

**§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons.<sup>1</sup>**

**(1) An offender under any sentence of imprisonment shall be eligible for judicial modification of sentence in circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence.**

**(2) The department of corrections shall notify prisoners of their rights under this provision when it becomes aware of a reasonable basis for a prisoner's eligibility, and shall provide prisoners with adequate assistance for the preparation of applications, which may be provided by nonlawyers.**

**(3) The courts shall create procedures for timely assignment of cases under this provision to an individual trial court, and may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under the standard of subsection (7).**

**(4) The trial courts shall have discretion to determine whether a hearing is required before ruling on an application under this provision.**

**(5) If the prisoner is indigent, the trial court may appoint counsel to represent the prisoner.**

**(6) The procedures for hearings under this Section shall include the following minimum requirements:**

**(a) The prosecuting authority that brought the charges of conviction against the prisoner shall be allowed to represent the state's interests at the hearing;**

**(b) Notice of the hearing shall be provided to any crime victim or victim's representative, if they can be located with reasonable efforts;**

**(c) The trial court shall render its decision within a reasonable time of the hearing;**

**(d) The court shall state the reasons for its decision on the record;**

**(e) The prisoner and the government may petition for discretionary review of the trial court's decision in the [court of appeals].**

**(7) The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the purposes of sentencing in § 1.02(2).**

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<sup>1</sup> This Section was originally approved in 2011; see Tentative Draft No. 2.

**(8) The court may modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law.**

**(9) When a prisoner who suffers from a physical or mental infirmity is ordered released under this provision, the department of corrections as part of the prisoner's reentry plan shall identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.**

**(10) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by courts when considering the modification of prison sentences under this provision.**

**Comment:**<sup>2</sup>

*a. Scope.* This provision is new to the Code. Most state codes include sentence-modification provisions that permit the “compassionate release” or “medical parole” or “geriatric release” of aged or infirm prisoners, although the relevant terminology and eligibility criteria vary widely. A handful of jurisdictions have enacted provisions that include broader or open-ended standards. Current federal law on the subject states that “extraordinary and compelling reasons” may warrant the reduction of an incarceration term. These expressly include exigent family circumstances such as the death of a spouse who was the sole caretaker of the prisoner’s minor children. Section 305.7 embraces and combines all of the above grounds for sentence modification into a single provision, to be administered by trial courts in light of the underlying purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007).

The sentence-modification authority under this Section may be exercised at any time during a term of imprisonment. The provision is intended to respond to circumstances that arise or are discovered after the time of sentencing, when those circumstances give compelling reason to reevaluate the original sentence.

*b. Criteria for eligibility.* Subsection (1) sets forth the grounds for eligibility for sentence modification, which include “circumstances of the prisoner’s advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence.” Subsection (1) interlocks with subsection (7), which requires that such considerations “justify a modified sentence in light of the purposes of sentencing in § 1.02(2).” This standard is enforceable by an appellate court, via discretionary review under subsection (6)(e), and may be elucidated both by the accumulation of judicial precedent, and by sentencing guidelines promulgated by the sentencing commission under subsection (10).

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<sup>2</sup> This Comment has not been revised since § 305.7’s approval in 2011. All Comments will be updated for the Code’s hardbound volumes.

The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner who reaches an advanced age while incarcerated, or a prisoner whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement. Subsection (1) makes separate provision for circumstances of age and infirmity. This is because advanced age may limit a person's capabilities, including the physical wherewithal to commit criminal acts, even in the absence of illness, injury, or special disability. Most states provide for the early release of aged and physically infirm inmates, or their removal to other institutions or programs. Some limit their provisions to cases of terminal illness or other very extreme conditions such as paralysis or a coma. The revised Code eschews such a narrow approach in favor of a standard that allows the courts to assess the full context of the situation, including the prisoner's condition and capabilities, and the presence or absence of reasons for continued confinement.

Only a minority of compassionate-release laws embrace serious mental infirmities, but the revised Code recommends that this should become the universal practice. While estimates vary, it is clear that a substantial percentage of inmates in the nation's prisons suffer from mental illnesses. Often, effective treatment is unavailable in prison, conditions of the institution may exacerbate the inmate's condition, and the inmate's impairment may make it impossible to navigate the daily life of the penitentiary.

No state code expressly authorizes prison sentence reductions on grounds of exigent family circumstances, but the principle is incorporated into the current federal code and sentencing guidelines. Given the powerful collateral effects of prison sentences on families, and the well-documented concern that incarceration of a parent is highly correlated with later offending by children, the sentencing system must be permitted in "exigent" circumstances to take account of third-party consequences of the penalties it imposes, and avoidable future harms that may be generated by the legal system itself. More broadly, the express reference to exigent family circumstances in subsection (1) signals that § 305.7 is not confined philosophically to events that occur within institutional walls. Cases arising under § 305.7 will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior, but the provision is flexible enough to reach compelling changes of circumstances outside the institution. One primary goal of sentencing under the revised Code is the preservation of families, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), and the effectiveness of the sentencing system as a whole is measured in part by "the effects of criminal sanctions on families and communities," § 1.02(2)(b)(vii) (id.).

The open-ended "compelling reasons" standard in subsection (1) borrows from the most flexible of existing provisions in American correctional codes. Current federal law on the subject states that "extraordinary and compelling reasons" may warrant a reduction of a term. At least one state code uses the catch-all standard of "good cause shown." Another looks to whether the prisoner is "a suitable candidate for suspension of sentence," without elaboration of what counts toward suitability. There are only a few compassionate-release laws of such scope nationwide. In

a related setting, however, it is relatively common to find prison-release provisions that respond to “extraordinary” events of an unspecified nature. Many existing good-time provisions grant sentence discounts for a prisoner’s extraordinarily meritorious conduct, and are intended to reward acts such as heroism during a prison riot, saving the life of a prison guard, or preventing an escape. Perhaps in recognition that extraordinariness is not distillable into specific statutory language, these laws are often expressed in terms of a general standard. The original Code, for example, offered a sentence reduction of up to 20 percent for “especially meritorious behavior or exceptional performance of his duties,” see Model Penal Code, Complete Statutory Text § 305.1 (1985). The revised Code elects to remove such broad authority from the department of corrections, see § 305.1 (this draft), and transfers decisional discretion to the courts.

Many compassionate-release statutes expressly require a finding that the prisoner does not pose a threat to public safety before release from prison may be ordered by the court. The revised Code contains no explicit command of this kind. Nevertheless, subsection (7) requires that the court’s sentence-modification power be exercised in light of the purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007). These include the incapacitation of dangerous offenders, see § 1.02(2)(a)(ii) (*id.*). A global statement in subsection (7), incorporating all of the purposes in § 1.02(2), is superior to a requirement that only one among those purposes should be reflected in the judge’s decision.

*c. Identity of decisionmaker.* Section 305.7 places final decisional authority in the trial courts, rather than a board of pardons, parole agency, or corrections department. This recommendation follows the minority practice among American states. It reflects the Code’s policy preference for “front-end” decisionmakers over “back-end” agencies in the sentencing chronology, and conforms to the Code’s general philosophy that sentencing is primarily a judicial function. See § 305.6 and Comment *d.*

In one important respect, § 305.7 departs sharply from current American laws of compassionate release. The provision declines to interpose a gatekeeper in the sentence-modification process to screen applications and decide which ones are worthy of consideration by the trial courts. In nearly all jurisdictions that have designated the courts as ultimate decisionmakers, the department of corrections or another agency plays such a role; the courts enjoy no sentence-modification power in the absence of a motion or recommendation from the gatekeeper.

There was much debate within the Institute concerning the advantages and dangers of a gatekeeping mechanism of this kind. On the one hand, a system that routes all applications directly to the courts may result in an undifferentiated flood of petitions, requiring the expenditure of scarce judicial resources to separate wheat from chaff. Further, the absence of a gatekeeper might actually reduce the number of worthy petitions. A system of third-party screening might promote meritorious cases if, for example, a department of corrections is alert to inmates’ potential eligibility, and encourages applications that would not otherwise be made. On the other side of the balance, however, is the substantial worry that a gatekeeper would exercise

its authority on too few occasions, thus choking off potentially worthy applications. While there is little research or data on how state departments of corrections have wielded their gatekeeping discretion in the compassionate-release setting, the Federal Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal compassionate-release provision a virtual nullity. Unless a state legislature is confident that its corrections officials—or alternative gatekeepers that may be identified—will discharge screening authority under § 305.7 in a way that comports with the statute’s intentions, the revised Code recommends that the screening process be performed within the court system; see subsection (3).

*d. Assistance provided by department of corrections.* Many eligible prisoners will be unaware of their rights under § 305.7, or will lack the skills or competence to assert those rights. There is little benefit to the prisoner, the corrections system, or the public at large when a strong case goes unasserted. Paragraph (2) provides that the department of corrections must provide appropriate notice whenever it learns of reasonable grounds for a prisoner’s eligibility. The department must ensure that correctional staff, and health providers, understand this responsibility. In addition, the department must make adequate assistance available to prisoners for the preparation of applications. The assistance may be provided by nonlawyers, such as knowledgeable staff members or volunteers, or qualified prisoners.

*e. Assignment and screening of applications.* Subsection (3) requires that the courts create a method of timely assignment of applications to individual trial courts. Because the provision lacks a third-party gatekeeper, see Comment *c* above, subsection (3) authorizes the courts to create a screening process of their own, both to manage the workload of many applications, and to preserve judicial resources for those colorable applications that deserve close attention. A centralized screening approach, prior to assignment to individual judges, would be consistent with this provision.

Additional provisions of § 305.7 allow for the sorting of applications into levels of higher and lower priority. Paragraph (4) makes clear that the trial courts have discretion to rule on applications with or without a hearing, and paragraph (5) gives the court discretion to appoint counsel in selected cases. Sentencing guidelines promulgated under subsection (10) may also speak to the question of what types of applications should receive a full hearing, and which may be disposed through more summary process.

*f. Appointment of counsel.* Paragraph (5) recommends that the legislature grant the courts discretion to appoint legal counsel to represent indigent prisoners. Normally appointment will be appropriate only after the court has determined that a hearing is warranted. In some instances, however, the court may conclude that counsel is necessary to assist a prisoner in the preparation of an amended application.

*g. Minimum hearing procedures.* Section 305.7 delegates much rulemaking authority to the court system itself, but subsection (6) speaks to selected procedural issues of importance for cases that reach the stage of a hearing. Given that sentence modification under this provision

may occur at any stage during a prison term, and may represent a radical change in penalty, the prosecuting authority must be allowed to represent the government's interests. Likewise, crime victims should be notified when a hearing has been set, if they are available and can be located through reasonable efforts. The revised Code will speak generally to victims' rights of participation in sentencing proceedings, at various stages of the process, in a separate provision slated for future drafting.

Subsections (6)(d) and (e) are especially important within the Code's scheme. Because § 305.7 creates a broad sentence-modification power, that will in some cases be exercised under an open-ended standard, and must in all cases include careful analysis of the basic sentencing purposes of § 1.02(2) (Tentative Draft No. 1, 2007), it is essential that the courts' reasoning process be visible and open to review. Accordingly, subsections (6)(d) and (e) require that trial courts give reasons for their decisions on the record, and that the appellate courts have discretion to accept appeals from adverse rulings. These basic protections will promote the legitimacy and accountability of the process, aid in reasoned decisionmaking, add to the effectiveness of the applicable sentencing guidelines, and encourage the development of a common law of sentence modification.

*h. Substantive standard for sentence modification.* Section 305.7 is designed to respond to circumstances that arise or are discovered after the time of sentencing, including cases in which the full effects of known conditions, such as a prisoner's physical or mental illness, are not appreciated until a later date. Such circumstances must provide compelling reason to reevaluate the original sentence, and to replace it with a modified penalty, when measured against the underlying purposes of § 1.02(2) (Tentative Draft No. 1, 2007).

*i. What modifications are permitted.* Paragraph (8) states that the court may "modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence." Subject to the ceiling on prospective severity, this is intended to give the courts broad authority to impose a modified sentence, which may take the form of a shortened prison term, but may also include new or altered sanctions of other kinds, such as new requirements of postrelease supervision and treatment.

Paragraph (8) also states that the sentence-modification power "is not limited by any mandatory-minimum term of imprisonment under state law." A number of compassionate-release provisions in current American codes likewise grant authority to override mandatory-minimum sentences, although some states make narrow exceptions to the general rule that mandatory penalties do not limit the modification power, e.g., for capital cases or sentences of life without parole. Paragraph (8) is consistent with the revised Code's general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute's longstanding disapproval of such laws; see § 6.06(8) and Comment *m*.

*j. Transition to outside medical and mental-health care.* Whenever a prisoner suffering from a physical or mental infirmity is released, there should a plan for adequate treatment of the

prisoner outside of prison. It would be perverse for § 305.7 to encourage the “dumping” of ex-prisoners into the community without adequate provision for the continuing care that they need. To avoid this possibility, subsection (9) provides that the department of corrections, as part of the prisoner’s reentry plan, must identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

*k. Sentencing guidelines.* Paragraph (10) requires the sentencing commission, on an ongoing basis, to produce and amend sentencing guidelines addressed to the courts for sentence-modification decisions under this provision. These guidelines may be addressed to the screening decisions courts must make in separating potentially meritorious applications from the frivolous, the determination of which applicants should be given the benefits of a full hearing, and final dispositions. Given the scope of the sentence-modification power under § 305.7, principled grounds for decision can best be evolved within an institutional framework that allows inputs from the trial courts, the appellate courts under paragraph (6)(e), and the sentencing commission through guidelines.

It should be noted that Article 6B governs the sentence-modification guidelines promulgated under this provision. Most importantly, the guidelines may carry no more than presumptive force, see § 6B.04 (Tentative Draft No. 1, 2007), so that ultimate decisionmaking authority remains with the trial courts, subject to the possibility of appellate review.

### **REPORTERS’ NOTE**<sup>3</sup>

#### *b. Criteria for eligibility*

*(1) Advanced age.* Inmates aged 50 and older have been the fastest-growing age group in the nation’s prisons, and the costs of their confinement, largely driven by medical expenses, are three times greater than for younger prisoners. See Carrie Abner, Council of State Governments, *Graying Prisons: States Face Challenges of an Aging Inmate Population* (2006), at 9 (“Some estimates suggest that the elder prisoner population has grown by as much as 750 percent in the last two decades”); Mike Mitka, *Aging Prisoners Stressing Health Care System*, *JAMA* 292:4, 423 (2004) (noting that “A 50-year-old inmate may have a physiological age that is 10 to 15 years older . . . due to such factors as abuse of illicit drugs and alcohol and limited lifetime access to preventive care and health services.”).

For existing laws on the subject of geriatric release, see Conn. Gen. Stat. § 54-131k(a) (“so physically or mentally debilitated, incapacitated or infirm as a result of advanced age . . . as to be physically incapable of presenting a danger to society”); D.C. Code § 24-468(a)(2) (“The inmate is 65 years or older and has a chronic infirmity, illness, or disease related to aging”); Ga. Code § 42-9-42(c) (“notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons”); Mo. Stat. § 217.250 (“advanced in age to the extent that the offender is in need of long-term nursing home care”); N.J. Rules of Court, R. 3:21-10(B)(2) (“infirmity”); N.M. Stat. § 31-21-25.1(F) (geriatric parole available when inmate is

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<sup>3</sup> This Reporters’ Note has not been revised since § 305.7’s approval in 2011. All Reporters’ Notes will be updated for the Code’s hardbound volumes.

“sixty-five years of age or older [and] suffers from a chronic infirmity, illness or disease related to aging”); N.C. Gen. Stat. § 15A-1369 (release available for geriatric inmate “who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk”); Or. Rev. Stat. § 144.122(1)(c) (inmate “[i]s elderly and is permanently incapacitated in such a manner that the prisoner is unable to move from place to place without the assistance of another person”); Va. Code § 53.1-40.01 (“Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence”); 18 U.S.C. § 3582(c)(1)(A)(ii) (“the defendant is at least 70 years of age, has served at least 30 years in prison”); Wyo. Stat. § 7-13-424(a)(ii) (“The inmate is incapacitated by age to the extent that deteriorating physical or mental health substantially diminishes the ability of the inmate to provide self-care within the environment of a correctional facility”).

(2) *Physical infirmity.* See Alaska Stat. § 33.16.085(a)(1),(5) (“the prisoner is severely medically or cognitively disabled” and “the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner”); Ark. Code § 12-29-404(a) (“an inmate has an incurable illness which, on the average, will result in death within twelve (12) months, or when an inmate is permanently physically or mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction”); Cal. Penal Code § 1170(e)(2)(A),(C) (effective January 1, 2009) (prisoner is terminally ill or “permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function”); Conn. Gen. Stat. § 54-131k(a) (“so physically or mentally debilitated, incapacitated or infirm as a result of advanced age or as a result of a condition, disease or syndrome that is not terminal as to be physically incapable of presenting a danger to society”); 11 Del. Code § 4346(e) (“Whenever the physical or mental condition of any person confined in any institution demands treatment which the Department cannot furnish”); D.C. Code § 24-468(a)(1) (“permanently incapacitated or terminally ill”); Fla. Stat. § 947.149(1)(a),(b) (inmate is terminally ill or suffers from “a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a danger to herself or himself or others”); Ga. Code § 42-9-42(c) (“notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons”); Idaho Code § 20-223(f) (prisoner is terminally ill or, “by reason of an existing physical condition which is not terminal, is permanently and irreversibly physically incapacitated”); La. Rev. Stat. § 15:574.20(B)(1),(2) (inmate is terminally ill or, “by reason of an existing physical or medical condition, is so permanently and irreversibly physically incapacitated that he does not constitute a danger to himself or to society”); Mich. Comp. Laws § 791.235(10) (“The parole board may grant a medical parole for a prisoner determined to be physically or mentally incapacitated”); Minn. Stat. § 244.05, subd. 8 (“the offender suffers from a grave illness or medical condition and the release poses no threat to the public”); Mo. Stat. § 217.250 (“a disease which is terminal . . . or when confinement will necessarily greatly endanger or shorten the offender’s life”); Mont. Code § 46-23-210(1)(c)(i) (“a medical condition requiring extensive medical attention” or “a medical condition that will likely cause death within



6 months or less”); Neb. Rev. Stat. § 83-1,110.02(1) (“terminally ill or permanently incapacitated”); N.H. Rev. Stat. § 651-A:10-a(I)(a) (“terminal, debilitating, incapacitating, or incurable medical condition or syndrome”); N.J. Rules of Court, R. 3:21-10(B)(2) (“illness or infirmity”); N.M. Stat. § 31-21-25.1(A)(6) (“permanently incapacitated and terminally ill” inmates are eligible for medical parole); McKinney’s Cons. Law of N.Y. § 259-r(1)(a) (eff. Sept. 1, 2009) (inmate suffers from “a terminal condition, disease or syndrome and [is] so debilitated or incapacitated as to create a reasonable probability that he or she is physically incapable of presenting any danger to society”); N.C. Gen. Stat. § 15A-1369 (“permanently and totally disabled” or “terminally ill”); Ohio Rev. Code § 2967.05 (“imminent danger of death”); 57 Okl. Stat. § 332.18(B) (“an inmate who is dying or is near death . . . or whose medical condition has rendered the inmate no longer a threat to public safety”); Or. Rev. Stat. § 144.122(1)(b) (“severe medical condition including terminal illness”); R.I. Stat. § 13-8.1-3 (terminally ill or “suffering from a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, permanently and irreversibly physically incapacitates the individual to the extent that no significant physical activity is possible, and the individual is confined to bed or a wheelchair”); S.C. Code of Laws § 24-21-970 (“Consideration [for pardon] shall be given to any inmate afflicted with a terminal illness where life expectancy is one year or less”); Tenn. Code § 41-21-227(i)(2)(A)(i),(ii) (“[i]nmates who, due to their medical condition, are in imminent peril of death [and] [i]nmates who can no longer take care of themselves in a prison environment due to severe physical . . . deterioration”); Tex. Admin. Code, tit. 37, § 143.34(a) (“terminal illness, total disability, or for needed medical care which cannot be provided by the medical facilities of the Texas Department of Corrections.”); 28 Vt. Stat. § 502a(d) (“a terminal or debilitating condition so as to render the inmate unlikely to be physically capable of presenting a danger to society”); Wyo. Stat. § 7-13-424(a)(i),(iii),(iv) (“The inmate has a serious incapacitating medical need which requires treatment that cannot reasonably be provided while confined in a state correctional facility” or “[t]he inmate is permanently physically incapacitated as the result of an irreversible injury, disease or illness which makes significant physical activity impossible, renders the inmate dependent on permanent medical intervention for survival or confines the inmate to a bed, wheelchair or other assistive device where his mobility is significantly limited” or “[t]he inmate suffers from a terminal illness caused by injury or disease which is predicted to result in death within twelve (12) months”).

(3) *Mental infirmity*. See Alaska Stat. § 33.16.085(a)(1),(5) (“the prisoner is severely . . . cognitively disabled” and “the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner”); Ark. Code § 12-29-404(a) (“inmate is permanently . . . mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction”); Conn. Gen. Stat. § 54-131k(a) (“so . . . mentally debilitated . . . as to be physically incapable of presenting a danger to society”); 11 Del. Code § 4346(e) (“Whenever the . . . mental condition of any person confined in any institution demands treatment which the Department cannot furnish”); Mich. Comp. Laws § 791.235(10) (“The parole board may grant a medical parole for a prisoner determined to be . . . mentally incapacitated”); N.J. Rules of Court, R. 3:21-10(B)(2) (“illness or infirmity”); Tenn. Code § 41-21-227(i)(2)(A)(ii) (“Inmates who can no longer take care of themselves in a prison environment due to severe physical or psychological deterioration”).

(4) *Exigent family circumstances.* 18 U.S.C. § 3582(c)(1)(A)(i), allows judicial modification of a term of imprisonment (albeit only upon motion of the Director of the Bureau of Prisons), if the court finds that “extraordinary and compelling reasons warrant such a reduction,” in light of the general purposes of sentencing in 18 U.S.C. § 3553(a). The U.S. Sentencing Commission, granted statutory power to issue policy statements for the implementation of this provision, has determined that one example of “extraordinary and compelling reasons” is “The death or incapacitation of the defendant’s only family member capable of caring for the defendant’s minor child or minor children.” U.S. Sentencing Guidelines, §1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement), Commentary, § I(A)(iii). Until 1994, Bureau of Prisons regulations governing sentence-reduction motions, under § 3582(c)(1)(A)(i) and 18 U.S.C. § 4205(g), explicitly contemplated invoking the judicial sentence-modification authority “if there is an extraordinary change in an inmate’s personal or family situation.” 28 C.F.R. § 572.40 (1993).

(5) *Open-ended criteria.* Most state codes do not authorize sentence modification on open-ended grounds, but at least three American jurisdictions have done so. See N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend prison sentence exists at any time if “the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence”); N.J. Rules of Court, R. 3:21-10(b)(3) (sentence may be reduced or changed “for good cause shown,” but only upon joint motion of the prisoner and the prosecuting authority); 18 U.S.C. § 3582(c)(1)(A)(i) (if, following motion from Federal Bureau of Prisons, court finds “extraordinary and compelling reasons warrant such a reduction”).

(6) *Requirement that public safety not be jeopardized.* Such a condition is ubiquitous in laws authorizing compassionate release. See, e.g., Alaska Stat. § 33.16.085(a)(2)(B) (requirement that “the prisoner will not pose a threat of harm to the public”); Cal. Penal Code § 1170(e)(2)(B) (effective January 1, 2009) (“The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety”); D.C. Code § 24-468(a)(1),(2) (“release of the inmate under supervision is not incompatible with public safety”); Fla. Stat. § 947.149(1)(a) (requirement that “the inmate does not constitute a danger to herself or himself or others”); La. Rev. Stat. § 15:574.20(B)(1) (requirement that inmate “does not constitute a danger to himself or to society”); Minn. Stat. § 244.05, subd. 8 (medical release available only if “the release poses no threat to the public”); N.H. Rev. Stat. § 651-A:10-a(I)(c) (requirement that “[t]he parole board has determined that the inmate will not be a danger to the public, and that there is a reasonable probability that the inmate will not violate the law while on medical parole and will conduct himself or herself as a good citizen”); N.M. Stat. § 31-21-25.1(F) (requirement that inmate “does not constitute a danger to himself or to society”); McKinney’s Cons. Law of N.Y. § 259-r(1)(b) (eff. Sept. 1, 2009) (“release shall be granted only after the board considers whether, in light of the inmate’s medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law”); N.C. Gen. Stat. § 15A-1369.2(a)(2) (inmate must be “incapacitated to the extent that the inmate does not pose a public safety risk”); R.I. Stat. § 13-8.1-4(f) (board must consider whether “there is a reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the release is compatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law”); Tenn. Code § 41-21-227(i)(2)(B) (release available to “those inmates who can be released into the community without substantial risk that they will commit a crime while on furlough”).

*c. Identity of decisionmaker.* Like § 305.7, a number of existing statutory provisions repose ultimate sentence-modification authority in the trial courts. Nearly all of these first require that a motion or recommendation be made by the department of corrections or other gatekeeping authority. See 18 U.S.C. § 3582(c) (motion by Federal Bureau of Prisons required); Cal. Penal Code § 1170(d) & (e) (if more than 120 days from initial sentencing, a recommendation to recall sentence is required from either the Department of Corrections and Rehabilitation or the Board of Parole Hearings); D.C. Code § 24-468 (motion by Federal Bureau of Prisons required); Mont. Code § 46-23-210(2) (only for cases in which offender was declared parole ineligible at original sentencing); N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend prison sentence exists at any time if “the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence”); N.J. Rules of Court, R. 3:21-10(b)(2) (allowing motion at any time to amend “a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant”). The New Jersey law imposes no gatekeeper for applications based on illness or infirmity, but requires consent of the prosecutor before a more general sentence-modification power may be invoked “for good cause shown,” see N.J. Rules of Court, R. 3:21-10(b)(3). New Jersey has a separate mechanism for “medical parole,” limited to terminally ill inmates, which is administered by its parole board, see N.J. Stat. § 30:4-123.51c.

A majority of state laws analogous to § 305.7 designate a nonjudicial official or agency as decisionmaker. Most of these, however, assume the existence of a parole-release agency—an institutional arrangement not recommended by the revised Code, see § 6.06(3),(4) and Appendix B, Reporter’s Study, The Question of Parole-Release Authority (this draft). See Alaska Stat. § 33.16.085 (board of parole); Ark. Code § 12-29-404 (post prison transfer board); Conn. Gen. Stat. § 54-131k (board of pardons and paroles); 11 Del. Code § 4346(e) (board of parole); Fla. Stat. § 947.149 (parole commission); Ga. Code § 42-9-42(c) (board of pardons and paroles); La. Rev. Stat. § 15:574.20 (board of parole); Mich. Comp. Laws § 791.235(10) (parole board); Minn. Stat. § 244.05, subd. 8 (commissioner of corrections); Mo. Stat. § 217.250 (board of probation and parole or governor); Mont. Code § 46-23-210 (board of pardons and parole for most cases); Neb. Rev. Stat. § 83-1,110.02(1) (board of parole); N.H. Rev. Stat. § 651-A:10-a (parole board); N.M. Stat. § 31-21-25.1 (parole board); McKinney’s Cons. Law of N.Y. § 259-r (board of parole); N.C. Gen. Stat. §§ 15A-1369 through 15A-1369.5 (postrelease supervision and parole commission); Ohio Rev. Code § 2967.05 (governor upon recommendation of director of rehabilitation and correction); 57 Okl. Stat. § 332.18(B) (pardon and parole board); S.C. Code of Laws § 24-21-970 (governor following recommendation of probation, parole, and pardon-services board); Tenn. Code § 41-21-227(i)(3) (commissioner of department of corrections given authority to grant furlough of indeterminate duration); Tex. Admin. Code, tit. 37, § 143.31 (governor upon recommendation of board of pardons and paroles); Va. Code § 53.1-40.01 (parole board).

After much debate, the Institute decided not to endorse a third-party gatekeeping mechanism in § 305.7, and instead located the responsibility to screen petitions in the trial courts themselves. This judgment was based on experience under the federal compassionate-release provision, which requires a motion from the Director of the Bureau of Prisons before the matter may be heard by the courts. This arrangement has resulted in only a trickle of recommendations each year. See Stephen R. Sady and Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration*, 21 Fed. Sent. Rptr. (2009)) (“with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between

2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on”); Mary Price, *A Case for Compassion*, 21 Fed. Sent. Rptr. 170 (2009) (recommending that, “[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion.”). In light of this experience, the American Bar Association Commission on Effective Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in both §§ 305.6 and 305.7 of the revised Code. See ABA Commission on Effective Criminal Sanctions, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable* (2009) (Margaret Colgate Love, Reporter), at 28.

If a state decides that there must be an outside gatekeeper for compassionate-release petitions, the ABA Commission encouraged creative thought in designating a gatekeeper other than the Department of Corrections. One suggestion was that an expert clemency commission might play this role. See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 Fed. Sent. Rptr. 153 (2009); Report of the Second Look Roundtable, at 15 (“The clemency commission could be enlisted to double duty as gatekeeper for the judicial sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i)”).

*i. What modifications are permitted.* Many state provisions authorize, at least in some instance, a sentence modification that departs from the terms of a mandatory-minimum sentence. See Alaska Stat. § 33.16.085(a) (“Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical parole [if statutory criteria satisfied]”); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) (“This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.”); Conn. Gen. Stat. § 54-131k (“The Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any sentence of imprisonment, except an inmate convicted of a capital felony”); Fla. Stat. § 947.149 (parole commission’s power to grant medical release exists “[n]otwithstanding any provision to the contrary” except for inmates under sentence of death); Idaho Code § 20-223(f) (“Subject to the limitations of this subsection and notwithstanding any fixed term of confinement or minimum period of confinement . . . the commission may parole an inmate for medical reasons.”); La. Rev. Stat. § 15:574.20(A)(1) (“Notwithstanding the provisions of this Part or any other law to the contrary, any person sentenced to the custody of the Department of Public Safety and Corrections may, upon referral by the department, be considered for medical parole by the Board of Parole. Medical parole consideration shall be in addition to any other parole for which an inmate may be eligible, but shall not be available to any inmate who is awaiting execution or who has a contagious disease.”); N.H. Rev. Stat. § 651-A:10-a(VI) (“An inmate who has been sentenced to life in prison without parole or sentenced to death shall not be eligible for medical parole under this section”); N.M. Stat. § 31-21-25.1(B) (“Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible.”); N.C. Gen. Stat. § 15A-1369.2(b) (“Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article”); Or. Rev. Stat. § 144.122(4) (“The provisions of this

section do not apply to prisoners sentenced to life imprisonment without the possibility of release or parole”); R.I. Stat. § 13-8.1-1 (“Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except those serving life without parole shall at any time after they begin serving their sentences be eligible for medical parole consideration, regardless of the crime committed or the sentence imposed.”); 28 Vt. Stat. § 502a(d) (“Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is serving a sentence, including an inmate who has not yet served the minimum term of the sentence” may be eligible for medical parole); Wyo. Stat. § 7-13-424(a) (“Notwithstanding any other provision of law restricting the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may grant a medical parole to any inmate meeting the conditions specified in this section.”).

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