

# THE JUSTICE COLLABORATIVE

## *Model District Attorney Sentence Review Guidelines*

*These “Model District Attorney Sentence Review Guidelines”, developed by The Justice Collaborative,<sup>1</sup> provide a detailed model of how elected prosecutors can develop and implement a sentencing review policy in their respective offices. This document is a companion piece to “Revisiting Past Extreme Sentences: Sentencing Review and Second Chances,” an “[Issues at a Glance](#)” brief developed by Fair and Just Prosecution (FJP) that discusses why, consistent with their mission to promote public safety, fiscal responsibility, and justice, prosecutors should seek to review and address excessive sentences that are currently being served.*

### INTRODUCTION

District Attorney<sup>2</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>3</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>4</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 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**

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<sup>1</sup> The Justice Collaborative Engagement Project is a 501(c)(4) research and advocacy organization devoted to holding public officials accountable for reforming the justice system and building healthier and safer communities. It is a project of The Advocacy Fund.

<sup>2</sup> The term “district attorney” or “DA” used here refers to a jurisdiction’s top criminal prosecutor.

<sup>3</sup> See Forman, James and Lustbader, Sarah, “Every D.A. in America 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>.

<sup>4</sup> 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>.

**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, DAs 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; and
- **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.

## **PROSECUTORIAL-LED SENTENCE REVIEW POLICY**

DA offices adopting this model policy, or portions of it, will establish policies to identify all individuals who previously received sentences from its office that are 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:** The review process;
- **Step 4:** Advocating for release;
- **Step 5:** Mechanisms to assist a person in seeking a reduced sentence;
- **Step 6:** Providing transition assistance;
- **Step 7:** Data collection.

**Step 1: Establishing the foundation for a sentence review unit.** To the extent budget and staffing permit, DAs' 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's 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's 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 DA 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 DA 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>5</sup>
- 4) **Data Collection:** The office should collect data for every person currently incarcerated following a conviction by that DA's 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

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<sup>5</sup> 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.

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 service providers in the community that can help ensure victims are supported through the process, have a chance to discuss any harm they suffered from the criminal behavior, and feel as if the justice system is inclusive of their point of view.<sup>6</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, since young people have both diminished culpability and greater prospects for reform.<sup>7</sup> If in the course of reviewing cases, the office uncovers a person who was sentenced to life without parole (LWOP) as a juvenile or to a sentence that did not provide the juvenile any meaningful opportunity for release,<sup>8</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>9</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's 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

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<sup>6</sup> 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>; "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/>.

<sup>7</sup> 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).

<sup>8</sup> 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>.

<sup>9</sup> 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>.

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; and
- 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's 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's 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 whom the DA's office prosecuted. The letter should 1) enumerate those previously prosecuted by the office in that facility; 2) enumerate those the DA's 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 office's 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>10</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>11</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 a 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 (not including felony murder);
- 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>12</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>13</sup> Such information is probably not discernible by data alone but

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<sup>10</sup> 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’s office to identify and assist as many people as possible who no longer need to be incarcerated.

<sup>11</sup> 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).

<sup>12</sup> 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.

<sup>13</sup> 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”).

outside groups, such as public defenders or incarcerated individuals themselves, may identify these cases for the office, which can then review case files;<sup>14</sup>

- the sentence imposed was infected by racial bias (for example, where there are disparate punishments for certain types of offenses).<sup>15</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>16</sup> Felony murder rules do not tie punishment to conduct and intent, and they are an anathema in the system.<sup>17</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 reviewing any case in which someone 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>18</sup>**

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<sup>14</sup> As with any of these categories, in particular any category that requires more than just looking at raw data, a DA's 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's offices should not allow the perfect to be the enemy of the good.

<sup>15</sup> 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.

<sup>16</sup> 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>.

<sup>17</sup> 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/2ATalXA>. 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/>.

<sup>18</sup> 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

Prison is no place for those who are sick, handicapped, and dying.<sup>19</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 may not be terminal but 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>20</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

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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/31VtrIo>.

<sup>19</sup> 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/2VkJK0V>.

<sup>20</sup> 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>.

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>21</sup> For all cases in which the office has determined that the person deserves a new, reduced sentence or early release, the office should write a recommendation, petition, or motion, depending on the appropriate procedural vehicle, for a new sentence, 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;

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<sup>21</sup> 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.

- any certificates of achievement or degrees the person earned while incarcerated;<sup>22</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>23</sup>and
- 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>24</sup> and prosecutors’ reflexive opposition to clemency has helped to defeat many meritorious petitions.<sup>25</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

<sup>22</sup> 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.

<sup>23</sup> Non-allocation or failure to secure a release plan does not justify lack of support.

<sup>24</sup> 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.cjpi.org/clemency>.

<sup>25</sup> 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).

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’s office or completely on their own—the office will support the petition if it otherwise meets this policy’s guidelines.<sup>26</sup>

If a jurisdiction does not provide a mechanism for a DA’s office to file a pleading in court to seek a reduced sentence,<sup>27</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; and
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>28</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, where available, they should allow community-based organizations outside of the DA’s office to develop and implement a person’s transition plan.<sup>29</sup>

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<sup>26</sup> It should be the rare occasion where a DA’s 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.

<sup>27</sup> 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).

<sup>28</sup> 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>.

<sup>29</sup> 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

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 board 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; and
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.

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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>.