

**PRACTICE ADVISORY** |5/13/2020 | Cindy Arends Elsberry

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**Prosecutor Has Discretion to Seek Resentencing – Effective Date June 11, 2020**

See [SB 6164](https://app.leg.wa.gov/billsummary?BillNumber=6164&Year=2019&Initiative=false) Amending [RCW 36.27](https://app.leg.wa.gov/RCW/default.aspx?cite=36.27)

In 2020, the Washington Legislature passed SB 6164, creating a new procedure for prosecutors to petition a sentencing court (or the court’s successor) to resentence an individual previously convicted and already sentenced for a felony ***“if the original sentence no longer serves the interests of justice.”*** The trial court has discretion to grant or deny the petition.

If the court grants the petition, the individual receives a new sentencing hearing. The court will resentence the individual “as if they have not previously been sentenced.” The new sentence cannot be greater than the original sentence.

The trial court may consider post-conviction factors, including but not limited to:

* + Discipline and rehabilitation while incarcerated;
  + Evidence that supports that an individual’s age, diminished physical condition (if any), or time served reduces the risk for future violence;
  + Evidence of changed circumstances since the original sentencing such that incarceration no longer serves the interests of justice.

There are no limits on the types of offenses eligible. This legislation provides ONLY prosecutors with new legal authority to bring a petition for resentencing in the interest of justice; it does not create a new process for individuals to petition for a resentencing hearing and does not address the role of defense counsel in the process leading up to the prosecutor filing a petition.

This legislation gives prosecutors and courts a powerful tool to correct injustices and bring older sentences more closely in line with recent changes to sentencing practices, including:

* Robbery in the second degree no longer being included in the definition of “most serious offense” (aka no longer a “strike” offense) (2019);
* A separate drug grid introduced in 2002, creating a separate sentencing scheme for drug offenses;
* Recognition of youth/developmental maturity as a mitigating circumstance for a declined youth or young adult sentenced in adult court for a felony.

The legislation also offers prosecutors a chance to support compassionate release for an individual with health issues or to take into account the impact of confinement on the individual or the individual’s family. Additionally, resentencing could assist noncitizens to avoid deportation where a reduced sentence could avoid having the conviction trigger deportation grounds.

Courts may question whether they have authority to act based upon *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)(a person may only be released early from a sentence as permitted pursuant to the SRA). Defenders can cite to the purpose of the legislation found in section one (1) of the bill to argue that this legislation supersedes *Shove*, granting authority for courts to act on these petitions.