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M E M O R A N D U M

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TO: Sentencing in the Criminal Justice System Interim Study Committee

FROM: Conrad Imel, Research Analyst, 303-866-2756

SUBJECT: Second Look Sentencing

Summary

This memorandum provides information concerning "second look sentencing." Second look sentencing refers to sentence modification that occurs while an offender is serving his or her term of incarceration. This memorandum briefly describes second look sentencing and discusses the differences between it and other forms of sentence modification. The memorandum then explains second look sentencing schemes for juveniles in other states, describing Oregon's scheme in detail, as well as discussing a recently created Colorado program for juvenile offenders. It also describes the American Law Institute's Model Penal Code's proposed second look sentencing policy, and concludes with a brief discussion of concerns relating to the separation of powers doctrine.

Overview of Second Look Sentencing

Second look sentencing is a process by which courts review, or take a "second look," at a lengthy sentence to incarceration after the offender has served a significant portion of the sentence.[1] For example, a second look provision may authorize a court to modify the sentence of an offender after he or she has served 15 years in prison. Courts may consider a number of factors when determining whether to modify a sentence, including the offender's rehabilitation, the effect of release on the victim of the offense, and whether the offender is fit to reenter society. Revisiting an offender's sentence after a long period of time allows the court to evaluate the sentence to ensure that the incarceration conforms with the jurisdiction's purposes of sentencing.

Currently, no states have enacted second look provisions for adult offenders, though some have such a review in place for juvenile offenders sentenced as adults. The American Law Institute has proposed second look provisions for inclusion in the organization's Model Penal Code. These laws and proposals are discussed in more detail below.

[1]"Second look sentencing" may be used to describe any sentence modification that alters a court-ordered term of incarceration, including those made by the executive branch, such as clemency, earned or good time credits, or parole. This memorandum focuses exclusively on second look sentencing as a modification effectuated by a judicial decisionmaker, such as a judge.

Difference between second look sentencing and Rule 35(b) modifications. Many states, including Colorado, have adopted judicial sentence modification rules similar to the former Federal Rule of Criminal Procedure 35(b) (such state rules will be referred to generically as "Rule 35(b)").[2] That version of the federal rule, in force until 1987, provided that a trial court could reduce a sentence for any reason within 120 days of its imposition, either on its own or on motion of defense counsel.[3] Under Colorado Rule of Criminal Procedure 35, courts are permitted to reduce a legally issued sentence upon a motion for reduced sentence filed within 126 days (18 weeks) of the imposition of the sentence or other appellate action that has a similar effect. The court may also reduce a legally imposed sentence on its own initiative within the same time period.[4] The rule does not prescribe a time frame for the court to issue a decision on the motion.

Generally, states' Rule 35(b) motions for sentence reduction differ from second look sentencing principles in two related ways. First, second look sentencing decisions are to be based on the offender's rehabilitation or in order to conform with the sentencing jurisdiction's purposes of sentencing, whereas Rule 35(b) sentence modifications are based on information about the offense or offender that existed at the time of sentencing but were not known to the court at that time. Relatedly, second look sentencing is performed well into an offender's term of incarceration, near the midpoint of the sentence or mandatory minimum sentence, while Rule 35(b) modifications are generally made soon after the time of sentencing.

Colorado law concerning modifying sentences for crimes of violence. Similar to Rule 35(b) sentence modifications, Colorado law permits courts to modify sentences levied against offenders who commit crimes of violence.[5] Offenders who commit crimes of violence are subject to enhanced sentencing, including a minimum sentence to incarceration greater than the presumptive minimum for classification of the committed offense. However, after receiving an evaluation and diagnosis of the offender from the Department of Corrections (DOC), and at least 119 days after entering DOC custody, a court may, "in a case which it considers to be exceptional and to involve unusual and extenuating circumstances," modify the sentence, which may include sentence to probation. Like Rule 35(b) motions, these crime of violence sentence modification decisions are made soon after the initial sentence, not after the offender has served a substantial portion of his or her sentence.

Difference between second look sentencing and compassionate release. Most states and the federal government have enacted compassionate release provisions for adult offenders. Compassionate release permits the release of offenders who are ill or infirm, or who meet other designated criteria. Under Colorado's compassionate release law, "special needs offenders" may be eligible for parole prior to or after the offender's parole eligibility date.[6] The DOC is responsible for identifying inmates who meet the eligibility criteria for special needs parole. If an offender is identified, DOC submits a referral to the State Board of Parole (parole board). The

[2]A 2003 study identified ten states that do not provide judges with any statutory authority to reduce sentences. Steven Grossman and Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. Balt. L. Rev. 1, 11 n.76 (2003).
[3]E. Lea Johnston, *Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release*, 4 Wake Forest J. L. & Pol'y 49, 77-78 (April 2014).
[4]Colo. R. Crim. P. 35(b). At any time, the court may correct a sentence not authorized by law or imposed when the court did not have jurisdiction. A sentence imposed in an illegal manner may be correct by the court within 126 days. Colo. R. Crim. P. 35(a).
[5]Section 18-1.3-406 (1)(a), C.R.S.
[6]Section 17-1-102 (7.5), C.R.S., defines "special needs offenders" as those who are at least 60 years old and have been diagnosed as suffering from a chronic infirmity, illness, condition, disease, or behavioral or mental health disorder and are incapacitated to the extent that they are not likely to pose a risk to public safety; or those who suffer from a chronic, permanent, terminal, or irreversible physical illness, condition, disease, or behavioral or mental health disorder that requires costly care or treatment and who are incapacitated to the extent that they are not likely to pose a risk to public safety. Offenders who have committed class 1 felonies cannot be classified as special needs offenders, and an offender convicted of a class 2 felony crime of violence cannot be classified as a special needs offender until he or she has served ten years in prison.

parole board then determines whether to grant parole to the offender based on statutory criteria.[7]

Compassionate release laws differ from second look sentencing policies because of the classification of the offender. Compassionate release policies apply to offenders who fit a specific set of characteristics, such as old age or health issues, without regard to the length of the sentence imposed on the offender. Second look policies, generally, apply to offenders who are serving a lengthy sentence to incarceration, and are not based on the characteristics of any individual offender. Second look evaluations, as in practice for juveniles, are performed by a judge, while in Colorado, compassionate release is determined by the State Parole Board, within the executive branch.

Second Look Sentencing for Juveniles Convicted as Adults in Other States

Some states provide a second look for juveniles tried for offenses and convicted as adults. Staff identified statutory schemes in Oregon, Florida, and Delaware that provide a second look for lengthy juvenile sentences to imprisonment.[8] Oregon was the first state to enact a second look sentencing scheme for juvenile offenders, which also includes developing a release plan for those whose sentences are reduced. Florida law permits sentencing modification based on the type of offense committed and the length of time served. Delaware law provides little guidance on the execution of its second look provisions, and instead permits the court to provide rules governing the implementation of the law. Each of these states' laws is described below.

Oregon. Oregon enacted second look sentencing for juveniles in 1995. Under Oregon law, juveniles sentenced as adults after June 30, 1995, to terms of imprisonment longer than 24 months, are eligible for sentence modification after serving half of the imposed sentence.[9] After receiving proper notice from the agency with custody of the offender, either the Oregon Youth Authority (OYA) or the Oregon Department of Corrections (ODOC), the court must schedule a hearing date within 30 days of the offender having reached the midpoint of his or her sentence.

Notification. The court is required to notify the offender and the offender's parents, the correctional institution where the offender is held, and the prosecuting district attorney, of the second look hearing. The court is required to "make reasonable efforts" to notify the victim and the victim's parents or legal guardian, and any other person who has requested to be notified of any hearing concerning the transfer, discharge, or release of the offender.

Hearing and sentence modification decision. At the hearing, the burden is on the offender to prove by clear and convincing evidence that he or she has been rehabilitated and reformed; would not be a threat to the safety of the victim, the victim's family, or the community; and would comply with any release conditions. The offender has the right to legal counsel at the hearing, and a court can appoint counsel for indigent offenders. The hearing is open to the public and must be recorded.

Following the hearing, the court may order the offender to serve the remainder of the initial sentence or order the person to be released at a specified time, if the court finds that the

[7]Section 17-22.5-403.5, C.R.S.
[8]Recent U.S. Supreme Court cases have affected state laws concerning sentencing juveniles to terms of imprisonment for life without parole, which has resulted in states enacting sentence review for such offenders. This section does not address those review policies; instead, it describes second look review for all lengthy juvenile sentences.
[9]Or. Rev. Stat. § 420A.203.

offender has been rehabilitated and reformed; is not a threat to the safety of the victim, the victim's family, or the community; and would comply with any release conditions. Both the offender and the state may appeal the court's decision. In making its decision, a court must consider the following:

- the experiences and character of the offender before and after incarceration;
- the offender's juvenile and criminal records;
- the offender's mental, emotional, and physical health;
- the gravity of the loss, or damage or injury caused or attempted, as part of the criminal act for which the offender was convicted and sentenced;
- the manner in which the offender committed the criminal act for which the offender was convicted and sentenced;
- the offender's efforts, participation, and progress in rehabilitation programs since the offender's conviction;
- the results of any mental health or substance abuse treatment;
- whether the offender demonstrates accountability and responsibility for past and future conduct;
- whether the offender has made, and will continue to make, restitution to the victim and the community;
- whether the offender will comply with and benefit from all conditions that will be imposed if the offender is conditionally released;
- the safety of the victim, the victim's family, and the community;
- the recommendations of the district attorney, the OYA, and the ODOC; and
- any other relevant factors or circumstances raised by the state, the OYA, the ODOC, or the offender.

Release plan. If the court orders release, the ODOC is required to prepare and submit a proposed release plan within 45 days.[10] The plan must include conditions recommended by the court and the ODOC must consider OYA's recommendations. If the proposed plan is not approved, the court returns the plan to the ODOC with recommended modifications and additions. Prison officials must then submit a revised plan to the court within 15 days. If the court does not approve of the revised plan, it may make any changes it deems appropriate and prepare a final release plan. The final release plan must require that the offender:

- comply with the conditions of post-release supervision;
- be under the supervision of the ODOC and its representatives and follow the direction and counsel of the ODOC and its representatives;
- answer all reasonable inquiries of the court or the supervisory authority of the ODOC;
- report to the supervision officer as directed by the court or the supervisory authority of the ODOC;
- not own, possess, or be in control of any dangerous weapon or deadly weapon, or any dangerous animal;
- respect and obey all municipal, county, state, and federal laws;
- participate in a victim impact treatment program; and
- pay any restitution, compensatory fine, or attorney fees ordered and regularly perform any required community service.

When the final release plan is approved, the court must enter a final order conditionally releasing the offender. The offender remains under the sentencing court's jurisdiction during

[10]Or. Rev. Stat. § 420A.206.

the period of conditional release, and the court may modify the order, on its own or at the request of the ODOC.

Violation of release conditions. If there is probable cause to believe that an offender has violated the conditions of the release order, the court must require the offender to appear and show cause as to why the release should not be revoked or suspended. The court is required to revoke the release and order the offender to serve the remainder of the original sentence to imprisonment if the court finds that the offender has been convicted of a new criminal offense; the offender has violated the condition prohibiting ownership, possession, or control of a dangerous weapon or deadly weapon, or a dangerous animal; or the offender's conditional release has been suspended twice within the past 18 months. Like an initial release decision, the decision to revoke or suspend the release is appealable by the state, the ODOC, or the offender.

Florida. Enacted in 2014, Florida law provides a second look at sentencing for juveniles who are sentenced to imprisonment in the Florida Department of Corrections (FDOC) for an offense committed by an offender younger than 18 years old.[11] The length of time for the review depends on the type of offense committed and the length of the prison term, as follows:

- *Capital felony homicide*: A juvenile offender convicted of a capital felony homicide may be sentenced to life imprisonment if the judge, after considering specified factors at a mandatory sentencing hearing, determines that life is appropriate. Otherwise, the offender must be sentenced to a term of at least 40 years. Such a juvenile offender is entitled to have the court review the sentence after 25 years, unless he or she has previously been convicted of an enumerated offense, or conspiracy to commit an enumerated offense;[12]
- *First degree homicide*: If a juvenile offender is convicted of first degree felony homicide that carries a potential life sentence, and he or she is sentenced to a term of imprisonment of more than 25 years, then he or she is entitled to have the court review the sentence after 25 years;
- *First degree felony homicide*: If a juvenile offender was convicted of a homicide offense that carries a potential life sentence, but did not actually kill, intend to kill, or attempt to kill the victim, and he or she is sentenced to a term of imprisonment of more than 15 years, then he or she is entitled to have the court review the sentence after 15 years; and
- *Non-homicide offense*: If a juvenile offender is convicted of a non-homicide offense that carries a potential life sentence, and he or she is sentenced to a term of imprisonment of more than 20 years, then he or she is entitled to have the court review the sentence after 20 years. A juvenile offender denied modification is eligible for one subsequent review hearing 10 years after the initial review hearing.

The FDOC must inform an offender that he or she is eligible to request sentence review 18 months prior to the offender's eligibility. In order to seek review, the offender must then submit an application to the court. Upon receipt of an application, the court schedules a hearing, at which the offender may be represented by counsel, to determine whether to modify the offender's sentence. In determining whether modification is appropriate, the court must consider the following:

[11]Fla. Stat. § 921.1402.

[12]Enumerated offenses that prevent an entitled review are murder, manslaughter, sexual battery, armed burglary, armed robbery, armed carjacking, home-invasion robbery, human trafficking in children for commercial sexual activity, false imprisonment, and kidnapping. Fla. Stat. § 921.1402 (2)(a).

- whether the juvenile offender demonstrates maturity and rehabilitation;
- whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing;
- the opinion of the victim or the victim's next of kin;
- whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person;
- whether the juvenile offender has shown sincere and sustained remorse for the criminal offense;
- whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior;
- whether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available;
- whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense; and
- the results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

If the court determines that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court must modify the sentence and impose a term of probation of at least five years. If the court decides not to modify the sentence, it must issue a written order stating the reasons for its decision.

Delaware. Under Delaware law, juvenile offenders who receive long sentences of imprisonment for offenses committed when the offender was younger than 18 years old may seek sentence modification from the court.[13] Such a juvenile offender convicted of first degree murder may petition the court for a modification after serving 30 years of the original sentence. Such a juvenile offender convicted of any other offense may petition the court for a modification after serving 20 years of the original sentence. Offenders who submit a petition for modification may not submit a subsequent petition within five years of the original petition; a court may extend that time period if the court finds there to be no reasonable likelihood that the interests of justice will require another hearing within five years.

The legislature authorized the state court to promulgate rules to regulate the sentencing modification process. Under the court's rules, it will not accept a petition prior to the offender serving the time required by law.[14] While the law does not require offenders to be represented by counsel, the court rule provides that counsel may be appointed for indigent petitioners. Unlike the laws in Oregon and Florida, the law does not provide factors for the court to consider when deciding upon a modification petition. However, court rules permit a court to request additional information, which may include, but need not be limited to, the mitigating factors of the offender's youth at the time of the offense and the initial sentencing determination, the offender's rehabilitation, and certification by the Delaware Department of Correction that the release of the offender will not constitute a substantial risk to him or herself, or the community. The court cannot act upon the petition for modification without first providing the Attorney General with a reasonable period of time to be heard on the matter.

Colorado's specialized program for juvenile offenders. In 2016, the Colorado General Assembly enacted Senate Bill 16-180, which requires the Department of Corrections (DOC) to create a specialized program for offenders who committed a felony as a juvenile and were

[13]Del. Code tit. 11, § 4204A.
[14]Del. Super. Ct. Crim. R. 35A.

sentenced as an adult. The program must be designed to foster independent living skills development, reentry services, and intensive supervision and monitoring. The program is open to such offenders who meet eligibility requirements, such as obtaining a high school diploma or passing a high school equivalency exam, and demonstrating responsibility and commitment while participating in other DOC programs. Participants must also meet DOC criteria for placement in the program. Each offender must participate for a minimum of three years in order to complete the program. If an offender has served at least 25 calendar years of his or her sentence and successfully completed the program, it is presumed that the offender has met the factual burden of presenting extraordinary mitigating circumstances and that the offender's release to early parole is compatible with the safety and welfare of society.

Participants who complete the program may submit applications for early parole for review and approval by the Governor. At the time of application, notice must be provided to the State Board of Parole, which is to make a parole recommendation to the Governor within 90 days. The DOC must, in cooperation with the State Board of Parole, develop any necessary policies and procedures for implementation, including notice to victims and the prosecuting district attorney's office. Any victim must have the opportunity to be heard at the hearing.

Unlike second look sentencing, which authorizes the judicial branch to modify sentences, Colorado's specialized program continues to permit the executive branch to modify sentences by granting early parole, with input from the State Board of Parole. However, like second look sentencing policies, the program provides an opportunity for juvenile offenders sentenced as adults for sentence modification after a period of incarceration.

Sentence Modification for Adult Habitual Offenders in Delaware

In 2016, as part of a broader reform to its habitual offender sentencing scheme, Delaware enacted a law that provides for sentence modification for certain habitual offenders.[15] Beginning January 1, 2017, an offender sentenced as a habitual criminal before July 19, 2016, is eligible to petition the court for sentence modification once the offender has served the applicable minimum sentence for the committed offense if the habitual offender sentence is based on:

- the third commission of a violent felony or the fourth commission of any felony; and
- he or she was sentenced to a term of incarceration greater than the maximum for the offense.

Eligible offenders are allowed to file only one such petition, unless there are extraordinary circumstances.

The law provides a priority order for hearing sentence modification petitions from habitual offenders. The court must first hear petitions from offenders where the felony establishing habitual criminal status was a Health and Safety offense under state law, followed by petitions where the establishing felony is a crime against property, then all other offenses.

In considering such a petition, a court must review the applicant's prior criminal history, including arrests and convictions; the applicant's conduct while incarcerated; and available evidence as to the likelihood that the applicant will reoffend if released, including a formal, recent risk assessment. To ensure that victims are not inconvenienced by petitions that should be denied based on submitted documents, the law requires the Delaware Department of Justice to consult with victims of crimes against persons or property, and file a formal response to the

[15]Del. Code tit. 11, § 4214 (f).

petition for modification. If the petition is not denied based on the submitted documents and a hearing is held, victims must be given an opportunity to be heard. Following the review, the court may modify, reduce, or suspend the petitioner's sentence, including requiring a probationary term. The court must record the results of its review and its rationale for granting or denying a petition.

Proposed Adult Sentencing Second Look Provisions in the Model Penal Code

Each of the 50 states and the federal government maintain their own criminal laws. The American Law Institute (ALI), a non-governmental organization of judges, lawyers, and law professors in the United States, first developed the Model Penal Code (MPC) in 1962 as a means to introduce some uniformity in state criminal codes. Though the MPC is not binding on any jurisdiction, states have used it as a model to develop and organize criminal statutes.

In May 2017, the ALI approved an update to the sentencing provisions of the MPC. All prior versions of the update contained a second look provision for adults, but the approved final draft removed second look from the updated MPC. Instead, the second look provisions are included in an appendix as a set of "principles that a legislature should seek to effectuate through enactment of such a provision."[16] The principles included in the proposed section include the following:

- the legislature should authorize a judicial panel or other judicial decisionmaker to rule on applications for sentence modification;
- only offenders who have served at least 15 years of their sentence should be permitted to apply for modification;
- the DOC would notify victims of their second look rights, and courts may appoint counsel to assist indigent defendants;
- the standard for determining whether to modify a sentence is whether the purposes of sentencing are better served by sentence modification rather than completion of the original sentence;
- the modified sentence cannot be more severe than the original sentence, and cannot be limited by mandatory minimum sentencing laws;
- victims should receive notice of sentence modification;
- there should be a record and review of sentence modification decisions; and
- retroactive modification of sentences issued prior to the adoption of second look provisions should be considered.[17]

In the comments to the proposed set of principles, the MPC authors suggest two reasons for including the second look provisions for extraordinarily long sentences. First, American criminal justice systems' use of lengthy prison terms, which the comment notes are used more in the United States than other Western democracies, has a tremendous impact on U.S. incarceration policy, and the long sentence terms "make no allowance for changes in the crime policy environment." Second, the proposal is "rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives."[18]

[16]American Law Institute, Model Penal Code: Sentencing, Proposed Final Draft, Appendix A, p. 567, April 10, 2017, *available at*: https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017.
[16]*Ibid.* at 564-65.
[17]*Ibid.* at 568.

Concerns Regarding the Separation of Powers

Traditionally, it is within the judicial branch's authority to impose sentences, while it is the executive branch's responsibility for implementing sentences once they are imposed, including the chief executive's power to pardon or commute a sentence. Because there are no jurisdictions with second look provisions for adult offenders, no court has ruled on the constitutionality of such policies. However, concerns related to upholding the separation of powers between the branches as they relate to sentence modification are not new.[19] The United States Supreme Court has upheld sentence modifications in light of separation of powers arguments, and state courts have allowed sentencing modifications under rules similar to Rule 35(b), discussed above.[20] Please contact the Office of Legislative Legal Services for an opinion on whether any specific second look sentencing policies might violate the separation of powers doctrine.

[19]Klingele, Cecelia, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of early Release*, 52 Wm. & Mary L. Rev. 465, 524 (2010).

[20]*Ibid.* at 524-525, citing *United States v. Benz*, 282 U.S. 304 (1931) (U.S. Supreme Court upholding a sentence modification as a judicial act), and *People v. Smith*, 536 P.2d 820 (Colo. 1975) (Colorado Supreme Court ruling that a modification under a court rule similar to Rule 35(b) did not violate the separation of powers doctrine because the rule had the effect of suspending the finality of the sentence.).