

HOUSE BILL REPORT

E2SHB 1189

As Passed House:

March 4, 2023

Title: An act relating to the release of incarcerated individuals from total confinement prior to the expiration of a sentence.

Brief Description: Concerning the release of incarcerated individuals from total confinement prior to the expiration of a sentence.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Hackney, Reed, Simmons, Wylie, Santos and Ormsby).

Brief History:

Committee Activity:

Community Safety, Justice, & Reentry: 1/24/23, 2/2/23 [DPS];

Appropriations: 2/21/23, 2/23/23 [DP2S(w/o sub CSJR)].

Floor Activity:

Passed House: 3/4/23, 53-42.

Brief Summary of Engrossed Second Substitute Bill

- Expands and modifies the membership of and process requirements for the Clemency and Pardons Board (CPB).
- Establishes a process for qualifying persons to petition the CPB for conditional commutations.
- Allows the CPB to recommend to the Governor that conditional commutations be granted in certain circumstances.
- Authorizes the Department of Corrections (DOC) to supervise persons granted conditional commutations.
- Expands the eligibility criteria and modifies electronic monitoring requirements for persons granted extraordinary medical placement by the DOC.

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

HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Goodman, Chair; Simmons, Vice Chair; Davis, Farivar, Fosse and Ramos.

Minority Report: Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Graham.

Staff: Martha Wehling (786-7067).

HOUSE COMMITTEE ON APPROPRIATIONS

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 Community Safety, Justice, & Reentry. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Hansen, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 12 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Connors, Couture, Dye, Harris, Rude, Sandlin, Schmick and Steele.

Staff: Yvonne Walker (786-7841).

Background:

The Sentencing Reform Act (SRA) provides the framework for sentencing of persons convicted of felony offenses, also referred to as "offenders" under the SRA. Under the SRA, persons are generally sentenced to determinate sentences, with some exceptions. Judges select a sentence within a sentence range provided in statute, which is calculated using both a statutory severity designation for the offense, or its "seriousness level," and a person's "offender score," which is based on the person's criminal history. In addition to the standard range, other factors affect the sentence, including enhancements, exceptional sentences, consecutive and concurrent sentences, and alternative sentences.

Initiative No. 593, approved by the voters in 1994 and often referred to as the "three strikes law," requires courts to impose life sentences for persons deemed to be persistent offenders. A "persistent offender" is an offender who is convicted of a "most serious offense" and who has at least two prior convictions for most serious offenses within a certain period of time. "Most serious offenses," also referred to as "strike offenses," include any class A felony, various class B felonies (which are primarily assault-, sex-, or

kidnapping-related offenses) as well as any felony with a deadly weapon verdict, and any equivalent federal or out-of-state offense.

Under the SRA, persons are generally required to serve the specific sentence imposed by the court regardless of their rehabilitative efforts or improvements. However, certain exceptions allow a person to be released prior to completing the term of confinement ordered by the court, including:

- a transfer to a partial confinement program;
- an authorized furlough or leave of absence;
- an extraordinary medical placement, subject to certain qualifications and conditions;
- an order to release by the Indeterminate Sentence Review Board;
- administratively earned early release time; and
- a pardon or commutation granted by the Governor.

Pardons and Commutations.

The Washington Constitution provides the Governor with the authority to grant pardons and commutations, and statute provides the Governor with the authority to commute sentences and release persons in extraordinary cases. The Clemency and Pardons Board (CPB) receives petitions for commutation and pardons and makes recommendations on those petitions to the Governor. The Governor makes the final decision in all petitions heard by the CPB.

Composition of the Clemency and Pardons Board. The CPB consists of five members appointed by the Governor, subject to confirmation by the Senate. Members serve terms of four years or until their successors are appointed, and members do not receive compensation but are reimbursed for travel expenses. The CPB receives staff support from the Attorney General and conducts hearings on a quarterly basis, or as needed, to review petitions.

Jurisdiction of the Clemency and Pardons Board. The CPB receives petitions for commutations and pardons from individuals, organizations, and the Department of Corrections (DOC) for review and then makes recommendations to the Governor. The CPB also receives petitions from individuals and organizations for the restoration of civil rights lost as a result of convictions for federal and out-of-state felony offenses.

The CPB generally reviews and hears petitions for pardon or commutation only in cases in which judicial remedies for the conviction have been concluded. Though not restricted by law from doing so, the CPB does not typically consider a petition until at least 10 years have passed from the date of conviction unless there are unique or emergency circumstances. Initiative No. 593 contains a provision recommending that the CPB and Governor not consider a petition for commutation from a person with a life sentence under the three strikes law until he or she is at least age 60 and has been judged to no longer be a threat to society.

Notification to Prosecutor and Relevant Parties. After receiving a petition, the CPB

evaluates whether the petitioner's request merits a hearing. If the CPB determines the petition merits a hearing, the CPB must provide the relevant county prosecuting attorney with 30 days advance notice. The prosecuting attorney must make reasonable efforts to notify victims, survivors of victims, witnesses, and law enforcement agencies.

Hearing and Recommendation. At the hearing, the CPB may hear testimony from a variety of witnesses, including the petitioner, an attorney for the petitioner, the prosecuting attorney, and family members of the victim and the offender. When determining whether to recommend a petitioner be pardoned or have their sentence commuted, the CPB focuses on the existence or non-existence of extraordinary circumstances. A petitioner must demonstrate why his or her circumstances are extraordinary and warrant the exercise of the Governor's discretionary pardon or commutation power. The CPB votes on a recommendation, which is then forwarded to the Governor. The Governor is under no legal obligation to follow the recommendation.

If the Governor grants a pardon, the conviction will be removed from the petitioner's criminal history that is available to the public. The Governor is free to place conditions on the pardon, such as requiring a conviction-free record for a specified period of time. A commutation results in a reduction of criminal penalties and is often conditional.

Extraordinary Medical Placement.

The Secretary of the DOC may authorize an extraordinary medical placement and transfer a person to an alternative care setting outside of the DOC if:

- the person has a serious medical condition expected to require costly care and treatment and granting the placement will result in savings to the state;
- the person is considered to be a low risk to the community because he or she is currently physically incapacitated due to age or the medical condition or is expected to be so at the time of release; and
- the person is not serving a sentence of life without the possibility of release.

Persons released for an extraordinary medical placement must be placed on electronic monitoring unless the monitoring equipment interferes with the function of medical equipment or results in the loss of funding for the person's medical care, in which case, different monitoring equipment may be used.

The DOC Secretary may revoke an extraordinary medical placement at any time.

State v. Blake Decision.

Under the Uniform Controlled Substances Act, possession of a controlled substance is a strict liability offense, meaning that no *mens rea* (guilty state of mind) element must be proven in order to convict of a person of the offense. In *State v. Blake (Blake)* in 2021, the Washington Supreme Court held that the strict liability nature of the offense violates the due process clauses of the state and federal constitutions and exceeds the state's police power. The Court invalidated the portion of the statute creating the simple possession crime.

Summary of Engrossed Second Substitute Bill:

The Clemency and Pardons Board.

Composition. The Clemency and Pardons Board (CPB) is expanded from five to 10 members appointed by the Governor, who are subject to confirmation by the Senate. The Governor must ensure diversity in the appointments, including racial, ethnic, geographic, gender, sexual identity, and age diversity. The CPB membership must consist of:

- a person with lived experience in a community of color
- a person with lived experience as an incarcerated individual, or work with the formerly incarcerated or successful community reentry;
- a representative of a faith-based organization or church with interest or experience in community reentry;
- a person with experience and interest in tribal affairs;
- a retired superior court judge; and
- an agency representing crime victims.

Member terms are expanded from four to five years, and are limited to two terms. An existing member may serve his or her remaining term, and may continue to serve until a successor is appointed and confirmed. Members receive compensation up to \$100 per day, including training and hearing preparation, and travel expenses. Members are not civilly liable for decisions made while performing their duties. The CPB must be funded for adequate staff to implement and maintain functional operations, and receives legal advice from the Attorney General's Office.

The CPB members must annually attend training on race equity, racism and mass incarceration, or restorative justice.

Jurisdiction. The CPB must make recommendations to the Governor for: commutation of sentences and pardoning of incarcerated individuals in extraordinary cases; and conditional commutation of sentences in accordance with additional requirements.

The recommendations in Initiative No. 593 are modified and expanded to encompass all life sentences imposed under the SRA as well as the provisions for Aggravated Murder in the first degree. It is recommended that the CPB not consider an incarcerated individual serving a life sentence for release until the individual has been judged to no longer be a threat to society and has served at least 20 years in total confinement or 25 years in total confinement when the person is serving a sentence for Aggravated Murder. It is further recommended that release take the form of a conditional commutation that includes a period of law-abiding behavior in the community.

Notification to Prosecutor and Relevant Parties. The timeframe for the CPB to notify the county prosecuting attorney of a hearing is extended to 90 days. The county prosecuting attorney must make reasonable efforts to ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as

part of the judgment and sentence. In the event that no known victim or survivor of the victim is known or identified for the panel, the county prosecuting attorney must be given reasonable time to certify to the panel that it has exhausted all reasonable efforts in locating and providing contact information to the panel.

If victims, survivors of victims, or witnesses participate in the hearing or provide written testimony, the CPB must consider those statements and provide written notification to those individuals about the Department of Corrections' (DOC) victim notification program and Washington Association of Sheriffs and Police Chiefs' "Victim Information and Notification Everyday Service" (VINE). These programs provide notification of an incarcerated individual's custody status and release. The victim, survivor, and witness statements are confidential and are not available to the petitioner.

Conditional Commutations. The CPB may deny a petition for commutation without a hearing, or the CPB may conduct a hearing to consider additional information, and then deny the petition or recommend commutation to the Governor. Five member panels, selected by a random drawing conducted by the CPB staff, will hear petitions.

In making its decision, the CPB must consider, if available, certain factors and information. This includes: public safety; criminal history; acceptance of responsibility and remorse; evidence of rehabilitation; input from victims, law enforcement agencies, and community members; and the person's release plan, which must be independently reviewed by the DOC. The DOC staff, supervisors, or volunteers may submit statements regarding the petitioning individual. If such statements are submitted, the CPB will withhold them as confidential and will not identify the commenter by name, content, or statement.

The CPB's decision shall explain the basis for the decision. If the CPB grants commutation, it may place conditions on the commutation, such as partial confinement, drug and alcohol testing, restrictions on travel and employment, or other community protection conditions. A person whose petition for conditional commutation is denied may file a new petition three years after denial or at a date set by the CPB.

A person granted conditional commutation may be required to serve a term of community custody up to the length of the term of incarceration imposed by the court, in which case the person will be subject to DOC supervision for compliance with conditions established by the CPB and the DOC.

A person who participates in the graduated reentry program for home detention may serve the final 18 months of their term in partial confinement, after serving at least four months in a DOC facility.

The court may order the release of a person whose conviction was vacated by the 2021 *Blake* decision when that person has been confined longer than the newly calculated standard range.

Annual Reporting. At least annually, the CPB must provide the Governor and Legislature with a report that includes the names and convictions of the individuals who received commutations or pardons within the prior year, and any acts of recidivism by any individual previously granted a commutation or pardon.

Governor's Decision.

The Governor may grant an extraordinary release in two circumstances: extraordinary circumstances, including serious health problems, senility, advanced age, or extraordinary meritorious acts; or pursuant to the CPB's recommendation following a hearing.

Extraordinary Medical Placement.

A person with a chronic medical condition may be granted extraordinary medical placement, subject to other current requirements.

When a person is released on extraordinary medical placement, electronic monitoring may be waived if the monitoring is detrimental to the person's health or prevents the person from being independently mobile.

Terminology.

References to "offender" are replaced with "incarcerated individual" or "individual" in certain statutes relating to sentencing and commutations.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Community Safety, Justice, & Reentry):

(In support) Mass incarceration has not made communities safer. There must be a mechanism that allows incarcerated individuals to show that they are no longer a threat to society and can be an asset, particularly when Washington's incarceration system imposes disproportionate sentences and fails to include a parole board. Crimes that used to have 10 year sentences now have lengths of 50-80 years. This destroys families. Many incarcerated individuals use counseling to heal trauma and better themselves. Those individuals deserve hope and an opportunity for a second chance. Knowledge of the opportunity for release motivates incarcerated people and increases accountability, which reduces fights and keeps staff safe. Some individuals who have received commutations have gone on to work with troubled youth because of their experience and perspective.

At the time of sentencing, people should know that clemency is an option, unless they have

a plea agreement that prohibits the request. This informs the victims that earned release or clemency might be an option. The clemency process also reassures victims that the individual has changed and the crime will not happen again. The bill does not allow individuals out of prison, it just provides an opportunity to present a case to the Clemency and Pardons Board (CPB). The CPB then makes a recommendation on an individual's petition and the Governor makes the final decision. Because of the political arena, there is a built-in safeguard on serious offenses, because no governor would allow someone who committed a serious offense to be released in a short amount of time. The bill does not limit the Governor's power, but it does have guidelines, including the recommendation that a person serving a life sentence serve at least 20 years in prison. For aggravated murder, the recommended length of time is 25 years. It costs too much to incarcerate individuals with chronic health conditions and it is inhumane.

The number of members of the CPB is expanded to 10. Including diversity, victim's rights, prosecutors, judges, behavioral health specialists, tribal, and faith organizations with experience in reentry ensures a diverse group of individuals with experience in determining whether a person can be an asset to society and also provides a racial equity lens. Members of the CPB should be paid to provide broader representation, because not everyone can afford to do this work for free.

(Opposed) The concept of a second chance and redemption is valuable, but conditional commutation is similar to a parole board, which is a significant departure from the determinate system, which was adopted to address inadequacies and disproportionalities. The current system already allows virtually everyone incarcerated to get a one-third reduction in their sentence for earned early release. The Indeterminate Sentence Review Board already functions as a partial parole board.

The Legislature could use the money that this bill would cost for offender change programs and diversity and equity programs. It would be better spent on gang intervention and youth programs to reduce crime and intervene to prevent convictions and incarceration. It is an error to remove language recommending limiting release to people over age 60 because science shows that people age out of criminal behavior. Physical incapacity should be limited to age or medical condition, not a medical placement. The option to waive electronic monitoring is troubling.

It is not community justice to release someone just because of the CPB recommendation, especially because victims in the communities also suffer from crimes. Victims in the community should be given notice to minimize trauma and allow them to prepare for a return to the community 20 years after the crime because that can be very traumatic.

While people who have changed should be given a second chance, expanding the membership of the CPB to 10 people is cumbersome and antithetical to the purpose. A five to seven member Board should be considered. The CPB should have been asked to provide their input. The increased size will create caucuses and the salary will encourage the CPB

to review petitions instead of focus on the common good. The proposed diversity is good, but some of the members are not qualified to make decisions prior to reentry. A retired superior court judge should be a member. The political arena does not provide an adequate safeguard. For example, Governor Inslee did not consider legislative input before suspending the death penalty.

Staff Summary of Public Testimony (Appropriations):

(In support) This bill will double the membership of the CPB, but they will still be working in teams of five members to review and make recommendations. The increase in board members will assist in taking care of the existing backlog of cases. The advantage is the governor will have the opportunity to release individuals that are worthy of clemency which will produce an approximate \$40,000 savings to the state. This means these released individuals will be out in the community and working and families will be reunited. This is a benefit to the State of Washington.

Many of the individuals serving long periods of time in prison have completely transformed and being in prison no longer serves the interest of justice or the interest of the community. Locking up humans and increasing mass incarceration is more expensive than giving deserving humans a chance for review. House Bill 1189 will reduce recidivism and will save state money. This bill is good policy and makes good fiscal sense.

(Opposed) Back in 1981, the Legislature intentionally moved away from the parole system. One of the reasons was due to the sentence disparity between individuals that committed the same crime but were treated substantially different. This bill could restore and create those same problems today. Many provisions of this bill not only undermines a judge's sentence but allows the release of individuals in ordinary circumstances.

Under current law, there has to be some type of extraordinary circumstances in order for a person to be released from custody. This bill implies that those serving life terms and those convicted of aggravated murder would be able to petition the board for release without having to show any extraordinary circumstance to substantiate their release.

This bill is a solution looking for a problem. The board is currently staffed with five volunteer members from the community, and it has been working well. It does not need to be expanded.

Persons Testifying (Community Safety, Justice, & Reentry): (In support)

Representative David Hackney, prime sponsor; Waldo Waldron-Ramsey, Washington Community Action Network; Gerald Hankerson, National Association for the Advancement of Colored People; and Larry Jefferson, Washington State Office of Public Defense.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; Tom Sahlberg; Russell Brown, Washington Association of Prosecuting Attorneys; and James

McDevitt.

Persons Testifying (Appropriations): (In support) Noreen Light, Information For A Change; Micaela Romero; and Waldo Waldron-Ramsey, National Association for the Advancement of Colored People Alaska Oregon Washington State-Area Conference.

(Opposed) Russell Brown, Washington Association of Prosecuting Attorneys; James McMahan, Washington Association of Sheriffs and Police Chiefs; and James McDevitt.

Persons Signed In To Testify But Not Testifying (Community Safety, Justice, & Reentry): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.