Testimony Before the United States Sentencing Commission

Concerning Policy Statement §1B1.13

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My name is Kate Stith. I am a professor at Yale Law School, where I teach courses on criminal law and procedure and on constitutional separation of powers. In addition to publishing numerous law review articles, I've co-authored two books, one on federal criminal law entitled *Defining Federal Crimes*, and one on the federal sentencing guidelines entitled *Fear of Judging: Sentencing Guidelines in the Federal Courts*. In addition, I served by appointment of Chief Justice Rehnquist on the Advisory Committee for the Federal Rules of Criminal Procedure. I have been an advisor to the American Law Institute's MODEL PENAL CODE: SENTENCING project since its inception almost 15 years ago. Before joining the Yale Law School faculty, I was a federal prosecutor in the Southern District of New York.

Background – Sentence Modification in a Determinate Scheme

While I have long advocated determinate sentencing as a general proposition, my work as an advisor to the ALI's project on determinate sentencing has led to a growing appreciation of the need to provide reliable ways to consider when an individual's original term of incarceration should be reduced on the basis of extraordinary and compelling changed circumstances. I thank you for allowing me to discuss with you the role of the Commission in setting forth policies to guide courts as to when sentence reduction is warranted for these reasons.

It has been a decade since the Commission first promulgated its policy on the authority of federal courts to reduce sentences on government motion for "extraordinary and compelling reasons." It has been almost that long since the Commission's last hearing on what is colloquially known as "compassionate release." In that time there has been a growing appreciation among those who have championed determinate sentencing over the years of the need to provide mechanisms for reconsidering the length of an individual's prison sentence when that sentence no longer is just or appropriate. Reconsideration may be in order because an individual prisoner's circumstances have changed significantly since his or her original sentencing; among such circumstances may be advanced age and infirmity. And apart from changed individual circumstances, reconsideration may be in order because the passage of time

has made a sentence imposed years before to be now judged harsher than necessary to justly punish and ensure public safety.[1]

I congratulate the Commission on its on-going commitment to reassess, and where appropriate to modify or urge Congress to modify, sentencing laws and policies. Sometimes such changes have been made retroactive. Some significant changes, however, have been given only prospective effect. It is obviously not possible to make every ameliorative change in sentencing law retroactive. But where there have been substantial, significant ameliorative changes, authorities may judge it unfair not to consider the appropriateness of applying those changes to those previously sentenced, a premise evidently underlying the clemency initiative launched by the Obama Administration two years ago.[2]

In particular, there is growing recognition that lengthy prison terms may undermine the very premise of determinate sentencing theory and practice, which is that an appropriate and just punishment can and should be imposed at an individual's initial sentencing proceeding. While I most certainly do not support reversion to widespread sentence reduction and early release, we must face the truth that some exceptionally long prison sentences, especially those mandated by statute no matter what the circumstances of the crime or the offender, may in hindsight be judged excessive and unnecessary by reasonable and knowledgeable observers. This is one of the considerations that has propelled the development by the ALI of revised sentencing articles in the Model Penal Code.

In the remainder of my testimony, I will describe those provisions of the ALI's proposed MPC sentencing modifications that recognize a place for sentence reduction in a determinate

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[1] *See* ABA Commission on Effective Criminal Sanctions, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED SENT'G REP. 217 (2009) (M. C. Love, Reporter) (quoting Professor Douglas Berman) ("The reason why second look mechanisms are so important is because we can expect, we should expect, first looks to be dysfunctionally harsh. That's why a parole system was included in modern imprisonment systems, and why the Framers included a pardon power in our founding document.").

[2] Historically, clemency was the federal justice system's fail-safe release mechanism, replaced at the dawn of the twentieth century by parole. When parole was abolished in the federal system, some expected a resurgence of clemency, but in fact the opposite occurred, for several reasons – including an understandable reluctance to rely on the unstructured, unexplained discretion of a president. As was pointed out 15 years ago by the late Daniel Freed, my colleague at Yale Law School for many years, clemency was never intended to address systemic shortcomings in the legal system or substitute for law reform. *See* Daniel J. Freed and Stevenson L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT'G REP. 119, 124 (2001).

scheme. Most relevant here, the MPC gives the jurisdiction's sentencing commission a central role in determining the types of circumstances in which a sentence may be reduced based on changed circumstances. I believe Congress envisioned the same broad policy-making role for this Commission. In light of the concerns that have recently been raised about the Bureau of Prison's role in implementing federal sentence reduction authority, I urge the Commission to move forward vigorously to develop specific guidance to ensure that federal courts are able to exercise such authority in all appropriate cases.

Sentence Reduction Authorities in the Model Penal Code: Sentencing

Eight years ago, when the American Law Institute was already well along in its project to revise the sentencing articles of the Model Penal Code using a determinate model, it became apparent to the project's Advisers that we would have to tackle the issue of early release if our sentencing system was to operate with the necessary legitimacy and efficiency. That is, we would have to devise processes to modify the court-imposed sentence while preserving the basic principles of determinacy. Key questions involved what circumstances would warrant sentence modification, and what process would be most likely to preserve the institutional arrangements on which determinacy depends, notably the central role of the court in determining the quantum of punishment.

The MPC deliberations produced three mechanisms for reducing a sentence after it has become final, addressing three separate concerns.[3] While only one of these mechanisms is directly relevant to the questions before this Commission today, I will describe all three briefly, in the interest of presenting a full picture of how early release fits into the MPC's determinate structure.

The first of the MPC's sentence reduction authorities is fairly conventional, and would apply routinely and equally to all prisoners. Under § 305.1, prison officials would be authorized to reduce a sentence up to an aggregate total of 30% through the application of good time and

[3] The sentence reduction provisions described in this testimony were approved by the Institute's Annual Meeting in May 2011. See Model Penal Code: Sentencing, Tentative Draft No. 2 (March 25, 2011) (hereafter MPC Draft). They will be considered by the Institute's membership again in 2017 when the entire sentencing project will be brought before the Annual Meeting for final approval. These provisions are discussed in Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOLEDO L. REV. 859 (2011).

earned time credits, "to further the goals of prison discipline and offender rehabilitation."[4] This broadly applicable good time provision seeks to enhance the rehabilitative and management functions of sentencing, though the MPC commentary does not claim empirical proof of such enhancement.[5] The commentary rejects good time as an appropriate means of controlling prison population.[6]

The other two MPC sentence authorities envision more dramatic but targeted modifications. Unlike the good time provision, these authorities have no analogue in the 1962 Code. Section 305.6 proposes a new model for sentence modification in cases involving very long prison terms; this so-called "Second Look" provision authorizes a de novo judicial resentencing after an individual has spent 15 years in prison.[7] And § 305.7 authorizes a court to respond at any time to "compelling" changes in a particular prisoner's circumstances, such as advanced age and infirmity, which make it inappropriate or inhumane to execute the entire original sentence.[8] Both of these judicial early release mechanisms are conceived as statutory

[4] MPC Draft, § 305.1, cmt. a. Most determinate sentencing systems allow for only a small reduction for institutional compliance, and early drafts of the MPC also restricted good time to the 15% allowed under federal law. After sentencing scholars criticized the 15% figure as too low to serve either rehabilitative or management functions, it was raised. *See* Richard F. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 195-96 (2009) (concluding, based on experience under Minnesota's 33% good time allowance, that "the 15% figure does not do much to curtail very long sentences, and it may not provide sufficient incentives for in-prison program participation").

[5] MPC Draft, § 305.1, cmt. a.

[6] *Id.*

[7] *Id.* § 305.6 ("Modification of Long-Term Prison Sentences"). This section contemplates that a "judicial panel or other judicial decision-maker" will hear and rule on applications under this section, and that sentence modification under this provision "should be viewed as analogous to a resentencing in light of present circumstances." § 305.6(4). Taking into account the potential for a 30% administrative reduction through good time, the "Second Look" provision would apply only where an individual was sentenced to at least 23 years in prison. This provision, the most radical of the MPC early release authorities, is discussed in Love & Klingele, *supra* note 3 at 873-876.

[8] *Id.* § 305.7 ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons"), cmt. b ("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.")

substitutes for clemency: one allowing the sentencing court to respond to changed circumstances at any time, and the other providing a more predictable opportunity for reassessment of a sentence after the passage of a significant number of years.[9]

Each of the three authorities in the MPC package of early release mechanisms performs a distinct function, and they complement one another in the design of a determinate system that is also a just and efficient one. However, § 305.7—on judicial authority to respond to changed circumstances—is most relevant to the issues before this Commission today, and I will therefore confine the remainder of my comments to it.[10]

Sentence Modification in Changed Circumstances under the MPC: Sentencing

Section 305.7 was modeled on the federal sentence reduction statute[11] that is the subject of today's hearing. Like its federal model, the MPC provision provides authority for courts to reduce a sentence in compelling circumstances. The precise language used in the new MPC provisions authorizes sentence reduction 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 [general purposes of sentencing]."[12] Along with a number of procedural provisions governing judicial proceedings, the new MPC regime specifically provides that the jurisdiction's sentencing commission "shall promulgate and periodically amend sentencing guidelines . . . to be used by courts when considering the modification of prison sentences under this provision."[13] This is the counterpart to 28 U.S.C. § 994(t), which requires the Commission to promulgate policy regarding judicial sentence modification authority, including "what should be considered extraordinary and compelling reasons for sentence reduction . . . ."

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[9] It is noteworthy that the recent report of the Charles Colson Task Force on Federal Corrections specifically endorsed the "Second Look" proposal in § 305.6. It's not clear why the Task Force did not recommend greater use of the "compassionate release" statute, the model for § 305.7 that is the subject of this hearing.

[10] A copy of § 305.7, with its commentary and the Reporter's Notes, is included as an Appendix to this testimony.

[11] 18 U.S.C. § 358(c)(1)(A)(i).

[12] MPC Draft § 305.7(7)

[13] MPC Draft § 305.7(10).

There is one significant way in which § 305.7 differs from its federal model. During the course of its progress through the Institute's approval process, the revised MPC removed the corrections agency as a gatekeeper for this exercise of judicial authority. Instead, prisoners are authorized to go directly to the court that sentenced them to make the case that compelling circumstances warrant their release, without the mediation of prison authorities.[14] The gatekeeper provisions in early drafts of § 305.7 had been the subject of scholarly criticism,[15] and were deleted in response to concerns expressed by members of the Institute at the 2010 Annual Meeting that the federal Bureau of Prisons had filed so few motions that courts were significantly limited in their ability to consider whether sentence reduction was warranted.[16]

The MPC thus places the sentence modification decision in the hands of trial courts rather than prison officials or executive branch agencies such as pardon or parole boards. The commentary to § 305.7 recognizes that this is currently a minority practice among the states. The commentary concludes, however, that allowing sentencing courts to decide prisoner petitions directly, unconstrained by prison officials—who may have potential institutional conflicts and in any event whose primary obligations relate to corrections—"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

[14] The corrections agency would have a role under § 305.7 in notifying prisoners of their potential eligibility, and providing prisoners with assistance in preparing applications, but the prosecuting authority that brought the charges against the prisoner would be authorized to represent the state's interests in court. Section 305.7(2) and (6).

[15] Early drafts of § 305.7 contained a "gatekeeper" provision similar to the one in 18 U.S.C. § 3582(c)(1)(A)(i). *See* Frase, *supra* note 5 at 196, 201 n. 8, 202 n. 15. In his 2009 article reviewing the sentence reduction authorities in an earlier draft of the Model Penal Code, Professor Frase was critical of the gatekeeper provision, opining that "corrections officials are not professional sentencers, and in some cases staff animosities or favoritism might distort the corrections position as to sentence reduction." Noting on the other hand that corrections officials have more information than anyone else about the prisoner's current circumstances, Frase recommends that they should "state their views [but] not act as a true gatekeeper." *Id*. at 199.

[16] *See* MPC Draft, § 305.7, cmt. c (". . . 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").

judicial function."[17] In other words, giving prisoners direct access to courts "recognizes that the early release decision is more closely related to sentencing than to corrections."[18]

Section 305.7 also recognizes, based largely on concerns about the federal experience, that allowing corrections officials to control prisoner access to courts may be tantamount to allowing them to control the sentence reduction decision itself. As I understand matters, this concern has been raised repeatedly, including by the Justice Department's own Inspector General, with respect to the way the federal Bureau of Prisons has administered its role under the federal "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A)(i).

The MPC and Federal "Compassionate Release"

What can be learned from the Model Penal Code experience about the issues now before the Commission on whether to amend its policy implementing the federal "compassionate release" statute? As discussed, both § 305.7 and this federal sentence reduction authority are part of a determinate sentencing scheme that seeks to balance a policy preference for front-end sentencing authority, on the one hand, with a recognition, on the other hand, that a just and comprehensive system must be able to address the "unusual case" in which circumstances are "so changed . . . that it would be inequitable to continue the prisoner's confinement."[19] The legislative history of the 1984 Sentencing Reform Act notably describes the sentence reduction authority in § 3582(c)(1)(A)(i) as a "safety valve" that "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[20] Like § 305.7, the federal scheme also contemplates that the sentencing commission will make policy for the courts considering sentence reduction motions.

Where the federal scheme diverges from § 305.7 most tellingly is in allowing prison officials to effectively control access to the courts that have power to reduce sentences. Because a BOP motion under § 3582(c)(1)(A)(i) is jurisdictional, this gives BOP the practical ability to deny sentence reduction even in situations where a court may have indicated it would be willing

[17] *Id.*

[18] Love & Klingele, *supra* note 3 at 872.

[19] *See* S. Rep. Sen. Rep. 98-225 at 121 (98th Cong., 1st Sess) (1984).

[20] *Id.*

to grant it.[21] This feature of the federal scheme seems a throw-back to a time when back-end administrative authorities were in a position to control the quantum of punishment, something that determinate sentencing was supposed to replace.[22] It has also evidently severely limited the usefulness of this federal "safety valve" to address situations where continued imprisonment would be "inequitable." Until quite recently, there were never more than a few dozen motions filed each year, despite an escalating and aging federal prison population. Even after a 2013 report from the Justice Department's Inspector General criticized BOP's parsimonious exercise of its gatekeeping authority,[23] and a revision of BOP's policy later that year expanded eligibility criteria, statutory sentencing reduction authority continues to be underutilized. For example, a second Inspector General report last spring noted that only two prisoners had been released under the general non-medical category of advanced age, despite the fact that more than 500 prisoners met the criteria in BOP's policy.[24]

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[21] *See, e.g.*, Mary Price, *A Case for Compassion*, 21 FED. SENT'G REP. 170 (2009) (describing a case in which the sentencing judge wrote to BOP asking that it file a motion so that he could reduce the sentence of a man who was terminally ill, to no avail).

[22] That the sentence reduction authority in § 3582(c)(1)(A)(i) provides a gate-keeping role for BOP may be an artifact stemming from the provision's progenitor in the "compassionate release" provision that was enacted during the indeterminate sentencing regime that existed prior to 1984. The authority in § 3582(c)(1)(A)(i) was originally enacted in 1976 as part of the Parole Reorganization Act, *see* 18 U.S.C. § 4205(g), and was intended to enable the Justice Department to expedite early parole consideration in cases it would otherwise have recommended for executive clemency. *See United States v. Diaco*, 457 F. Supp. 371, 372 (D.N.J. 1978) (motion filed to reduce sentence in light of unwarranted disparity among co-defendants; statement of Director of BOP explaining that the new procedure offered an alternative to submitting an application for clemency to the President through the Office of the Pardon Attorney); *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (sentence reduced because of exceptional adjustment in prison; same statement by BOP Director). The sentence reduction authority was carried forward with slight modifications as part of the Sentencing Reform Act of 1984 Act, with apparently no consideration given to how retaining BOP gatekeeping authority over which cases come before the sentencing court for modification was inconsistent with the larger purposes of the 1984 sentencing reform legislation, including abolishing the authority of back-end administrators to control actual sentence length.

[23] Office of the Inspector General, U.S. Department of Justice, *The Federal Bureau of Prisons Compassionate Release Program* 1 (April 2013) ("We found that, on average, only 24 inmates are released each year through BOP's compassionate release program."); *see also id.* at ii ("[A]lthough the BOP's regulations and Program Statement permit non-medical circumstances to be considered as a basis for compassionate release, the BOP routinely rejects such requests and did not approve a single nonmedical request during the 6-year period of our review.").

[24] Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 44 (May 2015) (reporting that BOP filed only two sentence reduction motions for prisoners eligible by virtue of having reached age 65 and having served the longer of 10 years or 75% of their sentence, despite the fact that 529 prisoners fell into this category).

You may well wonder how amendments to the Commission's sentencing reduction policy, which is addressed to courts, would result in BOP more expansively exercising its authority to trigger judicial consideration of resentencing. In the past, the Justice Department has taken the position that BOP is under no obligation to comply with Commission sentence reduction policy.[25] In effect, this position implies that policies for sentence reduction should be set by BOP, not by this Commission. This position seems to me to be inconsistent with both the overall scheme of the 1984 Act, in which Congress made the Commission responsible for developing judicial sentencing policies, and with 28 U.S.C. § 994(t), which specifically directs the Commission to develop a set of "extraordinary and compelling reasons" governing sentence reduction, the only limitation being that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[26]

If the Commission were to develop a narrow but comprehensive and detailed menu of "extraordinary and compelling reasons" warranting judicial consideration of sentence reduction, this full exercise of Commission authority would, in and of itself, discourage BOP from adopting inconsistent policies for the exercise of its gatekeeping function. I would also urge the Commission to consider following the approach of the new Model Penal Code sentence reduction provisions by authorizing the court, upon submission of a BOP motion, to invite the federal prosecutorial office responsible for the prisoner's conviction to represent the Government's interest.[27]

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[25] A letter submitted to the Commission by the Department of Justice dated July 12, 2006, commenting on the Commission's proposed policy implementing § 3582(c)(1)(A)(i), stated that any policy the Commission adopted that was inconsistent with what the letter described as BOP's sentence reduction policy would be treated as a "dead letter." The DOJ letter minced no words in explaining that, because Congress gave BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them."

[26] The inclusion of the word "alone" indicates that rehabilitation is an appropriate consideration in reducing a sentence, along with other changes in a prisoner's circumstances. But this consideration appears nowhere in BOP's policy for administering § 3582(c)(1)(A).

[27] The Commission's issue paper asks (p. 3) whether the Commission should provide that BOP "should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as 'extraordinary and compelling reasons' in § 1B1.13." While it is not clear to me that the Commission has the authority to direct BOP to file motions in particular cases, the law gives the Commission responsibility for devising generally applicable standards that BOP can be held accountable for administering. As former Commissioner John Steer wrote in a 2001 article, "Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section." *See* John R. Steer & Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 157 (2001). In the absence of

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In sum, I believe that principles of determinate sentencing, if not the mandate of § 994(t) itself, requires the Commission to take an active role in developing grounds for sentence reduction due to extraordinary and compelling circumstances. The Commission is certainly not bound by whatever policy BOP has independently developed, and is far better positioned than is BOP to consider what circumstances warrant a reduction in sentence. Indeed, the Commission may well decide—at the conclusion of its usual careful and deliberative process—that the permissible grounds for sentence reduction should not be limited to those set forth in BOP's program statement (illness, disability and advanced age, and family circumstances). It may decide that there are other compelling changes in a prisoner's circumstances that may also make continued incarceration inequitable, such as those proposed by the Practitioners' Advisory Group.[28]

I therefore urge the Commission to taken a broad view of its authority under § 994(t) to describe what constitutes "extraordinary and compelling reasons" for sentence reduction in changed circumstances. Thank you for your consideration.

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specific enforceable guidance from the Commission, BOP frequently decides cases based on considerations relating to the underlying criminal case that are more appropriate for the court than for a corrections agency. *See, e.g.*, Nat Hentoff, *A Slow, Lonely Death in Prison*, January 21, 2016, http://www.cato.org/publications/commentary/slow-lonely-death-prison.

[28] The present Administration has recognized through its clemency initiative the need to have a sentence-reduction procedure in certain cases where a prisoner would receive a lower sentence under current law and policy.

APPENDIX TO

TESTIMONY OF

PROFESSOR KATE STITH

FEBRUARY 17, 2016

2609244 (N.J. Super. A.D. 2007) (holding Rule 3:21-10(b) does not permit court to reduce sentence below a statutory mandatory-minimum period of incarceration).

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§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons.

(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).

(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:

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).

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 restoration of communities affected by a criminal offense, 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 upon 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, Comment *d* (this draft).

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.

REPORTER'S NOTE

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 "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"); Ore. 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"); Ore. 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 depreciate 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 & 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"); Ore. 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.").