

880 D

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Written Testimony Supporting S.B. 880, An Act Increasing Fairness and Transparency in the Criminal Justice System

March 25, 2019

I. Introduction

Chairs Winfield and Stafstrom, and distinguished members of the Judiciary Committee. My name is Bina Peltz, and I am a law student with the Samuel Jacobs Criminal Justice Clinic (“CJC”) of the Jerome N. Frank Legal Services Organization at Yale Law School. CJC submits this testimony to support SB 880, and specifically Section Three, which proposes a parole revocation representation pilot program through the Chief Public Defender and parole revocation data collection and reporting requirements.

In 2015, CJC agreed to study the parole revocation system in response to former Governor Malloy’s Second Chance Society Initiatives. In 2017, CJC completed a two-year study of the parole revocation system, culminating in the report *Parole Revocation in Connecticut: Opportunities to Reduce Incarceration*.¹ The CJC study led to important reforms in the parole revocation system, including new attorney appointment standards and a new policy to hold preliminary hearings (an opportunity to contest probable cause and the need for detention) in all cases involving technical (non-criminal) violations.² At the request of the Board of Pardons and Paroles (“BOPP”), CJC made recommendations to further improve the revocation process. Among others, CJC recommended default appointment of counsel for indigent parolees and collection and publication of parole revocation data.³ SB 880 is a meaningful response to these recommendations – the representation pilot will address the need for counsel, and the data reporting requirement will increase the transparency of the parole revocation process.

After the study, CJC represented individuals in parole revocation cases in the spring and fall of 2018 as an experimental project for the state to identify logistical barriers to access to counsel. CJC’s experience representing clients and conducting research makes clear that counsel is essential to ensure fair outcomes. Also, robust data collection is necessary to evaluate how parole revocation contributes to cycles of incarceration.

II. SB 880’s parole revocation representation pilot will help address high revocation rates.

a. Connecticut’s parole revocation system presents an opportunity to reduce incarceration.

During a period of reforms aimed at reducing incarceration in Connecticut, the incarceration rate from parole revocations stood out as “the only up arrow in a line of favorable down arrows.”⁴ Connecticut far

¹ See ASLI BASHIR ET AL., SAMUEL JACOBS CRIMINAL JUSTICE CLINIC, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, *PAROLE REVOCATION IN CONNECTICUT: OPPORTUNITIES TO REDUCE INCARCERATION* (Sept 2017) [hereinafter *PAROLE REVOCATION REPORT*], https://law.yale.edu/system/files/area/clinic/document/cjc_parole_revocation_report.final.9.21.17.pdf

² See BOPP, POLICY NO. II. 09, *APPOINTMENT OF COUNSEL IN REVOCATION AND RESCISSION PROCEEDINGS* (Sept. 4, 2018) (establishing an internal policy to bring BOPP attorney-appointment procedures in parole revocation cases in line with the federal constitutional standard); *PAROLE REVOCATION REPORT*, *supra* note 1, at 2.

³ *PAROLE REVOCATION REPORT*, *supra* note 1, at 12, 8.

⁴ See Josh Kovner, *Malloy Seeks to Stem Tide of Parolees Returning to Prison on Rule Violations*, *HARTFORD COURANT* (Apr. 3, 2016), <http://www.courant.com/news/connecticut/hc-parole-violators-prison-hc0319-20160401-story.html>.

exceeded national averages in the re-incarceration of parolees according to data from 2013, the most recent data on nationwide parole revocation rates.⁵ Forty percent of Connecticut parolees, as compared to 25 percent of parolees nationwide, exited parole by returning to prison.⁶ An October 2015 analysis by the Office of Policy and Management found that nearly 50 percent of people on special parole had been revoked within 12 months of release.⁷

Consistent with these findings, the CJC study showed that BOPP revoked parole and imposed a prison term in 100 percent of the 49 revocation hearings CJC observed in November 2015.⁸ Although BOPP has taken important steps to reform its revocation practices since then, the revocation rate is still high. For example, according to data BOPP provided CJC, the Board currently estimates that 83 percent of all cases it processed between February and December of 2018 resulted in revocation.⁹ Additionally and importantly, most parole revocation cases do not result from new criminal charges, but rather from technical violations. For example, there were more than twice as many technical violations as criminal violation remands in January 2019.¹⁰

High revocation rates are counterproductive to BOPP's stated mission of encouraging reintegration into the community.¹¹ Parolees spend months incarcerated awaiting revocation proceedings and are subject to additional incarceration if parole is revoked, setting back gains achieved during the challenging reentry process. In 2016, CJC conducted follow-up interviews with parolees whose hearings it observed. Seventy-nine percent of these parolees lost a job as a result of re-incarceration and 47 percent lost housing.¹² Additionally, revocation takes parolees out of the workforce and limits their ability to support and care for their families.

b. CJC identified lack of counsel at revocation hearings as contributing to revocation rates.

CJC identified access to counsel as a key problem underlying Connecticut's high rate of reincarceration stemming from parole revocations.¹³ In November 2015, CJC observed that 100 percent of indigent parolees appeared without counsel.¹⁴ More recently, according to estimates BOPP provided to CJC, from February to December of 2018, 95.6 percent of parolees appeared without counsel. Without counsel, parolees face many disadvantages – they are often unaware of their rights during the revocation process,

⁵ MARIEL E. ALPER, ROBINA INST. OF CRIM. LAW & CRIM. JUSTICE, BY THE NUMBERS: PAROLE RELEASE AND REVOCATION ACROSS 50 STATES, THE ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE, 28 (Apr. 26, 2016), <https://robinainstitute.umn.edu/publications/numbers-parole-release-and-revocation-across-50-states>.

⁶ *Id.*

⁷ Crim. Justice Policy & Planning Div., OPM, *Special Parole Update* (October 2015), https://www.ct.gov/opm/lib/opm/cjppd/cjipac/20151030_cipac_specialparole_presentation.pdf

⁸ See PAROLE REVOCATION REPORT, *supra* note 1, at 5.

⁹ Additionally, CJC has reviewed a sample of cases held in November 2018. Out of the 38 preliminary hearings and 36 final hearings we have reviewed from November 2018, only five preliminary hearings resulted in release, and one final hearing resulted in a recommendation to reinstate parole.

¹⁰ CRIMINAL JUSTICE POLICY & PLANNING DIVISION, OPM, MONTHLY INDICATORS REPORT, 4 (February 2019), <https://portal.ct.gov/-/media/OPM/CJPPD/CjResearch/MonthlyIndicators/2019-Monthly-Indicators-Reports/MonthlyIndicatorsReport-FEB-2019-FINAL.pdf?la=en> (showing 42 criminal violations out of 128 total remands).

¹¹ BOPP, <http://www.ct.gov/bopp/site/default.asp> (last visited on March 22, 2019) (“The mission of the Board of Pardons and Paroles is to facilitate the successful reintegration of suitable offenders into the community.”).

¹² PAROLE REVOCATION REPORT, *supra* note 1, at 6.

¹³ *Id.*, at 1, 8-12.

¹⁴ *Id.*, at 8. CJC also continues to observe parolees appearing at proceedings without counsel. We are currently reviewing all preliminary and final hearings held in November 2018. Of the 74 preliminary and final hearings we have reviewed to date, only six parolees appeared with counsel, including one parolee represented by CJC.

and they lack meaningful opportunities to develop evidence in support of their claims.¹⁵ Providing counsel would allow eligible parolees to contest alleged violations of parole conditions or present evidence demonstrating why a violation does not warrant revocation. SB 880's parole representation pilot will significantly increase the number of indigent parolees receiving appointed counsel, which will protect parolees' rights in revocation proceedings and produce a more accurate and fair process for adjudicating revocations.

c. Counsel will protect the legal rights of parolees.

The proposed representation pilot will safeguard important legal rights. In revocation proceedings, the U.S. Supreme Court has established a presumptive right to counsel for indigent parolees in cases involving substantial reasons mitigating the parole violation, cases with a colorable claim of innocence, and cases involving parolees incapable of speaking effectively for themselves.¹⁶ In such cases, "fundamental fairness—the touchstone of due process" obligates the state to provide counsel.¹⁷ Further, the U.S. Constitution requires that parole revocation hearings satisfy due process, and namely, that the hearings be "structured to assure that a finding of a parole violation will be based on verified facts . . . [and] accurate knowledge of the parolee's behavior."¹⁸

In the cases CJC has observed, parolees are often unaware of their rights at revocation hearings. For example, parolees thought they would benefit from admitting to violations even when they believed they were innocent.¹⁹ Parolees frequently admitted to violations and then later provided evidence rebutting the allegations; they did not appear to understand that an admission may be sufficient to support the finding of a violation.²⁰ Providing counsel would help ensure that parolees understand their rights during revocation proceedings.

d. Counsel will help improve accuracy in revocation proceedings.

Parole hearings with counsel are more likely to produce more accurate results than those with unrepresented, detained parolees who lack the means to develop evidence in support of their claims. The revocation proceedings that CJC has observed illustrate the investigatory challenges that parolees face in the absence of appointed counsel. For example, 85 percent of the parolees whom CJC interviewed in 2016 did not contact witnesses in advance of their revocation hearings, and 91 percent of these parolees did not collect exculpatory evidence.²¹ CJC's observations of revocation proceedings in 2018 make clear that unrepresented parolees continue to face significant obstacles in developing the evidentiary record.²²

Even when a parolee is able to secure exculpatory evidence, logistical difficulties can make it difficult to present that evidence to BOPP. For instance, in a preliminary hearing that CJC observed in March 2018, a parolee was able to secure records supporting his innocence. His mother had collected hospital records and an accident report on his behalf and delivered that evidence to the parolee during prison visiting hours. However, the parolee was unable to submit those documents to BOPP in time for his hearing. As he

¹⁵ *Id.*, at 12-13, 6.

¹⁶ *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

¹⁷ *Id.* at 790.

¹⁸ *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

¹⁹ PAROLE REVOCATION REPORT, *supra* note 1, at 11.

²⁰ *Id.*

²¹ *Id.* at 13.

²² On March 6, 2018, not a single parolee called a witness in the six preliminary hearings and four final revocation hearings that CJC observed. In September and October 2018, CJC observed seventeen preliminary and final revocation hearings. Although three parolees tried to call witnesses, the hearing examiner denied their requests in each case.

explained, correctional facilities do not process mail quickly and he did not have access to a fax machine. The hearing examiner offered to continue the hearing, but the parolee chose to proceed. He wanted to secure his release as soon as he could. Despite the parolee's efforts, the hearing examiner had no adequate way to review the records. To prove his innocence, he held the records up to the video camera, summarized the contents of the reports, and read portions aloud. As the obstacles in this case demonstrate, the assistance of counsel would both produce more effective investigation of violation allegations and reduce barriers to the admission and review of evidence, increasing the likelihood that hearing examiners will have a full evidentiary record when deciding whether to revoke parole.

e. Through representation of clients, CJC has found that counsel can help achieve reinstatement.

In the course of CJC's representation of parolees in revocation proceedings, the clinic has secured reinstatement of parole in a number of instances by presenting mitigating evidence and raising legal arguments.²³ For example, one parolee presented evidence demonstrating that his alleged violations were occasioned by the birth of his son. He visited the hospital on that day, setting off a series of events that resulted in his parole officer remanding him to custody. BOPP recognized the mitigating circumstances and reinstated his parole. In another case, CJC conducted in-depth factual investigation and presented a legal argument that the client's incarceration violated constitutional guarantees against wealth-based detention. BOPP reinstated the client's parole. As these examples illustrate, parolees with counsel are better equipped to demonstrate that allegations do not warrant revocation.

In sum, SB 880's representation pilot would help ameliorate a fundamental deficiency in Connecticut's parole revocation system – lack of counsel – which must be addressed in order to provide a fair process and to prevent unwarranted revocations.

III. SB 880's revocation data collection and reporting requirement will increase transparency of the parole revocation process and facilitate informed decisionmaking.

a. Best practices recommend data transparency in community corrections.

Establishing data reporting requirements will bring Connecticut in line with best practices in other states. Criminal justice experts recommend that paroling authorities collect, publicize, and analyze parole revocation data to improve outcomes.²⁴ In this vein, CJC's *Parole Revocation in Connecticut* recommended that BOPP collect and report parole revocation data to increase the transparency of the parole revocation process.²⁵ However, Connecticut was one of only eight states that did not participate in a 2017 national study on technical parole violations and incarceration rates because "either [it] did not

²³ *Id.* at 14.

²⁴ *See, e.g.*, CATHERINE C. McVEY ET AL., ROBINA INST. OF CRIM. LAW & CRIM. JUST., MODERNIZING PAROLE STATUTES: GUIDANCE FROM EVIDENCE-BASED PRACTICE, 17 (2018), <https://robinainstitute.umn.edu/publications/modernizing-parole-statutes-guidance-evidence-based-practice>; *see also* THE PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES, 2 (2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf; THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, 50-STATE DATA ON PUBLIC SAFETY CONNECTICUT WORKBOOK: ANALYSES TO INFORM PUBLIC SAFETY STRATEGIES, 62 (2018), https://50statespublicsafety.us/app/uploads/2018/06/CT_FINAL.pdf.

²⁵ PAROLE REVOCATION REPORT, *supra* note 1, at 8.

keep current state-level data or it would be too costly to generate.”²⁶ SB 880 would remedy this problem by comprehensively tracking the number of remands and outcomes of parole proceedings.

b. Revocation data will help assess the cost of parole revocation.

The parole revocation system exacts significant costs. Historically, Connecticut has had so many people in prison for parole violations that the revoked population could fill a prison by themselves, at enormous financial cost to the state.²⁷

In *Parole Revocation in Connecticut*, CJC reported that all observed parolees were incarcerated for at least three months before their final revocation hearings took place.²⁸ At the time of the CJC report, parolees awaiting final revocation hearings cost the state approximately \$11,500 for each parolee charged with a technical violation and approximately \$14,500 for each parolee charged with a criminal violation.²⁹ BOPP has worked to tighten hearing timelines in the wake of the CJC study, but parolees are still routinely incarcerated for months as they wait for their revocation hearings. Shortening the time between hearings, and permitting release of some parolees awaiting final revocation hearings would save the state significant funds. The state lacks the data to assess whether funds currently spent on detaining parolees with pending hearings could be put to more productive use to prevent unnecessary incarceration, increase public safety, and to fulfill BOPP’s stated mission of facilitating the reintegration of parolees into the community.³³

c. Revocation data is needed to evaluate reforms to Connecticut’s parole revocation system.

Data collection is critical for evaluating reforms to Connecticut’s parole revocation process. The CJC study was motivated by concerns about high revocation rates and the costs of the revocation process. In response to CJC’s research, the state has made significant strides, such as passing legislation authorizing BOPP to discharge special parole terms,³⁰ implementing policies to make BOPP’s appointment of counsel procedures compliant with constitutional standards,³¹ and holding preliminary hearings for all parolees accused of technical violations.³² However, due to the lack of parole revocation data, adequate assessment of the efficacy of the revocation system is impossible. Robust data collection is essential to analyzing the system and determining the need for future reforms. To this end, SB 880 will allow BOPP to meet its own objective of employing “evidence-based practices in [its] decision making.”³³

IV. Conclusion

SB 880’s parole reforms will improve the parole revocation system by providing parolees with a fairer process and by creating more transparency in outcomes. CJC urges the Committee to continue to advance parole reform in Connecticut by enacting SB 880.

²⁶ Eli Hager, *At Least 61,000 Nationwide Are in Prison for Minor Parole Violations*, The Marshall Project (Apr. 23, 2017), <https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations>.

²⁷ See Kovner, *Malloy Seeks to Stem Tide of Parolees Returning to Prison on Rule Violations*, *supra* note 4.

²⁸ PAROLE REVOCATION REPORT, *supra* note 1, at 5.

²⁹ *Id.*, at 20.

³⁰ The Board of Pardons and Paroles, <http://www.ct.gov/bopp/site/default.asp> (visited on March 1, 2019).

³¹ Conn. Gen. Stat. Ann. § 54-129.

³² BOPP, POLICY NO. II. 09, *supra* note 2.

³³ PAROLE REVOCATION REPORT, *supra* note 1, at 1.

³³ BOPP, ANNUAL REPORT 2016-2017, 2 (2018), <https://portal.ct.gov/-/media/BOPP/Legacy-Files/BoPPAnnualReport20162017forDASDigestpdf.pdf?la=en>.