



**D.C. Criminal Code Reform Commission**  
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**ADVISORY GROUP MEMORANDUM #25**

**To:** Advisory Group Members  
**From:** Criminal Code Reform Commission (CCRC)  
**Date:** September 23, 2019  
**Re:** “Second Look” and Related Provisions in Other Jurisdictions

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This Memorandum (Memo) primarily reviews support in other jurisdictions and other authorities for a “second look” provision that allows courts to review a sentence after initial imposition and potentially resentence a person. Such a second look provision may significantly improve penalty proportionality in particular cases and may be the subject of a future Commission recommendation. Given the current legislative and public attention to the District’s second look provision, the Commission is sharing in this Memo the background information that the agency has already collected about second look and related provisions in other jurisdictions.

The District’s criminal code currently contains a second look provision, and a bill is also pending before the D.C. Council that would expand the applicability of that provision. Current D.C. Code § 24-403.03 allows for individuals who committed an offense before their eighteenth birthday and have served at least fifteen years in prison to move the court to reduce their sentence.<sup>1</sup> The provision requires the court to resentence a petitioner if it concludes that the petitioner is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.<sup>2</sup> In its analysis, the court considers a number of factors, including the history and characteristics of the defendant, Bureau of Prisons records, a statement from the victim or the victim’s family, evidence of rehabilitation, psychiatric examinations, and “any other information the court deems relevant”.<sup>3</sup> This second look provision differs from procedures that allow for resentencing shortly after the imposition of a sentence. The proposed Second Look

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<sup>1</sup> When considering the original legislation, the Committee on the Judiciary cited advances in understanding brain development in teenagers and young adults as a reason that a second look provision was necessary to evaluate the culpability and potential for rehabilitation of juveniles previously sentenced to lengthy prison terms. Committee on the Judiciary, *Report on Bill 21-0683, the “Comprehensive Youth Justice Amendment Act of 2016”*, (Oct. 5, 2016), available at: <http://lims.dccouncil.us/Download/35539/B21-0683-CommitteeReport1.pdf>. The Supreme Court has acknowledged the incomplete development of teenagers’ brains in barring certain sentencing schemes for juveniles. See *Roper v. Simmons*, 542 U.S. 551 (2005) (holding death penalty unconstitutional for juveniles); *Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole sentences unconstitutional for juveniles convicted of non-homicide offenses); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding mandatory life without parole sentences for juveniles unconstitutional).

<sup>2</sup> D.C. Official Code § 24-403.03(a)(2).

<sup>3</sup> *Id.* at (c).

Amendment Act of 2019<sup>4</sup> (“proposed legislation”) would amend D.C. Code § 24-403.03 to include individuals who committed their offense prior to their twenty-fifth birthday in the statute’s existing sentence review process.<sup>5</sup>

### *Summary of Second Look Provisions in Other Jurisdictions*

Across American jurisdictions, second look provisions that allow for judicial review of a sentence fall into two basic categories. The first category allows for the defendant alone to petition the court for a review of the sentence.<sup>6</sup> The second category requires that the petition for review comes from either the prosecutor or the parties jointly.

#### *Examples of First Category*

The American Law Institute (ALI) **Model Penal Code** (“MPC”) provides the most recent, authoritative statement by experts about best practices.<sup>7</sup> The MPC would require a judicial panel to review applications for modification of sentences for any individual that has served 15 years of a sentence.<sup>8</sup> The MPC statute does not restrict review to individuals who committed their offenses before a certain age or who committed a particular offense.<sup>9</sup> If a sentence review does not result in a sentence modification, the MPC permits individuals to reapply for review at least every ten years.

**California** allows petition for review by individuals who committed their offense prior to their 26<sup>th</sup> birthday.<sup>10</sup> The timing of eligibility depends on the original sentence and would occur in either their fifteenth, twentieth, or twenty-fifth year of incarceration. In 2014, California offered review only to individuals who committed their offenses prior to age 18. In 2016, the legislature expanded eligibility to individuals who committed their

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<sup>4</sup> <http://lms.dccouncil.us/Legislation/B23-0127>.

<sup>5</sup> Attached as Appendix A is a red-inked statute that shows how the proposed legislation would change the text. Red ink with strikethrough indicates current D.C. Code statutory text that would be repealed. Red ink without strikethrough (clean) indicates the new statutory language.

<sup>6</sup> Like most second look provisions, current D.C. Code does not address whether an individual may waive his or her right to file a second look provision in a plea agreement. At least one jurisdiction specifies that the right to apply for sentence modification is not waivable. *See* Ind. Code Ann. § 35-38-1-17 (“Any purported waiver of the right to sentence modification under this section in a plea agreement is invalid and unenforceable as against public policy.”)

<sup>7</sup> The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

<sup>8</sup> Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017).

<sup>9</sup> The commentary to the proposed language does not address age at the time of the offense. Instead, the second look provision “is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.” Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

<sup>10</sup> <https://www.cdcr.ca.gov/bph/youth-offender-hearings-overview/>.

offenses prior to age 23, and in 2018, the legislature expanded eligibility to those who committed their offenses prior to age 26.

In **Oregon**, sentencing courts automatically reconsider the sentences of individuals sentenced as adults for conduct occurring prior to their 18<sup>th</sup> birthday.<sup>11</sup> The reconsideration occurs once the individual has served half of the sentence originally imposed.

In 2016, **Delaware** began allowing individuals sentenced as habitual offenders to petition a Superior Court judge for modification of their sentence – once they have served any mandatory minimum sentence.<sup>12</sup>

In **Maine**, an individual sentenced to more than one year in prison may apply to the Supreme Judicial Court (currently delegated to the Law Court) for review of the sentence, except if a different term could not legally be imposed or the term was result of a court accepting a recommended sentence in a plea agreement.<sup>13</sup>

In **New Jersey**, a court can release a defendant into treatment at any time – or otherwise modify a sentence for good cause under a joint application of the parties.<sup>14</sup>

In 2019, **federal legislation**, the Second Look Act of 2019, was introduced by United States Senator Cory Booker and Representative Karen Bass and would allow individuals to petition the court for a reduction in their sentence after they have served ten years of a sentence.<sup>15</sup> The factors a court must consider are very similar to the District's existing second look provision.

### *Examples of Second Category*

The **Illinois** Supreme Court has repeatedly affirmed a revestment doctrine allowing for the return of jurisdiction to the trial court 30 days after the judgment is entered. The doctrine requires (1) active participation by the parties; (2) without objection; (3) in proceedings inconsistent with the merits of the earlier judgment.<sup>16</sup>

In **California**, the Secretary of the Department of Corrections and Rehabilitation, the Board of Parole, or the prosecuting district attorney's office can petition the Court to recall and resentence an individual to a sentence less than the original sentence.<sup>17</sup>

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<sup>11</sup> Or. Rev. Stat. § 420A.203.

<sup>12</sup> <http://legis.delaware.gov/json/BillDetail/GetHtmlDocument?fileAttachmentId=49686>.

<sup>13</sup> Me. Rev. Stat. tit. 15, § 2151.

<sup>14</sup> N.J. Rules of Court, R. 3:21-10(b).

<sup>15</sup> <https://www.congress.gov/bill/116th-congress/senate-bill/2146/text?q=%7B%22search%22%3A%5B%22second+look+act%22%5D%7D&r=1&s=2>

<sup>16</sup> *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983).

<sup>17</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2942](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2942).

Attached as Appendix B is a chart that shows how various jurisdictions and authorities do or do not have a lookback provision, and the nature of such a provision.

***Summary of Other Relevant Provisions: Parole, Good Time, and Commutations***

The rationale for second look provisions in a given jurisdiction depends, in part, on what other remedies there may be to review and change a sentence that no longer reflects the state's penological goals. For example, in many jurisdictions, parole boards determine whether an individual may be released from prison. Also, in most jurisdictions, executives have the power to commute sentences. The existence and nature of parole boards' and executives' authority to review and modify sentence may decrease the need for a judicial "second look" procedure, while the absence of these alternative remedies strengthens the case for judicial authority to conduct a review and modification.

Unlike all state jurisdictions, the District does not have a locally elected executive with the power to pardon or commute sentences; only the President can pardon individuals convicted of crimes in the District.<sup>18</sup>

The District of Columbia is one of 16 American jurisdictions without a local parole opportunity of any kind.<sup>19</sup> Of the other jurisdictions without parole, several have second look provisions that allow for sentences to be reviewed in certain circumstances.<sup>20</sup>

Most parole systems calculate eligibility using the length of the sentence minus "good time" credit and earned credit.<sup>21</sup> Regardless of good behavior, program completion, or employment in custody, the District requires inmates to serve at least 85% of a total sentence.<sup>22</sup> Because of this 85% rule—a rule followed by the federal Bureau of Prisons—sentences imposed in the District have a greater effect on imprisonment time,

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<sup>18</sup> The District's Mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code Ann. § 1-301.76. However, the extent of Mayoral power to pardon does not reach the overwhelming majority of District crimes. See *United States v. Cella*, 37 App. D.C. 433, 435 (1911) ("crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("...he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

<sup>19</sup> The following states do not have parole systems: Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. California has a parole system that is limited to life indeterminate life sentences. See Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), available at: [https://www.prisonpolicy.org/reports/parole\\_grades\\_table.html](https://www.prisonpolicy.org/reports/parole_grades_table.html)

<sup>20</sup> California, Delaware, Illinois, Maine, and Ohio have various second look provisions discussed elsewhere in this memorandum.

<sup>21</sup> "Good time" credit is a sentence reduction typically awarded for time without a new crime or disciplinary violation. Earned credit is typically awarded for program completion or employment while in custody.

<sup>22</sup> D.C. Code Ann. § 24-221.01b. For a jurisdiction-by-jurisdiction analysis of good time and earned time available, see Prison Fellowship, *Earned and Good Time Policies: Maximum Available Reductions*, available at: [https://www.prisonfellowship.org/wp-content/uploads/2019/07/GoodTimeChartUS\\_2018.pdf](https://www.prisonfellowship.org/wp-content/uploads/2019/07/GoodTimeChartUS_2018.pdf).

on average, as compared to other jurisdictions. For example, in their most recent analysis, the Bureau of Justice Statistics found that nationwide, individuals serve an average of 55% of their felony prison sentences, including an average of 61% of prison sentences for murder.<sup>23</sup>

*Examples of Parole and Good Time in Other Jurisdictions*

- In **California**, individuals receive 12 months' credit for each 6 months served – not including credit available for completion of certain programs.<sup>24</sup> California allows for parole in very limited circumstances (indeterminate life sentences) and has enacted second look sentencing review similar to that proposed by the Second Look Amendment Act.<sup>25</sup>
- In **Massachusetts**, individuals receive 30 days per year in good time credit but, through available programming, can earn credit up to 35% of their total sentence.<sup>26</sup> Individuals are eligible for parole hearings at the minimum of their sentence range minus any “good time.”<sup>27</sup> (Judges sentence individuals to a range of time with a minimum and maximum sentence length.) This setup often results in eligibility at approximately 2/3 of the bottom of their sentencing range.
- In **New York**, individuals can receive good time credit up to 1/3 of their maximum sentence on indeterminate sentences and 1/7 credit on determinate sentences.<sup>28</sup> New York has a parole system for indeterminate prison sentences in which judges set a sentencing range with a maximum sentence and a minimum sentence that is typically one-third of the maximum. Parole eligibility begins at the minimum sentence, less any earned credit received.<sup>29</sup>
- In **Alabama**, the parole system operates on top of a “good time” system that allows for up to 105 days credit for every 30 days served.<sup>30</sup> Inmates are then eligible for a parole hearing as follows<sup>31</sup>:

Less than 5 year sentence.....Placed on next parole docket

<sup>23</sup>See U.S. Dept. of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004—Statistical Tables* (2008), table 1.5. Available at: <https://www.bjs.gov/content/pub/html/scscf04/tables/scs04105tab.cfm>

<sup>24</sup> CA Penal Code § 2933 *et seq.* Not available to individuals convicted of murder and other violent felonies.

<sup>25</sup> California Department of Corrections and Corrections, available at: <https://www.cdcr.ca.gov/bph/lifer-parole-process/>; Cal.Penal Code § 3051.

<sup>26</sup> Mass. Gen. Laws ch. 127 §129(C& D).

<sup>27</sup> Mass. Gen. Laws ch. 127, § 133.

<sup>28</sup> N.Y. Corrections Law § 803.

<sup>29</sup> N.Y. Penal Law § 70.40.

<sup>30</sup> Ala. Code § 14-9-41.

<sup>31</sup> Alabama Board of Pardons and Paroles, *Operating Rules*, available at: <http://www.pardons.state.al.us/DisplayPDF.aspx?sh=Rules>

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5-10 year sentence.....18 months prior to minimum release date<sup>32</sup>  
10-15 year sentence.....30 months prior to minimum release date  
Greater than 15 years.....1/3 of sentence or 10 years, whichever is less<sup>33</sup>

- In **Mississippi**, individuals receive 4.5 days of good time per 30 days served and may earn credit for programs for up to 50% of their total sentence.<sup>34</sup> Most individuals are eligible for parole once they have served 25% of their sentence.<sup>35</sup>

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<sup>32</sup> The minimum release date is calculated by subtracting good time credit earned from the sentence length.

<sup>33</sup> For example, a Class II inmate (one whose jobs will be under the supervision of a correctional employee at all times) serving a sentence of 12 years would be eligible for parole approximately 2 years, 9 months into his or her sentence.

<sup>34</sup> Miss. Code § 47-5-138.

<sup>35</sup> Miss. Code § 47-7-3.

**APPENDIX A:**

§ 24-403.03. Modification of an imposed term of imprisonment for violations of law committed before ~~18~~ 25 years of age.

(a) Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant's ~~18th~~ 25th birthday if:

(1) The defendant was sentenced pursuant to § 24-403 or § 24-403.01, or was committed pursuant to § 24-903, and has served at least 15 years in prison; and

(2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

(b)(1) A defendant convicted as an adult of an offense committed before his or her ~~18th~~ 25th birthday may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court and a copy shall be served on the United States Attorney.

(2) The court may direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion. The court shall hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the defendant's behalf. The court may permit the parties to introduce evidence.

(3)(A) The defendant shall be present at any hearing conducted under this section unless the defendant waives the right to be present. Any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in the video teleconference.

(B) A defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility.

(4) The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section, but the court may proceed to sentencing immediately after granting the application.

(c) The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:

(1) The defendant's age at the time of the offense;

(2) The history and characteristics of the defendant;

(3) Whether the defendant has substantially complied with the rules of the institution to which he or she has been confined and whether the defendant has completed any educational, vocational, or other program, where available;

(4) Any report or recommendation received from the United States Attorney;

(5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which the defendant is imprisoned, or by a family member of the victim if the victim is deceased;

(7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent an adult was involved in the offense;

(10) The diminished culpability of juveniles as compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to lengthy terms in prison, despite the brutality or cold-blooded nature of any particular crime; and

(11) Any other information the court deems relevant to its decision.

(d) If the court denies or grants only in part the defendant's 1st application under this section, a court shall entertain a 2nd application under this section no sooner than 3 years after the date that the order on the initial application becomes final. If the court denies or grants only in part the defendant's 2nd application under this section, a court shall entertain a 3rd and final application under this section no sooner than 3 years following the date that the order on the 2nd application becomes final. No court shall entertain a 4th or successive application under this section.

(e)(1) Any defendant whose sentence is reduced under this section shall be resentenced pursuant to § 24-403, § 24-403.01, or § 24-903, as applicable.

(2) Notwithstanding any other provision of law, when resentencing a defendant under this section, the court:

(A) May issue a sentence less than the minimum term otherwise required by law; and

(B) Shall not impose a sentence of life imprisonment without the possibility of parole or release.



**APPENDIX B:**

<b>State</b>	<b>Judicial Second Look Provision Details</b>
Alabama	None.
Alaska	A sentence of imprisonment lawfully imposed exceeding two years for a felony or 120 days for a misdemeanor may be appealed to the court of appeals on the ground that the sentence is excessive, unless the sentence was imposed in accordance with a plea agreement that provided for imposition of a specific sentence or a sentence equal to or less than a specified maximum sentence. If the court imposed a sentence in accordance with a plea agreement that provided for a minimum sentence, the defendant may appeal that portion of the sentence that exceeds the minimum. Alaska Stat. Ann. § 12.55.120(a).
Arizona	None.
Arkansas	None.
California	Offenses committed before age 26. Cal. Penal Code § 3051.
Colorado	<i>Miller</i> Hearing: Resentencing for juveniles charged as adults who are serving life sentences without parole. Colo. Rev. Stat. Ann. § 16-13-1002.
Connecticut	None. Appears to have been considered. ( <a href="https://www.courant.com/opinion/op-ed/hc-op-levin-give-connecticut-jvenile-offenders-se-20140428-story.html">https://www.courant.com/opinion/op-ed/hc-op-levin-give-connecticut-jvenile-offenders-se-20140428-story.html</a> )
Delaware	Any person sentenced as a habitual criminal shall be eligible to petition the Superior Court for sentence modification after the person has served a sentence of incarceration equal to any applicable mandatory sentence otherwise required by this section or the statutes describing said offense or offenses, whichever is greater. Del. Code Ann. tit. 11, § 4214.  For other individuals, the department of corrections may apply to the board of parole to have an inmate released, and the board of rules may petition the court for the individual's release. Del. Code Ann. tit. 11, § 4217(f).
District of Columbia	Offenses committed before age 18. D.C. Code § 24-403.03.
Hawaii	None.
Illinois	Revestment doctrine allows for restoration of jurisdiction to district court for resentencing with consent of both parties. <i>People v. Kaeding</i> , 98 Ill. 2d 237, 241 (1983).
Indiana	The Court may resentence individuals whose offense of conviction occurred before 7/1/14 and is not excluded by statute. If the individual pleaded guilty pursuant to a plea agreement, the Court may not resentence individual to a sentence not authorized by the plea agreement. Ind. Code § 35-38-1.
Kansas	None.
Kentucky	None.

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Maine	Where a defendant has been sentenced to a term of imprisonment of one year or more, the defendant may apply to the Supreme Judicial Court (currently delegated to the Law Court) for review of the sentence, except if a different term could not be imposed or term was result of a court accepting a recommendation of plea agreement. Me. Rev. Stat. tit. 15, § 2151.
Maryland	An individual may appeal a sentence of more than 2 years to a 3-judge panel. Md. Code Crim. P. § 8-107.
Massachusetts	None.
Minnesota	None
Mississippi	None.
Missouri	The sentencing court may, upon petition, reduce any term of sentence or conditional release/parole pronounced by the board of probation and parole if the conviction involved drugs/alcohol but not violence, and the person has completed a detoxification and rehabilitation program - and the person is not a prior offender, a persistent offender, a dangerous offender, a persistent misdemeanor offender, a persistent sexual offender, or a class X offender. Mo. Ann. Stat. § 558.046.
Montana	None.
New Hampshire	An inmate may apply for suspension of the balance of their sentence once they have served 2/3 the minimum sentence. N.H. Rev. Stat 651:20(a).
New York	Any person convicted of a class B felony offense defined in article 220 of the penal law committed prior to 1/13/05, who is serving an indeterminate sentence with a maximum term of more than three years may apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence. N.Y. Crim. Proc. Law § 440.46.
North Dakota	None
Ohio	On the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section. Timing of eligibility depends on length of sentence. Certain offenses excluded. Ohio Rev. Code Ann. § 2929.20.
Oregon	When an individual committed their offense prior to age 18 and was sentenced to an adult sentence greater than 2 years, the sentence is automatically reviewed by the sentencing court once they have served half the sentence. Or. Rev. Stat. § 420A.203
Pennsylvania	Jail inmates only: (a) General rule.--Except as otherwise provided under this chapter or if the Pennsylvania Board of Probation and Parole has exclusive parole jurisdiction, a court of this Commonwealth or other court of record having jurisdiction may, after due hearing, release on parole an inmate in the county correctional institution of that judicial district. 42 Pa. Stat. and Cons. Stat. Ann. § 9776.
South Dakota	None.

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Tennessee	None.
Texas	None.
Utah	None.
Washington	At any time after the board has determined the minimum term of confinement of any person subject to confinement in a state correctional institution for a crime committed before July 1, 1984, the board may request the superintendent of such correctional institution to conduct a full review of such person's prospects for rehabilitation and report to the board the facts of such review and the resulting findings. Upon the basis of such report, the board may redetermine and refix such convicted person's minimum term of confinement whether the term was set by the board or the court. Wash. Rev. Code Ann. § 9.95.052.
Wisconsin	An inmate who is serving a sentence imposed under s. 973.01 for a crime other than a Class B felony may petition the sentencing court to adjust the sentence if the inmate has served at least the applicable percentage (75%-85%) of the term of confinement in prison portion of the sentence. Wis. Stat. Ann. § 973.195.