

To: Senate Committee on Judiciary
From: Oregon Justice Resource Center
Date: March 23, 2023



Re: In support of SB 1027 – Summary of Oregon’s current 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 themselves 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

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

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

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.

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

<p>(1) Rehabilitation Hearing <i>Held after the incarcerated person's minimum sentence is served, usually 25+ years.</i></p> <p><i>2 to 8 hours long</i></p>	<p>(2) Prison Term Hearing <i>Usually held 4 to 6 months after a rehabilitation finding favorable to the incarcerated person.</i></p> <p><i>30 minutes to 1 hour</i></p>	<p>(3) Exit Interview <i>Held a few months to 10 years after the prison term hearing.</i></p> <p><i>1 to 3 hours</i></p>
<p>The Board assesses an individual's rehabilitation, change, and readiness to join the community.</p> <p>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.</p>	<p>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.</p>	<p>The Board determines whether to release the individual.</p>
<p>The Board considers:</p> <p>Whether the prisoner has a mental or emotional disturbance... rendering them a danger to the health and safety of the community</p> <p>Criminal history, including nature and circumstances of previous offenses</p> <p>Release plan</p> <p>Institutional conduct and employment</p> <p>Treatment, education, and other training while in custody</p> <p>Person's maturity, stability, demonstrated responsibility, and development</p> <p>Prior periods of parole or probation</p> <p>Past use of narcotics or other dangerous drugs, or past habitual and excessive use of alcoholic liquor</p>	<p>The Board considers:</p> <p>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</p> <p>Nature of the crime and prior criminal history of felony convictions</p>	<p>The Board considers:</p> <p>Whether the prisoner has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community</p> <p>Release plan</p> <p>Institutional conduct</p>