
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

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Bill No: SB 411 **Hearing Date:** April 23, 2019
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Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Parole: Elderly Parole Program*

HISTORY

Source: San Diego District Attorney's Office

Prior Legislation: AB 1448 (Weber), Ch. 676, Stats. 2017
SB 224 (Liu), ordered to the Inactive File on the Senate Floor

Support: California District Attorneys Association; Crime Victims United of California;
Riverside Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Public Defenders
Association

PURPOSE

The purpose of this bill is to exclude "One Strike" sex offenses from the Elderly Parole Program.

Existing law requires the Board of Parole Hearings (BPH) to meet with each inmate during the sixth year prior to the inmate's minimum eligible parole date (MEPD) for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to both parole eligibility. Requires that the BPH provide the inmate with information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior during the consultation hearing. (Pen. Code, § 3041, subd. (a)(1).)

Existing law provides that one year prior to the inmate's MEPD, a panel of two or more commissioners or deputy commissioners shall meet with the inmate and shall normally grant parole. (Pen. Code, § 3041, subd. (a)(2).)

Existing law requires that an inmate be released upon a grant of parole, subject to all applicable review periods. Prohibits the release of an inmate who has not reached his or her MEPD unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date or elderly parole eligible date. (Pen. Code, § 3041, subd. (a)(4).)

Existing law requires BPH to grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual. (Pen. Code, § 3041, subd. (b)(1).)

Existing law prohibits an inmate imprisoned under a life sentence from being paroled until he or she has served the greater of the following: (1) a term of at least seven calendar years; or (2) a term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole. Requires that notwithstanding this provision of law, an inmate found suitable for parole pursuant to a youth offender parole hearing or an elderly parole hearing be paroled regardless of the manner in which BPH sets release dates pursuant to other provisions of current law, as applicable. (Pen. Code, § 3055, subds. (a) & (c).)

Existing law establishes the Elderly Parole Program, to be administered by BPH, for purposes of reviewing the parole suitability of any inmate who is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence, serving either a determinate or indeterminate sentence. (Pen. Code, § 3055, subd. (a).)

Existing law defines “elderly parole eligible date” as the date on which an inmate who qualifies as an elderly offender is eligible for release from prison. (Pen. Code, § 3055, subd. (b)(1).)

Existing law defines “incarceration” as detention in a city or county jail, local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility. (Pen. Code, § 3055, subd. (b)(2).)

Existing law requires BPH to give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate’s risk for future violence, when considering the release of an inmate. (Pen. Code, § 3055, subd. (c).)

Existing law requires BPH to consider whether the inmate meets or will meet the criteria for the Elderly Parole Program. (Pen. Code, § 3055, subd. (d).)

Existing law requires that an individual who is subject to this section meet with BPH pursuant to Penal Code section 3041. Requires BPH to release the individual on parole as provided in Section 3041 if an inmate is found suitable for parole under the Elderly Parole Program. (Pen. Code, § 3055, subd. (e).)

Existing law requires BPH to set the time for a subsequent elderly parole hearing if parole is not granted. Provides that no subsequent elderly parole hearing is necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing. (Pen. Code, § 3055, subd. (f).)

Existing law prohibits the following individuals from being released via elderly parole: a person who was sentenced pursuant to the “Three Strikes” law; a person who was sentenced to life in prison without the possibility of parole or death; a person who was convicted of first-degree murder of a peace officer who was killed while engaged in the performance of his or her duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, or the victim was a peace officer or a former

peace officer, and was intentionally killed in retaliation for the performance of his or her official duties as defined. (Pen. Code, § 3055, subds. (g) & (h).)

Existing law provides that the Elderly Parole Program does not alter the rights of victims at parole hearings. (Pen. Code, § 3055, subd. (i).)

This bill adds “One Strike” sex offenses to the list of cases that are not eligible for the Elderly Parole Program.

COMMENTS

1. Need for This Bill

According to the author:

Existing law (Penal Code section 3055) provides that inmates who are 60 years of age or older and who have been incarcerated for 25 years or more are eligible for an elderly parole hearing. At the hearing, the Board of Parole Hearings [BPH] is required to give “great weight” to the inmate’s advanced age, long-term confinement, and diminished physical condition, if any. If an inmate is granted parole at an elderly parole hearing, the inmate will be eligible for release immediately after the decision granting him or her parole is final (which can take up to five months). If parole is not granted, the inmate is given a denial time pursuant to Penal Code section 3041.5, subdivision (b)(3). [Marsy’s Law denial times – 15-10-7-5-3 years.]

Penal Code section 3055 provides for exclusions from eligibility for an elderly parole hearing for inmates who receive the death penalty, a sentence of life without parole, or who are convicted under the 3 Strikes Law, or first degree murder of a peace officer killed in the performance of their duties (or for retaliation).

However, under existing law, violent sex offenders are eligible for an elderly parole hearing, including offenders convicted under the 1 Strike Sex Offense Law (Penal Code section 667.61). By contrast, 1 strike sex offenders are not eligible for a Youth Offender Parole Hearing under Penal Code section 3051.

The legislative history behind the two enactments (elder and youthful parole) reveals that the legislature was concerned that the class of offenses delineated in the One Strike Sex Offense Law were so serious that they warranted exclusion from early parole consideration for persons who committed their controlling offense when they were under the age of 18 (later raised to under 26).

There is no logical reason to exclude youthful parole hearings but allow elder parole hearings for the same serious and often violent sex offenders. Thus, this is a proposal to correct this manifest injustice and give sex offense victims the peace and security of knowing that the person who violated them physically, mentally and emotionally will have to serve their full term regardless of what age they were when they committed the offense, and what age they have attained while serving their term.

2. Elderly Parole

As the result of severe prison overcrowding, the Three-Judge Court ordered CDCR to implement several population reduction measures, including to “[f]inalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole.” (February 10, 2014 Order, 2:90-cv-0520 LKK DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown*) In response to the order, BPH created the Elderly Parole Program and began elderly parole hearings on October 1, 2014. Inmates with determinate terms as well as those sentenced to life with the possibility of parole are eligible for the program. (https://www.cdcr.ca.gov/BOPH/elderly_parole_hearings_overview.html) Inmates who are sentenced to life without the possibility of parole, or who are sentenced to death are not eligible for the program. (*Id.*)

AB 1448 (Weber), Chapter 676, Statutes of 2017, codified the Elderly Parole Program. However, AB 1448 narrowed the eligibility criteria. Under AB 1448, individuals who were sentenced pursuant to “Three Strikes” or who were convicted of first-degree murder of a peace officer are ineligible for the Elderly Parole Program. (Pen. Code, § 3055, subs. (g) & (h).) Notably, eligibility for the Elderly Parole Program continues to be based on the original eligibility criteria as established by the 2014 court order. CDCR has indicated that it will continue to use the 2014 criteria until the federal case from which the order arose is resolved or the February 10, 2014 court order is modified.

3. Analogous Provisions in Youth Offender Parole Statute

The sponsor of this bill argues that One Strike sex offenses should be excluded from Elderly Parole eligibility, in part to make the elderly parole process more similar to the youth offender parole process as codified in Penal Code section 3051. Penal Code section 3051 generally provides that an individual who was 25 years of age or younger at the time of his or her controlling offense, or under 18 years of age if the person was sentenced to life without the possibility of parole, is eligible for release on parole at the 15th, 20th, or 25th year of incarceration depending on the sentence imposed. Like the Elderly Parole Program, the youth offender parole process affords some inmates an opportunity to parole at an earlier date than would otherwise be the case. Both parole processes also require BPH to consider additional factors when making a parole suitability determination.

Both the elderly parole statute and youth offender parole statute contain categorical exclusions. Subdivisions (g) and (h) of Penal Code section 3055 exclude from elderly parole eligibility a person sentenced under the Three Strikes law, a person sentenced to death or life in prison without the possibility of parole, and a person convicted of the first-degree murder of a peace officer. Subdivision (h) of Penal Code section 3051 excludes from youth offender parole eligibility, a person sentenced under the Three Strikes law, under the One Strike law, or to life without the possibility of parole for an offense committed after the person turned 18.

The exclusion of One Strike sex offenses from youth offender parole eligibility has been challenged. In a recently published opinion, the First District Court of Appeal held that the exclusion of One Strike sex offenses from youth offender parole violated equal protection. (*People v. Edwards* (Apr. 10, 2019, A147103) [2019 Cal. App. LEXIS 332].) The appellants in *Edwards* were convicted on multiple counts arising out of a joint sexual assault and robbery of

two victims that occurred when both appellants were 19 years old. Both appellants were sentenced under the One Strike sex offense statute and received lengthy life terms.

In deciding the case, the court noted that in enacting Penal Code section 3051, the Legislature created a “parole eligibility mechanism for juvenile offenders that includes homicide defendants, which it subsequently expanded to reach most defendants serving long sentences for crimes they committed at 25 years of age or younger.” (*Id.* at p. 16.) The court summarized appellants’ argument as follows: “[Penal Code] section 3051, subdivision (h) violates their right to equal protection because, although the statute reaches almost all youthful offenders who draw life terms or long determinate sentences, it excludes them. Specifically, section 3051 reaches first degree murderers but excludes One Strikers.” (*Id.* at p. 18.) A successful equal protection claim requires the appellant to “first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” (*Id.* at p. 19.) The court agreed in this case that appellants—One Strike sex offenders—and first-degree murderers are similarly situated. (*Ibid.*)

Where two classes of criminal defendants are similarly situated but sentenced differently, the court “looks to determine whether there is a rational basis for the difference.” (*Ibid.*) This highly deferential standard requires a party to “‘negative every conceivable basis’ that might support the disputed statutory disparity.” (*Id.* at p. 20.) In its rational basis analysis, the court relied heavily on *People v. Contreras* (2018) 4 Cal.5th 349, as well as U.S. Supreme Court case law distinguishing between homicide and non-homicide crimes in various contexts. Specifically, the court noted that *Contreras* “confirms that there is no crime as horrible as intentional first degree murder.” (*Id.* at p. 22.) In finding that there is no rational relationship between the disparity of treatment of first-degree murderers and One Strike offenders for purposes of youth offender parole eligibility, the court asserted:

Certainly, the crimes punished by the One Strike law are heinous, and the crimes in this case are among the most awful in our judicial system short of murder. But United States Supreme Court and California Supreme Court precedent has already determined that these defendants are categorically less deserving of the most serious forms of punishment than are murderers. Because the Legislature made youthful offender parole hearings available for even first degree murderers . . . , there is no rational basis for excluding One Strike defendants from such hearings. (Internal citations and quotations omitted.)

(*Id.* at pp. 23-24.)

It is not known whether the *Edwards* case will be appealed, or what the outcome of such an appeal would be if accepted for review by the California Supreme Court. However, given that at least one court has ruled that the exclusion of One Strike sex offenses from youth offender parole eligibility is unconstitutional, committee members may wish to consider whether adding this same categorical exclusion to the Elderly Parole statute would be prudent at this time.

4. Effect of This Bill

This bill would further narrow the eligibility criteria for the Elderly Parole Program, by excluding cases in which a person was sentenced pursuant to Penal Code section 667.61—a list of specified felony sex offenses.

It is worth noting that some inmates who are currently eligible for elderly parole were already in the parole suitability hearing cycle based on their original MEPD. The parole eligibility of these inmates is not based on their inclusion in the Elderly Parole Program as their sentences have always permitted an opportunity for parole. Similarly, there are inmates who are eligible for parole but not yet in the parole suitability hearing cycle because they have not reached their MEPD. Again, irrespective of inclusion in the Elderly Parole Program, these inmates will have an opportunity for parole once they have reached their MEPD. This means that even if certain categories of offenders are excluded from the Elderly Parole Program, if the inmate otherwise has a sentence that permits parole (i.e., a sentence other than life without the possibility of parole or death), the inmate will have parole hearings upon reaching their MEPD. Inclusion in the Elderly Parole Program may affect when an inmate has his or first parole hearing. However, inclusion in the Elderly Parole Program does not mean that an inmate will automatically be released from prison solely because the inmate meets eligibility criteria for the program. Rather, eligibility for the program means that BPH is required “to give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate’s risk for future violence, when considering the release of an inmate.” (Pen. Code, § 3055, subd. (c).)

5. Argument in Support

According to the bill’s sponsor, the San Diego District Attorney’s Office:

SB 411 will ensure that those offenders who are sentenced under Penal Code 667.61 do not get released under the Elderly Parole Program. Individuals convicted and sentenced under PC 667.61 are some of the most violent, sexually sadistic offenders in the criminal justice system and do not deserve to be released early simply because they have reached the age of 60-years-old. More significantly, SB 411 brings parity among offenders who have committed some of the most egregious crimes, and honors sexually violated survivors by giving them the assurance that there is “truth in sentencing.”

Individuals convicted and sentenced under the 1 Strike Sex Offense Law, PC 667.61, can be sentenced to serve 25 years to life for committing a violent sex crime under certain circumstances....Interestingly, the legislature opines that the chronological age of a juvenile defendant and its hallmark features...should be spared the harshest sentences. Conversely, our legislature has gone to great lengths to ensure those youth offenders, who have committed these same crimes, are excluded from eligibility for a Youthful Offender Parole Hearing. This is because those who have been convicted under this code section have committed horrendous acts of sexual violence....Ironically, the current statute gives the mature adult, with years of maturity and life experience and a developed understanding that actions have consequences, the privilege of early release under the Elderly Parole Program. SB 411 seeks to change this inequity of justice.

The legislative history behind the two enactments (elder and youthful parole) reveals that the legislature was concerned that the class of offenses delineated in the One Strike Sex Offense Law were so serious that they warranted exclusion from early parole consideration for persons who committed their controlling offense when they were under the age of 18 (later raised to 26).

There is no logical reason to exclude youthful parole hearings but allow elder parole hearings for the same class of serious and often violent sex offenders....

6. Argument in Opposition

The ACLU of California opposes this bill, writing:

Initially created by order of the Three Judge Panel in the *Plata/Coleman* lawsuits and later codified by the Legislature in 2017, the Elderly Parole Program has been a common sense and humane program that has reduced the incarceration of people whose continued imprisonment has not been found to serve the goal of public safety....

...California's Elderly Parole Program is available only to individuals who are at least 60 years old. Moreover, in order to qualify for consideration, they must have already served at least 25 years of continuous incarceration. Importantly, eligibility for California's Elderly Parole Program does not guarantee release under the program.... This is because release under the program is not automatic. Rather, it is the result of a careful decision by the Board of Parole Hearings (BPH), following a rigorous review and assessment, and a determination that a person does not pose an unreasonable risk of danger to the community. Indeed, from February 2014 through December 2018 BPH held 3,159 hearings for people eligible for Elderly Parole but granted parole to only 873 people – a rate of 27.6 percent.

Because of the stringent standards for parole, the population released by BPH pose a miniscule risk to public safety. According to the 2018 California Department of Corrections and Rehabilitation recidivism report, of the *entire* population released by BPH between 2013 and 2014 – people of all ages, and all ranges for time served in prison – only 16 out of 510 people, or 3.1 percent, committed a new offense of any kind within the three-year period following release. Of them, only 3 people – than 1 percent – committed a new felony against persons. This number is likely even lower for people 60 years and older, given that data consistently indicates lower recidivism for this population.

Despite the lack of public safety justification for keeping elderly people incarcerated, Californians are paying extraordinary costs for their continued incarceration....

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