STATE OF NEW YORK

8894

IN ASSEMBLY

January 19, 2022

Introduced by M. of A. WALKER -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to authorizing certain persons confined in institutions operated by the department of corrections and community supervision to apply for a sentence reduction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 440.45 to read as follows:

§ 440.45 Application for sentence reduction.

1. (a) Notwithstanding any other provision of law, including any minimum sentence requirement, any person confined in an institution operated by the department of corrections and community supervision who has served ten years of their sentence, or one-half of the minimum term of an indeterminate sentence where the minimum term equals or exceeds ten years, or one-half of a determinate sentence where the sentence equals or exceeds ten years, whichever is less, may apply for a reduction of their sentence pursuant to the provisions of this statute. For the purposes of this subdivision, the term "sentence" shall include any aggregate sentence where consecutive sentences are imposed.

(b) Notwithstanding paragraph (a) of this subdivision, an otherwise ineligible person shall be deemed eligible to apply for a reduction in sentence upon consent of the prosecutor in the underlying criminal action in which the sentence was imposed.

(c) Notwithstanding paragraph (a) of this subdivision, the prosecutor in the underlying criminal action in which a sentence was imposed may initiate an application for resentencing on behalf of the incarcerated person and upon such application an attorney shall be assigned to represent the incarcerated person in proceedings pursuant to this section.

(d) No waiver of the right to make an application for a sentence reduction under this section shall be permitted or honored by the sentencing court. Any such waiver shall be deemed void and unenforceable.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(e) No less than thirty days before the date on which the person becomes eligible pursuant to paragraph (a) of this subdivision to apply for a sentence reduction, the department of corrections and community supervision shall provide written notice of this section and its provisions to:

(i) the defendant;

(ii) the attorney of record;

(iii) the administrator of the county panel established for purposes of the administration of article eighteen-B of the county law and all institutional offices that provide criminal defense services within the county in which the sentence was imposed;

(iv) Prisoners' Legal Services of New York;

(v) the sentencing court;

(vi) the prosecutor in the underlying criminal action in which the sentence was imposed; and

(vii) the district attorney in the county in which the sentence was imposed.

(f) A person who is eligible for a sentence reduction pursuant to this subdivision may request that the court assign him or her an attorney for the preparation of and proceedings on the application for resentencing pursuant to this section. The attorney shall be assigned in accordance with the provisions of subdivision one of section seven hundred seventeen and subdivision four of section seven hundred twenty-two of the county law and the related provisions of article eighteen-A of such law for the application and any proceedings under this section, including any appeal and successive application. The court shall notify the applicant about the appointment of counsel.

2. (a) An application for a sentence reduction under this section shall be filed in the county in which the sentence was imposed to reduce the sentence of the applicant pursuant to this section and may include affidavits, letters, declarations, records from the department of corrections and community supervision, video submissions, or any other written or electronic material.

(b) Upon the court's receipt of an application for a sentence reduction, the court shall promptly notify the appropriate prosecutor and provide such prosecutor with a copy of the application.

(c) An application filed pursuant to this section shall be randomly assigned by the administrative judge designated by the office of court administration with jurisdiction over the county where the application is filed to any superior court judge with criminal jurisdiction other than the judge who first sentenced the applicant unless the judge who first sentenced the applicant is the only judge in that county.

(d) An application filed under this section may be amended or supplemented as necessary.

(e) After the filing of an application to reduce a sentence under this section, the court may direct the parties to expand the record by submitting additional written materials relating to the application.

(f) (i) The court shall, upon request of the applicant or the prosecuting office, conduct a hearing on the application, at which the applicant and counsel for the applicant shall be given the opportunity to be heard. Such hearing shall be recorded or transcribed. The applicant has the right to be present at any such hearing unless the applicant waives the right to be present in writing.

(ii) In a hearing pursuant to subparagraph (i) of this paragraph, the court shall allow parties to present any evidence pertinent to the issue of a sentence reduction and the factors outlined in paragraph (b) of

subdivision four of this section. Such evidence may include documents, live testimony, tangible objects, or any other class of evidence or information pertinent to sentencing. At such hearing, the applicant shall have the right to make a statement personally, on their own behalf, in the same manner as provided in subdivision one of section 380.50 of this part.

3. (a) Notwithstanding any other provision of law, a court shall reduce a term of imprisonment imposed upon a defendant if:

(i) the applicant is eligible pursuant to subdivision one of this section; and

(ii) the court finds, after considering the factors set forth in subdivision four of this section, that the interests of justice warrant a sentence modification.

(b) (i) Notwithstanding any other provision of law, when reducing an applicant's sentence under this section, the court may issue a sentence less than the minimum term otherwise required by article seventy of the penal law. Otherwise, the applicable provisions in article seventy of the penal law in effect at the time of the sentence reduction shall apply.

(ii) Notwithstanding any other provision of law, when reducing an applicant's sentence under this section, the court may issue a sentence to be served concurrently to any other sentence of imprisonment, being served by the applicant.

(iii) Notwithstanding any other provision of law, when reducing an applicant's sentence under this section, the court may sentence the applicant to a less than minimum term of supervised release otherwise required by law.

(c) In ordering a sentence reduction, the court shall, unless counter-vailing considerations require, reduce the applicant's sentence so that the applicant will be eligible for immediate release from prison after the necessary calculations.

(d) The court may not increase any applicant's sentence, and if the original judgment was the result of a plea agreement, resentencing pursuant to this section shall not constitute grounds for a prosecutor or the court to withdraw their agreement to the original plea agreement.

4. (a) There shall be a rebuttable presumption that the applicant's sentence shall be reduced in the case of:

(i) an applicant who is fifty-five years of age or older on the date on which the applicant files an application for a sentence reduction pursuant to subdivision one of this section; or

(ii) an applicant who was twenty-five years old or younger on the date on which the applicant committed the offense or offenses for which the applicant is imprisoned.

(b) The court, in determining whether to reduce a term of imprisonment pursuant to subdivision three of this section, shall consider the following factors:

(i) the history and characteristics of the applicant at the time of the application for a reduction in sentence, including but not limited to:

(1) any history of abuse, trauma, or involvement in the child welfare system;

(2) the potential benefits to children and family members of reunifi-cation with the applicant;

(3) rehabilitation demonstrated by the applicant;

(4) the applicant's records while incarcerated; and

(5) the applicant's efforts to participate in educational, therapeutic, and vocational opportunities while incarcerated to the extent such programs were available; provided however that the fact that the applicant may have been unable to participate in treatment or other programming while incarcerated despite such applicant's willingness to do so shall not be considered a negative factor in determining an application pursuant to this section;

(ii) the circumstances of the offense, including the applicant's role in its commission, whether the applicant was under the influence of another, and whether there is any other factor that would tend to diminish the applicant's culpability;

(iii) any report from a physical, mental, or psychiatric examination of the applicant conducted by a licensed healthcare professional;

(iv) any statement offered in response to this application by any victim of an offense for which the applicant is imprisoned or by a family member of the victim if the victim is deceased;

(v) any evidence concerning whether the applicant's sentence was enhanced because the applicant exercised their constitutional right to a trial, including but not limited to, evidence concerning the plea offers made prior to the trial;

(vi) any presentation of argument and evidence by counsel for the applicant or by the applicant;

(vii) any presentation of argument and evidence by the prosecutor; and

(viii) the financial cost of continued incarceration to the state and/or localities.

5. A written order determining an application for reduction of sentence shall issue forthwith and in no event later than thirty days after any hearing or after all submissions have been filed if no hearing is held. Such an order shall include detailed written findings of fact and the reasons for granting or denying the application.

6. In calculating any new sentence to be served by the applicant, such applicant shall be credited for any jail time credited towards the subject convictions as well as any period of incarceration credited toward the sentence or sentences originally imposed.

7. An appeal may be taken as of right in accordance with applicable provisions of this chapter:

(a) from an order denying the application for a sentence reduction; or

(b) from a new sentence imposed under this section and may be based on the grounds that:

(i) the term of the new sentence is harsh or excessive; or

(ii) the term of the new sentence is unauthorized as a matter of law.

8. The applicant shall be permitted to file successive applications and such applications shall not be considered more than once every three years.

9. (a) This section shall not be construed to abridge or modify any existing remedy an incarcerated individual may have under habeas corpus, statutory or judicial postconviction relief, or any other legal framework.

(b) An application under this section shall not impact in any way or be impacted in any way by any pending habeas or other postconviction proceeding, nor shall the denial of an application under this section preclude such remedies from being granted.

10. In three years, the comptroller shall conduct an analysis of savings found from decarceration and shall make recommendations to the legislature regarding diverting such savings to fund prison-based and community-based programs designed to counter recidivism through educa-

tion, therapeutic intervention, maintenance of familial and social networks, restorative justice practices for survivors of crimes, and successful post-custodial re-entry to society.

11. (a) The clerk of the court upon determination of an application filed pursuant to this section shall report the following information to the office of court administration:

(i) the name, department identification number, and race of each incarcerated person who has been denied or granted resentencing;

(ii) how many years of imprisonment each incarcerated person served at the time of the application;

(iii) any new sentence if applicable;

(iv) the county and the name of the judge deciding the application;

(v) whether the prosecutor consented, opposed or took no position on the application; and

(vi) if any prior applications had been submitted and the date such applications were decided.

(b) The office of court administration shall provide an annual collective report containing the information received from the clerks of the court pursuant to paragraph (a) of this subdivision to the governor and legislature.

§ 2. Any applicant who is immediately eligible to apply for a sentence reduction pursuant to section 440.45 of the criminal procedure law shall be provided the notice required pursuant to paragraph (d) of subdivision one of such section within sixty days of the effective date of this act.

§ 3. This act shall take effect immediately and shall apply to offenses committed prior to, on or after the effective date of this act.