To: Senate and House Committees on Judiciary

From: Oregon Justice Resource Center

Date: January 12, 2024

Re: Parole Reform – Summary of Oregon's Parole Hearings

Our current parole process, used to determine the release of individuals convicted of aggravated murder and murder, needs reform. Years of a patchwork of shifting policies and case law related to sentencing and parole have created a confusing, contradictory, redundant, and needlessly lengthy process that the vast majority of attorneys and public officials do not understand and cannot explain. This results in inaccuracy and confusion about sentencing amongst all those involved: judges, attorneys, adults in custody (AIC), and victim family members. This does not serve the victims' family members or the broader community well.

The entirety of the parole process is so convoluted that it is difficult for stakeholders in the criminal justice system and policy makers to engage in learning about the process and the need for its reform.

The following summary of the three hearings involved in the current parole process is provided as a basic background of the process and to help policy makers recognize the need for reform.

Summary of Oregon Parole Hearings

The current process of release for individuals convicted of aggravated murder and murder ordinarily involves three separate hearings before the Board of Parole and Post-Prison Supervision (Board). This process applies to all individuals convicted of aggravated murder and sentenced to life imprisonment with a minimum prison term regardless of the date of the crime; and to individuals convicted of murder and sentenced to life imprisonment with a minimum prison term for crimes committed on or after April 1, 1995, when Measure 11 was enacted.

Below are summaries of the hearings in the current process: 1) the rehabilitation hearing, 2) the prison term hearing, and 3) the exit interview hearing.

(1) Rehabilitation Hearing

Since 1977, individuals sentenced to life imprisonment with a 30-year minimum prison term for the crime of aggravated murder are eligible to petition the Board for what is commonly referred to as a "rehabilitation hearing."[1] Individuals sentenced to life imprisonment with a 25-

[1] *See* ORS 163.105(2).

year minimum prison term for the crime of murder committed on or after April 1, 1995, are eligible to petition for such a hearing after completing the minimum term.[2]

The decision at a rehabilitation hearing is whether the individual is "likely to be rehabilitated within a reasonable period of time." The Board has by rule adopted criteria or factors it considers in addressing that issue. The non-exclusive criteria the Board considers are found in OAR 255-032-0020:

1) The inmate's involvement in correctional treatment, medical care, educational, vocational or other training in the institution which will substantially enhance his/her capacity to lead a law-abiding life when released;

2) The inmate's institutional employment history;

3) The inmate's institutional disciplinary conduct;

4) The inmate's maturity, stability, demonstrated responsibility, and any apparent development in the inmate personality which may promote or hinder conformity to law;

5) The inmate's past use of narcotics or other dangerous drugs, or past habitual and excessive use of alcoholic liquor;

6) The inmate's prior criminal history, including the nature and circumstances of previous offenses;

7) The inmate's conduct during any previous period of probation or parole;

8) The inmate does/does not have a mental or emotional disturbance, deficiency, condition or disorder predisposing them to the commission of a crime to a degree rendering them a danger to the health and safety of the community;

9) The adequacy of the inmate's parole plan including community support from family, friends, treatment providers, and others in the community; type of residence, neighborhood or community in which the inmate plans to live;

10) There is a reasonable probability that the inmate will remain in the community without violating the law, and there is substantial likelihood that the inmate will conform to the conditions of parole.

The individual carries the burden to prove they are likely to be rehabilitated.[3] As one legislator who participated in the drafting of the bill creating the rehabilitation hearing expressed,

[2] *See* ORS 163.115(5)(c).
[3] *See* ORS 163.115(5)(c)(A); ORS 163.105(2)(a); ORS 163.107(3).

the burden on a prisoner to show a likelihood of rehabilitation is a "heavy burden."[4] Meeting that standard requires the individual to compile and present their institutional record, criminal history, mental health records, and parole plans to the Board. The individual is required to personally explain to the Board how they have reformed themself during their confinement, showing that they have addressed the issues that led them to commit the crime. The individual must persuade all voting members of the Board that they are likely to be rehabilitated.[5]

Prior to the hearing, the incarcerated person submits, through their appointed counsel, materials outlining their rehabilitation and prison record. Rehabilitation hearings can be two to eight hours long; and usually involve three Board members and one Board staff person. Victim family members and the district attorney for the county of conviction are notified prior to the hearing and are given the opportunity to make a statement at the hearing.

A favorable finding requires the Board to convert the terms of the individual's confinement to life imprisonment with the possibility of parole or release to post-prison supervision.[6] This change in sentence eliminates any remaining minimum sentence, including consecutive minimum sentences for the crime of aggravated murder.[7] The Board is required to decide whether to set a release date for an individual after making a rehabilitation finding.[8]

If the Board does not find the individual has demonstrated the likelihood of rehabilitation, the Board is authorized to schedule a subsequent hearing after no less than two years (but as much as ten years) from the hearing date.[9]

(2) Prison Term Hearing

The Board holds a prison term hearing following a finding favorable to the incarcerated person at the rehabilitation hearing, usually four to six months after the rehabilitation hearing. During this hearing, the Board determines a person's release date using the parole matrix statutes and rules.

The parole matrix system was created in 1977 to establish the prison terms for all people convicted of felonies prior to the enactment of the sentencing guidelines in 1989. Originally, under the parole matrix system, a prison term hearing must occur under ORS 144.120 within six

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[4] *Norris v. Bd. of Parole & Post-Prison Supervision*, 152 Or App 57, 65 (1998).
[5] ORS 163.105(3); ORS 163.107(3)(b); ORS 163.115(5)(d).
[6] ORS 163.105(3); ORS 163.107(3)(b); ORS 163.115(5)(d).
[7] *See Janowski/Flemming v. Board of Parole,* 349 Or 432 (2010); *Severy/Wilson,* 349 Or 461 (2010).
[8] In 1999, the Board was granted the express authority to set release dates under the rehabilitation hearing statutes for murder and aggravated murder. Or Laws 1999, ch. 782. The 1999 amendments to those statutes applied retroactively. *State v. Haynes,* 168 Or App 565, 567 (2000). From 1989 until shortly after the 1999 amendments, the Board's rules governing aggravated murder mandated the Board to set a release date after a rehabilitation finding. *See* OAR 255-032-0025 (1989-2000).
[9] ORS 163.115(5)(e); ORS 163.105.

months to a year after an individual's arrival at a correctional facility.[10] The purpose of the hearing is to establish an individual's actual duration of imprisonment to be served prior to release on parole.[11] To do this, the Board relies on the parole matrix rules that were originally adopted in 1977 and amended in 1985. Under the parole matrix rules, the Board considers the offense and other factors *at the time of the offense*—the individual's criminal history, mental and emotional condition, addiction history, and age—in deciding whether and when to set a parole release date.[12]

The Board eliminated the matrix prison term rules for the crime of aggravated murder in 1985 and created a separate parole release procedure under its rules for that crime.[13] After November 1, 1989, when the sentencing guidelines were enacted, the Board removed the crime of aggravated murder entirely from its parole matrix rules.[14] In 2012, the Board reenacted the parole matrix rules and applied them retroactively to the crimes of aggravated murder and murder committed prior to March 2012.[15]

At a prison term hearing, the Board relies on the pre- or post-sentencing report and the sentencing judgment to establish an individual's release date. The individual can offer evidence to support mitigation, but has no right to representation. The prison term hearing process is largely pro forma, given the presumptive prison terms under the matrix rules. Prison term hearings are usually about 15 minutes long; and usually involve three Board members and one Board staff person. Victim family members and the district attorney for the county of conviction are notified prior to the hearing and are given the opportunity to make a statement at the hearing, if they choose to attend.

As applied to individuals convicted of aggravated murder and murder, the prison term hearing under ORS 144.120 and the application of the parole matrix rules are functionally incompatible with the rehabilitation hearing process. Contrary to ORS 144.120, the Board cannot hold the prison term hearing until a rehabilitation finding is made by the Board,[16] which cannot occur for over two to three decades after the individual was originally confined.

In addition to the delay in conducting the hearing, the actual parole matrix rules do not accurately reflect the amount of time an individual convicted of aggravated murder or murder has served by the time the Board sets the release date. The parole matrix rules provide for prison terms between a minimum of eight years to a maximum of true life.[17] It does not make sense to

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[10] *See Hamel v. Johnson,* 330 Or 180, 186-187 (2000) (discussing process).
[11] *Price v. Bd. of Parole*, 301 Or. 393, 395 (1986).
[12] ORS 144.120(4); OAR ch. 255, Exs. A through E.
[13] *See Engweiler v. Board of Parole,* 343 Or 536, 539-540 (2007) (so stating); *Fleming,* 349 Or at 453 (discussing matrix rules).
[14] *Id.*
[15] *See* PAR 1-2012; *see also Fleming,* 349 Or at 453 (discussing matrix rules). The Board applied the matrix rules to individuals convicted of murder committed after April 1, 1985.
[16] *Severy v. Bd. of Parole*, 318 Or 172 (1993)
[17] See OAR 255, Exhibits A & C.

establish prison terms that have already been completed or that prolong confinement after an individual has affirmatively shown they are capable of rehabilitation.

The prison term hearing under ORS 144.120 is also problematic in that it was meant to impose punishment for a felony offense shortly after an individual was sentenced.[18] In applying that statute two decades or more after an individual has served their sentence and shown they are capable of rehabilitation, the Board is carrying out a delayed punishment for the individual's crime. This makes no sense and returns everyone who has participated in the rehabilitation hearing process to the circumstances of the crime and the individual's pre-confinement history.

In addition, the matrix rules being retroactively applied date back to 1985 and therefore assesses factors of the crime contrary to recent science, i.e., a person is assessed more harshly if they committed their crime as a youth than if they committed their crime over the age of thirty.

(3) Exit Interview Hearing

Prior to the scheduled release date of an individual, per ORS 144.125, the Board has the *discretion* to hold an exit interview hearing. At that hearing, the Board may postpone the inmate's release date upon making one of three findings: (1) the inmate has a present severe mental or emotional disorder; (2) the inmate has a record of serious prison misconduct; or (3) the inmate's parole plan is inadequate.[19] Absent one of those findings, the Board must release an inmate on the scheduled release date.[20] If the Board makes one of those findings, it is authorized to postpone the release date to between two to ten years later.

Individuals subject to the exit interview hearing are not entitled to representation. They are allowed to submit a parole plan and documentation supporting their release. Although the Board often requires an individual to undergo a psychological evaluation, that evaluation is not subject to challenge at the hearing. Ordinarily the Board decides whether to defer release at the end of the hearing.

Exit interview hearings are usually about two hours long, and usually involve three Board members and one Board staff person. Victim family members and the district attorney for the county of conviction are notified prior to the hearing and are given the opportunity to make a statement at the hearing, if they choose to attend.

Customarily, when the Board postpones an individual's release date based on a finding that the individual has a mental or emotional disorder, it does not explain in that decision how the individual may address that problem. In other words, the Board's decision, which is grounded in a psychological diagnosis, leaves the individual without any idea about how to address that problem during the course of their extended incarceration. Mental health treatment is not generally available to individuals in ODOC custody. As a result, individuals have languished

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[18] *See* ORS 144.780(2)(a) (ranges of duration of confinement are to achieve "punishment which is commensurate with the seriousness of the prisoner's criminal conduct")
[19] *See Gordon v. Board of Parole,* 343 Or 618, 622-623 (2007) (explaining process).
[20] *Id.* (so stating); ORS 144.245.

in prison for years without any resources or opportunity to rehabilitate the mental or emotional condition that Board has decided warrants prolonged confinement.

All of the matters considered at the exit interview hearing are more fully considered at the rehabilitation hearing. The exit interview hearing occurs months if not years after the rehabilitation finding. And unlike the rehabilitation hearing, individuals are not represented by appointed counsel at the exit interview hearing, where complex issues about an individual's mental and emotional health are addressed publicly by the Board.

Redundancies and Unpredictability

To further highlight the redundant information considered by the Board in the three hearings, below is a chart of each hearing and the information considered by the board. The chart also notes the varying time periods of when the hearings will be held. Under the current system, neither the victims' family members nor the incarcerated individuals in this process can predict when the next hearing will occur or when the individuals will be released from prison.

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From this brief summary of the three hearings in the current parole process, it is plain to see why the vast majority of people involved in this process do not understand it and cannot explain it. It is plain to see why victims' family members and incarcerated individuals subject to this process are confused and do not know what to expect.

This convoluted and unpredictable process is a hardship on victims' family members, who are notified of each phase of this process and have the opportunity to be heard. For the incarcerated person, it can set back their rehabilitation efforts and makes it very difficult to plan for a successful release from prison. The process also creates additional and unnecessary work for the Board of Parole.

This process needs reform. It is not serving the community well.

Hearings in the Current Parole Process		
(1) Rehabilitation Hearing *Held after the incarcerated person's minimum sentence is served, usually 25+ years.* *2 to 8 hours long*	**(2) Prison Term Hearing** *Usually held 4 to 6 months after a rehabilitation finding favorable to the incarcerated person.* *30 minutes to 1 hour*	**(3) Exit Interview** *Held a few months to 10 years after the prison term hearing.* *1 to 3 hours*
The Board assesses an individual's rehabilitation, change, and readiness to join the community. Note: To improve the chances of success for a person who has proven themselves to be rehabilitated and ready to join the community, the release date should be set in short order, not years after that finding is made.	The Board determines the individual's prison term using a parole matrix system from 1985, originally meant to assess someone within six months to a year after their incarceration. The term can be more than the minimum sentence ordered but is often less than the minimum sentence ordered.	The Board determines whether to release the individual.
The Board considers: Whether the prisoner has a mental or emotional disturbance… rendering them a danger to the health and safety of the community Criminal history, including nature and circumstances of previous offenses Release plan Institutional conduct and employment Treatment, education, and other training while in custody Person's maturity, stability, demonstrated responsibility, and development Prior periods of parole or probation Past use of narcotics or other dangerous drugs, or past habitual and excessive use of alcoholic liquor	**The Board considers:** Whether the record includes a psychiatric or psychological diagnosis of severe emotional disturbance such as to constitute a danger to the health or safety of the community Nature of the crime and prior criminal history of felony convictions	**The Board considers:** Whether the prisoner has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community Release plan Institutional conduct

Oregon's parole process is desperately in need of reform.

Today, we're talking about the parole process for people:

- Convicted of Murder or Aggravated Murder; and
- Sentenced to life imprisonment with the opportunity for release after serving a minimum term of 25 or 30 years in prison

Traits of a Well-Serving Parole Process

PREDICTABILE

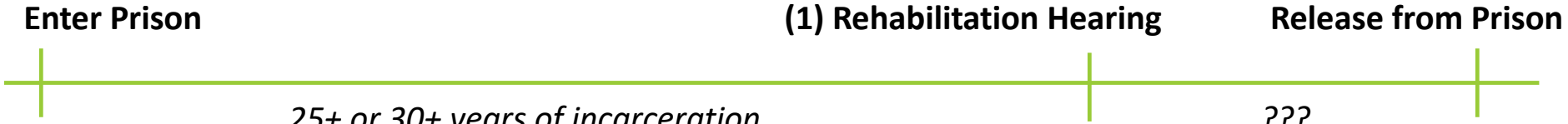
CLEAR EXPECTATIONS

FAIR & TRANSPARENT

FOSTERS HOPE

ENCOURAGES REHABILITATION

Parole Process Timeline



(2) Prison term hearing
(3) Exit Interview hearing
Hearings (2) & (3) consider the same information as in hearing (1).

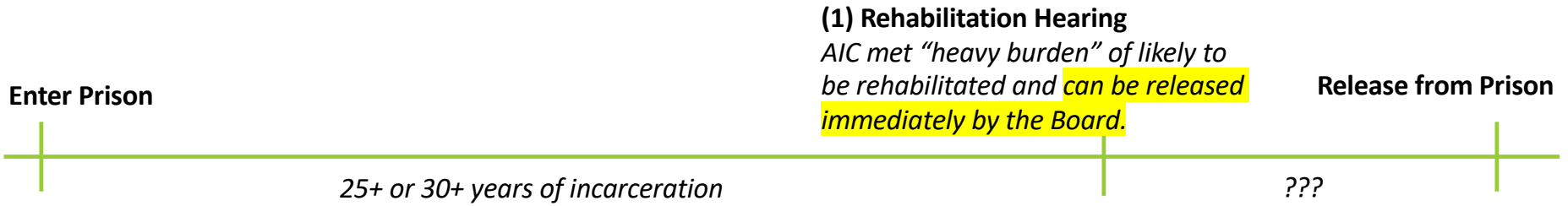
(1) Rehabilitation Hearing

AIC has a "*heavy burden*" to show "likely to be rehabilitated within a reasonable period of time"

Non-exclusive Criteria (OAR 255-032-0020)

1) The inmate's involvement in **correctional treatment, medical care, educational, vocational or other training** in the institution which will substantially enhance his/her capacity to lead a law-abiding life when released;
2) The inmate's **institutional employment history**;
3) The inmate's **institutional disciplinary conduct**;
4) The inmate's **maturity, stability, demonstrated responsibility, and any apparent development** in the inmate personality which may promote or hinder conformity to law;
5) The inmate's **past use of narcotics or other dangerous drugs**, or past habitual and excessive use of alcoholic liquor;
6) The inmate's prior **criminal history**, including the **nature and circumstances of previous offenses**;
7) The inmate's conduct during any **previous period of probation or parole**;
8) The inmate does/does not have a **mental or emotional disturbance, deficiency, condition or disorder** predisposing them to the commission of a crime to a degree **rendering them a danger to the health and safety of the community**;
9) The adequacy of the inmate's **parole plan** including community support from family, friends, treatment providers, and others in the community; type of residence, neighborhood or community in which the inmate plans to live;
10) There is a **reasonable probability that the inmate will remain in the community without violating the law**, and there is substantial likelihood that the inmate will **conform to the conditions of parole**.

(2) Prison Term Hearing/Calculation by the Board



- Completely unexpected! The Board calculates the actual prison term!
- *The prison term calculation makes no sense.*
- The prison term is calculated using a parole matrix system:
  - Created in 1977, last amended in 1985, to determine the sentence for all felony convictions before 1989.
  - No longer used in sentencing, except after being brought back for this parole process.
  - Created for use within the first year of incarceration and only considers factors *at the time of the crime.*
  - Factors and scoring are outdated and unreliable, no longer inline with science.
  - *Results in prison terms that are years less than the time already served or many more years than the minimum prison term ordered by the court.*

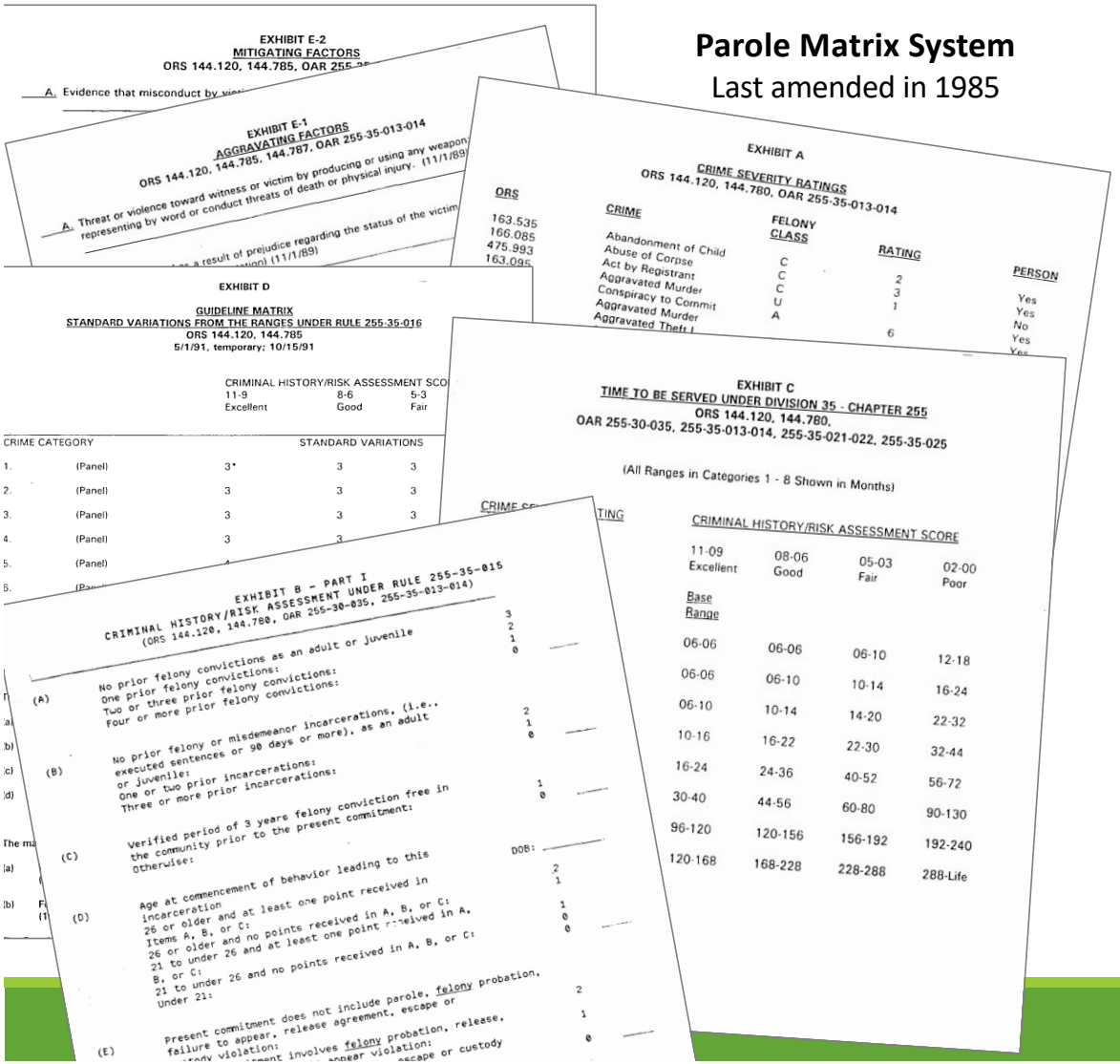


EXHIBIT E-2
MITIGATING FACTORS
ORS 144.120, 144.785, OAR 255-3

A. Evidence that misconduct by vic

EXHIBIT E-1
AGGRAVATING FACTORS
ORS 144.120, 144.785, 144.787, OAR 255-35-013-014

A. Threat or violence toward witness or victim by producing or using any weapon representing by word or conduct threats of death or physical injury. (11/1/89)

as a result of prejudice regarding the status of the victim

EXHIBIT A
CRIME SEVERITY RATINGS
ORS 144.120, 144.780, OAR 255-35-013-014

ORS	CRIME	FELONY CLASS	RATING	PERSON
163.535	Abandonment of Child	C	2	Yes
166.085	Abuse of Corpse	C	3	Yes
475.993	Act by Registrant	U	1	No
163.095	Aggravated Murder	A		Yes
	Conspiracy to Commit Aggravated Murder		6	Yes
	Aggravated Theft I			

EXHIBIT D
GUIDELINE MATRIX
STANDARD VARIATIONS FROM THE RANGES UNDER RULE 255-35-016
ORS 144.120, 144.785
5/1/91, temporary; 10/15/91

CRIMINAL HISTORY/RISK ASSESSMENT SCO
11-9 Excellent | 8-6 Good | 5-3 Fair

CRIME CATEGORY			STANDARD VARIATIONS	
1.	(Panel)	3*	3	3
2.	(Panel)	3	3	3
3.	(Panel)	3	3	3
4.	(Panel)	3	3	
5.	(Panel)			
5.	(Panel)			

EXHIBIT C
TIME TO BE SERVED UNDER DIVISION 35 - CHAPTER 255
ORS 144.120, 144.780,
OAR 255-30-035, 255-35-013-014, 255-35-021-022, 255-35-025

(All Ranges in Categories 1 - 8 Shown in Months)

CRIME SE... TING

	CRIMINAL HISTORY/RISK ASSESSMENT SCORE			
	11-09 Excellent	08-06 Good	05-03 Fair	02-00 Poor
Base Range				
	06-06	06-06	06-10	12-18
	06-06	06-10	10-14	16-24
	06-10	10-14	14-20	22-32
	10-16	16-22	22-30	32-44
	16-24	24-36	40-52	56-72
	30-40	44-56	60-80	90-130
	96-120	120-156	156-192	192-240
	120-168	168-228	228-288	288-Life

EXHIBIT B - PART I
CRIMINAL HISTORY/RISK ASSESSMENT UNDER RULE 255-35-015
(ORS 144.120, 144.780, OAR 255-30-035, 255-35-013-014)

(A) No prior felony convictions as an adult or juvenile — 3
One prior felony convictions: — 2
Two or three prior felony convictions: — 1
Four or more prior felony convictions: — 0

(B) No prior felony or misdemeanor incarcerations, (i.e., executed sentences or 90 days or more), as an adult or juvenile: — 2
One or two prior incarcerations: — 1
Three or more prior incarcerations: — 0

(C) Verified period of 3 years felony conviction free in the community prior to the present commitment: — 1
Otherwise: — 0

DOB:

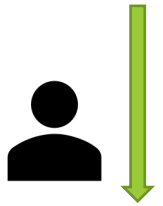
(D) Age at commencement of behavior leading to this incarceration — 2
26 or older and at least one point received in Items A, B, or C: — 1
26 or older and no points received in A, B, or C: — 0
21 to under 26 and at least one point received in A, B, or C: — 1
21 to under 26 and no points received in A, B, or C: — 0
Under 21: — 0

(E) Present commitment does not include parole, felony probation, failure to appear, release agreement, escape or — 2
custody violation: — 1
Present commitment involves felony probation, release, appear violation; escape or custody — 0

Parole Matrix System
Last amended in 1985

Jan. 2001: Incarcerated

EXAMPLE



Murder
Sentenced to life with a 25-yr min. prison term

Jul. 2026: (1) Rehabilitation Hearing

Found likely to be rehabilitated

Nov. 2026: (2) Prison term hearing/calculation:

= 120 months, release date in **Jan. 2011**

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•
•

= 396 months, release date in **Jan. 2033**

Difference in length of prison term is based almost entirely on factors at the time of the crime, 25+ years ago.

(3) Exit Interview Hearing

Enter Prison

(1) Rehabilitation Hearing
AIC met "heavy burden" of likely to be rehabilitated and can be released immediately by the Board.

Release from Prison

25+ or 30+ years of incarceration

???
(few months to many years)

(2) Prison term hearing
(3) Exit Interview hearing
Hearings (2) & (3) consider the same information as in hearing (1).

- At this point, the person is presumed ready to safely return to the community.
- *Discretionary hearing, not required by law.*
- Considers the same factors considered in the rehabilitation hearing:
  1) Whether the person has a severe mental or emotional disorder;*
  2) Whether the person has a record of serious misconduct; and
  3) The person's release plan.

*The board usually orders a psychological evaluation, which is not required by law and can be ordered for the rehabilitation hearing.

ALL information considered in the (2) Prison Term Hearing and the (3) Exit Interview is considered in the (1) Rehabilitation Hearing.

The (2) Prison Term Hearing and the (3) Exit Interview Hearing are held at unpredictable times over a span of months to many years.

Hearings in the Current Parole Process		
(1) Rehabilitation Hearing Usually held after 25+ years of incarceration. 2 to 8 hours long	**(2) Prison Term Hearing** Usually held 4 to 6 months after Board finds person is likely to be rehabilitated. 30 minutes to 1 hour	**(3) Exit Interview** Held a few months to 10 years after the prison term hearing. 1 to 3 hours
The Board assesses an individual's rehabilitation, change, and readiness to join the community.	The Board determines the prison term using a parole matrix system.	The Board determines whether to release the individual.
The Board considers: Whether the prisoner has a mental or emotional disturbance… rendering them a danger to the health and safety of the community Criminal history, including nature and circumstances of previous offenses Release plan Institutional conduct and employment Treatment, education, and other training while in custody Person's maturity, stability, demonstrated responsibility, and development Prior periods of parole or probation Past use of narcotics or other dangerous drugs, or past habitual and excessive use of alcoholic liquor	**The Board considers:** Whether the record includes a psychiatric or psychological diagnosis of severe emotional disturbance such as to constitute a danger to the health or safety of the community Nature of the crime and prior criminal history of felony convictions	**The Board considers:** Whether the prisoner has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community Release plan Institutional conduct

Oregon Justice Resource Center
Advocate. Educate. Engage.

April 21, 2023

Oregon Board of Parole
1321 Tandem Ave NE
Salem, Oregon 97301

RE: Statements to Senate Judiciary Committee on Senate Bill 1027

Chairperson Greta Lowry and Executive Director Dylan Arthur:

We are writing to address the written and oral testimony you provided to the Senate Judiciary Committee on March 23, 2023, during a public hearing on Senate Bill (SB) 1027, which mischaracterized not only the process of the related parole hearings but also the law. As a state agency, you have a responsibility to the public to be accurate in your understanding of your agency's standards and policies and to represent them accurately. This responsibility is of the utmost importance, not only because it affects the agency's credibility and public confidence, but also because all parties involved are intimately affected by the Board's representation of standards and policies. These parties include victims, as well as the adults in custody engaged in the parole hearing process. The importance of transparency to victims goes without saying. Transparency and reliable standards also have a significant impact on the behavior and rehabilitation of adults in custody, and therefore impacts community well-being. For these reasons, it is of great importance that we bring your public misrepresentations to your attention.

In addition to identifying key misleading points in your testimony, we write to inform you and the Oregon Board of Parole that your statements promulgated a new Board rule in violation of the Administrative Procedure Act and to request that you immediately repeal this rule.

SB 1027 proposed amending the three-hearing parole process for the crimes of murder and aggravated murder by reducing the process to one hearing, the murder review hearing (aka rehabilitation hearing), and eliminating the subsequent two hearings which review issues already assessed in the murder review hearing.

Your testimony mischaracterized the parole hearing process and SB 1027, and included statements contrary to law.

Your testimony generally mischaracterized the three-hearing parole process and SB 1027. A few examples include the following. Your testimony placed a heavy emphasis on the hearings following the murder review hearing, while glossing over the intensive and substantive nature of the murder review hearing, which covers an extensive criterion assessing a person's rehabilitation and readiness to join the community, involves appointment of counsel and hours of testimony from the adult in custody and others, and is by far the longest, most resource intensive, and substantive hearing. You also stated that SB 1027 does not allow for a safe transition from

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prison because it would require release within 60 days from a finding of likely rehabilitation following the murder review hearing. This fails to acknowledge that a person must have a release plan for their murder review hearing and ignored the fact that those release plans would be more successful when a release date is known and impending. It also fails to acknowledge the Oregon Department of Corrections and the Board often releases adults in custody in a far shorter time frame than 60 days, and that persons convicted of aggravated murder and murder are currently released around 60 days following a favorable finding at their exit interview. You also mischaracterized the extent of victims' knowledge about the parole hearing process and their expectations when a defendant is sentenced for aggravated murder or murder. Because the vast majority of attorneys and public officials do not understand and cannot explain the parole process, it is very unlikely that victims, at sentencing, have an accurate understanding of the time that a defendant will serve in prison and what to expect of the parole process.

However, even more problematic than your mischaracterizations were your statements that contradict current law and are without legal authority. At least three of your statements, provided below, contain inaccurate readings of the law. The final set of statements identified below is of particular concern and created a new Board rule in violation of the Administrative Procedure Act.

1. **"[A] number of AIC's convicted of murder and aggravated murder . . . would be released into the community prior to a finding by the Board that they do not have a present severe emotional disturbance such as to constitute a danger to the health or safety of the community."**[1]

This statement is untrue. Any person who has successfully demonstrated that they are likely to be rehabilitated under the murder review hearing process in ORS 163.105 and ORS 163.115, does so after the board has considered the criterion of whether:

> "The inmate does/does not have a mental or emotional disturbance, deficiency, condition or disorder predisposing them to the commission of a crime to a degree rendering them a danger to the health and safety of the community[.]"

OAR 255-032-0020(8).

2. **"SB 1027, by eliminating the Exit Interview under ORS 144.125, also eliminates the Board's clear authority to *order* a psychological evaluation for the use in parole decisions, as well as the requirement that an AIC undergo a psychological evaluation prior to release. . . . the Board would have no recourse but to proceed and potentially release an AIC" who has refused to participate in a psychological evaluation.**[2]

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[1] Written Testimony of Greta Lowry at 2, Senate Judiciary Committee, SB 1027, Mar 23, 2023, (submitted by Dylan Arthur on behalf of the Board of Parole) (emphasis in original), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Testimony/SB1027. *Id*. at 2.
[2] *Id*. at 1.

This statement is also untrue. First, ORS 144.223 authorizes the board to "require any prisoner being considered for parole to be examined by a psychiatrist or psychologist before being released on parole." ORS 144.223 is made applicable to persons convicted of murder and aggravated murder "regardless of the date of the crime." Or Laws 1999, ch 782, § 2.

Murder review hearings under ORS 163.105, which are mirrored in ORS 163.115 and ORS 163.107, have been interpreted as being "parole consideration hearings" under rules implementing ORS 163.105. *Engweiler v. Board of Parole and Post-Prison Supervision*, 340 Or 361, 372, 133 P3d 910 (2006).

Because ORS 144.223 authorizes the board to "require any prisoner being considered for parole to be examined by a psychiatrist or psychologist being released on parole" and the murder review hearings under ORS 163.105, ORS 163.115, and ORS 163.107 are "parole consideration hearing[s]," the board clearly has the power to order a mental health evaluation prior to the murder review hearing.

Second, the Court of Appeals has held pursuant to ORS 144.223 that the board may require any prisoner being considered for parole to be examined by psychiatrist or psychologist and that "if the prisoner refuses to participate in such an examination, the board is not obligated to release him or her." *Gholston v. Palmateer*, 183 Or App 7, 10, 51 P3d 617 (2002); *Turner v. Thompson*, 157 Or App 182, 968 P2d 858 (1998), *rev'd on other grounds*, 330 Or 361 (2000).

3. "[A]ctual rehabilitation would no longer be a requirement for release[.]"[3]

This statement is also untrue and particularly concerning as it strongly suggests that the Board is making decisions beyond its legal authority and has promulgated a rule in violation of the Administrative Procedure Act.

Neither the remaining two hearings under ORS 144.120 and ORS 144.125, nor any other provision under ORS chapter 144, require a prisoner to show or require the board to find that a prisoner is rehabilitated before being released. There has never been such a requirement under OAR chapter 255 of the board's administrative rules. This has never been a standard under Oregon's indeterminate matrix system or, for that matter, Measure 11, and Oregon felony sentencing guidelines.

Your testimony emphasized this inaccurate and concerning point at least three times. Specifically, you submitted written testimony, representing your oral testimony, stating:

> "SB 1027 removes the safeguard of *actual* rehabilitation, requiring only that an adult in custody be found likely to be rehabilitated within a reasonable period of time prior to release into the community."[4]

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[3] *Id*. at 1.

[4] Oral Testimony of Greta Lowry at 2, Senate Judiciary Committee, SB 1027, Mar 23, 2023 (written version submitted by Dylan Arthur on behalf of Chair Greta Lowry) (emphasis in original), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Testimony/SB1027.

Prior to the public hearing, you offered written testimony that stated, in part:

> "**I. Requires the Board to release *before* rehabilitation *actually* occurs.**
>
> "SB 1027 only requires that an Adult in Custody (AIC) demonstrate that they are likely to be rehabilitated within a reasonable period of time prior to being released to the community; it does not require an AIC to demonstrate *actual,* meaningful rehabilitation consistent with public safety. The ultimate outcome of this approach is that AICs who are not yet safe to be in the community will be released, within 60 days of their hearing, if the Board finds them to be rehabilitated within a reasonable period of time. As actual rehabilitation would no longer be a requirement for release, the necessary balance of risk and rehabilitation, and the exploration of the dynamic factors implicit in both, would fail to be addressed."[5]

Then, at the March 23, 2023, public hearing you testified that:

> "Clearly, the intent of SB 1027 is to reduce the three hearings process down to a single hearing. In its current form, however, a number of safeguards provided by the current process are lost. SB 1027 removes the safeguard of actual rehabilitation, requiring only that an adult-in-custody be found likely to be rehabilitated within a reasonable period of time prior to release to the community."[6]

Thus, on three separate occasions you represented to the members of the Senate Judiciary Committee and the public that the law governing the board's release process for persons convicted of murder and aggravated murder "require[s] an AIC to demonstrate *actual,* meaningful rehabilitation." It was your position that the effect of SB 1027 would be to "remove" that "requirement for release."

We have examined all relevant statutory provisions in SB 1027, ORS chapter 144, as well as existing and historical rules under OAR chapter 255. None of those statutes or regulations require a person to demonstrate "actual rehabilitation" as a requirement for release after a murder review hearing.

Given that these statements regarding "actual rehabilitation" suggest that the Board is acting outside of its authority, we request that you provide legal authority in support of these statements to the legislature.

Your statements about "actual rehabilitation" promulgated a rule in violation of the Administrative Procedures Act and must be repealed.

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[5] Written Testimony of Greta Lowry at 1. (emphasis in original).

[6] *See* Oral Testimony of Greta Lowry at 1:20:30, Senate Judiciary Committee, SB 1027, Mar 23, 2023, https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023031305.

We believe that your statements to the Senate Judiciary Committee indicating that a person needs to demonstrate "actual rehabilitation" after the murder review hearing promulgated a new Board rule. Agency statements, "whatever its precise form and whatever informality attending its promulgation,"[7] constitute a rule under the Administrative Procedures Act (APA). Under the APA, a "rule" is broadly defined as "any agency * * * statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency."[8] As board chairperson, your public statements to the Senate Judiciary Committee about how the law is being applied to persons convicted of murder and aggravated murder satisfy the definition of a rule under the APA.

Administrative rules are not to be secretly adopted and applied to citizens in Oregon. Almost 50 years ago, the court explained that:

> "Compliance with the Administrative Procedures Act is much more than an act of technical legal ritual. Unwritten standards and policies are no better than no standards and policies at all. Without written, published standards, the entire system of administrative law loses its keystone. The ramifications affect every party and every procedure involved in the fulfillment of the agency's responsibility under the law, e.g., the public, the applicant, agency personnel, the participants in the hearing, the commission, the legislature and the judiciary.
>
> "The policies of an agency in a democratic society must be subject to public scrutiny. Published standards are essential to inform the public. Further, they help assure public confidence that the agency acts by rules and not from whim or corrupt motivation. In addition, interested parties and the general public are entitled to be heard in the process of rule adoption under the Administrative Procedures Act."

Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 16 Or App 63, 70–71, 517 P2d 289 (1973).

Given those principles, and the fact that there is no identifiable legal authority to support your statements, we request that you immediately repeal the unwritten rule that requires persons convicted of murder and aggravated murder to demonstrate "actual rehabilitation" after the murder review hearing before being released from prison.[9] That rule remains effective until properly repealed under the APA or declared invalid by the court.[10] Should the board decide not

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[7] *Burke v. Children's Services Division*, 288 Or 533, 537-538, 607 P2d 141 (1980).
[8] ORS 183.310(9); *see also Smith v. Board of Parole and Post-Prison Supervision*, 250 Or App 345, 351, 284 P3d 1150 (2012) ("the board was required to follow the rulemaking procedures of the APA in adopting [rule]"); OAR 255-001-0010(1) (so stating).
[9] *See Burke,* 288 Or at 537 ("An agency's failure to employ proper procedures when adopting a rule does not eliminate the need to employ proper procedures when repealing it.")
[10] *Id*. at 538 (so stating).

to repeal the rule, we would request you stay enforcement of the rule until resolution of a rule challenge under ORS 183.400, which we intend to initiate within the next 14 days.[11]

Finally, due to the importance of reliable and accurate statements from the Board about its standards and policies, we request that the Board issue a statement to the Senate Judiciary Committee correcting the other misrepresentations in your testimony including but not limited to those we have identified in this letter.

Your attention to this matter is appreciated.

Sincerely,

Zach Winston
Director of Policy and Outreach

Brian Decker
Transparency and Accountability Director

Julia Yoshimoto
Senior Advisor and Women's Justice Project Director

Cc: Constantin Severe, Public Safety Advisor, Office of the Governor
Senator Floyd Prozanski, Chair of the Senate Committee on Judiciary
Senator Kim Thatcher, Vice-Chair of the Senate Committee on Judiciary
Senator Sara Gelser Blouin, Senate Committee on Judiciary
Senator James Manning Jr., Senate Committee on Judiciary
Senator Dennis Linthicum, Senate Committee on Judiciary

[11] We intend to seek costs and attorney fees if required to bring a challenge under ORS 183.400.

January 12, 2024

To: Senate and House Committees On Judiciary
From: Whitney Stark

Re: **Parole Reform for 2025**

Good afternoon, Chairs Prozanski and Kropf; Vice Chairs Thatcher, Andersen, and Wallan; and members of the Senate and House Committees on Judiciary.

Thank you for providing the opportunity to provide testimony on parole reform today. My name is Whitney Stark, I am an attorney in my professional life, but I am here in my personal capacity as a representative of the family of a crime victim who has testified in front of the parole board.

When I was 10 years old, in 1986, my Uncle, who is white, was shot in the back and paralyzed. It was a violent and unprovoked act, a robbery gone wrong, that re-defined not only my uncle's whole life, but our whole family.

The person who engaged in that crime was a 17-year-old black child, who I will call Mr. Smith. He was given the enhanced sentence of a dangerous offender even though the psychologist who examined him confirmed he didn't meet the criteria was based on assumptions and stereotypes based on his race. He was sentenced to 90 years in prison.

My Uncle long ago forgave Mr. Smith. He didn't forgive him in return for anything, and he didn't expect anything in exchange – that is just who he was. He likely recognized the really horrific circumstances of that person's life that led him to do what he did, and how that impacted him. He also probably recognized the underlying racism inherent in the sentencing. I eventually saw all this too, although it took me a lot longer.

Mr. Smith is still in prison. Over 35 years in prison. The fact that he is still in prison is a tragedy that I consider equal to the tragedy he imposed on my Uncle.

Last year, when Mr. Smith had a parole hearing, I read every single thing in his file, read everything I could about him or his situation, and I listened to his parole hearing. I testified at it as well.

I found the parole board hearing and process disheartening, confusing, disappointing, and, frankly, infuriating. Here is why:

First, as a family member of the victim, my voice went unheard or it was only given lip service. I understand it is probably unusual that a family member wants the perpetrator out of prison, but that is part of the problem here. I have no doubt that had I agreed with the parole board they would have used my name as a basis to keep him in prison. Yet, because our family supported his release our position was not even mentioned in the decision.

Second, the Board used my Uncle as a weapon against Mr. Smith. They spoke for my Uncle, even though that is what I was there to do, and it was not their role even if I had not been present. The Board claimed my uncle had granted him "extraordinary grace" and then demanded that Mr. Smith explain why

he had not shown the same compassion himself to prison guards because of conflicts or discipline in his record. Here is an example of a question:

> Q: "It felt like you have been shown this grace and this mercy and been granted forgiveness that, when I was reading through your history and your [discipline records] it felt to me like you are – and from your testimony -- that you are just now learning how to do that for others in custody. So, for example, you're just now learning how to have empathy for prison staff or corrections counselors."

In response, Mr. Smith took responsibility, and he was honest and authentic when he discussed and explained his record, including his interactions with other inmates and corrections officer. But it was clear the Board did not want to hear him so it ignored the facts that were inconvenient to what appeared to be its preordained conclusion.

Third, the questions the Board asked were nonsensical. They grilled him for hours, even where he had answered an impossible or duplicative question. In doing so, they made it abundantly clear that, at best, they were not listening or, more likely, were simply waiting to hear what they wanted to hear. For example, the Board questioned why he had not had a job when he was in segregation unit – even though you cannot. They accused him of not actively seeking therapy – even though they should know that those services are not even available to him.

Here is another example showing the fundamental lack of understanding of the role gangs play in prison:

> Q: Okay. So, do you have any association -- any gang associations in any way, shape, or form today?
> A: No.
> Q: Okay. So, anybody that is currently getting involved you don't talk to at all?
> A: No. That's not it at all. I live in a prison full of gang members, right? I mean, I […]-- speak to people every day. I just don't associate with the gang life or anything that they're doing. I'm not a part of it. I'm a neutral figure in all of it.
> Q: Okay. So, you're -- you continue to associate with people that are gang-involved, but you're indicating that your association is not gang related?
> A: I mean, it's no different than saying that anybody else who is in prison associates with gang members, and that makes them a gang member. I don't -- I mean, do I associate with those people? Do I -- do I 1have conversation with known gang members? Absolutely. Is that something that I participate in? No. And most of that -- most of that contact is simply due to me being incarcerated and living in a cage. They can put a gang member in my cell tomorrow.

Still, the Board accused him of having conflicting testimony on this issue, even though his position was clear as day to me. They asked at least 15-20 more questions about gang activity, which relied on their misunderstanding of the record. For example, he had a discipline in a file from an incident that they believed was gang related because it mentioned "security threat group" yet he was able to explain that the incident was from a riot in the chow hall that was not even gang related (though gang members were physically present). Because of the presence of gang members in the chow hall, the incident met the criteria for the security threat group, but they could not seem to understand the distinction between the presence of gang member's and Mr. Smith's actual affiliation with a gang.

Here is another example of a nonsensical question:

Q: “But what I want to understand is, in your mind, how did you rationalize killing someone? You didn't kill anyone,…”
The questioner even goes on to use Mr. Smith’s own childhood trauma against him to ask the same thing a second time:
Q: I mean, you had you had a mother who was murdered.
A. Yes.
B. Q: You had a brother who died of a [Congenital heart failure]. So, you had experienced death multiple times. Did those -- not at the exact moment of the crime, but had those thoughts of how can someone take someone's life -- I mean, after your mother died, I'm sure -- I mean, the record shows that it traumatized you quite a bit. But, yet, alone, you were able to do the same thing to someone else. Not -- it didn't result in that, but potentially the same.

Not only are these questions nearly impossible to answer, but they also entirely ignore the fact that he was five when his mother was murdered in front of him and still a juvenile when he committed the crime.

Finally, the Board members obviously lacked the necessary knowledge and expertise required for parole decisions. There are too many examples of this to include them all here. But, in summary the Board did not understand what programming was realistically available to him, the availability (or lack thereof) of mental health support, the weight or importance of disciplinary reports, or even a basic understanding of prison culture.

As a representative of the crime victim in Mr. Smith’s case I chose to exercise my right to have my Uncle and his family’s voice heard. Instead of feeling heard, however, I felt overwhelmingly let down by the process. The hearing was truly Kafka-esque, with impossible to answer questions and a result that denied reality. The Board members were biased, lacked relevant subject matter expertise, and did not engage in an honest attempt to ascertain whether Mr. Smith should be paroled.

January 12, 2024

To: Senate and House Committees On Judiciary
From: Irene Sexton

Re: **Parole Reform for 2025**

Good afternoon, Chairs Prozanski and Kropf; Vice Chairs Thatcher, Andersen, and Wallan; and members of the Senate and House Committees on Judiciary.

I stand before you today not only as a proud conservative, as a victim who has endured the profound tragedy of losing my sister and brother-in-law to a heinous crime committed by my nephew, Matthew, and as someone who has navigated the complexities of the parole process. My purpose here is to shed light on the need for reform in the practices of the parole board, based on my recent experience.

This last summer, in a pursuit of forgiveness and belief in the possibility of rehabilitation, I advocated for Matthew's release. Regrettably, the support I sought from the parole board, as a victim seeking closure and healing, was conspicuously absent. At first contact I had the impression that the parole board was going to help guide me through and support me through the hearing and whatever the final decision would be. However, after I expressed that I was going to be supportive of Matthew's release, I felt that their attitude towards me shifted, and they were very dismissive towards me. This, in itself, emphasizes the imperative for change.

Equally perplexing was the board's decision to permit another nephew, Brian, who had been adjudicated for the same crime, to also speak as a victim and to speak against Matthew's release. Despite my objections, the board both supported Brian as a victim and allowed him a voice, which was given the same weight as the innocent victim family members of my nephews' crimes. This disparity underscores the need for a more equitable and victim-centric approach in parole hearings.

Furthermore, the focus of the hearing seemed to deviate from its intended purpose. Although the intent of the hearing was to address Matthew's maturity and potential for rehabilitation, the process leading up to and proceeding itself forced victims to relive the traumatic events of the past. As a victim, I know all too well what my nephew did and the tremendous loss to our family.

It is disheartening that the focus of the hearing shifted towards reliving this trauma rather than addressing the core issues at hand—Matthew's maturity and potential for rehabilitation. The relevance of forcing victims to rehash the painful details of the crime diminishes the purpose of these proceedings, which should center on the individual's growth and readiness for reintegration into society. In the end, my intent was to contribute to Matthew's chances of becoming a better person and making amends for the grave mistakes of his youth.

I urge you to consider these experiences as indicative of systemic issues within the parole board's practices. There is a pressing need for reform to ensure a fair, balanced, and victim-inclusive parole process. Let our collective efforts be directed toward fostering a system that prioritizes the rehabilitation of individuals and acknowledges the rights and perspectives of victims.

Thank you for your attention and commitment to justice and reform.

Sincerely,
Irene Sexton