SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 445	**Hearing Date:**	April 27, 2021
Author:	Jones		
Version:	February 16, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SJ		

Subject: ***Parole: Elderly Parole Program***

HISTORY

Source: Author

Prior Legislation: AB 3234 (Ting), Ch. 334, Stats. 2020
SB 411 (Jones), not heard in Senate Public Safety 2019
AB 1448 (Weber), Ch. 676, Stats. 2017
SB 224 (Liu), ordered to the Inactive File on the Senate Floor

Support: California District Attorneys Association; California State Sheriffs' Association; Crime Survivors Resource Center; Crime Victims United of California; The Thumbprint Project Foundation

Opposition: ACLU of California; California Public Defenders Association; Californians United for A Responsible Budget; Ella Baker Center for Human Rights; Initiate Justice; Legal Services for Prisoners with Children; San Francisco Public Defender; Showing Up for Racial Justice Bay Area; UnCommon Law; We the People - San Diego; Young Women's Freedom Center

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. (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, § 3046, 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 50 years of age or older and has served a minimum of 20 years of continuous incarceration on the inmate's 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 eligible for an elderly parole hearing meet with BPH pursuant to existing provisions of law regarding parole hearings. Requires BPH to release the individual on parole, as provided, 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 excludes the following individuals from elderly parole eligibility: 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 exclusions from Elderly Parole eligibility.

COMMENTS

1. Need for This Bill

According to the author:

> During end of session last year, AB 3234 (Ting – 2020) was gutted and amended to include provisions taken from the budget trailer bill AB 88 (Budget – 2020). These provisions changed Penal Code §3055 by lowering the age threshold for elderly parole from 60 years of age to 50 years of age. Additionally, the bill reduced the minimum amount of time required to be severed for elderly parole consideration from 25 years to 20 years. Because of the late gut and amend, AB 3234 was not considered in the appropriate policy committees or fiscal committees, despite the significant societal and fiscal impacts of the bill. In fact, the new bill was not heard in a single Senate committee, thus bypassing the Senate Public Safety Committee's strict scrutiny analysis of this policy's consequences. Ultimately, this gut and amend bill only became law by circumventing the legislative process.
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> Existing law created by AB 3234 (Penal Code section 3055) provides that inmates who are 50 years of age or older and who have been incarcerated for 20 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.]
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> 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).
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> 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 Legislature considered One Strike Sex Offense Law 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).

SB 445 bring parity to the two programs by adding One Strike Sex Offenses to the list of exclusions for the Elderly Parole Program, giving 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 holding 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/bph/elderly-parole-hearings-overview/) 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, subds. (g) & (h).) AB 3234 (Ting), Chapter 334, Statutes of 2020, expanded the eligibility criteria for elderly parole. Specifically, AB 3234 changed the minimum age at which an inmate is eligible for elderly parole from 60 to 50 and the amount of time that must be served from 25 years to 20 years. CDCR has indicated that inmates who meet the eligibility criteria of the court-ordered Elderly Parole Program but who are excluded from the statutory Elderly Parole Program are eligible for elderly parole under the court-ordered program.

3. Analogous Provisions in Youth Offender Parole Statute

The author 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. As is the case with 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.

4. Litigation Arising Out of Exclusion of One Strike Sex Offenses from Youth Offender Parole Statute

People v Edwards

The exclusion of One Strike sex offenses from youth offender parole eligibility has been challenged. In 2019, 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* (2019) 34 Cal. App. 5th 183.) 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. 194.) 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. 195.) 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." (*Ibid*.) 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." (*Ibid*.) 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. 197.) 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.)

(*Ibid*.)

People v Williams

Last year, the Fourth District Court of Appeal reached a different conclusion than the one reached in *Edwards*. (*People v Williams* (2020) 47 Cal. App. 5th 475.) The appellant in *Williams* was convicted on multiple counts arising out of two separate incidents involving sexual assault that occurred when he was 24. He was sentenced to 100 years-to-life plus an additional 86 years and two months.

In conducting its equal protection analysis, the court assumed that the appellant had shown that the state had adopted a classification that affected two or more similarly situated groups in an unequal manner when it enacted Penal Code section 3051 and moved directly to examining whether there was a rational basis for the difference. The court explained:

> Equal protection of the law is denied only where there is no rational relationship between the disparity of treatment and some legitimate governmental purpose. This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. While the realities of the subject matter cannot be completely ignored, a court may engage in rational speculation as to the justifications for the legislative choice. It is immaterial for rational basis review whether or not any such speculation has a foundation in the record. (Internal citations and quotations omitted.)
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> (*Id*. at p. 489.)

The court asserted that the reliance by the *Edwards* court on *Contreras* was misplaced because *Contreras* did not analyze whether sentences of life without the possibility of parole violated the equal protection clause and only addressed the constitutional implications of juvenile offenders sentenced to life without the possibility of parole. (*Id*. at pp. 492-93.) Instead, the court found that there was a rational basis for the Legislature's exclusion of One Strike sex offenses from Penal Code section 3051—the risk of recidivism by violent sex offenders. (*Id*. at p. 493.) The court pointed to the enactment of several comprehensive statutory schemes including, the Sexually Violent Predators Act, the Mentally Disordered Offenders Act, and sex registration requirements under Penal Code section 290, as evidence of the Legislature's concern regarding the risk of recidivism by felony sex offenders, and concluded that "the risk of recidivism provides a rational basis for the Legislature to treat violent felony sex offenders differently than murderers or others who commit serious crimes." (*Ibid*.)

The appellant in *Williams* sought review from the California Supreme Court, and the Court granted review in July of 2020. The case has not yet been fully briefed, and the outcome is pending. Given that the constitutionality of the exclusion of One Strike sex offenses from youth offender parole eligibility is currently pending before the state's highest court, committee members may wish to consider whether adding this same categorical exclusion to the Elderly Parole statute would be prudent at this time.

5. Effect of This Bill

This bill would narrow the eligibility criteria for the Elderly Parole Program, by excluding any person who 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. 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, the inmate will have parole hearings upon reaching the inmate's MEPD if the inmate otherwise has a sentence that permits parole (i.e., a sentence other than life without the possibility of parole or death). 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).)

6. Argument in Support

The California State Sheriffs Association writes:

> In recent years, California has enacted several policy changes aimed at creating more opportunities for individuals to be released from state prison, including expansions to the state's elderly and youthful offender parole programs. Although certain habitual offenders and those sentenced to death or life without parole are ineligible for elderly parole, there is no specific, statutory exclusion keeping those offenders convicted of aggravated sex offenses under the one-strike rape law from being considered for elderly parole.
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> SB 445 eliminates that deficiency and precludes specified sex offenders from accessing early parole under the elderly parole program.

7. Argument in Opposition

According to UnCommon Law:

> Throughout the course of the past fifteen years, we have served numerous clients convicted of sex offenses. These individuals have transformed their lives and contributed to their communities in remarkable ways both before and after release. Many of them have reconnected with family, gained and maintained employment, and even actively worked to mentor others and reduce violence in the communities they once harmed.

We believe that California should embrace data and reject fear-mongering. In 2019, only 20 percent of parole hearings for applicants eligible under the Elderly Parole Program resulted in a grant. (https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2020/02/BPH-Significant-Events-2019.pdf?label=2019%20Report&from=https://www.cdcr.ca.gov/bph/statistical-data/) The Elderly Parole Program does not, in fact, provide relief to many elderly people. Yet, by excluding an entire group of elderly people from eligibility under this law, you would be implying that none of them are capable of transforming their lives or deserving of a meaningful chance to return home to their communities. For incarcerated individuals who are elderly and often very sick, this can mean the difference between dying behind bars or dying with dignity and proper care in the outside world.

We also object to the misguided belief that people who are convicted of sex offenses are uniquely dangerous or more likely to recidivate based solely on their crime of conviction. This is simply not what the data suggests. According to a report from the Bureau of Justice Statistics, people convicted of sex offenses are less likely than people convicted of other offenses to be rearrested or to go back to prison. (https://www.prisonpolicy.org/blog/2019/06/06/sexoffenses/)There is no valid reason to exclude this population from the Elderly Parole Program. …

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