SPONSOR: Sen. Townsend & Sen. Pinkney & Rep. Minor-Brown
Sens. Cruce, Hoffner, Lockman, Seigfried, Sokola, Sturgeon; Reps. Bolden, Chukwuocha, Gorman, Heffernan, Lambert, Morrison, Neal, Ortega, Phillips, Romer, Ross Levin, Kamela Smith, Snyder-Hall

DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE BILL NO. 10

AN ACT TO AMEND TITLE 11 AND TITLE 29 OF THE DELAWARE CODE RELATING TO MODIFICATION OF SENTENCES OF INCARCERATION.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. This Act may be cited at the "Richard 'Mouse' Smith Compassionate Release Act".

Section 2. Amend § 4217, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4217. Jurisdiction over sentence ~~retained.~~ retained; sentence modification process.

(a)(1) For purposes of this section, "person" means an individual serving an aggregate sentence of incarceration at Level V in excess of 1 year.

(2) ~~In any case where the trial court has imposed~~ If a court imposes an aggregate sentence of incarceration at Level V in excess of 1 year, the court ~~shall retain~~ retains jurisdiction over a person to modify the sentence to reduce the level of custody or time to be ~~served under the provisions of this section.~~ served under this section.

(3) A person may apply for a sentence modification under this section if any of the following apply:

a. The application for a sentence modification is based solely on the person's serious medical illness or infirmity.

b. The person is 60 years of age or older, has served at least 15 years of the originally imposed Level V sentence, and the application for sentence modification is based solely on the person's rehabilitation.

c. The person has served at least 25 years of the originally imposed Level V sentence and the application for sentence modification is based solely on the person's rehabilitation.

(4) A person who is eligible to apply for a sentence modification under paragraph (a)(3) of this section may apply for the sentence modification even if the person is sentenced to a statutorily mandated term of incarceration at Level V that is imposed for a conviction of an offense under this or another title.

(5) Except as provided in paragraph (a)(3) and (a)(4) of this section, a person is not eligible for a sentence modification under this section if any of the following apply:

a. The person is serving a sentence of incarceration at Level V imposed for a conviction of a Title 11 violent felony under § 4201(c) of this title and has not yet served ½ of the originally imposed Level V sentence.

b. The person is serving a statutorily mandated term of incarceration at Level V for a conviction of any offense under this title and has not yet served ½ of the originally imposed Level V sentence.

(b)(1) The court may modify the person's sentence ~~solely on the basis of an application filed by the Department of Correction for good cause shown which certifies that the~~ if the court finds all of the following:

a. The court is authorized under subsection (a) of this section to consider the person for a sentence modification.

b. Good cause for a sentence modification.

c. The release of the ~~defendant shall~~ person does not constitute a substantial risk to any of the following:

1. ~~the community or~~ The community.

2. A victim of, or witness to, an offense that is the subject of the sentence modification.

3. ~~the defendant's~~ The person's own self.

(2) An application for sentence modification may be filed under this section by any of the following:

a. The person, as provided under paragraph (a)(3) of this section.

b. The Department of Correction ("Department") or the person, as provided under subsection (d) of this section.

c. The Department, at any time other than as provided under subsection (d) of this section, if the basis for the Department's application is the person's serious medical illness or infirmity.

(3) The court's review of an application for sentence modification filed under this section shall include the court's review of the facts of an offense that is the subject of the sentence modification and the court's finding as to all of the following:

a. The person's present likelihood of posing and ability to pose a substantial risk to any of the following:

1. The community.

2. A victim of, or witness to, an offense that is the subject of the sentence modification.

3. The person's own self.

b. For an application for a sentence modification based on rehabilitation, the person's participation in programs during incarceration, including drug or alcohol counseling or treatment, education, or employment.

c. For an application for a sentence modification based on serious medical illness or infirmity, all of the following:

1. The person's diagnosis and likelihood of recovery.

2. The ability of the Department to meet the medical needs of the person.

3. The impact that the person's continued incarceration may have on the general provision of medical care within the Department.

(4) The court shall state on the record the court's findings under paragraphs (b)(1) and (b)(3) of this section and the court's rationale for granting or denying the application for sentence modification.

(5) The court may summarily dismiss the application of a person who is not eligible for a sentence modification under subsection (a) of this section.

(6) A person applying for sentence modification under this section has the right to counsel, but may proceed without an attorney as provided under court rules. The court may refer a person to the Office of Defense Services for an indigency determination and appointment of an attorney.

(7) The Department shall provide a person, or the person's attorney of record, with access to any information in the possession of the Department reasonably necessary for the person's application for a sentence modification.

(8) The person, or the person's attorney of record, may supplement or amend an application for a sentence modification filed by the Department or the person.

(9) A party filing an application for sentence modification under this section must provide a copy of the application to the Department of Justice.

(10) The court shall adopt rules to implement this section. The rules must provide for a person to proceed without an attorney with permission of the court.

(c) For purposes of this section:

(1) ~~Good cause under this section shall include, but not be limited to,~~ "Good cause" includes rehabilitation of the ~~offender,~~ person, serious medical illness or infirmity of the ~~offender~~ person, and prison overcrowding.

(2) "Prison overcrowding" means the number of individuals who are incarcerated exceeds the operating capacity of a correctional facility that can be reasonably accommodated based on design, staffing, available programs, and services.

(3) "Rehabilitation" means the process of restoring a person to a useful and constructive place in society especially through some form of vocational, correctional, or therapeutic training.

(4) "Serious medical illness or infirmity" includes all of the following:

a. Cognitively incapacitated. As used in this paragraph (c)(4)a., "cognitively incapacitated" means suffering from a cognitive condition, such as dementia, that greatly impairs activities of daily living such as feeding, toileting, dressing, and bathing and renders incarceration of a person non-punitive and non-rehabilitative.

b. Permanently physically incapacitated. As used in this paragraph (c)(4)b., "permanently physically incapacitated" means suffering from any of the following:

1. A physical condition caused by injury, disease, or illness, such as a persistent vegetative state, that, to a reasonable degree of medical certainty, permanently and irreversibly physically incapacitates the person to the extent that the person needs help with most activities of daily living, such as feeding, toileting, dressing, and bathing, or that no significant physical activity is possible.

2. An incurable, progressive condition that substantially diminishes the person's capacity to function in a correctional setting.

c. Severely ill. As used in this paragraph (c)(4)c., "severely ill" means suffering from a significant and permanent or chronic physical or mental condition that meets all of the following:

1. Requires extensive medical or behavioral health treatment with little to no possibility of recovery.

2. Significantly impairs rehabilitation.

d. Terminally ill. As used in this paragraph (c)(4)d., "terminally ill" means suffering from a condition caused by disease, illness, or injury, except self-inflicted injury, which, to a reasonable degree of medical certainty will lead to profound functional, cognitive, or physical decline, and likely will result in death within 18 months.

(d)(1) ~~Any application filed by the Department of Correction under this section shall be filed with the Board of Parole. The Board of Parole shall have the authority to promulgate reasonable regulations concerning the form and content of said applications. The Board of Parole may require the Department of Correction to provide it with any information in the possession of the Department reasonably necessary for the Board to assess such applications.~~ For each person, the Department shall annually determine all of the following:

a. If the person may apply for a sentence modification under paragraph (a)(3) of this section or is not ineligible for a sentence modification under paragraph (a)(5) of this section.

b. Whether the Department recommends the person for a sentence modification. For the Department to recommend a person for a sentence modification, the Department must find the requirements of paragraphs (b)(1)b. and (b)(1)c. of this section are met.

(2) ~~Following the receipt of any application for modification filed by the Department of Correction which conforms with any regulations and requirements of the Board of Parole promulgated pursuant to paragraph (d)(1) of~~

~~this section, the Board of Parole shall hold a hearing under the provisions of § 4350(a) of this title for the purpose of making a recommendation to the trial court as to the approval or disapproval of the application. This hearing shall not be held unless written notice of the hearing is provided to the Attorney General's office at least 30 days prior to scheduled hearing date. A copy of the Department of Correction's application for modification shall be provided to the Attorney General's office along with written notice of the hearing date.~~ If the Department recommends a sentence modification, the Department, with the consent of the person, shall file an application for sentence modification with the court and shall notify the person, the person's attorney of record, and, if the attorney of record is unavailable to receive notice, the Office of Defense Services.

(3) ~~Following the hearing described in paragraph (d)(2) of this section, the Board of Parole may reject an application for modification if it determines that the defendant constitutes a substantial risk to the community, or if it determines that the application is not based on good cause. Notwithstanding any provisions of this section to the contrary, any application rejected pursuant to this paragraph shall not be forwarded to the Superior Court, and any offender who is the subject of such rejected application shall not be the subject of a subsequent application for modification for at least 1 year, except in the case of serious medical illness or infirmity of said offender.~~ If the Department does not recommend a sentence modification, the Department shall state in writing the Department's reasons for not recommending a sentence modification and shall provide the reasons to the person, the person's attorney of record, and, if the attorney of record is unavailable to receive notice, the Office of Defense Services.

(4) ~~Only in those cases where the Board by a majority vote recommends a modification of the sentence shall the application be submitted to the Court for consideration.~~ After the Department provides notice under paragraph (d)(3) of this section, the person may file an application for sentence modification with the court on a form provided by the court if the person meets the eligibility criteria established under paragraph (a)(3) of this section. The person shall attach a copy of the Department's reasons for not recommending a sentence modification.

(e)(1) ~~Upon~~ On receipt of ~~the recommendation of the Board of Parole,~~ an application for sentence modification, the court may ~~in its discretion~~ grant or deny the application ~~for modification of sentence.~~ or may request additional information. ~~The Court may request additional information, but need not hold further hearings on the application.~~

(2) If the application for sentence modification is based on the person's serious medical illness or infirmity, the court may require the Department to submit a medical release plan for the person. The medical release plan may include all of the following:

a. The proposed course of treatment.

b. The proposed site for treatment and post-treatment care.

c. The insurance program in place, which must include the person's eligibility for enrollment in commercial insurance, Medicare, or Medicaid, or the person's access to other adequate financial resources to cover the cost of care after release, including those under existing partnerships with agencies or organizations.

d. Any other information requested by the court.

(3) The ~~Court shall not act upon the application~~ court may not act on the application for sentence modification without first providing the ~~Attorney General's office~~ Department of Justice and the victim of an offense that is the subject of the application with a reasonable period of time to be ~~heard on the matter.~~ heard, in writing or in person, on the application.

(4) ~~Should the Court deny the application because of a determination that the defendant~~ Except for an application for sentence modification based on a person's serious medical illness or infirmity, if the court denies the application for sentence modification because the court finds the person constitutes a substantial risk ~~to the community,~~ under paragraph (b)(1)c. of this section, or because ~~it determines~~ the court finds that the application lacks good cause, the ~~defendant~~ person who is the subject of the denied application ~~shall~~ may not be the subject of a subsequent application for sentence modification for at least ~~1 year, except in the case of serious medical illness or infirmity of the defendant.~~ 1 year from the date of the denial.

(f) ~~Notwithstanding any provision of this section to the contrary, in the case of any offender who is serving a sentence of incarceration at Level V imposed pursuant to a conviction for any crime, the Court may order that said offender shall be ineligible for sentence modification pursuant to this section until a specified portion of said Level V sentence has been served, except that no offender who is serving a sentence of incarceration at Level V imposed pursuant to a conviction for a violent felony in Title 11 shall be eligible for sentence modification pursuant to this section until the offender has served at least $^{1}/_{2}$ of the originally imposed Level V sentence, and no offender who is serving a statutory mandatory term of incarceration at Level V imposed pursuant to a conviction for any offense set forth in Title 11 shall be eligible for sentence modification pursuant to this section during the mandatory portion of said sentence. Nothing in this paragraph shall preclude a sentence modification pursuant to this section which is based solely upon serious medical illness or infirmity of the offender.~~ [Transferred to subsection (a) of this section.]

(g) ~~Nothing contained in this section shall be~~ This section may not be construed to limit the court's ability to modify a sentence within the scope of the ~~trial~~ court's duly ~~promulgated~~ adopted rules.

(h) ~~For purposes of this section, "rehabilitation" is defined as the process of restoring an individual to a useful and constructive place in society especially through some form of vocational, correctional, or therapeutic retraining.~~ The

Department shall adopt regulations to implement this section. The Department may not impose additional restrictions, exclusions, or eligibility requirements for persons seeking sentence modification under this section.

(i) Reporting requirements.

(1) The Statistical Analysis Center shall annually prepare a report containing all of the following information provided to the Statistical Analysis Center by the following state agencies:

a. From the Department, aggregated information including all of the following:

1. The number of persons who the Department determines under paragraph (d)(1)a. of this section are eligible for a sentence modification, with demographic data including race or ethnicity, gender, age, and correctional facility.

2. The number of applications submitted to the court by the Department under paragraph (d)(2) of this section and the basis for the application, with demographic data including race or ethnicity, gender, age, and correctional facility.

3. The number of persons for whom the Department did not recommend a sentence modification under paragraph (d)(3) of this section and a general reason for the Department's decision, with demographic data including race or ethnicity, gender, age, and correctional facility.

4. The number of persons released from Level V custody under this section and the good cause on which the application is based, with demographic data including race or ethnicity, gender, age, and correctional facility.

5. Information on serious medical illness and infirmity experienced by persons incarcerated at the Department's correctional facilities, including all of the following:

A. The number of persons currently receiving full-time one-on-one medical care or assistance with activities of daily living within the Department's correctional facilities and whether that care is provided by a medical practitioner or another individual, along with the facilities at which the persons are incarcerated.

B. The number of persons who spent more than 1 month in outside hospital care during the previous year and the persons' home correctional facility.

C. Demographic data, including race or ethnicity, gender, age, and correctional facility, for each person under paragraphs (i)(1)a.5.A. and (i)(1)a.5.B of this section.

b.1. From the courts, all of the following:

A. The number of persons granted a sentence modification under this section.

B. The number of persons denied a sentence modification on the merits under this section.

C. The number of persons whose application for sentence modification is summarily dismissed under paragraph (b)(5) of this section.

2. The Statistical Analysis Center shall report the data provided by the courts and use the data provided by the courts to report aggregated demographic data including race or ethnicity, gender, age, and correctional facility, and the good cause on which each application is based.

(2) The Statistical Analysis Center shall annually publish the report on the Statistical Analysis Center's website and submit the report to all of the following not later than October 1 of each year:

a. The Chair of the Senate Corrections & Public Safety Committee.

b. The Chair of the House of Representatives Corrections Committee.

c. The Chief Justice.

d. The Attorney General.

e. The Chief Defender.

f. The Director of the Division of Legislative Services.

g. The State Archivist.

h. The Governor.

Section 3. Amend § 4204, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4204. Authorized disposition of convicted offenders.

(k)(1) Except as provided in this subsection, notwithstanding any statute, rule, regulation or guideline to the contrary, the court may direct as a condition to a sentence of imprisonment to be served at Level V or otherwise that all or a specified portion of said sentence shall be served without benefit of any form of early release, good time, furlough, work release, supervised custody or any other form of reduction or diminution of sentence.

(2) For the purposes of this subsection, statutes which authorize early release, good time, furlough, work release, supervised custody, or reduction or diminution of sentence include ~~but are not limited to~~ §§ 4205(h) and (i), 4206(g) and (h), ~~4217,~~ 4381, 6533, 6533A [repealed] and 6537-6539 of this ~~title.~~ title, but do not include § 4217 of this title.

(3) The provisions of this subsection shall be applicable only to sentences of imprisonment at Level V for 1 year or less, or to sentences of imprisonment at Level V which are equal to the statutory maximum Level V sentence available for the crime or offense.

Section 4. Amend § 4346, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4346. Eligibility for parole.

(e) ~~Whenever the physical or mental condition of any person confined in any institution demands treatment which the Department cannot furnish, the Department may, if such action seems necessary for the well-being of such person, recommend~~ If good cause for release on the grounds of serious medical illness or infirmity would exist under § 4217 of this title, the Department shall recommend, or the person seeking release may request, that the person's case be considered by the Board of Parole at a regular or special meeting. When ~~such~~ the case is so considered, the Board of Parole, if satisfied that ~~removal from the institution is necessary for the well-being of such person,~~ good cause exists and that the release of the person does not constitute a substantial risk under § 4217(b)(1)c. of this title, may order the release of ~~such~~ the person on parole without regard to the time already served by ~~such~~ the person. ~~The Board of Parole shall parole in such case only when arrangements have been made for the treatment of the person in some institution.~~ The Board of Parole may impose any conditions of parole ~~in such case,~~ on the person and may revoke ~~such~~ the person's parole without hearing at any time and for any ~~cause,~~ cause and order the return of the person to the Department.

Section 5. Amend § 6531, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6531. Treatment and rehabilitation programs.

(e) ~~Inmates required to participate in compulsory programs of drug or alcohol counseling or treatment established by the Department pursuant to this section shall not be eligible for parole nor shall the Department apply for modification of sentence until successfully completing such programs. Inmates~~ An inmate's refusal to participate in compulsory programs of drug or alcohol counseling or treatment established by the Department does not prohibit an application for sentence modification under § 4217 of this title or eligibility for parole under § 4346(e) of this title, but may be considered by the court under § 4217(b) of this title. An inmate refusing to participate in ~~such~~ compulsory programs ~~shall further be~~ of drug or alcohol counseling or treatment established by the Department is subject to ~~such other~~ disciplinary measures as the Commissioner ~~shall~~ may establish by regulation.

Section 6. Amend § 6531A, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6531A. Education programs.

(e) ~~Inmates required to participate in compulsory programs of education as established under this section shall not be eligible for parole nor shall the Department of Correction apply for a modification of sentence until successfully~~

~~obtaining a high school diploma or G.E.D. Inmates~~ An inmate's refusal to participate in compulsory programs of education established under this section does not prohibit an application for sentence modification under § 4217 of this title or eligibility for parole under § 4346(e) of this title, but may be considered by the court under § 4217(b) of this title. An inmate refusing to participate in ~~such~~ compulsory programs of education established under this section ~~shall be~~ is subject to ~~such~~ disciplinary measures as the Commissioner ~~of Correction shall~~ may establish by regulation.

Section 7. Amend § 6532, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6532. Work by inmates.

(j) ~~Inmates~~ An inmate's refusal to participate in compulsory programs of employment established by the Department does not prohibit an application for sentence modification under § 4217 of this title or eligibility for parole under § 4346(e) of this title, but may be considered by the court under § 4217(b) of this title. An inmate refusing to participate in compulsory programs of employment established by the Department ~~pursuant to this program shall not be eligible for parole nor shall the Department apply for modification of sentence, and shall further be~~ under this section is subject to ~~such other~~ disciplinary measures as the Commissioner may establish by regulation.

Section 8. Amend § 4604, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4604. Representation of indigent persons.

When representing an indigent person, the Office of Defense Services ~~shall:~~ shall do all of the following:

(1) Counsel and defend the indigent person, whether held in custody without commitment or charged with a criminal offense, at every stage of the proceedings following ~~arrest; and~~ arrest.

(2) Prosecute any appeals or other remedies before or after conviction that the Chief Defender considers to be in the interest of ~~justice.~~ justice or as authorized by statute.

Section 9. This Act takes effect 180 days after the Act's enactment into law.

SYNOPSIS

This Act is named in honor of Richard "Mouse" Smith, a Delaware civil rights leader, who spent decades advocating on issues addressed by this Act.

Currently, the Department of Correction ("Department") biennially reviews individuals sentenced to more than 1 year of incarceration to determine if there is good cause to recommend a sentence modification to the Board of Parole for an individual who is not a substantial risk to the community or the individual's self. Good cause includes the individual's rehabilitation, serious medical illness or infirmity, and prison overcrowding. While any individual is eligible for consideration due to a serious medical illness or infirmity, only those who have served at least ½ of their sentence for a violent felony or ½ of their sentence with a statutorily mandated term of incarceration are eligible for consideration for rehabilitation, prison overcrowding, or another reason. If the Department recommends an individual for sentence modification, the Board of Parole considers the application and, if the Board approves, the sentencing court then makes a final determination on the sentence modification.

This Act revises the process for sentence modification in 3 ways. First, this Act removes the Board of Parole from the sentence modification process and provides that applications for sentence modification are made directly to the sentencing court.

Second, this Act provides that an individual who is incarcerated for more than 1 year may seek a sentence modification in 3 circumstances:

(1) The application for a sentence modification is based solely on the person's serious medical illness or infirmity.

(2) The person is 60 years of age or older, has served at least 15 years of the originally imposed Level V sentence, and the application for sentence modification is based solely on the person's rehabilitation.

(3) The person has served at least 25 years of the originally imposed Level V sentence and the application for sentence modification is based solely on the person's rehabilitation.

Third, this Act provides that an individual who is incarcerated for more than 1 year and whose sentence is reviewed by the Department, but who the Department does not recommend for sentence modification, may apply to the court for a sentence modification.

This Act also makes clear that the Department and sentencing court must consider if a sentence modification resulting in the release of an individual who is incarcerated would constitute a substantial risk to a victim of, or witness to, an offense that is the subject of the sentence modification and that the sentencing court must provide an opportunity for the victim to be heard.

This Act takes effect 180 days after the Act's enactment into law.

Author: Senator Townsend