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**SENATE BILL 5036**

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**State of Washington 67th Legislature 2021 Regular Session**

**By** Senators Dhingra, Carlyle, Darneille, Das, Hasegawa, Mullet, Nguyen, Pedersen, Stanford, Wellman, and Wilson, C.

AN ACT Relating to conditional commutation by the clemency and pardons board; amending RCW 9.94A.501, 9.94A.565, 9.94A.633, 9.94A.728, and 9.94A.880; reenacting and amending RCW 9.94A.885; adding a new section to chapter 9.94A RCW; creating a new section; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec.**  RCW 9.94A.501 and 2020 c 275 s 1 are each amended to read as follows:

(1) The department shall supervise the following offenders who are sentenced to probation in superior court, pursuant to RCW 9.92.060, 9.95.204, or 9.95.210:

(a) Offenders convicted of:

(i) Sexual misconduct with a minor second degree;

(ii) Custodial sexual misconduct second degree;

(iii) Communication with a minor for immoral purposes; and

(iv) Violation of RCW 9A.44.132(2) (failure to register); and

(b) Offenders who have:

(i) A current conviction for a repetitive domestic violence offense where domestic violence has been pleaded and proven after August 1, 2011; and

(ii) A prior conviction for a repetitive domestic violence offense or domestic violence felony offense where domestic violence has been pleaded and proven after August 1, 2011.

(2) Misdemeanor and gross misdemeanor offenders supervised by the department pursuant to this section shall be placed on community custody.

(3) The department shall supervise every felony offender sentenced to community custody pursuant to RCW 9.94A.701 or 9.94A.702 whose risk assessment classifies the offender as one who is at a high risk to reoffend.

(4) Notwithstanding any other provision of this section, the department shall supervise an offender sentenced to community custody regardless of risk classification if the offender:

(a) Has a current conviction for a sex offense or a serious violent offense and was sentenced to a term of community custody pursuant to RCW 9.94A.701, 9.94A.702, or 9.94A.507;

(b) Has been identified by the department as a dangerous mentally ill offender pursuant to RCW 72.09.370;

(c) Has an indeterminate sentence and is subject to parole pursuant to RCW 9.95.017;

(d) Has a current conviction for violating RCW 9A.44.132(1) (failure to register) and was sentenced to a term of community custody pursuant to RCW 9.94A.701;

(e)(i) Has a current conviction for a domestic violence felony offense where domestic violence has been pleaded and proven after August 1, 2011, and a prior conviction for a repetitive domestic violence offense or domestic violence felony offense where domestic violence was pleaded and proven after August 1, 2011. This subsection (4)(e)(i) applies only to offenses committed prior to July 24, 2015;

(ii) Has a current conviction for a domestic violence felony offense where domestic violence was pleaded and proven. The state and its officers, agents, and employees shall not be held criminally or civilly liable for its supervision of an offender under this subsection (4)(e)(ii) unless the state and its officers, agents, and employees acted with gross negligence;

(f) Was sentenced under RCW 9.94A.650, 9.94A.655, 9.94A.660, 9.94A.670, or 9.94A.711;

(g) Is subject to supervision pursuant to RCW 9.94A.745; or

(h) Was convicted and sentenced under RCW 46.61.520 (vehicular homicide), RCW 46.61.522 (vehicular assault), RCW 46.61.502(6) (felony DUI), or RCW 46.61.504(6) (felony physical control).

(5) The department shall supervise any offender who is released by the indeterminate sentence review board and who was sentenced to community custody or subject to community custody under the terms of release.

(6) The department shall supervise any individual granted conditional commutation pursuant to RCW 9.94A.885.

(7) The department is not authorized to, and may not, supervise any offender sentenced to a term of community custody or any probationer unless the offender or probationer is one for whom supervision is required under this section ((~~or RCW 9.94A.5011~~)).

((~~(7)~~)) (8) The department shall conduct a risk assessment for every felony offender sentenced to a term of community custody who may be subject to supervision under this section ((~~or RCW 9.94A.5011~~)).

((~~(8)~~)) (9) The period of time the department is authorized to supervise an offender under this section may not exceed the duration of community custody specified under RCW 9.94B.050, 9.94A.701 (1) through (8), or 9.94A.702, except in cases where the court has imposed an exceptional term of community custody under RCW 9.94A.535.

((~~(9)~~)) (10) The period of time the department is authorized to supervise an offender under this section may be reduced by the earned award of supervision compliance credit pursuant to RCW 9.94A.717.

**Sec.**  RCW 9.94A.565 and 1994 c 1 s 5 are each amended to read as follows:

(1) Nothing in this chapter ((~~1, Laws of 1994~~)) or chapter 10.95 RCW shall ever be interpreted or construed as to reduce or eliminate the power of the governor to grant a pardon or clemency to any offender on an individual case-by-case basis. However, the people recommend that ((~~any~~)):

(a) Any offender subject to total confinement for life without the possibility of parole not be considered for release until the offender has ((~~reached the age of at least sixty years old~~)) served at least 20 years in total confinement and has been judged to ((~~be~~)) no longer be a threat to society((~~. The people further recommend that sex~~));

(b) Sex offenders be held to the utmost scrutiny under this subsection regardless of age; and

(c) Release take the form of a conditional commutation that includes a period of law-abiding behavior in the community.

(2) Nothing in this section shall ever be interpreted or construed to grant any release for the purpose of reducing prison overcrowding. Furthermore, the governor shall provide twice yearly reports on the activities and progress of offenders subject to total confinement for life without the possibility of parole who are released through executive action during his or her tenure. These reports shall continue for not less than ((~~ten~~)) 10 years after the release of the offender or upon the death of the released offender.

**Sec.**  RCW 9.94A.633 and 2012 1st sp.s. c 6 s 2 are each amended to read as follows:

(1)(a) An offender who violates any condition or requirement of a sentence may be sanctioned by the court with up to ((~~sixty~~)) 60 days' confinement for each violation or by the department with up to ((~~thirty~~)) 30 days' confinement as provided in RCW 9.94A.737.

(b) In lieu of confinement, an offender may be sanctioned with work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other community-based sanctions.

(2) If an offender was under community custody pursuant to one of the following statutes, the offender may be sanctioned as follows:

(a) If the offender was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(b) If the offender was sentenced under the drug offender sentencing alternative set out in RCW 9.94A.660, the offender may be sanctioned in accordance with that section.

(c) If the offender was sentenced under the parenting sentencing alternative set out in RCW 9.94A.655, the offender may be sanctioned in accordance with that section.

(d) If the offender was sentenced under the special sex offender sentencing alternative set out in RCW 9.94A.670, the suspended sentence may be revoked and the offender committed to serve the original sentence of confinement.

(e) If the offender was sentenced to a work ethic camp pursuant to RCW 9.94A.690, the offender may be reclassified to serve the unexpired term of his or her sentence in total confinement.

(f) If a sex offender was sentenced pursuant to RCW 9.94A.507, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(g) If the offender was granted conditional commutation pursuant to RCW 9.94A.885, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(3) If a probationer is being supervised by the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, the probationer may be sanctioned pursuant to subsection (1) of this section. The department shall have authority to issue a warrant for the arrest of an offender who violates a condition of community custody, as provided in RCW 9.94A.716. Any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. Nothing in this subsection is intended to limit the power of the sentencing court to respond to a probationer's violation of conditions.

(4) The parole or probation of an offender who is charged with a new felony offense may be suspended and the offender placed in total confinement pending disposition of the new criminal charges if:

(a) The offender is on parole pursuant to RCW 9.95.110(1); or

(b) The offender is being supervised pursuant to RCW 9.94A.745 and is on parole or probation pursuant to the laws of another state.

**Sec.**  RCW 9.94A.728 and 2018 c 166 s 2 are each amended to read as follows:

(1) No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

(a) An offender may earn early release time as authorized by RCW 9.94A.729;

(b) An offender may leave a correctional facility pursuant to an authorized furlough or leave of absence. In addition, offenders may leave a correctional facility when in the custody of a corrections officer or officers;

(c)(i) The secretary may authorize an extraordinary medical placement for an offender when all of the following conditions exist:

(A) The offender has a medical condition that is serious and is expected to require costly care or treatment;

(B) The offender poses 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

(C) It is expected that granting the extraordinary medical placement will result in a cost savings to the state.

(ii) An offender sentenced to death or to life imprisonment without the possibility of release or parole is not eligible for an extraordinary medical placement.

(iii) The secretary shall require electronic monitoring for all offenders in extraordinary medical placement unless the electronic monitoring equipment interferes with the function of the offender's medical equipment or results in the loss of funding for the offender's medical care, in which case, an alternative type of monitoring shall be utilized. The secretary shall specify who shall provide the monitoring services and the terms under which the monitoring shall be performed.

(iv) The secretary may revoke an extraordinary medical placement under this subsection (1)(c) at any time.

(v) Persistent offenders are not eligible for extraordinary medical placement;

(d) The governor, upon recommendation from the clemency and pardons board, may grant ((~~an extraordinary~~)):

(i) Extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances; or

(ii) Conditional commutation pursuant to section 7 of this act;

(e) No more than the final ((~~twelve~~)) 12 months of the offender's term of confinement may be served in partial confinement for aiding the offender with: Finding work as part of the work release program under chapter 72.65 RCW; or reestablishing himself or herself in the community as part of the parenting program in RCW 9.94A.6551. This is in addition to that period of earned early release time that may be exchanged for partial confinement pursuant to RCW 9.94A.729(5)(d);

(f) No more than the final six months of the offender's term of confinement may be served in partial confinement as home detention as part of the graduated reentry program developed by the department under RCW 9.94A.733;

(g) The governor may pardon any offender;

(h) The department may release an offender from confinement any time within ((~~ten~~)) 10 days before a release date calculated under this section;

(i) An offender may leave a correctional facility prior to completion of his or her sentence if the sentence has been reduced as provided in RCW 9.94A.870;

(j) Notwithstanding any other provisions of this section, an offender sentenced for a felony crime listed in RCW 9.94A.540 as subject to a mandatory minimum sentence of total confinement shall not be released from total confinement before the completion of the listed mandatory minimum sentence for that felony crime of conviction unless allowed under RCW 9.94A.540; and

(k) Any person convicted of one or more crimes committed prior to the person's ((~~eighteenth~~)) 18th birthday may be released from confinement pursuant to RCW 9.94A.730.

(2) Offenders residing in a juvenile correctional facility placement pursuant to RCW 72.01.410(1)(a) are not subject to the limitations in this section.

**Sec.**  RCW 9.94A.880 and 2011 c 336 s 335 are each amended to read as follows:

(1) The clemency and pardons board is established as a board within the office of the governor. The board consists of ((~~five~~)) 10 members appointed by the governor, subject to confirmation by the senate.

(2) Board membership must consist of the following:

(a) A representative of a statewide or local organization representing communities of color or race equity;

(b) A representative of an agency representing crime victims;

(c) A representative of an association, community organization, or advocacy group with experience or interest in the formerly incarcerated with successful community reentry;

(d) A representative of a faith-based organization with interest and experience in successful community reentry;

(e) A representative of a statewide organization representing criminal defense lawyers;

(f) A law enforcement professional;

(g) A representative of a statewide organization representing prosecuting attorneys;

(h) A person with experience and interest in tribal affairs;

(i) A behavioral health professional; and

(j) A retired superior court judge.

(3) Board members must understand the principles of racial equity and restorative justice.

(4) Members of the board shall serve terms of ((~~four~~)) five years ((~~and~~)), but may serve more than one term until their successors are appointed and confirmed. ((~~However, the~~)) The governor shall stagger the initial terms ((~~by appointing one of the initial members for a term of one year, one for a term of two years, one for a term of three years, and two for terms of four years~~)) so that no more than three members are up for appointment in any given year.

((~~(3)~~)) (5) The board shall elect a chair from among its members and shall adopt bylaws governing the operation of the board.

((~~(4)~~)) (6) Members of the board shall ((~~receive no compensation but shall be reimbursed for travel expenses as provided in RCW 43.03.050 and 43.03.060 as now existing or hereafter amended~~)) each severally receive salaries fixed by the governor in accordance with the provisions of RCW 43.03.040, unless waived by the member. All members shall receive travel expenses incurred in the discharge of their official duties in accordance with RCW 43.03.050 and 43.03.060.

(7) The board shall be funded adequate personnel to implement and maintain functional operations such as support, records, victim liaisons, and information technology.

((~~(5)~~)) (8) The attorney general shall provide ((~~a staff as needed for the operation of~~)) legal counsel to the board.

**Sec.**  RCW 9.94A.885 and 2009 c 325 s 6 and 2009 c 138 s 4 are each reenacted and amended to read as follows:

(1) The clemency and pardons board shall receive petitions from individuals, organizations, and the department and make recommendations to the governor for ((~~review and commutation~~)):

(a) Commutation of sentences and pardoning of offenders in extraordinary cases((~~,~~)); and ((~~shall make recommendations thereon to the governor~~))

(b) Conditional commutation of sentences pursuant to section 7 of this act.

(2) The board shall receive petitions from individuals or organizations for the restoration of civil rights lost by operation of state law as a result of convictions for federal offenses or out-of-state felonies. The board may issue certificates of restoration limited to engaging in political office. Any certifications granted by the board must be filed with the secretary of state to be effective. In all other cases, the board shall make recommendations to the governor.

(3) The board shall not recommend that the governor grant clemency or conditional commutation under subsection (1) of this section until a public hearing has been held on the petition. The board shall consider statements of victims and survivors of victims presented as set forth in RCW 7.69.032, as well as any statements from the law enforcement agency or agencies that conducted the investigation.

(4)(a) The prosecuting attorney of the county where the conviction was obtained shall be notified at least ((~~thirty~~)) 90 days prior to the scheduled hearing that a petition has been filed and the date and place at which the hearing on the petition will be held. The board may waive the ((~~thirty-day~~)) 90-day notice requirement in cases where it determines that waiver is necessary to permit timely action on the petition. A copy of the petition shall be sent to the prosecuting attorney. ((~~The prosecuting attorney shall make reasonable efforts to notify victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation, of the date and place of the hearing.~~))

(b) To facilitate victim and survivor of victim involvement, county prosecutor's offices shall 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 prosecutor's office shall 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. Information regarding victims, survivors of victims, or witnesses receiving this notice are confidential and shall not be available to the offender. ((~~The board shall consider statements presented as set forth in RCW 7.69.032.~~))

(c) This subsection is intended solely for the guidance of the board. Nothing in this section is intended or may be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any person.

(5)(a) The board may recommend conditions of commutation for any individual released pursuant to this section, including a term of community custody up to the length of the court-imposed term of incarceration, partial confinement up to six months, restrictions on travel, no contact with certain persons or classes of persons, restrictions on the type of employment and any other restrictions that the board determines to be reasonable and appropriate, or any other condition which provides for community protection from the released individual.

(b) The department shall monitor the released individual's compliance with conditions of community custody imposed by the court or recommended by the board. Any violation of conditions of community custody is subject to the provisions of this chapter.

(6) The governor may revoke an order granting conditional commutation at any time.

(7) Members of the board are not civilly liable for decisions made while performing their duties.

NEW SECTION. **Sec.**  A new section is added to chapter 9.94A RCW to read as follows:

(1) Notwithstanding any other provision of this chapter, a person may petition the board for conditional commutation if the person:

(a) Is not subject to the jurisdiction of the indeterminate sentence review board pursuant to RCW 9.94A.730 or 9.94A.507, or the person's offense was committed prior to July 1, 1984;

(b) Has served at least 20 consecutive years of total confinement;

(c) Consents to a review of all of his or her medical, mental

health, and department files by the board; and

(d) Does not have any current appeals pending or collateral attacks pending on the case for which the person is seeking conditional commutation.

(2) No later than five years prior to the date the person will be eligible to petition for release, the department shall:

(a) Notify the person regarding his or her eligibility under this section; and

(b) Conduct an assessment of the person and identify programming and services that would be appropriate to prepare the person for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(3) If the person has a prior known or diagnosed decreased cognitive function or developmental disability, or a decreased cognitive function or developmental disability is determined during the assessment process as outlined in subsection (2)(b) of this section, the department shall assist the person with the process of applying for review by the board or refer to additional services for such assistance.

(4) No later than 180 days from the date that the person submits his or her petition for conditional commutation to the board, the department shall conduct, and the person shall participate in, an examination of the person, incorporating methodologies that are evidence-based, normed on the specific gender of the offender, and recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person.

(5) The board shall recommend the person be released under such affirmative and other conditions as the panel determines appropriate, unless the panel 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.

(6) The board may take any of the following actions: Deny a petition without a hearing because the person does not meet the initial criteria for filing a petition; or conduct a hearing in accordance with RCW 9.94A.885 to consider additional information, and then deny the petition or recommend conditional commutation to the governor.

(7) In making its decision, the board shall consider, if available, the following factors and information:

(a) Public safety;

(b) The person's criminal history;

(c) The nature and circumstances of the offenses committed, including the current and past offenses;

(d) The person's social and medical history;

(e) Evidence of the person's remorse, atonement, and self-reflection in relation to the offense committed, including any efforts to participate in the department's victim offender dialogue program. If the individual submitted an Alford plea, the board shall take into consideration the impact that may have on an individual's ability to provide evidence of remorse and atonement;

(f) Evidence of the person's rehabilitation, including behavior while incarcerated, job history, education participation in available rehabilitative program and treatment, and infraction history;

(g) Statements of correctional staff, program supervisors, and volunteer facilitators regarding the person;

(h) Input from the victims of the crime;

(i) Input from the police and prosecutors in the jurisdictions where the person's crimes were committed;

(j) Input from persons in the community pledging their support of the person, if released;

(k) The available resources in the community to help the person transition to life outside of prison;

(l) A risk assessment and psychological evaluation provided by the department;

(m) The sentencing judge's analysis in imposing an exceptional sentence, if any; and

(n) Any other relevant factors.

(8) Further, the board shall consider a release plan presented by the person showing where the person will reside and how he or she will support himself or herself during the first year after his or her release. The department shall independently review the proposed release plan and make an independent evaluation to ensure the person is not released to an area where the victim resides or that impacts community safety.

(9) If the board recommends commutation or denies the petition, it shall specify the reasons for the decision.

(10) The conditions for conditional commutation may include: Partial confinement for up to six months, regular drug and/or alcohol testing, no violations of law, restrictions on travel, no contact with certain individuals or classes of individuals, restrictions on the type of employment and any other restrictions that the board determines to be reasonable and appropriate, or any other condition which provides for community protection from the released person.

(11) A person whose petition for conditional commutation is denied may file a new petition for conditional commutation three years from the date of denial or at an earlier date as may be set by the board.

(12) The person does not have a right to appointed counsel. Both lawyers and nonlawyers may assist the person in the preparation of his or her petition and at the hearing.

(13) All information contained in a petition or that is submitted to the board is subject to public disclosure.

(14) The board may adopt rules setting out criteria and procedures for the review of petitions under this section and RCW 9.94A.885 as appropriate.

(15) For purposes of this section, "board" means the clemency and pardons board.

NEW SECTION. **Sec.**  (1) Chapter 187, Laws of 2019 removed robbery in the second degree as a most serious offense in sentencing a person as a persistent offender. At that time, the legislature declined to require resentencing of individuals serving a life sentence as the result of a conviction for robbery in the second degree. The legislature recognizes the need to balance considerations that may have gone into the original charging decision and the inequities that may have resulted from including robbery in the second degree as a third strike offense.

(2) In exercising its duties under RCW 9.94A.885 and section 7 of this act, the clemency and pardons board shall give priority consideration to individuals who petition for conditional commutation and who have a current or past conviction for robbery in the second degree that was used as a basis for a finding that the individual was a persistent offender.

(3) This section expires December 31, 2024.

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