
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No: SB 81 **Hearing Date:** April 25, 2023
Author: Skinner
Version: March 22, 2023
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Parole hearings*

HISTORY

Source: Author

Prior Legislation: SB 875 (Skinner), not heard in Senate Public Safety in 2022

Support: ACLU California Action; American Friends Service Committee; California Alliance for Youth and Community Justice; California Attorneys for Criminal Justice; California Coalition for Women Prisoners; California Families Against Solitary Confinement; California Innocence Coalition; Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent; California Public Defenders Association; Californians United for A Responsible Budget; Communities United for Restorative Youth Justice; CURE California; Ella Baker Center for Human Rights; Felony Murder Elimination Project; Initiate Justice; Initiate Justice Action; Legal Services for Prisoners With Children; Root & Rebound; Safe Return Project; San Francisco Public Defender; Showing Up for Racial Justice Bay Area; Sister Warriors Freedom Coalition; Smart Justice California; Survived & Punished; UnCommon Law

Opposition: California District Attorneys Association

PURPOSE

The purposes of this bill are to: 1) prohibit the Board of Parole Hearings (BPH) from considering any discriminatory factor, as specified, in reaching a finding of unsuitability for parole; 2) provide that parole candidates have a fundamental vested interest in being released upon reaching their minimum eligible parole date, youth parole eligible date, or elderly parole eligible date; 3) make changes to the habeas process for individuals challenging parole decisions, including providing that a parole candidate who has been denied parole after reaching their minimum eligible parole date, youth parole eligible date, or elderly parole eligible date has made a prima facie case for relief, and changing the court's standard of review for parole denials and parole grant reversals from "some evidence" to "clear and convincing evidence"; and 4) mandate the California Department of Corrections and Rehabilitation (CDCR) collect and publish specific data regarding parole hearings.

Existing law provides that in the case of any incarcerated person sentenced pursuant to any law, except as specified, the BPH must meet with each incarcerated individual during the sixth year before the individual's minimum eligible parole date (MEPD) for the purposes of reviewing and

documenting the individual's activities and conduct pertinent to parole eligibility. (Pen. Code, § 3041, subd. (a)(1).)

Existing law requires that during the incarcerated individual's consultation, the board provide the person with information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the person regarding his or her work assignments, rehabilitative programs, and institutional behavior. Requires the board, within 30 days following the consultation, to issue its positive and negative findings and recommendations to the person in writing. (Pen. Code, § 3041, subd. (a)(1).)

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

Existing law provides that the panel or the board, sitting en banc, shall grant parole to an incarcerated individual 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 requires BPH, within 20 days following any decision denying parole, to send the incarcerated individual a written statement setting forth the reason or reasons for denying parole, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated. (Pen. Code, § 3041.5, subd. (b)(2).)

Existing law establishes the youth offender parole hearing process for eligible individuals who were convicted of a controlling offense that was committed when the person was 25 years of age or younger and after serving a minimum amount of time, as specified. Defines "youth parole eligible date" as the earliest date upon which a youth offender is eligible for release on parole at a youth offender parole hearing. (Pen. Code, § 3051, subs. (a) & (b).)

Existing law requires BPH, when considering the release of an individual via the youth offender parole process, to give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual in accordance with relevant case law. (Pen. Code, § 4801, subd. (c).)

Existing law establishes the Elderly Parole Program to be administered by BPH for purposes of reviewing the parole suitability of any incarcerated person who is 50 years of age or older and has served a minimum of 20 years of continuous incarceration on the individual's current sentence, serving either a determinate or indeterminate sentence. Defines "elderly parole eligible date" as the date on which an incarcerated individual who qualifies as an elderly offender is eligible for release from prison. (Pen. Code, § 3055, subs. (a) & (b).)

Existing law requires BPH, when considering the release of an individual via the Elderly Parole Program, 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. (Pen. Code, § 3055, subd. (c).)

Existing law defines “unreasonable risk of danger to public safety” to mean an unreasonable risk that the individual will commit a new violent felony, as defined. (Pen. Code, § 1170.18, subd. (c).)

This bill prohibits BPH from considering any discriminatory factor in reaching a finding of unsuitability for parole, including, but not limited to, any of the following:

- The person’s race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation.
- The person’s physical or mental disability, or cognitive, speech, or physical impairment.
- The person’s current or prior history of mental illness or a substance use disorder unless there is clear and convincing evidence that the illness or disorder cannot be effectively managed in the community.
- The person’s housing status at the time of conviction, current or prior employment history, socioeconomic status, English language proficiency, immigration history or status, or education level.
- The person’s relations or prior association with a group of persons who share the person’s race, ethnicity, national origin, neighborhood, or religion, unless there is clear and convincing evidence that the association is ongoing and currently relevant to a specific future risk of violence.
- Other factors which have been documented to be subject to bias, including, but not limited to, a parole candidate’s prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate’s ability to articulate complex or abstract concepts.

This bill requires BPH to articulate the relationship between each reason for denial and the parole candidate’s current risk of violence when stating reasons for its decision to deny parole.

This bill provides that parole candidates have a fundamental vested interest in being released on parole upon reaching their minimum eligible parole date, as described, their youth parole eligible date, as defined, or their elderly parole eligible date, as defined.

This bill requires BPH to notify the parole candidate of their right to petition for habeas relief from a court upon denial of parole. Provides that a parole candidate may have the petition heard in either the county of conviction or in the county in which the parole candidate is incarcerated.

This bill provides that a parole candidate may petition a court for relief after a denial of parole, either by petition for writ of habeas corpus or by submitting the appropriate form. Provides that the parole candidate may request the assistance of counsel for this purpose. Requires the court to appoint counsel upon request, whether the request is made upon the submission of a petition or upon a request for assistance to prepare the petition.

This bill provides that a parole candidate who has been denied parole after reaching their minimum eligible parole date, their youth parole eligible date, or their elderly parole eligible date has made a prima facie case for relief and the reviewing court may not summarily deny any such petition.

This bill requires a court reviewing a decision to deny parole or to reverse the grant of parole to exercise its independent judgment on the decision. Provides that the court shall uphold the decision only if the court finds, based on clear and convincing evidence, that the person presents a current, unreasonable risk of danger to public safety, as defined.

This bill requires the court to transmit its decision to the BPH.

This bill requires the BPH to track and publish data on the outcomes of court decisions in which a parole decision was challenged, including, but not limited to:

- The number of candidates seeking court relief.
- The number of court affirmations.
- The number of reversals.
- The length of commitment for each parole candidate seeking relief.

This bill requires CDCR's Office of Research to serve as the data aggregator and repository unit for the data described in the provisions of this bill. Requires the office to ensure the uniformity and accuracy of the data, use technological resources necessary to collect the hearing-level data described in this section in standard formats and aggregate that data using appropriate means developed by the office, and publish the data in a format that will allow users to easily navigate and access the data they require, for example, on an internet website.

This bill requires the office to do all of the following:

- Collect specified data described within specified timeframes.
- Develop consistent definitions and formats for data elements to ensure the successful development of the metrics created using the data elements.
- Publicly report data using a modern, open, and electronic format, such as comma-separated values or a similar file format that will allow the user to download the data sets and conduct their own analyses.
- Ensure that the public interface for metrics makes raw, case-level data available for download so that independent analyses can be conducted using the data.
- Ensure that personal identifying information is not published except as allowed by law. Provides that the use of anonymized data may be used for this purpose.
- Use standardized practices in developing internet web pages, including the use of open web standards and standard best practices such as those recommendations published by the World Wide Web Consortium (W3C) or those published by the International Organization for Standardization (ISO).
- Employ appropriate security measures and best practices for data elements transmitted and stored to account for personal identifying information and other sensitive information as governed by state and federal law. Requires these processes to include the remote backing-up of all data, including data elements and metrics, as well as the logging and detection of data-related events.
- Use technology that is scalable so as to accommodate large increases in the volume of data.
- Hire and maintain personnel familiar with web user-interface coding and web service coding.

- Make all data available, including raw data elements and metrics, in a machine-readable format with open format, nonproprietary file formats that will permit the download of complete data sets, except as provided
- Make all data, including data elements and metrics, available in a format that will allow users to easily navigate and access the data they require using modern web application programming interfaces that allow access to data directly through programs in addition to internet website publishing, except as provided.
- Assess and create processes to collect, aggregate, and validate data elements transmitted by an agency, to include methods to identify duplicate, overlapping, or missing data and processes for the rejection and retransmission of invalid data.
- Test data quality to facilitate the dissemination of accurate, valid, reliable, and complete criminal justice data.
- Develop methods for editing and archiving data and retrieving archived data.

This bill requires the office to, on a weekly basis, publicly report all of the following data elements pertaining to each parole hearing on the department's website:

- The name of the parole candidate.
- The parole candidate's CDCR identification number.
- Whether the hearing was conducted in person or virtually.
- The hearing date.
- Whether the hearing was an initial or subsequent hearing.
- The county in which the parole candidate was convicted.
- The outcome of the hearing.

This bill requires the office to, on an annual basis, collect the information contained in the data elements and the following parole hearing-level data elements:

- The name of the institution in which the parole candidate was incarcerated.
- The outcome of the hearing.
- The number of prior parole hearings, if any.
- Whether the hearing was scheduled pursuant to the administrative review process; the petition to advance process; a reversal by the Governor; an en banc review resulting in rescission; or a court order.
- The following parole board commissioners who participated in the hearing, identified by an anonymized numerical or alphanumeric code: the presiding commissioner and the deputy commissioner or commissioners.
- The race of the parole candidate.
- The date of birth of the parole candidate.
- The length of time the parole candidate spent in the department's custody at the time of the hearing.
- The parole candidate's age at the time of the relevant offense.
- The self-described gender identity of the parole candidate.
- Any special considerations including, but not limited to, all of the following: whether the parole candidate was being considered for elderly parole, youth offender parole, or medical parole, and whether the board considered the effects of intimate partner battering.
- The parole candidate's most recent comprehensive risk assessment rating.

- The parole candidate's most recent comprehensive static risk assessment score.
- The parole candidate's security level at the time of hearing.
- The highest level of education attained by the parole candidate.
- The parole candidate's Test of Adult Basic Education score.
- All of the following regarding rules violation reports for the parole candidate: the time that has elapsed since the most recent rules violation report; the time that has elapsed since the most recent serious rules violation report; the time that has elapsed since the most recent nonserious rules violation report; the total number of rules violation reports; the total number of serious rules violation reports; and the total number of nonserious rules violation reports.
- Whether a language interpreter was used in the parole hearing.
- Whether the parole candidate had a private or appointed attorney.
- All of the following information regarding the controlling offense: the controlling offense group; whether the offense was for murder; whether the offense was a sex offense requiring registration; whether the conviction was a second strike, as defined; whether the conviction was a third strike, as defined; and whether the victim was a peace officer, as defined.
- Whether the district attorney attended the parole hearing.
- The number of registered victims or next of kin that attended the parole hearing.
- Whether the parole candidate is a veteran.
- If the parole candidate participates in the disability placement program or the developmental disability program, their classification in the program.
- The parole candidate's mental health classification at the time of the hearing.
- The parole candidate's highest level of mental health classification during their incarceration.
- Whether a confidential recording was created during the parole hearing.
- All of the following regarding outcomes after the parole hearing: whether the Governor reversed the parole decision; if the hearing resulted in an en banc review, whether the hearing was referred to an en banc review by the Governor or by the board, and the outcome of the en banc review; and if the parole candidate was released, whether the parole candidate was returned to custody after release and the reason for the parole candidate being returned to custody.
- If applicable, all of the following regarding the administrative review process for the current and any prior parole hearing: whether the case was screened for possible administrative review; whether the case received a review on the merits; whether the case was approved for an advanced hearing date; and if the case was denied an advanced hearing date, the reason for denial.
- If applicable, all of the following regarding the petition to advance process for the current and any prior parole hearing: whether a petition to advance was submitted and preliminarily reviewed; whether the petition to advance was reviewed on the merits; whether the petition to advance was approved for an advanced hearing; and if the petition to advance was denied an advanced hearing date, the reason for denial.

This bill requires the office to, on an annual basis, publish on the department's website the information contained in the parole hearing-level data elements described above.

This bill prohibits the following information from being published in the annual report:

- The name of the parole candidate.
- The parole candidate's CDCR identification number.
- The parole candidate's anonymized identifier.
- The date of birth of the parole candidate.
- The parole candidate's hearing date.
- Any other personally identifying information or information that could reasonably lead to reidentification of an individual charged with a crime or an individual who is the victim of a crime.

This bill requires this publication to be made using a modern, open, and electronic format, such as comma-separated values or similar file format that will allow the user to download the data sets and conduct their own analyses. Requires the public interface for metrics to also make raw, hearing-level data available for download so that independent analyses can be conducted using the data.

This bill requires the office to ensure that personal identifying information is not published except as allowed by law. Provides that the use of anonymized data may be used for this purpose.

This bill authorizes a bona fide research institution concerned with the quality of the criminal justice system to be provided with raw, individual, hearing-level data including, but not limited to, the information contained in the data elements described above as required for the performance of its duties, including the conduct of research. Provides that information that identifies individuals only be provided for research and statistical activities and prohibits that information from being transferred, revealed, or used for purposes other than research or statistical activities. Prohibits the reports or publications derived from the above listed information from identifying specific individuals.

This bill includes the following definitions:

- "Aggregate data elements" means collecting data elements in such a way that the data elements can support metrics.
- "Collect data" means facilitating cooperation between, and providing assistance to, participating divisions within the office to ensure the transmission and collection of data according to the timeframes and standards described in this section, and developing consistent and clear guidelines for how those divisions are used to define data elements.
- "Data elements" means the information described in specified provisions of the bill.
- "Develop metrics" means using industry-appropriate methods and technology and cooperation with participating agencies to create accurate, actionable, and digestible metrics using the collected data elements.
- "Metrics" means the combination of data elements used to track outcomes on any given process or decision point.
- "Publicly report" means using appropriate technology, methods, and interface design to make metrics available to the public, which may include the use of web publishing, the use of interactive portals or other applications to not only display metrics, but to allow metrics to be compared and filtered so that each metric may be analyzed and dissected by multiple factors.
- "Transmit data elements" means using the method designated by the office for participating divisions to provide collected data elements to the office.

COMMENTS

1. Need For This Bill

According to Senator Skinner:

California's parole system needs more safeguards to improve fairness and eliminate possible bias and discrimination in parole hearings. SB 81 will ensure that candidates who qualify for parole based on an objective set of standards are granted release from prison — and not unfairly kept locked up because of subjective factors that may be tainted by bias. In addition, SB 81 will raise the bar on standards to allow the release of people who have demonstrated they're suitable for parole and ready to reenter society and live productive lives.

Senator Becker writes:

As it currently stands, California's parole system is leaving out and leaving behind eligible candidates. There is too much room for elements, such as implicit bias, to make an impact in parole decisions. By outlining objective and consistent standards for review, SB 81 will remove unnecessary barriers to eligible and qualified parole candidates. This bill aims to preserve equity in parole hearings and protect due process for all candidates.

2. Parole Suitability

Incarcerated individuals who are indeterminately sentenced must be granted parole by the BPH in order to be released from prison. The Penal Code provides that the parole board “shall 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).) The fundamental consideration when making a determination about an individual's suitability for parole is whether the individual currently poses an unreasonable risk of danger to society if released from prison. (*In re Shaputis* (2008) 44 Cal.4th 1241.) The decision whether to grant parole is an inherently subjective determination. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

In deciding whether to grant parole, the BPH must consider all relevant and reliable information available. (Cal. Code Regs., tit. 15, § 2281, subd. (b).) Factors the BPH must consider include the nature of the commitment offense, including the circumstances of the person's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the individual may safely be released to the community; and any other information which bears on the individual's suitability for release. (Cal. Code Regs., tit. 15, §§ 2281, subd. (b).) The regulations further state that “[c]ircumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.” (*Ibid.*)

Although the parole board is required to consider the circumstances of the offense, the California Supreme Court has held that the parole board may not rely solely on the commitment offense when deciding to grant parole unless the circumstances of the offense “continue to be predictive of current dangerousness.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1221.) The parole board is prohibited from requiring an admission of guilt to any crime for which an incarcerated person was committed to CDCR when considering whether to grant an inmate parole. (Pen. Code, § 5011, subd. (b).) However, “an implausible denial of guilt may support a finding of current dangerousness, without in any sense requiring the inmate to admit guilt as a condition of parole....it is not the failure to admit guilt that reflects a lack of insight, but the fact that the denial is factually unsupported or otherwise lacking in credibility.” (*In re Shaputis* (2011) 53 Cal.4th 192, 216.) Although the term “insight” is not explicitly included in the regulations, the regulations “direct the Board to consider the inmate’s ‘past and present attitude toward the crime’ and ‘the presence of remorse,’ expressly including indications that the inmate ‘understands the nature and magnitude of the offense’.... fit[ting] comfortably within the descriptive category of ‘insight.’” (*Id.* at 218 (citations omitted).)

Additional guidance for making parole suitability determinations is provided in the regulations which list circumstances tending to show suitability and those tending to show unsuitability. The following circumstances tend to show unsuitability for release:

- The person committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:
 - Multiple victims were attacked, injured or killed in the same or separate incidents.
 - The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.
 - The victim was abused, defiled or mutilated during or after the offense.
 - The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
 - The motive for the crime is inexplicable or very trivial in relation to the offense.
- The person on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the incarcerated person demonstrated serious assaultive behavior at an early age.
- The person has a history of unstable or tumultuous relationships with others.
- The person has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.
- The person has a lengthy history of severe mental problems related to the offense.
- The person has engaged in serious misconduct in prison or jail. (Cal. Code of Regs., tit. 15, § 2281, subd. (c).)

The following are circumstances tending to show suitability:

- The person does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.
- The person has experienced reasonably stable relationships with others.
- The person performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.
- The person committed his or her crime as the result of significant stress in his or her life, especially if the stress has built over a long period of time.

- At the time of the commission of the crime, the person suffered from Battered Woman Syndrome, as defined, and it appears the criminal behavior was the result of that victimization.
- The person lacks any significant history of violent crime.
- The person's present age reduces the probability of recidivism.
- The person has made realistic plans for release or has developed marketable skills that can be put to use upon release.
- Institutional activities indicate an enhanced ability to function within the law upon release. (Cal. Code of Regs., tit. 15, § 2281, subd. (d).)

The circumstances which tend to show suitability and unsuitability for parole are set forth as general guidelines, and the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. (Cal. Code of Regs., tit. 15, § 2281, subds. (c) & (d).)

3. Parole Denials

BPH Procedures

A finding of unsuitability for parole results in a denial of parole. When BPH denies an individual parole, Penal Code section 3041.5 requires the board to send the individual a written statement within 20 days following the decision setting forth the reason or reasons for denying parole, and to suggest activities in which the individual might participate that will benefit the individual while the person is incarcerated. (Pen. Code, § 3041.5, subd. (b)(2).)

CDCR regulations provide that upon a decision to deny parole, the panel must schedule the incarcerated individual's next parole hearing as follows:

- The panel must first consider a fifteen-year denial. The panel must schedule the individual's next hearing in fifteen years unless the panel finds by clear and convincing evidence that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration than ten additional years;
- If the panel finds by clear and convincing evidence that the individual does not require a more lengthy period of incarceration than ten years, the panel must next consider a ten-year denial. The panel is required to schedule the individual's next hearing in ten years unless the panel finds by clear and convincing evidence that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the individual than seven additional years;
- If a panel finds by clear and convincing evidence that the individual does not require a more lengthy period of incarceration than seven years, the panel must consider a denial length of seven, five, or three years. The panel is required to schedule the individual's next hearing in three years, five years, or seven years after considering the criteria relevant to the decision denying parole.
(Cal. Code of Regs., tit. 15, § 2270, subd. (c).)

The denial lengths listed above are consistent with those required by Proposition 9, Marsy's Law, which was approved by the voters on November 4, 2008 and codified in Penal Code

section 3041.5. BPH may in its discretion, after considering the views and interests of the victim, advance a subsequent parole hearing to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the individual. (Pen. Code, § 3041.5, subd. (b)(4).) An incarcerated individual may also petition the board to exercise its discretion to advance a subsequent parole hearing to an earlier date, by submitting a written request, setting forth the change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration of the individual. (Pen. Code, § 3041.5, subd. (d)(1).)

At a subsequent parole hearing, an individual who was previously denied parole must be reconsidered for parole in the same manner as at the initial parole hearing, and the hearing panel must consider the same information considered at the initial parole hearing and any information developed since the last hearing. (Cal. Code. Regs., tit. 15, § 2270, subd. (a).)

Habeas Proceedings

An individual who is denied parole may challenge the decision by filing a habeas petition. (*In re Sturm*, 11 Cal.3d 258, 269.) In reviewing a parole denial, “the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation.” (*In re Rosenkrantz*, supra, 29 Cal.4th at p. 658.) If the parole decision is “not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner’s petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law.” (*Ibid.*) While “[t]his standard is unquestionably deferential, ... [it] certainly is not toothless, and ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*In re Lawrence*, supra, 44 Cal.4th at p. 1210.)

The Governor has the authority to review any BPH decision to grant, deny, revoke, or suspend the parole of a person sentenced to an indeterminate term upon conviction of murder. (Cal. Const., art. V, § 8, subd. (b).) The Governor may only affirm, modify, or reverse a BPH decision on the basis of the same factors which BPH is required to consider. (*Ibid.*) The Governor’s decision whether to affirm, modify, or reverse parole decisions is subject to judicial review to determine whether it complies with due process of law and is subject to the same standard of review as BPH’s decisions. (*In re Rosenkrantz*, supra, 29 Cal.4th at p. 667.)

4. Legislative Analyst Office Report

Earlier this year, the LAO published a report on the state’s parole process. (LAO, *Promoting Equity in the Parole Hearing Process* (Jan. 2023), available at <<https://lao.ca.gov/reports/2023/4658/Promoting-Equity-in-Parole-Hearing-Process-010523.pdf>>.) Among the key findings were that two aspects of the current parole process—overly broad discretion afforded to key actors and inequitable access to effective legal and hearing preparation services—could lead to inequitable parole hearing outcomes. (*Id.* at p. 1.) The report identified BPH commissioners, BPH psychologists, and the Governor as having overly broad discretion in the parole process. (*Id.* at pp. 8-9.) The report explained how despite the adoption of a Structured Decision-Making Framework in 2019, the BPH commissioners continue to retain significant discretion:

[S]ome of the factors included in the SDMF—such as the amount by which candidates have changed since they committed their crimes—are inherently subjective. Second, commissioners can consider factors that are not explicitly included in the SDMF, such as whether and how the candidate expresses remorse about the crime. Third, commissioners retain full discretion in how to weight the various factors that they choose to consider to produce a decision on whether to grant release. In other words, even if most information suggests that a candidate is not dangerous, as long as one piece of information provides some evidence of possible dangerousness, commissioners have the discretion to deny release. (*Id.* at p. 8.)

With respect to the potential consequences of the broad discretion the commissioners enjoy, the report noted:

On the one hand, discretion allows decision makers to interpret information in a more nuanced way than a formulaic approach. For example, a BPH commissioner could assess the details of a disciplinary infraction and conclude that the issue should be disregarded as it was due to unique circumstances in prison unrelated to how the candidate would behave if released. On the other hand, discretion allows decisions to be influenced by the idiosyncrasies, values, or conscious or unconscious biases of decision makers. This creates the potential for decisions to be arbitrary or biased. (*Id.* at p. 9.)

The LAO additionally found that the current parole process does not adequately provide safeguards on the use of discretion:

Specifically, BPH does not publish data on the outcomes of scheduled hearings (including grants, denials, waivers, and stipulations) disaggregated by candidate subgroups, such as race or ethnicity. Having such data would help the Legislature and stakeholders monitor the parole process and ensure that the discretion provided does not result in different subgroups being treated differently. In addition, while there have been a few limited studies done at the discretion of external researchers, there is no regular external monitoring of the extent to which there are differences in release rates between groups that are likely the result of bias in the parole hearing process. (*Id.* at p. 10.)

The LAO's report included several recommendations, including that the Legislature consider limiting the discretion of the BPH commissioners and creating greater transparency and oversight of how the commissioners and other key actor use their discretion. (*Id.* at pp. 13-14.) With respect to limiting the discretion of the BPH commissioners, the LAO recommended "that the Legislature consider changing statute to somewhat reduce commissioners' discretion to deny parole, particularly based on subjective factors" by increasing the standard that must be met from some evidence to "a preponderance of evidence" or "clear and convincing evidence" that a parole candidate poses a current risk. (*Id.* at p. 14.) With respect to providing greater transparency and oversight of the commissioners, the LAO recommended the Legislature "adopt legislation requiring BPH to release public data on CRA (Comprehensive Risk Assessment),

parole hearing, and Governor review outcomes by subgroups, such as race and ethnicity.” (*Ibid.*) This bill adopts both recommendations.

5. Effect of This Bill

This bill has three components. First, this bill seeks to limit biased and arbitrary decision making with respect to parole decisions. Specifically, this bill prohibits the board from considering what it identifies as discriminatory factors in reaching a finding of unsuitability for parole. Those factors are identified as, including, but not limited to, any of the following:

- The person’s race, ethnicity, national origin, gender, sexual orientation, gender identity, disability, or cultural or religious affiliation.
- The person’s cognitive, speech, or physical impairment.
- The person’s current or prior history of mental illness or a substance use disorder unless there is clear and convincing evidence that the illness or disorder cannot be effectively managed in the community.
- The person’s housing status at the time of conviction, current or prior employment history, socioeconomic status, or education level.
- The person’s relations or prior association with a group of persons who share the person’s race, ethnicity, national origin, neighborhood, or religion, unless there is clear and convincing evidence that the association is ongoing and currently relevant to a specific future risk of violence.
- Other factors which have been documented to be subject to bias, including, but not limited to, a parole candidate’s prior status as a victim or alleged victim of crime, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate’s ability to articulate complex or abstract concepts.

If BPH denies an individual parole, this bill explicitly requires BPH to articulate the relationship between each reason for denial and the parole candidate’s current risk of violence.

Second, this bill makes a number of changes to the habeas process for individuals challenging parole decisions. This bill states that parole candidates “have a fundamental vested interest in being released on parole” upon reaching their MEPD, youth parole eligible date, or elderly parole eligible date. This bill further provides that a parole candidate who has been denied parole after reaching their MEPD, youth parole eligible date, or elderly parole eligible date has made a prima facie case for relief and prohibits the reviewing court from summarily deny the person’s habeas petition. This bill requires the court reviewing a parole denial or parole grant reversal to exercise its independent judgment on the decision and changes the standard of review from “some evidence” to a requirement that the court uphold the parole decision “only if the court finds, based on clear and convincing evidence, that the person presents a current, unreasonable risk of danger to public safety.” This bill additionally requires BPH to notify the parole candidate of their right to petition for habeas relief from a court, and specifies that a parole candidate may have the petition heard in either the county of conviction or in the county in which the parole candidate is incarcerated. This bill also provides that a parole candidate may petition a court for relief after a denial of parole, by petition for writ of habeas corpus or by submitting the appropriate form, and requires the court to appoint counsel if the parole candidate requests the assistance of counsel.

Finally, this bill includes several data collection provisions. This bill mandates that CDCR's Office of Research collect and report on a weekly basis specified data related to each parole hearing that occurs during that week, including the name of the parole candidate, the individual's CDCR number, the hearing date, whether the hearing was conducted in person or virtually, whether the hearing was an initial or subsequent hearing, the county in which the parole candidate was convicted, and the outcome of the hearing. This bill also mandates that CDCR collect on an annual basis the above listed information as well as several hearing-level data points such as the race of the parole candidate, the amount of time the person had served at the time of the hearing, the parole board commissioners presiding over the hearing, the outcome of the hearing, the number of prior parole hearings, the highest level of education attained by the parole candidate, information regarding rules violation reports, whether the parole candidate had a private or appointed attorney, whether the district attorney attended the hearing, how many registered victims or next of kin attended the hearing, and the parole candidate's mental health classification at the time of the hearing, among other things. This bill additionally requires CDCR to, on an annual basis, publish all of the information related to parole hearings that it is required to collect but excludes from publication certain specified pieces of information that could identify parole candidates or crime victims. The bill permits a bona fide research institution to be provided with the raw, individual, hearing-level data in order for it to conduct research, and prohibits reports or publications derived from this information from identifying specific individuals.

6. Argument in Support

UnCommon Law supports the bill writing:

SB 81 would increase fairness, equity, and transparency in California's discretionary parole process by:

- Ensuring that parole release decisions are not based on discriminatory factors;
- Increasing access to counsel for parole candidates challenging biased or otherwise unlawful parole denials;
- Strengthening the standard of judicial review when parole is denied or a grant of parole is reversed; and
- Ensuring that the stated reasons for denying parole correlate to a current risk of violence.

UnCommon Law supports people navigating California's discretionary parole process ... Over the past 17 years, we have seen countless examples of how perceived differences in parole candidates' identities and presentations have been used as proxies for dangerousness, and in turn, have been used as justification for denying them release.

In January 2023, the Legislative Analyst's Office (LAO) published a report raising concern about the potential for bias in discretionary parole decisions, noting the absence of data transparency and external monitoring as safeguards. ... This report follows a goring mountain of evidence showing that parole candidates are disadvantaged based upon factors that include their race, gender identity,

mental health classification, disability status, cognitive difference (including cognitive differences that are age-related), and ability to retain a private attorney.

Although there have been studies demonstrating concerning disparities and inequities in parole outcomes, the existing data is incomplete and inaccessible. It is especially critical that raw, pre-aggregated parole outcome data be made publicly available for diverse and robust analysis by multiple researchers who can form independent conclusions. ... The outcome data must also be available on an ongoing basis, to allow researchers, the legislature, and the general public to more readily assess trends over time. ...

...

The available data, as well as decades of anecdotal evidence from parole candidates, their supporters, and their lawyers, shows that the decision-making process relies heavily on factors that do not predict current risk and which are subject to implicit bias. *Without a more meaningful standard of judicial review, the Board's discretion will remain unfettered and implicit bias will remain unchecked.* When a parole candidate challenges a parole denial in court, they should be able to access counsel as soon as they need it, and their case should be reviewed for “clear and convincing evidence” that they present a current, unreasonable risk of violence. The current judicial standard of “some evidence” is the most deferential standard in existence, simply requiring that *any* evidence ... could be sufficient to support the Board's decision. ... The Board's decades-long refusal to comply with the statutory mandate to *normally* grant parole has proven this current standard to be a completely inadequate safeguard.

California should pass SB 81 because it provides critically needed steps to improve equity, fairness, and transparency in our parole system, which impacts roughly one-half of our current prison population. By elevating the judicial review standard, requiring data transparency, and prohibiting discrimination, SB 81 will bring long overdue oversight and accountability into the broken parole release process.

7. Argument in Opposition

According to the California District Attorneys Association:

While we respect the desire to remove certain discriminatory factors from consideration of a person's unsuitability for parole, there are certain factors that are clearly not discriminatory and which are currently utilized by parole boards in California that SB 81 would disallow from consideration.

SB 81 ... prohibit[s] [the] consider[ation] of factors including, but not limited to, “a parole candidate's prior experience as a victim of violence or abuse, verbal or nonverbal communication, tone of voice, volume of speech, facial expressions, body language, eye contact, or the candidate's ability to articulate complex or abstract concepts.” There are reasonable, nondiscriminatory reasons for considering these factors during a parole hearing. ... [W]e oppose blanketly excluding these factors from consideration.

In addition, it is neither necessary nor prudent to alter established habeas corpus procedures, as specified in the proposed Penal Code section 3041.8. First, under existing law, habeas corpus is already a remedy for discriminatory parole denial decisions. (*In re Roberts* (2005) 36 Cal.4th 575, 584.) Second, while we understand the intent of the legislation, declaring that “parole candidates have a fundamental vested interest in being released on parole upon reaching their minimum eligibility date,” would likely have the unintended consequence of creating new, unanticipated avenues for habeas claims and other civil causes of action. Finally, the prima facie case language in subdivision (d) would deny courts their traditional gatekeeper role in habeas matters and most likely drown worthy petitions in a sea of meritless ones, ultimately wasting scarce resources. In short, habeas corpus already provides an adequate remedy, and the proposed alterations are unnecessary and likely to cause numerous negative, unintended consequences.

-- END --