

SENATE BILL REPORT

E2SHB 1189

As of March 29, 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: Passed House: 3/4/23, 53-42.

Committee Activity: Law & Justice: 3/13/23 [w/oRec-HS].

Human Services: 3/16/23, 3/21/23 [DPA-WM, DNP].

Ways & Means: 3/30/23.

Brief Summary of Amended Bill

- Expands and modifies the membership, compensation, and training requirements for the Clemency and Pardons Board (CPB).
- Establishes a process for the CPB to consider and make recommendations on petitions for commutations.
- Authorizes the Department of Corrections (DOC) to supervise persons who receive a recommendation for commutation from the CPB under certain circumstances.
- Alters the eligibility criteria and modifies electronic monitoring requirements for persons granted extraordinary medical placement by DOC.

SENATE COMMITTEE ON HUMAN SERVICES

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.

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Wilson, C., Chair; Kauffman, Vice Chair; Frame and Nguyen.

Minority Report: Do not pass.
Signed by Senators Boehnke, Ranking Member; Warnick and Wilson, J..

Staff: Kelsey-anne Fung (786-7479)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Sarian Scott (786-7729)

Background: Sentencing Reform Act. In 1981, the Legislature passed the Sentencing Reform Act (SRA), which established determinate sentencing for felony offenders. The SRA eliminated indeterminate sentences and parole in Washington, with some exceptions. Instead, judges select a sentence within a standard sentence range provided in statute, which is calculated based on the designated seriousness level for the offense and the person's offender score based on the person's criminal history. In addition to the standard range, other factors may affect the sentence, including sentencing enhancements, exceptional sentences, consecutive and concurrent sentences, whether the offender qualifies as a persistent offender under the three-strikes or two-strikes laws, and alternative sentences.

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 qualifying person to be released prior to completing the term of confinement ordered by the court, including, for example, pursuant to:

- 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 (ISRB) for certain qualifying persons;
- administrative earned early release time; and
- a pardon or commutation granted by the Governor.

Indeterminate Sentence Review Board. There are some exceptions to determinate sentencing where certain offenders are eligible for review after serving a certain number of years. The Legislature has given authority to the ISRB to review and release inmates if the statutory criteria is met for the following three populations:

- parole offenders convicted before the enactment of the SRA, July 1, 1984;
- Community Custody Board (CCB), sex offenders who committed their offenses after August 31, 2001, and who have determinate-plus sentences; and
- Juvenile Board Cases (JUVBRD), offenders who committed crimes under age 18 and were sentenced for terms longer than 20 years.

When determining whether to release a CCB or JUVBRD offender, the ISRB must determine if a preponderance of evidence suggests the offender is more likely than not to commit a new crime. If the ISRB decides to release the offender on supervision, the offender must comply with all release conditions imposed by the court when the person was sentenced as well as any conditions imposed by the ISRB. This person must remain on supervision for three years or the remaining term of the person's sentence. If the person fails to follow conditions of supervision, the ISRB can revoke the release or impose new release conditions on the offender.

Persistent Offenders. Initiative No. 593, approved by the voters in 1994, 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 has committed specified offenses listed as two-strike or three-strike offenses and as a result, is sentenced to life without parole. In 2019, the Legislature removed robbery in the second degree as a strike offense in sentencing an offender as a persistent offender. This change was prospective and did not affect persons serving life sentences as a result of a conviction for robbery in the second degree prior to 2019.

Extraordinary Medical Placement. The Secretary of the Department of Corrections (DOC) may authorize an extraordinary medical placement (EMP) and transfer an offender to an alternative care setting outside of DOC if:

- the offender has a serious medical condition expected to require costly care and treatment;
- granting the placement is expected to result in savings to the state; and
- the offender poses a low risk to the community because they are currently physically incapacitated due to age or the medical condition, or is expected to be so at the time of release.

Offenders authorized for an EMP 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 offender's medical care, in which case, alternative monitoring must be used. An EMP can be revoked at any time. Persistent offenders and offenders sentenced to life imprisonment without the possibility of release or parole are not eligible for EMP.

Pardons and Commutations. The Governor has the constitutional and statutory authority to issue pardons and commute sentences. A pardon is generally a government decision to allow a person to be absolved of guilt for a crime and restores the person's civil rights. A commutation of sentence is a reduction in sentence, usually to time served.

Clemency and Pardons Board. The Clemency and Pardons Board (CPB) was established to make recommendations to the Governor concerning petitions for clemency. The CPB consists of five members appointed by the Governor and subject to confirmation by the Senate. Members serve four year terms 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 Office of the Attorney General and holds regular quarterly meetings, but can call special meetings at other times when appropriate.

The CPB generally reviews and hears petitions for pardon or commutation only in cases in which judicial remedies for the conviction have been concluded or exhausted. In most cases, absent unique or emergency circumstances, the CPB will not consider a petition until at least ten years have passed from the date of conviction. In addition, the CPB does not hear new petitions from the same individual on the same matter until three years have elapsed from the date of the previous hearing, unless there are exceptional circumstances or new information not previously considered by the CPB. 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 the person is at least age 60 and has been judged to no longer be a threat to society.

The CPB is charged with receiving petitions from individuals, organizations, and DOC for the review and reduction of sentences and pardoning of offenders in extraordinary cases. After receiving a petition, the CPB evaluates whether the petitioner's request merits a hearing. If a hearing is determined to be appropriate, 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. At the hearing, the CPB may hear testimony from a variety of witnesses, including the petitioner, an attorney for the offender, the prosecuting attorney, and family members of the victim, and the offender. Victims and survivors of victims have the right to present a statement to CPB in person, via audio or videotape, or in writing at the hearing.

After the hearing, 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 person's conviction will be removed from the petitioner's criminal history available to the public. The Governor can 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.

When determining whether to recommend a person be pardoned or have their sentence commuted, the CPB focuses on the existence or non-existence of extraordinary circumstances. A petitioner must demonstrate why their circumstances are extraordinary and warrant the exercise of the Governor's discretionary pardon or commutation power. Extraordinary circumstances are not defined. Examples of factors the CPB has considered include:

- the seriousness of the offense;
- the impact on the victims;
- the offender's criminal history and other relevant background;
- acceptance of responsibility, remorse, and atonement;
- personal development and positive life changes since the offense occurred;

- benefit or risk to the community;
- position of prosecuting attorney and sentencing judge, or both;
- whether the individual has complied with all obligations imposed by the court; and
- the amount of time elapsed since the offense occurred.

Summary of Amended Bill: The Clemency and Pardons Board. The CPB is expanded from five to ten 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; and
- a representative of an agency representing crime victims.

Terms are expanded from four to five years, and members are limited to two consecutive terms. The initial terms must be staggered so no more than three members are up for appointment in any given year. Members must receive compensation up to \$100 per day, unless waived by the person, and be compensated for time spent for 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 must receive legal counsel from the Attorney General's Office. The CPB members must attend training on race equity, racism and mass incarceration, or restorative justice at least annually. Current members may serve the remainder of their term, and are eligible for appointment to a second term.

Initiative 593. The recommendations in Initiative No. 593 are modified and expanded to encompass life sentences imposed for aggravated murder in the first degree. It is recommended that any incarcerated individual serving a life sentence not be considered 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 if the person is serving a sentence for aggravated murder. It is further recommended that releases that take the form of a commutation include a period of law-abiding behavior in the community.

Nothing in this chapter shall be interpreted or construed to reduce or eliminate the power of the Governor to grant a pardon or clemency to any individual not in total confinement, or impose conditions on a commutation in addition to or other than those recommended by the CPB.

Notification to Prosecutor and Relevant Parties. The timeframe for the CPB to notify the county prosecuting attorney of a hearing is extended from 30 days 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 DOC's Victim and Witness Notification Program and Washington Association of Sheriffs and Police Chiefs' Victim Information and Notification system.

Hearing Procedures. The CPB may deny a petition for commutation without a hearing for failure to meet initial filing criteria, 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 and review petitions for commutation or pardon.

In making its decision, the CPB must consider, if available, certain factors and information. These include:

- public safety;
- criminal history;
- social and medical history;
- acceptance of responsibility and remorse;
- evidence of rehabilitation;
- input from victims, law enforcement agencies, and community members;
- a risk assessment and psychological evaluation provided by DOC, and
- the person's release plan, which must be independently reviewed by DOC.

The CPB may consider information from DOC in the form of a case analysis regarding the incarcerated individual that includes information on the person's disciplinary record, risk-level classification history, program participation, work history, behavioral observations, community concerns, and recommendations for potential release conditions. The CPB shall not identify the content of DOC's case analysis.

Following a hearing, if the CPB recommends commutation or denies the petition, it must specify the reasons for the decision. If the petition is denied, the incarcerated individual may file a new petition for commutation three years after the date of denial or at a date set by the CPB. The CPB may recommend conditions on the commutation, such as community custody, partial confinement, drug and alcohol testing, contact restrictions, restrictions on travel and employment, or other community protection conditions.

Supervision. DOC must supervise any individual who receives a recommendation for commutation from the CPB, is granted a commutation by the Governor, and has conditions

of community custody imposed as part of the commutation granted by the Governor. DOC must monitor the person's compliance with conditions of community custody imposed by the Governor. If a person violates a condition of community custody, the person may be transferred to a more restrictive confinement status to serve the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of the alleged violation.

Annual Reporting. The CPB must provide a report to the Governor and Legislature, at least annually, that includes the names and convictions of the individuals who received commutations or pardons in the previous calendar year, and any convictions during the previous five years by any offender previously granted a commutation or pardon who was listed in a report.

Extraordinary Medical Placement. Restrictions limiting eligibility based on current or expected physical incapacitation due to age or the individual's medical condition are removed. Electronic monitoring requirements 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.

EFFECT OF HUMAN SERVICES COMMITTEE AMENDMENT(S):

- Clarifies DOC's supervision authority applies only to individuals who receive a recommendation for commutation from the CPB, the commutation is granted by the Governor, and the Governor imposes community custody as a condition of the commutation.
- Provides that nothing in this chapter shall limit the Governor's power to grant a pardon or clemency to any individual not in total confinement, or impose conditions in addition to or other than those recommended by the CPB.
- Clarifies that a current member is eligible to serve the remainder of their term and be appointed to a second term.
- Removes a retired superior court judge as one of the required members of the CPB.
- Instead of considering statements from DOC staff, the CPB can consider a DOC case analysis that includes information regarding discipline and behavior, risk level, work and program history, community concerns, and potential release conditions.
- Alters the CPB annual reporting requirement to convictions during the previous five years for any offenders granted clemency or pardons who are included in a report.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: Washington State is long overdue for sentencing reform. The parole board was abolished in 1984, and the state needs a credible process to identify incarcerated individuals that have demonstrated their rehabilitation, transformation, and ability to be successful outside of prison. The bill increases the diversity of thought and experience and doubles the capacity of the CPB, and will compensate members for their work. The bill will add community voice and a racial equity lens to the board, and give hope to the hopeless. It is important to have a stop gap measure to give people a second chance and opportunity for redemption that will reduce racial disparities and inequities from the past. This does not encroach on the Governor's power to pardon.

CON: This bill has important goals of expanding and empowering the CPB to consider more cases more efficiently, however there should be a strong presumption that the sentence imposed is the appropriate sentence. The state moved away from parole because there were disparate sentences for the persons committing the same crime with the same criminal history, and this structure will not provide for uniform laws and uniform sentences. Appointments should not be reserved for certain backgrounds and the Governor should have discretion in appointments. There are concerns about drawing hard lines about age or length of time served, and instead clemency considerations should be achievement-based. Expansion of extraordinary medical placement will be too broad without consideration of community safety.

Persons Testifying (Human Services): PRO: Representative David Hackney, Prime Sponsor; Gerald Hankerson, NAACP State Area Conference; Waldo Waldron-Ramsey, Washington Community Action Network; Ginny Parham, Impacted Family Member; Toni Kelly-King, Impacted Family Member.

CON: Tom Sahlberg; James McMahan, WA Assoc Sheriffs & Police Chiefs; Jon Tunheim, Thurston County Prosecutor/Washington Association of Prosecuting Attorneys; Laurie Layne; James McDevitt.

Persons Signed In To Testify But Not Testifying (Human Services): PRO: Virginia Parham, Impacted family member.