

**APPENDIX B**

# MODEL PROSECUTOR GUIDELINES

## SENTENCING REVIEW

 DATA FOR *PROGRESS*



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## INTRODUCTION

**People grow and change. But our criminal legal system does not recognize this fact. The United States leads the world in incarceration, and increased sentence lengths, combined with strict limits on early release opportunities, have seriously contributed to the explosion of our prison population. There are presently tens of thousands of rehabilitated people in prisons who have no meaningful mechanism to seek release and no one advocating on their behalf. To end our incarceration addiction and develop a more dignified, humane, and sensible system, we must do more than change how we arrest, prosecute, and sentence people in the future. We must also look back at those we have already locked away and recognize people’s ability to grow.**

District Attorney<sup>1</sup> offices, by creating sentence review units—or at minimum processes to review sentences if a stand-alone unit is not feasible—can assist people currently incarcerated with receiving new and reduced sentences when continued imprisonment no longer serves the interests of justice.<sup>2</sup> By doing so, prosecutors can put into practice one of the most “consistent findings in developmental criminology”—that criminal behavior decreases significantly as people age, and therefore, lengthy and extended incarceration often does not promote community safety.<sup>3</sup> This will lead to a more fair and equitable system, will save precious taxpayer resources, and allow cities, counties, and states to invest in solutions that prevent crime and help those who are victims of it to heal.

The resources available to prosecutor offices will vary, both because of legal restrictions on reviewing old sentences and because

of financial resources. This policy provides recommendations for what a well-resourced office with few legal limitations can do to establish a separate unit devoted to sentence review. But less resourced offices can implement these identical principles to identify and assist those for whom continued incarceration is no longer serving the public’s best interest. **Even an office with restrictive legal mechanisms and little money, in other words, can follow some of these recommendations to establish processes to review and reduce past sentences, including advocating for clemency, parole, and compassionate release. Any possible constraints should not prevent offices from using their power to do something, as the ultimate aim is to address and avoid unnecessary continued incarceration.** And all prosecutor offices should use their power to advocate in the legislature for increased legal

mechanisms, budget, and staffing to allow for robust sentence review procedures to take place.

As explained below, DA's should establish sentence review units or processes to review cases generally that will uncover those falling into the following categories:

- ▶ **Disproportionate sentences:** Cases where the individual's current sentence is no longer (or was never) proportionate to public safety or the interests of justice, with priority given to people currently incarcerated who are either over 50 years old or were sentenced for crimes committed as a teenager.
- ▶ **Felony murder sentences:** Cases where an individual was convicted of felony murder but did not commit the killing or have an intent to kill.

- ▶ **Parole eligibility:** Cases where a person is eligible for parole within the next 12 months.

- ▶ **Compassionate release:** Cases where a person is suffering from a terminal or debilitating illness.

Once cases falling within these categories are identified, the office shall have a rebuttable presumption that the person deserves a reduced sentence. The office can overcome that presumption with evidence indicating the person poses an unreasonable safety risk in the community. If the presumption is not overcome, the next step is to explore all possibilities within that jurisdiction's laws to advocate for a reduced sentence. Even an office with restrictive legal mechanisms and little money can follow some of these recommendations to establish processes to review and reduce past sentences, including advocating for clemency, parole, and compassionate release.

## PART 1

# WHY PROSECUTORS SHOULD ACTIVELY REVIEW PAST SENTENCES

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There are currently 2.2 million people behind bars in the United States—a 500% increase over the last 40 years. An increase in crime did not drive this incarceration crisis—in fact, crime has declined dramatically since the early 1990s.<sup>4</sup> Rather, an explosion in extreme sentences, including life sentences, along with truth-in-sentencing laws, mandatory minimums, and three-strikes laws, have resulted in prisons that are exploding at the seams.<sup>5</sup> Even as reforming the criminal legal system gains

wider traction, there remain few mechanisms in place to permit those already serving time to be released upon rehabilitation.<sup>6</sup> We keep people in prison despite clear evidence they have been rehabilitated, and lock them up as they age even though criminal behavior drops dramatically once people reach their thirties and then continues to decline.<sup>7</sup> Thousands of people are therefore locked in prisons who are no longer a risk to public safety and whose continued incarceration provides no benefit to our community.

Lengthy prison sentences have caused great harm to families and communities, in particular low-income and minority communities; produced severe race-based disparities in incarceration;<sup>8</sup> ballooned our prison systems and cost billions of taxpayer dollars;<sup>9</sup> and, burdened our prisons with the care of sick and elderly inmates.<sup>10</sup> Extreme sentences, including for crimes we no longer think are deserving of such sentences or of punishment at all,<sup>11</sup> and the enormous price tag that accompanies them, have diverted resources that could reduce crime in the first place and that more effectively could be spent addressing the root causes of crime.<sup>12</sup> Many prisons have been forced to become elder-care centers, as each year American prisons spend **\$16 billion alone in elder care** on people who would pose almost no risk to the public if released.<sup>13</sup> In short, these extreme sentencing practices have not served the interests of justice nor made us safer.

Evidence has shown that prison populations can shrink alongside a declining crime rate, and that people, no matter the seriousness of the original offense, can be released early from prison without risking public safety.<sup>14</sup> For example:

- ▶ The Brennan Center for Justice recently documented that 34 states reduced both their prison populations and their crime rates over a ten-year span.<sup>15</sup>
- ▶ Following a ruling by the state’s highest court, Maryland released more than 200 people early from prison, nearly all of whom were convicted of murder. Six years later, only one of the more than 200 people released had been arrested for a new offense.<sup>16</sup>
- ▶ In 2016 in neighboring Washington, D.C., the city passed a law permitting those sentenced as juveniles to seek new sentences if they had served at least 15 years in prison. Of the 20 people released from prison thus far under the law, none have committed new crimes and many have taken on roles as community organizers, mentors, and youth advocates.<sup>17</sup>

Research confirms what these anecdotes show: that early release is consistent with public safety as in all but the “most exceptional” situations, people “mature out of lawbreaking” which means that “long sentences do little to prevent crime.”<sup>18</sup> Neuroscience suggests that the parts of the brain that control risk and reward are not fully developed until a person reaches the age of 25, which is also the age at which “lawbreaking drops off.”<sup>19</sup> People who commit property crimes tend to stop in their 20s, more violent offenses in their early 30s, and drug crimes in their mid 30s.<sup>20</sup>

And a person’s risk of returning to prison after being released drops even more once a person passes the age of 40.<sup>21</sup> Only 7 percent of those aged 50-64 and 4 percent of those over 65 are returned to prison after being released for new convictions—the lowest rates among all incarcerated demographics.<sup>22</sup> Moreover, “arrest rates among older adults decline to a mere 2 percent by age 50 and are close to zero percent by age 65.”<sup>23</sup> Due to the low risk to public safety older people present, the Office of Inspector General of the Department of Justice has recommended the early release of aging inmates to help manage the inmate population and reduce costs at the Bureau of Prisons.<sup>24</sup>

DA's sentence review policies would address this reality by providing an opportunity for meaningful examination of how a person has grown and changed during the intervening years, or even decades, of incarceration. Once the office identifies a person whose continued incarceration is no longer consistent with the interests of justice, it can assist the person in obtaining a reduced sentence. When a jurisdiction's procedure allows a DA to file a motion with the sentencing court to reduce a person's sentence, a D.A. can file a recommendation for a reduced sentence as a motion or court filing and appearing in court. Other options may include filing a: 1) post-conviction motion in the sentencing court for a reduced or modified sentence; 2) post-conviction motion for a new trial based on newly discovered evidence, such as *Brady* material; 3) post-conviction motion for a new

trial accompanied by an agreement for a new sentence; 4) recommendations with a parole board; or 5) petitions in support of executive pardons and commutations.<sup>25</sup>

Several offices have started to review old sentences already, even with limited mechanisms at their disposal. In Philadelphia, D.A. Larry Krasner as part of the conviction integrity unit, is identifying sentences where the "facts [do] not warrant such harsh sentences." In Seattle, D.A. Dan Satterberg has proactively taken steps to support clemency petitions of those sentenced under the state's three-strikes law. Groups of district attorneys in Georgia have come together to agree to re-evaluate overly harsh drug that no longer would be imposed today, and in California several district attorneys supported the state's effort to pass sentence review legislation last year, which has already gone into effect.<sup>26</sup>

## PART 2

# PROSECUTORIAL LED SENTENCE REVIEW POLICY

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D.A. offices adopting this model policy, or portions of it, will establish policies to identify all individuals who previously received sentences from its office disproportionate with the seriousness of the offense, who have demonstrated substantial rehabilitation, or whose incarceration no longer promotes public safety. It will then take steps to assist the person in receiving a reduced sentence. As stated above, this document sets out guidelines for a stand-alone sentence review unit ("the unit") as that should be any office's goal. However,

if an office lacks sufficient resources for a separate unit, it should still follow the guidelines to develop a sentencing review process for its office to proactively support release through the mechanisms available in the jurisdiction,

The model policy is broken down into seven steps:

- ▶ **Step 1:** Establishing the foundation for a sentence review unit;
- ▶ **Step 2:** Collecting the needed case information;

- ▶ **Step 3:** Reviewing cases;
- ▶ **Step 4:** Advocating for release;
- ▶ **Step 5:** Mechanisms to assist a person in seeking a reduced sentence
- ▶ **Step 6:** Connecting people with transition assistance;
- ▶ **Step 7:** Data collection.

**Step 1: Establishing the foundation to review past sentences.** To the extent budgetary and staffing permit, DA offices should aim to follow the below goals and staffing suggestions:

**1. Planning stages and Community Input:**

The DA, in the planning stages, should reach out to the local public defender office, civil rights groups, correctional facilities, court systems, and legislators, to seek input on how to best coordinate a policy that aims to efficiently achieve the goal of identifying all people in prison who no longer pose a reasonable risk to public safety and therefore need not remain incarcerated. Beyond these stakeholders, it is critical for any DA office that wants to reform the criminal legal system to hear from those most impacted by lengthy incarceration—people who are currently and formerly incarcerated and their families. Accordingly, the DA should provide them a voice in the process—either directly or through local groups that work with people who are currently or formerly incarcerated and their families. But while a DA should respect and consider all input from relevant stakeholders, a DA should not allow roadblocks put in place by other actors in the criminal legal system to fully prevent the creation of sentence review policies.

**2. Identify available legal mechanisms:**

Each DA office should research the legal landscape within the jurisdiction to determine what legal mechanisms are and are not available to assist a person, once identified, with seeking a reduced sentence, as well as any particular mechanism’s potential barriers, such as timing restrictions on when a court can consider a motion for a reduced sentence or limitations on motions for new trial. Further, the office should determine if there is any pending criminal justice reform legislation in the works that would create or expand release mechanisms.

**3. The Process:** The district attorney should select a supervisor-level attorney in the office to serve as chief of a sentence review unit or to oversee the office’s process if a separate unit cannot be created. If there is a separate unit, it should be walled off from the rest of the office, with the exception of the district attorney and the conviction integrity unit if one exists. If staffing limitations prevent the unit from being completely walled off, at a minimum, a person who participated in any way in the original conviction or any proceedings since conviction shall be walled off from the review, except to the extent the reviewing team must interview the individual for its evaluation<sup>27</sup>

**4. Data Collection:** The office should collect data for every person currently incarcerated following a conviction by that DA office (see step 2). Ideally, the office would utilize a data analyst to be able to gather and sort the information by conviction, age, gender, race, sentence length, remaining prison

time, time served, parole eligibility, and next parole hearing;

5. **Community Outreach Specialist:** Because the office will need to reach out to prisons and other advocates to be successful, there should be at least one paralegal to assist in drafting and sending letters to people currently incarcerated, local public defenders, restorative justice organizations, and other civil rights groups.
6. **Victims' Assistance:** The community outreach specialist, which could also be a person within the office's victim advocacy group if one exists, should ensure any attempt to assist a person with receiving a reduced sentence complies with a jurisdiction's established victims' rights laws. That person should connect victims, who are interested, with any existing restorative justice group working in the community that can help ensure victims, who are willing, have a voice in the process, a chance to discuss any harm they suffered from the criminal behavior with the person who is incarcerated, and feel as if the justice system is inclusive of their point of view.<sup>28</sup>
7. **Prioritizing cases:** The office should prioritize cases of anyone currently incarcerated **over the age of 50**, as this group of people is least likely to present a public safety issue. It should also prioritize cases of people sentenced for crimes **committed as teenagers or younger**

who have served more than 15 years in prison, as juveniles have both diminished culpability and greater prospects for reform.<sup>29</sup> If in the course of reviewing cases, the office uncovers a person who was sentenced to life without parole as a juvenile or to a sentence that did not provide the juvenile any meaningful opportunity for release,<sup>30</sup> the case should immediately be prioritized as the Supreme Court has declared all such sentences illegal absent evidence the person is "irreparably corrupt" or "permanently incorrigible."<sup>31</sup>

8. **Newly discovered evidence:** If in the course of reviewing cases, an attorney uncovers any evidence or information that should have been disclosed to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) or any other statutory or constitutional provision, or that calls into question the integrity of the conviction, the attorney should: 1) immediately disclose the information to the defense, 2) provide the information to the office's conviction integrity unit if one is established, and 3) if there is no conviction integrity unit, review the information to decide whether to file a motion for new trial based on newly discovered evidence, with a presumption that if the new information would have been material based on a preponderance standard, that the person is entitled to a new trial

## **Step 2: Collecting the needed case**

**information.** Once a DA office determines the feasible scope of its sentence review process, it must then determine who is currently incarcerated for crimes that were prosecuted by the DA's office and gather the needed information for the review teams to conduct a meaningful review for each case. The office should collect as much of the following information as possible for each case:

- ▶ the current age of each person;
- ▶ age at the time of the offense;
- ▶ charges;
- ▶ sentence length;
- ▶ sentencing enhancements applied;
- ▶ time served;
- ▶ time remaining;
- ▶ race;
- ▶ gender;
- ▶ defense attorney and prosecutor at trial and sentencing.

Data alone cannot tell a person's whole story, and datasets are often incomplete. In an effort to gather as complete information as possible for each case, the office should also:

- ▶ **Reach out to public defenders and other civil rights groups:** These organizations may know of individuals who received a disproportionate sentence, have mitigating information never presented to the original sentencing court or DA's office, or who have demonstrated substantial change and rehabilitation during their incarceration. The office should seek input from the

local public defender offices and ask for relevant information. The office should encourage local public defenders and civil rights groups to provide recommendations of people who should be considered for sentence review.

- ▶ **Reach out to individuals currently incarcerated:** The office should send a letter explaining its goals, and the criteria for receiving review, to each individual currently incarcerated after a conviction obtained by that office. The office should provide each person with contact information for the public defender office if they wish to further discuss the case review process with a defense attorney, and include a checklist of information the DA office seeks should they wish to provide it. The letter should also state that the person is under no obligation to provide information directly to the DA office and that any information provided to the DA in support of reconsideration will not be used against that person in future litigation.
- ▶ **Reach out to correctional agencies:** The office should also send a letter to each jail or prison housing people who the DA office prosecuted. The letter should 1) enumerate those previously prosecuted by the office in that facility; 2) enumerate those the DA office believes may be strong candidates for a revised sentence and seek feedback from the jail or prison, and 3) ask the facility to highlight any additional individuals who have not previously been identified that the facility believes should be considered for a revised sentence due to their conduct while incarcerated or who likely meet the requirements for medical release. An office

should repeat this process at least once per year to allow each jail or prison to update the office with current information about the progress of those the DA has incarcerated.

**Step 3: The review process.** Once the office has collected cases, an attorney or review team, depending on a respective's offices staffing, will analyze cases to determine if a case falls within any of the following enumerated categories: 1) disproportionate sentence review; 2) felony murder review; 3) compassionate release review; and 4) parole review.<sup>32</sup>

### 1. **DISPROPORTIONALITY REVIEW:**

The office should identify people whose sentences fall within the following criteria:

- ▶ the person has served over 10 years and is over the age of 50;<sup>33</sup>
- ▶ the person has served over 15 years and is over the age of 35;
- ▶ the person was sentenced for a crime committed as a teenager or younger to an adult sentence of 10 years or more and has served at least five years;
- ▶ the person received a sentence of over ten years for a first adult felony offense and has served at least five years, unless the person was convicted of murder or an offense involving serious bodily injury;
- ▶ the person's sentence was enhanced under three strikes laws, a mandatory sentence, or a life sentence (including all non-mandatory LWOP sentences);
- ▶ the sentence is out-of-step with sentencing recommendations currently imposed by the office, meaning the individual received

a sentence more than 20% longer than the average sentence currently imposed for similar offenses under similar circumstances (using the average sentence for similar conduct over the previous two years, if known);

- ▶ the sentence could not legally be imposed currently if the person were convicted for the same crime today;<sup>34</sup>
- ▶ the sentence was disproportionate to the alleged conduct, including, but not limited to, identifiable instances of charge stacking or overcharging where a person was charged with multiple offenses covering the same conduct or where an offense was charged at a recognizably higher level than the conduct or intent warranted.<sup>35</sup> Such information is probably not discernible by data alone but outside groups like the public defender or individuals incarcerated themselves may identify these cases for the office, which can then review case files;<sup>36</sup>
- ▶ the sentence imposed was infected by racial bias, for example, where there are disparate punishments for certain types of offenses.<sup>37</sup>

### 2. **FELONY MURDER REVIEW:**

Under the felony murder rule in most jurisdictions, if someone dies during the commission of a felony, everyone involved in the underlying felony is as guilty of murder as the person who actually committed the killing. The rule has led to countless people in prison across the country for murder who neither intended to kill nor aided a killing in any way.<sup>38</sup> Felony murder rules do not tie punishment to conduct and intent, and they are an anathema in the system.<sup>39</sup> Accordingly, the office should

aim to identify cases where a person was convicted of murder under such a broad definition of criminal responsibility.

Once the office identifies all felony murder cases originating from the DA's office, it should evaluate who qualifies for relief by pulling any person's case where he or she was convicted of a felony murder but did not actually commit the killing and did not intend for the killing to have occurred. The office should rely on case files, legal opinions, interviews with the assigned prosecutor and defense attorney, and interviews with the charged individual.

If the person did not commit the killing or intend for it to occur, there is a rebuttable presumption that the individual is entitled to a new sentence. To rebut that presumption, the office should examine: the extent to which the individual was involved with the homicide, any evidence that the individual intended for death to occur, or exhibited a reckless indifference to the likelihood that death would occur, or any evidence of recent violence while incarcerated.

### 3. **COMPASSIONATE RELEASE REVIEW:**<sup>40</sup>

Prison is no place for those who are sick, handicapped, and dying.<sup>41</sup> Accordingly, the office should identify and review cases of people currently incarcerated who do not pose a threat to public safety because they are either:

1. terminally ill with an incurable condition, as determined by a licensed physician, that will likely lead to death within **two years**; or
2. suffering from a serious medical condition, which means a medical condition, as determined by a licensed physician, that

while may not be terminal is debilitating to the extent it requires chronic assistance with a necessary daily life function.

"Necessary daily life function" includes, but is not limited to, eating, breathing, toileting, walking, or bathing.

Obtaining information that a person currently incarcerated is either terminally or seriously ill may not be easy for a prosecutor to obtain. The office, therefore, should take proactive steps to make sure local correctional facilities are actively identifying these individuals, focusing on anyone incarcerated over the age of 50. Additionally, by reaching out to individuals currently in prison, local public defenders, and community organizations, the office can increase the likelihood that it learns about people eligible for compassionate release.

Upon identifying anyone meeting the criteria for compassionate release, absent clear and convincing evidence that the medical diagnosis is incorrect or that the person still poses a danger to the community—an extremely unlikely situation—the office will take steps to assist the person in release. That may mean advocating at a hearing or writing a letter, depending on the mechanism in each jurisdiction.

### 4. **PAROLE:**

Though most sentences generally include a period of parole supervision, obtaining actual release from prison through parole has proven "rare" even when people are "no longer a threat."<sup>42</sup> Understanding that a prosecutor's recommendation can have **significant positive impact** on a parole board, the office's goal should be to improve the number of parole grants by assisting and advocating for people eligible for parole who no longer pose a risk to public safety.

The office should work with parole boards to identify people the office prosecuted who will be eligible for parole within the next six months. The office would then have a presumption to advocate on the person's behalf absent **clear and convincing evidence** that release would create an unreasonable risk to public safety based on:

- ▶ acts of violence or
- ▶ a history of non-technical violations while in prison, with the focus on the most recent five years.

Wherever possible, the office should advocate on the person's behalf in person at the hearing.

**Step 4: Advocating for release.** Once cases are identified within the above categories, the office will make a final decision whether to assist the person in seeking a reduced sentence or early release.<sup>43</sup> For all cases where it has determined the person deserves a new, reduced sentence, or early release, the office should write a recommendation, petition, or a motion, depending on the appropriate procedural vehicle, for a new sentence on the person's behalf, which shall include all pertinent information gathered to support an argument for a new sentence. If there is a hearing, whether in court, or before a parole board, the reviewing attorney from the office should be present to advocate on behalf of the person.

Falling within an above category leads to a strong though rebuttable presumption that the office will advocate for a sentence modification.

**To rebut the presumption, there must be clear and convincing evidence that despite the person meeting any of the above criteria, the**

**person would still pose an unreasonable risk to public safety if released.** That conclusion can be based on:

- ▶ evidence of acts of violence while incarcerated within the last ten years;
- ▶ or a history of non-technical violations, with a focus on the person's record during the most recent five years.

When evaluating cases, the office should consider a person's entire history and not focus only on the crime. While the original offense may be a factor, it should never be the sole factor in denying assistance. Relevant factors, include, but are not limited to:

- ▶ a person's age;
- ▶ length of time the person has already served in prison;
- ▶ evidence of the person's positive activities, substantial growth or extended good behavior while in prison, with a focus on the past five years and the absence of violent infractions;
- ▶ evidence of the person's remorse;
- ▶ mitigation known at the time of trial, sentencing, and post-conviction review
- ▶ mitigation developed since conviction and including from any post-conviction litigation, prison records, or health evaluations;
- ▶ evidence of participation or completion of any programs while incarcerated;
- ▶ any certificates of achievement or degrees the person earned while incarcerated;<sup>44</sup>

- ▶ any letters of recommendation the person has received advocating for release or reduced sentence;
- ▶ any evidence of family or community support;
- ▶ any information from the person detailing a release plan;
- ▶ any evidence of a diminished role in the offense, including, but not limited to, evidence the person committed the offense under pressure from an older individual;
- ▶ any evidence that a person’s crime stemmed primarily out of substance use disorder, a mental health issue, trauma or financial instability, such that society would be better served assisting this person obtaining needed services rather than incarceration;
- ▶ a statement from the person if the person wants to allocute;<sup>45</sup>
- ▶ any other information deemed relevant to assisting the person obtain a new, reduced sentence.

If an office decides to assist a person in receiving a new sentence and advocate on that person’s behalf, the presumption shall be that the appropriate sentence is time served.

**Step 5: Mechanisms to assist a person in seeking a reduced sentence.** When a jurisdiction’s procedure allows a DA to file a **post-conviction motion for a new or reduced sentence** with the sentencing court to reduce a person’s sentence, an office can file a motion or

court filing and appear in court on the person’s behalf. Other options may include filing a:

- ▶ post-conviction motion for a new trial accompanied by a plea agreement for a new sentence;
- ▶ post-conviction motion for a new trial based on newly discovered evidence, such as Brady material;
- ▶ recommendations with a parole board; or
- ▶ petitions in support of executive pardons and commutations.

Besides court filings and parole opportunities, offices should utilize **executive clemency** to assist people with release. Governors enjoy wide discretion to grant executive clemency through pardons and sentence commutations. That power, however, is traditionally underused, especially in recent years<sup>46</sup> and prosecutors’ reflexive opposition to clemency has helped to defeat many meritorious petitions.<sup>47</sup> To reverse these trends, the office should take an active role in supporting people for clemency, in particular in jurisdictions where there are no legal mechanisms for a court on its own to reduce the person’s sentence. If the office decides a person would be a good candidate for clemency—based on meeting any of the criteria identified above for disparate review, felony murder, or compassionate release—it should contact the person in writing, inform the person of its position and the reasons why, and encourage the person to file for executive clemency, noting that the local district attorney’s office will support the petition. In this letter, the office should also provide the person with 1) information for filing a petition for executive clemency, including relevant information to include that only the person likely would know;

2) contact information for local legal assistance, whether the public defender or other legal aid agency, that would assist the person or answer questions; and 3) guidance for contacting the DA's sentence review unit, or attorney responsible for reviewing that person's case, directly if the person wishes, with the assurance that no information the person provides will be used against the person. If people seek clemency on their own—either after being contacted by the DA office or completely on their own—the office will support the petition if it otherwise meets this policy's guidelines.<sup>48</sup>

If a jurisdiction does not provide a mechanism for a DA office to file a pleading in court to seek a reduced sentence,<sup>49</sup> the office should:

1. Identify, if it has not already, the person's next possible parole hearing and be prepared to assist the person in gaining release through parole;
2. Assist the person in seeking relief through executive clemency;
3. Continue to use the district attorney's platform to advocate for the state to pass needed legislation to permit sentence review pleadings to be filed in court.<sup>50</sup>

**Step 6: Providing Transition Assistance.** A person's potential for success upon release is maximized if they have assistance in transitioning back to the community. Once an office determines that a person should receive a reduced sentence, it should identify organizations and services in the community

that can help individuals and their families with transition assistance. While all DA's offices should have a vested interest in ensuring that any person released from incarceration is provided all available assistance and guidance, they should allow community-based organizations outside of the DA's office to develop and implement a person's transition plan.<sup>51</sup>

Once a person has been released, the office should assist the person in filing all necessary motions and paperwork to clear arrest, court, and conviction records for anyone who meets a jurisdiction's expungement requirements.

**Step 7: Data collection.** As is well known, racial disparities are rampant in virtually every single aspect of the criminal legal system. All DA's offices should take steps to ensure that its sentencing review policies are not directly or indirectly adding to those discrepancies. Thus, the office should keep data, compiled at least annually, on the following categories, with each category, as applicable, including the age, gender, and race of each person:

1. The number of people currently incarcerated due to convictions prosecuted by that DA's office;
2. The number of cases reviewed each year by the office;
3. The number of cases identified for possible relief by the office;
4. The number of court pleadings filed on behalf of an individual seeking a sentence reduction;

5. The number of people provided relief by a court based, in part, on actions by the office’s sentence review process, as well as the number of denials;
6. The number of people the office supported before a parole board;
7. The number of people provided relief by a parole based, in part, on actions by the office’s sentence review process, as well as the number of denials;
8. The number of people the office supported for executive clemency;
9. The number of people provided executive clemency based, in part, on actions by the office’s sentence review process as well as the number of denials.

## ENDNOTES

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1. The term “district attorney” or “DA” used here refers to a jurisdiction’s top criminal prosecutor.
2. See Forman, James and Lustbader, Sarah, “Every D.A. in American Should Open a Sentence Review Unit,” *The New York Times* (Aug. 1, 2019), available at <https://www.nytimes.com/2019/08/01/opinion/mass-incarceration-prosecutors-sentencing.html>.
3. See Shulman, E.P., Steinberg, L.D. & Piquero, A.R. *J Youth Adolescence* (2013) 42: 848, available at <https://www.ncbi.nlm.nih.gov/pubmed/23595417>.
4. See Golash-Boza, Tanya, “5 columns show why mandatory minimum sentences don’t work,” *PBS.org* (June 1, 2017), available at <https://rb.gy/731d80>. Though crime rates dropped nationally over the last two decades, studies have shown that increasing the rates of incarceration has played, at best, a minimal role and in some cases may have increased crime. See Gelb, Adam and Denney, Jacob, “National prison population continues to decline amid sentencing, re-entry reforms,” *Pew Trusts* (Jan. 16, 2018), available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.
5. See Cullen, James, “Sentencing laws and how they contribute to mass incarceration,” *Brennan Center for Justice* (Oct. 5, 2018), available at <https://www.brennancenter.org/blog/sentencing-laws-and-how-they-contribute-mass-incarceration-0>; King, Ryan, “Cumulative impact: why criminal sentences have increased,” *Criminology* (Dec. 14, 2018), available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9125.12197>.
6. See “The High Costs of Low Risk: The Crisis of America’s Aging Prison Population,” *The Osborne Association* (May 2018), available at <http://www.osborneny.org/resources/the-high-costs-of-low-risk/the-high-cost-of-low-risk/>.
7. See Loeber, Rolk, Farrington, David P., Petechuk, David, “From Juvenile Delinquency to Young Adult Offending,” *National Institute of Justice* (July 2013), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf>; see also Landsman, Daniel, “A Second Chance Starts with a Second Look: The Case for Reconsideration of Lengthy Prison Sentences,” *Families for Justice Reform*, available at <https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf>.
8. Despite making up 13% of the population, Black people are nearly 35% of the prison population, and one in five Black people in prison are serving a life sentence. See “Facts of Life Sentences,” *The Sentencing Project*, available at <https://www.sentencingproject.org/wp-content/uploads/2018/12/Facts-of-Life.pdf>.
9. While the Bureau of Justice Statistics places the annual cost of mass incarceration at \$81 billion, the Prison Policy Initiative found that the total costs to the government and the families of those incarcerated is closer to \$182 billion annually. See Press Release, “Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety,” *Equal Justice Initiative* (Feb. 6, 2017), available at <https://eji.org/news/mass-incarceration-costs-182-billion-annually>.

10. In 1993, there were 45,000 people over 50 in U.S. state prisons. Twenty years later, there were 243,800, a 280 percent increase. It is estimated that by 2030, if we do not act, there will be over 400,000 people in our prisons over the age of 50. See Chen, Michelle, “By 2030, 1 in 3 U.S. Prisoners Will Be Over 50,” *The Nation* (May 29, 2018), available at <https://www.thenation.com/article/by-2030-one-in-three-us-prisoners-will-be-over-50/>.
11. See *generally* Blinder, Alan and Medina, Jennifer, “He was sentenced to life for selling crack. Now congress wants to reconsider,” *The New York Times* (Dec. 20, 2018), available at <https://www.nytimes.com/2018/12/20/us/sentencing-reform-crack.html>.
12. In 2016, the U.S. Department of Education documented that state spending over the last three decades on prisons and jails increased at triple the rate of funding for public education for preschool through grade 12. Kelly, Stephanie, “The U.S. spends a troubling amount of money on prisons compared to schools,” *Business Inside* (July 7, 2016), available at <https://www.businessinsider.com/r-us-spending-on-prisons-grew-at-three-times-rate-of-school-spending-report-2016-7>. Since 1990, state and local spending on prisons increased by 44 percent, as spending on higher education decreased by 28 percent. *Id.*
13. See Arkin, Daniel, “Exploding number of elderly prisoners strains system, taxpayers,” *NBCnews.com* (June 29, 2013), available at [http://usnews.nbcnews.com/\\_news/2013/06/29/19192029-exploding-number-of-elderly-prisoners-strains-system-taxpayers?lite](http://usnews.nbcnews.com/_news/2013/06/29/19192029-exploding-number-of-elderly-prisoners-strains-system-taxpayers?lite).
14. Lopez, German, “A massive review of the evidence shows letting people out of prison doesn’t increase crime,” *Vox* (Sept. 25, 2017), available at <https://www.vox.com/policy-and-politics/2017/9/25/16340782/study-mass-incarceration>. See also David Abrams, *Building Criminal Capital vs. Specific Deterrence: The Effect of Incarceration Length on Recidivism*, at 8-9 (5th Annual Conference on Empirical Legal Studies Paper, 2010), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1641477](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641477).
15. See Kimble, Cameron, “Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem,” *Brennan Center for Justice* (Aug. 6, 2019), available at <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem>.
16. See Prudente, Tim, “Nonprofit points to Unger case as proof oldest prisoners should be set free,” *Baltimore Sun* (Nov. 15, 2018), available at <https://www.baltimoresun.com/news/investigations/bs-md-sun-investigates-unger-20181114-story.html>. See also “The Maryland Unger Project: Safe Decarceration of Older, Life-Sentenced Prisoners,” *Maryland Restorative Justice Initiative* (2018), available at <http://gocccp.maryland.gov/wp-content/uploads/justice-reinvestment-advisory-20180625-unger-presentation.pdf>.
17. See Lerner, Kira, “D.C. Shows Mercy for People Who Committed Crimes as Children, But Prosecutors are Fighting Back,” *The Appeal* (May 23, 2019), available at <https://theappeal.org/d-c-offers-hope-to-people-who-committed-crimes-as-children-but-prosecutors-are-fighting-back/>; Bahrapour, Tara, “Locked up for years as teens, they’ve returned home to D.C. hoping to make a difference,” *The Washington Post* (June 5, 2018), available at <https://www.washingtonpost.com/news/inspired-life/wp/2018/06/05/locked-up-for-years-as-teens-theyve-returned-home-to-d-c-hoping-to-make-a-difference/>; Zeigler, James, “D.C. Council’s second look sentencing efforts are thoughtful, safe, and just response to mass incarceration,” *The D.C. Line* (Aug. 13, 2019), available at <https://thedcline.org/2019/08/13/james-zeigler-dc-councils-second-look-sentencing-efforts-are-thoughtful-safe-and-just-responses-to-crisis-of-mass-incarceration/>.
18. See Goldstein, Dana, “Too Old to Commit Crime?,” *The Marshall Project* (Mar. 20, 2015), available at <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.
19. *Id.*
20. *Id.* “The research shows that people are most likely to commit crime in their late teens and early 20s. After that, the chances dwindle — people settle down in their lives and begin more sustainable careers, old age comes with less energy, and older bodies make it a lot more difficult to run around and get in trouble.” Lopez, German, “Can we release violent criminals from prison without increasing crime? Yes,” *Vox* (June 15, 2015), available at <https://www.vox.com/2015/6/15/8783209/mass-incarceration-crime-effect>.
21. See Rebecca Silber, Alison Shames, and Kelsey Reid, “Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations,” *Vera Institute* (Dec. 2017), available at <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf>.
22. See “The High Costs of Low Risk: The Crisis of America’s Aging Prison Population,” *The Osborne Association* (May 2018), available at <http://www.osborneny.org/resources/the-high-costs-of-low-risk/the-high-cost-of-low-risk/>.
23. See “The High Costs of Low Risk: The Crisis of America’s Aging Prison Population,” *The Osborne Association* (July 2014), available at <http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/>.
24. See “The Impact of the Aging Prison Population on the Federal Bureau of Prisons,” *The Office of the Inspector General* (February 2016), available at <https://oig.justice.gov/reports/2015/e1505.pdf>. The OIG report highlighted that infrastructure limitations prevent most correctional facilities from being able to meet even the most basic needs for the elderly and infirm people who are incarcerated that render prison life for these individuals even more difficult, and at times, unbearable. Many correctional facilities lack adequate accommodations for the elderly and the infirm and have an insufficient number of lower bunks, handicapped-accessible cells and bathrooms, and elevators for those with mobility issues.
25. See McCray, Rebecca, “For a New Breed of Prosecutors, Justice Sometimes Entails a Second Chance,” *The Appeal* (Nov. 16, 2017), available at <https://theappeal.org/for-a-new-breed-of-prosecutors-justice-sometimes-entails-a-second-chance-a10fe0104a1b/>. Currently, only California has a specific second look provision that permits adults to petition the court for a new sentence. See Barry, Kyle, “A new power is on the horizon for prosecutors—reducing harsh sentences,” *The Appeal* (Sept. 7, 2018), available at <https://bit.ly/2oUWv46>. Delaware allows people sentenced as “habitual offenders” prior to 2016 to petition the court for

- a new sentence. Bittle, Matt, “Delaware senate approves changes to habitual offender law,” Delaware State News (Mar. 24, 2016), available at <https://bit.ly/2p1n8UQ>. A number of jurisdictions, including California, Colorado, Delaware, D.C., Florida, and Oregon, Florida, have second look provisions for people sentenced as juveniles.
26. See Eli Hager, “The DAs Who Want to Set the Guilty Free: Sentence review units would revisit harsh punishments from the past,” The Marshall Project (March 20, 2018), available at <https://www.themarshallproject.org/2018/03/20/the-das-who-want-to-set-the-guilty-free>; Freeman, Danny and Stickney, R., “San Diego Man Released Under California’s New Re-sentencing Law,” NBC San Diego (Aug. 2, 2019), available at <https://www.nbcsandiego.com/news/local/Kent-Williams-Three-Strikes-Law-San-Diego-Prison-Release-513628211.html>.
  27. Walling off the review process from the rest of the office isolates the reviewing team from biasing information, including the hindsight bias that inevitably exists among those who previously prosecuted the case.
  28. For more information, see “Building Community Trust: Restorative Justice Principles, Practices, and Promising Practices,” Fair and Just Prosecution, available at [https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP\\_Brief.RestorativeJustice.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP_Brief.RestorativeJustice.pdf); “What is Restorative Justice,” Center for Justice and Reconciliation, available at <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/>.
  29. See Barnes, Robert, “Supreme Court: Life sentences on juveniles open for later reviews,” The Washington Post (Jan. 25, 2016), available at [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-juveniles-sentenced-to-life-have-option-for-new-reviews/2016/01/25/06e3dfc2-c378-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-juveniles-sentenced-to-life-have-option-for-new-reviews/2016/01/25/06e3dfc2-c378-11e5-8965-0607e0e265ce_story.html).
  30. See Annito, Megan, “Graham’s Gatekeeper and Beyond: Juvenile Sentencing and Reform in the Wake of *Graham* and *Miller*,” 80 Brook. L. Rev. 119 (Fall, 2014), available at <https://bit.ly/2OCp4hJ>.
  31. See Totenberg, Nina, “Supreme Court Opens Door to Juveniles Given Life Sentences,” NPR.org (Jan. 25, 2016), available at <https://www.npr.org/2016/01/25/464338364/supreme-court-opens-door-to-parole-for-juvenile-lifers>. See also Requarth, Tim, “Neuroscience is Changing the Debate Over What Role Age Should Play in the Courts,” Newsweek (Apr. 18, 2016), <https://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html>.
  32. This list is not meant to be exclusive—the office is free to consider relief when the interests of justice require. Similarly, if a person meets the criteria for one category but not another, the office should still seek to assist the person. The purpose of this policy is for a DA office to identify and assist as many people as possible who no longer need to be incarcerated.
  33. There is overwhelming consensus among correctional experts, criminologists, and the National Institute of Corrections that 50 years of age is the appropriate point marking when a prisoner becomes “aging” or “elderly,” because people age physiologically faster in prison. See “At America’s Expense: The Mass Incarceration of the Elderly,” ACLU (June 2012), available at [https://www.aclu.org/sites/default/files/field\\_document/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf).
  34. Barring an extreme situation, an office will recommend a new sentence for anyone serving a sentence that could no longer be imposed due to a change in law. It should be the position of every DA that any change in criminal sentencing that would shorten the term of incarceration should be applied retroactively.
  35. Justice Scalia recognized the inherent coerciveness of overcharging and its impact on the criminal legal system. See *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (surmising that plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense.”); see also Graham, Kyle, “Overcharging,” 11 Ohio St. J. Crim. L. 701 (Spring, 2014) (discussing the practice of overcharging and that critics maintain that overcharging is “socially undesirable, immoral, and even corrupt behavior”).
  36. As with any of these categories, in particular any category that requires more than just looking at raw data, a DA office likely will not identify every single case that meets the criteria. The purpose, however, of these criteria is to provide an office committed to sentence review with information for what to look for when reviewing case information. In seeking to help people receive reduced sentences whose continued incarceration is no longer needed to reasonably protect the public, DA offices should not allow the perfect to be the enemy of the good.
  37. If a jurisdiction has a statutory provision in place that permits certain people to seek sentence reductions under various conditions, the sentence review team should also identify any cases that meet the jurisdiction’s conditions to any extent they are not otherwise covered.
  38. See Khan, Adnan, “The judge and jury agreed I didn’t kill anyone. So why did I just serve 16 years for murder?” The New York Times (July 22, 2019), available at <https://www.nytimes.com/2019/07/22/opinion/felony-murder-rule-adnan-khan.html>.
  39. The United States is the only country in the world that still utilizes the felony murder rule. Cates, Jobi, “Lake County case shows why Illinois should abolish the felony murder rule,” Chicago Sun Times (Aug. 15, 2019), available at <https://bit.ly/2ATaIXA>. Felony murder has been described as “unnecessary and outdated because it doesn’t allow for an accurate determination of culpability.” Simpson, Kevin and Moffeit, Miles, “Felony murder: legal fiction,” Denver Post (Feb. 19, 2006), available at <https://www.denverpost.com/2006/02/19/felony-murder-legal-fiction/>.
  40. Compassionate release laws often rightly allow people to seek new sentences after reaching a certain age and amount of time served in prison. This policy deals with individuals meeting such criteria in the disproportionate review section. Currently, forty-nine states and the District of Columbia provide one or more forms of compassionate release. Only Iowa has no specific compassionate release law or regulation. Several other states, such as Illinois and

- Michigan, technically have programs in place, but provide no detailed rules or guidance on implementing them.” See Burks, Rabiah, “New State-by-State Report Reveals Compassionate Release Programs Are Rarely Used,” FAMM.org (June 17, 2018), available at <https://bit.ly/31Vtrlo>.
41. See Thompson, Christie, “Frail, Old, and Dying, But the Only Way Out of Prison is a Coffin,” *The New York Times* (March 7, 2018), available at <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html>; Thompson, Christie, “Your Loved One Dies. The Prison Leaves a Voicemail,” *The Marshall Project* (June 21, 2018), available at <https://bit.ly/2VkZK0V>.
  42. See Lopez, German, “Prisoners rarely get released on parole even when they’re no longer a threat. Here’s why,” *Vox* (July 13, 2015), available at <https://www.vox.com/2015/7/13/8938061/parole-boards-politics>.
  43. If resources permit, cases should be reviewed by teams of three people, with a vote of two team members sufficient for the office to then advocate on that person’s behalf. If a team can only be two people, then a supervisor can break the tie. If cases are reviewed by only an individual attorney, that attorney would need to bring any decision to the supervisor who would then accept or reject the recommendation.
  44. A person should not be penalized for things like failing to participate in programs or obtaining certificates or degrees if such programs have not been offered or available to that person during incarceration.
  45. Non-allocation or failure to secure a release plan does not justify lack of support.
  46. See Steven Zeidman, “End Mass Imprisonment,” *New York Times*, Letter to the Editor (Nov. 4, 2018), available at <https://www.nytimes.com/2018/11/04/opinion/letters/prosecutors-clemency-parole.html>; “Clemency,” *Criminal Justice Policy Institute* available at <https://www.cjpf.org/clemency>.
  47. See generally Barkow, Rachel, “The Politics of Forgiveness: Reconceptualizing Clemency,” Vol 21, No. 3 *Federal Sentencing Reporter* 153, 156 (Feb. 2009), available at [http://www.law.nyu.edu/sites/default/files/ecm\\_pro\\_062016.pdf](http://www.law.nyu.edu/sites/default/files/ecm_pro_062016.pdf).
  48. It should be the rare occasion where a DA office actively opposes a clemency petition, and any opposition to a clemency petition should first be approved by the sentence review supervisor. As an alternative to opposing a clemency petition in close cases, the better course in most instances will be for the office to not take any position. No office should withhold support for clemency—or parole—merely because the petitioner is an undocumented immigrant, undergoing treatment, receiving rehabilitative services, or dependent on government benefits at the time he or she submits the petition.
  49. See Budryk, Zack, “Missouri judge denies petition for new trial after prosecutors say man is innocent,” *The Hill* (Aug. 27, 2019), available at <https://thehill.com/regulation/court-battles/458936-missouri-judge-denies-petition-for-new-trial-after-prosecutors-say> (detailing judge’s denial of motion for new trial, even though prosecutors argued he was innocent, because the law did not procedurally permit the judge to rule on such a motion).
  50. See Miller, Ben and Harawa, Daniel, “Why America needs to break its addiction to long prison sentences,” *Politico* (Sept. 3, 2019), available at <https://www.politico.com/magazine/story/2019/09/03/why-america-needs-to-break-its-addiction-to-long-prison-sentences-227999>.
  51. Providing robust transition can be achieved while still saving taxpayers money when compared to the cost of incarceration. For example, when Maryland released over 200 people early from prison and provided them each with robust state-sponsored transition assistance, it led to annual taxpayer savings of \$185 million per year. When people are elderly and sick, it is a poor use of taxpayer money to keep them locked in prison. See “Building on the Unger Experience: A cost-benefit analysis of releasing aging prisoners,” *Open Society Institute-Baltimore* (Jan. 2019), available at <https://www.osibaltimore.org/wp-content/uploads/2019/01/Unger-Cost-Benefit3.pdf>.