The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	CS/SB 92
INTRODUCER:	Criminal Justice Committee and Senator Joyner
SUBJECT:	Reducing or Suspending the Sentence of a Juvenile Offender
DATE:	November 7, 2011 REVISED:

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

Please see Section VIII. for Additional Information:

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

I. Summary:

This bill provides for a resentencing hearing at age 25 for certain inmates who were prosecuted and sentenced as adults for offenses committed while they were minors. These "juvenile offenders" are inmates who were sentenced to a single or cumulative term of 10 or more years for committing one or more nonhomicide offenses when they were less than 18 years of age. In order to be eligible for a resentencing hearing under the bill's provisions, the juvenile offender must have met certain educational goals and must not have received an approved disciplinary report for the preceding three years.

This bill substantially amends section 947.16 of the Florida Statutes.

II. Present Situation:

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

> "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance."

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

The Department of Corrections (department) reports that 219 inmates were sentenced to life imprisonment for nonhomicide offenses committed while they were under 18 years of age.[1] This includes inmates who were sentenced for attempted murder.[2] Ninety-seven of these inmates also had a homicide for which they were separately sentenced.

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

Parole

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

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

Inmates who were sentenced as adults for offenses committed prior to reaching 18 years of age are eligible for parole on the same basis as other inmates. An inmate who is granted parole is

[1] Department of Corrections Analysis of Senate Bill 92, September 8, 2011, page 2.
[2] In Manuel v. State, 48 So.3d 94 (Fla. 2d Dist. 2010), the Second District Court of Appeals held that attempted murder is a nonhomicide offense because the act did not result in the death of a human being.
[3] Section 985.03(6), F.S., defines juvenile as "any unmarried person under the age of 18 who has not been emancipated by order of the court and who has been found or alleged to be dependent, in need of services, or from a family in need of services; or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years."
[4] Section 985.58, F.S.
[5] Parole Commission Analysis of Senate Bill 92, September 13, 2011, page 2.

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

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

Clemency

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

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

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

Resentencing as a Result of Graham Decision

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

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

[6] Report and Recommendations of the Florida Tax Watch Government Cost Savings Task Force to Save More than $3 Billion," Florida Tax Watch, March 2010, p.47.

[7] "Rapist who was serving life sentence will get second chance," August 30, 2011, last viewed on November 7, 2011 at http://www2.tbo.com/news/breaking-news/2011/aug/30/3/rapist-who-was-serving-life-resentenced-to-seven-y-ar-254096/.

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

III. Effect of Proposed Changes:

This bill, named the "Second Chance for Children Act," amends s. 947.16, F.S., to provide that certain inmates may be eligible for a resentencing hearing for nonhomicide offenses that were committed when they were less than eighteen years old. The bill states that upon reaching twenty-five years of age, an inmate may petition the original sentencing court to hold a resentencing hearing if he or she meets the following criteria:

- The inmate is serving a sentence for one or more offenses committed when he or she was seventeen years old or younger;
- The sentence is for a single or cumulative term of incarceration for ten years or more; and
- The offense or offenses were "nonhomicide offenses," defined as an offense that did not involve the death of a human being.[10]

The bill refers to an inmate who meets the above criteria as a "juvenile offender." The department reports that approximately 900 inmates meet the definition of juvenile offender, including approximately 500 who also have a homicide offense.[11] The bill does not exclude juvenile offenders who also have a homicide conviction from being resentenced for nonhomicide offenses that include a single or cumulative sentence for ten or more years.[12]

A juvenile offender's petition for resentencing must allege that:

- He or she successfully completed the GED (general education development) program or received a high school diploma, unless the requirement is waived because of disability. Waiver for disability must be shown by the inmate's individual education plan, 504 accommodation plan under s. 504 of the federal Rehabilitation Act of 1973, or by a psychological evaluation;[13] and
- He or she has not received an approved disciplinary report from the department for the three years preceding filing of the petition.[14,15]

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[8] "Man who served 11 years fails to persuade Hillsborough judge to set him free," October 6, 2011, last viewed on November 7, 2011 at http://www.tampabay.com/news/courts/criminal/man-who-served-11-years-fails-to-persuade-hillsborough-judge-to-set-him/1195464.

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

[10] It is not clear whether nonhomicide offenses include only offenses that have death of a human being as an element of the offense, or whether the factual circumstances of the offense would have to be examined.

[11] Email from department personnel to Criminal Justice Committee staff dated November 7, 2011.

[12] It is not unusual for a convicted offender to be resentenced for only one of multiple convictions as the result of an appellate decision or due to factors that are unique to that conviction.

[13] Determination of whether an inmate has either met or received a waiver for the education requirement would require separate examination of each inmate's files, so the department is unable to provide the number of juvenile offenders who meet this requirement.

[14] A disciplinary report is a document that initiates the process of disciplining an inmate for a violation of department rules. Upon receiving a disciplinary report, the inmate must be afforded administrative due process before the report is approved. The inmate's due process rights include further investigation, a hearing to determine guilt or innocence and appropriate punishment, and final review by the warden or the regional director of institutions to approve, disapprove, or modify the

If the juvenile offender meets all of these threshold requirements, the court must schedule a resentencing hearing within 90 days after the petition is filed to determine whether the inmate's sentence should be reduced or suspended. The court may appoint an attorney to represent the juvenile offender at the hearing. At the hearing, the court is required to consider a number of factors in determining whether the inmate had been sufficiently rehabilitated to warrant a reduction or suspension of sentence. These factors are:

- The juvenile offender's age, maturity, and psychological development at the time of the offense or offenses;
- Any physical, sexual, or emotional abuse of the juvenile offender before she or he committed the offense or offenses;
- Any showing of insufficient adult support or supervision of the juvenile offender before the offense or offenses;
- Whether the juvenile offender was a principal or an accomplice, was a relatively minor participant, or acted under extreme duress or domination by another person;
- The wishes of the victim or the opinions of the victim's next of kin;
- The results of any available psychological evaluation administered by a mental health professional as ordered by the court before the sentencing hearing;
- Any showing of sincere and sustained remorse by the juvenile offender for the offense or offenses;
- The juvenile offender's behavior while in the custody of the department, including disciplinary reports;
- Whether the juvenile offender has successfully completed or participated in educational, technical, or vocational programs and any available self-rehabilitation programs while in the custody of the department;
- Any showing by the juvenile offender of a post-release plan, including contacts made with transitional organization, faith and character-based organizations, or other reentry service programs; and
- Any other factor relevant to the offender's rehabilitation.

If the court reduces or suspends the sentence in accordance with the bill, the juvenile offender must participate in a reentry program for two years after release. Under the bill, a "reentry program" is a program that promotes effective reintegration of an offender back into the community upon release and provides vocational training, placement services, transitional housing, mentoring, or drug rehabilitation.

If the court does not reduce or suspend the sentence, the inmate may petition the court for another hearing 7 years after the hearing, and may do so every 7 years after an unsuccessful hearing.

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result of the hearing. The department's rules concerning disciplinary reports and the inmate disciplinary process are found in Chapter 33-601.301 – 33-601.314, Florida Administrative Code.

[15] The department has provided data indicating that 53 of the 219 *Graham* inmates have not received an approved disciplinary report in the past three years. If this percentage of approximately 25% who are disciplinary report free holds for all juvenile offenders, approximately 225 would currently be eligible for a resentencing hearing if they have met the educational requirement.

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

Other Potential Implications:
The bill specifically provides that it applies "notwithstanding any other law to the contrary." This would allow a juvenile offender who commits an offense after the effective date to be resentenced to less than a minimum mandatory sentence. However, retroactive application of the "notwithstanding clause" may be prohibited by the Savings Clause of the Florida Constitution. This is discussed in the "Other Constitutional Issues" section below.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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

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

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

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

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

Therefore, it appears that the provision for a resentencing hearing can be applied to offenses committed before the effective date of the bill. However, the Saving Clause would prevent a reduction of sentence below what was permissible at the time of the offense.[16]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet considered the fiscal impact of this bill on the state prison population. However, assuming a portion of the 900 cases receive sentence reductions, this bill will likely reduce the costs associated with prison beds.

The resentencing hearings contemplated by the bill would have some fiscal impact on the judiciary, state attorneys, and public defenders.

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

VI. Technical Deficiencies:

It is recommended that the bill be amended to clarify whether it is to apply retroactively and whether the term "nonhomicide offenses" includes only offenses for which death of a human being is an element of the offense.

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 November 3, 2011:

- Provides for eligible inmates to have a resentencing hearing upon reaching 25 years of age, rather than creating a possibility of parole after being incarcerated for 25 years.
- Expands the bill to include more inmates in its application. The bill applied to inmates who received a life sentence for a nonhomicide offense committed when they were 17 years old or less. The CS expands eligibility to include inmates who received a single or cumulative sentence of ten years or more for one or more nonhomicide offenses committed when they were 17 years old or less.

B. Amendments:

None.