

HOUSE BILL REPORT

E2SSB 5036

As Reported by House Committee On:
Public Safety

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: Senate Committee on Ways & Means (originally sponsored by Senators Dhingra, Carlyle, Darneille, Das, Hasegawa, Mullet, Nguyen, Pedersen, Stanford, Wellman and Wilson, C.).

Brief History:

Committee Activity:

Public Safety: 3/16/21, 3/26/21 [DPA].

**Brief Summary of Engrossed Second Substitute Bill
(As Amended By Committee)**

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

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

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: Do pass as amended. Signed by 8 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Davis, Hackney, Lovick, Orwall, Ramos and Simmons.

Minority Report: Do not pass. Signed by 4 members: Representatives Mosbrucker, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Graham and Young.

Minority Report: Without recommendation. Signed by 1 member: Representative Griffey.

Staff: Kelly Leonard (786-7147).

Background:

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

Initiative No. 593, approved by the voters in 1994 and often referred to as the "three strikes law," requires courts to impose life sentences for persons deemed to be persistent offenders. A persistent offender is an offender who is convicted of a most serious offense and who has at least two prior convictions for most serious offenses within a certain period of time. "Most serious offense," also referred to as "strike offense," includes any class A felony, various class B felonies—which are primarily assault, sex, or kidnapping-related offenses—as well as any felony with a deadly weapon verdict, and any equivalent federal or out-of-state offense. In 2019 the state passed legislation removing Robbery in the second degree as a "most serious offense," meaning the offense no longer qualifies as a strike offense; however, this change was prospective and did not affect persons serving life sentences under the "three strikes law" predicated on a Robbery in the second degree offense committed before 2019.

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 earn early release time; and
- a pardon or commutation granted by the Governor.

Pardons and Commutations.

The Washington Constitution provides the Governor the authority to grant pardons, and statute provides the Governor with the authority to commute sentences and release persons in extraordinary cases.

The Clemency and Pardons Board (CPB) receives petitions for commutation and pardons and makes recommendations on those petitions to the Governor. The Governor makes the final decision in all petitions heard by the CPB.

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

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

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

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

Hearing and Recommendation. At the hearing, the CPB hears testimony from a variety of

witnesses, including the petitioner, an attorney for the petitioner, the prosecuting attorney, and family members of the victim and the offender. When determining whether to recommend a petitioner be pardoned or have their sentence commuted, the CPB focuses on the existence or non-existence of extraordinary circumstances. A petitioner must demonstrate why his or her circumstances are extraordinary and warrant the exercise of the Governor's discretionary pardon or commutation power.

The CPB votes on a recommendation, which is then forwarded to the Governor. The Governor is under no legal obligation to follow the recommendation. If the Governor grants a pardon, the conviction will be removed from the petitioner's criminal history available to the public. The Governor is free to place conditions on the pardon, such as requiring a conviction-free record for a specified period of time. A commutation results in a reduction of criminal penalties and is often conditional.

Extraordinary Medical Placement.

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

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

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

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

Summary of Amended Bill:

Clemency and Pardons Board.

Composition. The CPB is expanded from five to 10 members appointed by the Governor, who are subject to confirmation by the Senate. The CPB membership must consist of:

- a representative of an organization representing communities of color or racial equity;
- a representative of an agency representing crime victims;
- a representative of an association, community organization, or advocacy group with experience or interest in the formerly incarcerated with successful community reentry;
- a representative of a faith-based organization with interest in community reentry;
- a representative of a statewide organization representing criminal defense lawyers;

- a law enforcement professional;
- a representative of a statewide organization representing prosecuting attorneys;
- a person with experience and interest in tribal affairs;
- a behavioral health professional; and
- a retired superior court judge.

Member terms are expanded from four to five years. Members receive a salary unless waived by the member. Members are not civilly liable for decisions made while performing their duties. The CPB must additionally be funded for adequate staff to implement and maintain functional operations.

Jurisdiction. The jurisdiction of the CPB is modified. The CPB must receive petitions from individuals, organizations, and the DOC and make recommendations to the Governor for: commutation of sentences and pardoning of individuals in extraordinary cases; and conditional commutation of sentences in accordance with additional requirements.

The recommendations in Initiative No. 593 are modified and expanded to encompass all life sentences imposed under the SRA as well as the provisions for Aggravated Murder in the first degree. It is recommended that the CPB not consider an individual serving a life sentence for release until he or she 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 individual is serving a sentence for Aggravated Murder. It is further recommended that release take the form of a conditional commutation that includes a period of law-abiding behavior in the community.

Through December 31, 2024, in processing petitions for conditional commutations, the CPB must give priority consideration to individual who are serving a sentence under the "three strikes law" who have a current or past conviction for Robbery in the second degree.

Notification to Prosecutor and Relevant Parties. The timeframe for the CPB to notify the county prosecuting attorney of a hearing is extended to 90 days in advance of the scheduled hearing. The requirements for the county prosecuting attorney to notify relevant parties is modified. To facilitate victim and survivor of victim involvement, 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.

Conditional Commutations. A process for conditional commutations is established. An individual may petition the CPB for conditional commutation if the person:

- is not subject to the jurisdiction of the ISRB for certain types sentences;
- has served at least 20 consecutive years of total confinement, or has served at least 15

- years if he or she is serving a life sentence under the "three strikes law" and Robbery in the second degree was his or her third strike, or has served at least 25 years if he or she is serving a life sentence for Aggravated Murder in the first degree;
- consents to a review of all of his or her medical, mental health, and DOC files by the CPB; and
 - does not have any current appeals pending or collateral attacks pending on the case for which he or she is seeking conditional commutation.

No later than five years prior to the date the individual will be eligible to petition for release, the DOC must notify the individual, conduct an assessment of the individual, and identify programming and services that would be appropriate to prepare him or her for return to the community. No later than 180 days from the date that the individual submits his or her petition for conditional commutation, the DOC must conduct, and the individual must participate in, an examination, incorporating methodologies that are evidence-based, normed on the specific gender of the individual, and recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the individual will engage in future criminal behavior if released on conditions to be set by the CPB. The CPB may consider an individual's failure to participate in an evaluation when determining whether to release the person.

The CPB may deny a petition without a hearing because the individual does not meet the initial criteria for filing a petition, or the CPB may conduct a hearing to consider additional information, and then deny the petition or recommend conditional commutation to the Governor.

In making its decision, the CPB must consider, if available, the certain factors and information. This includes, for example, public safety, criminal history, social and medical history, the individual's acceptance of responsibility and remorse, evidence of rehabilitation, input from victims, law enforcement agencies, and community members, and the individual's release plan, which must be independently reviewed by the DOC. However, the CPB must recommend the individual 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 individual will commit new criminal law violations if released. An individual 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.

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

If the Governor approves the recommendation and issues an order granting conditional commutation, the order cannot be subsequently revoked.

Extraordinary Medical Placement.

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

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

Terminology.

Certain references to "offender" are replaced with "individual." The SRA is modified to provide that the term "individual" has the same meaning as—and can be used interchangeably with—the term "offender," unless the context indicates otherwise.

Amended Bill Compared to Engrossed Second Substitute Bill:

References to "incarcerated individual" are replaced with "individual" throughout the bill, thereby restoring the applicability of certain provisions to individuals who are not incarcerated. The SRA is modified to provide that the term "individual" has the same meaning as—and can be used interchangeably with—the term "offender," unless the context indicates otherwise.

A provision is added requiring appointed members of the CPB to be knowledgeable about the impact of crime upon victims and communities.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The criminal justice system has a serious impact on our society, and its functionality is immensely important, especially to practitioners who have dedicated their lives to it. Prosecutors, defense attorneys, and judges see people at their very worst, but that

is not the sum total of who they are. Accountability should be balanced with rehabilitation and even forgiveness. While there will always be some stakeholder concerns about any proposal for post-conviction review and release, this bill represents a balanced approach. This bill is supported by practitioners and advocates across the spectrum.

The bill expands the membership of the CPB to reflect the practitioners and the persons affected by the process. The bill professionalizes the CPB by making appointed members salaried positions and providing them with additional support. This will also address ongoing resource issues that have created a backlog of petitions.

The bill sets up a process for conditional commutations. This would be separate from the current clemency and pardons process; however, it utilizes the infrastructure already in place. Prosecutors and defense attorneys are already familiar with the CPB, and there is already a system for notifying victims and bringing information to the CPB. For a conditional commutation, the CPB would be required to consider several factors aimed at evaluating the person and the crime. If someone has not been rehabilitated, then he or she would not receive a recommendation in favor of a conditional commutation. Most importantly, regardless of the recommendation, the final decision rests with the Governor. Prosecutors support the final decision being made by an elected official. This framework is preferable to other proposals that have come to the Legislature in recent years, including the proposal to expand administrative earned early release. This approach is more robust and transparent.

Further, the bill emphasizes the importance of victims' voices. The CPB would have a representative of victims, and the CPB would be required to consider input from victims in each case, in addition to public safety, the nature of the offense, and other significant factors. The bill also expands requirements for notification to victims.

The bill also makes some changes to process for extraordinary medical placements at the request of the DOC.

It is very difficult to discuss institutionalized racism, but it is important to speak the truth and recognize that the criminal justice system has been weaponized against people of color. To support this bill is to support the dismantling of institutionalized racism. This bill is a critical step towards addressing disparities in the criminal justice system. This will bring equity and humanity. It will also reorient the criminal justice system towards rehabilitation and restorative justice.

(Opposed) Every year there are more legislative proposals to release offenders from prison. The intent of these proposals seems to be to reduce the prison population. This particular bill equates to mass release of offenders who have committed the most violent and horrific crimes. These are serious violent offenses and call for serious consequences. This is an inappropriate way to accomplish sentencing reform, and it completely ignores the concerns of victims and their families. Many victims do not survive, while others are left with

lifelong injuries and trauma. The survivors are forced to relive their trauma through these procedures. The state obviously does not want to hear from victims.

While this is the most responsible proposal for post-conviction review and release that has come before the Legislature in recent years, it should not be passed in its current form. There should be a fair, objective, and comprehensive review process, but there are key components in the bill that undermine these principles. At a minimum, the bill should be amended to remove the presumption in favor of a recommendation. The bill should also be amended to remove the restriction against revoking a conditional commutation. If it cannot be revoked, then it is not conditional.

Persons Testifying: (In support) Senator Dhingra, prime sponsor; Virginia Parham, Washington Can; Kurtis Robinson, Alaska Oregon Washington State Area Conference of the National Association for the Advancement of Colored People; Russell Brown, Washington Association of Prosecuting Attorneys; and Gerald Hankerson, National Association for the Advancement of Colored People.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Kelley Tarp.

Persons Signed In To Testify But Not Testifying: None.