

HOUSE BILL REPORT

HB 1338

As Reported by House Committee On:
Public Safety
Appropriations Subcommittee on General Government

Title: An act relating to juveniles sentenced to long terms of incarceration.

Brief Description: Concerning juveniles sentenced to long terms of incarceration.

Sponsors: Representatives Roberts, Moscoso, Pettigrew, Pedersen, Clibborn, Wylie, Jinkins, Kagi, Hunt, Springer, Farrell, Appleton, McCoy, Walsh, Moeller, Santos and Freeman.

Brief History:

Committee Activity:

Public Safety: 2/5/13, 2/14/13 [DPS];

Appropriations Subcommittee on General Government: 2/23/13, 2/25/13 [DP2S(w/o sub PS)].

Brief Summary of Second Substitute Bill

- Provides for an indeterminate sentence of between 20 years and life for the commission of Aggravated first degree Murder as a juvenile.
- Provides for resentencing of those sentenced to life without the possibility of parole for Aggravated Murder committed as a juvenile to an indeterminate sentence of between 20 years and life.
- Allows those sentenced to a term of incarceration of 20 years or more for offenses committed as a juvenile to petition the sentencing court for early release after serving 20 years of confinement.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.
Signed by 6 members: Representatives Goodman, Chair; Roberts, Vice Chair; Appleton, Moscoso, Pettigrew and Takko.

Minority Report: Do not pass. Signed by 5 members: Representatives Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Holy, Hope and Ross.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Sarah Koster (786-7303).

Background:

In Washington, the crime of Aggravated first degree Murder is punishable by either a sentence of life imprisonment without the possibility of parole or, if sufficient mitigating factors are not present, the death penalty.

Eighth Amendment Sentencing Restrictions.

In 2012 in *Miller v. Alabama*, the United States Supreme Court (Supreme Court) held that the Eighth Amendment's prohibition on cruel and unusual punishment forbids a sentencing scheme that imposes a mandatory sentence of life in prison without the possibility of parole for juvenile homicide offenders, building on a 2010 decision, *Graham v. Florida*, which prohibited a sentence of life without parole for a juvenile non-homicide offender. The Supreme Court had also previously found, in a 2005 decision, *Roper v. Simmons*, that the Eighth Amendment forbids the imposition of a sentence of death for an offense committed as a juvenile.

In this set of cases, the Supreme Court determined that children are constitutionally different from adults for sentencing purposes because of their lack of maturity, underdeveloped sense of responsibility, vulnerability to negative influences, lack of control over their environments, and possibility for rehabilitation. The Supreme Court mandated that these differences between children and adults be considered in sentencing juveniles for homicide offenses.

Aggravated First Degree Murder.

A person is guilty of Aggravated first degree Murder if he or she commits Murder in the first degree and one of the following factors was present:

1. at the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;
2. at the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;
3. the person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;
4. the person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;
5. the person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;
6. the murder was committed during the course of or as a result of a shooting where the discharge of the firearm is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;
7. the victim was:
 - a judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney;

- defense attorney; a member of the Indeterminate Sentence Review Board; or a probation or parole officer; and
- the murder was related to the exercise of official duties performed or to be performed by the victim;
8. the person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender;
 9. there was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;
 10. the murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:
 - Robbery in the first or second degree;
 - Rape in the first or second degree;
 - Burglary in the first or second degree or Residential Burglary;
 - Kidnapping in the first degree; or
 - Arson in the first degree;
 11. the victim was regularly employed or self-employed as a reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;
 12. at the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order; or
 13. at the time the person committed the murder, the person and the victim were "family or household members" and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted in:
 - Harassment; or
 - any criminal assault.
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Summary of Substitute Bill:

Juveniles Sentenced for Aggravated First Degree Murder.

A person convicted of Aggravated first degree Murder for an offense committed prior to the person's eighteenth birthday will be sentenced to an indeterminate sentence with a minimum term of between 20 and 25 years and a maximum term of no more than 35 years.

In determining the maximum and minimum terms, the court must consider the following factors:

1. the offender's age at the time of offense;
2. the offender's level of participation in the offense;
3. the offender's intellectual capacity;
4. the offender's ability to appreciate the risks and consequences of his or her conduct;
5. the degree of familial or peer pressure exerted upon the offender in the commission of the offense;
6. the offender's familial and community environment;

7. the offender's educational history;
8. any history of trauma in the offender's life;
9. the offender's faith and community involvement;
10. the offender's involvement in the child welfare system;
11. the offender's potential for rehabilitation;
12. the outcomes of a professional mental health examination of the offender; and
13. any other mitigating factors.

Approximately six months before the expiration of the minimum sentence, the sentencing court must conduct a hearing to determine whether the person should be released before expiration of the maximum term. Both the offender and victim's families will have the opportunity to participate in the hearing. The offender is entitled to counsel at the hearing.

The court must order the offender released except if it determines, by a preponderance of the evidence, that, despite any conditions which may be imposed, it is more likely than not that the person will commit new violent crimes if released. If the offender is released, the court will determine a term of community custody, during which time the offender will be under the supervision of the Department of Corrections.

The court must consider the following factors in making its determination:

1. the extent to which issues concerning juvenile brain development contributed to the offense;
2. the offender's age at the time of offense;
3. the offender's intellectual capacity;
4. the offender's level of participation in the offense;
5. the offender's efforts towards rehabilitation, including participation in and completion of education and employment programs while in prison;
6. whether the offender's character deficiencies have been reformed; and
7. any other mitigating evidence.

Juveniles Who Were Previously Given a Life Sentence for Aggravated First Degree Murder.
A person who was previously sentenced to life without the possibility of parole for an offense committed prior to his or her eighteenth birthday will be returned to the sentencing court to be resentenced to an indeterminate sentence with a minimum term of between 20 and 25 years and a maximum term of no more than 35 years. The sentencing court must consider the same mitigating factors described above, with regard to a sentencing hearing. There will be an opportunity for victims to present a statement.

Juvenile Who Received a Sentence of at Least 20 Years for Offenses Other than Aggravated First Degree Murder.

If an offender is given a sentence of 20 years or more for offenses committed prior to his or her eighteenth birthday, he or she is eligible for review by the sentencing court no later than 180 days before the 20 years has expired, except if he or she has committed a major violation in the preceding 12 months or been convicted of any felony in the five years prior to the petition.

The court shall order the person released, under such circumstances as the court determines appropriate, unless it determines, by a preponderance of the evidence, that the person will

commit new violent criminal law violations if released. In making its determination, the court must consider the same factors, described above, as are to be considered in releasing a person convicted of Aggravated first degree Murder. If the offender is released, the court will determine a term of community custody, which is not to exceed the maximum term of the sentence.

Substitute Bill Compared to Original Bill:

The substitute bill changes the eligibility criteria for review of offenders who have served 20 years or more for an offense committed prior to their eighteenth birthday. While the original bill prohibits any offender who had been convicted for any offense committed subsequent to his or her eighteenth birthday from petitioning the court for release, the substitute bill allows an offender to seek early release as long as he or she has not been convicted of a felony in the five years prior to filing the petition or has committed a major violation in the 12 months prior.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect on June 1, 2013.

Staff Summary of Public Testimony:

(In support) The current sentencing scheme reflects an outdated notion of juvenile offenders. This bill asks us to move into another phase in our understanding of rehabilitation of offenders and takes into consideration the existence of evidence-based practices for offenders which are used in the Department of Corrections. New brain science acknowledges that juveniles are different. The Supreme Court has made a change in the law necessary. The Supreme Court references child brain development throughout the *Miller* decision—juveniles have less culpability and greater prospects for reform. Juveniles should be given the opportunity to redeem themselves and make positive contributions to society. This bill prohibits life without parole as a sentencing option for juveniles and this follows the Supreme Court's decision in *Miller*. Some offenders are remorseful and would make a great contribution to society if released.

Native Americans make up a much higher percentage of the juvenile incarcerated population than the population at large. The tribe's philosophy is in favor of rehabilitation. Everyone deserves a second chance. When Barry Massey matured, his infraction history abruptly stopped. It does not take 30 years before a person should be given a chance—even 20 years is too long. It is really damaging for a young person to grow up in confinement among men who have attacked kids or women. There is never really justice for anyone; long sentences do not help provide justice for victims. Adolescents are not given responsibility for many areas of adult life, like drinking, but are given responsibility for the rest of their life for some actions. We have an opportunity to set a model for other states in changing sentencing in

light of *Miller*. Seventy-eight percent of the 192 cases are kids of color. This is about maintaining racial inequity. The arguments in opposition are about retribution and preventative detention. Neither comports with what *Miller* said.

(In support with concerns) There is a perspective besides compassion for offenders, societal responsibility and fiscal responsibility. Obviously not everyone in prison has been reformed, but juveniles are different people after long terms—they have become adults. What is the purpose of long sentences for juveniles? It is only punishment. This is not a rational justification for this level of cost and effect on people. The bigger issue is the operation of the Sentencing Reform Act (SRA), generally the SRA provides for some egregious sentences, like a drive by shooting with no one hurt creates a sentence of 92 years, three times that of murderers. The Legislature should fix these sentences from the outset, rather than require juveniles to prove that they should be treated fairly.

(Opposed) This bill goes too far. The concern is about having this element back on the street. Victims never have a second chance; this bill says that a victim's life is not worth as much. The bill proposed by the Washington Association of Prosecuting Attorneys, which does not go as far as this bill, goes further than *Miller* requires. It addresses the functional equivalent of life. This bill requires release after 35 years, no matter the risk of new offenses, no matter their original crime. The system demands accountability for the most serious of crimes. *Miller* did not say that you could not give a juvenile a long sentence or life sentence, just that it needs to be an individual determination. The court talked about wanting to have a meaningful opportunity for review, not that it was necessary. This proposal involves 192 cases which are almost entirely all murder cases. The Legislature is hearing only about one side of these cases, not hearing about the loss on the other side. It is necessary to balance the loss to the community and the need for a severe sentence. Twenty to 25 years is too short. Thirty years is more appropriate. It is important to consider the seriousness of these offenses; they are not drug or property crimes.

Persons Testifying: (In support) Representative Roberts, prime sponsor; Nick Allen, Columbia Legal Services; Charles Baldwin; Miguel Perez-Gibson, Colville Tribes; Sneena Brooks, The Confederate Tribes of the Colville Reservation; David Wilhelm; Rhonda Massey; Jeff Coats; Loren Taylor, People 4 Parole; Gerald Hankerson, Seattle Chapter of National Association of the Advancement of Colored People; Bob Cooper, Washington Defender Association and Washington Criminal Defense Lawyers; and Steven Aldrich, Friends Committee on Washington Public Policy.

(In support with concerns) Tiffnie Lothrop, People 4 Parole; and Kimberly Ambrose, University of Washington Law School.

(Opposed) Tom McBride, Washington Association of Prosecuting Attorneys; Russ Hauge, Kitsap County Prosecuting Attorney; and Marge Martin, Families and Friends of Violent Crime.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON GENERAL GOVERNMENT

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Public Safety. Signed by 5 members: Representatives Hudgins, Chair; Dunshee, Hunt, Pedersen and Springer.

Minority Report: Do not pass. Signed by 4 members: Representatives Parker, Ranking Minority Member; Buys, Chandler and Taylor.

Staff: Alex MacBain (786-7288).

Summary of Recommendation of Committee On Appropriations Subcommittee on General Government Compared to Recommendation of Committee On Public Safety:

The Appropriations Subcommittee on General Government recommended extending the maximum sentence for a person convicted of committing Aggravated first degree Murder as a juvenile from 35 years to life imprisonment, so that if the court finds at every review that it is more likely than not that the person will commit new violent crimes, he or she will not be released.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill contains an emergency clause and takes effect on June 1, 2013.

Staff Summary of Public Testimony:

(In support) This bill is good policy and a fiscally sound bill that provides the Legislature with an opportunity to save significant taxpayer dollars in the long term. With respect to the costs related to resentencing, due to the court decision these costs will be incurred one way or another and are not specific to this bill. Those individuals found to be serving an unconstitutional sentence will have to be returned to the court for resentencing. We appreciate that the fiscal note recognizes the cost savings associated with releasing individuals who are fit to return to society after serving long portions of their sentences for crimes they committed as youths. Even conservative estimates by the Department of Corrections find that this will save over \$200,000 a year in the long term. The fiscal note does not account for all the savings from this bill. Taxpayers, on average, spend approximately \$2 million to incarcerate a youth for the rest of his or her life. The Sentencing Guidelines Commission estimated that it costs over four times more per year to incarcerate an offender over the age of 50 than a younger prisoner due in large part to increased medical costs. Crime and recidivism rates significantly decline with age.

(Opposed) The Sentencing Guidelines Commission supports the Senate version of this bill. The bill provides for court review after 20 years of incarceration, creating an expensive process for going back to court and appointing new counsel 10 to 20 years after the case had the original trial. There is already a cheaper and more efficient administrative process designed for doing this type of review through the Indeterminate Sentence Review Board

(Board). This Board operates much like a parole board in other states, with members who are trained to make similar determinations. This shifts costs and workload for this process needlessly to the county level at a time when county budgets are tight and workload in the courts is high. Victims and communities would much rather have an administrative review process than create a whole new trial. There are also policy concerns over the length of sentence. Of the 197 current cases impacted by this bill, 167 are for Aggravated Murder in the first degree, Murder in the first degree, or Murder in the second degree. Each of those cases has a victim who does not have a voice here today. The bill would limit discretion to 20-25 years regardless of the underlying severity of the crime. Also, the bill only allows judges to consider mitigating factors rather than the underlying crime or the impact to victims or society. A more balanced approach should be used to allow judges to consider all of the circumstances surrounding the case.

Persons Testifying: (In support) Nick Allen, Columbia Legal Services.

(Opposed) David Boerner, Sentencing Guidelines Commission; Tom McBride, Washington Association of Prosecuting Attorneys; Jon Tunheim, Thurston County Prosecuting Attorneys; Don Pierce, Washington Association of Sheriffs and Police Chiefs; and Terrie Noble, Violent Crime Victim Services.

Persons Signed In To Testify But Not Testifying: None.