Model Penal Code: Sentencing (2017)*

AMERICAN LAW INSTITUTE

§ 6.03. Deferred Prosecution.

(1) For purposes of this provision, deferred prosecution refers to the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions, with the exception of an agreement to cooperate in the prosecution of any criminal case.

(2) The purpose of deferred prosecution is to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction.

(3) When a prosecutor has probable cause to believe that an individual has committed a crime and reasonably anticipates that sufficient admissible evidence can be developed to support conviction at trial, the prosecutor may decline to charge the individual or dismiss already-filed charges without prejudice, and forgo prosecution completely, contingent on the individual's willingness to comply with specified conditions.

(4) When the prosecution offers to defer prosecution in a case involving an identified victim, the government shall make a good-faith effort to notify the victim of the conditions of the proposed deferred-prosecution agreement.

(5) Before agreeing to the terms of a deferred-prosecution agreement, an individual shall have a right to counsel.

(6) Entry of a deferred-prosecution agreement does not relieve the prosecuting agency of any duty to disclose exculpatory evidence or bar the individual from seeking otherwise discoverable information about the alleged crime.

(7) [A deferred-prosecution agreement may be conditioned on an individual's consent to a tolling of any applicable statutes of limitations during the period of a deferred-prosecution agreement.]

(8) A prosecutor's office may seek the cooperation of [correctional and court-services agencies] to provide services and supervision for the execution of deferred-prosecution agreements, or may contract with qualified service providers. No assessments of costs or fees may be collected from the individual subject to the deferred-prosecution agreement in excess of actual expenditures incurred by the prosecutor's office in the case.

(9) The deferred-prosecution agreement should extend for a specified duration that is reasonable in light of the stipulated condition(s) and the potential charge(s) available for prosecution.

(10) A deferred-prosecution agreement may be presented to the trial court for approval if needed to secure funding for or access to agreed-upon programs or services. If the court approves the agreement, it may order any conditions or services, consistent with the agreement, that might be ordered for a defendant for whom adjudication is deferred pursuant to § 6.04.

(11) If the terms of the deferred-prosecution agreement are materially satisfied, no criminal charges shall be filed in connection with the conduct known to the prosecution that led to deferred prosecution. Completion of the terms of a deferred-prosecution agreement shall not be considered a conviction for any purpose.

(12) A deferred-prosecution agreement may be terminated only when the individual materially breaches the terms of the agreement. When such a breach occurs, sanctions short of termination should be used when reasonably feasible.

(13) If a deferred-prosecution agreement is terminated pursuant to subsection (12), the prosecutor may file against the accused any charge supported by fact and law. An individual's failure to comply with the agreement should not bear on the severity of the ultimate charge pursued or sentence imposed.

(14) Each prosecutor's office shall adopt and make publicly available written standards for its use of deferred-prosecution agreements. The standards should address:

(a) the criteria for selection of cases for the program;

(b) the content of agreements, including the number and kinds of conditions required for successful completion;

(c) the grounds and processes for responding to alleged breaches of agreements, and the possible consequences of noncompliance; and

(d) the benefits afforded upon successful completion of agreements.

(15) Each prosecutor's office shall maintain records and data relating to its use of deferred prosecution in a manner that allows for monitoring and evaluation of the practice while protecting the confidentiality of participants. Demographic information shall be maintained, including the economic status, race, gender, ethnicity, and national origin of individuals who participated in the program, or were offered the

Federal Sentencing Reporter, Vol. 30, Nos. 4-5, pp. 326–347, ISSN 1053-9867, electronic ISSN 1533-8363.

DOI: https://doi.org/10.1525/fsr.2018.30.4-5.326.

option of participating, and shall be matched against demographic information concerning crime victims, if any, in each case.

Comment:

a. Scope. This provision, new to the Code, provides structure for the use of deferred prosecution, a longstanding practice by which the prosecution agrees to forgo charges in exchange for the accused individual's compliance with certain requirements, such as the payment of restitution or completion of a treatment program. (This is distinct from the practice of deferred adjudication, discussed in § 6.04, which allows courts to resolve without conviction criminal cases in which charges have already been filed.) When there is probable cause to believe an individual has committed a crime, the prosecutor possesses largely unfettered discretion to decide whether to issue formal charges. Often, and for many reasons both legal and nonlegal, a prosecutor will decline to charge even when there is legal authority to do so. This provision addresses those decisions not to prosecute that arise from a prosecutor's decision not to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions. The sole exceptions, made clear by § 6.03(1), are cases in which a prosecutor decides not to pursue criminal charges in exchange for an individual's cooperation with law enforcement. Such agreements fall outside the scope of § 6.03, since the use of such deferred-prosecution agreements requires more secrecy than the publication provisions of subsections (14)-(15) would require.

The provision acknowledges that deferred prosecution is a legitimate practice, but one that benefits from transparency and structure. It recognizes that deferred prosecution may be used to rehabilitate individuals who have committed crimes, to make reparation to crime victims, and to advance public safety. At the same time, by placing restrictions on how precharge diversion programs may be arranged and requiring monitoring of their use, § 6.03 also represents a new way of regulating prosecutorial discretion.

By requiring that deferred prosecution be used only in cases where the state could prove a defendant's guilt at trial, the provision bans the use of conditional deferral as a way to "punish" individuals who would not be found guilty in a court of law because of weak or tainted evidence. See § 6.03(3). The provision permits and encourages the use of deferred prosecution in cases where guilt could be proven, but the individual can nonetheless be fairly held accountable without resort to formal charge and conviction.

Under this provision, the decisions to defer and determine the conditions of the deferred-prosecution agreement lie solely with the prosecutor. In jurisdictions where the prosecutor is unable, however, to arrange for necessary services or adequately monitor compliance with the terms of the agreement, subsection (10) allows the prosecution, with approval from the court, to draw upon the court's resources, including community supervision and access to publicly funded treatment programs.

A central objective of this provision is to encourage prosecutors to use their legal authority parsimoniously and, when appropriate, in ways that avoid the often-severe collateral consequences imposed on individuals who have been charged with a crime or who have made an admission of guilt in open court. For example, precharge diversion may be an effective way for a noncitizen to avoid deportation for a relatively minor offense, or for a youthful offender to avoid the stigma of a criminal record based on an anomalous indiscretion.

b. Purposes of deferred prosecution. As an alternative to traditional prosecution, deferred prosecution lacks many of the procedural safeguards that accompany criminal prosecution. Deferred prosecution is not intended to be an extrajudicial mechanism by which the prosecutor exacts punishment without first proving guilt. Although conditions of a deferred-prosecution agreement may have a subjectively punitive element, the purpose of deferred prosecution should be the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime.

Subsection (2) addresses the goals pursued by deferred-prosecution agreements, but it is not a full statement of their external benefits. High among these is the conservation of prosecutorial and judicial resources.

c. The problems of net-widening and relinquishment of rights. The Institute recognizes that a number of dangers attend the practice of precharge diversion. Among the most salient is the risk that individuals who would not otherwise be prosecuted or convicted will be persuaded to enter into deferred-prosecution agreements, thus expanding the net of social control in the name of "diversion." The psychological pressure to resolve the matter as quickly as possible may also prevent accused individuals from invoking constitutional rights and other protections they would possess in a formal prosecution. Consequently, the decision to offer deferred prosecution should be made thoughtfully, with sensitivity to the danger of net-widening. This provision addresses these concerns in several of its subsections, including subsection (3), which limits deferred prosecution to cases in which "a prosecutor has probable cause to believe that an individual has committed a crime and reasonably anticipates that sufficient admissible evidence can be developed to support conviction at trial."

Subsection (5) provides that "[b]efore agreeing to the terms of a deferred-prosecution agreement, an individual shall have a right to counsel." Although the opportunity to consult with counsel is not constitutionally mandated before the initiation of formal charges, providing counsel to individuals who are offered a deferred-prosecution agreement serves many purposes. One responsibility of defense counsel at this juncture is to provide the accused with information and advice concerning the prospects and likely consequences of a formal prosecution, and the costs and benefits of the agreement offered by the government. In some states, it may be necessary to revise the legal prerequisites for appointment of defense counsel so that

representation may begin early enough to assist the accused's decision of whether to enter into a deferred-prosecution agreement. While individuals may waive the right to counsel, providing access to an attorney helps ensure that conditions imposed are proportional to the suspected offense and that the individual understands the positive and negative ramifications of choosing to enter into the agreement.

In order to ensure that only culpable individuals are made the subject of deferred-prosecution agreements, subsection (6) further states that the existence of a deferred-prosecution agreement "does not relieve the prosecuting agency of any duty to disclose exculpatory evidence" or prevent an individual subject to such an agreement from "seeking otherwise discoverable information about the alleged crime." Without the initiation of formal criminal proceedings, the accused has no constitutional right to discovery, and consequently the prosecution may not be required to disclose any information under this standard. In some jurisdictions, however, local rules or codes of ethics may impose obligations on the prosecution or provide a limited right of discovery to the accused individual even when the constitutional right to disclosure of exculpatory evidence has not yet attached. Requiring disclosure under these circumstances reinforces the common-sense notion that when the prosecutor comes into possession of evidence suggesting the accused has committed no crime, the deferred-prosecution agreement should be revisited by the parties.

Finally, subsection (9) requires that the deferred-prosecution agreement specify a reasonable duration for the agreement to continue that takes account of the severity of the potential charges and the nature of the stipulated conditions. This provision encourages the prosecution to use its leverage parsimoniously, being attentive to proportionality when setting the length of time in which an accused but uncharged individual is subject to the conditions set forth in the deferred-prosecution agreement.

d. Cases appropriate for deferred prosecution. For reasons discussed above, no case should be selected for deferred prosecution unless the prosecution reasonably anticipates that, by the time of trial, the state will be able to prove guilt beyond a reasonable doubt. Deferred prosecution is appropriate in cases where (1) guilt is clear and provable; (2) an individual has sufficient culpability to be held accountable for his or her criminal conduct; and (3) neither justice nor public safety demands that the individual be stigmatized by formal charge and conviction, with their attendant collateral consequences. Such cases might include first-time or youthful offenders, nonviolent offenders, and individuals with substance-abuse or mental-health problems that can be safely treated in the community.

e. Eligibility. No offense- or offender-based restrictions on admission to deferred- prosecution programs are set out in this provision. Under subsection (14), eligibility must be determined with reference to objective criteria that are formulated and publicized by the prosecutor's office.

f. Victim notification. Recognizing that victims of crime often have a stake in the outcome of a charging decision and may have rights under state law relevant to the charging decision, subsection (4) requires the prosecution to make good-faith efforts to inform any identified victim of the terms of any deferred-prosecution agreement.

g. Conditions of the agreement. This provision does not place a limit on the number or kind of conditions that may be imposed on an individual who is the subject of a deferred-prosecution agreement. Subsection (8) contemplates that prosecutors may require, as a condition of deferral, that individuals participate in treatment programs or submit to some level of supervision for a specified period of time. Prosecutors imposing conditions should take care to ensure that any burdens imposed by the agreement are proportional to the suspected offense and in light of the formal punishments that would be available upon conviction.

Language in subsection (8) makes reference to the common practice among prosecutors' offices to assess costs or fees against those who participate in precharge diversion programs. Under § 6.10, the Code recommends that assessments of this kind not be permitted under state law, and that those suspected or even convicted of criminal offenses should not be treated as special sources of revenue for agencies of the criminal-justice system. The Code recognizes that the elimination of costs and fees is a difficult policy question, however, and includes an Alternative § 6.10 for jurisdictions that cannot accept the Code's primary recommendation. The language in § 6.03(8) speaks only to those states that follow the approach in Alternative § 6.10. It prohibits prosecutors from using deferred prosecution as a means of generating revenue for their offices by barring cost and fee assessments "in excess of actual expenditures incurred by the prosecutor's office."

h. Sources of supervision and services. Ideally, participants in deferred-prosecution programs should have access to the same state-funded resources as individuals on probation or defendants in deferred-adjudication programs under § 6.04. Subsection (10) achieves this result for selected cases. When the prosecutor's office lacks the resources to provide the supervision, services, or programs that may be required as part of a deferred-prosecution agreement, the parties may petition the court to order the full panoply of supervision and treatment services that would be available under § 6.04. At the same time, § 6.03 anticipates that a large group of individuals who enter deferred-prosecution programs will not require supervision or services—or no more than may be administered by prosecutors' offices themselves.

i. Tolling of statute of limitations. Subsection (7), concerning the tolling of applicable limitations periods, is presented in brackets on the assumption that the law in some jurisdictions will not allow for tolling by agreement of the parties.

j. Termination. Subsection (12) allows for termination of the agreement only when an individual materially breaches

the terms of the agreement. When a deferred-prosecution agreement is terminated, subsection (13) gives the prosecutor the discretion to file any and all charges supported by the evidence. In determining whether to terminate the agreement, consideration should be given for an individual's good-faith attempt to comply with the deferred-prosecution agreement. The accused's failure to comply with the deferred-prosecution agreement should not serve as a basis for the ultimate charge pursued in the event that the agreement is breached

k. Monitoring and evaluation. A central concern surrounding precharge diversion is the risk that it will be used in a discriminatory way. Even in the absence of conscious discrimination, the benefits of deferred prosecution may be extended disparately to individuals of different races, genders, ethnicities, national origins, and social and economic stature. The revised Code has adopted as a fundamental goal of the sentencing system "to eliminate inequities in sentencing across population groups," § 1.02(2)(b)(iii). This principle must be understood to extend across all dispositions of criminal cases, even if a technical "sentencing" has not occurred. The best antidote to inequities of this kind is transparency, as required in subsections (14)-(15), and the ability to evaluate a program's implementation in light of its own published standards.

Reporters' Note

a. Scope. This Section, while new to the Code, has analogues in a variety of state procedures and rules governing "precharge diversion." States take different statutory approaches to precharge diversion programs. Several states expressly regulate the authorization of prosecutors to create diversion programs that engage before charges have been filed. See Okla. Stat. tit. 22, § 305.1-.6 (2011) ("Deferred Prosecution"); Mont. Code Ann. § 46-16-130 (2017) ("Pretrial Diversion"). Other states have passed statutes that merge precharge and postcharge diversion programs. See Colo. Rev. Stat. § 18-1.3-101 (2017) ("pretrial diversion" before or after charge); Wis. Stat. § 971.41 (2015-2016) (deferred prosecution for persons charged with, or for whom probable cause exists to charge with, passing worthless checks). Other states have opted for a hands-off approach, implicitly or explicitly leaving precharge diversion within the discretion of the prosecutor. For example, North Dakota has specific rules regulating deferred adjudication with court approval, but creates an exception for prosecutors and defendants who form precharge diversion agreements. N.D. R. Crim. P. 32.2(h). Washington code does not define or regulate precharge diversion, but recognizes the existence of the practice. Wash. Rev. Code § 10.37.015 (2017). Finally, even in states without statutes recognizing deferred prosecution, the practice is pervasive.

The use of deferred prosecution is common in the context of corporate criminal enforcement. Prosecutors in such cases often apply considerations similar to those found in § 6.03: in order to avoid severe collateral consequences, such as delicensing, prosecutors forego filing charges against a corporate defendant and instead enter into a "Nonprosecution Agreement." See Jennifer Arlen & Marcel Kahan, Corporate Governance Regulation Through Nonprosecution, 84 U. Chi. L. Rev. 323, 333 (2017). The resulting agreement has a regulatory function, ensuring corporate compliance with the threat of resumed prosecution. Corporate crime is not, however, the focus of § 6.03.

c. The problems of net-widening and relinquishment of rights. The standard adopted by subsection (3) is modeled on the American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, 3d ed. (1993), Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."). Subsection (5), which provides a right to counsel when agreeing to a deferred-prosecution agreement, has an analog in Montana's "Pretrial Diversion" statute. Mont. Code Ann. § 46-16-130 (2017).

Under the Code, probable cause is a prerequisite for deferred prosecution, regardless of the underlying accusations. This prerequisite is not currently followed in all states. For example, in Wisconsin, different standards of evidence apply depending on the underlying offense. A district attorney may enter into a deferred prosecution agreement with an offender merely accused of domestic violence or child sexual abuse under Wis. Stat. § 971.37 (2015-2016), but must have probable cause if the offender is accused of passing worthless checks under Wis. Stat. § 971.41 (2015-2016). The Code disagrees with such an approach and instead prescribes a uniform standard of (1) probable cause; and (2) reasonable anticipation of conviction. The Code's position is similar to the standard found in Oklahoma's statute, which requires the State to consider whether there is "sufficient evidence to achieve conviction." Okla. Stat. tit. 22, § 305.1 (2011).

e. Eligibility. Several states have statutes that specify the offenses eligible for deferred prosecution. See e.g. Haw. Rev. Stat. § 342H-38 (2010) (deferred prosecution for first-time offenders of felony disposal of solid waste); Mont. Code Ann. § 46-16-130 (2017) (barring the use of deferred prosecution for DUI offenses); Wis. Stat. § 971.41 (2015-2016) (deferred prosecution for worthless checks). State statutes that specify offenses eligible for deferral do not necessarily create an exclusive list. Actual practice among local prosecutors may include a wider range of offenses.

The Model Code does not specify the offenses or offenders eligible for deferred prosecution, and instead takes an approach similar to the one found in Okla. Stat. tit. 22, § 305.1 (2011). The Oklahoma statute allows persons accused of any crime to receive deferred prosecution, so long as the deferral agreement is in the best interests of the accused and not contrary to the public interest. The Oklahoma statute further requires local District Attorneys to

create guidelines specifying the factors considered to determine eligibility in a deferral program. Similarly, Subsection (14) requires each prosecutor's office to adopt and publish written standards for its use of deferred-prosecution agreements. When formulating these standards, prosecutors should not merely catalog offenses as either eligible or ineligible for deferred prosecution. Instead, the criteria for eligibility in a deferral program should reflect the purposes of deferred prosecution as described by Subsection (2). Deferred prosecution should be offered when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences of a formal charge and conviction. The underlying offense is only relevant insofar as it reflects other objective criteria, such as the violent or nonviolent nature of an offender and the role that treatable substance-abuse or mental-health problems played in the commission of the crime.

f. Victim notification. Since deferred prosecution takes place before a case reaches the courtroom, few states have regulated the practice in detail. Oklahoma, which does have a detailed set of statutes controlling precharge diversion practices, requires District Attorneys to consider the opinions of the victim as one of several factors before offering a deferred-prosecution agreement. Okla. Stat., Title 22, § 305.1 (2011). In other states, an applicable duty for prosecutors to notify or confer with the victim may be codified elsewhere as a "victim rights" provision. See e.g. Mont. Code Ann. § 46-24-203 (2017) (victims of certain offenses are entitled to notice of the accused's arrest, release, and any other criminal proceedings).

g. Conditions of the agreement. Deferred prosecution can be a useful tool for minor cases and instances in which traditional prosecution is unnecessary or might impose unwarranted collateral consequences, it is also a practice that can be abused. Nevertheless, because the exercise of prosecutorial discretion is hidden from public view, and because the threat of criminal prosecution is so powerful, it is also a tool that is subject to abuse. For an example of the ways in which financial incentives can affect the use of pretrial diversion programs administered by prosecutors, see Nathan Koppel, Probation Pays Bills for Prosecutors, The Wall Street Journal, January 20, 2012 (describing Oklahoma's programs of "DA supervision," which are "larger than the state prison system's traditional probation program," and generate fees in excess of actual expenses that have been used to offset a $1.2 million drop in state funding).

h. Sources of supervision and services. One of the primary goals of deferred prosecution is to avoid overly severe collateral consequences. For noncitizens, precharge diversion can be used to avoid the initiation of deportation proceedings for a minor offense. However, caution must be exercised when petitioning the court for supervision services so as not to trigger a "conviction" warranting deportation under federal law. Even without a plea or finding of guilt, the Immigration and Nationality Act defines "conviction" to include any situation where (1) an alien has admitted sufficient facts to warrant a finding of guilt; and (2) the judge has ordered some form of punishment, penalty, or restraint on liberty. 8 U.S.C. § 1101(a)(48)(A) (2012). If the parties seek a court order for programs or services under Subsection (10), and present facts sufficient to satisfy all elements of the underlying offense, then they may inadvertently trigger removal proceedings. For an example of how court-ordered diversion programs may be analyzed by Immigration Judges, see Matter of Mohamed, 27 I. & N. Dec. 92, 92 (BIA 2017) (removal proceedings of an offender who participated in deferred adjudication, but made incriminating stipulations of fact).

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§ 6.04. Deferred Adjudication.

(1) For purposes of this provision, deferred adjudication refers to any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction. Courts are encouraged to defer adjudication in ways consistent with this provision.

(2) The purposes of deferred adjudication are to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.

(3) The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(4) The court may defer adjudication upon motion of either party, or on its own motion. Deferred adjudication shall not be permitted unless the court has given both parties an opportunity to be heard on the motion and has obtained the consent of the defendant. Before deciding to grant deferred adjudication, the court shall direct the prosecution to make a good-faith effort to notify the victim, if any, of any judicial proceedings that may occur in connection with the motion, and provide an opportunity for comment.

(5) Deferred adjudication shall not be conditioned on a guilty plea but may be conditioned on an admission of facts by the accused.

(6) Deferred adjudication may be conditioned on a waiver of the right to a speedy trial during the period in which the conditions of deferred adjudication are being satisfied.

(7) As a condition of deferred adjudication, the court may order, separately or in combination, any condition that would be authorized under § 6.05, along with victim restitution.

(8) If the defendant materially satisfies the conditions for deferred adjudication, the court shall dismiss the underlying charges with prejudice. A disposition under this Section shall not be considered a conviction for any purpose.

(9) If there is probable cause to believe a defendant who has been offered deferred adjudication has materially breached one or more conditions of deferral, the court may require the defendant to appear for a hearing, at which the defendant is entitled to the assistance of counsel.

(a) If, after hearing the evidence, the court finds by a preponderance of the evidence that a material breach has occurred, it may take any of the following actions:

(i) modify the conditions of deferral in light of the violation to address the offender's identified risks and needs; or

(ii) revoke the opportunity for deferred adjudication, and resume the traditional adjudicative process.

(b) When sanctioning a violation, the court should impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, in light of the purpose for which the condition was originally imposed.

(10) The sentencing commission shall develop guidelines identifying the kinds of cases and offenders for which deferred adjudication is a recommended disposition.

Comment:

a. Scope. Like § 6.03, this provision is new to the Code, but not to practice. As the number of people charged with crimes has risen, courts and prosecutors have developed numerous ways of managing certain criminal cases, particularly those committed by youthful or first-time offenders, that do not result in a record of conviction. These practices go by many names ("pre-trial diversion," "deferred entry of judgment," "deferred sentencing," "probation before judgment," etc.), and are administered by different actors (sometimes the prosecutor, sometimes the court). In most cases, participation requires the entry of a guilty plea or an admission of guilt. Some practices referred to as "deferred adjudication" involve the entry of a guilty plea that is later expunged upon completion of conditions by the convicted person.

This provision defines deferred adjudication as any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction. The provision vests administrative responsibility over deferred adjudication in the trial courts, which set the conditions of deferral, see § 6.04(7), and resolve questions of compliance, see § 6.04(9). The provision is the postcharge judicial analog to the prosecutor's precharge power to defer prosecution under § 6.03.

Section 6.04 reverses the Institute's former policy that "[t]he Model Code does not provide for the imposition of probation without conviction" because "[t]he Institute . . . was unwilling to approve a procedure so likely to put pressure on the innocent to submit to correctional restraints." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 9 at p. 56. The original Code championed a postconviction version of deferred adjudication under the title "deferred imposition of sentence." Section 6.02(3) of the 1962 Code provided that "the Court may suspend the imposition of sentence on a person who has been convicted of a crime." During the period of suspended imposition, former § 301.1(1) authorized trial courts to attach supervision conditions identical to those available for a sentence of probation. For defendants who fully satisfied these conditions, § 301.5(1) gave courts discretion to order that "so long as the defendant is not convicted of another crime, the judgment shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction of a crime." Many existing state provisions have followed the original Code's approach.

Section 6.04 responds to many of the same concerns, but pauses the normal flow of case processing at an earlier juncture—before a conviction has occurred. The most compelling reason for this change is to prevent the imposition of some of the most serious collateral consequences of conviction. In addition, because mandatory-minimum sentencing laws are commonplace—despite the Institute's categorical disapproval—it is helpful to give courts a pathway to disposition that bypasses the force of those laws.

b. Purposes. Like deferred prosecution, deferred adjudication is intended to promote the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime. Although conditions imposed by the court may be subjectively punitive, the court should make every effort to be parsimonious in the imposition of conditions.

c. Eligibility. Similar to deferred prosecution, cases should not be selected for deferred adjudication unless neither justice nor public safety demands that the individual be stigmatized by formal conviction, with its attendant collateral consequences. Such cases might include first-time or youthful offenders, nonviolent offenders, and individuals with substance-abuse or mental-health problems that can be safely treated in the community.

This provision does not impose any offense- or offender-based restrictions on admission to deferred-prosecution programs. Subsection (3) allows courts to make use of deferred adjudication in cases where mandatory-minimum sentences would otherwise apply. Under subsection (10), eligibility may turn on guidelines developed by the sentencing commission.

d. Process. The main significance of subsection (4) is that a deferred adjudication does not require the approval of the prosecutor, though it always requires the consent of the defendant. The majority of existing state provisions interpose prosecutors as gatekeepers to deferred adjudications, and the revised Code would disapprove of this arrangement in all cases. While the views of the prosecutor and crime victims, if any, may be heard on the question, full dispositional authority resides in the courts.

This provision does not impose a requirement of a presentence report before a deferred adjudication may be

granted. While a report will often—perhaps usually—be desirable, the Code would allow court systems flexibility on this point.

e. Offenses that carry mandatory penalties. The revised Code prohibits the use of mandatory prison sentences in every instance, but also includes numerous provisions designed to mute the impact of such laws where they exist despite the Institute's longstanding disapproval. See § 6.11, Comments *a* and *m*. Subsection (3) continues this approach. It is also an explicit disavowal of state laws that exclude offenses carrying mandatory penalties from eligibility for deferred adjudication. In the absence of the prospect of statutory exclusion, subsection (3) would be uncontroversial. Mandatory punishments follow upon convictions, and § 6.04 interrupts the flow of case processing before convictions have occurred. For other Code provisions carving out exceptions to the operation of mandatory penalties, see § 6.14(f); § 9.03(6); § 9.08(3); § 10.01(3)(b); § 7.09(5)(b); § 11.01(3); § 11.02(5); § 11.03(8).

f. Guilty plea not required. Subsection (5) adopts a pre-plea model of deferred adjudication. Because § 6.04 is intended to serve as a full-fledged alternative to conviction and sentences short of imprisonment, it is reasonable to expect that some defendants may be required to make admissions of fact to be granted deferred adjudication. Subsection (5) vests discretion in the courts to determine whether such a prerequisite is desirable in individual cases.

g. Waiver of speedy-trial rights. Subsection (6) responds to the self-evident necessity of obtaining a waiver from the defendant of the right to a speedy trial.

h. Repeat eligibility. This provision rejects the common practice among the states of allowing an individual only one opportunity to participate in a deferred-adjudication program. Instead, it leaves the decision to the discretion of the trial court, guided by the sentencing commission, see § 9.03(4).

i. Benefits of completion. Insofar as possible, the deferred-adjudication program should attempt to restore defendants to the legal and social position of someone who has never been charged with a crime. For individuals who successfully complete the terms imposed by the court, subsection (8) provides that the charges be dismissed with prejudice, that the disposition not be considered part of the defendant's criminal record, and that collateral consequences should not be triggered by the disposition.

This provision does not provide for expungement of records of arrests and charges as part of any deferred-adjudication provision, but instead follows the original Code's practice of ameliorating the harms that flow from conviction rather than attempting the difficult—and perhaps inadvisable—step of trying to hide the fact of past arrest or charge—in an era of electronic records. Proponents of expungement want defendants to be permitted to "truthfully" represent to government officials and private parties that they have never been arrested or convicted. Others argue that records of criminal-case processing are so widely available that expungement is simply not feasible. Even were the law to allow individuals to state "truthfully" that they had never been arrested or convicted, these representations would often be viewed as concealments or lies in the broader world. On this view, some form of "certificate of restoration of rights" is preferable to ineffectual attempts at erasure of the past. See § 7.06.

j. Violations of conditions. Subsection (9)(a) provides that, upon proof of a material breach of the conditions of deferred adjudication, the court may either modify the conditions of the original offer of deferred adjudication or revoke the opportunity for deferred adjudication. When an offer of deferred adjudication is revoked, the case resumes its processing through the traditional adjudicative process. Subsection (9)(b) encourages judges, when responding to material breaches, to impose the least severe consequence needed to address the violation and the risks posed by the offender in the community.

k. Sentencing guidelines. Under the revised Code, sentencing guidelines may take the form of presumptively enforceable rules, subject to trial-court discretion to depart from those rules, or advisory recommendations. See § 9.04. Guidelines for deferred adjudications could supply valuable information and direction, and could foster uniformity of analysis, for decisions on admission and appropriate sanctions. Accordingly, subsection (10) encourages, but does not mandate, that sentencing commissions create such guidelines.

Reporters' Note

a. Scope. State provisions authorizing deferred adjudications exist in many states, although there is a wide variety in terminology and approach across jurisdictions. See Cal. Penal Code § 1000 (West 2018) ("pretrial diversion"); Colo. Rev. Stat. § 18-1.3-101 (2017) ("pretrial diversion" before or after charge); Colo. Rev. Stat. § 18-1.3-102 (2017) ("deferred sentencing" after a plea of guilty); Del. Code Ann. tit. 11, § 4218 (West Supp. 2018) ("probation before judgment"); N.D. R. Crim. Proc. 32.2 ("pretrial diversion"); Conn. Gen. Stat. § 54-56e (2017) ("accelerated pretrial rehabilitation"); Haw. Rev. Stat. § 853-1 (2014) ("deferred acceptance of guilty plea"); 730 Ill. Comp. Stat. § 5/5-6-1 (2016) ("disposition of supervision"); Mass. Gen. Laws, Ch. 276A (2014) ("pretrial diversion"); Md. Code Ann., Crim. Proc. § 6-220 (2011) ("probation before judgment"); N.Y. Crim. Proc. Law § 170.55 (McKinney 2017) ("adjournment in contemplation of dismissal"); Ohio Rev. Code § 2935.36 ("pretrial diversion"); Ohio Rev. Code § 2951.041 (West Supp. 2017) ("intervention in lieu of conviction" for defendants in need of drug or alcohol treatment); Vt. Stat. tit. 3, § 164 (Supp. 2017) ("adult court diversion"); Wis. Stat. § 971.39 (2015-2016) ("deferred prosecution").

For background on deferred-adjudication processes across the states, see Margaret Colgate Love, Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences, 22 Fed. Sent'g Rep. 6, 7 (2009) (noting that "[d]eferred adjudication schemes are statutorily authorized in over half the states"). Love credits the

provisions of the original Code for spawning much of the state legislation that now exists on deferred adjudications. See id. ("In the 1970s, many states adopted deferred adjudication laws that were evidently inspired by the corrections articles of the Model Penal Code.").

c. Eligibility. States place a variety of offender- and offense-based restrictions on admission to deferred adjudication programs. For example, several states limit eligibility to only misdemeanor offenses, Del. Code Ann. tit. 11, § 4218 (West Supp. 2018); Wash. Rev. Code § 10.05.010 (2017), bar sex crimes from diversion programs, Colo. Rev. Stat. § 18-1.3-101(7) (2017); Ky. Rev. Stat. § 533.250, limit the use of deferral programs for DUI offenses, Ind. Code § 33-39-1-8; Wis. Stat. § 967.055(3) (2015-2016), or granularly designate specific crimes as eligible or ineligible for diversion. Haw. Rev. Stat. § 853-4 (2014); 730 Ill. Comp. Stat. § 5/5-6-1 (2016); Md. Code Ann., Crim. Proc. § 6-220(d) (2011); Ohio Rev. Code § 2951.041 (West Supp. 2017); Vt. Stat., tit. 3, § 164 (Supp. 2017). Apart from the underlying offense, several states may also consider the offender's criminal record, Ariz. Rev. Stat. 11-361; Cal. Penal Code § 1000 (West 2018); Del. Code Ann. tit. 11, § 4218 (West Supp. 2018), mental health and substance abuse issues, Ohio Rev. Code § 2951.041 (West Supp. 2017), or even veteran status, Conn. Gen. Stat. § 54-56e (2017). Finally, Ohio considers the victim's characteristics regardless of the underlying offense. Ohio Rev. Code § 2951.041 (West Supp. 2017) (victim cannot be an on-duty peace officer, disabled, or over 65 or under 13 years old).

Under § 6.02(3) the 1962 Code, one of the precursors to the current § 6.04, the Court was permitted to "suspend the imposition of sentence" for any crime, with the sole, optional exception of murder. The current Code builds on this tradition and § 6.04 is written to be broadly applicable, without rigid limitations. As with eligibility for Deferred Prosecution under § 6.03(14), the Code does not specify the offenses or offenders eligible for deferred adjudication. Its approach is similar to statutes passed in Texas and Arizona, which broadly define their deferral programs and call for the establishment of guidelines to be used when determining eligibility for a deferral program. Tex. Gov't Code Ann. § 76.011; Ariz. Rev. Stat. § 11-362. Similarly, Subsection (10) calls upon the Sentencing Commission to develop guidelines for the cases and offenders appropriate for deferral programs. Such guidelines should not merely catalog offenses as either eligible or ineligible for deferred adjudication. Instead, the guidelines should reflect the purposes of deferred adjudication as described by Subsection (2). Deferred adjudication should be offered when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences of a formal conviction. The underlying offense, and the characteristics of the offender, may be relevant insofar as they reflect other objective criteria, such as the role that violence or treatable substance-abuse and mental-health problems played in the commission of the crime.

d. Process. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 (McKinney 2017) ("Adjournment in contemplation of dismissal in cases involving marihuana"); Vt. Stat., tit. 13, § 7041 (Supp. 2017) (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (West Supp. 2017) (prosecutor may initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs; see Lane v. Phillabaum, 912 N.E.2d 113 (Ohio Ct. App. 2008)).

Some codes require that the prosecutor or court consider the victim's views before consenting to a deferred adjudication or sentencing, see, e.g., N.D. R. Crim. P. 32.2(a)(1); Min. R. Crim. P. 27.05. Often, there is a mandatory duty to notify or confer with the victim, while the ultimate decisionmaking is left within the prosecutor or Court's discretion. Del. Code Ann. tit. 11, § 9405 (West 2010) ("prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion"); Ohio Rev. Code § 2951.041 (West Supp. 2017) (prosecutor's obligation to notify victim of hearing under § 2930.06 applies to deferral hearing); Ind. Code § 33-39-1-8 (2017) (prosecutor must notify the victim before withholding further prosecution); Ky. Rev. Stat. § 533.252 (West 2016) (prosecutor must interview victim, and may choose to present the victim's recommendations to the Court). Subsection (4) of this provision requires the court to order the prosecution to provide the victim with notice of proceedings and the opportunity to comment on the decision to defer adjudication of any given case.

e. Offenses that carry mandatory penalties. Deferred-adjudication agreements allow offenders to avoid unjustly harsh sentencing provisions, putting them in direct conflict with mandatory minimum statutes. Therefore, some states explicitly bar the use of deferral programs when the offense carries a mandatory sentence. See e.g. Ohio Rev. Code § 2951.041 (West Supp. 2017). In other jurisdictions, case law may also dictate that deferral is unavailable for any offenses that carry mandatory penalties. See e.g. State v. Hamili, 952 P.2d 390, 395 (Hawaii 1998). The Model Code, and the Institute, condemn the use of mandatory sentences and Subsection (3) insures that deferred adjudication is not limited by pre-existing mandatory sentencing provisions.

f. Guilty plea not required. States are split regarding the role of guilty pleas in deferral proceedings. Several states have provisions requiring the court to accept a guilty plea before deferring adjudication. Del. Code Ann. tit. 11, § 4218 (West Supp. 2018); Haw. Rev. Stat. § 853-1 (2014); 730 Ill. Comp. Stat. § 5/5-6-1 (2016) (deferral upon guilty plea or stipulation of necessary facts); Md. Code Ann., Crim. Proc. § 6-220 (2011); Ohio Rev. Code § 2951.041 (West Supp. 2017) (Defendant requests intervention prior to plea, then court accepts a guilty plea when it finds defendant eligible for the program). Other states have provisions that

specifically require deferral to occur without a guilty plea. Ariz. Rev. Stat. § 11-361 (2017) (deferral prior to guilty plea or trial); Cal. Penal Code § 1000.1 (West 2018) (defendant pleas not guilty when accepting deferral). Kentucky generally requires a guilty or Alford plea for participation in pretrial diversion programs, Ky. Rev. Stat. § 533.250 (West 2016), but specifically bars the Court from accepting a plea for deferrals in drug possession cases, Ky. Rev. Stat. § 218A.14151 (West 2016). See also Tex. Att'y Gen. Op. GA-0986 (2013) (in Texas, the power of a prosecutor to require a guilty plea as a condition of deferral is an open question of law).

For noncitizens, the requirement of a guilty plea, or the requirement to admit the facts of the underlying crime, can have unintended consequences. The Immigration and Nationality Act defines "conviction" to include any situation where (1) an alien has plead guilty or admitted sufficient facts to warrant a finding of guilt; and (2) the judge has ordered some form of punishment, penalty, or restraint on liberty. 8 U.S.C. § 1101(a)(48)(A) (2012). Even if charges are dismissed upon the completion of a deferral program, the guilty plea is still considered a "conviction" under the Immigration and Nationality Act and may trigger removal proceedings. See Matter of Mohamed, 27 I. & N. Dec. 92, 92 (BIA 2017) (Deferral recipient was not "convicted" under Texas law, but incriminating statements of fact constituted a "conviction" under federal immigration law).

To avoid deportation, or other unintended consequences, for a relatively minor offense, the Model Code does not allow deferral to be conditioned upon the receipt of a guilty plea. This approach furthers one of the primary purposes of deferred adjudication: to avoid unjustly harsh collateral consequences. It also furthers the intent specified in many state statutes – including those states requiring a guilty plea - that successful completion of a diversion program shall not be considered a "conviction". See Haw. Rev. Stat. § 853-1 (2014); 730 Ill. Comp. Stat. § 5/5-6-3.1 (2016); Md. Code Ann., Crim. Proc. § 6-220 (2011); Ohio Rev. Code § 2951.041 (West Supp. 2017).

h. Repeat eligibility. Unlike some states, the Code rejects the practice of limiting repeat eligibility for deferral programs. See Conn. Gen. Stat. §54-56e(b) (2017); Haw. Rev. Stat. § 853-4 (2014); Wash. Rev. Code § 10.05.010(2) (2017); Ky. Rev. Stat. § 218A.14151 (West 2016); Ohio Rev. Code § 2951.041 (West Supp. 2017). It also rejects the practice of some states to place a time limit on repeat eligibility. See Conn. Gen. Stat. § 54-56e(b) (2017) (ten years); Del. Code Ann. tit. 11, § 4218(d) (West Supp. 2018) (five years); 730 Ill. Comp. Stat. § 5/5-6-1 (2016) (five years); Ky. Rev. Stat. § 533.250 (West 2016) (five years).

Instead, the Code adheres to the philosophy espoused by Vermont's statute, which does not limit repeat eligibility and specifies that diversion programs should be designed to treat substance abuse or mental health needs "regardless of the person's prior criminal history record." Vt. Stat. tit. 3 § 164 (Supp. 2017). In addition, several other states either lack statutory limitations on deferral program eligibility, or define eligibility without restrictions on repeat applicants. Ariz. Rev. Stat. § 11-362 (2017); Ind. Code § 33-39-1-8 (2017); Min. R. Crim. P. 27.05; Tex. Gov't Code Ann. § 76.011 (West 2018).

i. Benefits of completion. Subsection (8) goes further than the law of many states in providing that a deferred adjudication may not be considered a part of the accused's criminal history in later proceedings. See Rudman v. Leavitt, 578 F. Supp. 2d 812 (D. Md. 2008) (holding that probation before judgment under Maryland law is considered a prior conviction for purposes of federal sentencing); United States v. Morillo, 178 F.3d 18 (1st Cir. 1999) (holding that a "continuance without finding" disposition under Mass. Gen. Law, Ch. 278, § 18 (2014), counts as a prior sentence for federal sentencing purposes because it is an admission of guilt).

j. Violations of conditions. The procedures in Subsection (9), including the recommendation that courts impose the least severe sanction necessary to address violations, are similar to the procedures recommended for violations of probation. See § 6.15(4). This matches the approach of several states with provisions applying probation revocation procedures to the revocation of deferred adjudication agreements. Colo. Rev. Stat. § 18-1.3-101 (2017); Ky. Rev. Stat. § 533.256 (West 2016). For a discussion of probation revocation procedures, and the role of discretion in sanctioning probation violations, see § 6.15, Reporters' Note a.

ARTICLE 7. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

§ 7.01. Definitions.

(1) For purposes of this Article, collateral consequences are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court.

(2) For purposes of this Article, a collateral consequence is mandatory if it applies automatically, with no determination of its applicability and appropriateness in individual cases.

(3) For purposes of this Article, a collateral consequence is discretionary if a civil court, or administrative agency or official, is authorized, but not required, to impose the consequence on grounds related to an individual's conviction.

Comment:

a. Collateral consequences, generally. When the Model Penal Code was adopted in 1962, the primary consequence of conviction was a fine, probation, or a period of incarceration. Collateral consequences were limited in most cases to a temporary loss of the right to vote, hold public office, serve on a jury, and testify in court. Since then collateral consequences have proliferated, and now include mandatory deportation, inclusion on a public registry, loss of access to public housing and benefits, financial aid ineligibility, and occupational licensing restrictions. Some

of these consequences last for the duration of the convicted individual's life. This Section, and those that immediately follow (§§ 7.02-7.06), address legal mechanisms by which convicted individuals may seek and obtain relief from some types of collateral consequences.

b. Scope. The term of art "collateral consequences" has been defined to include a host of legally imposed or authorized sanctions, usually denominated as civil or regulatory measures triggered by criminal conviction. The Code uses the term to refer specifically to the negative consequences of conviction that are authorized by state or federal law as a result of an individual's conviction. It excludes from the definition of collateral consequences all informal, locally imposed, private, and extralegal consequences of conviction. It also excludes all direct consequences of conviction, that is, those consequences that are authorized by a sentencing court as part of an offender's criminal sentence. (Those direct consequences may include not only fines and terms of community supervision or custody imposed as a penalty for a criminal offense, but also the conditions of supervision and/or institutional restrictions, such as security classification, imposed in connection with the service of the criminal sentence.)

Subsections (2) and (3) define two distinct categories of collateral consequences, distinguished by their legal modes of operation. Mandatory collateral consequences are those imposed automatically by force of law as a result of conviction. The nonindividualized nature of mandatory consequences implicates the Code's policies against mandatory punishments that allow no room for individualization by a sentencing judge; see § 6.11 Comments *a* and *m*. Discretionary collateral consequences are those consequences that may, but need not, be imposed on an individual as a result of criminal conviction. Although these consequences can be long-lasting, they allow room for consideration of individual circumstances by discretionary decisionmakers, and are therefore less problematic under the Code.

Reporters' Note

a. Collateral consequences, generally. In America today, estimates suggest that more than one in four adults has a criminal record. Mike Vuolo, Sarah Lageson, & Christopher Uggen, Criminal Record Questions in the Era of "Ban the Box," 16 Criminology & Pub. Pol'y 139 (2017). Increasingly, the harshest and most enduring consequence of conviction is not the sentence imposed by a court, but the penalties and disqualifications imposed by civil statutes and regulatory requirements as a result of conviction. See Margaret Colgate Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 754 (2011). From registration to limits on occupational licensure, residency, and access to public benefits, collateral consequences play an increasingly important role in preventing those who have committed crimes from successfully reintegrating into the law-abiding community. Michael Pinard, Reflections and Perspectives on Reentry and Collateral Consequences, 100 J. Crim. L. & Criminology 1213, 1211-1219 (2010) ("Given the breadth and permanence of collateral consequences, [convicted] individuals are perhaps more burdened and marginalized by a criminal record today than at any point in U.S. history"); Joan Petersilia, When Prisoners Come Home 136 (2003) (collateral consequences "are growing in number and kind, being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history").

Collateral consequences arise under both state and federal law. In a typical U.S. state, hundreds of collateral consequences attach to any felony conviction, and there are additional mandatory collateral consequences that attach to particular classes of offenses, such as sexual assaults, see Article 213, and drug-trafficking offenses. Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele, Collateral Consequences of Criminal Conviction: Law, Theory & Practice (2016 ed.). A number of federal collateral consequences are also triggered by state conviction. Id.

Courts have taken the position that collateral consequences are not "punishment" within the meaning of the Eighth Amendment See Doe v. Dep't of Pub. Safety and Corr. Servs., 430 Md. 535, 600, 62 A.3d 123 (Md. Ct. App. 2013) ("sex offender registration is not punishment, but a collateral consequence of a conviction"); Green v. Board of Elections of City of New York, 380 F.2d 445, 451 (2d Cir. 1967) ("Depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise'"). Nevertheless, those within the criminal-justice system have become increasingly conscious of the punitive weight of these sanctions. Meda Chesney-Lind and Marc Mauer, Invisible Punishment: The Collateral Consequences of Mass Imprisonment (2003). Major modern developments in charging and sentencing practice, such as the proliferation of deferred-prosecution and deferred-adjudication programs (including "first offender" programs and some problem-solving courts), have been driven by a desire to avoid triggering collateral consequences through formal conviction. See Richard A. Bierschbach and Stephanos Bibas, Constitutionally Tailoring Punishment, 112 Mich. L. Rev. 397, 445 (2013); Jenny Roberts, Why Misdemeanors Matter: Defining Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 297 (2011). In light of the degree to which collateral consequences now drive many charging, bargaining, and sentencing decisions, the revised Code devotes serious attention to the issue of collateral consequences.

b. Scope. The definitions used in this Section are distinct from, but consistent with, the definition of collateral consequences adopted by two recent law-reform projects—the American Bar Association's Standards for Mandatory Collateral Consequences and Discretionary Disqualification of Convicted Persons (3d ed. 2004) and the Uniform Collateral Consequences of Conviction Act (Unif. Law Comm'n 2010). The definitions found in this provision draw upon those earlier efforts, but also represent the independent policy assessments of The American Law Institute. In many

respects—including, at the most prosaic level, the definitions of terms found in this provision—the Institute has charted its own course. Where differences exist, they spring from the comprehensive scope of the Model Penal Code project, which includes all aspects of formal sentences imposed on offenders, together with alternative dispositions and noncriminal penalties or disqualifications.

Consistent with the definitions used in the ABA Standards and the Uniform Collateral Consequences of Conviction Act, collateral consequences are defined in this Section as negative repercussions of conviction, authorized by law, that fall outside the direct sentence imposed by the court at sentencing. Collateral consequences do not include informal sanctions, see Wayne Logan, Informal Collateral Consequences, 88 Wash. L. Rev. 1103 (2013), nor are they defined here to include economic sanctions, imprisonment (and its attendant hardships), or periods of community supervision with their attendant conditions. They do include a broad range of legally imposed restrictions, such as loss of civic rights, limits on occupational licensure, and reporting requirements. This provision distinguishes between mandatory and discretionary collateral consequences. Mandatory consequences are those which are imposed automatically by operation of federal or state law, and include bans on voting by convicted felons, see, e.g., Nev. Const. Art. II, § 1; N.Y. Const. Art II, § 3; Wash. Rev. Code § 10.64.140 (2017); and rules prohibiting individuals convicted of certain offenses from obtaining teaching licenses, see, e.g., Cal. Code Regs. tit. 5, § 80301 (2017-2018); 105 Ill. Comp. Stat. 5/21B-15 (2016); S.C. Code Ann. § 59-25-280(A) (2011). Discretionary consequences are those that permit authorized decisionmakers to deny benefits or opportunities to individuals convicted of certain offenses, but do not require disqualification. See, e.g., Neb. Rev. Stat. § 19-1832 (2012) (providing for discretionary discharge of any civil servant convicted of a misdemeanor or felony); N.J. Stat. Ann. § 3B:12A-6 (2007) (discretionary bar to service as legal guardian for relatives for any misdemeanant or felon). Because discretionary consequences allow decisionmakers to consider the facts underlying an individual conviction when deciding whether a given consequence should be imposed, they provide a safeguard against enforcement of sanctions that do not serve legitimate regulatory purposes in specific cases.

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§ 7.02. Sentencing Guidelines and Collateral Consequences.

(1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.

(a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law.

(b) The commission [or designated agency] shall ensure the compendium is kept current.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under §§ 7.04 and 7.05. The commission's guidance shall take into account the extent to which a mandatory consequence is substantially related to the elements and facts of an offense and likely to impose a substantial and unjustified burden on a defendant's reintegration.

Comment:

a. Scope. The goal of this new provision is to aggregate in one location as much information as possible about collateral consequences so that the public, defendants, counsel, and courts can easily access information regarding the full consequences of conviction. This provision requires the sentencing commission to collect and maintain information on all collateral consequences as defined in § 7.01, whether mandatory or discretionary, and to make that information accessible to the public.

The provision requires the commission to regularly maintain and publish its compendium, making it a reliable and easily accessible resource for individuals and their lawyers at every stage of a criminal prosecution, from charging through sentencing.

b. Information collected. Under subsection (1), the sentencing commission is required to "compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations." Subsection (1)(a) further requires that the compendium delineate for each individual crime "all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law." Excluded from the commission's compendium are all nonfederal, extrajurisdictional collateral consequences, and all disqualifications and sanctions not contained in statutes or administrative code provisions, such as municipal ordinances.

c. Distribution. Subsection (1) requires the sentencing commission to "publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations." The provision does not mandate how publication should occur or to whom the compendium should be distributed; however, publication should make the compendium easily accessible to courts, prosecutors, defense counsel, and the general public. Electronic methods of publications may prove most simple, accessible, and cost-effective.

d. Organization. Subsection (1)(a) requires the sentencing commission to provide information about all mandatory collateral consequences that apply to every offense listed in the criminal code, arranged by crime. This requirement is designed to ensure that the compendium is accessible both to legal professionals and to general users who want to know the full consequences of conviction of any given offense. See ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons § 19-1.2(a)(iii) (3d ed. 2004)

(information concerning the mandatory collateral consequences that are applicable to a particular offense should be readily available). Although not required by the Code, the compendium would most usefully be organized to distinguish between mandatory and discretionary collateral consequences in order to provide parties and courts with an easy-to-use reference for determining which consequences can be subject to a petition for relief under § 7.04(2).

e. Challenges of nonstatutory collateral consequences. Many collateral consequences (particularly those that relate to residency) are imposed at the local level, by ordinance or common practice. These low-visibility restrictions change often and are difficult to track. In order to ensure that collateral consequences are fairly publicized and scrutinized, states would ideally mandate that all collateral consequences be imposed at the state, rather than the local, level. Nevertheless, recognizing the significant challenges involved in indexing local restrictions as they are currently compiled, subsection (1) requires the sentencing commission to track only those sanctions and disqualifications that are contained in federal and state statutes and regulations.

f. Guiding courts on petitions for relief. Subsection (2) requires sentencing commissions to develop guidance for courts on how best to exercise their discretion when ruling on petitions for relief from mandatory collateral consequences under §§ 7.04(2) and § 7.05. This Section allows individual commissions to guide courts by developing standards for determining when there is a clear or close connection between a mandatory collateral consequence and the crime of conviction or the facts underlying the criminal case. The "substantial relationship" standard is meant to embody the type of connection that will warrant imposition of a mandatory consequence and, conversely, that will warrant its relief.

Requiring commissions to provide guidance to courts exercising their discretion under §§ 7.04(2) and 7.05 furthers the public interest in equitable decisions while preserving judicial discretion. Because such guidance is not currently available from most sentencing commissions, this subsection leaves room for commissions to experiment with offering guidance in forms that differ from traditional structured guidelines.

Alternative formats might take the form of bulletins providing relevant data or supplemental information about the purposes and operation of certain mandatory collateral consequences in terms of their public-safety purposes, and collateral consequences most or least likely to advance public safety for certain categories of offenses or offenders. Thus, for example, a mandatory bar to certification as an operator of a commercial vehicle might have a substantial relationship to a crime involving a driving offense, a tenuous relationship to a crime involving drugs or violence, and little or no relationship to a crime involving theft or false statements. A mandatory bar to public housing might have a substantial relationship to a crime involving serious violence and major drug trafficking, but little or no relationship to dated fraud offenses. A third example is a mandatory bar to a day-care operator's license, which has a clear nexus to violence and sexual assault, but a less clear relationship to a minor drug crime or gambling offense.

The commission's guidance to courts considering motions for relief may also take into account a particular defendant's circumstances that bear on public safety risk, such as other criminal history, age at the time of the offense, time elapsed since the offense, participation in treatment for mental-health or substance-abuse problems, and evidence of rehabilitation.

It is important to bear in mind that, as provided in § 7.04(3), an order of relief from a mandatory consequence under §§ 7.04(2) or 7.05 does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer the benefit or opportunity in question. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be reasonably related to the benefit or opportunity the individual seeks to obtain.

Reporters' Note

a. Scope. The goal of this provision is to aggregate in one location as much information as possible about the collateral consequences of conviction so that defendants, counsel, and courts can easily access information needed for pre- and post-conviction decisions. This provision requires the sentencing commission to collect and maintain information on all mandatory collateral consequences and discretionary collateral consequences that attend conviction, and to make that information accessible to the public.

b. Information collected. In many jurisdictions, the number of collateral consequences that attach upon conviction number in the hundreds. The laws that authorize these consequences are scattered throughout statutes and regulations; aggregating such a high volume of information is no easy task, particularly given the pace at which such legislation is passed and modified. The information that subsection (1) requires the commission to gather is similar in nature and scope to that required by the Uniform Collateral Consequences of Conviction Act § 4 (Unif. Law Comm'n 2010) (requiring "designated governmental agency or official" to "identify . . . any provision in this state's Constitution, statutes, and administrative rules which imposes a collateral sanction or authorizes the imposition of a disqualification" and to publish and update a compilation of the identified provisions).

While such a task is daunting, it is not impossible and has been made simpler by recent research efforts. In 2008, Congress directed the National Institute of Justice to compile a 50-state inventory of collateral consequences. Court Security Improvement Act of 2007, Pub. L. 110-177, § 510, 121 Stat. 2534, 2544 (2008). Through the efforts of the American Bar Association, the National Inventory of the Collateral Consequences of Conviction was developed and made available online to the public. Project Description, NICCC, https://niccc.csgjusticecenter.org/description/

(last visited: April 10, 2018). Since 2017, the repository has been hosted and maintained by the Council of State Governments' Justice Center. The inventory provides a listing of mandatory collateral consequences and discretionary collateral consequences authorized by statute or administrative regulation in every state and in the federal system. Although this resource is one that will require continuous updating, it has removed many of the logistical barriers to the collection of such information that previously existed.

c. Distribution. There are several existing examples of web-based compilations. The National Inventory of the Collateral Consequences of Conviction, https://niccc.csgjusticecenter.org (last visited: Apr. 10, 2018), uses a website to provide a searchable database of information on collateral consequences in a number of jurisdictions, as do Ohio's Civil Impacts of Criminal Convictions database, http://civiccohio.org/ (last visited: Apr. 10, 2018), and Columbia Law School's Collateral Consequences Calculator for New York State, https://calculator.law.columbia.edu (last visited: Apr. 10, 2018).

f. Guiding courts on petitions for relief. In many states, administrative licensing agencies are called upon to make discretionary decisions about the imposition of employment restrictions for people with criminal records. In doing so, many are guided by statutory standards that permit the imposition of employment and licensing restrictions only when a crime is substantially related to the work for which a license or permit is sought. See generally Collateral Consequences Res. Ctr., 50-State Comparison: Consideration of Criminal Records in Licensing and Employment (2017) (citing Cal. Bus. & Prof. Code § 490 (West 2018); 74 Del. Laws 580 (2004) (codified in scattered sections of Del. Code. Ann., tit. 24); N.H. Rev. Stat. Ann. § 332-G:10 (2017); Wis. Stat. §§ 111.32, 111.335(1)(c)) (2015-2016), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/. In determining whether a substantial relationship exists, states look to factors such as the nature of the crime; the relationship of the crime(s) to the activities authorized by the license; the relevance of any conviction to the fitness of the licensee to perform the occupation authorized by the license; the length of time since the conviction; and the behavior and activities of licensee following conviction. Code Regs. 09.01.10.02 (2017). See also Colo. Rev. Stat. § 24-5-101(4) (2017); N.D. Cent. Code § 12.1-33-02.1 (2016-2017); Tex. Occ. Code Ann. § 53.022 (West 2018) (same); Va. Code Ann. § 54.1-204(B) (2013) (same).

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§ 7.03. Voting and Jury Service.

(1) No person convicted of a crime shall be disqualified on that basis from exercising the right to vote [, except that an individual serving a custodial sentence as a result of a felony conviction may be disqualified while incarcerated].

(2) A person convicted of a crime may be disqualified on that basis from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

Comment:

a. Scope. This provision closely tracks § 306.3 of the original Model Penal Code, with one primary difference. The original Code required that incarcerated voters be disqualified from voting, while the current Code favors a prohibition on disenfranchisement altogether, and offers a bracketed alternative that permits disenfranchisement only during the period of incarceration for those convicted of felony offenses. The original Code required, and the current provision allows, juror disqualification for the full duration of the sentence. This provision does not permit juror disqualification beyond the termination of the sentence.

b. Period of disqualification, voting rights. This provision offers jurisdictions a choice with respect to voter disqualification. The favored option prohibits disenfranchisement as a consequence of conviction in all cases. Although disenfranchisement has been justified as a fitting punishment for transgressing the rules of civil society, the legal justification for collateral consequences is that they serve regulatory functions, not punitive ones. (This is why collateral consequences can be applied retroactively and are ordinarily not subject to challenge under the Eighth Amendment.) For that reason, punishment alone cannot justify the denial of voting rights to convicted individuals, and there is no evidence suggesting that ballots cast by prisoners are any more likely to be fraudulent than those cast outside prison walls. Furthermore, there are few logistical obstacles to allowing convicted individuals to vote in prison or jail. Two states allow prisoners to vote, Maine and Vermont, and both authorize prisoners to complete absentee ballots.

Even though there are few principled or practical arguments in favor of disenfranchising prisoners, a bracketed alternative is included that would authorize disenfranchisement for individuals convicted of felony offenses during the period of imprisonment only. Under this alternative, individuals would regain the right to vote automatically upon release from prison.

c. Full opportunity to exercise the right to vote. Retaining the right to vote while incarcerated has little meaning if those behind bars are unable to exercise their civic rights. Under Subsection (1), individuals serving jail and prison sentences must be given adequate opportunity to exercise the right to vote. This includes the opportunity to register to vote in the jurisdiction where the prisoner is entitled to vote, and to exercise the right, either by absentee ballot or as otherwise permitted by the jurisdiction in which the prisoner is registered.

d. Period of disqualification, jury service. Recognizing the logistical challenges of arranging for jury service in a custodial setting, this provision allows convicted individuals to be excluded from jury service during the custodial phase of any sentence. Additionally, because jury service (particularly in the context of grand-jury proceedings) may expose

jurors to confidential information about law-enforcement operations, subsection (2) allows individuals serving terms of community supervision to be excluded from jury service as well. Once an individual has completed his or her sentence, subsection (2) does not allow the individual to be barred from future jury service on the basis of past conviction alone.

Reporters' Note

a. Scope. The practice of prohibiting convicted individuals from participating fully in civic life has a long history, with roots in the ancient world. "Civil death"—the loss of the right to hold public office, vote, and bring suit on one's behalf—was an incident of conviction throughout much of Western European history, and continuing into early America. Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1794 (2012). Nevertheless, the practice of barring convicted individuals from taking an active role in civic affairs is difficult to square with the principle that collateral consequences are meant to serve a regulatory, rather than a punitive, purpose.

The number of U.S. citizens disenfranchised as a result of past criminal conviction has soared dramatically over the past half century, from an estimated 1.17 million in 1976 to 6.1 million Americans in 2016. Christopher Uggen et al., 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016, The Sentencing Project 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf. One of every 40 adult Americans is disenfranchised by conviction, and one of every 13 African Americans. Id.

Laws governing disenfranchisement vary considerably from one jurisdiction to another. Two states—Maine and Vermont—do not impose any voting restrictions on individuals convicted of crimes. See Me. Const. Art. II, § 1; Vt. Stat. Ann. Tit. 28, § 807 (2008). At the other end of the spectrum, 12 states impose lifetime disenfranchisement on at least some convicted individuals. See Uggen, supra, at 4. While many of the states that authorize lifetime disenfranchisement have mechanisms for restoring the right to vote, only a small number of individuals see their rights restored. Jessie Allen, Documentary Disenfranchisement, 86 Tul. L. Rev. 389 (2011).

The total number of disenfranchised persons continues to rise. Amongst legislatures, however, the general trend is in the direction of reform, as states slowly rollback disenfranchisement provisions. See e.g. 2016 Md. Laws Ch. 6 (restoring felon voting rights except during confinement); 2006 R.I. Pub. Laws Ch. 476 (implementing constitutional amendment to eliminate disenfranchisement for probationers and parolees); 2016 Cal. Legis. Serv. Ch. 757 (West) (legislation restoring voting rights for some felons); but see 2012 S.D. Sess. Laws Ch. 82, § 1 (disenfranchising felon probationers).

It is important to acknowledge that the use of felon disenfranchisement in the United States has a checkered past. See, e.g., George Brooks, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 Fordham Urb. L.J. 851, 855-859 (2004). Laws disenfranchising those with criminal records have been used to systematically and disproportionately prevent minority voters from casting ballots. With that history as a backdrop, it seems particularly important to use disenfranchisement sparingly, and only when legitimate regulatory concerns so require. When it comes to regulation, however, there are few reasons why disenfranchisement is required at all. Individuals in prison are well-identified and easily located, so preventing voter fraud is no justification. Moreover, there are few logistical obstacles to voting in prison. In Maine and Vermont, prisoners vote by absentee ballot. For those not serving sentences of confinement, there is no evidence that individuals convicted of criminal offense are more likely to abuse the right to vote than any other citizen.

In addition to disenfranchisement, a majority of states impose a lifetime ban on jury service by felons—a practice that, like disenfranchisement, has significant effects on the racial balance of jury pools. Darren Wheelock, A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia, 32 Just. Sys. J. 335 (2011) (reporting that "felon jury exclusion dramatically reduces the pool of eligible African-Americans statewide by nearly one-third"). Although felony disenfranchisement remains the primary focus of many reformers, it is in the realm of jury service that state laws take a significantly harsher approach. In 47 states, some or all felons are excluded from jury service, and in 12 states, some misdemeanants are also excluded. See generally Collateral Consequences Res. Ctr., 50-State Comparison: Loss and Restoration of Civil rights & Firearm Rights (2017), http://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/.

Like disenfranchisement, the justifications for banning convicted individuals from jury service appear primarily punitive. It is not clear what regulatory goals are served by barring felons from jury service, when as a practical matter, they may be struck by the parties during the voir dire process. As did the original Code, Model Penal Code § 306.3 (Proposed Official Draft, 1962), this provision takes the position that jury service should be prohibited during the period of the sentence only, because legitimate regulatory concerns justify such a limitation. Individuals who remain in or return to the community following conviction should see their right to jury service retained or restored.

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§ 7.04. Notification of Collateral Consequences; Order of Relief.

(1) At the time of sentencing, the court shall confirm on the record that the defendant has been provided with the following information in writing:

(a) a list of all collateral consequences that apply under state or federal law as a result of the current conviction;

(b) a warning that the collateral consequences applicable to the offender may change over time;

(c) a warning that jurisdictions to which the defendant may travel or relocate may impose additional collateral consequences; and

(d) notice of the defendant's right to petition for relief from mandatory collateral consequences pursuant to subsection (2) during the period of the sentence, and thereafter pursuant to §§ 7.05 and 7.06.

(2) At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.

(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney.

(c) The court may grant relief from a mandatory collateral consequence if, after considering the guidance provided by the sentencing commission under § 7.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence is not substantially related to the elements and facts of the offense and is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) An order of relief granted under this Section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity, such as an occupational or professional license. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be substantially related to the benefit or opportunity the individual seeks to obtain. If the decisionmaker determines that the benefit or opportunity should be denied based upon the conduct underlying the conviction, the decisionmaker shall explain the reasons for the denial in writing.

Comment:

a. Scope. This provision, new to the Code, provides assurance that convicted individuals are made aware of the collateral consequences to which they will be subject, and provides courts with a mechanism for alleviating some types of mandatory collateral consequences on a case-by-case basis. This provision recognizes that although collateral consequences can serve important regulatory goals, there are instances in which the application of a particular collateral consequence will unnecessarily impede a convicted individual's successful reintegration into the law-abiding community without advancing public safety. This is likely to be most true when the consequence bears little connection to the individual's risk of criminal re-offending.

This section has two subsections. The first, § 7.04(1), requires courts at sentencing to confirm that defendants have been provided with basic written information about the sources and types of collateral consequences to which they may be subject as a result of criminal conviction. This information, which may come from counsel or the court, includes a comprehensive list of relevant state- and federally-imposed collateral consequences (presumably drawn from the sentencing commission's compendium, see § 7.02(1)), along with notice that the consequences may change with time or as a convicted person moves from one jurisdiction to another. While this information should be provided to the defendant at earlier points in the criminal process (such as at arraignment and plea), the sentencing court is obliged to confirm at the time of sentencing that the defendant has been given written notice of the laws that will govern his post-sentencing conduct. Such full disclosure is an improvement on current practice in most states, where individuals are provided with no (or very limited) information about the long-term collateral consequences of their convictions.

The second subsection authorizes relief from the automatic imposition of specific mandatory collateral consequences whose burdens outweigh their regulatory benefits in the particular case. The subsection is designed to prevent the imposition of consequences not substantially related to the underlying offense. Under § 7.04(2), a convicted individual may petition the sentencing court at the time of sentencing, or at any time during the sentence, to grant relief from the mandatory nature of a collateral consequence that is imposed by state law and is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. Although the sentencing court is not obliged to grant relief, or even to hold a hearing on the petition, the court may grant relief when it finds, after consulting any guidance offered by the sentencing commission under § 7.02(2), that the defendant has shown by clear and convincing evidence that the consequence "is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence." § 7.04(2)(c). When the sentencing court grants relief from a mandatory collateral consequence under § 7.04(2), the court merely removes the mandatory nature of the consequence: it does not prevent other authorized decision-makers, such as licensing boards, from later considering the conduct underlying the conviction when deciding whether to confer a discretionary benefit or opportunity, so

long as the facts underlying the conviction are substantially related to the individual's competency to exercise the benefit or opportunity sought. See § 7.04(3).

b. Notification of collateral consequences. Under subsection (1), the court must confirm on the record that the defendant has been given written notice of the existence of all mandatory collateral consequences that apply under federal law and the law of the relevant jurisdiction at the time of sentencing. (This information is made available by the sentencing commission, which is charged under § 7.02(1) with "compil[ing], maintain[ing], and publish[ing] a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.") The court must also confirm that the defendant has been informed that discretionary collateral consequences may attend conviction, though it need not specify what those may be. The court must also confirm that the defendant has been given notice of the right to seek relief from any mandatory collateral consequences that are not relieved at the time of sentencing. This notice should include information regarding the offender's right to petition for relief from specific sanctions under § 7.05 should a need arise after the termination of the sentence, and right to petition for a certificate of restoration of rights under § 7.06 when the proscribed amount of time has passed.

This provision addresses the obligation of courts to provide information about collateral consequences at the time of sentencing. It is not meant to limit or in any way discourage the practice of providing such information at a much earlier stage of the proceedings. The information about collateral consequences discussed by the court at sentencing should already be familiar to the defendant. Defense counsel should routinely provide and discuss such information with the client at early stages of the prosecution, and before entry of a guilty plea. Even so, ensuring on the record at the time of sentencing that the defendant has been provided with this information in writing guarantees that the individual being sentenced has been given as complete notice as possible of the consequences that attend conviction.

c. The special problem of extra-jurisdictional collateral consequences. Any attempt to limit the application of mandatory collateral consequences is subject to unavoidable jurisdictional constraints. Although a sentencing court can provide relief from some mandatory collateral consequences imposed by the relevant jurisdiction, it cannot relieve those imposed at the federal level or by other jurisdictions to which the offender may travel or move. Section 7.04 requires the court to ensure that defendants have been advised of all federal collateral consequences that attach to them as of the date of sentencing. Subsection (1)(c) requires courts to ensure that defendants are aware that additional mandatory and discretionary collateral consequences may be imposed by other jurisdictions and that the consequences imposed by any jurisdiction may change over time.

d. Limits on court's power to grant relief from mandatory collateral consequences. Under § 7.04(2), the court is only authorized to grant relief from mandatory collateral consequences; it may not remove any discretionary collateral consequences that attend conviction. Furthermore, under this Section the court may only grant relief from mandatory collateral consequences that relate to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. These restrictions ensure that the court's power to grant relief is directed toward removing significant barriers to successful reintegration, rather than toward addressing collateral consequences that do not significantly impede the convicted person's ability to function as a law-abiding member of society.

e. Notice. Subsection (2)(b) requires that the defendant provide the prosecuting attorney with notice of the mandatory collateral consequences from which relief is being sought in order to ensure that the prosecutor is given adequate opportunity to object to or support the petition.

f. Standard for relief. The strategy of the Model Penal Code is to make the law of collateral consequences consistent with overriding goals of public safety and recidivism prevention. With these objectives in mind, collateral consequences are seen as a negative force whenever they impede the successful reintegration of offenders into law-abiding society without offering a commensurate public-safety benefit. Consequently, § 7.04(2) allows a court to grant relief from mandatory collateral consequences related to "employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business" when it finds that the defendant has shown by clear and convincing evidence that "the consequence is not substantially related to the elements and facts of the offense and is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence."

Applying this standard, courts are most likely to grant relief when a collateral sanction bears little connection to a petitioner's crime of conviction or the facts underlying the criminal case, and when the burden imposed by the consequence also impedes the individual's rehabilitative efforts. Conversely, courts are likely to deny relief in cases where there is a clear or close connection between the collateral consequences and a public-safety risk posed by the offender's criminal conduct. Examples of the latter include the loss of a motor-vehicle license by a person convicted of operating a motor vehicle while intoxicated and prohibiting receipt of a daycare operator's license by a person convicted of the sexual assault of a minor. The defendant bears the burden of proving both the burden and the lack of an adequate public-safety consideration.

g. Prohibition on arbitrary and punitive purposes. Courts have often distinguished between the direct and collateral consequences of conviction by observing that direct consequences of conviction—to which constitutional protections such as the Eighth Amendment apply—are intentionally punitive, while collateral consequences are

primarily regulatory. The distinction between direct and collateral consequences is often thin, however. Subsection (2)(d) reminds courts that mandatory collateral consequences should never be justified as a way of enhancing the punishment of any offender, or for any arbitrary reason.

h. Effect of relief. When a court grants relief from a mandatory collateral consequence pursuant to subsection (2), the defendant is excused from complying with any requirements imposed by the sanction and may not be *automatically* barred from receiving specified opportunities and benefits from which he or she would otherwise be barred by virtue of conviction. As subsection (3) makes clear, however, an order of relief does not prevent authorized decisionmakers from later considering the conduct underlying the conviction when deciding whether to confer a *discretionary* benefit or opportunity, such as occupational licensure. In determining whether the conduct underlying the conviction is substantially related to the benefit or opportunity the individual seeks to obtain, the decisionmaker may consider (a) the time elapsed since the person's conviction; (b) the person's age at the time of the conviction; (c) the seriousness of the conduct underlying the conviction; (d) the person's conduct following conviction, including the person's progress toward rehabilitation, and any information supplied by individuals familiar with the person's conduct and character; and (e) any information indicating that granting the benefit or opportunity is likely to pose an unreasonable risk to the safety of the public or of any individual.

Reporters' Note

a. Scope. Although new to the Code, the type of relief authority conferred by § 7.04 finds some support in both the original Code and state practice.

The original Code provided a mechanism for relieving mandatory collateral consequences imposed as a result of conviction, allowing courts to order that previously entered judgments should no longer "constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime." Model Penal Code § 306.6(1) (Proposed Official Draft, 1962). Such orders were available to individuals who had successfully completed both custodial and noncustodial sentences. Id. In addition to ordering relief from collateral consequences under § 306.6(1), the Code authorized the court to vacate the conviction entirely upon proof that a convicted person had lived a law-abiding life for five years following the completion of sentence (or less, if the person was a young-adult offender). Model Penal Code § 306.6(2) (Proposed Official Draft, 1962). The revision does not authorize courts to vacate convictions, but instead allows them to grant relief from particular mandatory collateral consequences without disturbing the underlying conviction.

Section 7.04 authorizes the court, upon petition, to relieve an offender of a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business when the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and public-safety considerations do not require mandatory imposition. Although the number of states that currently authorize judicial relief from collateral consequences are few, judges in Illinois and New York have long had such authority, see 730 Ill. Comp. Stat. 5/5-5.5-15 (2016); N.Y. Corr. Law § 702 (McKinney 2017), and states such as Vermont and Colorado have enacted legislation in recent years that permits courts to grant relief from certain collateral consequences (particularly those related to employment) for designated categories of convicted individuals. See Vt. Stat. Ann. tit. 13, §§ 8001-8017 (Supp. 2017); Colo. Rev. Stat. § 18-1.3-213 (2017). Much of the ongoing state legislation in this area was catalyzed by the Uniform Collateral Consequences of Conviction Act ("UCCCA") and the ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons. Both publications urged courts to inform offenders about collateral consequences and mechanisms for relief from them at the time of sentencing, and to provide mechanisms for granting relief when the consequences are not essential to public safety.

b. Notification of collateral consequences. Notice is the first essential safeguard that needs to be addressed at sentencing. For this reason, the ABA Standards and the UCCCA both insist that notice of collateral consequences be provided at sentencing, if not before. See ABA Standards for Criminal Justice § 19-2.4 (3d ed. 2004) ("The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law"); UCCCA § 6(a) (Unif. Law Comm'n 2010) (requiring that "[a]n individual convicted of an offense shall be given notice" that collateral consequences may apply, referred to a collection of laws authorizing collateral consequences, and given information about relief mechanisms).

Comment b emphasizes, however, that defense counsel should provide this information to clients throughout the proceedings. Defendants should be familiar with any potential collateral consequences prior to conviction or the entry of a guilty plea. In addition, the ABA Standards further recommend that courts ensure defendants have been informed of the applicable collateral consequences before accepting a guilty plea. ABA Standards for Criminal Justice § 19-2.3 (3d ed. 2004). Note that, while such notice requirements are usually not legally required, there may be constitutional implications in limited circumstances. See *Padilla v. Kentucky*, 559 U.S. 356 (2010) (failure to advise defendant of the immigration consequences of a guilty plea was inefficient assistance of counsel).

With respect to disclosure, § 7.04(1) requires the court to confirm at sentencing that the defendant has received written information about specific federal and jurisdictional

mandatory collateral consequences. The UCCCA also requires notification, but does not specify how such information will be provided to offenders. See UCCCA § 6(a). Like § 7.04(1), the ABA Standards allow the court to discharge its duty to advise by "confirming on the record that defense counsel has so advised the defendant." ABA Standards for Criminal Justice § 19-2.4(a).

c. The special problem of extra-jurisdictional collateral consequences. Among the full range of collateral consequences, the Model Penal Code addresses only targeted subsets—and these only in specific procedural settings. The Code is intended as model state legislation, and is therefore unable to speak to some of the most significant collateral consequences imposed at the federal level, such as deportation. See Padilla v. Kentucky, 559 U.S. 356, 363 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."). Instead, the Code appeals to state legislatures to make improvements in law that are within their powers to effect, through changes in their criminal or civil codes. Further, because governmental power over criminal justice is highly localized in our federal system, with enormous diversity of approach across the states, the Code cannot realistically offer "uniform" recommendations with the expectation that nationwide consistency will be achieved. Thus, in this Article, the Code can speak directly only to collateral consequences that exist under authority of state law within a single jurisdiction. The jurisdiction of state lawmakers does not extend to amendments of federal laws or the laws of other states.

d. Limits on court's power to grant relief from mandatory collateral consequences. Under § 7.04(2), courts are only authorized to grant relief from the mandatory effect of collateral consequences that relate to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. Excluded from that list are consequences pertaining to deportation and gun rights, as well as family-law-related rights (such as adoption, foster parenting, and guardianship), service on advisory boards, and volunteer opportunities. Some of these consequences—immigration in particular—are imposed at the federal level, making them impossible for a state court to remove. Others, such as volunteer and advisory positions, are more peripheral to reintegration, and are therefore best addressed by the legislature directly, rather than on a case-by-case basis by the sentencing court. Family-law-related consequences, implicating as they do the direct interests of vulnerable persons, are not subject to relief under § 7.04, though they may be removed by a certificate of restoration of rights after the sentence has been fully served and additional time has passed without re-offense. See § 7.06.

f. Standard for relief. In deciding whether a collateral sanction is appropriate, the court must consider both the burden the consequence imposes on the individual's ability to reintegrate into law-abiding society, and any public-safety considerations that might require mandatory imposition of the consequence. The burden of persuasion rests with the petitioner. For an alternative standard, see Ala. Code § 15-20A-23 (Supp. 2017) (allowing courts to relieve sex offenders with terminal illness of residency restrictions upon finding by clear and convincing evidence that the sex offender "does not pose a substantial risk of perpetrating any future sexual offense").

Several states limit relief for repeat offenders and for offenders of specific crimes. See Colo. Rev. Stat. §§ 18-1.3-107, 18-1.3-213, 18-1.3-303 (2017) (relief provisions only for sentences other than imprisonment); 730 Ill. Comp. Stat. 5/5-5.5-5 (2016) (listing crimes for which offender is not eligible for relief); N.Y. Corr. Law § 700 (McKinney 2017) ("[eligible only if] not been convicted more than once of a felony"). The Code does not follow this approach; relief should not be denied as a punitive response against repeat offenders. Rather, relief should only be denied when the consequence is substantially related to the facts and elements of the underlying offense or other public safety concerns require its imposition.

g. Prohibition on arbitrary and punitive purposes. As a doctrinal matter, the legal distinction between a "direct" and "collateral" consequence of conviction is whether the law is primarily punitive or primarily regulatory. See, e.g., Smith v. Doe, 538 U.S. 84, 92 (2003) (holding that federal sex-offender registration is not "so punitive either in purpose or effect as to negate" the legislature's intent to regulate rather than punish); Sames v. State, 805 N.W.2d 565, 568 (Minn. Ct. App. 2011) (quoting Kaiser v. State, 641 N.W.2d 900, 903-904 (Minn. 2002) ("Direct consequences are those that have 'a definite, immediate and automatic effect on the range of a defendant's punishment.' Collateral consequences, on the other hand, 'are not punishment' but, rather, 'are civil and regulatory in nature and are imposed in the interest of public safety'"). Despite that rule, it is often difficult to discern the regulatory purpose behind many new laws imposing civil restrictions on convicted individuals. Subsection (2)(d) serves as a reminder that punishment cannot serve as the primary justification for retaining a collateral sanction when it otherwise imposes burdens that outweigh its benefits, and that courts should exercise their relief discretion wisely, and not arbitrarily.

h. Effect of relief. An order under § 7.04(2) grants relief from one or more mandatory collateral consequences, based upon the recommendations of the sentencing commission created pursuant to § 7.02(2). These recommendations are formed using a "substantial relationship" test to determine whether a collateral consequence is appropriately tailored to the underlying conduct. See § 7.02 Comment f.

An order of relief under this section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when deciding whether to confer a discretionary benefit. However, Comment h recommends decisionmakers use a substantial relationship test similar to the one used by the sentencing commission.

It lists several factors for decisionmakers to consider. These factors are drawn from those incorporated in a number of existing state provisions. See e.g. Colo. Rev. Stat. § 24-5-101(4) (2017); Va. Code Ann. § 54.1-204(B) (2013); Md. Code Regs. 09.01.10.02 (2017); N.D. Cent. Code § 12.1-33-02.1 (2016-2017); Ky. Rev. Stat. Ann. § 335B.020(2) (West, Westlaw through end of the 2017 regular session); Tex. Occ. Code Ann. § 53.022 (West 2018).

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§ 7.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.

(1) Any individual who, by virtue of conviction in another jurisdiction, is subject or potentially subject in this jurisdiction to a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business, may petition the court for an order of relief if:

(a) The individual is not the subject of pending charges in any jurisdiction;

(b) The individual resides, is employed or seeking employment, or regularly conducts business in this jurisdiction; and

(c) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on the individual's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(2) An individual convicted in this jurisdiction whose sentence has been fully served may petition under this Section for relief from a mandatory collateral sanction if:

(a) No charges are pending against the individual in any jurisdiction; and

(b) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on his or her ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(3) The court may grant relief if it finds that the petitioner has demonstrated by clear and convincing evidence a specific need for relief from one or more mandatory consequences, and that public-safety considerations do not require mandatory imposition of the consequence. In determining whether to grant relief, the court should give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.

(4) A petition filed under subsection (1) or (2) shall be decided in accordance with the procedures and standards set forth in § 7.04(2), and an order of relief shall have the effect described in § 7.04(3).

Comment:

a. Scope. Given the length of many criminal sentences, changes occurring after the sentence has ended may turn a mandatory collateral consequence overlooked at the time of sentencing into a significant obstacle to later reintegration. Section 7.05 allows an individual to petition the court for relief froml a mandatory collateral consequence in either of two circumstances. Subsection (1) allows an individual convicted in a foreign jurisdiction to petition the court in the jurisdiction where he "resides, is employed or seeking employment, or regularly conducts business" for relief from one or more mandatory collateral consequences imposed by that jurisdiction. Subsection (2) permits similar petitions from individuals convicted within the jurisdiction whose sentences have expired (and over whom the court has therefore lost jurisdiction in the criminal case). In either case, to secure relief petitioners must demonstrate by clear and convincing evidence both a specific need for relief and "that public-safety considerations do not require mandatory imposition of the consequence" from which relief is sought.

b. Standard for relief. Unlike petitions for relief from mandatory collateral consequences that are made during the service of a sentence, see § 7.04(2), petitions made after the sentence has ended or made by individuals convicted in other jurisdictions require a showing of specific need for the relief sought. Section 7.05(3). This higher standard reflects the administrative burden of opening a new case and obtaining information about the closed case or foreign conviction. In all other ways, the procedures to be followed and effects of a grant of relief are identical to those relevant to a petition for relief under § 7.04(2).

c. Consideration of extra-jurisdictional orders of relief. When a convicted person works, resides, or conducts business in more than one jurisdiction, he or she may seek relief from mandatory collateral consequences in each jurisdiction that imposes such consequences. Section 7.05(3) provides that a court considering a petition under § 7.05(1) from an individual convicted in another jurisdiction should give favorable weight to any relief that has already been granted by the original jurisdiction.

Reporters' Note

a. Scope. As the notice required by § 7.04(1)(c) suggests, an individual convicted in one jurisdiction may face different collateral consequences flowing from that conviction in each state where he or she lives, works, or conducts business. This provision provides a way for individuals to seek relief from specific collateral consequences imposed by non-convicting jurisdictions when the consequence is not required for public-safety reasons and imposes a substantial obstacle to successful reintegration. This provision is consistent with the ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, which provide that "[w]here the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction." ABA Standards for Criminal Justice § 19-2.5(b).

This provision also includes a safety valve for individuals sentenced within the jurisdiction who failed to obtain earlier relief or who were unable to petition for relief under § 7.04(2). Individual circumstances, and the applicability of various collateral consequences, can change long after the completion of a sentence. For example, unforeseen medical conditions may mitigate an offender's risk to public safety, while also making restrictions unduly burdensome. See e.g. Ala. Code § 15-20A-23 (Supp. 2017) (mechanism to remove residency restrictions for terminally ill sex offenders that are unlikely to reoffend.). It is worth noting that while the Code has separate provisions (with separate standards) for relief at sentencing and relief post-sentencing, several existing state laws merge the two mechanisms. 730 Ill. Comp. Stat. 5/5-5.5-15 (2016); N.Y. Corr. Law § 702 (McKinney 2017); Vt. Stat. Ann. tit. 13, §§ 8010 (Supp. 2017).

b. Standard for relief. The standard for granting relief under § 7.05(3) differs from the standard under § 7.04(2). Significantly, the former requires a petitioner to show an actual need for relief – a higher burden that reflects the administrative complexities of opening a new case.

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§ 7.06. Certificate of Restoration of Rights.

(1) Any individual convicted of one or more misdemeanors or felonies may petition the [designated agency or court] in the [county] in which the individual resides for a certificate of restoration of rights, provided that:
- **(a) No criminal charges against the individual are pending; and**
- **(b) [Four] or more years have passed since the completion of all the individual's past criminal sentences with no further convictions.**

(2) When a petition is filed under subsection (1), notice of the petition and any scheduled hearings related to it shall be sent to the prosecuting attorney of the jurisdiction that handled the underlying criminal case.

(3) In ruling on a petition filed under subsection (1), the court shall determine the classification of the most serious offense for which the individual has been convicted.
- **(a) When the individual has been convicted of one or more [fourth or fifth] degree felonies or misdemeanors, the [court or designated agency] shall issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences.**
- **(b) When the individual has been convicted of a [first, second, or third] degree felony, the [court or designated agency] may issue a certificate of restoration of rights if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community. In making this determination, the court may consider the amount of time that has passed since the individual's most recent conviction, any subsequent involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to any cultural, educational, or economic limitations affecting the petitioner.**

(4) A certificate of restoration of rights removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this jurisdiction as a result of prior convictions, except as provided by Article 213. A court may deny a certificate or specify that a certificate should issue with exceptions when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences. A certificate does not entitle a recipient to any discretionary benefits or opportunities, though it may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.

(5) Information regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the individual.

Comment:

a. Scope. Like the original provision from which it is derived, § 7.06 "is concerned with relief from disqualifications" and with placing "appropriate limits on . . . such relief." Model Penal Code § 306.6, Explanatory Note (1985). A certificate of restoration of rights issued under this section has the effect of removing all mandatory collateral consequences, except as provided in Article 213 (now under revision) and with any specific exceptions provided by the court. Unlike §§ 7.04-7.05, which are meant to limit the burden of particular collateral consequences, § 7.06 is a relief mechanism designed to grant broader relief to individuals who have served their sentences and gone on to live law-abiding lives in the community. As a result, the standard for relief under this section requires proof of law-abiding behavior over a sustained period of time. To qualify, an individual must have served his or her full sentence (including any period of supervised release) and have gone four or more years without reconviction. § 7.06(1). The effect of a certificate is to remove most, if not all, mandatory collateral consequences and to assist the recipient in obtaining employment by shielding employers from introduction of the petitioner's criminal history "in any civil action against an employer or its employees or agents that is based on the conduct of the individual." § 7.06(5).

b. Eligibility. Before petitioning for a certificate of restoration of rights, a petitioner must have fully served all of his or her sentences, including any period of supervised release, and have gone four years or more without committing any new offense. No charges may be pending at the time of application. Eligibility standards for individuals

seeking a certificate of restoration of rights are divided into two categories based on the classification of the petitioner's most serious crime of conviction. § 7.06(3). For eligible petitioners convicted of misdemeanors and lower-level felony offenses, the certificate is presumptively appropriate; for those convicted of serious felony offenses, proof of rehabilitation is required.

The four-year exclusion period in subsection (1)(b) is bracketed, and could easily be shortened. There is no one period of sustained law-abiding conduct that indicates conclusively that any given individual will not return to criminal offending. Research shows, however, that recidivism most often occurs soon after a previous offense and sentence. As multiple years of life in the free community go by without incident, the statistical chances of new criminal behavior begin to decline. While risk of criminality never disappears entirely, over time the risk presented by past offenders comes very close to, or matches, the risk presented by ordinary individuals with no record of criminal involvement. Although these "redemption times" vary depending on age of first offense and the type of crime at issue, four years beyond the completion of any sentence is a conservative period of exclusion, especially for more serious crimes for which the sentence length itself may easily last a decade or more.

c. Standard for relief. The standard for obtaining relief from collateral consequences varies depending on the severity of the crime or crimes for which the petitioner has been convicted. For individuals convicted of less serious crimes, it is enough for the petitioner to demonstrate that he or she has avoided reconviction for a prolonged period of time. § 7.06(3)(a). The Court can only deny the certificate, or issue the certificate with exceptions, if it has reason to believe that "public-safety considerations require the continuation of one or more mandatory collateral consequences." § 7.06(4). For those convicted of more serious offenses, a more searching inquiry is required. In cases where a petitioner has been convicted of a third- or higher-degree felony, the decisionmaker has discretion to issue a certificate when the petitioner proves by a preponderance of the evidence that he or she has successfully reintegrated into the law-abiding community. § 7.06(3)(b). Rehabilitation is personal, and therefore proof of reintegration will differ from one individual to the next. In determining whether the petitioner has met his or her burden, the decisionmaker should primarily consider the lack of reconviction, but may also consider the amount of time that has passed since the individual's most recent conviction, and factors such as successful participation in treatment for mental-health or substance-abuse problems that were linked to past criminal offending.

d. Effect of relief. A certificate of restoration of rights removes all mandatory collateral consequences, with two potential exceptions. First, for individuals convicted of sexual offenses, the restrictions on relief set forth in Article 213 apply. Second, the decisionmaker may grant the certificate with exceptions "when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences." Section 7.06(4).

Like an order of relief issued under § 7.04, the effect of a certificate of restoration of rights is to remove the mandatory nature of a collateral consequence, and not to prohibit the imposition of discretionary collateral consequences by authorized decisionmakers. A discretionary decisionmaker may deny a benefit or opportunity notwithstanding the certificate of restoration of rights if it finds that the facts underlying the conviction continue to call into question the individual's competency to exercise the benefit or opportunity the individual seeks to obtain, even in light of the individual's post-sentencing conduct. In evaluating the individual's post-sentencing conduct, weight should be given to the certificate of restoration of rights, which "may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities." Section 7.06(4).

e. Protection for employers. In addition to removing all mandatory collateral consequences except as otherwise provided, a certificate of restoration of rights provides protection to employers who hire certificate recipients. Subsection (5) provides that "[i]nformation regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the individual." Section 7.06(5).

Reporters' Note

a. Scope. Section 7.06 provides a mechanism for erasing the stigma of a criminal conviction without hiding the fact of conviction itself. Section 7.06 does not authorize the court to vacate a sentence, but it does offer a formal mechanism for ameliorating the effects of collateral consequences on individuals who have succeeded in reintegrating into their communities following criminal conviction. This mechanism provides a way for individuals who have reformed their lives to eliminate any lingering mandatory collateral consequences that may inhibit their social and economic prospects.

Several states already provide legal mechanisms that allow courts, special panels, or parole boards to remove such collateral consequences. See generally Collateral Consequences Res. Ctr., Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement and Restoration of Rights (2018), http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf. These provisions vary in scope. Several states offer certificates that focus on lowering barriers to employment. See e.g. Cal. Penal Code §§ 4852.01-.22; Cal. Bus. & Prof. § 480(b) (West 2018) (certificate aids the individual in obtaining occupational licensing and serves as a step towards pardon); N.Y. Corr. Law §§ 700-705, 753(2) (McKinney 2017) (certificates creating a "presumption of rehabilitation" in applications for discretionary relief and private employment); Ohio Rev. Code Ann. § 2953.25 (West Supp. 2017) (certificate creates rebuttable presumption that

person's criminal convictions are insufficient evidence that the person is unfit for licensure or employment). Other states, encouraged in part by the Uniform Collateral Consequences of Conviction Act, have recently made available certificates that provide broad, general relief from the imposition of mandatory collateral consequences. See N.C. Gen. Stat. §§ 15A-173.2 (2017); Vt. Stat. Ann. tit. 13, § 8011 (Supp. 2017) (relief from all collateral consequences, except for sex offender registry, federal sanctions, and other delineated exceptions).

b. Eligibility. A growing body of research has attempted to quantify the period of time in which former offenders are most likely to recidivate, and conversely, the amount of time in which rehabilitation can be reasonably inferred for various categories of offenders. In general, the risk of reoffense posed by ex-offenders decreases with the passage of time, and eventually approximates the general population. For a sampling of the literature discussing these findings, see Anthony W. Flores, Alexander M. Holsinger, Christopher T. Lowenkamp, & Thomas H. Cohen, Time-Free Effects in Predicting Recidivism Using Both Fixed and Variable Follow-Up Periods: Do Different Methods Produce Different Results, 44 Crim. Just. and Behav. 121, 122 (2016) (collecting research on the effect of time spent at risk without committing a new offense); R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus, David Thornton, High-Risk Sex Offenders May Not Be High Risk Forever, 29 J. Interpersonal Violence 2792 (2014) (sexual offenders' risk of re-offense primarily decreased during first several years spent offense-free in the community); Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009) (reporting on empirical studies of the length of time required to reduce the risk of rearrest for a convicted individual to the risk level of the general population); Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology & Pub. Pol'y 483 (2006) (finding that after six or seven years, the risk of new offenses approximates the general population).

States have taken different approaches to estimating the time required for redemption. The Code's recommendation of four years is in line with, and in many cases more conservative than, the current provisions in several states. See N.C. Gen. Stat. §§ 15A-173.2 (2017) (one year from end of sentence); Ohio Rev. Code Ann. § 2953.25(B)(4)(a) (West Supp. 2017) (one year from end of sentence for felonies; Six months for misdemeanors) Vt. Stat. Ann. tit. 13, § 8011 (Supp. 2017) (five years from end of sentence). California starts calculating the period of rehabilitation at release from confinement, rather than end of sentence, and allows convicted persons to petition after seven to ten years depending on the offense. Cal. Penal Code § 4852.03 (West 2018). Washington applies a variety of different standards for different offenses, ranging from one year from the date of sentencing, to five years from the date of release. Wash. Rev. Code § 9.97.010 (2017).

d. Effect of relief. Unlike the Certificate of Restoration of Rights authorized by the Uniform Collateral Consequences of Conviction Act ("UCCCA"), the Model Code's certificate of restoration of rights is not revocable. See UCCCA § 13(b) (Unif. Law Comm'n 2010). The Code's certificate recognizes reintegration following past offenses, but it does not purport to predict or guarantee future behavior in any way. Consequently, once relief has been granted, it cannot be rescinded. New collateral consequences will attach to future criminal convictions, but the relief granted by the certificate with respect to past convictions is not revocable.

e. Protection for employers. Subsection (5), like Section 14 of the UCCCA, provides protection against charges of negligent hiring based on criminal record for employers who knowingly hire a recipient of a certificate of restoration of rights. See UCCCA § 14 ("In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued, if the person knew of the order or certificate at the time of the alleged negligence or other fault.") This provision is designed to encourage employers to give weight to the judicial certificate as evidence of a convicted person's reintegration without fear of later liability should the person's conduct deteriorate. Similar provisions exist in several states. See e.g. 730 Ill. Comp. Stat. 5/5-5.5-15 (2016); Tenn. Code Ann. § 40-29-107 (Supp. 2017). In some states, the certificate protects not only the liability of employers, but also extends to renting, licensing, enrollment in educational programs, and other transactional activities. N.C. Gen. Stat. § 15A-173.5 (2017); Ohio Rev. Code Ann. § 2953.25(G)(2) (West Supp. 2017); Vt. Stat. Ann. tit. 13, § 8014 (Supp. 2017).

Note

* Sections revised and renumbered by Reporters, February 2018.