CONCURRENCE IN SENATE AMENDMENTS
AB 960 (Ting)
As Amended August 16, 2022
Majority vote

SUMMARY

Original Committee of Reference: PUB. S.

Requires the California Department of Corrections and Rehabilitation (CDCR) to make a recommendation for recall and resentencing of an incarcerated person who has a serious and advanced illness with an end-of-life trajectory or who is found to be permanently medically incapacitated.

Senate Amendments
Current Committee Recommendation: Concur

1) Require CDCR to make a recommendation to the court that a person's sentence be recalled when the Chief Medical Officer determines the person meets either of the following medical criteria:

   a) The person has a serious and advanced illness with an end-of-life trajectory, including, but not limited to, metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced end-stage dementia; or,

   b) The person is permanently medically incapacitated with a medical condition or functional impairment that renders them permanently unable to complete basic activities of daily living, including, but not limited to, bathing, eating, dressing, toileting, transferring, and ambulation, or has progressive end-stage dementia, and that incapacitation did not exist at the time of the original sentencing.

2) Create a presumption favoring recall if the medical criteria exists which may only be overcome if the court finds that the person is an unreasonable risk of danger to public safety, as defined.

3) Establish a timeline for CDCR staff to follow to refer an incarcerated person for compassionate release recall and resentencing based on this medical criteria.

4) Require the referring physician or their designee to be available to the court or defense counsel as necessary through the recall and resentencing process.

5) Entitle the incarcerated person to counsel upon a recommendation to the court for recall and resentencing.

6) Require the Judicial Council to release an annual report beginning January 1, 2024, reporting on this compassionate release program, as specified.

7) Reorganize compassionate release provisions and make other conforming changes.

COMMENTS

Compassionate Release:

An incarcerated person or their family member or advocate can request a compassionate release through the Chief Medical Executive at the prison or the CDCR Secretary. If a prison doctor determines that a person meets the medical requirements, the doctor must start the compassionate release process. A person meets the medical requires if they are terminally ill with an incurable condition that is expected to cause death within 12 months or the person is permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care. (Penal Code Section 1170(e))

The timeline for CDCR to consider compassionate release is intended to be completed within 30 days. A prison doctor first determines whether the person meets the medical criteria. The prison's Chief Medical Executive and the Statewide Chief Medical Executive must approve or reject the doctor's findings within 5 working days. If the person is not sentenced to death or life without the possibility of parole (LWOP), a report will be prepared on public safety case factors like the person's criminal history, prison behavior, and post-release plans. The CDCR Secretary (or someone designated by the CDCR Secretary) then decides whether to send the person's case to the sentencing court with a recommendation for compassionate release. A recommendation must include medical evaluations, postrelease plans, and eligibility findings. When deciding whether to grant or deny compassionate release, CDCR officials may not rely on factors or criteria other than statutory criteria; for example, it is improper to consider whether a person's period of incarceration has been proportionate to the seriousness of their crime. The court that imposed the prison sentence must hold a hearing within 10 days of receiving a compassionate release recommendation from the CDCR Secretary. (https://prisonlaw.com/wp-content/uploads/2020/12/Comp-Release-Med-Parole-Dec-2020.pdf) The court is responsible for making the determination regarding compassionate release. In addition to the medical criteria, the court must also find that the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety. (Penal Code Section 1170(e))

A person whose sentence is recalled under compassionate release, is no longer subject to the jurisdiction of CDCR and is not placed on supervision, and cannot be returned to prison if the person's health improves.

This bill would require CDCR to make a recommendation for recall and resentencing of an incarcerated person with a serious and advanced illness with an end-of-life trajectory (as opposed to an incurable condition that is expected to cause death within 12 months). This standard is more in alignment with federal compassionate release guidelines where "[a] specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required." (U.S.S.G. Section 1B1.13 cmt. n.1(A)(i).) Instead, a defendant need only show that they are "suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory)." (*Ibid*.)

This bill would also require CDCR to make a recommendation for recall and resentencing of an incarcerated person who is found to be permanently medically incapacitated with a medical condition or functional impairment that renders them permanently unable to complete basic activities of daily living, as specified (as opposed to permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily

living, and results in the prisoner requiring 24-hour total care). Removing the 24-hour care requirement is also more in alignment with federal guidelines where a defendant need only show they are suffering from a medical condition that substantially diminishes their ability to provide self-care within the correctional environment and from which they are not expected to recover. (U.S.S.G. Section 1B1.13 cmt. n.1(A)(ii).)

The bill would also create a presumption favoring recall based on these medical criteria which may only be overcome if the court finds that the person is an unreasonable risk of danger to public safety – i.e., unreasonable risk that they will commit a new violent felony, as specified.

Further, this bill would establish a timeline for CDCR staff to follow to recommend an incarcerated person for compassionate release recall-and-resentencing within the existing 30-day time frame. Beginning January 1, 2024, Judicial Council would be required to release an annual report on the number of people who were referred to the court for recall and resentencing disaggregated by race, ethnicity, age, and gender identity, as well as the criteria on which the recommendation for recall and resentencing was based.

As Passed by the Assembly, this bill created a medical parole panel at each CDCR prison, and expanded the criteria for medical parole.

However, a change in federal rules limited medical parole to those on ventilators, meaning they are not a public danger because their movement is so limited. Previously, a much broader range of permanent incapacities allowed incarcerated persons to be cared for in nursing homes. California officials reported they had no choice but to limit medical parole because of a new approach to the enforcement of federal licensing requirements for nursing homes by the Centers for Medicare & Medicaid Services. "The federal agency has taken the position that parole officials can't impose any conditions on inmates in community medical facilities, the state says. That includes a rule that they not leave except with permission from their parole agent — a restriction state officials said is necessary to ensure public safety." https://www.latimes.com/world-nation/story/2021-11-30/california-now-limits-medical-parole-to-those-on-ventilators [as of August 17, 2022].)

According to information recently provided to this committee by CDCR, they have expanded the medical parole criteria again, having identified a facility that is not seeking Medicare/Medicaid reimbursement and that will accept these patients

According to the Author
"The eligibility criteria for the Compassionate Release program remain too narrow and the process too cumbersome for a population that poses the lowest risk to public safety. As a result, very few people are granted relief and, consequently, many die while awaiting a referral to the court. For instance, between January 2015 and April 2021, 306 people were referred for compassionate release, yet 95 people died before the process could be completed and only 53 people were successfully released. Consequently, the State is spending more money to cover costly health care services for a population that is nearing death or requiring thoughtful medical attention. AB 960 would streamline and improve California's Compassionate Release program under the California Department of Corrections and Rehabilitation (CDCR) in order to address our State's most vulnerable population's needs."

Arguments in Support
According to *FAMM*, "California law permits courts to resentence certain people meeting strict medical criteria to time served so that they may live their final months outside of a prison. Unfortunately, this system, referred to as compassionate release, is hampered by eligibility criteria that are too narrow and a process that funnels meritorious cases through a single actor. Currently, people are only eligible for compassionate release if they have a terminal illness likely to result in death within 12 months or are permanently medically incapacitated and require 24-hour care.

"These criteria are much too narrow and limit the number of seriously ill and dying people the courts can consider for relief. Defining a terminal illness with a 12-month prognosis is harmful to both the patient and the physician. Physicians say that accurately predicting how much time a person has left to live is elusive; the science is inexact and predictions are unreliable.1 Furthermore, physicians are often reluctant to prognosticate and, when they do, they more often than not significantly overestimate the time remaining. This may leave the patient, physician, CDCR, and the courts with much less time to act than they believe.

"Furthermore, while the current eligibility criteria rightfully include allowances for people with medical incapacitation, the current definition is too limited to account for all the people in CDCR custody who have physical and cognitive impairments that prevent them from meeting their basic needs. Requiring someone who needs assistance to eat or ambulate to wait until they are so impaired they need 24-hour care may simply be too late. Other states, such as Alabama, Illinois, Michigan, and Oregon define incapacitation more broadly than we currently do in California. For example, rather than requiring round-the-clock care, Alabama considers people eligible if they are unable to complete one or more activities of basic daily living (e.g., eating, toileting, transferring).

"In addition to unduly restricted eligibility criteria, the decision-making process places a burdensome and redundant task on the Secretary to make a public safety determination. Our courts are best suited to make a public safety determination regarding compassionate release cases. Requiring the Secretary, whose role is removed from the applicant's day-to-day life in prison, to make a public safety determination before a referral to the courts is duplicative and unnecessary. While the courts follow due process and adhere to case law in making their public safety determination, the Secretary has broader discretion in determining someone's suitability for recommendation for resentencing - this can lead to undue weight given to the underlying offense and the applicant's medical history and rehabilitation being discounted.

"These flaws have led to a system that releases too few people and leads to too many dying before the process is complete. According to a recent analysis of CDCR data, 30% of people who were considered for compassionate release between January 2015 and April 2021 died before the process could be complete. Additionally, the Secretary of the CDCR denied approximately one in four compassionate release applications that reached their desk during this time period. Ultimately, only 53 people, 17% of people who were considered for compassionate release, were released between January 2015 and April 2021.

"AB 960 offers common sense reforms to California's compassionate release process, allowing the state to safely release those who are the most expensive to incarcerate and least likely to reoffend. This bill would reform medical eligibility to better serve the population and ensure the courts are able to consider and rule on all medically eligible incarcerated individuals. This does

not undermine public safety; instead it ensures the incapacitated and dying get a proper judicial review.

California's prisons were not designed to serve as hospice centers and nursing homes. Continuing to incarcerate terminally ill and medically incapacitated people does not make us safer and is a considerable waste of finite resources. It has been estimated that older incarcerated people, due to their health concerns, are three to nine times more expensive to incarcerate. Furthermore, medical care spending in prisons across the country increased 10 fold between 1976 and 2013 as prison populations grew and aged. California simply cannot afford to keep sick and dying people in its prisons. People who are near death should be safely released and allowed to live their remaining months outside of a prison." (Footnotes omitted.)

Arguments in Opposition
According to the *California District Attorneys Association (CDAA)*, "Current law, both P.C. 1170(e) and P.C. 3550, are already generous to state prisoners who are ill. Any expansion of existing law hurts public safety, undermines the criminal justice system, and destroys truth in sentencing.

"P.C. 1170(e) was amended by SB 118 on August 6, 2020, to expand the re-sentencing provisions for terminally ill state prison inmates. Before SB 118, a terminally ill state prisoner could be re-sentenced only if he or she had six months to live. SB 118 expanded re-sentencing to inmates who are determined by a physician to have twelve months to live. P.C. 1170(e) also continues to provide that a permanently medically incapacitated inmate who needs 24-hour care may be re-sentenced, and lists conditions such as coma, persistent vegetative state, brain death, ventilator-dependency, and loss of control of muscular or neurological function *if* the inmate's condition did not exist at the time of original sentencing.

"Existing P.C. 3550 permits medical parole if the head physician of a state prison determines that a prisoner is permanently medically incapacitated with a medical condition that renders the inmate permanently unable to perform activities of basic daily living and results in the inmate requiring 24-hour care if the incapacitation did not exist at the time of sentencing and if the Board of Parole Hearings determines that the inmate's release conditions would not reasonably pose a threat to public safety…

"Enough is enough. Existing [Penal Code Section] 1170(e) and P.C. 3550 already provide for truly ill inmates to be paroled or resentenced: those who have 12 months to live, and those who are permanently medically incapacitated and require 24-hour care."

FISCAL COMMENTS

According to the Senate Appropriation Committee, pursuant to Senate Rule 28.8, negligible state costs.

VOTES

ASM PUBLIC SAFETY: 6-2-0
YES: Jones-Sawyer, Bauer-Kahan, Quirk, Santiago, Wicks, Lee
NO: Lackey, Seyarto

ASM APPROPRIATIONS: 12-4-0
YES: Lorena Gonzalez, Calderon, Carrillo, Chau, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas
NO: Bigelow, Megan Dahle, Davies, Fong

ASSEMBLY FLOOR: 45-24-10
YES: Aguiar-Curry, Bauer-Kahan, Bennett, Berman, Bloom, Bryan, Burke, Calderon, Carrillo, Chau, Chiu, Daly, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Holden, Jones-Sawyer, Kalra, Lee, Levine, Low, McCarty, Medina, Mullin, Nazarian, O'Donnell, Quirk, Quirk-Silva, Reyes, Luz Rivas, Robert Rivas, Blanca Rubio, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wood, Rendon
NO: Bigelow, Boerner Horvath, Chen, Choi, Cunningham, Megan Dahle, Davies, Flora, Fong, Frazier, Gallagher, Irwin, Kiley, Lackey, Mathis, Mayes, Muratsuchi, Nguyen, Patterson, Petrie-Norris, Seyarto, Smith, Valladares, Voepel
ABS, ABST OR NV: Arambula, Cervantes, Cooley, Cooper, Gray, Maienschein, Ramos, Rodriguez, Salas, Waldron

SENATE FLOOR: 29-9-2
YES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Pan, Portantino, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener
NO: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Nielsen, Ochoa Bogh, Wilk
ABS, ABST OR NV: Hurtado, Roth

ASM PUBLIC SAFETY: 5-1-1
YES: Jones-Sawyer, Mia Bonta, Bryan, Quirk, Santiago
NO: Seyarto
ABS, ABST OR NV: Lackey

UPDATED

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