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**SECOND SUBSTITUTE HOUSE BILL 2001**

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**State of Washington 68th Legislature 2024 Regular Session**

**By** House Appropriations (originally sponsored by Representatives Simmons, Farivar, Reed, Ormsby, Peterson, Macri, Street, Stearns, Santos, and Pollet)

AN ACT Relating to providing judicial discretion to modify sentences in the interests of justice; amending RCW 10.73.100 and 9.94A.535; adding a new section to chapter 9.94A RCW; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  This act shall be known and may be cited as the judicial discretion act.

NEW SECTION. **Sec.**  (1) The legislature finds that long-term incarceration disproportionately impacts poor communities and communities of color. The legislature further finds that an expansive body of research demonstrates that lengthy sentences can increase, rather than reduce, recidivism. The legislature further finds that the potential to reduce a sentence encourages incarcerated individuals to engage in good behavior and to take advantage of rehabilitative programming. The legislature further finds that because the cost of long-term incarceration is substantial and the state must use its resources responsibly, providing judges the opportunity to modify lengthy sentences in the interests of justice will result in significant cost savings to the state.

(2) Therefore, the legislature intends to authorize sentencing courts to review lengthy sentences upon a showing that a person's original sentence no longer serves the interests of justice.

NEW SECTION. **Sec.**  A new section is added to chapter 9.94A RCW to read as follows:

(1) Except as provided in subsection (18) of this section, and notwithstanding any other provision of this chapter, any person under a term of partial or total confinement or subject to conditions of supervision by the department for a felony conviction may petition the sentencing court or the sentencing court's successor for a modification of sentence if the original sentence no longer serves the interests of justice and the person meets any of the following criteria:

(a) If the person is serving a sentence for a felony offense committed at 18 years of age or older, the person is eligible to petition after serving at least 10 years of their sentence;

(b) If the person is serving a sentence for a felony offense committed at 17 years of age or younger, the person is eligible to petition after serving at least seven years of their sentence; or

(c) If the petitioner does not meet the criteria under (a) or (b) of this subsection, the person is eligible to petition with the consent of the prosecuting attorney.

(2) A person eligible to file a petition for modification of sentence pursuant to subsection (1)(a) or (b) of this section may file the petition no earlier than 180 days prior to the date on which the person will have served 10 years in confinement, or, if the person is serving a sentence for an offense committed at 17 years of age or younger, no earlier than 180 days prior to the date on which the person will have served seven years in confinement.

(3) The petitioner must file the petition in writing with the sentencing court in the judicial district in which the original sentence was imposed and serve the prosecuting attorney. The petition may include affidavits, declarations, letters, prison records, or other written or electronic materials. The petition must include a statement by the petitioner and supporting documentation demonstrating that they meet one or more of the following requirements for a hearing:

(a) The petitioner has demonstrated positive, engaged, and productive behavior while in the custody of the department that indicates substantial rehabilitation;

(b) The petitioner has otherwise demonstrated a minimal risk of reoffense, which may include, but is not limited to, a demonstration of medical frailty; or

(c) The petitioner has presented evidence of some significant material fact not related to the crime and not in existence at the time of conviction, and such fact is relevant to the necessity of the current terms of sentence.

(4) The department shall assist the petitioner or the petitioner's counsel in compiling the petitioner's disciplinary record and record of rehabilitation to submit with the petition.

(5) If the court determines by a preponderance of the evidence that the petitioner meets one or more of the criteria under subsection (3) of this section, the court shall grant a hearing to consider the petition, which must be heard within 120 days. The hearing may be continued upon motion of the petitioner or the prosecuting attorney for good cause. In setting any hearing to consider a petition pursuant to this section, the court shall prioritize the scheduling of hearings for petitioners who are currently subject to total confinement.

(6)(a) At the hearing to consider the petition, the court may grant the petition and modify the petitioner's original sentence if the court finds that the sentence no longer advances the interests of justice, provided that any new sentence imposed shall not be greater than the original sentence, and provided that any new sentence imposed shall be subject to the following restrictions:

(i) If the petitioner's original sentence is an indeterminate sentence imposed under RCW 9.94A.507, the court may modify the minimum term of the sentence but may not modify the maximum term of the sentence or order the petitioner's release from custody;

(ii) If the petitioner's original sentence includes a mandatory minimum term imposed pursuant to RCW 9.94A.540, the court may not modify the sentence below the mandatory minimum term required by law; and

(iii) The soonest allowable release date from total confinement for any petitioner resentenced pursuant to this section may be no sooner than six months after the date of the hearing to consider the petition.

(b) In addition to the mitigating factors provided under RCW 9.94A.535(1), the court may consider the following nonexhaustive list of factors when determining whether to modify the petitioner's sentence:

(i) The petitioner's disciplinary record and record of rehabilitation while incarcerated;

(ii) Evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the petitioner's risk for future violence;

(iii) Evidence regarding the petitioner's circumstances at the time of the offense, or regarding the petitioner's level of culpability for the offense;

(iv) Evidence that reflects changed circumstances since imposing the petitioner's original sentence such that the sentence no longer serves the interests of justice;

(v) Evidence of some significant material fact, not related to the offense and not in existence at the time of conviction, that is relevant to the necessity of the current terms of sentence; and

(vi) Demonstration of an extraordinary adverse impact of the petitioner's release on the victim or survivors of the victim of the crime for which the petitioner is presently incarcerated, with special consideration given to the impact of release on any victims of sex offenses or domestic violence offenses committed by the petitioner against an intimate partner.

(7) When modifying a sentence pursuant to this section:

(a) The court may impose an exceptional sentence below the standard range based on evidence of significant rehabilitation since the offense or any other applicable factors; and

(b) If the petitioner's original sentence included one or more mandatory enhancements that were imposed under RCW 9.94A.533, the court may impose a sentence below the mandatory minimum enhancement term.

(8) If the court denies a petition filed pursuant to this section and declines to set a hearing, or grants a hearing but declines to modify the petitioner's sentence at the hearing, the petitioner may, upon a showing of a change in circumstances, file a new petition no earlier than three years after the date the court denied the previous petition or declined to modify the petitioner's sentence, unless the court authorizes the petitioner to file a new petition at an earlier date. If the court denies the petition or declines to modify the petitioner's sentence, the court shall state the basis for its decision on the record. The petitioner may appeal the denial of a hearing or an order entered pursuant to a resentencing hearing, provided, however, that denying a petition filed pursuant to this section shall not reopen the petitioner's conviction or sentence to any other challenges that would otherwise be barred.

(9)(a) The prosecuting attorney shall make reasonable efforts to notify victims and survivors of victims of any petition for modification of sentence filed pursuant to this section and the date of any hearing to consider the petition.

(b) For purposes of (a) of this subsection, the prosecuting attorney shall make reasonable efforts to notify victims and survivors of victims of any offense for which the petitioner is seeking a modification of sentence, and victims of any sex offense or domestic violence offense committed against an intimate partner victim for which the petitioner was previously convicted.

(10)(a) The office of crime victims advocacy shall create a flexible fund to serve victims and survivors of victims impacted by this act. The office may contract for administration of this fund. The flexible fund may be used for purposes including, but not limited to:

(i) Relocation assistance related to a change in safety planning associated with the petitioner's resentencing;

(ii) Traveling to and from court for resentencing hearings; and

(iii) Out-of-pocket expenses for psychotherapy associated with the committed offense or resentencing.

(b) The office of crime victims advocacy shall contract with prosecuting attorney's offices to offer victim advocacy services for victims impacted by this act. Such victim advocacy services must include:

(i) Legal advocacy to understand the resentencing process and how a victim can exercise their rights;

(ii) Safety planning;

(iii) Options to participate in a restorative justice program with the petitioner; and

(iv) Case management to address needs that may arise as a result of resentencing.

(c) The office of crime victims advocacy shall contract with an entity with expertise in victim services to provide training for victim advocates embedded within prosecutor's offices regarding safety planning and other case management services that victims impacted by this act may require.

(11) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the petitioner has been convicted to present a statement personally or by representation at the hearing. The prosecuting attorney and the court shall comply with the requirements set forth in chapter 7.69 RCW.

(12) The court shall not permit any person to waive the right to petition pursuant to this section. Any agreement to waive the right to petition pursuant to this section shall be void.

(13) The time limit for collateral attacks established under RCW 10.73.090 does not apply to any petition filed pursuant to this section.

(14)(a) Any incarcerated individual who is eligible to file a petition pursuant to this section, who the court has determined meets the criteria described under subsection (3) of this section, and who is unable to afford counsel, shall be entitled to have counsel appointed, at no cost to the individual, to represent the individual for the petition and proceedings under this section, unless the individual expressly waives the right to counsel after being fully advised of this right by the court.

(b) The office of public defense shall develop a triage plan to prioritize representation of incarcerated persons who file a petition pursuant to this section and:

(i) Were sentenced for crimes committed at 24 years of age or younger;

(ii) Are now over age 60 or suffering from a serious medical condition; or

(iii) Have served greater than 20 years in custody.

(15) Any person who files a pro se petition and subsequently retains or is appointed counsel shall be entitled to amend such petition at least once as of right with the assistance of counsel. Subsequent amendments may be permitted by leave of court.

(16) The department shall provide written notice of this section to any incarcerated individual sentenced to a term of confinement of more than 10 years, and the applicable sentencing court, prosecuting attorney, and public defense agency for the judicial district in which the individual was sentenced, within the following time frames:

(a) For any incarcerated individual serving an applicable sentence for a felony offense committed at 18 years of age or older, the department shall provide written notice of this section no later than 180 days before the date on which the person's 10th year of confinement begins; and

(b) For any incarcerated individual serving an applicable sentence for a felony offense committed at 17 years of age or younger, the department shall provide written notice of this section no later than 180 days before the date on which the person's seventh year of confinement begins.

(17) When any person granted a modified sentence pursuant to this section is within six months of his or her expected release date from total confinement, the department of corrections must prepare and make available an individual reentry plan under chapter 72.09 RCW and the resources necessary for the person to complete the plan.

(18) A person may not petition for a modification of sentence pursuant to this section if the person's original sentence was imposed under RCW 9.94A.570 or 10.95.030.

**Sec.**  RCW 10.73.100 and 1989 c 395 s 2 are each amended to read as follows:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant ((~~pled~~)) pleaded not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; ((~~or~~))

(6) A petition for a modification of sentence pursuant to section 3 of this act; or

(7) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

**Sec.**  RCW 9.94A.535 and 2019 c 219 s 1 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in RCW 9.94A.030, and the sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(l) The defendant petitions the court for modification of sentence pursuant to section 3 of this act, and the court considers the nonexhaustive list of additional factors provided under section 3(6)(b) of this act at a hearing on the petition.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

(ff) The current offense involved the assault of a utility employee of any publicly or privately owned utility company or agency, who is at the time of the act engaged in official duties, including: (i) The maintenance or repair of utility poles, lines, conduits, pipes, or other infrastructure; or (ii) connecting, disconnecting, or recording utility meters.

NEW SECTION. **Sec.**  If specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2024, in the omnibus appropriations act, this act is null and void.

**--- END ---**