

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 Children, Families, and Elder Affairs Committee

BILL: CS/SB 212

INTRODUCER: Criminal Justice Committee and Senator Oelrich

SUBJECT: Juvenile Offenders

DATE: February 21, 2012 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	Daniell	Farmer	CF	Pre-meeting
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

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

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

The Department of Corrections (DOC or department) reports that 198 inmates were sentenced to life imprisonment for nonhomicide offenses committed while the person was younger than 18 years of age.¹ This includes inmates who were sentenced for attempted murder.² Ninety-three of these inmates also had a homicide for which they were separately sentenced.³

¹ E-mail from the Dep't of Corrections to Senate professional staff (Feb. 7, 2012) (on file with the Senate Committee on Criminal Justice). The e-mail provided updated statistics from the DOC bill analysis on SB 212. See Dep't of Corrections, *2012 Bill Analysis, SB 212*, at 2 (on file with the Senate Committee on Children, Families, and Elder Affairs).

Most crimes committed by juveniles⁴ are dealt with through delinquency proceedings as set forth in ch. 985, F.S. However, the law provides a mechanism for juvenile offenders to be tried and handled as adults.⁵ There are several ways that a juvenile can be tried as an adult. For example, the juvenile can voluntarily waive juvenile court jurisdiction, which would transfer and certify a juvenile's criminal case for trial as an adult.⁶ In certain situations in which the juvenile is 14 years of age or older, the state attorney must request that the case be transferred.⁷ Additionally, the state attorney can directly file an information that requests adult sanctions be imposed on the juvenile.⁸ Finally, regardless of age, a grand jury indictment is required to try a juvenile as an adult for an offense that is punishable by death or life imprisonment.⁹

Parole

Parole is a discretionary prison release mechanism administered by the Florida Parole Commission (Commission).¹⁰ An inmate who is granted parole is allowed to serve the remainder of his or her prison sentence outside of confinement according to terms and conditions established by the Commission. Parolees are supervised by DOC probation officers.

With the implementation of the sentencing guidelines in October 1983, parole was abolished.¹¹ Accordingly, sentences imposed under the guidelines cannot result in a parole release. However, inmates serving sentences imposed for crimes committed prior to October 1, 1983, are still eligible for parole. Additionally, because the guidelines do not apply to capital felonies, sentences for certain capital felonies, under certain circumstances, committed after the guidelines went into effect retain parole eligibility.¹² Currently, there are 5,360 inmates who are eligible for parole consideration and approximately 439 persons on parole supervision.¹³ In January 2008, the Blueprint Commission of the Florida Department of Juvenile Justice released a report that included a recommendation that juveniles who received more than a 10

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

³ E-mail from the Dep't of Corrections, *supra* note 1.

⁴ Section 985.03(6), F.S., defines a juvenile as "any unmarried person under the age of 18 who has not been emancipated by order of the court and who has been found or alleged to be dependent, in need of services, or from a family in need of services; or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years."

⁵ See Part X, ch. 985, F.S.

⁶ Section 985.556(1), F.S.

⁷ Section 985.556(2) and (3), F.S.

⁸ Section 985.557, F.S.

⁹ Section 985.56, F.S.

¹⁰ The Commission has 121 employees and a \$7.7 million budget. The Commission acts as a quasi-judicial body by conducting administrative proceedings and hearings, and eliciting testimony from witnesses and victims. Fla. Parole Comm'n, *Parole Commission Facts and Frequently Asked Questions*, <https://fpc.state.fl.us/Facts.htm> (last visited Feb. 15, 2012).

¹¹ Dep't of Corrections, *supra* note 1, at 1.

¹² *Id.*; see also Fla. Parole Comm'n, *Fiscal Note/Bill Analysis Request re: SB 92* (Sept. 13, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs) (Senate Bill 92 is substantially similar to SB 212).

¹³ Fla. Parole Comm'n, *supra* note 12.

year adult prison sentence should be eligible for parole consideration.¹⁴ In 2010, Florida TaxWatch also recommended that the “Legislature should allow juvenile offenders who have served 10 years of their sentence, were convicted of crimes other than capital murder, have no prior convictions, and have demonstrated exemplary behavior while serving their sentence to be eligible for parole.”¹⁵

Clemency

Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or part of the punishment for a crime.¹⁶ The power of clemency is vested in the Governor pursuant to article IV, section 8 of the Florida Constitution. All inmates, including those who are not eligible for parole, can apply for clemency.

The Clemency Board is comprised of the governor and members of the Cabinet. The governor has discretion to deny clemency at any time for any reason and, with the approval of at least two members of the Cabinet, may grant clemency at any time and for any reason.¹⁷ There are several types of clemency, including pardon, commutation of sentence, remission of fines and forfeitures, restoration of authority to possess firearms, restoration of civil rights, and restoration of alien status under Florida law.¹⁸ The Rules of Executive Clemency provide that a person is not eligible for commutation of sentence until he or she has served at least one-third of the sentence imposed, or, if serving a minimum mandatory sentence, has completed at least one-half of the sentence.¹⁹ However, the governor may waive these requirements in cases of extraordinary merit and compelling need.

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

Resentencing as a Result of the *Graham* Decision

In 2010, the United States Supreme Court held that it is unconstitutional for a minor who does not commit homicide to be sentenced to life imprisonment without the possibility of parole.²⁰ The Court stated:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some meaningful opportunity to obtain release based on

¹⁴ Blueprint Comm’n, Fla. Dep’t of Juvenile Justice, *Getting Smart About Juvenile Justice in Florida*, 36 (Jan. 2008), available at http://www.iamforkids.org/wp-content/uploads/2010/09/Recommendation_Report_Without_Appendices.pdf (last visited Feb. 15, 2012).

¹⁵ Fla. TaxWatch, *Report and Recommendations of the Florida TaxWatch Government Cost Savings Task Force to Save More than \$3 Billion*, 47 (March 2010), available at <http://www.famm.org/Repository/Files/FL%20Tax%20Watch%20Report%202003.10.pdf> (last visited Feb. 15, 2012).

¹⁶ See generally BLACK’S LAW DICTIONARY 104 (2d pocket ed. 1996).

¹⁷ Fla. Parole Comm’n, *Rules of Executive Clemency*, at 2, available at https://fpc.state.fl.us/PDFs/clemency_rules.pdf (last visited Feb. 15, 2012).

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 9.

²⁰ *Graham v. Florida*, 130 S.Ct. 2011 (2010).

demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. . . .The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.²¹

Because parole has been abolished in Florida, any recent sentence to life imprisonment is a sentence to life without parole. Therefore, the only alternative for a person sentenced to life imprisonment for release is through executive clemency. However, according to the *Graham* Court, executive clemency is a “remote possibility.”²² Accordingly, it appears that provisions for executive clemency do not satisfy the requirement that there be a “realistic opportunity to obtain release.”²³

In the absence of legislative or executive direction, some inmates who fall under the *Graham* decision have already petitioned for and received a resentencing hearing.²⁴ There appears to be no consolidated source for obtaining the results of these resentencing hearings. However, the results of some resentencing hearings are known from news reports. These include:

- An inmate sentenced to life for the 2005 rape of a young girl when he was 17 years old was resentenced to a split sentence of seven years in prison followed by 20 years of probation.²⁵
- An inmate sentenced to four life sentences for armed robberies committed when he was 14 and 15 years old was resentenced to a term of 30 years.²⁶
- An inmate sentenced to life for sexual battery with a weapon or force committed in 2008 when he was 14 was resentenced to a term of 65 years.²⁷

III. Effect of Proposed Changes:

This bill, named the “Graham Compliance Act,” creates an opportunity for a juvenile offender who is sentenced to life imprisonment for a nonhomicide offense to be eligible for resentencing. A “juvenile offender” is defined as an offender who was younger than 18 years of age at the time

²¹ *Id.* at 2030.

²² *Id.* at 2027.

²³ *Id.* at 2034.

²⁴ See *Cunningham v. State*, 74 So. 3d 568 (Fla. 4th DCA 2011); *Garland v. State*, 70 So. 3d 609 (Fla. 1st DCA 2010).

²⁵ Tom Brennan, *Rapist who was serving life sentence will get second chance*, THE TAMPA TRIBUNE, Aug. 30, 2011, available at <http://www2.tbo.com/news/breaking-news/2011/aug/30/3/rapist-who-was-serving-life-resentenced-to-seven-y-ar-254096/> (last visited Feb. 16, 2012).

²⁶ John Barry, *Man who served 11 years fails to persuade Hillsborough judge to set him free*, TAMPA BAY TIMES, Oct. 6, 2011, available at <http://www.tampabay.com/news/courts/criminal/man-who-served-11-years-fails-to-persuade-hillsborough-judge-to-set-him/1195464> (last visited Feb. 16, 2012).

²⁷ Alexandra Zayas, *Teenage rapist Jose Walle resentenced to 65 years in prison*, TAMPA BAY TIMES, Nov. 18, 2010, available at <http://www.tampabay.com/news/courts/criminal/teenage-rapist-jose-walle-re-sentenced-to-65-years-in-prison/1134862> (last visited Feb. 16, 2012).

the nonhomicide offense was committed. Consistent with the opinion in *Manuel v. State*,²⁸ “nonhomicide offense” is defined as an offense that did not result in the death of a human being.

A juvenile offender with a life sentence must be incarcerated for 25 years before becoming eligible for resentencing under the provisions of the bill. In addition, the offender must not have received an approved disciplinary report during the three years preceding the resentencing hearing.²⁹ If a juvenile offender meets these criteria, the Department of Corrections (DOC or department) must request that the court of original jurisdiction hold a resentencing hearing.

Nine of the 198 inmates who are serving a life sentence for committing a nonhomicide offense when they were younger than 18 years old have already served 25 years and one more has served 24 years. Six of those 10 inmates have not had an approved disciplinary report during the last three years.³⁰

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

- Whether the juvenile offender poses the same risk to society as at the time of original sentencing;
- The wishes of the victim or the opinions of the victim’s next of kin, with specific direction that the absence of the victim or next of kin at the hearing may not be a factor in the decision;
- Whether the juvenile offender was a relatively minor participant³¹ in the criminal offense or acted under extreme duress or domination of another person;
- Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense;
- Whether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected her or his behavior;
- Whether the juvenile offender, while in the custody of the department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates;
- Whether the juvenile offender has successfully completed any General Educational Development or other educational, technical, work, vocational, or self-rehabilitation program;
- Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before she or he committed the offense;
- The results of any mental health assessment or evaluation of the juvenile offender;
- The facts and circumstances of the offense, including its severity; and

²⁸ 48 So. 3d 94 (Fla. 2d DCA 2010).

²⁹ A disciplinary report is a document that initiates the process of disciplining an inmate for a violation of Department of Correction (DOC or department) rules. Upon receiving a disciplinary report, the inmate must be afforded administrative due process before the report is approved. The inmate’s due process rights include further investigation, a hearing to determine guilt or innocence and appropriate punishment, and final review by the warden or the regional director of institutions to approve, disapprove, or modify the result of the hearing. The department’s rules concerning disciplinary reports and the inmate disciplinary process are found in chs. 33-601.301 – 33-601.314 of the Florida Administrative Code.

³⁰ E-mail from the Dep’t of Corrections, *supra* note 1.

³¹ The bill does not provide guidance as to what a “relatively minor participant” means.

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

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

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

The bill provides that it will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Retroactivity

The bill does not state whether it is intended to apply to sentences that were imposed for crimes that were committed prior to when it becomes law. A change in a statute is presumed to operate prospectively unless there is a clear showing that it is to be applied retroactively and its retroactive application is constitutionally permissible.³²

There are indications that this bill is intended to apply to sentences that have already been imposed. The fact that the bill is to be cited as the "Graham Compliance Act" arguably

³² *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999); *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999).

demonstrates legislative intent that the bill is to apply retroactively to provide a “meaningful opportunity for review” for offenders affected by the *Graham* decision. The bill applies to all offenders who were younger than 18 years of age at the time the nonhomicide offense was committed.

If it is determined that the bill is intended to be applied retroactively, the second step of the analysis is to determine whether retroactive application of the statute is constitutionally permissible. Article X, section 9 of the Florida Constitution (the “Savings Clause”) provides that “repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” This means that the criminal statutes in effect at the time an offense was committed apply to any prosecution or punishment for that offense.³³

The Savings Clause prevents retroactive application of a statute that affects prosecution or punishment for a crime, but does not prohibit retroactive application of a statute that is procedural or remedial in nature. The aspect of the bill that provides for a resentencing hearing is procedural or remedial in nature. Therefore, it can be applied retroactively to the extent that it allows resentencing for a punishment that would have been permissible under the law in effect at the time the offense was committed. However, a Savings Clause analysis may not be required because it could be argued that the federal constitutional protection against cruel and unusual punishment outweighs the Florida Constitution’s Savings Clause.

The *Graham* Decision

According to the Florida Parole Commission (Commission), the proposed legislation may be challenged under the proposition that it does not give full effect to the *Graham* decision, which required a “meaningful opportunity” for release, because the bill requires that a juvenile offender to serve 25 years of his or her sentence before being eligible for resentencing.³⁴ Although the *Graham* Court stated that the “Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide” the Court also stated that “a State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.” Also, in *Thomas v. State*, the court held that a sentence of concurrent terms of 50 years was not the functional equivalent of a life sentence for purposes of the Eighth Amendment.³⁵ Taking into account the holding in *Graham* and the fact that at least one court did not consider a 50 year sentence to violate the Eighth Amendment, it does not appear that a court would consider the 25 year minimum in the bill as denying an inmate a “meaningful opportunity” for release.

Equal Protection

Finally, this bill provides a juvenile offender who is sentenced to life imprisonment for a

³³ See *State v. Smiley*, 966 So. 2d 330 (Fla. 2007).

³⁴ Fla. Parole Comm’n, *supra* note 12.

³⁵ *Thomas v. State*, 2011 WL 6847814 (Fla. 1st DCA 2001).

nonhomicide offense an opportunity for resentencing. However, some juvenile offenders who commit nonhomicide offenses may not receive a life sentence, but rather a term-of-years sentence, such as 99 years or some other lengthy sentence. The First District Court of Appeal has stated that “at some point, a term-of-years sentence may become the functional equivalent of a life sentence.”³⁶ If this happens, an argument could be made by a juvenile offender who receives a term-of-years sentence that is the functional equivalent to a life sentence, that he or she is similarly situated as an offender who receives a life sentence, which could implicate the equal protection clause.³⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference reviewed the impact of House Bill 5, which is substantively similar to this bill, on the state prison population and determined that it would result in an insignificant savings.³⁸

According to the Department of Corrections, nine of the 198 inmates who are serving a life sentence for committing a nonhomicide offense when they were younger than 18 years old have already served 25 years and one more has served 24 years. Six of those 10 inmates have not had an approved disciplinary report during the last three years.³⁹ The bill may have an impact on the court system, however, the impact should be minimal considering the number of inmates who would be eligible for resentencing under the requirements of the bill.

VI. Technical Deficiencies:

As mentioned in the “Other Constitutional Issues” section above, the bill does not specify whether it is intended to apply retroactively. The Legislature may wish to amend the bill to clarify whether it is to apply retroactively.

³⁶ *Id.* at 2.

³⁷ The Equal Protection clause provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. See U.S. CONST. amend. XIV, s. 1 and FLA. CONST. art. I, s. 2. According to the Commission, in at least one case, a resentencing to a term-of-years sentence is being challenged as a violation of *Graham*, arguing that the term-of-years is the functional equivalent to a life without parole sentence. Fla. Parole Comm’n, *supra* note 12.

³⁸ Office of Economic and Demographic Research, *Criminal Justice Impact Conference, 2012 Legislature* (Feb. 9, 2012), available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (follow “2012 Session Bills and Links to Backup Materials” hyperlink) (last visited Feb. 16, 2012).

³⁹ E-mail from the Dep’t of Corrections, *supra* note 1.

On line 46, the bill requires the Department of Corrections to request the court to “hold a resentencing hearing for that *juvenile*.” Because the bill requires the inmate to have served at least 25 years before being eligible for a resentencing hearing, the inmate will no longer be a “juvenile.” For clarification and consistency, the Legislature may wish to amend the bill to use the term “juvenile offender” on line 46. Additionally, on line 88 of the bill, the term “offender” is used and, for consistency purposes, the Legislature may wish to amend the bill to use the term “juvenile offender.”

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Criminal Justice on February 9, 2012:

The committee substitute provides for a resentencing hearing by the sentencing court and potential release on probation rather than consideration for parole by the Parole Commission.

- B. **Amendments:**

None.