New York State Justice Task Force

Recommendations on Second Look Sentencing Reform

January 2024

I. Introduction

The New York State Justice Task Force (the "Task Force") was formed in May 2009 by Chief Judge Jonathan Lippman to identify practices that may contribute to wrongful convictions in the State and to consider measures to reduce—and, ideally, to eliminate—such convictions. In 2016, Chief Judge Janet DiFiore expanded the Task Force's mission to promote fairness, effectiveness, and efficiency in the criminal justice system; to eradicate harms caused by wrongful convictions; to further public safety; and to recommend judicial and legislative reforms to advance these causes throughout the state.

In April 2023, Hon. Rowan D. Wilson was confirmed as Chief Judge of the State of New York and elected to continue the Task Force's work. The Task Force's expanded mission to promote equality in the criminal justice system continues under Chief Judge Wilson's leadership.

The Task Force is chaired by Hon. Carmen Beauchamp Ciparick (Ret.), former Senior Associate Judge of the New York Court of Appeals, and Hon. Deborah A. Kaplan, Deputy Chief Administrative Judge for the New York City Courts. The Task Force's members represent a broad cross-section of the criminal justice community in New York State, consisting of judges, prosecutors, defense attorneys, law enforcement officials, victim advocates, and other stakeholders who are committed to investigating and building consensus around some of the most important and difficult issues in our criminal justice system.

Since its inception, the Task Force has studied and provided recommendations on a number of issues, including expanding the State's DNA databank; granting post-conviction access to DNA testing; utilizing electronic recordings of custodial interrogations; implementing best practices in identification procedures; granting greater access to forensic case file materials; reforming criminal discovery; using root-cause analysis to prevent wrongful convictions; addressing attorney misconduct; providing meaningful bail reform; and ensuring fair representation in the jury selection process. Davis Polk & Wardwell LLP has served as counsel to the Task Force since 2009.

II. Executive Summary

Chief Judge Wilson most recently reaffirmed the Task Force's ongoing efforts to examine racial disparities in the criminal justice system at all key stages of the process—from arrest through sentencing—with a goal of proposing broad reforms to effectively address these disparities and ensure a more just system for all New Yorkers.

In recognition of the complexity and breadth of the issues, as well as the need to make timely progress, the Task Force's recommendations to mitigate racial bias in the criminal justice system have been issued on a rolling basis. The Task Force's prior recommendations include the following: Recommendation on a Criminal Case Dispositions Working Group (February 2021), Recommendations Regarding Criminal Case Disposition Data (June 2021), Recommendations Regarding the Issuances of

Criminal Summonses (October 2021), and Recommendations Regarding Reforms to Jury Selection in New York (August 2022).

In this report, the Task Force turns its attention to sentencing reform, specifically "Second Look" reforms that enable courts to review and reevaluate an incarcerated person's sentence after the completion of the appellate process and after a period of time served to determine if the sentence is still necessary and in the interests of justice. Second Look aims to remedy the effects of "tough on crime" sentencing laws that, over the past several decades, have disproportionally impacted Black and Brown communities and have resulted in dramatic increases in sentence lengths for defendants of color.[1] Second Look allows incarcerated individuals serving lengthy sentences to apply for a judge to review and reconsider their sentences after a period of time served. These reassessments promote the interests of justice, relieve the prison system of costly incarceration that fails to serve public safety, and provide those who have rehabilitated themselves an opportunity to reunite with their loved ones and reenter the community. Importantly, Second Look also reduces racial disparities in sentencing. For these reasons, after careful deliberation and study, the Task Force concluded overwhelmingly to endorse Second Look reform.

As explained in greater detail below, in addition to supporting the concept of Second Look review, the Task Force endorsed 15 recommendations regarding the scope, elements, and process of a Second Look review. In particular, the Task Force recommends that:

1. Multiple stakeholders, including the incarcerated individual, the original prosecutor's office, the original sentencing court, the Department of Corrections and Community Supervision, the Board of Parole, and the Attorney General, should all be able to apply for a Second Look review;

2. Once initiated, the Second Look application should be assigned to the original sentencing court judge or the court in which the sentencing took place if the specific judge is unavailable;

3. In reviewing a Second Look application, an "interest of justice" standard should be applied;

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[1] *See* THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf (noting that tough-on-crime laws "contributed to a substantial increase in sentence length and time served in prison, disproportionately imposing unduly harsh sentences on Black and Latinx individuals"); *see also* THE SENTENCING PROJECT, A SECOND LOOK AT INJUSTICE 6 (2021), https://www.sentencingproject.org/app/uploads/2022/10/A-Second-Look-at-Injustice.pdf. ("Because of the dramatic increase in long prison terms in the United States, especially for African Americans, ending mass incarceration and tackling its racial disparities require a second look at long sentences. Currently, over 200,000 people are serving life sentences in U.S. prisons, more people than were in prison with any sentence in 1970. One in five imprisoned Black men is serving a life sentence."); VERA INSTITUTE, NEW YORK SHOULD PASS SECOND-LOOK LAW TO REDUCE THE PRISON POPULATION 2 (2022), https://www.vera.org/downloads/publications/New-York-Should-Pass-Second-Look-Law-to-Reduce-the-Prison-Population.pdf (highlighting that "Second-look laws would address racial disparities in New York's sentencing regime.").

4. An incarcerated individual should have the right to counsel in both the filing of a Second Look application and any subsequent hearing that takes place on such application;

5. There should be no exception to a Second Look review based upon an incarcerated individual's age at the time of the offense;

6. There should likewise be no exception to a Second Look review based upon an incarcerated individual's age at the time of application;

7. An incarcerated individual should serve a minimum of five years of their sentence before becoming eligible to apply for a Second Look review;

8. That five-year waiting period, however, should not apply if the Second Look review is initiated by the original prosecutor's office;

9. There should be no exceptions to Second Look review eligibility based on the offense committed;

10. The right to initiate a Second Look review should not be waivable as part of a plea bargain;

11. The court should have discretion in issuing a reduced sentence after considering a Second Look application;

12. Victims should be given notice of a court's consideration of a Second Look application, if not summarily denied, and be given the ability to submit a written statement or make an oral statement at any hearing;

13. Upon denial of a Second Look application, there should be a right to appeal;

14. Upon denial of a Second Look application and the exhaustion of appeals, an application should be able to be submitted again after two years, but this waiting period should not apply to the original prosecutor's office seeking a Second Look review; and

15. On an annual basis, the appropriate State agencies should provide data to both the prosecutor's office and defense counsel of record of incarcerated individuals meeting the above criteria for Second Look review.

III. Background

The Task Force's recommendations derive from the deliberations of a Task Force subcommittee, chaired by Judge Kaplan and Twyla Carter, Attorney-in-Chief and Chief Executive Officer of the Legal Aid Society, and focused specifically on studying Second Look reforms (the "Second Look Subcommittee" or the "Subcommittee"). As detailed below, the Subcommittee met five times over a period of six months, reviewed extensive materials from other jurisdictions and committees, heard from experts from across the country, and ultimately made proposals to be considered by the full Task Force.

A. Reforms Enacted in Other States

In crafting its recommendations, the Subcommittee considered other jurisdictions in which Second Look has been enacted. For example, both California and the District of Columbia ("D.C.") have passed second look reforms.[2] California's law was originally enacted in 1976, as part of the Determinate Sentencing Act. It authorized a court on its own motion and within 120 days after sentencing—or at any time upon the recommendation of the Secretary of the Department of Corrections and Rehabilitation, the Board of Parole Hearings, or the appropriate county correctional administrator—to recall the sentence of an incarcerated defendant and resentence that defendant to a lesser sentence. [3] Such opportunities were not restricted by age, sentence length, or offense type. In 2018, California expanded this law by amending it to allow the court to also recall and resentence a defendant upon the recommendation of the district attorney of the county in which the defendant was sentenced.[4] In 2021, this law was again amended to create a strong presumption in favor of resentencing, outline specific timelines to ensure timely adjudication, and provide for the assistance of counsel, among other changes.[5]

The Second Look reform enacted in D.C. follows a different model. In 2017, the D.C. Council passed a Second Look reform allowing incarcerated people to petition the court for a sentence review after serving 15 years if the person was under 18 years old at the time

[2] Cal. Penal Code § 1172.1; D.C. Code § 24-402.03.

[3] Cal. Penal Code § 1170(d)(1); A.B. 2942, 2017-2018 Reg. Sess. (Cal. 2018) (enacted) (recognizing that existing law authorizes a court on its own motion and within 120 days after sentencing, or at any time upon the recommendation of the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, to recall the sentence of a defendant who has been committed to state prison or county jail and resentence that defendant to a lesser sentence, as specified.); *see also Dix v. Superior Ct.*, 53 Cal.3d 442, 455 (1991) (recounting the history and purpose of California's resentencing law).

[4] A.B. 2942, 2017-2018 Reg. Sess. (Cal. 2018) (enacted).

[5] A.B. 1540, 2021-2022 Reg. Sess. (Cal. 2021) (enacted).

of the crime.[6] In 2021, the D.C. Council expanded the law to raise the "age at the time of the crime" eligibility requirement from under 18-years old to under 25-years old.[7]

D.C. and California are but two jurisdictions, among a growing number, that have enacted Second Look legislation, including Illinois, Louisiana, Maryland, and Oregon.[8]

B. Additional Second Look Proposals

In addition to those states that have already enacted Second Look legislation, a number of states—and the United States Congress—have proposed Second Look legislation, including New York State.[9] In New York specifically, the Second Look Act (S.321/A.531) was sponsored by State Senator Julia Salazar, Chair of the Committee on Crime Victims, Crime and Correction, and by Assemblywoman Latrice Walker in 2023 to allow certain incarcerated persons to apply for a sentence reduction.[10] This proposed Second Look Act aims to "address the harms caused by New York's history of imposing overly harsh sentences, including those required by mandatory minimums, by allowing judges to utilize their independent discretion in the interest of justice to reduce an individual's sentence."[11] The bill was referred to the Committees on Codes in both houses in January 2024 and remains pending.

A number of Bar Associations are similarly considering endorsing Second Look reforms, including both the American Bar Association (the "ABA") and the New York State Bar Association (the "NYSBA"). Specifically, the ABA Criminal Justice Section on Civil Rights and Social Justice adopted Resolution 502 in 2022, which "urges federal, state, local, territorial, and tribal governments to authorize judicial decision-makers to hear petitions for *de novo* 'second look' resentencing brought by any incarcerated person who has served at least ten continuous years of a custodial sentence."[12] The Sentencing Reform Subcommittee of the NYSBA Task Force on the Modernization of Criminal Practice has also proposed that the New York State Legislature enact legislation "[p]ermitting judicial decision-makers to review and consider modifying the sentence of a defendant who has served at least 10 continuous years of a sentence of imprisonment."[13]

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[6] D.C. Code § 24-403.03.

[7] *Id.*

[8] 725 Ill. Comp. Stat. Ann. 5/122-9 (formerly section 5/123); La. Stat. Ann. § 15:574.4.4; MD Senate Bill 0771 (2023); ORS § 137.218.

[9] *See, e.g.*, Fla. H.B. 1041 (2024); Va. S.B. 842 (2023); H.R. 9431, 117th Cong. (2022); S. 2146, 116th Cong. (2019).

[10] S.321/A.531, Sponsor's Memo, 2023-2024 Reg. Sess. (N.Y. 2023).

[11] *Id.*

[12] House of Delegates Resol. 502 (AM. BAR ASS'N 2022).

[13] N.Y.S. BAR ASS'N, REPORT ON THE PROPOSED LEGISLATION BY THE NYSBA TASK FORCE ON THE MODERNIZATION OF CRIMINAL PRACTICE, SENTENCING REFORM SUBCOMMITTEE (2023),

C. The Subcommittee's Deliberations

During its tenure, the Second Look Subcommittee heard presentations on various topics, including from academics, practitioners, and advocates.

At the Subcommittee's first meeting on July 6, 2023, Professor Steven Zeidman, Director of CUNY's Criminal Defense Clinic and an expert on Second Look, and Amanda Jack, Director of Policy and Criminal Defense Practice at Legal Aid, presented on alternative, forward-looking legislation. The Subcommittee learned about the general lack of options for incarcerated individuals in New York who have been rehabilitated and seek a review of their sentence. Specifically, the Subcommittee learned that limited mechanisms exist in New York for individuals to have their sentences revisited: parole is often denied because the focus is on the original crime rather than who the person is today; clemency or pardons are exceptionally difficult to obtain; and there is no ground to move to vacate a judgment in the interest of justice under section 440.10 of the Criminal Procedure Law. As a result, courts, prosecutors, defense attorneys, and incarcerated individuals and their families are often left without adequate—or any—recourse. The Subcommittee also learned about potential reforms to remedy these issues—including Second Look—and, according to Professor Zeidman, the moral imperative to pass Second Look and other such reforms. From Ms. Jack, the Subcommittee learned about the extent to which lack of access to mental health treatment further contributes to New York's crisis of mass incarceration.

On September 19, 2023, the full Task Force met to hear from John Maki, Director of the Council on Criminal Justice's Task Force on Long Sentences, and Liza Bayless, Policy Specialist at the Council on Criminal Justice, a nonpartisan organization and think tank that advances criminal justice policies aimed at addressing challenges facing the nation. The Task Force learned about the recommendations in the report of the Council's Task Force on Long Sentences about addressing sentencing issues, including racial disparities. The Task Force also heard how Second Look opportunities promote accountability and rehabilitation, especially when Second Look reforms are paired with programming in prisons and jails. The Task Force also learned about the ways that prosecutor-initiated resentencing reforms expand the role that prosecutors already play in advancing not just punishment and retribution, but also justice and fairness.

In order to better understand the impact of Second Look on incarceration rates and racial disparities in sentencing, the Subcommittee invited Dr. Nazgol Ghandnoosh, the Co-Director of Research at The Sentencing Project, a nonprofit organization engaged in research and advocacy for criminal legal reform, to make a presentation at its October 4, 2023 meeting. The Subcommittee heard about trends in recent incarceration levels in the U.S. and learned that, while incarceration rates have been steadily declining at a rate of 1-2 percent since reaching peak levels in 2009, this decline alone is insufficient to end mass incarceration in the foreseeable future. The Subcommittee also learned that racial disparities increase with sentence lengths. The Subcommittee also learned that, while 14

https://nysba.org/app/uploads/2023/06/final-report-Task-Force-on-Modernization-of-Criminal-Practice-June-2023.pdf.

percent of the general population is Black, 33 percent of the prison population is Black; and of those in prison serving more than 10 years, 46 percent are Black. Finally, the Subcommittee heard about the importance of ensuring reentry coordination and support to account for racial disparities even after resentencing.

The Subcommittee met again on October 24, 2023 with an interest in learning about the practical implementation and application of Second Look reform. To that end, the Subcommittee heard from Destiny Fullwood, Co-Executive Director at The Second Look Project, and Bryant Woodland, Reentry Coordinator at The Second Look Project, an organization that provides advocacy and legal support for individuals seeking relief from extreme sentences in D.C. The Subcommittee learned about the workings of Second Look in D.C., its impact on the prison population, and practical challenges to its implementation. The Subcommittee also heard about the development of reentry plans, identifying reliable service providers, and the need to provide ongoing support to released individuals as long as necessary to best effectuate the goals of Second Look reforms.

Finally, the Subcommittee met on November 28, 2023 to hear from Hillary Blout, Founder and Executive Director of For The People, a nonpartisan organization that supports prosecutors in examining sentences of incarcerated individuals and safely bringing people home from prison. Ms. Blout discussed Prosecutor-Initiated Resentencing ("PIR"), one version of Second Look that has been enacted in California. The Subcommittee learned about the mechanics of PIR, which involve a discretionary prosecutor-initiated look into an incarcerated individual. The Subcommittee also heard about the unique goal of these laws, which is to have a collaborative process between both the defense and prosecution in order to gather information on the incarcerated individual and to form a reentry plan. The Subcommittee also learned about the use of prison data in PIR, as well as the implementation of PIR and the potential impact of PIR laws in New York based on a demographic analysis of currently incarcerated individuals.

On December 13, 2023, following the Subcommittee's extensive discussions, presentations, and analyses on various reforms throughout the country, the Subcommittee put forth a series of proposed recommendations to be voted on by the full Task Force. The Task Force considered these proposed recommendations over the course of three separate meetings—on December 13, 2023, January 9, 2024, and January 22, 2024—allowing for robust discussion and deliberation on this topic.

IV. Recommendations

The Task Force intends the following recommendations to be read holistically as a complete package of reforms to mitigate racial bias in the criminal justice system. This is the first series of recommendations regarding sentencing reform following the Task Force's continuing efforts on the related topics of criminal case disposition data, the issuance of summonses, and jury selection.

A. Recommendation to Endorse the Concept of Second Look

After careful study and deliberation, the Task Force overwhelmingly endorsed Second Look reforms, which will allow the review and reevaluation of an incarcerated individual's sentence upon application and a period of time served. The Task Force's deliberations then moved to additional recommendations concerning the individual attributes and mechanics of such reforms.

B. Recommendations on the Elements of Second Look Reform

1. Multiple stakeholders in the criminal justice system should be empowered to initiate a Second Look review.

The Task Force had a robust discussion regarding which individuals or governmental bodies could initiate a Second Look review that would ultimately be considered by a court. In connection with this discussion, certain concerns were raised by some Task Force members for consideration, including that a review by stakeholders could overlap with the Board of Parole's responsibilities, as well as with the commutation power of the Governor, or that access to Second Look could strain the justice system, particularly in regions of New York with fewer resources. Other members believed that a Second Look review should be solely initiated by prosecutors, similar to California's initial model. However, other Task Force members argued that, in order to best meet the stated goals of serving justice and combating racial disparities, Second Look reviews should be broadly available, recognizing that this is merely an application that will ultimately be reviewed by a court with discretion to evaluate any eventual resentencing.

Ultimately, the Task Force recommends that multiple stakeholders should be able to initiate a Second Look review of an incarcerated individual's sentence, including:

- the incarcerated individual;
- the prosecutor's office originally responsible for the incarcerated individual's case;
- the sentencing court originally responsible for the incarcerated individual's case;
- the Department of Corrections and Community Supervision;
- the Board of Parole; and
- the Office of the Attorney General.

2. **The sentencing court judge or the court of original sentencing should be assigned for review and consideration of the Second Look application.**

The Task Force discussed which body should conduct the Second Look review, weighing the benefits of placing review in the Executive Chamber or the courts. The Task Force also considered the logistics of assignment to the court where the original sentencing judge may have retired. Some Task Force members queried whether review should be assigned to the Executive Chamber as part of the Governor's clemency and commutation powers, as well as whether the Executive Chamber would have the capacity and resources to complete such review. Other members questioned whether assigning cases to the court of the original sentencing, as opposed to the original sentencing court judge, would affect outcomes based on certain judges being more lenient or being resistant to modifying their own sentences. On the other hand, several members noted that there would be an advantage to assigning the review to the original sentencing court judge, since that judge would presumably be more familiar with their own cases.

A majority of the Task Force recommends that a Second Look application be submitted to the sentencing judge, or the court in which the sentencing took place if the specific judge is unavailable, for review and consideration.

3. **An "interest of justice" standard should apply in Second Look review.**

The Task Force discussed that, procedurally, once an application is made for a Second Look review, it must be submitted to a court for review and any resentencing would be in the discretion of that court. In conducting such a review, the Task Force discussed what standard should apply. Members considered one standard that provides that a new sentence must be issued where it is "in the interest of justice and consistent with public safety and rehabilitation of the incarcerated individual." This standard is similar to the one used in a number of Second Look reforms in other states,[14] as well as the standard proposed by the New York State Bar Association's Task Force on Modernization of Criminal Practice[15] and in the proposed New York bill.[16] The Task Force considered other standards, including one in which a new sentence be issued where it is "more likely than not that the incarcerated individual will not commit new criminal law violations if released," which is based on the standard used in Washington's 2014 Second Look reform;[17] and that a new sentence must be issued "unless, by clear and convincing evidence, there are no means to address the

[14] *See, e.g.*, Wash. Rev. Code Ann. § 36.27.130; Cal. Penal Code §§ 1170(d), 1172.1.

[15] *Legislation by the NYSBA Task Force on the Modernization of Criminal Practice*, Sentencing Reform Subcommittee (2023), https://nysba.org/app/uploads/2023/06/final-report-Task-Force-on-Modernization-of-Criminal-Practice-June-2023.pdf.

[16] A531, 2023-2024 Leg. Sess. (N.Y. 2023).

[17] Wash. Rev. Code Ann. § 9.94A.730.

unlawful behavior and promote community safety other than imprisonment," which resembles the standard set forth in a former New York bill proposed in 2021.[18]

The Task Force recommends by a majority vote that the body considering a Second Look review issue a new sentence when it is in the interest of justice and is consistent with public safety and rehabilitation of the applicant.

4. A right to counsel should attach for Second Look review.

The Task Force considered whether a lack of representation could negatively impact the effectiveness of any Second Look review and could even lead to further disparities in its application. The Task Force was generally of the view that any genuine review of a Second Look application must include a right to counsel. The Task Force then considered when that right attaches, and the pros and cons of the attachment at different stages of the review process.

By an overwhelming majority vote, the Task Force recommends that there be a right to counsel for Second Look review. After further deliberations, and consideration of how the application and review process would be conducted, the Task Force additionally recommends that the right to counsel attach during the filing of the application, and then continue through the commencement and conduct of a Second Look hearing, if applicable.

5. The availability of Second Look should not be restricted based on the incarcerated individual's age at the time of the offense.

The Task Force next considered whether Second Look should be uniquely available to individuals who are under a certain age at the time that they commit an offense. For example, D.C.'s Second Look reform requires that the incarcerated individual seeking modification of their sentence must have been under 25 years old at the time the offense was committed.[19] California and Washington similarly require that the incarcerated individual seeking modification of their sentence must have been under 18 years old at the time the offense was committed.[20] By contrast, Illinois and Louisiana have no age limitation.[21] Task Force members acknowledged the extensive research establishing that minors age out of crime. However, the Task Force came to the view that such a limitation prioritizes age over the consideration of other important factors relevant to whether an incarcerated individual should receive a reduced sentence and denies access for many applicants for whom a reduced sentence would be in the interest of justice.

[18] A9166, 2021-2022 Leg. Sess. (N.Y. 2021).

[19] D.C. Code § 24-403.03.

[20] Cal. Penal Code § 11170(d), 1172.1, 1170.03; Wash. Rev. Code Ann. § 9.94A.730.

[21] 725 Ill. Comp. Stat. Ann. 5/122-9; La. Code Crim. Proc. Ann. art. 930.10.

By a majority vote, the Task Force recommends that there be no restriction to an application for a Second Look review based upon an individual's age at the time of the offense's commission.

6. **The availability of Second Look should not be limited based on an incarcerated individual reaching a minimum age.**

The Task Force considered whether there should be a minimum age restriction in applying for a Second Look review in light of the reduced recidivism rates among older adults. Similar concerns and discussion topics were raised as in the prior recommendation. For similar reasons, the Task Force determined that the Second Look process should be flexible.

By an overwhelming majority vote, the Task Force recommends that there be no age restriction for eligibility to apply for a Second Look Review.

7. **An incarcerated person should serve a minimum of five years before becoming eligible for Second Look review.**

The Task Force engaged in an extensive and lively debate on whether an incarcerated individual should be required to serve a minimum portion of a sentence before becoming eligible for a Second Look review. A number of Task Force members noted that if an individual was not required to serve a minimum portion of a sentence, then individuals could seek a Second Look review immediately after sentencing, even before avenues of appeal were exhausted. These members expressed a concern that such a result could not only put further strain on the criminal justice system, but also deny closure to victims. Other members suggested that without a minimum amount of time served, the deterrent and rehabilitative value of sentencing would be minimized.

Ultimately, a significant portion of the Task Force recognized the importance of having a person serve a minimum portion of a sentence before being eligible to apply for a Second Look review. The Task Force, by a majority vote, thus recommends that there be a minimum period of time served before an individual can become eligible to apply for a Second Look review.

Having determined that there must be a minimum length of time served before becoming eligible to apply for a Second Look review, the Task Force engaged in a robust discussion on how much time would be required and how it would be calculated. In terms of calculating a minimum amount of time, the Task Force discussed whether it should be set in years, or whether it should be calculated as a percentage of the individual's sentence. Some Task Force members noted that the statutes reviewed—including but not limited to D.C., California, and Washington—generally set a minimum length of time in years rather than percentage of time served. Some members also queried whether such a determination was best left to the Legislature and preferred not to make a specific recommendation in this regard.

The Task Force, by a majority vote, determined that the minimum length of time served before an individual be eligible for a Second Look review be set in years.

The Task Force next considered the minimum number of years that should be required before a Second Look review is possible. To do so, the Task Force discussed what minimum sentence would be required to ensure rehabilitation of the incarcerated individual and effectuate the reform properly without burdening the courts or preventing closure for victims by a Second Look review being undertaken too quickly. While recognizing that certain other Second Look reforms and proposals involved 10-, 15-, or even 20-year minimum time served requirements, some Task Force members suggested that these were largely arbitrary minimums.

After discussion, the Task Force, by a majority vote, recommends there be a five-year minimum of time served before an individual is eligible for a Second Look review.

8. **The five-year restriction on Second Look eligibility should not apply for a Second Look review initiated by the prosecutor's office.**

The Task Force discussed whether there should be exceptions to the five-year waiting period for Second Look eligibility, and specifically whether the restrictions should apply if the Second Look review were initiated by the original prosecutor's office. Some members raised concerns about giving a special role to prosecutors in the Second Look review process. Other members, however, thought it was important that there be some limitation to this restriction and that prosecutors' offices were best positioned to exercise discretion without a temporal limitation, which would be more favorable to incarcerated individuals than not providing such ability.

The Task Force, by a majority vote, recommends that the five-year restriction on Second Look eligibility should not apply for a Second Look review initiated by the prosecutor's office.

9. **There should be no offense exceptions to Second Look review eligibility.**

The Task Force then discussed whether incarcerated individuals convicted of certain offenses should be ineligible for a Second Look review. Some Task Force members raised potential exceptions for sex offenses, crimes in which the victim was a public official, and other serious offenses. Other members raised the potential implications of such line drawing and whether such broad strokes failed to account for individual circumstances. Still other members raised whether the time at which Second Look review should be available should differ for different offenses, and whether this was essentially an exercise more suitable for the Legislature. Finally, some members voiced concerns about balancing fairness to victims with addressing racial disparities in mass incarceration.

Recalling that the purpose of Second Look is to address mass incarceration and racial bias, the Task Force, by a majority vote, recommends that there be no offense exceptions to a Second Look review.

10. **The right to initiate a Second Look review should not be waivable.**

The Task Force discussed whether incarcerated individuals could waive their right to a Second Look review in the course of negotiating a plea agreement. Some members expressed strong concerns about allowing such a waiver and stressed that it was important that prosecutors not be able to use the right to initiate a Second Look review as a bargaining tool during plea negotiations.

By an overwhelming majority vote, the Task Force recommends that there can be no waiver of the right to initiate a Second Look review.

11. **The court should have discretion in issuing a reduced sentence upon Second Look review.**

The Task Force considered how much discretion the sentencing judge or the court of the original sentencing court should have when resentencing incarcerated individuals if a Second Look application is both reviewed and a new sentence is required. Some members suggested that giving courts the discretion to order an incarcerated individual released—even when that person is subject to a mandatory minimum that has not been fully served—would enable courts to effectively evade the application of statutorily required mandatory minimum sentences. Some members argued that this was a benefit of Second Look review, noting the general unfairness of mandatory minimum sentences. Other members highlighted the need for accountability in sentencing, particularly where the offense is especially serious. Some Task Force members also expressed concerns with the possible negative impact on public trust in the justice system in the event that a court were to resentence an individual to a lower sentence for a serious offense through the Second Look process.

Ultimately, by majority vote, the Task Force recommends that, in conducting a Second Look review, the court may:

- issue a sentence less than the minimum term otherwise required;
- sentence the incarcerated individual to less than a minimum term of supervised release otherwise required by law;
- reduce the individual's sentence so that the individual will be eligible for immediate release; or
- impose a period of community supervision.

12. **Victims should be given advance notice of any Second Look hearings and be allowed to submit written or oral statements to the court.**

The Task Force engaged in an extensive discussion regarding the victim's role in a Second Look review. Task Force members were especially sensitive to the impact that any Second Look review of an incarcerated individual's sentence would have on crime victims. Some Task Force members thought it was important for victims to not only receive notice of a

Second Look review, but also be given an opportunity to be heard. Other Task Force members argued that while the victim should be given an opportunity to be heard, they should not be cross-examined as part of this process. On the other hand, some Task Force members thought it was equally important not to unnecessarily burden victims in cases where the Second Look application was likely to be denied on the papers, and where there was no likelihood of a new sentence being imposed.

After assessing these various objectives and concerns, the Task Force, by an overwhelming majority vote, recommends that unless the court denies the Second Look application on the papers, a victim shall be given notice of the court's consideration of the application at least 45 days in advance of any hearing or disposition by the court, and be given the opportunity to submit a written statement or make an oral statement at any hearing, which shall not be subject to cross examination.

13. **Applicants should be able to appeal Second Look review determinations.**

The Task Force considered whether applicants should have the right to appeal a denial of a Second Look application. In particular, some Task Force members analogized the right to appeal such a denial to the right applicants have to appeal a denial of parole.

By an overwhelming majority vote, the Task Force recommends that there should exist a right to appeal a Second Look review determination.

14. **Relevant stakeholders have the right to reapply for a Second Look review after two years from the time of denial, unless the Second Look review is initiated by the prosecutor's office.**

The Task Force considered whether there could be a subsequent application for a Second Look review after one had been denied. Relatedly, the Task Force discussed whether any such limitation would apply only to the incarcerated individual or to every stakeholder empowered to initiate Second Look review—such as the prosecutor's office originally responsible for the incarcerated individual's case, the sentencing court originally responsible for the incarcerated individual's case, the Department of Corrections and Community Supervision, the Board of Parole, and the Attorney General.

Some members questioned whether there should be a two-year limitation or a five-year limitation (similar to existing limitations for reapplication for parole), or whether another time limitation was more appropriate in this regard. Some Task Force members, comparing Second Look to the Governor's clemency and commutation process, noted that an applicant eligible for executive clemency must wait one year after a denial in order to reapply, and thought a similar time limitation should apply.[22] Other members argued that there should be no time limitation on the ability to reapply, highlighting that the expansion of

[22] *See* STATE OF N.Y. EXEC. CHAMBER, GUIDELINES FOR REVIEW OF EXECUTIVE CLEMENCY APPLICATIONS (2019), https://doccs.ny.gov/system/files/documents/2019/06/GRECA.pdf.

opportunities for release was the ultimate goal of Second Look reform, while others suggested that to allow no time between denial and reapplication would essentially create an endless repetition of applications. Still other Task Force members proposed a middle ground, offering that, if there should be a time limitation on the right to reapply, such limitation should not apply to reviews that are initiated by prosecutors' offices.

Ultimately, by a majority vote, the Task Force recommends that any individual or governmental body can reapply for a Second Look review after two years from the time of denial unless initiated by the prosecutor's office. In the case of the prosecutor's office, the Task Force recommends that there should be no time limitation on reapplication.

15. **On an annual basis, DCJS, DOCCS, and other relevant State agencies should provide data on which incarcerated individuals meet the criteria for Second Look review.**

Finally, the Task Force discussed the collection and reporting of data regarding individuals eligible for Second Look review. Some members noted that it was important that relevant stakeholders—and, in particular, the prosecutor's office empowered to initiate such applications—have the data necessary to make informed decisions about those eligible for a Second Look review. There was discussion regarding whether the Division of Criminal Justice Services ("DCJS") might be the appropriate body to conduct such data collection and dissemination, which led to consideration of the current technical limitations and the role that other State agencies may have in this process, and whether the Department of Corrections and Community Supervision ("DOCCS") should likewise be involved since it already collects data for purposes of parole. In addition to this data being shared with prosecutors' offices, some Task Force members expressed a desire that such data also be shared with defense counsel of record to ensure a fair process.

The Task Force recommends, by an overwhelming majority vote, that the DCJS, DOCCS, or any other applicable State agencies should annually provide data to both the district attorney's office and defense counsel of the incarcerated individuals meeting the criteria for Second Look review in their jurisdictions.