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 384
INTRODUCER:	Senator Bradley
SUBJECT:	Juvenile Sentencing
DATE:	January 3, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Favorable**
2.			JU	
3.			ACJ	
4.			AP	

I. Summary:

SB 384 conforms Florida law concerning the sentencing of juvenile offenders to the requirements of the Eighth Amendment as set forth in recent opinions of the United States Supreme Court. It provides that any offender who is convicted of murder committed before he or she was 18 years old can be sentenced to life imprisonment only after a mandatory hearing at which the judge considers specified factors relating to the offender's age and attendant circumstances. For capital offenses, the judge must impose a minimum sentence of at least 35 years if life imprisonment is not appropriate.

The bill also provides for a judicial hearing to review any sentence of more than 25 years (including a life sentence) that is imposed for a non-homicide offense committed when the offender was less than 18 years old. The offender may request the sentence review after serving 25 years of the sentence. If the reviewing court determines that the offender has been rehabilitated and is fit to reenter society, the offender must be released with a modified sentence that requires serving a minimum term of 5 years of probation. Otherwise, the court must enter a written order stating the reasons for not modifying the sentence.

This bill has an effective date of July 1, 2014.

II. Present Situation:

In recent years, the U.S. Supreme Court has issued several opinions addressing the application of the Eighth Amendment's prohibition against cruel and unusual punishment in relation to the punishment of juvenile offenders.[1] The first of these was *Roper v. Simmons*, 543 U. S. 551

[1] The term "juvenile offender" refers to an offender who was under 18 years of age at the time of committing the offense 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

(2005), in which the Court found that juvenile offenders cannot be subject to the death penalty for any offense. More recently, the Court expanded constitutional doctrine regarding punishment of juvenile offenders in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

Graham v. Florida

In *Graham*, the Court held that a juvenile offender cannot be sentenced to life in prison without the possibility of parole for any offense other than a homicide. 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."[2] Because Florida has abolished parole[3] and the Court deems the possibility of executive clemency to be remote,[4] currently a juvenile offender in Florida cannot be given a life sentence for a non-homicide offense.

Graham applies retroactively to previously sentenced offenders because it established a fundamental constitutional right.[5] 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 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. This has led to different results among the circuits in reviewing sentences for a lengthy term of years. The First Circuit Court of Appeal recognizes that a lengthy term of years is a *de facto* life sentence if it exceeds the juvenile offender's life expectancy.[6] On the other hand, the Fourth and Fifth Circuit Courts of Appeal have strictly construed *Graham* to apply only to life sentences and not to affect sentences for a lengthy term of years.[7]

On September 17, 2013, the Florida Supreme Court heard oral argument in *Gridine v. State*, 89 So.3d 909 (Fla. 1st Dist. 2011) and *Henry v. State*, 82 So.3d 1084 (Fla. 5th Dist. 2012). In *Gridine*, the First District Court of Appeal found that a 70 year sentence was not the equivalent

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 more than 13 years old 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.

[2] *Graham* at 2034

[3] 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.

[4] *Graham* at 2027

[5] *See, e.g., St. Val v. State*, 107 So.3d 553 (Fla. 4th DCA 2012); *Manuel v. State*, 48 So.3d 94 (Fla. 2d DCA 2010).

[6] *Adams v. State*, --- So.3d ---, 37 Fla.L.Weekly D1865 (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)).

[7] *See Guzman v. State*, 110 So.3d 480 (Fla. 4th Dist. 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 Dist. 2013).

of life. In *Henry*, the Fifth District Court of Appeal upheld a sentence of 90 years because *Graham* does not prohibit a lengthy term of years.

Miller v. Alabama

In *Miller*, the Court held that juvenile offenders who commit homicide cannot 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 consideration of factors related to the offender's age must be considered before a life without parole sentence can be imposed. The Court also indicated that it expects that few juvenile offenders will be found to merit life without parole sentences.

The majority opinion in *Miller* noted that 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."[8] Although the Court did not require consideration of specific factors, it highlighted the following concerns:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g., Graham*, 560 U.S., at ––––, 130 S.Ct., at 2032 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina*, 564 U.S. ——, ——, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[9]

Section 775.082, F.S., provides that the only permissible punishments for a capital offense are the death penalty or life imprisonment. As the result of the Court's holdings in *Roper* (invalidating the death penalty for juvenile offenders) and *Miller*, there is currently no statutory punishment for a juvenile who commits capital murder. In *Horsley v. State*, 121 So.3d 494 (Fla. 5th Dist. 2013), the Fifth District Court of Appeal applied the principle of statutory revival in concluding that the only possible sentence for a juvenile convicted of capital murder is life with

[8] *Miller* at 2467.
[9] *Miller* at 2468.

the possibility of parole after 25 years.[10] The Florida Supreme Court has accepted jurisdiction of *Horsley* to address the question of whether *Miller* operates to revive this earlier sentence previously contained in the 1993 statute.[11]

Other state and federal courts have issued differing opinions as to whether *Miller* applies retroactively, but there is agreement among Florida appellate courts that have addressed this question. The First and Third District Courts of Appeal view *Miller* as a procedural change in the law that does not apply retroactively to sentences that were final before the opinion was issued.[12] The other District Courts of Appeal and the Florida Supreme Court have not addressed the retroactivity issue.[13] However, the Florida Supreme Court has scheduled oral argument on March 6, 2014 to address the question of whether *Miller* should be given retroactive effect.[14]

Graham and Miller Inmates

The Department of Corrections reports that it has custody of 222 juvenile offenders who received a mandatory life sentence for capital murder (*Miller* inmates); 43 inmates who received life sentences for non-homicide offenses (*Graham* inmates);[15] and 39 inmates who received life sentences for committing second degree murder, but who could have been sentenced to a lesser term.[16]

Life Expectancy

The Center for Disease Control's United States Life Tables for 2008 (the most recent published) reflect the following remaining life expectancies for 17-18 year olds in the United States:[17]

[10] 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 is constitutional under *Miller* when applied to a juvenile offender.
[11] *Id.*
[12] *See Gonzalez v. State*, 101 So.3d 886 (Fla. 1st DCA 2012); *Geter v. State*, 115 So.3d 385 (Fla. 3d DCA 2012).
[13] The United States Court of Appeals for the Eleventh Circuit, whose geographical jurisdiction includes cases arising in Florida, has also held that Miller does not apply retroactively to cases that are not on direct appeal (*In re Morgan*, 713 F.3d 1365 (11th Cir. 2013)).
[14] The Court will be considering the appeal of *Falcon v. Graham*, 111 So.3d 973 (Fla. 1st Dist. 2013).
[15] This includes inmates who were sentenced for attempted murder. 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.
[16] The information is derived from an attachment to an e-mail dated March 22, 2013 from Department of Corrections (DOC) staff to Senate Criminal Justice Committee staff, which is on file with the Senate Criminal Justice Committee. A follow-up e-mail dated January 3, 2014 from DOC staff (on file with Senate Criminal Justice Committee) indicates there have been no significant changes in this information.
[17] The information is from Tables 5, 6, 8, 9, 11 and 12 in the *United States Life Tables, 2008*, National Vital Statistics Reports, Volume 61, Number 3 (September 24, 2012), available at www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf (last visited on January 2, 2014).

Remaining Life Expectancy: 17-18 Year Old Persons in the United States	
Hispanic Females	67.0 years
White Females	64.5 years
Hispanic Males	62.1 years
Black Females	61.3 years
White Males	59.8 years
Black Males	54.9 years

Parole

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.[18]

III. Effect of Proposed Changes:

The bill amends s. 775.082, F.S., to conform Florida law concerning the sentencing of juvenile offenders to the requirements of the Eighth Amendment set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). It does so by: (1) making procedural changes at the sentencing phase for juvenile offenders who are convicted of a murder for which they can be imprisoned for life; and (2) creating a procedure to review the sentence of juvenile offenders after they are incarcerated for 25 years if they are serving a sentence for committing a non-homicide offense.

***Graham* Defendants**

The bill does not change the procedure for original sentencing of juvenile offenders for non-homicide offenses. However, it gives juvenile offenders who are sentenced to more than 25 years (including those sentenced to life) the opportunity to have a resentencing hearing after 25 years of incarceration. The bill requires the Department of Correction to notify the offender of the right to have a resentencing hearing 18 months before the beginning of his or her 25th year of incarceration. If the offender requests the resentencing hearing, the sentencing court must hold a hearing at which it considers:

- Whether the offender demonstrates maturity and rehabilitation.
- Whether the offender is at the same level of risk to society as at the time of the initial sentencing.
- The opinion of the victim or the victim's next of kin, including previous statements made during the trial or initial sentencing phase if the victim or the next of kin chooses not to participate in the resentencing hearing.

[18] "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.

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

If the court finds that the offender has been rehabilitated and reasonably believes that the offender is fit to reenter society, it must impose a probationary term of at least 5 years. Otherwise, it must enter a written order stating the reasons for not modifying the sentence.

The bill does not expressly state whether its provision relating to a 25-year resentencing hearing for non-homicide offenders is intended to apply retroactively. Therefore, it is presumed to apply prospectively.[19] It is unclear, however, whether it is intended to apply only to those offenders whose offenses are committed after the effective date of the bill or to all offenders who have not served 25 years of imprisonment prior to the effective date.

***Miller* defendants and other juvenile offenders who commit homicide**

The bill provides for a mandatory sentencing hearing to determine whether a juvenile offender who is convicted of a capital felony (or an offense that is reclassified as a capital felony) will be sentenced to life imprisonment. The bill requires the court to sentence the juvenile offender to life imprisonment if it concludes that life imprisonment is appropriate. In making its determination, the court must consider the following factors that reflect the areas of concern expressed by the United States Supreme Court in *Miller*:

- The nature and circumstances of the offense committed by the defendant.
- The effect of the crime on the victim's family and on the community.
- The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
- The defendant's background, including his or her family, home, and community environment.
- The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
- The extent of the defendant's participation in the offense.
- The effect, if any, of familial pressure or peer pressure on the defendant's actions.
- The nature and extent of the defendant's prior criminal history.

[19] *See 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).

- The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
- The possibility of rehabilitating the defendant.

If the sentencing court concludes that life imprisonment is not appropriate, it must sentence the offender to imprisonment for a term of at least 35 years.

The sentencing court must also consider the above factors in sentencing a juvenile offender who has been convicted of murder under s. 782.04, F.S., which is classified as a life felony or a first-degree felony punishable by a term of years not exceeding life imprisonment. Such an offender can only be sentenced to life imprisonment or to imprisonment for a term of years equal to life imprisonment[20] if the court considers the factors and concludes that a life sentence is appropriate.[21] If the court concludes that a life sentence is inappropriate, it is not required to sentence the offender to a minimum of 35 years as it is in capital cases.

The bill does not state whether this provision relating to juvenile murderers is intended to apply retroactively. Therefore, it is presumed to apply prospectively.[22] The implications of this with regard to those convicted of murders for which a life sentence is mandatory are discussed in paragraph D of the "Constitutional Issues" section of this analysis.

Correction of Cross-references

Sections 3, 4, 5, and 6 of the bill correct cross-references to s. 775.082(3), F.S., that are found in s. 316.3026(2), F.S., s. 373.430(3), F.S., s. 403.161(3), F.S., and s. 648.571(3), F.S., respectively. The corrections are non-substantive and are required by the renumbering of paragraphs in s. 775.082(3), F.S., due to the insertion of a new paragraph (b).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[20] The bill creates the phrase "term of years equal to life imprisonment," leaving the courts to decide whether a particular term of years is the equivalent of a life sentence.
[21] Although *Miller* technically does not apply to non-mandatory life sentences, requiring consideration of the sentencing factors avoids the possibility of an equal protection claim by a juvenile offender who receives a life sentence after less consideration than is required for a juvenile offender who commits a more serious offense.
[22] See footnote 19.

D. Other Constitutional Issues:

Retroactivity of Provisions Relating to *Miller* (Section 1 of the bill)

The bill does not specify whether its provisions are intended to apply retroactively or prospectively. 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).

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.

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). However, it is likely that the provisions of the Savings Clause in the Florida Constitution would be trumped by a constitutional imperative of the United States Constitution if there is no way to satisfy both clauses.

Florida opinions by the First and Third District Courts of Appeal currently indicate that *Miller* does not apply retroactively to juvenile offenders who were sentenced to a mandatory life sentence for murder if their appeals were final before the *Miller* opinion was issued.[23] Applying this case law, the Savings Clause, and the principle that a law is considered to operate prospectively unless it specifically states that it is to be applied retroactively, it appears the following statements can be made:

- The bill does not apply retroactively because it does not expressly state that it is intended to apply retroactively. Additionally, retroactive application of this provision would violate the Savings Clause because it creates a new penalty that affects the punishment for previously committed offenses.
- The bill should not affect the situation of juvenile offenders who were sentenced to a mandatory life sentence for murder and whose appeals were final before *Miller* based on the previously discussed Florida district court cases. (However, the Florida Supreme Court will have an opportunity to definitively address this issue when hearing oral argument on March 6, 2014.)[24]

[23] See footnote 12.
[24] See footnote 14.

- The bill applies prospectively to juvenile offenders who commit capital murder after the effective date. For this group, the bill resolves the problem created by the lack of statutory guidance resulting from the unconstitutionality of the statute as applied to them.
- Because the bill does not apply retroactively, it does not resolve the sentencing problem with regard to juveniles convicted of a murder for which a life sentence is mandatory in the following situations: (1) the offense was or will be committed before the bill's effective date; and (2) the offender's appeals were not final before *Miller*. However, the Florida Supreme Court could find that *Miller* should be given retroactive effect and/or that the Legislature intended for the bill to apply retroactively to this group because Section 1 appears to be intended to resolve the current lack of a constitutionally-acceptable sentence alternative to mandatory life imprisonment. In such case, or if the bill were amended to expressly apply retroactively to this group, it appears that the constitutional requirement to comply with *Miller* would override the Savings Clause violation.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) has not yet considered whether the bill will have an impact on the need for prison beds. The bill will potentially have an impact on the court system to the extent that sentencing and resentencing hearings for offenders affected by the bill may require more time and resources than current sentencing proceedings. However, according to the State Courts Administrator, any such fiscal impact is indeterminate at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 775.082 of the Florida Statutes. This bill creates an unnumbered section of the Florida Statutes. This bill amends the following sections of the Florida Statutes to conform to cross-references: 316.3026, 373.430, 403.161, and 648.571.

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.