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## **SENATE COMMITTEE ON PUBLIC SAFETY**

**Senator Nancy Skinner, Chair**

**2017 - 2018 Regular**

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**Bill No:** AB 2845      **Hearing Date:** June 26, 2018

**Author:** Bonta

**Version:** April 12, 2018

**Urgency:** No

**Consultant:** SJ

**Fiscal:** Yes

**Subject:** *Criminal Procedure: Pardons*

### **HISTORY**

**Source:** Asian Americans Advancing Justice – California

Asian Prisoner Support Committee

California Coalition for Women Prisoners

Coalition for Humane Immigrant Rights

Immigrant Legal Resource Center

Legal Services for Prisoners with Children

PICO California

Root & Rebound

Youth Justice Coalition

**Prior Legislation:** AB 648 (Block), Ch. 437, Stats. of 2011

ACA 8 (Garcia), failed passage in Assembly Public Safety Comm. 2003

**Support:** California Calls; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; California Public Defenders Association; Community Health Councils; Community Works West; Ella Baker Center for Human Rights; Food Empowerment Project; Jus Siempre Global alliance; National Lawyers Guild Los Angeles Chapter; Pangea Legal Services; Resilience Orange County; Services, Immigrant Rights, and Education Network; W. Haywood Burns Institute

**Opposition:** None known

**Assembly Floor Vote:** 46 - 29

### **PURPOSE**

*The purpose of this bill is to establish a Pardon and Commutation Panel to review, investigate, and make recommendations to the Governor regarding pardon and commutation applications.*

*Existing law provides that the Governor may grant a reprieve, pardon, or commutation, after a sentence, except in cases of impeachment. (Cal. Const., art. 5, § 8(a).)*

*Existing law provides that the Governor's power to grant a reprieve, pardon, or commutation is subject to application procedures provided by statute. (Cal. Const., art. 5, § 8(a).)*

*Existing law* requires the Governor to report to the Legislature to each reprieve, pardon, or commutation granted and provide the pertinent facts and reasons for the grant. (Cal. Const., art. 5, § 8(a).)

*Existing law* prohibits the Governor from granting a pardon or commutation to a person twice convicted of a felony without a recommendation from at least four judges of the state Supreme Court. (Cal. Const., art. 5, § 8(a).)

*Existing law* provides that the Board of Parole Hearings (BPH) may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. (Pen. Code, § 4801, subd. (a).)

*Existing law* provides that in the case of a person twice convicted of felony, the application for pardon or commutation of sentence shall be made directly to the Governor, who shall transmit all papers and documents relied upon in support of and in opposition to the application to the BPH. (Pen. Code, § 4802.)

*Existing law* provides that when an application is made to the Governor for pardon or commutation of sentence, or when an application has been referred to the BPH, the Governor or the board may require the judge of the court before which the conviction was had, or the district attorney by whom the action was prosecuted, to furnish the Governor or the board, without delay, with a summarized statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing said application, together with his or her recommendation for or against the granting of the same and his or her reason for such recommendation. (Pen. Code, § 4803.)

*Existing law* provides that at least 10 days before the Governor acts upon an application for a pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the district attorney of the county where the conviction was had, and proof, by affidavit, of the service must be presented to the Governor. (Pen. Code, § 4804.)

*Existing law* provides that at least 10 days before the Governor acts upon an application for a commutation of sentence, written notice of the intention to apply therefor, signed by the person applying, shall be served upon the district attorney of the county where the conviction was had, and proof, by affidavit, of the service shall be presented to the Governor. Provides that the district attorney may submit a written recommendation to the Governor for or against commutation of sentence. Requires the district attorney to make reasonable efforts to notify the victim or victims of the crime or crimes related to the application and the victims' families who may also submit a recommendation to the Governor for or against commutation of sentence. (Pen. Code, § 4805.)

*Existing law* requires at the beginning of every regular session of the Legislature, the Governor to file a written report with the Legislature that includes each application that was granted for each case of reprieve, pardon, or commutation by the Governor, or his or her predecessor in office, during the immediately preceding regular session of the Legislature, stating the name of the person convicted, the crime of which the person was convicted, the sentence and its date, the date of the reprieve, pardon, or commutation, and the reason for granting the reprieve, pardon, or commutation. (Pen. Code, § 4807, subd. (a).)

*Existing law* provides that the BPH will be granted powers and duties pertaining to pardons and commutations. (Pen. Code, § 4810.)

*Existing law* provides that, upon request of the Governor, the BPH shall investigate and report on all applications for reprieves, pardons, and commutation of sentence and shall make such recommendations to the Governor with reference thereto as to it may seem advisable. Requires the board to examine and consider all applications so referred and all transcripts of judicial proceedings and all affidavits or other documents submitted in connection therewith, and to have power to employ assistants and take testimony and to examine witnesses under oath and to do any and all things necessary to make a full and complete investigation of and concerning all applications referred to it. Members of the board and its administrative officer are, and each of them is, hereby authorized to administer oaths. (Pen. Code, § 4812.)

*Existing law* requires that in the case of applications of persons twice convicted of a felony, the BPH, after investigation, to transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application. (Pen. Code, § 4813.)

*Existing law* prohibits an application that has not received a recommendation from the BPH favorable to the applicant from being forwarded to the Clerk/Executive Officer of the state Supreme Court, unless the Governor, notwithstanding the fact that the board has failed to make a recommendation favorable to the applicant, especially refers an application to the justices for their recommendation. (Pen. Code, § 4850.)

*Existing law* requires that in all cases where the BPH has made a recommendation favorable to the applicant and in those cases referred by the Governor, notwithstanding an adverse recommendation, the application, together with all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms, be forwarded to the Clerk/Executive Officer of the state Supreme Court for consideration of the justices. (Pen. Code, § 4851.)

*Existing law* requires, if a majority of the justices recommend that clemency be granted, the Clerk/Executive Officer of the state Supreme Court to transmit the application, together with all papers and documents filed in the case, to the Governor; otherwise the documents shall remain in the files of the court. (Pen. Code, § 4852.)

*Existing law* provides that a person convicted of a felony who is committed to a state prison or other institution or agency, including commitment to a county jail pursuant to Section 1170(h), may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of this chapter. (Pen. Code, § 4852.01, subd. (a).)

*Existing law* provides that the period of rehabilitation commences upon the discharge of the petitioner from custody due to his or her completion of the term to which he or she was sentenced or upon his or her release on parole, postrelease community supervision, mandatory supervision, or probation, whichever is sooner. Provides that the period of rehabilitation shall constitute five years' residence in this state, plus an additional period of time as specified based on the offense. (Pen. Code, § 4852.03, subd. (a)(1)-(3).)

*Existing law* authorizes the trial court hearing the application for the certificate of rehabilitation to, if the defendant was ordered to serve consecutive sentences, order that the statutory period of rehabilitation be extended for an additional period of time which when combined with the time already served will not exceed the period prescribed by statute for the sum of the maximum penalties for all the crimes. (Pen. Code, § 4852.03, subd. (a)(4).)

*Existing law* provides that unless and until the period of rehabilitation required has passed, the petitioner is ineligible to file his or her petition for a certificate of rehabilitation with the court. Provides that a certificate of rehabilitation that is issued and under which the petitioner has not fulfilled the specified requirements is void. (Pen. Code, § 4852.03, subd. (b).)

*Existing law* provides that the person shall live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land. (Pen. Code, § 4852.05.)

*Existing law* provides that after the expiration of the minimum period of rehabilitation applicable to him or her and after the termination of parole, probation, postrelease supervision, or mandatory supervision, a person who has complied with the specified requirements may file in the superior court of the county in which he or she then resides a petition for ascertainment and declaration of the fact of his or her rehabilitation and of matters incident thereto, and for a certificate of rehabilitation under this chapter. Provides that a petition shall not be filed until and unless the petitioner has continuously resided in this state, after leaving prison or jail, for a period of not less than five years immediately preceding the date of filing the petition. (Pen. Code, § 4852.06.)

*Existing law* requires the petitioner to give notice of the filing of the petition to the district attorney of the county in which the petition is filed, to the district attorney of each county in which the petitioner was convicted of a felony or of a crime the accusatory pleading of which was dismissed pursuant to Section 1203.4, and to the Governor's office, together with notice of the time of the hearing of the petition, at least 30 days prior to the date set for such hearing. (Pen. Code, § 4852.07.)

*Existing law* provides that during the proceedings upon the petition, the petitioner may be represented by counsel of his or her own selection. Provides that if the petitioner does not have counsel, he or she shall be represented by the public defender, if there is one in the county, and if there is none, by the adult probation officer of the county, or if in the opinion of the court the petitioner needs counsel, the court shall assign counsel to represent him or her. (Pen. Code, § 4852.08.)

*Existing law* provides that the court in which the petition is filed may require testimony as it deems necessary, and the production, for the use of the court and without expense of any kind to the petitioner, of all records and reports relating to the petitioner and the crime of which he or she was convicted, including the following:

- 1) The record of the trial;
- 2) The report of the probation officer, if any;

- 3) The records of the prison, jail, detention facility, or other penal institution from which the petitioner has been released showing his or her conduct during the time he or she was there, including the records of the penal institution, jail, or agency doctor and psychiatrist;
- 4) The records of the parole officer concerning the petitioner if the petitioner was released on parole, records of the probation officer concerning the petitioner if the petitioner was released on postrelease community supervision or mandatory supervision, or the records of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities concerning the petitioner if the petitioner had been committed to that authority; and,
- 5) The written reports or records of any other law enforcement agency concerning the conduct of the petitioner since the petitioner's release on probation, parole, postrelease community supervision, or mandatory supervision, or discharge from custody. (Pen. Code, § 4852.1, subd. (a).)

*Existing law* requires a peace officer to report to the court, upon receiving a request, all known violations of law committed by the petitioner. Provides that upon receiving satisfactory proof of a violation the court may deny the petition and determine a new period of rehabilitation not to exceed the original period of rehabilitation for the same crime. Authorizes the court, in that event, before granting the petition, to require the petitioner to fulfill all the requirements provided to be fulfilled before the granting of the certificate under the original petition. (Pen. Code, § 4852.11.)

*Existing law* authorizes the court, upon the filing of the application for petition of rehabilitation, to request from the district attorney an investigation of the residence of the petitioner, the criminal record of the petitioner as shown by the records of the Department of Justice (DOJ), any representation made to the court by the applicant, the conduct of the petitioner during the period of rehabilitation, and any other information the court deems necessary in making its determination. Requires the district attorney, upon request of the court, to provide the court with a full and complete report of the investigations. (Pen. Code, § 4852.12, subd. (a).)

*Existing law* authorizes, except as otherwise provided, the court to make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner, if after hearing, the court finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship. Requires this order to be filed with the clerk of the court, and to be known as a certificate of rehabilitation. (Pen. Code, § 4852.13, subd. (a).)

*Existing law* requires the clerk of the court to immediately transmit certified copies of the certificate of rehabilitation to the Governor, to the BPH and the DOJ, and, in the case of persons twice convicted of a felony, to the state Supreme Court. (Pen. Code, § 4852.14.)

*Existing law* provides that nothing in the statutes pertaining to pardons shall be construed to abridge or impair the power or authority conferred by law on any officer, board, or tribunal to revoke or suspend any right, privilege, or franchise for any act or omission not involved in his or her conviction, or to require the reinstatement of the right or privilege to practice or carry on any profession or occupation the practice or conduct of which requires the possession or obtaining of a license, permit, or certificate. (Pen. Code, § 4852.15.)

*Existing law* provides that the certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to the state Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court. (Pen. Code, § 4852.16.)

*Existing law* requires that whenever a person is issued a certificate of rehabilitation or granted a pardon from the Governor, the fact be immediately reported to the DOJ by the court, Governor, officer, or governmental agency by whose official action the certificate is issued or the pardon granted. Requires the DOJ to immediately record the facts so reported on the former criminal record of the person, and transmit those facts to the Federal Bureau of Investigation. Provides that when the criminal record is thereafter reported by the DOJ, it shall also report the fact that the person has received a certificate of rehabilitation, or pardon, or both. (Pen. Code, § 4852.17.)

*Existing law* provides that whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including, but not limited to the right to vote and the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens, except that this right shall not be restored if the person was ever convicted of a felony involving the use of a dangerous weapon. (Pen. Code, § 4852.17.)

*Existing law* requires the BPH to furnish to the clerk of the superior court of each county a set of sample forms for a petition for certificate of rehabilitation and pardon, a notice of filing of petition for certificate of rehabilitation and pardon, and a certificate of rehabilitation. Requires the clerk of the court to have a sufficient number of these forms printed to meet the needs of the people of the county, and shall make these forms available at no charge to persons requesting them. (Pen. Code, § 4852.18.)

*Existing law* requires that a person, prior to discharge or release on parole or postrelease community supervision from a state prison or other state penal institution or agency, or prior to discharge or release on mandatory supervision from a county jail, be informed in writing by the official in charge of the place of confinement of the person's right to petition for, and of the procedure for filing the petition for and obtaining, a certificate of rehabilitation and pardon pursuant to this chapter. (Pen. Code, § 4852.021, subd. (a).)

*Existing law* requires that prior to dismissal of the accusatory pleading pursuant to Section 1203.4, the defendant be informed in writing by the clerk of the court dismissing the accusatory pleading of the defendant's right, if any, to petition for, and of the procedure for filing a petition for and obtaining, a certificate of rehabilitation and pardon. (Pen. Code, § 4852.021, subd. (b).)

*This bill* provides that the Pardon and Commutation Panel will replace the BPH with respect to duties related to reprieves, pardons, and commutations.

*This bill* provides that, upon request from the Governor, the panel will investigate and report on all applications for reprieves, pardons, and commutation of sentence and shall make such recommendations to the Governor with reference thereto as to it may seem advisable.

*This bill* provides that the panel will consist of five commissioners appointed by the Governor to a maximum of two four-year terms.

*This bill* provides that a majority of commissioners will determine the recommendation to the Governor on an application for pardon or commutation and requires the panel's recommendations to be accompanied by reasons and explanations.

*This bill* requires the commissioners to have expertise and experience in community-based reentry, community-based risk assessment issues, and immigration law.

*This bill* requires the panel to meet once a month to review applications and issue recommendations to the Governor.

*This bill* requires the panel issue a recommendation on an application within one year of submission, or within three months if there is some urgent need for the for the pardon, including, but not limited to, a pending deportation order or deportation proceeding.

*This bill* requires the panel to review an application for a pardon or commutation as soon as reasonably possible when the applicant has a pending deportation order or deportation proceeding; also requires that the panel provide notification to applicants regarding when the panel receives the application, when it begins to investigate the application, and when the panel has issued its recommendation to the Governor.

*This bill* requires the Governor to make the application for pardon available for submission on the Governor's Office website and requires the Governor to promptly forward all applications for a direct part to the panel for investigation and recommendation.

*This bill* allows the Governor to grant an application for a pardon without forwarding it to the panel if the application is supported by a certificate of rehabilitation.

*This bill* makes it unlawful for any employer to consider, distribute, or disseminate information about a conviction for which a person has received a full pardon or been issued a certificate of rehabilitation.

*This bill* permits a person to file a petition for a certificate of rehabilitation in the county in which he or she was convicted of a felony, or had an accusatory pleading dismissed.

*This bill* replaces the BPH with the Pardon and Commutation panel in various statutes pertaining to the procedures for pardon and commutation applications, including those applications by persons twice convicted of a felony.

## COMMENTS

### 1. Need for This Bill

According to the author:

In California, individuals who were convicted of a crime may apply for a gubernatorial pardon or commutation if they have demonstrated exemplary behavior. A pardon restores specified rights that people lose when convicted of a

felony, such as the ability to obtain a professional license. The pardon also allows for immigrants to reopen their deportation case.

Currently, the Governor forwards applications for pardons and commutations to the Board of Parole to review and make recommendations. The Governor has the authority to grant pardons and commutations and the Legislature can establish the pardon application process.

Although those convicted of crimes may spend years rehabilitating themselves into productive and law-abiding residents, immigrants are faced with the risk of being sent back to countries where they have little or no ties. Due to the sharp increase in immigration enforcement arrests, one of the primary reasons people have been seeking pardons is to obtain potential relief from deportation. Pardons are one of the only available avenues of relief for immigrants facing deportation. Governor Brown recently issued several pardons to immigrants facing imminent deportation.

Since the tough on crime policies were enacted in the 1990s, California Governors have granted very few pardons. Governor Brown has granted 1,115 pardons thus far in his third and fourth terms as Governor. By contrast, from 1991 to 2010, three California Governors granted a total of just 28 pardons. Future Governors may not be as willing to grant pardons, especially in their first term. De-politicizing the pardon process for future Governors is needed to continue Governor Brown's record on pardons.

There is also little transparency around the pardon process. Individuals who apply for pardons do not know if the request was received, if it is being reviewed, and if/when a decision will be made.

## 2. Background on the Pardon and Commutations Process

Clemency is an umbrella term that encompasses various mechanisms through which an executive can remit the consequences of a crime. The executive clemency power is found in Article 8 of the California Constitution which provides that the Governor may "grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment." (Cal. Con., art. 5 § 8(a).) The Merriam-Webster Dictionary defines a pardon as "the excusing of an offense without exacting a penalty." (<https://www.merriam-webster.com/dictionary/pardon>.) A commutation of a sentence is "a permanent reduction in degree or amount of punishment." (Way v. Superior Court (1977) 74 Cal. App. 3d 165, 176.) In providing background on the history and purpose of executive clemency in California, an American Bar Association article stated "the founders of the California Constitution contemplated executive clemency as a tool to correct both legislative and judicial deficiencies."

([https://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_24\\_3\\_ridolfi.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_ridolfi.authcheckdam.pdf).)

Although the gubernatorial pardon power has been used sparingly in the recent past, this was not always the case. Governors Edmund "Pat" Brown, Ronald Reagan, Jerry Brown (during his first term), and George Deukmijian each granting hundreds of pardons. (<http://www.latimes.com/politics/la-pol-ca-jerry-brown-christmas-pardons-20171223-story.html>.) That practice changed when Governor Pete Wilson took office in 1991. Between

1991 and 2010, only 28 pardons were granted.

(<https://www.mercurynews.com/2016/12/30/jerry-brown-has-pardoned-more-felons-than-any-governor-in-recent-state-history/>.)

Governor Brown's has taken a different approach to the pardon process and has granted over 1,000 pardons and 51 commutations since 2011. (<http://www.latimes.com/politics/la-pol-ca-jerry-brown-christmas-pardons-20171223-story.html>.) Notably, the first commutation during Governor Brown's current administration was granted in December 2016.

(<https://www.gov.ca.gov/2016/12/23/news19634/>.) The current Governor's approach to pardons has received substantial coverage in the press. (See <http://www.latimes.com/politics/la-pol-ca-jerry-brown-christmas-pardons-20171223-story.html>.)

The Penal Code provides detailed processes for applying for a pardon as well as the duties of the various government entities that have a role in the pardons process, including the BPG, Governor's Office, courts, and the DOJ. (Pen. Code, §§ 4800-4854.) A person who lives in California must petition the superior court in the county of residence for a certificate of rehabilitation in order to apply for a pardon. If the person receives a certificate of rehabilitation, it is sent to the Governor's Office and serves as the application for a pardon. Individuals who live outside of California must complete a pardon application and submit it to the Governor's Office. The Governor's website currently contains instructions for how to apply for a pardon or commutation as well as a downloadable application to begin the process.

(<https://www.gov.ca.gov/pardons-and-commutations/>.) Some of the bill's proponents shared anecdotal evidence with this committee that the success of individuals petitioning for a certificate of rehabilitation has varied based on the county where the person has filed the petition rather than on the merits.

### **3. What This Bill Does**

This bill has several components. First, this bill creates a new entity to take over the duties currently delegated to the BPH. Specifically, the bill establishes the Pardons and Commutations Panel to review and investigate pardon and commutation applications. The panel would consist of five gubernatorial appointees with specified expertise who would review clemency applications and make recommendations to the Governor within specified timelines. Second, the bill prohibits an employer from considering, distributing, or disseminating information about a conviction for which a person has received a full pardon or been issued a certificate of rehabilitation. Third, the bill permits a person to file a petition for a certificate of rehabilitation in the county in which he or she was convicted of a felony, or had an accusatory pleading dismissed, rather than limiting the person to filing the petition in the county where the person resides. Finally, this bill requires the Governor to make the application for pardon available for submission on the Governor's Office website.

One of the primary purposes of this bill is to create a more streamlined and expedited application review process in light of the potentially significant consequences of receiving a pardon, particularly in the immigrant context. To that end, the bill establishes various timelines by which the panel must review and make a recommendation on an application for clemency to the Governor.

Given that the panel is made up of gubernatorial appointees, the committee may wish to consider making those panel members subject to Senate confirmation.

**4. Argument in Support**

The California Public Defenders Association writes:

AB 2845 will help rehabilitated former felons, whose rehabilitation has been recognized by the court, after considering a prosecutor's investigation, to fully reintegrate back into free society. It will provide that employers (with five or more employees), when conducting a conviction history background check in connection with a job application, cannot consider a conviction for which the person has received a certificate of rehabilitation. Employers already cannot consider a conviction that has been sealed, dismissed, expunged, or statutorily eradicated. It is appropriate, and in the interest of public safety, to add certificates of rehabilitation to that list.

...

AB 2845 will also create a Pardon and Commutation Panel to review, investigate, and make recommendations regarding pardon and commutation applications to the Governor....They will have adequate time to consider pardon applications, but not so much time that applications languish. This will further public safety by helping those who deserve a full pardon to achieve one fairly.

**-- END --**