

SENATE BILL REPORT

SB 5819

As Reported by Senate Committee On:
Law & Justice, February 21, 2019

Title: An act relating to establishing a postconviction review board and review process for early release of qualifying offenders.

Brief Description: Establishing a postconviction review board and review process for early release of qualifying offenders.

Sponsors: Senators Darneille, Nguyen and Wilson, C..

Brief History:

Committee Activity: Law & Justice: 2/14/19, 2/21/19 [DPS-WM, DNP].

Brief Summary of First Substitute Bill

- Transfers the Indeterminate Sentence Review Board within the Department of Corrections to the Office of the Governor and renames it as the Post-Conviction Review Board (the PCR Board).
- Adds members to the PCR Board and requires members to meet minimum qualifications.
- Authorizes the PCR Board to hear petitions and make determinations regarding the early release of persons who have served: at least 15 consecutive years of total confinement; at least 20 consecutive years of total confinement if convicted of murder 1; or one-half of the person's sentence of total confinement if the person is over age sixty.
- Allows a person convicted prior to turning age eighteen to petition for release after serving 15 years in total confinement.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5819 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

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.

Signed by Senators Padden, Ranking Member; Holy and Wilson, L..

Staff: Shani Bauer (786-7468)

Background: Determinate Sentencing. 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, the SRA determines a specific sentence within the statutory maximum. Judges select an offender's sentence within a standard sentence range provided in statute, which is calculated based on the statutorily designated seriousness level for the offense and the offender's criminal history score based on the offender's past convictions.

In addition to the standard range, other factors may affect the sentence, including sentencing enhancements, exceptional sentences, consecutive/concurrent sentences, whether the offender qualifies as a persistent offender under the three-strikes or two-strikes laws, and alternative sentences.

Review of Sentences. 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 Indeterminate Sentence Review Board (ISRB) to review and release inmates if the statutory criteria is met for three different 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 the age of eighteen and were sentenced for terms longer than 20 years.

Parole. Persons who committed crimes prior to July 1, 1984 were sentenced to an indeterminate term of incarceration with a maximum prison term. The ISRB is responsible for determining when an offender is a fit subject for release and whether the inmate's rehabilitation is complete. If the ISRB determines the person is fit for release, the parolee must follow the terms of supervision set by the court, the Department of Corrections (DOC), and the ISRB. If a parolee fails to follow the conditions of parole, the ISRB can revoke parole or impose new parole conditions. The ISRB will discharge the parolee from supervision after 36 months.

Indeterminate law allowed all inmates, except those sentenced to life without parole, to be considered for parole before their maximum sentence was over. Under this indeterminate system, inmates have a right to parole review, but they do not have a right to parole itself.

Community Custody Board. CCB offenders are persons who commit certain sex offenses on or after September 1, 2001 and are sentenced under the determinate plus sentencing system. CCB's are given a minimum and maximum sentence by the court. The ISRB holds a hearing several months before the earliest possible release date. This date is figured based on the minimum term and inmate earned time. At the hearing, the ISRB must determine by a preponderance of evidence if the offender is more likely than not to commit a sex offense if released with conditions. If the ISRB decides to release the offender to community custody, the offender must comply with all release conditions that were imposed by the court when the

offender was sentenced, as well as any conditions imposed by the ISRB. If an offender fails to follow those conditions, the ISRB can revoke the release or impose new release conditions on the offender. The length of supervision is determined by the felony level of the crime. If convicted of a class A felony it is life, for class B it is ten years, minus time served in prison, and class C is five years minus the time served in prison.

Juvenile Board Cases. JUVBRD offenders are those who committed crimes prior to their eighteenth birthday and were sentenced as adults. In *Miller v. Alabama*, the U.S. Supreme Court recognized juveniles should not be sentenced to life without parole prior to considering certain mitigating factors. Resulting state legislation passed in 2014 placed two types of JUVBRD offenders under ISRB authority:

- aggravated first degree murder—juveniles convicted of aggravated first degree murder must be re-sentenced by the sentencing court and may fall under the Board if sentenced to a term of less than Life-Without-Parole.
- Long Term Juvenile Board—juveniles sentenced to 20 or more years may petition the ISRB for release after serving 20 years flat time if they have not been convicted of a new crime after the age of eighteen and have not had a serious infraction in the last 12 months.

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 that were imposed by the court when the person was sentenced, as well as any conditions imposed by the ISRB and must be supervised for three years. If the person fails to follow conditions of supervision, the ISRB can revoke the release or impose new release conditions on the offender.

JUVBRD offenders have a presumption of release unless the ISRB determines by a preponderance of the evidence the person is more likely than not to commit new criminal law violations.

Evolution of the Indeterminate Sentence Review Board. The ISRB has evolved over time depending on its caseload and obligations. In 1986 shortly after the enactment of the SRA, the name of the Board was changed from the Board of Prison Terms and Paroles to its current name. As its caseload shrank, the number of Board members was reduced to two members plus the chair, until 2007 when it was expanded to the current level of four full-time members in addition to the chair. Board members serve a five year term with vacancies appointed by the Governor and approved by the Senate. No specific qualifications are outlined in law.

Until 2011, the ISRB existed as an independent entity. At that time, as part of a cost savings measure, the ISRB was transferred to DOC. DOC was directed to provide administrative and staffing support to the Board.

Summary of Bill (First Substitute): Transfer of Indeterminate Sentence Review Board. The ISRB is renamed the PCR Board. The PCR Board shall exist under the Office of the Governor and exercise its powers and duties independently of DOC.

Board Composition. The PCR Board shall consist of one chair and eight other members, each of whom shall be appointed by the Governor with the consent of the Senate. Members shall be composed of:

- a superior court judge;
- a representative of DOC;
- a prosecutor or prosecutor's association;
- a representative of law enforcement;
- a public defender;
- a formerly incarcerated person or person with experience working with criminal justice populations;
- a victim's advocate; and
- a behavioral health professional.

The Governor shall consider racial inequities in Washington's criminal justice system and ensure members of the PCR Board are representative of communities most impacted by crime. Minimum qualifications for the PCR Board members include but are not limited to:

- demonstrated knowledge of Washington's legal system and experience with standardized risk assessment tools;
- ten years' experience in criminal justice or a social science field; and
- demonstrated competence in principles of racial equity and restorative justice.

Petitions for Early Release. A person may petition the PCR Board for early release when the person:

- has served at least 15 consecutive years of total confinement;
- has served at least 20 consecutive years of total confinement for the current charge if the person is serving a sentence for murder in the first degree; or
- is at least sixty years of age and has served at least one-half of the person's sentenced term of total confinement.

Additionally, the person must not currently be under the jurisdiction of the PCR Board, must not have committed a serious infraction in the 12 months prior to filing the petition for early release, and must consent to a PCR Board review of all the individual's medical, mental health, and DOC files.

DOC must notify the person regarding their eligibility to petition for early release, conduct an assessment, and identify programming and services that would be appropriate to prepare the person for return to the community no later than five years prior to the date the person will be eligible to petition for release. To the extent possible, DOC must make programming available as identified by the assessment.

No later than 180 days from the date the person submits a petition for early release to the PCR Board, DOC must conduct an examination of the individual, incorporating evidence based and gender responsive tools recognized by experts in the prediction of dangerousness that includes a prediction of the probability that the person will engage in future criminal behavior if released.

Upon receipt of a petition, the PCR Board shall deny the petition if the person does not meet the statutory eligibility criteria or the person has:

- a serious infraction relating to drugs, alcohol, sex, or violence within the past five years;
- a confirmed status as a security threat group member within the past five years;
- failed to comply with available recommended treatment and programming; or
- a new conviction in the past fifteen years for an offense committed after admission to prison.

If the person otherwise meets the initial review criteria, the PCR Board will conduct a hearing to determine whether the person should be released. Factors to be considered include the nature, circumstances, and seriousness of the offense; the person's behavior while incarcerated; statements of those who have interacted with the person while incarcerated; and psychological evaluations. The PCR Board must seek input from the victim, who may choose whether or not to participate. Individuals determined to be indigent who are petitioning for early release have a right to appointed counsel.

If the PCR Board makes a decision to deny a petition for release, the PCR Board shall provide the person with a written report setting forth the reasons for the denial and recommendations as to what the person should do prior to submitting any subsequent petition. A person whose petition for release is denied may file a new petition for release five years from the date of denial or at an earlier date as may be set by the Board.

The PCR Board decision to grant a petition for early release must be made by a majority vote of the PCR Board. The PCR Board shall order the person released under conditions the PCR Board determines are appropriate, unless the PCR Board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.

The PCR Board has jurisdiction over a person granted early release by the PCR Board, for the length of the person's original sentence. The PCR Board shall order the released person to serve a term of community custody under the supervision of DOC, which may not be less than three years and may not exceed the expiration date of the original sentence imposed by the court. The PCR Board may return a person who has been granted an early release to the institution if the person is found to have violated a condition of community custody. If the person commits a new law violation, the PCR Board must return the person to the institution for the remainder of the sentence and the person is not eligible to petition for release again in the future.

An offender who was sentenced prior to their eighteenth birthday may petition for release after serving 15 years of total confinement rather than 20.

The PCR Board must evaluate outcomes of early release petitions and develop recommendations for changes to the eligibility requirements, and the composition or scope of review for the PCR Board. The PCR Board shall submit a report to the appropriate committees of the Legislature and the Governor's Office by July 1, 2022.

This act does not create a right or entitlement to be released from incarceration before the end of the term of incarceration imposed by the court and applies retroactively to all persons currently incarcerated, regardless of the date of the offense or conviction.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute): The eligibility criteria to petition for post conviction review is modified as follows:

- the person must not currently be under the jurisdiction of the PCR Board by another statute;
- if the person is serving a sentence for murder 1, the person must have served 20 consecutive years for the current charge prior to petitioning;
- a person over the age of sixty may petition after having served at least one-half of their sentence; and
- the person may not have any appeals pending.

Language is added to reinforce the involvement of the victim in consideration for release:

- if a victim chooses to participate, the PCR Board must consider victim input regarding protective measures for supervision and supports the victim may need if the person is released;
- the PCR Board is encouraged to develop a standard written victim impact questionnaire for submittal to the PCR Board in addition to the standard victim impact statement; and
- the prosecutor's office must certify they have exhausted all reasonable efforts to locate and contact the victim;

DOC must ensure a defendant is not released to where victim resides. If an offender commits a new law violation while on supervision, the PCR Board must return the offender to the institution for the remainder of the person's sentence. The returned offender may not file a new petition for release.

Language is added to clarify that a person sentenced to LWOP for aggravated murder is not eligible for release. The membership and minimum qualifications of the PCR Board are adjusted. The PCR Board must include a victim's advocate.

A JUVBRD offender—person committed to DOC prior to the person's eighteenth birthday—may petition for review after serving no less than 15 years of total confinement rather than 20.

Appropriation: None.

Fiscal Note: Requested on February 5, 2019.

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 Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill recognizes that people have the capacity to change. If we believe that all of our investments in DOC have value and the ability to change people, we ought to be able to look at the person and not the crime that brought them to prison. Over 16 percent of three strikers are veterans and 10 percent had a juvenile offense that contributed to the three strikes.

A person's age, educational level, history in the juvenile justice and foster care system, homelessness, mental illness—all contribute to a person's criminality.

All persistent offenders are likely to grow old and die in prison. An elderly offender costs four times the amount of a younger person as a result of health care costs. The rates of recidivism decrease with age.

The proliferation of life in prison has been a response to a confluence of policy shifts with the premise that long sentences make the public safer. Research has not borne this out and we now know that long term and life sentences are not an effective way of addressing public safety and is expensive. This proposed legislation is consistent with criminogenic research.

Over-incarceration has resulted in an aging prison population. One in five prisoners are over the age of fifty. This bill allows a mechanism for review for those who are aging. It also provides counsel for those who may not have the ability to navigate the system themselves.

This bill would put offenders on a path to accountability. Prisons do not make people change. People need to be self-motivated. This bill would give offenders an incentive to seek out opportunities for change.

Offenders disproportionately suffer from behavioral health challenges yet they have never received services until they get to prison. This is a great opportunity to look back and allow those people to get services and work their way back to society.

The juvenile resentencing process is an example that this can work. Judges have found some of these offenders to be model citizens and have significantly shortened their sentences. Eventually inmates grow up and have the same hopes and dreams of having a better life that the rest of us do. They should be given that opportunity.

Four percent of the state population is African American, yet they represent twenty-two percent of those serving LWOP. Prosecutorial discretion in the hands of prosecutors leads to racially disparate results.

CON: This legislation would have a detrimental impact on crime victims. The current determinate sentencing system allows the victim a chance to stabilize and achieve meaningful rehabilitation for themselves; this bill erodes their well-being and robs them of certainty in the criminal justice system. Some of these offenders have committed some of the most heinous crimes. The process relies on victim information from the time of sentencing to ensure a victim is notified. This is unlikely to provide actual notice. Further, the most vulnerable victims are the least likely to come forward. If a reentry specialist is a member of the Board, a victim advocate should also be included.

While it is important to give people an incentive to do well in prison, we believe it is more important to give them an incentive to do well in the community. We have heard the eliminating the death penalty does not jeopardize public safety because these offenders will serve life in prison. This bill changes that. There are other routes available for these offenders to seek release: for example, the clemency and pardons process or the process to

allow release of elderly offenders. This legislation also provides no consideration of the number of victims resulting from their crimes.

There are significant concerns with the current lack of transparency of the ISRB. The Board's authority should absolutely not be expanded.

Legislators should consider what this bill will do to victims and their families. These hearings are extremely painful for the victims. The lack of certainty and need to come back every five years causes the victim and the families to relive that crime over and over again.

OTHER: The Sentencing Guidelines Commission has reviewed this issue for years. Some of the elements of this bill are endorsed by the SGC and there are other areas the SGC would recommend changes. WAPA is not opposed to a lookback, but the lookback period for more serious crimes should be much longer.

Persons Testifying: PRO: Senator Jeannie Darneille, Prime Sponsor; Melanie Smith, NAMI Washington; Noreen Light, Washington Community Action Network; Virginia Parham, Washington Community Action Network; Kurt Myers, Prison Scholar Fund; Nick Strahley, Columbia Legal Service; Adam Paczkowski, Washington Defender Association; Devitta Briscoe, Community Justice Project; Rachael Seevers, Disability Rights Washington; Katherine Beckett, University of Washington; Gerard Bozeman, citizen; Dan Pens, Quaker Voice on Washington Public Policy; Josh Dukes, citizen; Jaime Hawk, ACLU of Washington; Gerald Hankerson, NAACP Alaska/Oregon/Washington.

CON: Angie Dowell, citizen; Sidney Oie, citizen; Heather Oie, citizen; James McMahan, Washington Association of Sheriffs and Police Chiefs; Maia McCoy, Victim Advocate.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys; Keri-Anne Jetzer, Sentencing Guidelines Commission.

Persons Signed In To Testify But Not Testifying: PRO: Xochitl Maykovich, Washington CAN.