



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

DRAFT

SENTENCING GUIDELINES COMMISSION

In 2015, the Sentencing Guidelines Commission (SGC) created a work group to discuss the idea of a second look option for individuals sentenced to Life Without Parole. Since then, several different entities have submitted proposals for a way to review individuals with long sentences to the legislature. The SGC has reviewed the literature and has created a review process around what the literature has found to work. This brief includes a draft proposal of the SGC's post-conviction review process as well as support for why the SGC choose the components it did.

Post-Conviction Review

Who Is Eligible?

There are several groups who already have an avenue for review built into their sentence. Those are individuals sentenced prior the Sentencing Reform Act, individuals who received a sentence of 20 or more years when they were a juvenile, and individuals sentenced with a Determinate-Plus sentence. All these sentences are under the jurisdiction of the Indeterminate Sentence Review Board (ISRB) and are not eligible under this post-conviction review process.

Time Served

The SGC recommends creating a post-conviction review process for offenders who have served at least 15 years in confinement. The American Law Institute (ALI) uses a 15 year eligibility term in their recommended policy and numerous scholars agree with them.^{1,2,3,4,5} The ALI's reasoning behind 15 years is the same reasoning behind a second look option, "that sentences of extraordinary length present compelling ethical and utilitarian uncertainties – directly as a consequence of the amount of time they span." There was near consensus within the ALI on the 15 year term, at least until there is information and data to suggest otherwise. The ALI goes on to recommend that 15 years be an aggregate period of

¹ American Law Institute. (2017). Model penal code: Sentencing Proposed Final Draft (April 10, 2017). Philadelphia, PA: Author.

² Rhine, E. E., Petersilia, J., & Reitz, K. R. (2015). Improving parole release in America. *Federal Sentencing Reporter*, 28(2), 96-104. doi: 10.1525/fsr.2015.28.2.96.

³ Love M. C. and Klingele, C. M. (2011). First thoughts about 'second look' and other sentence reduction provisions of the model penal code: Sentencing Revision (August 17, 2011). University of Toledo Law Review, 2011; University of Wisconsin Legal Studies Research paper No. 1169. Available at SSRN: <https://ssrn.com/abstract=1911381>.

⁴ Zeidman, S. (2018, June 26). For justice and decarceration, enact second-look sentencing. *Gotham Gazette*. Retrieved from <http://www.gothamgazette.com/opinion/7766-for-justice-and-decarceration-enact-second-look-sentencing>.

⁵ Diddams, M. (2017). A second chance at freedom: Punitive sentencing in Washington state and lessons from a new era of rehabilitations and parole. Seattle, WA: Washington Community Action Network.

incarceration, regardless of whether an individual has a single 30 year sentence, two consecutive 15 year sentences or two concurrent 30 year sentences.

Offenses

The post-conviction review is meant to be a release for incarcerated individuals who have rehabilitated and are no longer considered a threat to public safety. Because rehabilitation can occur regardless of the type of offense committed, it is the position of the SGC that all offense types be included. If an inmate has not demonstrated successful rehabilitation and has been considered to still pose a threat to society, the incarcerated individual will not be released. It would be a disservice to restrict access to this opportunity solely based on the offense committed.

The SGC considered excluding incarcerated individuals convicted of sex offenses since there were some of these offenses committed prior to the Determinate-Plus law that received long confinement terms and, thus, would become part of this eligible population. They decided against this restriction because individuals who were sentenced under the Determinate-Plus law for the same offenses are given an opportunity for a release review through the ISRB under the Community Custody Board.⁶

Who Has Jurisdiction?

The SGC recommends the post-conviction review process be placed under the authority of the ISRB. The Clemency and Pardons Board (CPB) and a Community Board created in a legislative proposal⁷ were also considered. The ISRB was chosen as it met the requirements needed for a parole board to “operate effectively, appropriately, and knowledgeably” as determined by the National Institute for Corrections.⁸ Those requirements include:

- Members who
 - understand broad public policy expectations and legislative findings
 - remain apprised of changes in the law
 - are able to review and understand evidence-based practices and literature
 - are cognizant of the legal framework and principals involved
 - have learned effective interviewing skills
- Independence in decision-making
- Collaboration with other agencies, such as the Department of Corrections
- Use of risk assessment

The ISRB is an existing agency that already handles petitions for release from several groups of incarcerated individuals. It has established the necessary policies and practices for this work. Adding this post-conviction review to their responsibilities would not require as many resources as creating a new entity. For this post-conviction review process, the SGC recommends a panel comprised of two members of the ISRB plus one judicial member. The creation of a pool of six to eight retired former Superior Court or Appellate Court judges/justices would allow a judicial member to be available to participate in release hearings around the state. This added position is important as it would bring historical legal knowledge to the process.

⁶ RCW 9.94A.507

⁷ House Bill 1789 (2017-2018)

⁸ National Institute of Corrections. (2010). *Parole essentials: practical guidelines for parole leaders, core competencies* (NIC Accession No. 024197). Washington, DC: U.S. Government Printing Office.

One suggestion found in the literature was to place requirements for becoming a board member in state statute.^{9 10} Washington does not have their requirements in statute, rather, they are available as a list of desirable qualifications included in every position announcement. The SGC recommends incorporating into statute minimum member requirements of a Bachelor's degree and five years' experience in a social science or criminal justice field, or 10 years' experience in a social science or criminal justice field.

The proposed Community Board in HB 1789 listed specific qualifications for members of its board, such as an organization representing communities of color or racial equity, an advocacy group with experience with formerly incarcerated, and a faith-based organization with interest in successful community reentry as a way to create a more diverse membership. Increasing diversity is a concern of others as well.^{11 12} The SGC supports a more diverse board and hopes a balance can be found between increased diversity while maintaining the competency that is essential for ISRB members.

The Community Board and the CPB were not chosen for several reasons.

- **Neither require specific education and experience for their members.** The qualifications set by the Community Board are related to the agency/organization the person would represent and the only qualification for CPB members noted in their bylaws¹³ is to be a legally registered voter in the State of Washington.
- **Neither have independent decision-making authority.** The proposed Community Board and the CPB are located within the Office of the Governor and their authority is limited to making recommendations to the governor who makes the final decision. The connection to a political office (governor) is a concern of some SGC members and others.^{14 15 16 17} Many other factors can influence a governor's decision beyond the individual and his/her case.
- **Neither have full-time employed members.** The CPB members are volunteers and are often have other jobs. The Community Board proposal would be comprised of persons from other organizations or employees of state and local government. The members would be paid salary but some would also have other employment. Members of the ISRB are full-time employees dedicated to this task.

⁹ Rhine, E. E., Petersilia, J., & Reitz, K. R. (2015). Improving Parole Release in America. *Federal Sentencing Reporter*, 28(2), 96-104. doi: 10.1525/fsr.2015.28.2.96.

¹⁰ Robey, J. P. & Rhine, E. E. (2017). Parole board members: Statutory requirements, educational achievements, and institutional structure. Minneapolis, MN: Robina Institute of Criminal Law and Criminal Justice. Retrieved from <https://robinainstitute.umn.edu/news-views/parole-board-members-statutory-requirements-educational-achievements-and-institutional>.

¹¹ Diddams, M. (2017). A second chance at freedom: Punitive sentencing in Washington state and lessons from a new era of rehabilitations and parole. Seattle, WA: Washington Community Action Network.

¹² Memorandum from Kimberly Gordon to Sentencing Guidelines Commission, June 1, 2018.

¹³ Bylaws of the Washington State Clemency and Pardons Board (2011). Retrieved from https://www.governor.wa.gov/sites/default/files/documents/clemency_bylaws.pdf.

¹⁴ National Institute of Corrections. (2010). *Core competencies: a resource for parole board chairs, members, and executive staff* (NIC Accession No. 024197). Washington, DC: U.S. Government Printing Office. Jenkins, A. (2014, July 15). Long sentences, aging inmates may strain Washington's clemency system. *NW News Network*. Retrieved from <http://nwnewsnetwork.org/post/long-sentences-aging-inmates-may-strain-washingtons-clemency-system>.

¹⁵ Fetterman, M. (2016, January 6). Move is on to make end-of-year pardons less random. *Stateline*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/06/move-is-on-to-make-end-of-year-pardons-less-random>.

¹⁶ Diddams, M. (2017). A second chance at freedom: Punitive sentencing in Washington state and lessons from a new era of rehabilitations and parole. Seattle, WA: Washington Community Action Network.

¹⁷ Memorandum from Kimberly Gordon to Sentencing Guidelines Commission, June 1, 2018.

- **Both hold petition hearings on a quarterly basis.** The CPB receives 60-100 petitions per year and holds a hearing for about 25 percent of those. As reported in 2014 by the chair of CPB, that was a manageable amount but she feared that “at some point it’s going to become overwhelming.”¹⁸ That time may be on the horizon as efforts by the Northwest Immigrant Rights Project and the Clemency Project have increased the CPB’s work load resulting in an additional one to two more days to their quarterly hearings.¹⁹ In comparison, the ISRB holds 30 – 35 release hearings and 12 violation hearings per month.²⁰

Other concerns with the clemency process include a lack of definition for “extraordinary circumstances”, attorneys are not available to most incarcerated individuals who want to complete a clemency petition, incarcerated individuals with lengthy sentences are often not eligible for programs and education that would help them to demonstrate they are rehabilitated and, while an individual’s disciplinary record is shared during a clemency hearing, a Department of Corrections’ (DOC) policy restricts DOC employees and/or contractors from providing comments at the hearing.^{21,22}

When to Petition?

The SGC recommends using the petition process used with the ISRB’s Long Term Juvenile Board cases²³ with a few modifications. The required served term would be based on a 15 years served rather than 20 years, as discussed above, plus there would be a two-step review instead of just one hearing. The purpose of the two-step review process is to reduce the amount of trauma to the victims of these crimes. Victims would only be contacted for the hearings of individuals who passed Step 1 and have shown themselves to be serious candidates for early release.

Step 1 would help flush out petitioners with blatant issues that would keep them from being approved for release or who have not exhibited any attempt to better themselves in anticipation of possible release. A petitioner could be denied in Step 1 if any of the following are present:

- **A risk-related infraction within the past five years.** A risk-related infraction is defined as a sex-, violent-, drug-, or alcohol-related infraction. As explained by ISRB members, these types of infractions are more indicative of uncorrected behavior. It is recognized in the corrections system that there are varying degrees of serious infractions; some should not disqualify a person for review, while others should be held against an individual for longer than 12 months.
- **A Security Threat Group concern within the past five years.**
- **Lack of compliance with DOC-recommended treatment and programming.** The panel would look at which programs were recommended, which had been completed, which had not been completed and the reason why. Which programs are available where the individual is located would also be taken into consideration. *Suggestion: require completion of 1-2 offender change programs?*
- **A new conviction after admission to prison.** If a conviction occurs after the individual is incarcerated the clock on the 15 years’ time served term would start over based on that most recent conviction.

¹⁸ Jenkins, A. (2014, July 15). Long sentences, aging inmates may strain Washington’s clemency system. *NW News Network*. Retrieved from <http://nwnewsnetwork.org/post/long-sentences-aging-inmates-may-strain-washingtons-clemency-system>.

¹⁹ Phone conversation May 23, 2018 with Jennifer Rhéaume at the CPB.

²⁰ Post-Conviction Review Process Authority Chart, Sentencing Guidelines Commission. Retrieved from https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2018/post_conviction_review_process_authority_chart.pdf

²¹ Memorandum from Kimberly Gordon to Sentencing Guidelines Commission, June 1, 2018.

²² Washington DOC Policy 850.030

²³ RCW 9.94A.730

If the individual does not pass Step 1, the panel would assign the individual another petition date 36 – 60 months in the future, depending on the case.

In Step 2, the panel shall consider factors such as public safety and the nature and circumstances of the offenses committed, as well as information from a variety of sources, including but not limited to, the individual’s social and medical history, input from victims of the crime, input from the police and prosecutors in the jurisdiction where the individual’s crimes were committed, and the risk assessment and psychological evaluation provided by the department. Within 60 days of the hearing, the panel will render a decision to grant the petition and release the individual on conditions following a hearing or deny the petition. If the petition is denied, the individual may file a new petition within 1 to 5 years, as determined by the panel.

Why Have a Post-Conviction Review Process?

There are many reasons to have a post-conviction review process.

- Post-conviction reviews can be used as an incentive to encourage incarcerated individuals to pursue programming and invest in their own growth.^{24,25,26,27} A study that looked at inmate behavior before and after a state denied parole eligibility found that “inmates who lost parole eligibility as a consequence of the reform accumulated more disciplinary infractions, completed fewer prison rehabilitative programs and recidivated at higher rates after the reform than did a control group not subject to [the reform].”²⁸
- Research has shown that individuals who were released after serving their full sentence (mandatory release) had higher re-arrest and reconviction rates than those who received parole (discretionary release).^{29, 30} One of the studies investigated if there is a “parole effect” on reconviction rates and found “it is clear that those prisoners subject to post-release supervision have lower reconviction rates and, by inference, re-offending rates than those released at the end of their full sentence.”³¹
- Prison sentence lengths have been increasing in Washington and across the country and have been found to be a key driver in the increase in prison populations and costs.³² In Fiscal Year 2009, the

²⁴ National Institute of Corrections. (2011). *Evidence-based policy, practice, and decisionmaking: Implications for paroling authorities* (NIC Accession No. 024198). Washington, DC: U.S. Government Printing Office.

²⁵ Diddams, M. (2017). A second chance at freedom: Punitive sentencing in Washington state and lessons from a new era of rehabilitations and parole. Seattle, WA: Washington Community Action Network.

²⁶ Kuziemko, I. (2013). How should inmates be released from prison? An assessment of parole versus fixed-sentence regimes. *The Quarterly Journal of Economics*, 371-424. doi: 10.1093/qje/qjs052. Kuziemko, I. (2007).

²⁷ Going off parole: How the elimination of discretionary prison release affects the social cost of crime (NBER Working Paper No. 13380). Cambridge, MA: National bureau of Economic Research.

²⁸ Ibid.

²⁹ Ellis, T., and Marshall, P. (2000). Does parole work? A post-release comparison of reconviction rates for paroled and non-paroled prisoners. *The Australian and New Zealand Journal of Criminology*, 3(33), pp 300-317.

³⁰ Marble, D. (2018). The impact of discretionary release on offender recidivism using survival analysis. *Corrections: Policy, Practice and Research*, 3(1). <https://doi.org/10.1080/23774657.2017.1361799>

³¹ Ibid.

³² Pew Center on the States. (2012) *Time Served: the high cost, low return of longer prison terms*. Washington, DC: The Pew Charitable Trusts. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms>.

average prison sentence issued was 39.4 months and by 2017 it was 41 months.³³ Incarcerated individuals with these sentence lengths wouldn't be eligible for the post-conviction review, but they do contribute to the increasing costs and occupancy of our prisons. Locating individuals who have rehabilitated and pose no threat to the community would help reduce the state's correctional burden.

A post-conviction review process would create a huge incentive for incarcerated individuals to make positive changes in their behaviors and attitudes, invest in their future and themselves (i.e. "corrections"), and reduce prison populations and costs while still providing meaningful and real punishment for criminal behavior and keeping public safety a priority.

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³³ Caseload Forecast Council. Statistical Summary of Adult Felony Sentencing, 2009 and 2017. Retrieved from <http://www.cfc.wa.gov/Publications.htm>.