105]

Revocation and Recommitment

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

- That a violation of any condition of the release has occurred; or
- His or her medical or physical condition improves to the point that the offender no longer meets the CMR criteria.[106]

<u>Revocation Due to Improved Medical or Physical Condition</u>

If it is discovered during the CMR release that the medical or physical condition of the medical releasee has improved to the extent that she or he would no longer be eligible for such release,

[99] Rule 23-24.025(1), F.A.C.
[100] Rule 23-24.025(2) and (3), F.A.C. *See* Rule 23-24.025(4), F.A.C., regarding specifics about what is allowed to be submitted or utilized during oral testimony. Rule 23-24.025(7), F.A.C., provides that victims who appear and speak must be advised that any information submitted at FCOR meetings becomes public record.
[101] Rule 23-24.025(3), F.A.C.
[102] Rule 23-24.025(5), F.A.C.
[103] Section 947.149(4), F.S.
[104] Rule 23-24.030(1), F.A.C.
[105] Rule 23-24.030(2), F.A.C.
[106] Section 947.149(5), F.S.

the FCOR may order that the medical releasee be returned to the custody of the DOC for a revocation hearing, in accordance with s. 947.141, F.S. A medical releasee who has his or her CMR revoked due to improvement in medical or physical condition must serve the balance of the sentence with credit for the time served on CMR, but does not forfeit any gain-time[107] accrued prior to release on CMR.[108]

Revocation Due to Violation of CMR Conditions

When there are reasonable grounds to believe that a medical releasee who is on CMR has violated the conditions of the release in a material respect the FCOR is authorized to have a warrant issued for the arrest of the medical releasee. A warrant must be issued if the medical releasee was found to be a sexual predator.[109] Further, if a law enforcement officer has probable cause to believe that a medical releasee who is on CMR supervision has violated the terms and conditions of his or her release by committing a felony offense then the officer must arrest the medical releasee without a warrant and a warrant need not be issued in the case.[110]

A medical releasee who is arrested for a felony must be detained without bond until the initial appearance of the medical releasee at which a judicial determination of probable cause is made. The medical releasee may be released if the trial court judge does not find probable cause existed for the arrest. However, if the court makes a finding of probable cause, such determination also constitutes reasonable grounds to believe that the medical releasee violated the conditions of the CMR release and the chief county correctional officer must notify the FCOR and the DOC of the finding within 24 hours.[111] The medical releasee must continue to be detained without bond for a period not more than 72 hours excluding weekends and holidays after the date of the probable cause determination, pending a decision by the FCOR whether to issue a warrant charging the medical releasee with violation of the conditions of CMR. If the FCOR issues such warrant, the medical releasee must continue to be held in custody pending a revocation hearing.[112]

Revocation Hearing

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

- Alleged violation; and

[107] 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. 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. Section 944.275(1) and (4)(f), F.S.

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

[109] Section 947.141(1), F.S.

[110] Section 947.141(7), F.S.

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

[112] *Id*.

- Right to:
  - Be represented by counsel.
  - Be heard in person.
  - Secure, present, and compel the attendance of witnesses relevant to the proceeding.
  - Produce documents on his or her own behalf.
  - Access all evidence used against the releasee and confront and cross-examine adverse witnesses.
  - Waive the hearing.[113]

The commissioner, who conducts the hearing, is required to make findings of fact in regard to the alleged violation within a reasonable time following the hearing and at least two commissioners must enter an order determining whether the charge of violation of CMR has been sustained based upon the findings of fact presented by the hearing commissioner or authorized representative. The panel may: revoke CMR, thereby returning the medical releasee to prison to serve the sentence imposed; reinstate the original order granting the release; or enter such other order, as it considers proper.[114]

If CMR is revoked and the medical releasee is ordered to be returned to prison, the medical releasee is deemed to have forfeited all gain-time or commutation of time for good conduct earned up to the date of release. However, if CMR is revoked due to the improved medical or physical condition of the medical releasee, the medical releasee does not forfeit gain-time accrued before the date of CMR.[115] Gain-time or commutation of time for good conduct may be earned from the date of return to prison.

Statistics

The FCOR has approved and released 94 inmates for CMR in the last three fiscal years:
- 35 in FY 2019-20;
- 38 in FY 2018-19; and
- 21 in FY 2017-18.[116]

The DOC has recommended 180 inmates for release in the past three fiscal years:
- 65 in FY 2019-20;
- 76 in FY 2018-19; and
- 39 in FY 2017-18.[117]

Currently, the DOC's role in the CMR process is making the initial designation of medical eligibility, referring the inmate's case to the FCOR for an investigation and final decision, and supervising inmates who are granted CMR.[118]

[113] Section 947.141(3), F.S.
[114] Section 947.141(4), F.S.
[115] Section 947.141(6), F.S.
[116] *See* FCOR, *2020 Annual Report*, p. 8, available at https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202020.pdf; FCOR, *2019 Annual Report*, p. 8, available at https://www.fcor.state.fl.us/docs/reports/AnnualReport2019.pdf; FCOR, *2018 Annual Report*, p. 8, available at https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202018%20WEB.pdf; (all sites last visited February 1, 2021).
[117] *Id*.
[118] The FCOR, *Agency Analysis for SB 232*, January 25, 2021, p. 2 (on file with the Senate Committee on Criminal Justice).

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.[119]

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.[120] 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 improvements in some or all facilities.[121] 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*[122] 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.[123]

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."[124] 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.[125]

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.[126] The DOC has the constitutional and statutory imperative to provide adequate health services to state prison inmates

[119] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
[120] 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 January 22, 2021) (hereinafter cited as "The PEW Trusts Prison Health Care Cost Report").
[121] *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 January 22, 2021); *See also Newman et al. v. Alabama et al.*, 349 F. Supp. 278 (M.D. Ala. 1972).
[122] 430 U.S. 325 (1977).
[123] *Id*. The Correctional Medical Authority, 2017-2018 Annual Report and Update on the Status of Elderly Offender's in Florida's Prisons, p. 1, http://www.floridahealth.gov/programs-and-services/correctional-medical-authority/_documents/annual-reports/CorrectionalMedicalAuthority-2017-2018AnnualReport.pdf (last visited January 31, 2021).
[124] The PEW Trusts Prison Health Care Cost Report, p. 4.
[125] *Id*.
[126] Sections 945.04(1) and 945.025(1), F.S.

directly related to this responsibility.[127] This medical care includes comprehensive medical, mental health, and dental services, and all associated ancillary services.[128] 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.[129]

The DOC contracts with the Centurion of Florida, LLC (Centurion) to provide comprehensive statewide medical, mental health, dental services, and operates the DOC's reception medical center. The care provided is under a managed care 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 through assessments, in part, for auditory, mobility and vision disabilities, and the need for specialized mental health treatment.[130]

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.[131]

Federal First Step Act

In December 2018, the United States Congress passed, and President Trump signed into law, the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act" or the "FIRST STEP Act" (First Step Act).[132] The law makes a number of changes to the federal criminal justice system and procedures applicable to inmates in the Federal Bureau of Prisons (BOP), including, in part, modifying provisions related to compassionate release to:

- Require inmates be informed of reduction in sentence availability and process;
- Modify the definition of "terminally ill;"
- Require notice and assistance for terminally ill offenders; and
- Require requests from terminally ill offenders to be processed within 14 days.[133]

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

- Notify the defendant's attorney, partner, and family members, not later than 72 hours after the diagnosis, of the defendant's diagnosis of a terminal condition and inform the defendant's

[127] *Crews v. Florida Public Employers Council 79, AFSCME*, 113 So. 3d 1063 (Fla. 1st DCA 2013); *See also* s. 945.025(2), F.S.
[128] The DOC, Office of Health Services, available at http://www.dc.state.fl.us/org/health.html (last visited January 31, 2021).
[129] *Id*.
[130] *Id*. *See also* the DOC Annual Report, p. 19.
[131] *Id*.
[132] The First Step Act of 2018, Pub. L. No. 115-391 (2018).
[133] 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 January 22, 2021).

attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction;
- Provide the defendant's partner and family members, including extended family, with an opportunity to visit the defendant in person not later than 7 days after the date of the diagnosis;
- Upon request from the defendant or his attorney, partner, or a family member, ensure that BOP employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction; and
- Process a request for sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member not later than 14 days from receipt of a request.[134]

The statutory time frames mentioned above begin once the Clinical Director of an institution makes a terminal diagnosis. Once the diagnosis is made, the Clinical Director will inform the Warden and the appropriate Unit Manager as soon as possible to ensure requirements are met.[135]

Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.[136] 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 Florida and its agencies and subdivisions for damages resulting from the negligence of government employees acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct. Section 768.28, F.S., applies only to "injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment ...."[137]

Section 768.28(5), F.S., limits tort recovery from a governmental entity at $200,000 per person and $300,000 per accident.[138] This limitation does not prevent a judgement in excess of such amounts from being entered, but a claimant is unable to collect above the statutory limit unless a claim bill is passed by the Legislature.[139]

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.[140, 141] Thus, the immunity may be pierced only if state employees or agents either act outside the scope of their employment, or act "in bad

[134] *Id*.
[135] *Id*.
[136] The Legal Information Institute, *Sovereign Immunity*, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited January 22, 2021).
[137] *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.).
[138] Section 768.28(5), F.S.
[139] *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).
[140] *See Peterson v. Pollack*, 2019 WL 6884887 (Fla. 4th DCA December 18, 2019).
[141] Section 768.28(9)(a), F.S.

faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."[142]

Courts 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."[143] Conduct meeting the wanton and willful standard is defined as "worse than gross negligence,"[144] and "more reprehensible and unacceptable than mere intentional conduct."[145, 146]

Effect of the Bill

The bill creates two programs for conditional release within the DOC, CMR and CAIR. The bill repeals s. 947.149, F.S., which establishes the CMR program within the FCOR and creates s. 945.0911, F.S., to establish a CMR program within the DOC. The bill also creates s. 945.0912, F.S., which establishes a CAIR program within the DOC. Both programs have the same stated purpose, which is to:

- Determine whether release is appropriate for eligible inmates;
- Supervise the released inmates; and
- Conduct revocation hearings.

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

The CAIR program also 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.

The eligibility criteria for each program differs, but both programs have very similar structures and will be discussed together below when possible.

Eligibility Criteria

The bill provides a specific exception to the 85 percent rule that allows an inmate who meets the eligibility criteria for CMR or CAIR to be released from the custody of the DOC pursuant to the applicable program prior to satisfying 85 percent of his or her term of imprisonment. The specific eligibility criteria for each program are discussed below.

[142] *Eiras v. Fla.*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017).
[143] *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).
[144] *Eiras v. Fla.*, 239, *supra* at 50; *Sierra v. Associated Marine Insts., Inc.*, 850 So.2d 582, 593 (Fla. 2d DCA 2003).
[145] *Eiras v. Fla.*, *supra* at 50; *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123 (Fla. 4th DCA 1987).
[146] *See also Kastritis v. City of Daytona Beach Shores*, 835 F.Supp.2d 1200, 1225 (M.D. Fla. 2011) (defining these standards).

CMR

The bill provides that an inmate is eligible for consideration for release under the CMR program when the inmate, because of an existing medical or physical condition, is determined by the DOC to be an inmate with a debilitating illness, a permanently incapacitated inmate, or a terminally ill inmate. The bill provides definitions for such terms, including:

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

CAIR

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.

Referral Process

The bill requires that any inmate in the custody of the DOC who meets one or more of the above-mentioned eligibility requirements must be considered for CMR or CAIR, respectively. However, the authority to grant CMR or CAIR rests solely with the DOC. In addition, the bill provides that an inmate does not have a right to release or to a medical evaluation to determine

eligibility for release on CMR pursuant to s. 945.0911, F.S., or a right to release on CAIR pursuant to s. 945.0912, F.S., respectively.

The bill requires the DOC to identify inmates who may be eligible for CMR based upon available medical information and authorizes the DOC to require additional medical evidence, including examinations of the inmate, or any other additional investigations it deems necessary for determining the appropriateness of the eligible inmate's release. Further, 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 CMR or CAIR, the DOC must refer such inmate to the respective three-member panel described above for review and determination of release.

The bill requires the DOC to provide notice to a victim of the inmate's referral to the panel immediately upon identification of the inmate as potentially eligible for release on CMR or 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 three-member panel established in s. 945.0911(1), F.S., or s. 945.0912(2), F.S., whichever is applicable, to conduct a hearing within a specified time after receiving the referral to determine whether CMR or CAIR, respectively, is appropriate for the inmate. The bill specifies that the hearing must be conducted by the panel:

- By April 1, 2022, if the inmate is immediately eligible for consideration for the CMR program or the CAIR program when the provisions take effect on October 1, 2021.
- By July 1, 2022, if the inmate becomes eligible for consideration for the CMR program or the CAIR program after October 1, 2021, but before July 1, 2022.
- Within 45 days after receiving the referral if the inmate becomes eligible for the CMR program or the CAIR program any time on or after July 1, 2022.

Before the hearing for an inmate being referred for the CMR program, the director of inmate health services or his or her designee must review any relevant information, including, but not limited to, medical evidence, and provide the panel with a recommendation regarding the appropriateness of releasing the inmate on CMR.

A majority of the panel members must agree that release on CMR or CAIR is appropriate for the inmate. If CMR or 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 CMR is considered a medical releasee upon release to the community. Similarly, the bill provides that an inmate released on CAIR is considered an aging releasee upon release to the community.

An inmate who is denied CMR or CAIR by the applicable three-member panel is able to have the decision reviewed. For an inmate who is denied release on CMR, the bill provides that the DOC's general counsel and chief medical officer must review the decision of the three-member panel and make a recommendation to the secretary. For an inmate who is denied release on CAIR, the decision is only 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 the release on CMR or CAIR and the bill provides that the appeal decision of the secretary is a final administrative decision not subject to appeal.

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

Inmate's Diagnosis of a Terminal Condition - CMR

If an inmate is diagnosed with a terminal medical condition that makes him or her eligible for consideration for release while in the custody of the DOC, subject to confidentiality requirements, the DOC must:

- Notify the inmate's family or next of kin and attorney, if applicable, of such diagnosis within 72 hours after the diagnosis.
- Provide the inmate's family, including extended family, an opportunity to visit the inmate in person within 7 days after the diagnosis.
- Initiate a review for CMR, as stated above, immediately upon the diagnosis.

If the inmate has mental and physical capacity, he or she must consent to release of confidential information for the DOC to comply with the notification requirements required.

Release Conditions

The bill requires that an inmate granted release on CMR or 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 medical releasee or 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.[147]
- Any other conditions the DOC deems appropriate to ensure the safety of the community and compliance by the medical releasee or aging releasee.

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

Additionally, the bill requires a medical releasee to have periodic medical evaluations at intervals determined by the DOC at the time of release.

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

Revocation of Conditional Release and Recommitment to the DOC

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

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

The bill provides that CMR or 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 medical releasee's CMR or the aging releasee's CAIR and return him or her to the same or another institution designated by the DOC.

Revocation Based on Medical or Physical Improvement - CMR

This provision only applies to revocation of a medical releasee's CMR.

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

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

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

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

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

Revocation Based on Violation of Conditions

The bill provides that CMR or CAIR may be revoked for violation of any release conditions the DOC establishes, including, but not limited to, a new violation of law. The bill provides that, if a duly authorized representative of the DOC has reasonable grounds to believe that a medical releasee or 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 medical releasee or aging releasee.

Further, a law enforcement officer or a probation officer may arrest the medical releasee or 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 CMR or CAIR, respectively. The law enforcement officer must report the medical releasee's or 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 medical releasee or 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 medical releasee or aging releasee may be released. If the judge determines that there was probable cause for the arrest, the judge's probable cause determination also constitutes reasonable grounds to believe that the medical releasee or aging releasee violated the conditions of the CMR or CAIR, respectively.

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

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

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

Revocation Hearing Process

CMR

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

- Alleged basis for the pending revocation proceeding against the releasee.
- Right to:
  - Be represented by counsel.[148]
  - Be heard in person.
  - Secure, present, and compel the attendance of witnesses relevant to the proceeding.
  - Produce documents on his or her own behalf.
  - Access all evidence used to support the revocation proceeding against the releasee and confront and cross-examine adverse witnesses.
  - Waive the hearing.

CAIR

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.[149]
  - 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.

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

Sovereign Immunity

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

[148] However, this bill explicitly provides that this does not create a right to publicly funded legal counsel.
[149] However, this bill explicitly provides that this does not create a right to publicly funded legal counsel.

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

The bill also amends a number of sections to conform these provisions to changes made by the Act.

These provisions of the bill are effective October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 1 of the bill relating to electronic recording of custodial interrogations may result in indeterminate local fund expenditures for equipment, maintenance, and operation. However, these provisions relate to the defense, prosecution, or punishment of criminal offenses, and criminal laws are exempt from the requirements of Art. VII, s. 18(d) of the Florida Constitution, relating to unfunded mandates.

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:

Custodial Interrogations (Section 1)

The requirements of the bill relating to electronic recording of custodial interrogations may have an indeterminate fiscal impact on local law enforcement agencies if agencies

determine that expenditures to purchase recording equipment, retain recorded statements, and store electronic recordings are necessary to comply with the requirements of the bill relating to electronically recording custodial interrogations.

Conditional Release for Certain Inmates (Sections 5-6)

Conditional Medical Release (CMR)

The Criminal Justice Impact Conference, (CJIC) has not reviewed the bill. However, CJIC reviewed PCS/CS/SB 556 (2020), which is identical to this bill, on February 10, 2020. The CJIC determined that these sections will likely result in a negative significant prison bed impact (i.e. a decrease of more than 25 prison beds).[150] Additionally, these sections will likely result in a reduction in the associated inmate healthcare costs.

The bill removes any role of determining the appropriateness of an inmate's release on CMR from the FCOR and places such comparable duties within the DOC. In Fiscal Year 2019-2020, FCOR conducted 72 CMR determinations. They report that they spent 933 hours on the investigation/determination, 164 hours on victim assistance, and 394 hours on revocations for CMR. The FCOR reports that this equates to less than 1 FTE.[151]

Conditional Aging Inmate Release (CAIR)

The CJIC has not reviewed the bill. However, the CJIC reviewed PCS/CS/SB 574 (2020), which is identical to this bill, on February 10, 2020. The CJIC determined that these sections will likely result in a negative significant prison bed impact (i.e. a decrease of more than 25 prison beds).[152]

The DOC reported that as of December 2020, there were a total of 4,169 inmates age 65 or older in its custody, and, based on the criteria set forth in the bill, only 282 of these inmates would immediately meet eligibility criteria for consideration for the CAIR program.[153]

Conditional Medical Release (CMR) and Conditional Aging Inmate Release (CAIR)

According to the DOC, the overall fiscal impact to the department is significant but indeterminate.[154]

The DOC reports that when the inmate population is impacted in small increments statewide, the Fiscal Year 2019-2020 inmate variable per diem of $22.29 is the most

[150] 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/2-10-20-criminal-justice-estimating-conference/ (last visited January 31, 2021).
[151] The FCOR, *Agency Analysis for SB 232*, January 25, 2021, p. 4 (on file with the Senate Committee on Criminal Justice).
[152] The CJIC meeting at which this bill estimate was made occurred during a meeting of the Criminal Justice Estimating Conference on February 10, 2020. The meeting is available on video on the Florida Channel at https://thefloridachannel.org/videos/2-10-20-criminal-justice-estimating-conference/ (last visited January 31, 2021).
[153] *Id.*at 12.
[154] The DOC, *2021 Agency Bill Analysis for SB 232*, February 1, 2021, p. 13 (on file with the Senate Committee on Criminal Justice).

appropriate to use to determine the fiscal impact. The variable per diem includes costs more directly aligned with individual inmate care such as medical, food, inmate clothing, personal care items, etc. The DOC's Fiscal Year 2019-2020 average per diem for community supervision was $6.01.[155]

The DOC provides the department will need 7 additional staff to coordinate the implementation and administration of the CMR and CAIR programs.[156] The staff requested by the DOC is as follows:

- 1 Attorney $60,907 (salary and benefits)
- 1 Correctional Program Administrator $77,849 (salary and benefits)
- 1 Correctional Services Consultant $66,986 (salary and benefits)
- 1 Correctional Services Assistant Consultant $55,233 (salary and benefits)
- 1 Government Operations Consultant II $60,146 (salary and benefits)
- 2 Government Operations Consultant I $58,203 (salary and benefits).[157]

The DOC reports the following other costs:

- Recurring expense – Prof light travel $23,646
- Non-recurring expense – Prof light travel $31,003
- Human Recourses Services $2,310
- Information Technology $26,100.[158]

The DOC specifies that the total cost of the CMR and CAIR programs on the department will be $595,709, $534,177 in recurring costs and $61,532 in non-recurring costs.[159]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The 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, 921.1402, 944.605, 944.70, 947.13, and 947.141.

The bill creates the following sections of the Florida Statutes: 900.06, 921.14021, 921.1403, 945.0911, and 945.0912.

This bill repeals section 947.149 of the Florida Statutes.

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[155] *Id.*at 15.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

IX. Additional Information:

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

None.

B. Amendments:

None.