
SUBSTITUTE SENATE BILL 5236

State of Washington

62nd Legislature

2011 Regular Session

By Senate Judiciary (originally sponsored by Senators Kline and Kohl-Welles)

READ FIRST TIME 02/21/11.

1 AN ACT Relating to persistent offenders; amending RCW 9.94A.570 and
2 9.95.435; reenacting and amending RCW 9.94A.501; adding a new section
3 to chapter 9.94A RCW; adding new sections to chapter 9.95 RCW; and
4 prescribing penalties.

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

6 **Sec. 1.** RCW 9.94A.501 and 2010 c 267 s 10 and 2010 c 224 s 3 are
7 each reenacted and amended to read as follows:

8 (1) The department shall supervise every offender convicted of a
9 misdemeanor or gross misdemeanor offense who is sentenced to probation
10 in superior court, pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, for
11 an offense included in (a) and (b) of this subsection. The superior
12 court shall order probation for:

13 (a) Offenders convicted of fourth degree assault, violation of a
14 domestic violence court order pursuant to RCW 10.99.040, 10.99.050,
15 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145,
16 and who also have a prior conviction for one or more of the following:

17 (i) A violent offense;

18 (ii) A sex offense;

19 (iii) A crime against a person as provided in RCW 9.94A.411;

- 1 (iv) Fourth degree assault; or
2 (v) Violation of a domestic violence court order; and
3 (b) Offenders convicted of:
4 (i) Sexual misconduct with a minor second degree;
5 (ii) Custodial sexual misconduct second degree;
6 (iii) Communication with a minor for immoral purposes; and
7 (iv) Violation of RCW 9A.44.132(2) (failure to register).

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

11 (3) The department shall supervise every felony offender sentenced
12 to community custody whose risk assessment, conducted pursuant to
13 subsection (6) of this section, classifies the offender as one who is
14 at a high risk to reoffend.

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

18 (a) Has a current conviction for a sex offense or a serious violent
19 offense as defined in RCW 9.94A.030;

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

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

24 (d) Has a current conviction for violating RCW 9A.44.132(1)
25 (failure to register);

26 (e) Was sentenced under RCW 9.94A.650, 9.94A.655, 9.94A.660, or
27 9.94A.670; (~~or~~)

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

29 (g) Has been released by the indeterminate sentence review board
30 pursuant to section 4 of this act.

31 (5) The department is not authorized to, and may not, supervise any
32 offender sentenced to a term of community custody or any probationer
33 unless the offender or probationer is one for whom supervision is
34 required under subsection (1), (2), (3), or (4) of this section.

35 (6) The department shall conduct a risk assessment for every felony
36 offender sentenced to a term of community custody who may be subject to
37 supervision under this section.

1 **Sec. 2.** RCW 9.94A.570 and 2000 c 28 s 6 are each amended to read
2 as follows:

3 (1) Notwithstanding the statutory maximum sentence or any other
4 provision of this chapter and except as provided in subsection (2) of
5 this section, a persistent offender shall be sentenced to a term of
6 total confinement for life without the possibility of release or, when
7 authorized by RCW 10.95.030 for the crime of aggravated murder in the
8 first degree, sentenced to death. In addition, no offender subject to
9 this section may be eligible for community custody, earned release
10 time, furlough, home detention, partial confinement, work crew, work
11 release, or any other form of release as defined under RCW 9.94A.728
12 ~~((1))~~ (2), (3), ~~((4), (6))~~ (5), (7), and (8), ~~((or (9)))~~ or any
13 other form of authorized leave from a correctional facility while not
14 in the direct custody of a corrections officer or officers, except:

15 ~~((1))~~ (a) In the case of an offender in need of emergency medical
16 treatment; ~~((or (2)))~~

17 (b) For the purpose of commitment to an inpatient treatment
18 facility in the case of an offender convicted of the crime of rape in
19 the first degree; or

20 (c) When authorized under sections 3 and 4 of this act and RCW
21 9.95.435.

22 (2)(a) A persistent offender shall be sentenced under this
23 subsection if the persistent offender does not have: (i) A prior or
24 current conviction for a class A felony, assault in the second degree,
25 or a sex offense; (ii) a federal or out-of-state conviction for an
26 offense that under the laws of this state would be considered a class
27 A felony, assault in the second degree, or a sex offense; (iii) a prior
28 or current conviction with a deadly weapon verdict under RCW 9.94A.825
29 or 9.95.015; (iv) a federal or out-of-state conviction for which the
30 offender would be required to register as a sex offender while residing
31 in the state of conviction; (v) a federal or out-of-state conviction
32 that included a finding, whether as an element of the offense or for
33 the purpose of imposing a sentencing enhancement, that offender was
34 armed with a deadly weapon, with a dangerous weapon, or with a firearm,
35 as those terms are defined in the jurisdiction of conviction; or (vi)
36 a federal or out-of-state conviction for an offense for which the
37 sentencing court imposed a sentence of incarceration, supervision, or
38 probation, or a combination thereof, of ten or more years.

1 (b) Upon a finding that the persistent offender is subject to
2 sentencing under (a) of this subsection, the court shall impose a
3 sentence to a maximum term and a minimum term. The maximum term shall
4 consist of a maximum sentence of life without the possibility of early
5 release. The minimum term shall consist of the greater of fifteen
6 years, the high end of the standard range for the current offense, or
7 an exceptional sentence above the standard range pursuant to RCW
8 9.94A.535. An offender serving a term of confinement under this
9 subsection is not eligible for earned early release or any reduction in
10 the minimum term imposed by the court.

11 (c) When imposing sentence under (b) of this subsection, the court
12 shall, in addition to the other terms of the sentence, sentence the
13 offender to community custody under the supervision of the department
14 and the authority of the board for any period of time the person is
15 released from total confinement. As part of any sentence, the court
16 shall also require the offender to comply with any conditions imposed
17 by the board under chapter 9.95 RCW. After the offender has served the
18 mandatory minimum term in total confinement without reduction, the
19 board shall have the authority to conditionally release the offender
20 pursuant to section 4 of this act.

21 NEW SECTION. Sec. 3. A new section is added to chapter 9.94A RCW
22 to read as follows:

23 The board shall have jurisdiction over any offender in custody who:
24 (1) Was sentenced as a persistent offender prior to the effective date
25 of this section; and (2) does not have: (i) A prior or current
26 conviction for a class A felony, assault in the second degree, or a sex
27 offense; (ii) a federal or out-of-state conviction for an offense that
28 under the laws of this state would be considered a class A felony,
29 assault in the second degree, or a sex offense; (iii) a prior or
30 current conviction with a deadly weapon verdict under RCW 9.94A.825 or
31 9.95.015; (iv) a federal or out-of-state conviction for which the
32 offender would be required to register as a sex offender while residing
33 in the state of conviction; (v) a federal or out-of-state conviction
34 that included a finding, whether as an element of the offense or for
35 the purpose of imposing a sentencing enhancement, that offender was
36 armed with a deadly weapon, with a dangerous weapon, or with a firearm,
37 as those terms are defined in the jurisdiction of conviction; or (vi)

1 a federal or out-of-state conviction for an offense for which the
2 sentencing court imposed a sentence of incarceration, supervision, or
3 probation, or a combination thereof, of ten or more years.
4 Notwithstanding the terms of the judgment and sentence, after such an
5 offender has served fifteen years in total confinement without
6 reduction under sentence as a persistent offender, the board shall have
7 the authority to grant conditional release pursuant to section 4 of
8 this act. The board shall impose conditions of community custody
9 consistent with RCW 9.94A.703. The offender shall be under the
10 supervision of the department and the authority of the board for any
11 period of time the person is released from total confinement before the
12 expiration of the maximum sentence.

13 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.95 RCW
14 to read as follows:

15 (1) The board shall not release a persistent offender pursuant to
16 section 3 of this act unless in its opinion his or her rehabilitation
17 has been completed and he or she is a fit subject for release. The
18 board shall start with the presumption that the offender is to remain
19 in total confinement for the maximum sentence of life. The offender
20 may file his or her petition in writing with the board anytime after he
21 or she has served the minimal sentence as defined in RCW
22 9.94A.570(2)(b). The offender must prove by clear and convincing
23 evidence that his or her rehabilitation is complete and that he or she
24 is fit for release. The board must then find by clear and convincing
25 evidence that the offender has shown that he or she is completely
26 rehabilitated and is fit for release. The board must document its
27 decision in a report to the secretary. Upon denial of an offender's
28 petition by the board, the offender shall wait a minimum term, as set
29 by the board, to appear in front of the board for a subsequent release
30 hearing. The board shall set a minimum term, not to exceed five years
31 from the date on which the petition was denied, by which the board must
32 schedule a subsequent release hearing. The offender is not required to
33 submit a new petition for subsequent release hearings.

34 (2) Upon receipt of an offender's petition for release under this
35 section, the board shall make all reasonable efforts to notify by any
36 reasonable means any of the offender's victims for those offenses that
37 qualified the offender as a persistent offender. The board shall

1 provide notification to the victim at least thirty days prior to any
2 scheduled release hearing in which the offender's petition shall be
3 heard by the board so that the victim has the opportunity to provide
4 his or her input to the board on the issue of the offender's release.
5 The board shall consider any input provided by the victim regarding the
6 offender's petition.

7 As part of the board's reasonable efforts to notify the victim in
8 writing of the offender's pending petition, the board shall provide
9 notification in writing of the offender's petition to the prosecuting
10 attorney for the county in which the offender was convicted of his or
11 her most recent most serious offense. The board shall provide notice
12 to the prosecuting attorney no later than thirty days prior to any
13 scheduled release hearing by the board.

14 (3) Once the initial petition seeking release under this section
15 has been filed by the offender, the department shall conduct, and the
16 offender shall participate in, an examination of the offender prior to
17 each release hearing. The department shall complete an examination
18 within ninety days of receipt of the offender's petition, or at least
19 ninety days prior to any subsequently scheduled release hearings, and
20 provide the evaluation to the board for review. The board may consider
21 an offender's failure to participate in the examination in its
22 determination as to whether the offender should be released.

23 (4) If conditional release is granted, the board shall retain
24 jurisdiction for the remainder of the offender's life with the power to
25 revoke the conditional release if the offender violates the imposed
26 conditions. An offender released by the board shall be monitored by
27 the department for compliance. The board shall impose the conditions
28 and instructions provided for in RCW 9.94A.704 should the board decide
29 to release the offender. The board shall consider the department's
30 recommendations and may impose conditions in addition to those
31 recommended by the department. The board may impose or modify
32 conditions of community custody following notice to the offender.

33 (5) Whenever the board or a community corrections officer of this
34 state has reason to believe an offender released under subsection (1)
35 of this section has violated a condition of community custody or the
36 laws of this state, any community corrections officer may arrest or
37 cause the arrest and detention of the offender pending a determination
38 by the board whether sanctions should be imposed or the offender's

1 community custody should be revoked. The community corrections officer
2 shall report all facts and circumstances surrounding the alleged
3 violation to the board in a written report to the board, with
4 recommendations.

5 NEW SECTION. **Sec. 5.** A new section is added to chapter 9.95 RCW
6 to read as follows:

7 If conditional release is granted by the board under section 4 of
8 this act, the governor shall have the opportunity to reject the board's
9 decision in writing within sixty days of the board's decision. If the
10 governor rejects the board's decision, the offender's petition for
11 release is denied. If the governor fails to act on the board's
12 decision within sixty days, the offender's petition for release is
13 denied. If the offender's petition for release is denied, the board
14 shall set a new minimum term not to exceed five years from the date on
15 which the petition was denied.

16 **Sec. 6.** RCW 9.95.435 and 2007 c 363 s 3 are each amended to read
17 as follows:

18 (1)(a) If an offender released by the board under RCW 9.95.420
19 violates any condition or requirement of community custody, the board
20 may transfer the offender to a more restrictive confinement status to
21 serve up to the remaining portion of the sentence, less credit for any
22 period actually spent in community custody or in detention awaiting
23 disposition of an alleged violation and subject to the limitations of
24 subsection (2) of this section.

25 (b) If an offender released by the board under section 4 of this
26 act is alleged to have violated any condition or requirement of
27 community custody, the offender shall be transferred to confinement in
28 a correctional institution owned, operated by, or operated under
29 contract with the state while awaiting the disposition of the hearing
30 specified in subsection (3) of this section.

31 (c) If an offender released by the board under section 4 of this
32 act is alleged to have violated any three conditions or requirements of
33 community custody within a six-month period, the offender shall be
34 transferred to confinement in a correctional institution owned,
35 operated by, or operated under contract with the state while awaiting

1 the disposition of the hearing specified in subsection (3) of this
2 section.

3 (d) If an offender released by the board under section 4 of this
4 act is convicted of any felony offense, that offender shall be
5 transferred to confinement in a correctional institution owned,
6 operated by, or operated under contract with the state while awaiting
7 the disposition of the hearing specified in subsection (3) of this
8 section.

9 (2)(a) Following the hearing specified in subsection (3) of this
10 section, the board may impose sanctions such as work release, home
11 detention with electronic monitoring, work crew, community restitution,
12 inpatient treatment, daily reporting, curfew, educational or counseling
13 sessions, supervision enhanced through electronic monitoring, or any
14 other sanctions available in the community, or may suspend the release
15 and sanction up to sixty days' confinement in a local correctional
16 facility for each violation, or revoke the release to community custody
17 whenever an offender released by the board under RCW 9.95.420 or
18 section 4 of this act violates any condition or requirement of
19 community custody.

20 (b) If the board finds pursuant to the hearing specified in
21 subsection (3) of this section, that an offender released by the board
22 under section 4 of this act violated any condition or requirement of
23 community custody, the board may revoke the offender's conditional
24 release and impose the remaining portion of the offender's life
25 sentence. The offender may repetition the board for conditional
26 release pursuant to section 4 of this act after the offender has served
27 at least five years in total confinement, without reduction, from the
28 date on which the board revoked the offender's conditional release. If
29 the board finds that a violation of a condition or requirement of
30 community custody has been proved by a preponderance of the evidence,
31 but is not sufficient cause for revocation of the offender's release
32 from community custody, the board may, in its discretion, reinstate the
33 offender on community custody. If the board reinstates the offender on
34 community custody, the board may impose upon the offender sanctions
35 listed under (a) of this subsection as well as additional conditions or
36 requirements of community custody.

37 (c) If the board finds pursuant to the hearing specified in
38 subsection (3) of this section, that an offender released by the board

1 under section 4 of this act has violated three conditions or
2 requirements of community custody within a six-month period, the board
3 shall revoke the offender's conditional release and impose the
4 remaining portion of the offender's life sentence. The offender may
5 repetition the board for conditional release pursuant to section 4 of
6 this act after the offender has served at least five years in total
7 confinement, without reduction, from the date on which the board
8 revoked the offender's conditional release.

9 (d) If the board finds pursuant to the hearing specified in
10 subsection (3) of this section, that an offender released by the board
11 under section 4 of this act has been convicted of a most serious
12 offense under RCW 9.94A.030(31), the board shall revoke the offender's
13 conditional release and impose the remaining portion of the offender's
14 life sentence. These offenders shall not be eligible for release. If
15 the board finds that the offender has been convicted of any felony that
16 is not a most serious offense under RCW 9.94A.030(31), the board shall
17 revoke the offender's conditional release and impose the remaining
18 portion of the offender's life sentence. The offender may repetition
19 the board for conditional release pursuant to section 4 of this act
20 after the offender has served at least ten years in total confinement,
21 without reduction, from the date on which the board revoked the
22 offender's conditional release.

23 (3) If an offender released by the board under RCW 9.95.420 or
24 section 4 of this act is accused of violating any condition or
25 requirement of community custody, he or she is entitled to a hearing
26 before the board or a designee of the board prior to the imposition of
27 sanctions. The hearing shall be considered as offender disciplinary
28 proceedings and shall not be subject to chapter 34.05 RCW. The board
29 shall develop hearing procedures and a structure of graduated sanctions
30 consistent with the hearing procedures and graduated sanctions
31 developed pursuant to RCW 9.94A.737. The board may suspend the
32 offender's release to community custody and confine the offender in a
33 correctional institution owned, operated by, or operated under contract
34 with the state prior to the hearing unless the offender has been
35 arrested and confined for a new criminal offense.

36 (4) The hearing procedures required under subsection (3) of this
37 section shall be developed by rule and include the following:

1 (a) Hearings shall be conducted by members or designees of the
2 board unless the board enters into an agreement with the department to
3 use the hearing officers established under RCW 9.94A.737;

4 (b) The board shall provide the offender with findings and
5 conclusions which include the evidence relied upon, and the reasons the
6 particular sanction was imposed. The board shall notify the offender
7 of the right to appeal the sanction and the right to file a personal
8 restraint petition under court rules after the final decision of the
9 board;

10 (c) The hearing shall be held unless waived by the offender, and
11 shall be electronically recorded. For offenders not in total
12 confinement, the hearing shall be held within thirty days of service of
13 notice of the violation, but not less than twenty-four hours after
14 notice of the violation. For offenders in total confinement, the
15 hearing shall be held within thirty days of service of notice of the
16 violation, but not less than twenty-four hours after notice of the
17 violation. The board or its designee shall make a determination
18 whether probable cause exists to believe the violation or violations
19 occurred. The determination shall be made within forty-eight hours of
20 receipt of the allegation;

21 (d) The offender shall have the right to: (i) Be present at the
22 hearing; (ii) have the assistance of a person qualified to assist the
23 offender in the hearing, appointed by the presiding hearing officer, if
24 the offender has a language or communications barrier; (iii) testify or
25 remain silent; (iv) call witnesses and present documentary evidence;
26 (v) question witnesses who appear and testify; and (vi) be represented
27 by counsel if revocation of the release to community custody upon a
28 finding of violation is a probable sanction for the violation. The
29 board may not revoke the release to community custody of any offender
30 who was not represented by counsel at the hearing, unless the offender
31 has waived the right to counsel; and

32 (e) The sanction shall take effect if affirmed by the presiding
33 hearing officer.

34 (5) Within seven days after the presiding hearing officer's
35 decision, the offender may appeal the decision to the full board or to
36 a panel of three reviewing examiners designated by the chair of the
37 board or by the chair's designee. The sanction shall be reversed or
38 modified if a majority of the panel finds that the sanction was not

1 reasonably related to any of the following: (a) The crime of
2 conviction; (b) the violation committed; (c) the offender's risk of
3 reoffending; or (d) the safety of the community.

4 (6) For purposes of this section, no finding of a violation of
5 conditions may be based on unconfirmed or unconfirmable allegations.

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