

APRIL 20, 2023

Promoting Equity in the Parole Hearing Process

PRESENTED TO:

Senate Budget and Fiscal Review Subcommittee No. 5
On Corrections, Public Safety, Judiciary, Labor and
Transportation
Hon. María Elena Durazo, Chair



LEGISLATIVE ANALYST'S OFFICE

Background on Parole Hearings

Overview of Board of Parole Hearings (BPH)

- Within the California Department of Corrections and Rehabilitation (CDCR) and composed of 21 commissioners who are appointed by the Governor and subject to confirmation by the Senate.
- Primarily conducts parole hearings to decide whether to release certain people from state prison, with each parole hearing typically administered by one appointed commissioner and one civil service deputy commissioner.

Eligibility for Parole Hearings

- ***People With Indeterminate Sentences.*** People with indeterminate sentences—typically given for severe crimes such as murder—have a prison term that includes a minimum number of years but no specific maximum, such as “30-years-to-life.” They can only be released from prison if found suitable for release through a parole hearing.
- ***People Previously Sentenced as Minors to Life Without the Possibility of Parole (LWOP).*** People can be sentenced to LWOP for certain severe crimes, such as murder involving torture. However, U.S. Supreme Court rulings prohibited LWOP sentences for minors and required that those who had previously received them be given a meaningful opportunity for release. Accordingly, such people are eligible for hearings after serving 25 years in prison.
- ***Certain People With Determinate Sentences.*** People with determinate sentences are sentenced to a fixed number of years in prison and are released after serving that time. However, certain people with determinate sentences can become eligible for parole hearings to potentially be released earlier. First, people who were under age 26 when they committed their crime are generally eligible to begin receiving hearings after serving 15 years in prison. Second, people age 50 or over can generally begin receiving parole hearings after serving 20 years in prison.



Background on Parole Hearings

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Key Decisions Made in Parole Hearings

- ***Would the Candidate Pose an Unreasonable Risk of Danger if Released?*** The California Supreme Court has ruled that the central question in determining suitability is whether a candidate would currently pose an unreasonable risk of danger if released. As a result, denials must be based on “some evidence” that the candidate represents an unreasonable risk.
- ***If Not Released, When Should the Candidate’s Next Hearing Occur?*** When commissioners find a candidate unsuitable for release, state law requires them to set the candidate’s next hearing 3, 5, 7, 10, or 15 years in the future based on the amount of additional incarceration needed to protect the safety of the public and the victim. The number of years until a candidate’s next parole hearing is often referred to as the “denial period.”

Key Steps in Parole Hearing Process

- ***Consultation With Parole Commissioner.*** Five years prior to a parole candidate’s first parole hearing, a commissioner consults one on one with the candidate to discuss the process, factors relevant to suitability, and recommendations on how candidates can increase their chances of release, such as by participating in certain rehabilitation programs. In 2021, commissioners conducted 2,158 consultations.
- ***Scheduling of Hearing.*** About six months prior to when a candidate is expected to receive a hearing, BPH staff schedule the hearing for a particular week. There were 8,722 parole hearings scheduled to occur in 2021.
- ***Assignment of Legal Counsel.*** Statute gives parole candidates the right to an attorney at parole hearings. About four to five months before their hearing, BPH appoints an attorney for candidates who do not retain a private attorney. Such attorneys are required to provide basic legal services to their clients, such as ensuring that candidates’ procedural rights are protected. Private attorneys tend



Background on Parole Hearings

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to provide additional services, such as helping their clients prepare relapse prevention plans. About 90 percent of candidates relied on a state-appointed attorney in 2021.

- **Risk Assessment by BPH Psychologist.** About four months before their hearing, candidates are generally interviewed by a BPH psychologist to assess their potential for future violence as well as factors that could minimize their risk of violence. In 2021, BPH psychologists completed 4,428 assessments.
- **Voluntary Waiver of Hearing or Stipulation to Unsuitability.** No later than 45 days before their parole hearing, candidates may waive their right to a hearing for one to five years. Alternatively, candidates may stipulate to unsuitability for 3, 5, 7, 10, or 15 years. This is typically done to avoid a potentially longer denial period if the hearing occurs. Of the 8,722 hearings that were scheduled to occur in 2021, candidates waived their hearing in 1,758 (20 percent) cases and stipulated to unsuitability in 301 (3 percent) cases.
- **Parole Hearing.** During hearings, commissioners ask candidates questions about their social history, mental state, attitude toward their crime, and plans if released. Commissioners use a Structured Decision-Making Framework (SDMF) intended to focus questions on factors found in research to be most associated with risk of violence, such as the risk assessment by BPH psychologists. In 2021, of the 4,188 hearings held, 1,424 (34 percent) resulted in a decision to grant release and 2,764 (66 percent) resulted in a denial.
- **Governor's Review.** The Governor can refer any decision to grant parole to a review by a majority of the board's 21 appointed commissioners for possible reversal. The Governor also has constitutional authority to unilaterally reverse grants of parole for people convicted of murder.



Aspects of Parole Hearing Process Could Lead to Inequitable Outcomes

Potential Bias From Overly Broad Discretion

- ***Process Affords Significant Discretion to Key Actors.*** Commissioners have significant discretion because (1) some factors in the SDMF are inherently subjective, (2) they can consider factors that are not in the SDMF, and (3) they retain full discretion in how to weight the various factors to produce a decision. Other key actors—including BPH psychologists and the Governor—also maintain substantial discretion in the process.
- ***Current Level of Discretion Could Allow Biases to Affect Parole Decisions.*** On the one hand, discretion allows decisions to be made in a more nuanced way. On the other hand, discretion allows decisions to be influenced by conscious or unconscious biases. For example, research has found that people can exhibit implicit bias, meaning they tend to unconsciously associate certain groups with specific attributes. If implicit bias affects key actors' thinking, candidates subject to negative implicit biases would be disproportionately disadvantaged and vice versa.
- ***Process Lacks Key Safeguards on the Use of Discretion.*** BPH does not publish data on the outcomes of scheduled hearings disaggregated by subgroups, such as race or ethnicity. There is also no regular external monitoring of whether there are differences in release rates between groups that are likely the result of bias.



Aspects of Parole Hearing Process Could Lead to Inequitable Outcomes

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Potentially Inequitable Access to Effective Legal and Hearing Preparation Services

- ***Data Raise Concerns About State-Appointed Attorney Effectiveness and Lack of Hearing Preparation Services.***
 - ***Candidates With Such Attorneys Have Worse Outcomes.***

Of the parole hearings scheduled to occur in 2021, candidates represented by state-appointed attorneys were granted parole at around half the rate of those represented by private attorneys. Of those denied parole, candidates with state-appointed attorneys received denial periods that averaged six months (15 percent) longer than candidates with private attorneys.
 - ***Potentially Due to Lower Level of Legal and Hearing Preparation Services.*** A 2020-21 survey of parole candidates suggests that state-appointed attorneys may not be meeting the minimum expectations for legal services. For example, only about 8 percent of respondents confirmed their state-appointed attorney met all minimum BPH expectations. Disparities could also be due to private attorneys providing more extensive services than required of state-appointed attorneys by BPH, such as working with clients for longer periods and providing hearing preparation services.
 - ***Inequitable Access to Private Attorneys.*** If state-appointed attorneys provide a lower level of service, it raises an equity concern as it would mean that otherwise identical candidates might have different outcomes based on their access to a private attorney.
 - ***Reinforcement of Other Biases in the Process.*** Without competent and zealous advocacy and/or hearing preparation services, candidates may be more vulnerable to the effects of other potential biases, such as implicit bias.



Aspects of Parole Hearing Process Could Lead to Inequitable Outcomes

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- ***Unclear if Recent Steps to Improve Attorney Effectiveness and Access to Hearing Preparation Services Are Sufficient.***
 - ***Efforts to Improve State-Appointed Attorney Services.*** After BPH reported difficulty attracting and retaining competent attorneys, the 2019-20 budget provided BPH with \$2.5 million (General Fund) to increase attorney pay from \$400 to \$750 per case and increase training and mentorship for attorneys.
 - ***Efforts to Increase Access to Hearing Preparation Services.*** The 2019-20 budget provided \$4 million one-time General Fund for UnCommon Law—a nonprofit providing free legal representation to parole candidates—to pilot a program to deliver hearing preparation services through group workshops and individual counseling. The state also recently expanded programs that generally focus on helping people in prison understand the impact of crime, build empathy, and develop insight into their behavior.
 - ***Insufficient Data to Determine Whether Attorney Effectiveness Is Improving.*** While it is possible the services provided by state-appointed attorneys have improved, it is unclear because no comprehensive data is available to examine whether the various changes have been effective.
 - ***Unclear if Hearing Preparation Services Are Effective or Accessible.*** In 2023, UnCommon Law expects to complete a report on its pilot program. Hearing preparation services potentially being provided by other organizations have not been evaluated. Finally, even if some of these programs are effective, it is unclear if they can serve all of the parole candidates needing them.



Recommendations to Promote Equity in the Parole Hearing Process

Consider Reducing Commissioner Discretion and Add Key Safeguards

- ***Consider Limiting Discretion of Parole Commissioners.*** Commissioners can deny parole if they can point to any evidence—even if based on subjective determination—that a candidate may pose a current risk of dangerousness. We recommend that the Legislature consider changing statute to somewhat reduce commissioners’ discretion to deny parole.
- ***Provide Greater Transparency and Oversight of How Key Actors Use Their Discretion.*** We recommend adopting legislation requiring BPH to release public data on risk assessment, parole hearing, and Governor review outcomes by subgroups, such as race and ethnicity. In addition, we recommend that the Legislature support periodic quantitative and qualitative studies by independent researchers of both the risk assessment and parole hearings processes.



Recommendations to Promote Equity in the Parole Hearing Process

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Ensure Consistent Access to Effective Legal and Hearing Preparation Services

- **Assess Impact of Recent Steps to Improve Effectiveness of Legal and Hearing Preparation Services.** We recommend requiring an assessment by an external researcher to (1) evaluate the effectiveness of legal services provided by state-appointed attorneys and (2) identify any remaining barriers to ensuring equitable access to effective legal services. While a report by UnCommon Law on its pilot program is forthcoming, CDCR does not collect information about whether hearing preparation services are being provided through other programs. Accordingly, we recommend that the Legislature direct CDCR to report on the extent to which such programs provide hearing preparation services.
- **Use Analyses to Determine Future Legislative Action.** If an analysis of recent efforts to improve attorney effectiveness and access to parole hearing preparation services does not reveal adequate improvements, the Legislature could consider pursuing different options, such as shifting responsibility for providing attorneys to an external entity or increasing attorney pay. In doing so, it would want to consider (1) any underlying problems and recommended solutions identified through the external research we recommend commissioning and (2) any trade-offs associated with each option, such as cost and effectiveness.

