

SENATE BILL REPORT

E2SSB 5036

As of Third Reading

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: Law & Justice: 1/28/21, 2/04/21 [DPS-WM, DNP].
Ways & Means: 2/17/21, 2/19/21 [DP2S, DNP].

Brief Summary of Second Substitute Bill

- Expands the membership of the Clemency and Pardons Board (CPB) and provides for member salaries.
- Authorizes persons to petition for conditional commutation after serving 15, 20, or 25 years of total confinement depending on the person's underlying conviction.
- Charges the CPB with hearing petitions for conditional commutation and making recommendations to the Governor.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5036 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; Darneille, Kuderer and Salomon.

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.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Assistant Ranking Member; Holy and Wagoner.

Staff: Joe McKittrick (786-7287)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5036 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Mullet, Pedersen, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Braun, Gildon, Muzzall, Rivers, Wagoner and Warnick.

Staff: Sarian Scott (786-7729)

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 the following three populations:

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

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

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

The Clemency and Pardons Board (CPB) was established to make recommendations to the Governor concerning petitions for clemency. The CPB consists of five members appointed by the Governor and subject to confirmation by the Senate. The CPB holds regular quarterly meetings, but can call special meetings at other times when appropriate. CPB members are not entitled to compensation.

The CPB is charged with receiving petitions from individuals, organizations, and the Department of Corrections (DOC) for the review and reduction of sentences and pardoning of offenders in extraordinary cases. After receiving a petition, the CPB evaluates whether the petitioner's request merits a hearing. If a hearing is determined to be appropriate, the CPB schedules the hearing, at which time it may take testimony from a variety of witnesses, including the petitioner, an attorney for the offender, the prosecuting attorney, and family members of the victim and the offender.

After the hearing, the CPB votes on a recommendation, which is then forwarded to the Governor. The Governor is under no legal obligation to follow the recommendation. If the Governor grants a pardon, the person's conviction will be removed from the petitioner's criminal history available to the public. The Governor 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.

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

- the seriousness of the offense;
- the impact on the victims;
- the offender's criminal history and other relevant background;

- acceptance of responsibility, remorse, and atonement;
- personal development and positive life changes since the offense occurred;
- benefit or risk to the community;
- position of prosecuting attorney and sentencing judge, or both;
- whether the individual has complied with all obligations imposed by the court; and
- the amount of time elapsed since the offense occurred.

A persistent offender is an offender who has committed specified offenses listed as two-strike or three-strike offenses and as a result, is sentenced to life without parole. In 2019, the Legislature removed robbery in the second degree as a strike offense in sentencing an offender as a persistent offender. At that time, the Legislature declined to require re-sentencing of individuals serving a life sentence as a result of a conviction for robbery 2. In 2019, there were approximately 64 individuals serving a life sentence for which a conviction for robbery 2 was one of the strike offenses.

Summary of Engrossed Second Substitute Bill: Clemency and Pardons Board. The membership of the CPB is expanded from five to ten members. Members appointed by the Governor shall 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.

Members are appointed to serve a term of five years and must receive a salary unless waived by the member. The CPB must additionally be funded for adequate staff to implement and maintain functional operations.

Eligibility to Petition. In addition to extraordinary placement petitions, the CPB is charged with receiving petitions for the conditional commutation of sentences. A person is eligible to petition for conditional commutation if the person:

- is not subject to jurisdiction of the ISRB;
- has served at least 20 consecutive years of total confinement except:
 1. a person convicted as a persistent offender in which a conviction for robbery 2 was the person's last conviction, may petition after serving 15 consecutive years; and
 2. a person sentenced pursuant to chapter 10.95 RCW may petition only after

- serving 25 consecutive years;
- consents to a review of all of their medical, mental health, and department files by the CPB; and
- does not have any current appeals pending or collateral attacks pending.

A person serving life without parole is eligible to petition for conditional commutation so long as the person meets the criteria.

Five years prior to the date the person may petition, DOC must notify the person of their right to petition, conduct an assessment to identify programming and services that will prepare the person for a return to the community, and make programming available to the extent possible.

Conditional Commutation. When the CPB receives a petition for conditional commutation, the board may deny any petition that does not meet initial criteria or conduct a hearing to consider additional information. In making its determination, the CPB must consider the following factors:

- public safety;
- the person's criminal history;
- the nature and circumstances of the offenses committed, including current and past offenses;
- the person's social and medical history;
- the person's acceptance of responsibility, remorse, and atonement;
- evidence of the person's rehabilitation;
- statements of correctional staff, program supervisors, and volunteer facilitators;
- input from the victims of the crime;
- input from police and prosecutors in the jurisdiction where the crime was committed;
- input from persons in the community pledging their support of the person if released;
- the available resources in the community to assist the person with transition;
- a risk assessment and psychological evaluation provided by DOC;
- the sentencing judge's analysis in imposing an exceptional sentence; and
- any other relevant factors.

The CPB must recommend the person be released with affirmative conditions, unless the panel determines by a preponderance of the evidence that it is more likely than not the person will commit new criminal law violations if released. Affirmative conditions may include a term of community custody, partial confinement, restrictions on travel, no contact orders, restrictions on employment, or any other restriction the CPB believes is appropriate. The board must specify reasons for its decision, regardless of whether it recommends commutation or denies the petition. A person whose petition is denied may file a new petition after three years or at an earlier date set by the CPB.

In considering petitions for conditional commutation, the CPB must give priority consideration to individuals 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.

A recommendation for conditional commutation must be forwarded to the Governor. The Governor is under no legal obligation to follow the recommendation and may also place conditions on the commutation. Any person released to conditional commutation must be monitored by DOC. DOC may sanction persons who violate conditions consistent with those who violate community custody. Once granted, the Governor may not revoke an order granting conditional commutation .

When an individual is released on extraordinary medical placement, electronic monitoring may be waived if the monitoring is detrimental to the person's health or prevents the individual from being independently mobile. Terminology throughout the bill is changed from offender to incarcerated individual or individual.

Appropriation: None.

Fiscal Note: Available.

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

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

Staff Summary of Public Testimony on Original Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: Past legislative acts have exacerbated the disproportionate impact of criminal sentences on minority populations. We are at a reckoning with how the criminal justice system has been weaponized against minority populations.

This bill is an improvement as it requires members of the board to have a racial equity lens.

This policy will move toward lowering prison and jail populations and increasing access to clemency. The language should be retained that will require the board to recommend release if the person is not likely to commit a new offense. If the language is changed, it will allow harm and disproportionality to continue for black, brown, and indigenous populations.

Washington's system of no parole gives no hope or opportunity of release for those who have transformed themselves.

If a person has healed and rehabilitated, an avenue for release should be made available to them. The families of incarcerated persons need the hope of their loved one being reunited with them.

Prosecutors have long petitioned for expansion of clemency. We support that expansion as well as giving the Governor the ultimate authority to approve commutation as well as revocation. We would like to see some adjustment to the number of years in total confinement required before an offender can petition for commutation.

CON: We have a fundamental concern with the 20-year requirement. The language in Section 7(5) should be changed from a "shall" to a "may." The board should not be required to recommend release if they do not believe the person is likely to commit another offense.

This bill gives false hope. It does not change anything. This is a nice idea, but there is no real change that would give people an additional avenue for release.

We need to dismantle the institution of mass incarceration but this bill is not the answer. The bill requires the Governor to make a political calculation as to whether a person should be released. Juveniles should not have to serve 20 years before they are eligible to petition. We believe there is a better solution.

OTHER: The Clemency and Pardons Board is the proper venue for these decisions. We have the same concern with Section 7(5). "Shall" should be changed to "may." The power to release or revoke should not be with the Governor.

Persons Testifying (Law & Justice): PRO: Senator Manka Dhingra, Prime Sponsor; Waldo Waldron-Ramsey, Washington Community Action Network; Virginia Parham, Wcan; Colette McLeary; Gerald Hankerson, NAACP; Gilda Sheppard; Kurtis Robinson, NAACP; Christopher Poulos, Washington Statewide Reentry Council; Russell Brown, Washington Assoc of Prosecuting Attorneys; Emijah Smith, citizen.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs; Kari Reardon, Cowlitz County Office of Public Defense; Jeremiah Bourgeois, Beyond the Blindfold of Justice.

OTHER: Steve Eckstrom; Anthony Powers, American Equity and Justice Group.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: This is an exceptional bill that gives opportunity to those who were sentenced decades ago. So many individuals have worked hard to improve themselves. This will move towards rehabilitation. Given the almost 35 years of tough on crime bills, this will give a mechanism for a second chance. The tough on crime bills and racial disparities in sentencing have devastated our communities. Criminal justice reform is here and now. We strongly support this as a tool in our state tool kit. This gives a second chance for individuals to reunite with their families. If just 50 individuals came back to our

communities, earnings to our communities would increase. Invest in our families who have been impacted by mass incarceration.

Persons Testifying (Ways & Means): PRO: Virginia Parham, Wcan; Gerald Hankerson, National Association for the Advancement of Colored People; Lydia Flora Barlow, National Association for the Advancement of Colored People.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.