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POSITION ON PROPOSED LEGISLATION

BILL: SB 771 – Maryland Second Look Act

FROM: Maryland Office of the Public Defender

POSITION: Favorable with amendments

DATE: 3/14/2023

The Maryland Office of the Public Defender respectfully requests that this Committee issue a favorable report with amendments on Senate Bill 771.

The Office of the Public Defender (OPD) supports the Maryland Second Look Act because it will create a needed procedural vehicle to allow courts to reduce unnecessary incarceration by releasing non-dangerous, rehabilitated individuals. Based on recent experience and legal developments, the OPD is proposing three friendly amendments.

The General Assembly has adopted "second look" provisions in the past to reduce unnecessary incarceration. As part of the Justice Reinvestment Act of 2016, it permitted people serving mandatory minimum sentences for drug felonies to file motions for reduction of sentence. As part of the Juvenile Restoration Act of 2021, it permitted people who had served at least 20 years for a crime that occurred when they were a minor to file a motion for reduction of sentence. These have been safe and effective ways to reduce mass incarceration in Maryland. If we trust judges to send people to prison for decades or even for life based on speculation that the person needs to be incarcerated to protect the public, then we ought trust judges to reduce those sentences when a defendant can show that they have been rehabilitated and would not pose a danger if released.

Based on its experience representing individuals on sentence reductions after the 2012 *Unger* decision, the 2016 Justice Reinvestment Act, and the 2021 Juvenile Restoration Act (JUVRA), the OPD knows that judges are more than capable of identifying people who can be safely released and modifying sentences accordingly. Counsel typically provide judges extensive information about the individual's childhood, the underlying crime, and, most importantly, their conduct while incarcerated to aid the court in making its decision. OPD, sometimes in collaboration with the Division of Correction, normally prepares release plans for clients to ensure they have the reentry support they need to be successful. The result is that rates of recidivism for people released after lengthy periods of incarceration through *Unger* and JUVRA have been very low, and many of those released have become forces for good in their communities.

Opponents to this legislation generally raise three points.

- First, they note that there are a number of other procedural vehicles to challenge a conviction or sentence in court, and suggest that this bill is unnecessary. This is incorrect. The procedural vehicles they cite require a showing of legal error, illegality, or newly discovered evidence, or they are time-limited so that they are no longer available when a person has served long enough to demonstrate significant rehabilitation, or they only apply to people convicted as adults for crimes occurring when they were children. None of them authorize a court to reduce a legal sentence of a person convicted of a crime that occurred when they were 18 or older after enough time has passed for the person to show that they have been rehabilitated. (If there was such a mechanism, we wouldn't need this bill!)

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- Second, they argue that the Parole Commission, not the courts, should decide whether a person should be released. The problems with this argument are that there is no recognized right to state-funded counsel for indigent people in parole proceedings, and even if a person can hire counsel, the lawyer is not permitted to participate in the parole hearing. In second look court hearings, however, there is a right to counsel. This is important because having a lawyer (often working with a social worker and/or a reentry specialist) makes all the difference in the world. The legal team can more effectively gather and present information, retain an expert if needed, develop a release plan, call witnesses, and elicit information helpful to the decisionmaker in making the right call.
- Third, opponents note that participating in these hearings can be hard on victims or victims' family members. That is unfortunately true. But it is important to remember a few things. First, the State's Attorney is only required to notify the victim or victim's representative if they have requested notification. A victim or victim's representative is never required to request notification. If notified, they are never required to appear for the hearing. If they appear, they cannot be required to speak. Second, the reality is that for as long as a person is imprisoned, they will seek opportunities to be released. It is human nature to try to get out of a cage. A victim who has requested notice will be notified of those efforts. Only two things will stop a caged person from trying to regain their freedom: release from incarceration, or death. When a rehabilitated, non-dangerous person is released, the hearings normally end.

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The OPD supports SB 771, and suggests the following amendments:

Proposed Amendment No. 1

Simplify the provision stating how long the person must serve before becoming eligible to file by changing subparagraph (a)(1)(i) as follows:

> (A) (1) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PERSON WHO IS SERVING A TERM OF CONFINEMENT MAY PETITION THE COURT TO MODIFY OR REDUCE THE SENTENCE, REGARDLESS OF WHETHER THE PERSON FILED TIMELY MOTION FOR RECONSIDERATION UNDER MARYLAND RULE 4–345(E) OR WHETHER A PRIOR MOTION FOR RECONSIDERATION WAS DENIED BY THE COURT, IF:
>
> (I) THE PETITIONER HAS SERVED ~~THE GREATER OF~~ AT LEAST~~:~~
>
> ~~1.~~ 20 YEARS OF THE TERM OF CONFINEMENT ~~WITHOUT APPLICATION OF DIMINUTION CREDITS; OR~~
>
> ~~2. THE EQUIVALENT OF 25 YEARS OF THE TERM OF CONFINEMENT WITH APPLICATION OF DIMINUTION CREDITS~~

This change would make a person eligible after serving 20 years, without regard to diminution credits. This has three main advantages. First, removing diminution credits from the standard makes it much less confusing. Second, it eliminates the need to ask the Department of Public Safety and Correctional Services' Commitments Unit to calculate diminution credits for every petitioner to determine when they are eligible to file. Third, the 20-year requirement is consistent with the Juvenile Restoration Act, which also requires a person to serve at least 20 years before they are eligible to file a motion for reduction of sentence.

Proposed Amendment No. 2

Modify paragraphs (e)(1) and (2) to remove the language creating a different standard for people who were under 18 at the time of the crime, as follows (and renumber the remaining paragraphs in subsection (e)):

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(E) (1) ~~FOR A PETITIONER WHO WAS SENTENCED TO A TERM OF CONFINEMENT FOR AN OFFENSE THAT WAS COMMITTED WHEN THE PETITIONER WAS A MINOR, THE COURT SHALL MODIFY THE SENTENCE IN A MANNER REASONABLY CALCULATED TO RESULT IN THE PETITIONER'S RELEASE WITHIN 3 YEARS IF THE COURT FINDS THAT THE PETITIONER HAS MATURED AND REHABILITATED SUCH THAT RETENTION OF THE SENTENCE IS NOT NECESSARY FOR THE PROTECTION OF THE PUBLIC.~~

~~(2) FOR A PETITIONER WHO WAS SENTENCED TO A TERM OF CONFINEMENT WHEN THE PETITIONER WAS AT LEAST 18 YEARS OLD,~~ THE COURT MAY MODIFY THE SENTENCE IF THE COURT FINDS THAT RETENTION OF THE SENTENCE IS NOT NECESSARY FOR THE PROTECTION OF THE PUBLIC.

The OPD is recommending this change because the 2021 Juvenile Restoration Act, codified in pertinent part at Criminal Procedure Article § 8-110, already provides a means for a person who was under the age of 18 when the crime occurred to file a motion for reduction of sentence.

Proposed Amendment No. 3

Remove subsection (f), which provides that either party may file an application for leave to appeal from the court's ruling. This language is unnecessary. Maryland's appellate courts routinely apply existing statutory and case law to determine whether a particular type of order is appealable. *See, e.g.*, *Brown v. State*, 470 Md. 503, 552 (2020) (concluding that an order denying a motion for modification of sentence under the Justice Reinvestment Act was appealable). Removing subsection (f) will ensure that the question of appealability is resolved in a manner consistent with the general law regarding appealability.

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For these reasons, we urge this Committee to issue a favorable report with the foregoing amendments for Senate Bill 771.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.

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