

**APPENDIX A**

# MODEL LEGISLATION: SENTENCING REVIEW



DATA FOR *PROGRESS*

**THE JUSTICE  
COLLABORATIVE  
INSTITUTE**

**FJP  
FAIR AND JUST  
PROSECUTION**

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## SECTION 1

# FINDINGS AND DECLARATIONS

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The Legislature finds and declares the following:

1. People who commit crimes grow and change over time. The commission of a crime should not define a person forever.
2. Research consistently shows that even those who make terrible mistakes can and do rehabilitate and become productive members of their communities.
3. Research shows that individuals age out of committing crimes, even those convicted of the most serious offenses. By the time individuals reach their thirties, their odds of committing future crimes drop dramatically. Much of this is due to neurological changes, which take place in profound ways up until an individual turns 26. The prefrontal cortex, which is highly involved in executive functioning and behavior control, continues to develop until age 26, making it harder for young people to make what adults consider logical and appropriate decisions.
4. That means that, as the United States Supreme Court recognized, adolescents have a diminished culpability as compared to adults. These features, or “hallmarks of youth,” include immaturity, impulsivity, recklessness or heedless risk-taking, a vulnerability to negative influences, a limited ability to appreciate the risks and consequences of one’s actions, an inability to extricate oneself from a family or neighborhood with negative surroundings, and an underdeveloped sense of responsibility.
5. Even those individuals who commit crimes as they get older can grow and change. Individuals released from prison over 50 have an extremely low recidivism rate. That group has the lowest recidivism rate of any other inmate demographic. [Recent studies](#) have determined that whether a person is over the age of 50 is the “the **most important predictor of lower recidivism rates.**”
6. Only [7 percent of those aged 50-64 and 4 percent of those over 65 are returned to prison for new convictions—the lowest rates among all incarcerated demographics.](#) Moreover, “arrest rates among older adults decline to a mere [2 percent by age 50](#) and are close to zero percent by age 65.
7. And yet our criminal justice system currently fails to recognize people’s innate opportunity for growth. Our use of lengthy and mandatory minimum sentences, combined with our failure to utilize parole and clemency, has created a prison system full of people who pose no risk to public safety. We regularly incarcerate those who could safely go home to their families and communities. Many of them are dying.

8. Currently, in [insert state here], 1 out of [xx] incarcerated individuals is serving a life or de facto life sentence. [X number of people] in prison are over 50.
9. Lengthy periods of incarceration separates families and communities. It has led to many children in [state] growing up without a parent.
10. Our lengthy prison sentences are also meted out disproportionately, as people of color receive lengthy sentences at disproportionate rates.
11. Keeping people in prison for decades is not only immoral, it is also devastatingly costly. The current average cost of imprisoning a person in [insert state prison agency here] is \$[XX].
12. That cost is astronomically high in part because those who are over 55 have increased health costs, and the number of people in that category keeps growing. [XX] number of people currently incarcerated in [this state's] prisons are over 55.
13. Incarcerating people for long periods of time, and after a person presents a public safety risk, takes away tax dollars that could be used for health care, housing, education, child care, law enforcement, and care for the elderly.
14. Our lengthy sentences which provide no meaningful chance at release stand out for their unique cruelty and punitiveness.
  - a. It is rare for a European country to have a sentence longer than 20 years, and many do not have life sentences.
  - b. In Latin America, only 6 out of 19 countries allow life sentences.
  - c. Many places allow for parole release, like Belgium which requires parole review after ten years and Germany after 15.
15. Our current system of [parole or supervised release, if applicable] and clemency provides little relief for those facing lengthy sentences who have been rehabilitated. [The parole grant rate currently stands at [%].
16. We must dramatically change how we treat people, even those who have made serious mistakes. When people no longer pose a risk to our communities, they should return to them. This bill provides people with that opportunity.

## SECTION 2

# MODIFICATION OF CERTAIN TERMS OF IMPRISONMENT

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### a. DEFINITIONS.

As used in this [Penal Code/Criminal Code section]

1. “Petitioner” means a person currently incarcerated sentenced to over ten years in prison who has served that time or who is over 50.
2. “Court” means the [superior/trial] court in which the petitioner was sentenced.
3. An “unreasonable risk to public safety” means the petitioner will present an unreasonable to the physical safety of the community, as proven by clear and convincing evidence.

### b. MODIFICATION OF CERTAIN TERMS OF IMPRISONMENT.

Notwithstanding any other provision of law, a court may reduce a term of imprisonment *[or refer a person who is currently incarcerated to the Board of Parole Hearing/Board of Parole Terms for parole consideration]*<sup>1</sup> imposed upon a petitioner if the following conditions apply:

1. the petitioner has served over ten years and is over the age of 50; or
2. the petitioner has served over fifteen years and is over the age of 35; and

3. the court [or parole board] finds, after considering the factors set forth in subsection [XX], that the petitioner does not present an unreasonable risk to public safety.

### c. To determine whether the petitioner poses an unreasonable risk to public safety, the court [or the parole board] shall consider—

1. the petitioner’s age at the time of the offense;
2. the petitioner’s current age and relevant data regarding the decline in criminality as people age;
3. any argument and evidence presented by counsel for the petitioner and by the [prosecution/district attorney];
4. any report and recommendation of the [Department of Corrections/Bureau of Prisons], including information on whether the petitioner has substantially complied with the rules of each institution in which petitioner has been confined, especially over the last five years, and whether the petitioner has completed any educational, vocational, or other prison program, where available;

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1. This model legislation envisions a court conducting a second-look review. In many jurisdictions, it may be preferable to have the court accept that a petitioner is presumptively eligible for relief, to recall the sentence, and to then refer the ultimate decision whether to grant parole to a parole board for consideration of parole.

5. whether the petitioner has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;
  6. any statement, which may be presented orally or otherwise, by any victim of an offense for which the petitioner is imprisoned or by a family member of the victim if the victim is deceased;
  7. any report from a physical, mental, or psychiatric examination of the petitioner conducted by a licensed health-care professional;
  8. mitigating evidence such as the family and community circumstances of the petitioner at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;
  9. the role of the petitioner in the offense and whether, and to what extent, the petitioner may have been influenced or encouraged by others;
  10. whether the sentence is disproportionate to the crime;
  11. the cost to the state of continued incarceration;
  12. the nature and circumstances of the offense, although the nature and circumstances of the offense alone shall not preclude relief under this section.
- d. A court [or parole board] may only deny relief if, after consideration of the above factors, the court finds that the petitioner is currently an unreasonable risk to public safety.
  - e. In any case of a petitioner who is 50 years of age or older on the date on which the petitioner files an application for a sentence reduction under subsection (a), the court shall presume that a petitioner is suitable for relief under this section. This presumption may be rebutted by clear and convincing evidence that the petitioner is currently an unreasonable risk to public safety.
  - f. In any case in which a petitioner's term of imprisonment is reduced under this section and release granted, the court may impose a term of [parole or supervised release].
  - g. In no case may a sentence be modified to increase the sentence initially imposed.

## SECTION 3

# SECTION XX.1 IS ADDED TO THE [PENAL CODE/CRIMINAL CODE]

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### A. NOTICE.

Not later than 30 days after the date on which the 10th year of imprisonment begins for a petitioner sentenced to more than 10 years of imprisonment for an offense, the [state custodial agency] shall provide written notice of [Section XX, above] to—

1. The petitioner;
2. the sentencing court; the [County Prosecuting agency]; the public defender or entity responsible for the defense of the indigent; and the attorney of record for Petitioner.

### B. FILING.

An eligible petitioner or his or her counsel or representative may file a motion for a sentence reduction under this section in the court in which the sentence was imposed as a motion. This motion must also be served on the prosecuting agency, although if petitioner is proceeding pro se, the court shall serve the motion upon the prosecutor. Upon receiving a motion, the [prosecuting attorney] shall provide any notifications required under [] to the victims or family of the victim.

### C. CONTENTS OF MOTION.

A motion must include: 1) the case number and year of Petitioner's case; 2) the name of the sentencing judge; 3) the name of the

agency responsible for the prosecution; 4) a declaration of why Petitioner believes he or she is entitled to relief; and 5) whether Petitioner requests appointment of counsel. A motion may include affidavits, documents, or other written material supporting Petitioner's argument. A motion filed by a person currently incarcerated without the assistance of counsel need not be typed.

### D. COUNSEL.

Upon the filing of a motion to reduce a sentence under this section, if the court determines that the petitioner has been sentenced to more than 10 years and has served not less than 10 years in custody, the court shall appoint counsel for the petitioner if the petitioner is indigent. Counsel shall represent petitioner for all proceedings under this section, including any appeal, unless the petitioner expressly waives the right to counsel after being fully advised of their rights by the court. Counsel shall have 30 days to supplement petitioner's motion.

### E. RESPONSE.

From the date of the filing of the initial motion or from the filing of a supplement, the State shall have 30 days to file a response. A court may only grant the State one 30 day extension unless the defense consents.

## F. HEARING ON THE MOTION.

1. In a hearing under this section, the court shall allow parties to present evidence.
2. At a hearing under this section, the petitioner shall be present unless the petitioner waives the right to be present.
3. The court shall state in open court, and file in writing, the reasons for granting or denying a motion under this section.
4. The [prosecution] or the petitioner may file a notice of appeal in the district court for review of a final order under this section. The time limit for filing such appeal shall be governed by []. Counsel shall be appointed to represent petitioner on appeal.

## G. BRADY DISCLOSURE.

1. Upon petitioner's filing of the motion, the prosecution has a duty to disclose to petitioner all relevant evidence and all evidence that would qualify as Brady material in the pre-trial context. See *Brady v. Maryland*, 373 U.S. 83 (1963).

## H. SUBSEQUENT PETITIONS

1. **Second application.**—Not earlier than [3 years] after the date on which an order denying release on an initial application under this section becomes final, a court shall entertain a second application by the same defendant under this section.
2. **Third application.**—Not earlier than [3 years] after the date on which an order entered by a court on a second application under paragraph (1) becomes final, a court shall entertain a third application by the same defendant under this section.
3. **subsequent applications.**—A court shall thereafter entertain subsequent applications not earlier than every [2 years] if the defendant—(A) is 50 years of age or older; and (B) Three or More Applications have been filed.