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**ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1189**

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**State of Washington 68th Legislature 2023 Regular Session**

**By** House Appropriations (originally sponsored by Representatives Hackney, Reed, Simmons, Wylie, Santos, and Ormsby)

AN ACT Relating to the release of incarcerated individuals from total confinement prior to the expiration of a sentence; amending RCW 9.94A.501, 9.94A.565, 9.94A.633, and 9.94A.880; reenacting and amending RCW 9.94A.728 and 9.94A.885; adding new sections to chapter 9.94A RCW; and creating a new section.

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

**Sec.**  RCW 9.94A.501 and 2021 c 242 s 2 are each amended to read as follows:

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

(a) ((~~Offenders~~)) Individuals 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~~)) Individuals 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~~)) Individuals convicted of misdemeanor and gross misdemeanor ((~~offenders~~)) offenses supervised by the department pursuant to this section shall be placed on community custody.

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

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

(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~~)) individual 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, 9.94A.711, or 9.94A.695;

(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~~)) individual 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~~)) individual sentenced to a term of community custody or any probationer unless the ((~~offender~~)) individual 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 individual convicted of a felony ((~~offender~~)) and 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~~)) individual under this section may not exceed the duration of community custody specified under RCW 9.94B.050, 9.94A.701 (1) through (9), 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~~)) individual 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 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~~)) incarcerated individual on an individual case-by-case basis. However, the people recommend that ((~~any offender~~)):

(a) Any incarcerated individual subject to total confinement for life without the possibility of parole not be considered for release until the ((~~offender~~)) incarcerated individual has ((~~reached the age of at least sixty years old and has~~)) been judged to ((~~be~~)) no longer be a threat to society((~~. The people further recommend that sex offenders~~)) and has served at least 20 years in total confinement or 25 years in total confinement if the incarcerated individual was sentenced pursuant to chapter 10.95 RCW;

(b) Incarcerated individuals who have been convicted of a sex offense be held to the utmost scrutiny under this subsection regardless of age; and

(c) Release take the form of a 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~~)) individuals 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~~)) individual or upon the death of the released ((~~offender~~)) individual.

**Sec.**  RCW 9.94A.633 and 2021 c 242 s 4 are each amended to read as follows:

(1)(a) An ((~~offender~~)) individual 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~~)) individual 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~~)) individual was under community custody pursuant to one of the following statutes, the ((~~offender~~)) individual may be sanctioned as follows:

(a) If the ((~~offender~~)) individual was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728, the ((~~offender~~)) individual 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~~)) individual was sentenced under the drug offender sentencing alternative set out in RCW 9.94A.660, the ((~~offender~~)) individual may be sanctioned in accordance with that section.

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

(d) If the ((~~offender~~)) individual 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~~)) individual committed to serve the original sentence of confinement.

(e) If the ((~~offender~~)) individual was sentenced under the mental health sentencing alternative set out in RCW 9.94A.695, the ((~~offender~~)) individual may be sanctioned in accordance with that section.

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

(g) If ((~~a sex offender~~)) an individual convicted of a sex offense was sentenced pursuant to RCW 9.94A.507, the ((~~offender~~)) individual 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.

(h) If the individual was granted conditional commutation pursuant to RCW 9.94A.885, the individual 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~~)) individual 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~~)) individual who is charged with a new felony offense may be suspended and the ((~~offender~~)) individual placed in total confinement pending disposition of the new criminal charges if:

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

(b) The ((~~offender~~)) individual 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 2021 c 311 s 19 and 2021 c 266 s 2 are each reenacted and amended to read as follows:

(1) No ((~~person~~)) incarcerated individual 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~~)) incarcerated individual may earn early release time as authorized by RCW 9.94A.729;

(b) An ((~~offender~~)) incarcerated individual may leave a correctional facility pursuant to an authorized furlough or leave of absence. In addition, ((~~offenders~~)) incarcerated individuals 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~~)) incarcerated individual when all of the following conditions exist:

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

(B) The ((~~offender poses a~~)) incarcerated individual has been assessed as 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~~)) incarcerated individual 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~~)) individuals in extraordinary medical placement unless the electronic monitoring equipment is detrimental to the individual's health, interferes with the function of the ((~~offender's~~)) individual's medical equipment, or results in the loss of funding for the ((~~offender's~~)) individual'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. The requirement for electronic monitoring shall be waived if the medical condition as certified by the individual's treating physician prevents the individual from being independently mobile.

(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 release ((~~for~~)):

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

(ii) Pursuant to section 7 of this act;

(e) No more than the final ((~~twelve~~)) 12 months of the ((~~offender's~~)) incarcerated individual's term of confinement may be served in partial confinement for aiding the ((~~offender~~)) incarcerated individual 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)(i) No more than the final five months of the ((~~offender's~~)) incarcerated individual'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(1)(a);

(ii) For eligible ((~~offenders~~)) individuals under RCW 9.94A.733(1)(b), after serving at least four months in total confinement in a state correctional facility, an ((~~offender~~)) incarcerated individual may serve no more than the final 18 months of the ((~~offender's~~)) incarcerated individual's term of confinement in partial confinement as home detention as part of the graduated reentry program developed by the department;

(g) The governor may pardon any ((~~offender~~)) incarcerated individual;

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

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

(2) Notwithstanding any other provision of this section, an ((~~offender~~)) individual entitled to vacation of a conviction or the recalculation of his or her offender score pursuant to *State v. Blake*, No. 96873-0 (Feb. 25, 2021), may be released from confinement pursuant to a court order if the ((~~offender~~)) individual has already served a period of confinement that exceeds his or her new standard range. This provision does not create an independent right to release from confinement prior to resentencing.

(3) ((~~Offenders~~)) Individuals 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) In making appointments to the board, the governor shall strive to ensure racial, ethnic, geographic, gender, sexual identity, and age diversity. The board membership must consist of the following:

(a) A person with lived experience in a community of color;

(b) A person with lived experience as an incarcerated individual or who has worked with the formerly incarcerated or successful community reentry;

(c) A representative of a faith-based organization or church with interest or experience in successful community reentry;

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

(e) A retired superior court judge; and

(f) A representative of an agency representing crime victims.

(3) Board members must attend training including the principles of racial equity, racism and mass incarceration, or restorative justice on at least an annual basis.

(4) Members of the board ((~~shall~~)) may serve up to two terms of ((~~four~~)) five years ((~~and~~)) and may continue to serve 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. Board members as of the effective date of this section may serve the member's remaining term.

((~~(3)~~)) (5) The board shall elect a chair from among its members and shall adopt bylaws governing the operation of the board. The chair shall approve training and each member's hearing preparation time as duties authorized for compensation under subsection (6) of this section.

((~~(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 receive compensation in accordance with the provisions of RCW 43.03.250, 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 personnel to implement and maintain functional operations such as support, records management and disclosure, 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.

(9) Each petition for commutation or pardon shall be reviewed by a panel of five board members. The panel membership shall be selected by a random drawing conducted by board staff.

(10) For purposes of this section, "lived experience" has the meaning provided in RCW 43.03.220.

**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 of incarcerated individuals when the sentence no longer serves the interest of justice; and ((~~pardoning~~))

(b) Pardoning of ((~~offenders~~)) incarcerated individuals in extraordinary cases((~~, and shall make recommendations thereon to the governor~~)).

(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 under subsection (1) of this section until a public hearing has been held on the petition. The board shall consider available statements of victims and survivors of victims, 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.~~)) 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~~)) incarcerated individual seeking clemency or commutation. ((~~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.

(d) The board shall provide written notification to any victims, survivors of victims, or witnesses who participate in the hearing or provide written testimony about the department of correction's victim notification program and the victim information and notification everyday service administered by the Washington association of sheriffs and police chiefs.

(5)(a) The board may recommend conditions of commutation for any incarcerated 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 governor. Any violation of conditions of community custody is subject to the provisions of this chapter.

(6) 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) The board may take any of the following actions: Deny a petition without a hearing because the incarcerated individual 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 commutation to the governor.

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

(a) Public safety;

(b) The incarcerated individual's criminal history;

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

(d) The incarcerated individual's social and medical history;

(e) The incarcerated individual's acceptance of responsibility, remorse, and atonement. If the individual submitted an Alford plea, the impact that may have on an individual's ability to provide evidence of remorse, atonement, and self-reflection in relation to the offense committed;

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

(g) Input from the victims of the crime;

(h) Input from the police and prosecutors in the jurisdictions where the incarcerated individual's crimes were committed;

(i) Input from persons in the community pledging their support of the incarcerated individual, if released;

(j) The available resources in the community to help the incarcerated individual transition to life outside of prison;

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

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

(m) Statements of correctional staff, program supervisors, and volunteer facilitators regarding the incarcerated individual. Such statements shall be voluntary and withheld as confidential. The board shall not publicly identify the names, content, or statement in the hearing or its written decision;

(n) Any other relevant factors.

(3) Further, the board shall consider a release plan presented by the incarcerated individual showing where the incarcerated individual 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 incarcerated individual is not released to an area where the victim resides or that impacts community safety.

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

(5) The conditions for 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 individual.

(6) An incarcerated individual whose petition for commutation is denied may file a new petition for commutation three years from the date of denial or at an earlier date as may be set by the board.

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

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

(9) 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.

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

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

The clemency and pardons board shall transmit to the governor and the legislature, at least annually, a report of its work, in which shall be given such information as may be relevant. The information must include the names of any offenders granted clemency or pardons in the previous calendar year, the crimes of which those offenders were convicted, and any known acts of recidivism during the preceding calendar year by any offender listed in any report submitted under this section.

NEW SECTION. **Sec.**  If specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2023, in the omnibus appropriations act, this act is null and void.

**--- END ---**