

Date of Hearing: June 27, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 81 (Skinner) – As Amended June 21, 2023

CORRECTED

SUMMARY: Prohibits the Board of Parole Hearings (BPH) from considering discriminatory factors in reaching a finding of unsuitability for parole, and changes the standard a reviewing court must use for reviewing a denial of parole from “some evidence” to “preponderance of the evidence. Specifically, **this bill**:

- 1) Prohibits BPH from considering any discriminatory factor in reaching a finding of unsuitability for parole, including, but not limited to, any of the following:
 - a) The person’s race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation;
 - b) The person’s physical or mental disability, or cognitive, speech, or physical impairment;
 - c) 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;
 - d) 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;
 - e) 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; and,
 - f) 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.
- 2) Requires BPH, when stating reasons for its decision to deny parole, to articulate the relationship between each reason for denial and the parole candidate’s current risk of violence.

- 3) Provides that, upon denial of parole, BPH shall notify the parole candidate of their right to petition for habeas relief from a court, as follows:
 - a) 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; and,
 - b) The parole candidate may request the assistance of counsel for this purpose. The court shall appoint counsel upon request.
- 4) Changes the processes for habeas review of parole decisions as follows:
 - a) A parole candidate who has been denied parole after reaching their minimum eligible parole date, 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 a petition for writ of habeas corpus;
 - b) A court shall exercise its independent judgment on the decision;
 - c) The court shall uphold a decision to deny parole only if the court finds, by a preponderance of the evidence, that the person presents a current, unreasonable risk of danger to public safety; and,
 - d) The court may order whatever relief as the case may require, including an order for a new parole hearing, with or without limitations on what evidence BPH may consider.
- 5) Requires Judicial Council to track and publish data on the above-described habeas petitions, including, but not limited to:
 - a) The number of petitions filed;
 - b) The number of petitions granted; and,
 - c) The number of petitions denied.

EXISTING LAW:

- 1) 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).)
- 2) 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).)
- 3) 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).)

- 4) 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).)
- 5) 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).)
- 6) 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).)
- 7) 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).)
- 8) 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).)
- 9) 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).)
- 10) Provides that habeas corpus relief is available to incarcerated persons to ensure that parole decisions are supported by at least “some evidence.” (*In re Powell* (1988) 45 Cal.3d 894; *In re Lawrence* (2008) 44 Cal.4th 1181.)

FISCAL EFFECT:

COMMENTS:

- 1) **Author's Statement:** 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.”

- 2) **Parole Suitability Hearings:** “Parole applicants in this state have an expectation that they will be granted parole unless [BPH] finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) In determining suitability for parole, “the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) 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.)

Title 15 parole regulations direct BPH to consider all available relevant and reliable information to determine parole suitability. (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.*)

This bill would narrow BPH’s discretion by prohibiting consideration of discriminatory factors in parole suitability hearings, including but not limited to: the person’s race, ethnicity, national origin, sexual orientation, gender identity or expression, or cultural or religious affiliation, mental disability, cognitive speech or physical impairment, mental illness or a substance use disorder, housing status, employment history, socioeconomic status, English language proficiency, immigration history or status, education level, and other factors which have been documented to be subject to bias, including, but not limited to, 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.

Opponents of this bill have expressed concern that consideration of “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” is information used by BPH and is race agnostic.

However, given the research on implicit biases, there are serious doubts as to whether consideration of such factors are truly agnostic to an individual's race, gender, culture, disability (diagnosed or undiagnosed) and ethnic background. For example, avoidance of eye contact is a characteristic hallmark of autism spectrum disorder. (Senju A. Johnson MH, *Atypical Eye Contact In Autism: Models, Mechanisms and Development*, *Neurosci Biobehav Rev.* 2009; 33(8): 1204–14.) Implicit biases could disadvantage candidates who truly have been impacted by situational factors, such as trauma and people who face a high risk of victimization in prison. (LAO, *Promoting Equity in the Parole Hearing Process* (Jan. 2023) at p. 10 <<https://lao.ca.gov/reports/2023/4658/Promoting-Equity-in-Parole-Hearing-Process-010523.pdf>> [June 18, 2023].) And, body language, demeanor, speech, and facial expressions are largely cultural and are not reliable determinations of a person's credibility. (O'Regan, Daphne, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers* (June 5, 2016). *Pace L. Rev.* 37.2, 2017.) “Even if universal bodily expressions of emotion exist, a strong cultural overlay influences both the physical expressions themselves and the ability to read them, particularly in individuals from other cultures.” (*Ibid.*) Contentions that BPH relies on these factors in its decision-making, and considers them “race agnostic,” illuminates the very problem that this bill attempts to solve.

- 3) **LAO Recommendations:** In January 2023, the Legislative Analyst's Office (LAO) issued a report with recommendations to promote equity in the parole hearing process. (LAO, *Promoting Equity in the Parole Hearing Process*, *supra*, at p. 1.) The LAO report found that the current level of discretion afforded to BPH commissioners and other key actors could allow implicit, cognitive, and institutional biases to affect parole decisions. (*Ibid.*) This happens, in large part, because “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. Discretion allows decisions to be influenced by the idiosyncrasies, values, or conscious or unconscious biases of decision makers. (*Id.*, at p. 9.) This creates the potential for decisions to be arbitrary or biased. 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 of dangerousness, commissioners have the discretion to deny release. (*Id.*, at p. 8.)

To the extent that the parole hearing process could inequitably disadvantage certain candidates, it means that the State is paying to continue to incarcerate people without a public safety need to do so. Conversely, to the extent that some inequities could work in favor of certain candidates, it means that BPH could be release a person despite the potentially high risk they may represent to public safety. (LAO, *Promoting Equity in the Parole Hearing Process*, *supra*, at p. 7.)

Ultimately, the report recommends, among other things, that the Legislature consider changing parole statutes to reduce this discretion somewhat, such as by increasing the standard that commissioners must meet to deny parole. (LAO, *Promoting Equity in the Parole Hearing Process*, *supra*, at p. 8.) “We recommend that the Legislature consider changing statute to somewhat reduce commissioners' discretion to deny parole, particularly based on subjective factors. (*Id.*, at p. 14.)

This bill incorporates some of the LAO's recommendations by limiting discretion of BPH to consider certain discriminatory factors in reaching a finding of unsuitability for parole.

- 4) **Habeas Remedy:** The California and federal Constitutions bar the infliction of punishment that is grossly disproportionate to the offender’s individual culpability. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) The courts, “as coequal guardian[s] of the Constitution, are to condemn any violation of that prohibition.” (*In re Lynch* (1972) 8 Cal.3d 410, 414.) Thus, habeas corpus relief is available to incarcerated persons who have been denied release by BPH. (*In re Streeter* (1967) 66 Cal. 2d 47, 49.)

This bill codifies the well-established right of incarcerated persons to seek habeas review in court of parole board denials and provides petitioners the assistance of counsel. It also changes the standards used to evaluate these habeas petitions.

Currently, courts require habeas petitioners, in their plea for relief, to allege with particularity the circumstances constituting the State’s claimed wrongful conduct and demonstrate how they are prejudiced thereby. (*In re Swain* (1949) 34 Cal.2d 300.) A habeas petition will not receive judicial consideration, and will be summarily denied, unless this prima facie requirement is met. (*Ibid.*) This bill provides that a person who, after reaching their minimum eligible parole date, youth parole eligible date, or their elderly parole eligible date, has been denied parole has made a prima facie case for relief and the reviewing court may not summarily deny their petition for writ of habeas corpus.

This bill further provides that the court shall uphold a decision to deny parole only if the court finds, by a “preponderance of the evidence,” that the person presents a current, unreasonable risk of danger to public safety.

Although BPH exercises broad discretion in determining whether to grant or deny parole, such decisions are subject to a form of limited judicial review to ensure that they are supported by at least “some evidence.” (*In re Powell* (1988) 45 Cal.3d 894, 904.) In *Lawrence*, the California Supreme Court observed, “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* (2008) 44 Cal.4th 1181, 1210.) “Accordingly, when a court reviews a decision of [BPH], the relevant inquiry is whether some evidence supports the decision of [BPH] that the inmate constitutes a current threat to public safety.” (*Id.* at p. 1212.) Such review simply ensures that parole decisions are supported by a modicum of evidence and are not arbitrary and capricious. (*Ibid.*)

In its report, the LAO suggested that the Legislature increase the standard that must be met—which is currently established through case law as “some evidence”—to “a preponderance of evidence” or “clear and convincing evidence” that a candidate poses a current risk. For example, if the Legislature were to require decisions to be supported by a preponderance of evidence, decisions to deny release would need to be backed by evidence showing that candidates are more likely than not to be an unreasonable risk to public safety. (LAO, *Promoting Equity in the Parole Hearing Process*, *supra*, at p. 14.)

This bill would change the standard of review for habeas petitions from “some evidence” to “preponderance of the evidence.”

- 5) **Argument in Support:** According to Attorney General Rob Bonta, “The Correctional Writs and Appeals Section (CWA) of the Criminal Division at the California Department of Justice

(DOJ) represents the Governor's Office and California Department of Corrections and Rehabilitation in state and federal courts against constitutional challenges raised in petitions for writ of habeas corpus. CWA also responds to petitions seeking extraordinary writ relief from DOJ's clients, such as writs of mandate or writs of prohibition. Currently, CWA handles, approximately 85 parole-related petitions each year.

"In 2019, 20% of people eligible for parole were granted release, however given the LAO's recent analysis and findings, the process can benefit from additional transparency and objective standards to ensure justice for parole candidates and safety for the community. SB 81 addresses recommendations from the LAO, which found that the broad discretion provided to Board commissioners "allows decisions to be influenced by the idiosyncrasies, values, or conscious or unconscious biases of decision makers," and that data on parole outcomes by race, ethnicity, or other subgroups is also lacking. The court has also held that the decision whether to grant parole is an inherently subjective determination.

"This legislation will require the Board ensure that a denial is based on objective reasons that a parole candidate is a public safety risk; help reduce parole decisions that may rely on factors that are subject to bias, including race, gender, and disability, among others; clarify that reviewing courts should apply a "preponderance of the evidence" standard when reviewing parole denials; and provide that parole candidates who are denied parole are informed of the right – which they already have - to seek judicial review of a denial and have an attorney for this process."

- 6) **Argument in Opposition:** According to the *California District Attorneys Association* (CDAA), "CDAA continues to oppose inclusion of Penal Code § 3041(b)(2)(F), which would prohibit consideration of "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 information has previously been utilized as a basis for evaluation for parole hearings and is race agnostic. As such, we see its inclusion NOT as a bias-reducing strategy to prevent discriminatory factors, but rather, as an elimination of a factor that has been appropriately used.

"We also remain opposed to the proposed Penal Code section § 3041.8 in its entirety for the following reasons:

- Habeas corpus is already a remedy for discriminatory parole denial decisions. (*In re Roberts* (2005) 36 Cal.4th 575, 584.) Habeas corpus already provides an adequate remedy, and the proposed alterations are unnecessary and likely to cause numerous negative, unintended consequences.
 - The prime 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 the meritless, ultimately wasting scarce resources."
- 7) **Related Legislation:** AB 1177 (McKinnor) would have required BPH to send a transcript and audio recording of the parole hearing to the incarcerated person. AB 1117 was held under submission in the Assembly Appropriations Committee.

- 8) **Prior Legislation:** SB 875 (Skinner), of the 2021-2022 Legislative Session, would have prohibited BPH from considering specified factors when reaching a finding of unsuitability for parole, including, the person's race, ethnicity, national origin, gender, sexual orientation, gender identity, disability, cultural or religious affiliation, and cognitive, speech, or physical impairment. SB 875 was never heard by Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
Alliance for Boys and Men of Color
American Friends Service Committee
Attorney General Rob Bonta
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Families Against Solitary Confinement
California for Safety and Justice
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
Center on Juvenile and Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Cure California
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice (UNREG)
Initiate Justice Action
Legal Services for Prisoners With Children
Milpa (motivating Individual Leadership for Public Advancement)
Root & Rebound
Safe Return Project
San Francisco Public Defender
Showing Up for Racial Justice (SURJ) Bay Area
Sister Warriors Freedom Coalition
Smart Justice California
Survived & Punished
Uncommon Law
W. Haywood Burns Institute
Young Women's Freedom Center
Youth Leadership Institute

Oppose

California District Attorneys Association
Monterey County District Attorney's Office - ODA - Salinas, CA
Riverside County District Attorney
San Diegans Against Crime
San Diego Deputy District Attorneys Association
Yolo County District Attorney

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744