

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 21, 1998 Revised: _____

Subject: Proposing a Constitutional Amendment Relating to Clemency

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Barrow</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u> </u>	<u> </u>	<u>WM</u>	<u>Withdrawn</u>
3.	<u> </u>	<u>Krasovsky</u>	<u>RC</u>	<u>Favorable</u>
4.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

Senate Joint Resolution 610 proposes an amendment to the Florida Constitution that relates to the length of sentence that an offender serves. The Senate Joint Resolution would propose a revision to Article IV, section 8 of the Florida Constitution, which addresses clemency. It would require state prisoners to serve at least 85 percent of their court-imposed term-of-years, unless granted a pardon or clemency.

The joint resolution would also propose a constitutional requirement that state prisoners who are sentenced to life imprisonment be incarcerated for the rest of their natural lives, unless granted pardon or clemency.

This joint resolution would substantially amend section 8, Article IV of the Florida Constitution.

II. Present Situation:

A. The Status of Florida's Prison Population

In the mid-1980's, Florida's prison system began to experience a substantial rise in the number of admissions. In fiscal year 1989-90, the state prison system experienced the unprecedented number of 44,701 inmate admissions. Florida Department of Corrections, *1993-94 Annual Report: The Guidebook to Corrections in Florida*, p. 54 (Tallahassee, Florida) (September 14, 1994).

Throughout the 1970's, 80's, and early 90's, the State of Florida was engaged in federal court litigation in *Costello v. Singletary*, Nos. 72-109-Civ-J-14, U.S. Dist. Ct. (M.D. Fla.) (Final Settlement, 147 F.D.R. 258 (1993)), due to prison overcrowding, among other prison-related issues. Partial settlement was reached in *Costello* in 1980 which resulted in a consent agreement

as the lawsuit related to inmate overcrowding. *Costello v. Wainwright*, 389 F. Supp. 1100 (M.D. Fla. 1980). In that consent agreement, state officials agreed to maintain the inmate population of the state correctional facilities system within 133 percent of the system's design capacity. *Id.* Unable to adequately deal with the record number of admissions that the prison system was experiencing, several types of early release mechanisms were utilized to help alleviate the prison system capacity in order to maintain capacity within the lawful confines mandated in *Costello*.

B. The Effects of Prison Overcrowding

Mechanisms that were created over time that had the effect of ultimately reducing the length of an offender's court-imposed incarcerative sentence included: administrative gain-time, provisional credits, mandatory conditional release, and control release, among others. Created during special session in 1989 and effective September 1, 1990, the Control Release Authority released a total of 76,580 inmates on control release through December, 1994.

As a result of all of the conditions present at the time, by 1993, inmates were serving, on average, approximately 35 percent of their court-imposed prison sentence. *See* Florida Joint Legislative Management Committee, Division of Economic and Demographic Research, *Final Report of the Criminal Justice Estimating Conference*, p. 49 (Tallahassee, Florida) (on file with comm.) (held July 12, 1995) [hereinafter *C.J. Estimating Conference Final Report*]. The Department of Corrections maintains that offenders sentenced after January, 1995 will serve on average 75 percent of their court-imposed sentence under current conditions. However, for inmates in the prison system as of June, 1995, the average percent of sentence served was 61.6 percent. *Id.*

Many mechanisms that have the effect of releasing inmates "early" have been repealed by the Legislature, such as administrative gain-time and provisional credits. However a U.S. Supreme Court decision has held that such credits could not be retroactively taken away from an inmate because it was a constitutional violation of the Ex Post Facto Clause, despite the fact that such credits were created for the sole purpose of controlling the prison population. *See, Lynce v. Mathis*, Case No. 95-7452 (decided on February 19, 1997). The usage of other mechanisms, such as control release, has been significantly curtailed since their creation. The usage of control release as a form of early release for inmates through the Control Release Authority has been effectively eliminated since January, 1995, according to the Department of Corrections.

C. Florida's Prison Population

Since its peak in fiscal year 1989-90, prison admissions have steadily reduced. The prison admissions for fiscal year 1993-94 totaled 25,806. *Id.* at 24. Prison admissions for fiscal year 1994-95 dropped to 23,709. *Id.* Prison admissions have remained relatively constant over the last year. For instance, in July, 1997, prison admissions totaled 2,114. For January, 1998, prison admissions were 1,936. A slight increase is estimated, however. Prison admissions are estimated by the CJEC to be approximately 2,368.

The Florida Legislature has also funded an aggressive prison expansion plan since the late 1980's. Within the last six years, the Legislature has appropriated enough money to more than double the prison capacity since 1988. However, the 1996 and 1997 Legislature did not appropriate state funds toward the construction of any state prison beds.

The state prison system is currently funded to result in a total capacity of slightly more than 85,000 prison beds if the system is operating at 150% of the system's design capacity. According to the Criminal Justice Estimating Conference, which last met on February 20, 1998, the prison population will reach approximately 84,100 inmates by the end of June 2002. However, this forecast is accurate only to the extent that all criminal justice indices remain consistent with current trends. Any major changes in criminal justice legislation or prosecutorial and court practices will change this estimate significantly. As of the end of March, 1997, there were 64,030 inmates in the state prison system. As of a year later, on March 18, 1998, the prison population has only slightly increased to a total 65,317.

D. Clemency

Clemency is an executive act of grace, with power vested in the executive branch of government as granted by Article IV, section 8 of the *Florida Constitution*. With the approval of three members of the Cabinet, the Governor may grant full or conditional pardons, restore civil rights, commute punishments, and remit fines and forfeitures for offenses. Most clemency petitions request restoration of civil rights for felony convictions. See Daley, Jr., B., *Florida Post Sentencing Practice and Procedure*, Vol. 2, p. 588 (Capital Legal Publishers) (1994). However, other clemency petitions may involve death row inmates commutation of a sentence or the modification of a sentence that carries a minimum mandatory sentence. *Id.*

E. Gain-Time

Incentive gain-time may be earned by inmates to reduce the length of their incarcerative sentence. Over the last several years, including 1995, the gain-time statute has been amended often. Thus, inmates who were sentenced between January 1, 1994, and October 1, 1995, can earn the following amounts of incentive gain-time: for offenses ranked between Level 1 and Level 7 of the sentencing guidelines, up to 25 days per month; for offenses ranked between Level 8 and Level 10 of the sentencing guidelines, up to 20 days per month. s. 944.275(4), F.S. This gain-time eligibility was substantially curtailed in 1995. See Ch. 95-294, 1995 *Fla. Laws* 2717.

F. 1995 Passage of the S.T.O.P. Bill (85% Law) Into Statutory Law

The 1995 Legislature enacted a law that substantially affects the amount of incentive gain-time that may be earned. The statutory law which passed has the same effect as this SJR, which is called the "Stop Turning Out Prisoners Act." See Fla. CS/HB 687 (1995) (amending s. 944.275(4), F.S.). The Stop Turning Out Prisoners Act took effect on October 1, 1995. See ch. 95-294, 1995 *Fla. Laws* 2717. This Act reduced the amount of incentive gain-time that may be earned by an inmate from up to 20 or 25 days to up to 10 days per month for *any* offense

committed on or after October 1, 1995. *Id.* (amending s. 944.275(4)(c), F.S.) Further, the incentive gain-time authorized to be earned is “capped” when an inmate has earned the equivalent of 15 percent of the inmate’s court-imposed sentence. *Id.* The law clearly states that each inmate who commits a criminal offense on or after October 1, 1995, must serve a minimum of 85 percent of his or her court-imposed sentence. *Id.* The law also states that a state prisoner sentenced to life imprisonment must be incarcerated for the rest of his or her natural life, unless the prisoner is granted a pardon or clemency. *Id.*

Other types of currently authorized gain-time are meritorious, educational/incentive, and literacy/incentive gain-time. An inmate may be awarded from 1 day up to 60 days of meritorious gain-time for performing an outstanding deed or service, such as saving a life or assisting in the recapture of an escaped inmate. s. 944.275(4)(d), F.S. (1996 Supp.). An inmate may receive a one-time award of 60 additional days of incentive gain-time if an inmate successfully completes the requirements for and is awarded a general educational development certificate (GED) or vocational certificate. s. 944.275(4)(e), F.S. (1996 Supp.). If an inmate attends and actively participates in the 150 hours of adult basic education instruction for functional literacy, the inmate may receive up to 6 additional days of incentive gain-time as recommended by the education program manager. s. 944.801(3)(I)5., F.S. (1996 Supp.). However, all of these types of incentive gain-time are subject to the 15 percent “cap” pursuant to the Stop Turning Out Prisoners Act of 1995. *See* Ch. 95-294, 1995 *Fla. Laws* 2717, 2718 (amending s. 944.275, F.S.).

G. The Constitution and How It May Be Amended

A constitution is generally defined by *Black’s Law Dictionary* as, “[t]he organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.” *Black’s Law Dictionary*, p. 282 (1979). Thus, a constitution is a framework from which a government operates.

Florida’s Constitution, in Article XI, sets out how the *Constitution of the State of Florida* may be amended or revised. One way in which the constitution may be proposed to be amended or revised is by joint resolution agreed to by three-fifths of the membership of each house of the legislature. *Fla. Const.*, Art. XI, s. 1. Subsequently, the voters of Florida make the final decision on the proposal’s passage. *Id.* Another way in which the constitution may be amended is by a constitutional revision commission, which is created under certain circumstances. *See Fla. Const.*, Art. XI, s. 2. A constitutional convention is another method of constitutional amendment or revision. *See Fla. Const.*, Art. XI, s. 4. The other method of constitutional amendment is by initiative of the people. *See Fla. Const.*, Art. XI, s. 3. Using the initiative method, there are several requirements that must be fulfilled, such as requirements on the signature of electors. *Id.*

Section 101.161, F.S., requires each joint resolution to contain a statement of the substance of its proposed constitutional amendment (summary) and a ballot title, both of which are to appear on

the ballot of a general election. The ballot summary must be clear and unambiguous in informing the voters as to the terms of the constitutional provision that is being amended, and must not mislead the public. *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982). In other words, the ballot must be “fair and advise the voter sufficiently to enable him intelligently to cast his ballot.” *Hill v. Milander*, 72 So.2d 796, 798 (Fla. 1954).

H. Past Efforts to Pass A Constitutional Amendment to Require Inmates to Serve 85% of Their Sentences

In 1993, the S.O.S. (Save Our State) Foundation, with the support of S.T.O.P. (Stop Turning Out Prisoners, Inc.), proposed a constitutional amendment to the Florida Constitution to “ensure” that state prisoners would serve at least 85 percent of their sentence. The proposed amendment’s ballot summary stated, “[a] state constitutional amendment to ensure that state prisoners serve at least eighty-five percent of their sentence.” The full text of the proposed amendment reads, “[e]xcept for pardon, clemency and gain-time, no state prisoner shall be released prior to serving the full term of the lawful sentence of incarceration. Granting of incentive gain-time shall not be automatic but awarded only for good conduct. In no event, shall incentive gain-time exceed fifteen days for every one hundred days of the sentence.”

On May 5, 1994, the Attorney General received the initiative petition from the Secretary of State for review. On May 18, 1994, the Attorney General advised the Florida Supreme Court by letter that the proposed amendment met the prerequisites for review by the Court. The Florida Supreme Court must determine by advisory opinion whether the proposed amendment complied with general law. Art. IV, s. 10, Fla. Const. Thus, the Court had to determine whether the proposed amendment complied with the requirements of Art. XI, s. 3 of the Florida Constitution, governing initiative petitions for constitutional amendments, whether the proposed amendment was limited to a single subject, and whether the ballot summary was sufficient to provide clear and adequate notice which was not misleading to the voter on the substance of the proposed amendment.

On July 7, 1994, the Florida Supreme Court issued its advisory opinion to the Attorney General. *Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 642 So.2d 724 (Fla. 1994), *reh. den.* (Sept. 28, 1994). The Court did not address the issue of whether the proposed amendment met the single subject rule because it found the ballot summary issue dispositive of the case. However, the Court found the ballot summary legally deficient in three areas:

1. The word “ensure” was misleading or inaccurate because the full text of the proposed amendment included an expressed exception to pardon or clemency. *Id.* at 726-27.
2. There was no mention of the collateral consequence that the proposed amendment would substantially modify the power of the Parole Commission “to grant paroles or grant conditional releases to persons under sentences of crime” through the Control Release Authority. *Id.* at 726.

3. The proposed amendment did not address the “puzzling question of how to determine what constitutes eighty-five percent of a life sentence.” *Id.*

In August 1994, S.T.O.P. rewrote the proposed amendment with the Florida Supreme Court’s objections about the previous proposed amendment in mind. For the 1995 Session, SJR 762 was drafted to reflect revisions made to the proposed constitutional amendment. However, SJR 762 did not pass. For 1996, the same joint resolution was filed in SJR 58, but did not pass. The same joint resolution was again filed in 1997 as SJR 2030, reflecting the same revised proposed amendment to the Florida Constitution as all the previously filed joint resolutions on this subject.

III. Effect of Proposed Changes:

This SJR would propose a constitutional amendment to the voters in Florida. This SJR would allow the voters to decide if they want to place the S.T.O.P. amendment in the *Constitution of the State of Florida*. Mirroring current statutory law, the constitutional amendment would require every state prisoner sentenced subsequent to the effective date of the constitutional amendment to serve at least 85 percent of his or her court-imposed sentence of a term of years, if successfully passed by the voters. However, inmates are already serving at least 85 percent of their prison sentence if their crimes were committed on or after October 1, 1995, pursuant to s. 944.275(4)(b)3., F.S. Any inmate who is sentenced to imprisonment for life would be incarcerated until the expiration of the inmate’s natural life. This would also duplicate current law under the aforementioned statute.

The only exception to the requirement to serve a minimum of 85 percent of their sentence, pursuant to this proposed amendment, would be if an inmate were granted pardon or clemency, which is consistent with current statutory law.

Parole, conditional release, or any other mechanism of sentence reduction, such as gain-time, will be limited to a reduction of 15 percent, maximum, for a sentence of a term of years, which is also consistent with current statutory law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

With this SJR, there appears to be *no additional fiscal impact* to the Stop Turning Out Prisoners Act of 1995, according to the Department of Corrections. It is important to consider that when inmates are kept in institutions for a longer percentage of time, operational costs go up proportionally, at a minimum, even if other factors are not taken into consideration.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Constitution Revision Commission has addressed proposal 24, which proposes language be placed in the constitution that would require prisoners to serve a minimum of 85 percent of their court-imposed sentence. However, this proposal failed by a 17-14 vote. For a proposal to pass, an affirmative vote of 22 is needed.

VIII. Amendments:

None.