



**ROBINA INSTITUTE**  
OF CRIMINAL LAW AND CRIMINAL JUSTICE

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# **PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE**

## ***STATE REPORT: COLORADO***

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# Prison-Release Discretion and Prison Population Size

## State Report: Colorado

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## *Executive Summary*

Colorado has a parole board with prison-release discretion that extends across most prison sentences. It also employs a system of earned-time credits that can advance dates of parole eligibility for most prisoners. Also for most prisoners, the accrual of earned-time credits can shorten the amount of time they must serve to their mandatory release dates.

Overall, we rank the Colorado prison-sentencing system as one of *moderate indeterminacy*. The vast majority of prisoners are governed by general rules of prison-release discretion that give somewhat more discretion over time served to back-end authorities than to the front-end authorities who shape judicially-pronounced prison sentences. Compared with most other paroling states, there is no pronounced concentration of time-served discretion at the back end of the prison-sentence chronology. Moreover, back-end power over sentence length is not consolidated in any single agency, but is distributed in almost equal shares between the parole board and department of corrections. This means that the ability of the system to lurch toward always-release or never-release extremes would require the sustained and coordinated efforts of two independent agencies. This institutional structure provides more of an anchor against sudden changes in prison-release practices than found in many states.

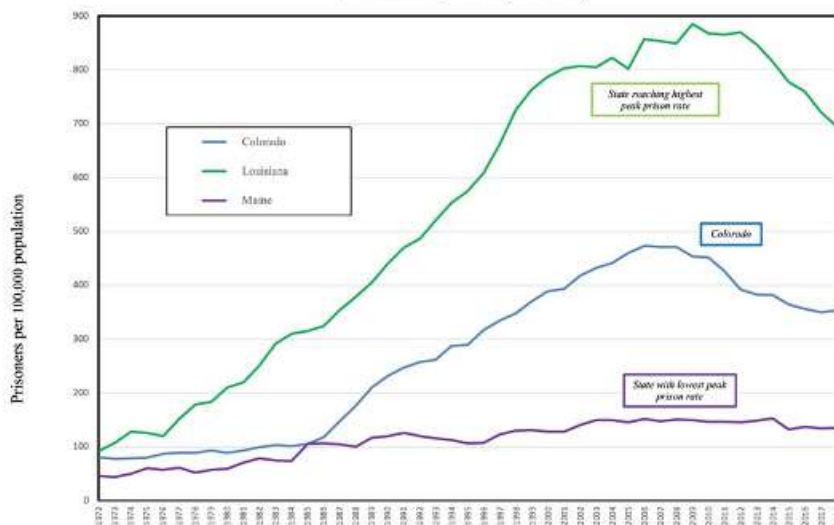
As an important qualification to our ranking, it should be noted that Colorado has a unique and highly-indeterminate approach to prison sentences for many sex offenders. In some cases, sentences for this group of prisoners reach levels of exceptionally-high indeterminacy. Although this has been a slowly-growing subpopulation over the past 20 years, people with this class of sentence made up only 9 percent of the total Colorado prison population in 2020. In our view, this group is not large enough to change our overall assessment that the Colorado prison-sentencing system is one of moderate indeterminacy.

**Introduction**

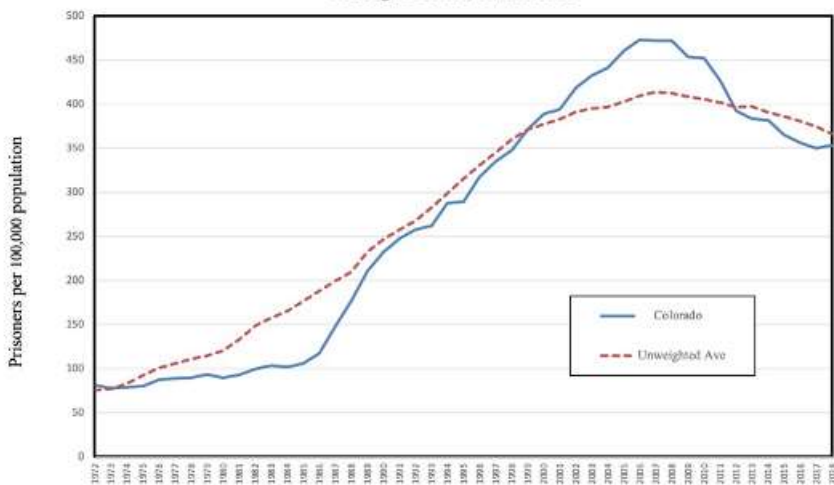
*Colorado’s prison-rate history, 1972 to 2018*

In 2018, Colorado’s prison rate was 353 per 100,000 general population, with a yearend prison population of 20,254.<sup>1</sup> Colorado’s prison rate was 27th largest among all states.

**Figure 2. Prison Rate Change in Colorado, Louisiana, and Maine, 1972 to 2018 (standard 900 per 100K y-axis scale)**



**Figure 1. Prison Rate Change in Colorado and (Unweighted) Average Among All States, 1972 to 2018**



Sources: Timothy J. Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics*, 1990, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December

<sup>1</sup> E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 7 table 4, 11 table 7.

31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016 (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps> (visited May 24, 2020); E. Ann Carson, Prisoners in 2018 (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017-2018).

Colorado's prison-rate history is one of slow growth compared with the average state from 1972 to 1985, followed by a steeper growth curve than the average state from 1985 through 2006, the year in which Colorado's prison rates hit their peak position during the national prison buildup era. Colorado's accelerated pace of growth is illustrated by its changing ranking among all states for prisoners per capita. In 1985, Colorado's prison rate was 40<sup>th</sup> among all 50 states. By 2006, Colorado had the 18<sup>th</sup> highest rate among all states.

From its peak position in 2006 through yearend 2018, Colorado's prison rate fell from 473 per 100,000 to 353, for a net change of -120 per 100,000. This is the 12<sup>th</sup> largest prison-rate drop among all states from their peak prison rates through 2018.

During most of the years shown in the figures, Colorado had an "indeterminate" sentencing system with parole-release discretion for most prisoners. From 1979 to 1985, however, the state switched briefly to a "determinate" system—afterward switching back to indeterminacy through the present day.<sup>2</sup>

### *Organization of this report*

The report is divided into four parts. Parts I through III describe the contours of Colorado's prison-release system in some detail, with extensive citations and statutory analysis. Part I surveys the prison-release rules that apply to most prisoners. Part II then covers a number of important subgroups of prisoners in Colorado who are not subject to the general rules. Part III catalogues some additional prison-release mechanisms that exist in the system but are infrequently used, such as medical release and the clemency power.

Part IV draws on the raw research in Parts I through III to analyze and model the degrees of indeterminacy that exist for subgroups of prisoners with different classes of sentences, and for the Colorado system as a whole. The overarching goal of Part IV is to explore the relationship between prison-release discretion in Colorado and the size of the state's prison population.

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<sup>2</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (Oxford University Press, 2003), at xx table 3.1; Marianne Wesson, *Sentencing Reform in Colorado—Many Changes, Little Progress*, in Michael Tonry and Kathleen Hatlestad eds., *SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* (Oxford University Press, 1997).

## *I. General Rules of Prison-Release Discretion*

### *A. General rules of parole-release eligibility*

#### *1.1. General rules of first release eligibility*

As a general rule, prisoners become eligible for discretionary parole release after serving 50 percent of their judicial maximum sentences, less any good-time credits they have earned (see section 1.3).<sup>3</sup> The department of corrections has broad discretion to delay first release eligibility for a prisoner's misconduct, a power that extends to the judicial maximum term.<sup>4</sup>

A prisoner otherwise eligible for parole release loses their eligibility if they are convicted of a "class 1 code of penal discipline violation" or if they decline to participate in recommended programs in the 12 months before their scheduled parole hearing date.<sup>5</sup>

#### *1.2. Reconsideration after denials of release*

In general, prisoners who have been denied release by the parole board are entitled to a reconsideration within one year.<sup>6</sup> For certain classes of prisoners, the period before required reconsideration is longer:

Prisoners convicted of a class 3 sexual offense, habitual offenders subject to life imprisonment,<sup>7</sup> and sex offenders subject to an indeterminate commitment are reviewed every three years.<sup>8</sup>

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<sup>3</sup> Colo. Rev. Stat. § 17-22.5-403(1). A separate scheme for determining parole-release eligibility and the computation of good-time credits applies to offenders serving a sentence for crimes committed on and after July 1, 1979, who were incarcerated on or before June 7, 1990. See Colo. Rev. Stat. § 17-22.5-406(3); *Ankeney v. Raemisch*, 344 P.3d 847, 853–54 (Colo. 2015).

<sup>4</sup> Colo. Rev. Stat. § 17-22.5-403(1) (“[T]he date established . . . upon which any person shall be eligible for parole may be extended by the executive director [of the department of corrections] for misconduct during incarceration.”). See also Colo. Rev. Stat. § 17-22.5-401 (“The general assembly hereby declares that if any inmate does not demonstrate positive behavior during incarceration, such inmate should be required to serve out the full sentence imposed upon such inmate.”).

<sup>5</sup> Colo. Rev. Stat. § 17-2-201(3.7)(a).

<sup>6</sup> Colo. Rev. Stat. § 17-2-201(4)(a) (“If the board refuses an application for parole, the board shall reconsider the granting of parole to such person within one year thereafter, or earlier if the board so chooses, and shall continue to reconsider the granting of parole each year thereafter until such person is granted parole or until such person is discharged pursuant to law”).

<sup>7</sup> See section 2.2 for the statutory definition of “habitual offender.”

<sup>8</sup> Colo. Rev. Stat. § 17-2-201(4)(a).

Reconsiderations for those convicted of a class 1 or class 2 felony deemed a crime of violence are only required every five years.<sup>9</sup>

A prisoner's date of reconsideration may be delayed if they are convicted of a "class 1 code of penal discipline violation" or if they decline to participate in recommended programs within 12 months of the date of required reconsideration.<sup>10</sup>

## ***B. General rules on the effects of good-time, earned-time, and other discounts***

### ***1.3. Generally-available credits: types and amounts***

For most prisoners, good-time credits (called "earned time" in Colorado) of as much as 12 days per month may be awarded for "consistent progress" in prison living and programming.<sup>11</sup> Juveniles sentenced as adults for a class 1 felony may earn only 10 days per month.<sup>12</sup>

Inmates working at a disaster site are entitled to additional credits of one day per day worked.<sup>13</sup> "Achievement earned time" may also be awarded for successful completion of program milestones or instances of exceptional conduct, up to 60 days per event subject to a total maximum of 120 days.<sup>14</sup>

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<sup>9</sup> Id. A "crime of violence" is defined as the use, possession, or threatened use of a deadly weapon or the infliction of serious bodily injury or death during the commission of the following crimes: murder, first- or second-degree assault, kidnapping, sexual offenses (identified in title 18, article 3, part 4), aggravated robbery, first-degree arson, first-degree burglary, escape, criminal extortion, first- or second-degree unlawful termination of pregnancy, or any crime against an at-risk adult or at-risk juvenile. Colo. Rev. Stat. § 18-1.3-406(2)(a). It also includes any felony sex offense "in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim." Id. § 18-1.3-406(2)(b).

<sup>10</sup> Colo. Rev. Stat. § 17-2-201(3.7)(a).

<sup>11</sup> Colo. Rev. Stat. § 17-22.5-405(1)–(1.5). The categories evaluated are work and training, group living, participation in counseling and self-help groups, diagnostic program goals, compliance with parole release conditions (if paroled), victim harassment, and literacy or education programs. Id. § 17-22.5-405(1). Prisoners eligible for up to 12 days per month are those serving a sentence for a class 4, 5, or 6 felony or level 3 or 4 drug felony who (1) have not has a class I penal discipline violation in the past 24 months or a class II violation within the past 12 months, (2) are "program-compliant," and (3) have never been convicted of the following felonies: false imprisonment, enticement of a child, Internet luring of a child, contributing to the delinquency of a minor, soliciting for child prostitution, pandering of a child, procurement of a child, keeping a place of child prostitution, pimping of a child, inducement of child prostitution, patronizing a prostituted child, possessing a dangerous or illegal weapon, acts involving explosive devices or chemical weapons [and an even longer list in 24-4.1-302(1)].

<sup>12</sup> Colo. Rev. Stat. § 17-22.5-405(1.2).

<sup>13</sup> Colo. Rev. Stat. § 17-22.5-405(3.5).

<sup>14</sup> Colo. Rev. Stat. § 17-22.5-405(9). Examples of "exceptional conduct" include "saving or attempting to save the life of another person," "aiding in the prevention of serious bodily injury or loss of life," "providing significant assistance in the prevention of a major facility disruption," "providing significant assistance in the solving of a cold case," "acting to prevent an escape," and "providing direct assistance in a documented facility or community emergency." Id.



*a. Effects of good-time credits on parole-release eligibility*

As a general rule, earned time credits are applied to advance a prisoner's first date of eligibility for discretionary parole release.<sup>15</sup>

*b. Effects of good-time credits on the judicial maximum term*

For most prisoners, earned-time credits are subtracted from the judicial maximum term to produce an earlier mandatory-release date. These reductions are capped at 25 percent of the judicial maximum for most prisoners (who are eligible to earn up to 12 days per month) or 30 percent for juveniles sentenced as adults (who are eligible to earn up to 10 days per month).<sup>16</sup>

*1.4. Loss of good-time credits*

By statute, the department of corrections must review prisoners' performance records annually during their confinement. As part of such reviews, the department has discretion to grant, withhold, withdraw, or restore earned time credits.<sup>17</sup>

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<sup>15</sup> Colo. Rev. Stat. § 17-22.5-403 (defining parole eligibility as serving the statutory percentage of time less earned time).

<sup>16</sup> Colo. Rev. Stat. § 17-22.5-402(2) (“[T]he full term for which an inmate is sentenced shall be reduced by any earned release time and earned time granted pursuant to section 17-22.5-405” unless exceptions apply); *id.* § 17-22.5-405(4)(a),(b) (30- and 25-percent ceilings on reductions from judicial maximum sentences).

<sup>17</sup> Colo. Rev. Stat. § 17-22.5-405(3).

## ***II. Prisoners Outside the General Rules***

### ***2.1. Life without parole***

Life sentences for class 1 felonies carry no eligibility for discretionary parole release.<sup>18</sup>

### ***2.2. Life sentences with possibility of parole***

Generally, prisoners sentenced to life with the possibility of parole must wait a minimum of 40 years before becoming eligible for discretionary parole release, with no reduction for earned-time credits.<sup>19</sup> These include designated “habitual offenders.”<sup>20</sup>

### ***2.3. Juvenile life sentences***

The mandatory penalty for juveniles convicted as adults of class 1 felonies is a life sentence with eligibility for discretionary parole release after 40 years, with reductions for earned-time credits.<sup>21</sup>

### ***2.4. Sentences with mandatory minimum terms***

For prisoners with legislatively-mandated minimum sentences, parole release eligibility occurs after they have served the statutory minimum term.<sup>22</sup>

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<sup>18</sup> Colo. Rev. Stat. § 17-22.5-104(2)(d)(I) (“No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole.”). Class 1 felonies include first-degree murder, id. § 18-3-102, first-degree kidnapping, id. § 18-3-301, assault during an escape, id. § 18-8-206, and treason, id. § 18-11-101.

<sup>19</sup> Colo. Rev. Stat. § 17-22.5-104(2)(c)(I). This rule applies to those serving sentences for crimes committed on or after July 1, 1985. Id. For crimes committed prior to July 1, 1977, prisoners became eligible for parole after 10 years. Id. § 17-22.5-104(2)(a). For crimes committed on or after July 1, 1977, but before July 1, 1985, prisoners became eligible for parole after 20 years. Id. § 17-22.5-104(2)(b).

<sup>20</sup> Colo. Rev. Stat. § 18-1.3-801. Habitual offenders are:

Those convicted of (1) a class 1 or 2 felony, a level 1 drug felony, or a class 3 felony that is a crime of violence, and (2) have been convicted of any of these offenses twice previously. Id. § 18-1.3-801(1)(a).

Those convicted of (1) a class 1, 2, 3, 4, or 5 felony or a level 1, 2, or 3 drug felony, and (2) have two prior felonies within the last 10 years. Id. § 18-1.3-801(1.5).

Those convicted of a fourth felony, with exceptions for level 4 drug felonies. Id. § 18-1.3-801(2)–(2.5).

<sup>21</sup> Colo. Rev. Stat. § 18-1.3-401(4)(b)(I).

<sup>22</sup> Colo. Rev. Stat. § 17-2-204(1).

### 2.5. Sentences with delayed parole-release eligibility

Prisoners convicted of certain violent offenses<sup>23</sup> who have a previous conviction for a crime of violence must serve 75 percent of their sentence, less earned time, before becoming eligible for discretionary parole release.<sup>24</sup> If they have two prior convictions for crimes of violence, they must serve the full judicial maximum sentence minus earned time before they become eligible for parole release.<sup>25</sup>

The governor has the power to grant parole in these cases before the statutory parole-release eligibility date “if, in the governor’s opinion, extraordinary mitigating circumstances exist and such offender’s release from institutional custody is compatible with the safety and welfare of society.”<sup>26</sup>

### 2.6. Sex offenders with indeterminate life sentences

Most sex offenders who commit crimes graded as Classes 2, 3, and 4 felonies in the Colorado scheme receive “indeterminate sentences” that differ in their framework from other prison sentences in the state.<sup>27</sup> The indeterminate sentence statute requires a judicially-imposed maximum sentence of life in prison for all sex offenses, regardless of their felony grade.<sup>28</sup> The statute also includes a variety of formulas for the minimum terms to parole eligibility that must be imposed by sentencing courts. These formulas establish the lowest minimum term the judge is required to impose, but allow judicial discretion to impose longer minimum terms on a case-by-case basis.

Unlike general-rules prisoners in Colorado, no sex offender receives a mandatory-release date and there is no mechanism for them to earn a mandatory-release date during their prison stays.

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<sup>23</sup> The offenses include second-degree murder, first-degree assault, first-degree kidnapping (except if it is a class 1 felony), first- or second-degree sexual assault, first-degree arson, first-degree burglary, and aggravated robbery. Colo. Rev. Stat. § 17-22.5-303.3(1).

<sup>24</sup> Colo. Rev. Stat. § 17-22.5-303.3(1). A “crime of violence” has been interpreted as a crime in which a deadly weapon was used, possessed, or threatened to be used. *Busch v. Gunter*, 870 P.2d 586, 587 (Colo. App. 1993).

<sup>25</sup> Colo. Rev. Stat. § 17-22.5-303.3(2).

<sup>26</sup> Colo. Rev. Stat. § 17-22.5-303.3(3).

<sup>27</sup> The term “indeterminate” in this statute is used in the Canadian or European sense, which defines an indeterminate sentence as one with no specified maximum term of years. See Final Report at xx (noting different international usages of the terms “indeterminate” and “determinate” sentences).

<sup>28</sup> Colo. Rev. Stat. § 18-1.3-1004(1)(a) (“Except as otherwise provided ..., the district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the sex offender’s natural life.”). The terms “sex offender” and “sex offense” are defined in Colorado law in Colo. Rev. Stat. § 18-1.3-1003(4)–(5). See Table 1.

Some sex offenders may become eligible for parole-release after serving as little as two years, but others are subject to required minimum sentences of four years, eight years, or considerably longer—up to 36 years for a “habitual sex offender against children.”<sup>29</sup>

There is no statutory ceiling on minimum terms sentencing judges may select in individual cases that are longer than the minimums required by statute.

The crimes statutorily defined as “sex offenses” subject to indeterminate life sentences are collected below in Table 1.

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<sup>29</sup> See Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A.1) (defining presumptive sentence ranges for felonies committed on or after July 1, 2018, with a minimum sentence of two years imprisonment for class 4 felonies, four years for class 3 felonies, and eight years for class 2 felonies). Subsections (b) through (e) of Colo. Rev. Stat. § 18-1.3-1004 requires longer minimum sentences. For sex offenses that fall within the definition of a “crime of violence” in Colo. Rev. Stat. § 18-1.3-406, the required minimum terms are three years for class 4 felonies, six years for class 3 felonies, and ten years for class 2 felonies. For offenders eligible to be sentenced as a habitual sex offender against children under Colo. Rev. Stat. § 18-3-412, the required minimum terms are 12 years for class 4 felonies, 24 years for class 3 felonies, and 36 years for class 2 felonies. If the offender transmitted HIV in the course of the offense and was aware of being HIV-positive, the required minimum terms are four years for class 4 felonies, eight years for class 3 felonies, and 12 years for class 2 felonies. If the act was a sexual assault and involved sexual intrusion or penetration, a child under the age of 12, and an offender who was at least 18 years old and at least 10 years older than the child, the mandatory minimum ranges from ten to twenty-four years, depending on the class of the offense.

**Table 1. Sex Offenses Carrying “Indeterminate” Life Sentences**

<b>Offense</b>	<b>Felony Level</b>
§ 18-3-402 (sexual assault) § 18-3-405 (sexual assault on a child) § 18-3-405.3 (sexual assault on a child by one in a position of trust); § 18-3-405.5 (sexual assault on client by psychotherapist)	Class 2–4
§ 18-3-404 (unlawful sexual contact)	Class 4
§ 18-3-305 (enticement of a child)	Class 3–4
§ 18-6-301 (incest) § 18-6-302 (aggravated incest)	Class 3–4
§ 18-7-406 (patronizing a prostituted child)	Class 3
§ 18-3-306(3) (internet luring of a child)	Class 4
§ 18-3-405.4 (internet sexual exploitation of a child)	Class 4
§ 18-3-405.7 (unlawful sexual conduct by a peace officer)	Class 3–4

Sources: Colo. Rev. Stat. §§ 18-1.3-1003(4)–(5) and 18-1.3-1004(1).

### III. Other Forms of Prison-Release Discretion (not routinely used)

#### 3.1. Medical or “compassionate” release

“Special needs parole” allows offenders with particular medical needs (“special needs offenders”) to be eligible for parole at any time.<sup>30</sup>

A “special needs offender” either (1) is 55 years of age or older and suffers “from a chronic infirmity, illness, condition, disease, or behavioral or mental health disorder;” (2) “suffers from a chronic, permanent, terminal, or irreversible physical illness, condition, disease, or a behavioral or mental health disorder that requires costly care or treatment;” or (3) “does not have a substantial probability of being restored to competency<sup>31</sup> for the completion of any sentence,” and “is not likely to pose a risk to public safety.”<sup>32</sup>

Prisoners convicted of (1) a class 1 felony,<sup>33</sup> or (2) a class 2 felony “crime of violence” who have served fewer than ten years are not eligible for classification as special needs offenders.<sup>34</sup>

#### 3.2. Executive clemency

Colorado’s governor has the authority to commute sentences of prisoners and pardon those convicted of crimes.<sup>35</sup> In 2012, the Executive Clemency Advisory Board was “recreated” by executive order to make recommendations on clemency applications to the governor.<sup>36</sup> The ECAB has promulgated several criteria for offenders seeking commutations of their sentences: (1) at least 20 years (for adults) or 10 years (for those who were juveniles at the time of the

<sup>30</sup> Colo. Rev. Stat. § 17-22.5-403.5 (“[A] special needs offender . . . may be eligible for parole prior to or after the offender’s parole eligibility date . . .”).

<sup>31</sup> “Competency” means that “the defendant does not have a mental disability or developmental disability that prevents the defendant from having sufficient present ability to consult with the defendant’s lawyer with a reasonable degree of rational understanding in order to assist in the defense or prevents the defendant from having a rational and factual understanding of the criminal proceedings.” See Colo. Rev. Stat. § 16-8.5-101(5) (defining “competent to proceed”); *id.* § 17-1-102(7.5)(a)(IV) (defining “competency” by referring to the statutory definition of “competent to proceed”).

<sup>32</sup> Colo. Rev. Stat. § 17-1-102(7.5)(a).

<sup>33</sup> An exception to this exception is class 1 felons if their offenses were committed prior to July 1, 1990, and they have served at least twenty years. Colo. Rev. Stat. § 17-1-102(7.5)(b)(I). These prisoners have the potential to be classified as special needs offenders and thus eligible for special needs parole.

<sup>34</sup> Colo. Rev. Stat. § 17-1-102(7.5)(b).

<sup>35</sup> See Colo. Const. art. IV, § 7 (“The governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except in case of impeachment . . .”); Colo. Rev. Stat. § 16-17-101 (“The governor is hereby fully authorized, when he deems it proper and advisable and consistent with the public interests and the rights and interests of the condemned, to commute the sentence in any case by reducing the penalty in a capital case to imprisonment for life or for a term of not less than twenty years at hard labor.”).

<sup>36</sup> Colo. Exec. Order No. B 2012-003 (Oct. 19, 2012), <https://drive.google.com/file/d/1rCMoJOwKXMCj-LNmWhxBfv7loXYk43cl/view>.

offense) must have been served for offenders serving life sentences; (2) all other offenders must have served the lesser of one-third of the judicial maximum sentence or 10 years; (3) offenders must be more than 12 months away from their parole eligibility date, unless they have already been denied parole more than 3 times; and (4) the offender must not have serious misconduct issues.<sup>37</sup>

### *3.3. Emergency release for prison overcrowding*

If Colorado's prison system capacity exceeds 97 percent for a month-long period, the parole board is to review the files of prisoners who (1) are close to their mandatory release date and have a parole plan, (2) have satisfied conditions for conditional release and for parole, and (3) are low to medium risk based on the department of public safety's risk assessment tool, and set conditions and a date of release, many within 30 days after the board conducts the review.<sup>38</sup>

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<sup>37</sup> *Application Eligibility Criteria, Commutation of Sentence*, EXECUTIVE CLEMENCY ADVISORY BOARD, <https://drive.google.com/file/d/1AWLzTm3NINKSkC0ef4QGb2GQuallLI5O/view> (last visited June 19, 2020).

<sup>38</sup> Colo. Rev. Stat. § 17-1-119.7(2). Exceptions are for those prisoners who have been convicted of [same long list as 12-day credit accrual exceptions] and “unlawful sexual behavior” as defined in Colo. Rev. Stat. § 16-22-102(9), and those with prison disciplinary issues. Colo. Rev. Stat. § 17-1-119.7(2)(IV)(D).

## ***IV. Modeling the Relationship Between Prison-Release Discretion and Prison Population Size in Colorado***

### ***4.1. Prison release timeline for general-rules prisoners***

While publicly-reported statistics do not allow a precise estimate, the great majority of prisoners in Colorado appear to be subject to the general rules of prison release as described in Part I above. (These will be called “general-rules prisoners.”) For all prisoners released in FY 2018, average time served as a percentage of judicial maximum sentences was close to 50 percent, a relationship that held true across most felony levels, from felony class 2 (49 percent), felony class 3 (52 percent), felony class 4 (51 percent), felony class 5 (50 percent), and felony class 6 (44 percent).<sup>39</sup> Such average time-served percentages are in line with the degree of prison-release discretion applicable to general-rules prisoners, as discussed below.

General-rules prisoners in Colorado enter prison with a date of first parole-release eligibility set at 50 percent of their judicial maximum sentences. Figure 3 depicts this starting position.

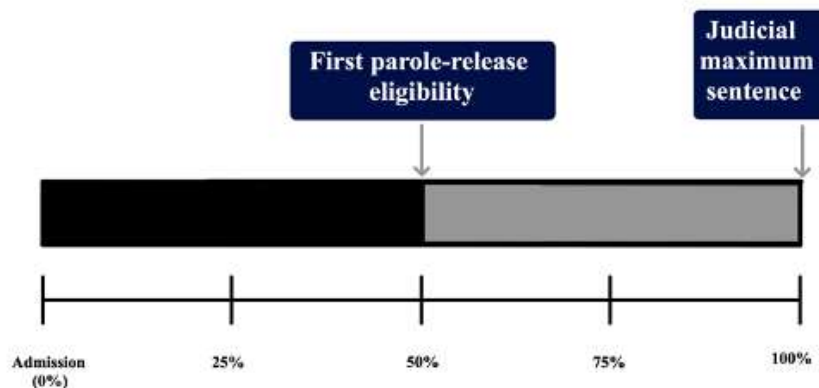
For most prisoners, the accrual of good-time credits advances the date of first parole-release eligibility *and* generates a mandatory release date that is earlier than the expiration of the judicially-imposed maximum term. In other words, the date of first release eligibility and the date mandatory release are both movable milestones within the prison-sentence timeline.

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<sup>39</sup> Colorado Department of Corrections, *Statistical Report FY 2018* (undated), at 22 figure 27. Other categories not listed above were releasees who had been serving life sentences for class 1 felonies, as habitual offenders, or as lifetime sex offenders, and other habitual offenders. The report tells us that 15.2 percent of all prisoners in FY 2018 were serving life sentences of one kind or another, including sex offenders with indeterminate life sentences. Beyond this 15 percent, we are unable to say what additional percentage of prisoners are serving sentences that are *not subject* to the general rules of prison release, a group that includes habitual offenders and prisoners serving mandatory minimum terms.



**Colorado Figure 3. Prison-Release Timeline for General-Rules Prisoners With No Good-Time Credits**



**Colorado Figure 4. Prison-Release Timeline for General-Rules Prisoners With Good-Time Credits of 12 Days/Month**

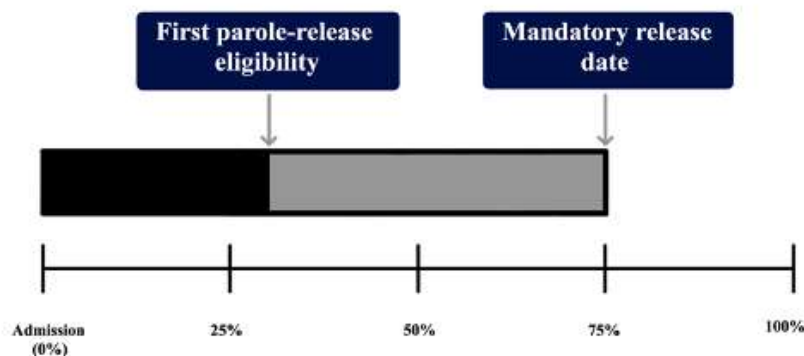
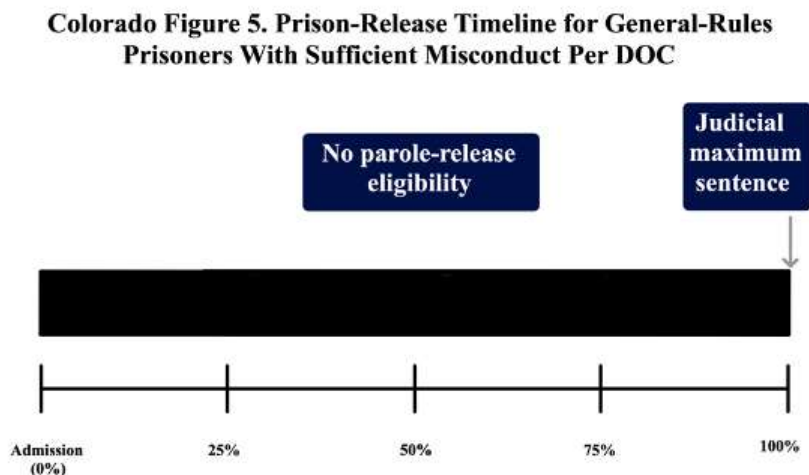


Figure 4 illustrates the effects of good-time credits accrued at a rate of 12 days per month, which is the earning formula for most prisoners. In this scenario, the first date of eligibility for parole release shifts back to the 30 percent mark of the judicial maximum term. As to the resulting mandatory release date, Colorado limits the total good-time reduction to 25 percent of the judicial maximum sentence.

Figure 4 is the timeline for a general-rules prisoner with a good record while incarcerated, but it does not plumb the outer boundaries of good-time benefits. Additional good-time credits are available for prisoners who work at a “disaster site,” through “achievement earned time” for the completion of program milestones, and for instances of “exceptional conduct.” If earned, these supplemental discounts would move the first date of parole-release eligibility even earlier than the 30-percent mark shown in Figure 4. However, they would have no effect on a prisoner’s date of mandatory release once the statutory cut-off of 25 percent from the maximum term has been reached.

In the terminology of this project, Figure 4 demonstrates that prison officials have some authority to increase the *release discretion* of the parole board by allowing for release earlier than would otherwise be legally permitted. At the same time, Figure 4 represents the department’s power to bring about a 25-percent decrease in the parole board’s *release-denial discretion*, since unremitting denials by the parole board cannot result in as much time served in Figure 4 as in Figure 3. Thus, in the Figure 4 scenario, the department of corrections can rearrange the parole board’s range of authority in ways that both enlarge and constrict the board’s autonomous powers.

Colorado also has a version of bad-time penalties for prisoner misconduct. As depicted in Figure 5, the department of corrections has the power to delay a prisoner’s date of release eligibility for reasons of “misconduct while incarcerated.” Figure 5 shows the most extreme exercise of this power, per its statutory authorization, which allows for misconduct-based delays in release eligibility that stretch all the way to the judicial maximum. We presume that such cases are infrequent, but cannot guess at the overall impact of this authority in practice. When prison officials delay a prisoner’s release-eligibility date by any amount of time, they subtract an increment from the parole board’s release discretion. Small, medium, and large increments are all within statutory bounds. At the extreme in Figure 5, the department has erased the entirety of the board’s release discretion in an individual case.



The department of corrections can subtract from the parole board’s release discretion in yet another important way. By statute, prisoners found to have committed a “class 1” disciplinary violation, or who refuse to participate in recommended programming, must lose their parole-release eligibility for a 12-month period. The power to make the findings that trigger such delays lies with prison officials.

Looking back across the preceding discussion, the department of corrections is (on paper) a powerful player in Colorado’s framework for prison-release decisions—more so than in many other states. The department has greater authority to carve away at the parole board’s

authority than it has power to increase it. Depending on how these powers are used in practice, the department of corrections could claim a degree of prison-release discretion in Colorado that closely rivals that of the parole board itself. Routine monitoring of the current Colorado system should include careful inquiry into prison officials' patterns of decision making when administering earned-time credits and postponing parole-release eligibility dates. Changes in these norms have roughly the same degree of potential impact on prison population size as changes in parole release practices.

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence on prison-population size that is ceded by law to back-end decision makers such as parole boards and departments of corrections. To give an oversimplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board's release decisions is 4:1. That is, if the parole board were to deny release to all prisoners for as long as possible (a *never-release scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at the earliest possible date (an *always-release scenario*).<sup>40</sup>

For general-rules cases in Colorado, there is no single calculation that represents the population-multiplier potential that exists across all forms of back-end release discretion. The PMP is a moving target because, in any given sentence, the degree of indeterminacy depends on the total earned-time credits awarded to the prisoner, and there is no fixed limit on the advancement of prisoners' first parole eligibility dates.

For purposes of approximating the PMP of back-end authorities in general-rules cases, we will treat prisoners who earn the full “regular” allocation of 12 days of credit per month—who become eligible for release at 30 percent of their maximum stays—as those with the earliest release dates. In such cases, the court's sentence is determinate of 30 percent of the maximum sentence, with the remaining 70 percent of potential time served within the combined discretionary control of the parole board and department of corrections. For all prisoners who fall within this range of possible time served, the PMP of the two major back-end players is 2.33:1. That is, if they were to use their discretions at every turn to produce the longest possible prison stays for all prisoners (a never-release regime), the total population of the general-rules group would eventually rise to 2.33 times the size of the group's population if those same decision makers were to use their discretion in every case to produce the earliest possible releases for all prisoners (an always-release regime).

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<sup>40</sup> In every real-world prison population, there are many subgroups of prisoners who are serving different types of prison sentences, and some who are serving revocation sentences. A separate PMP must be calculated for each cohort.

Compared with some other states, this is a moderate-level PMP for the general-rules segment of the total prison population—not as great as in many indeterminate states, but well above that of states with prison-sentencing systems classified as “determinate.”<sup>41</sup>

#### 4.2. Pockets of Heightened Determinacy

A substantial number of Colorado prisoners are serving sentences that are more determinate than the state’s general-rules sentences. These include non-sex offenders with life sentences, prisoners with mandatory minimum sentences, habitual offenders, and the group of repeat violent offenders who must serve 75 percent of their judicial maximum sentences before becoming eligible for discretionary parole release. Except for prisoners with life terms, we are unable to estimate the sizes of the subpopulations with sentences of heightened determinacy.

As of March 31, 2020, the Colorado Department of Corrections reported that, among all prisoners, 14.8 percent were serving life sentences of one kind or another. This total included 1,784 sex offenders, the largest category of prisoners with life sentences in the Colorado system, who are discussed separately in the next section. A little more than four percent of all prisoners (806) were serving sentences of *life without parole*. An additional 266 were serving life sentences with parole eligibility after 40 years. There were 67 non-sex offenders with life terms carrying minimum sentences of 10 or 20 years.<sup>42</sup>

#### 4.3. Sex offenders with indeterminate life sentences

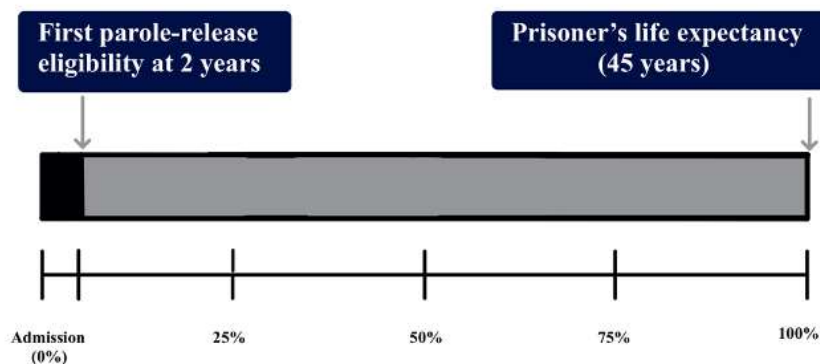
Since enactment of the Sex Offender Lifetime Supervision Act in 1998, most sex offenders in Colorado convicted of Class 2, 3, or 4 felonies are given sentences with maximum life terms and no mandatory release dates. For many of these “lifetime sex offenders,” the law allows minimum terms to parole eligibility that are as short as two, three, or four years. The combination of low authorized minimum terms and maximum life terms creates a pocket of *exceptionally-high indeterminacy* in Colorado’s prison-sentencing system. Figure 6 depicts the extreme case of a sentence of two-years-to-life—the required minimum sentence for many Class 4 sex offenders.

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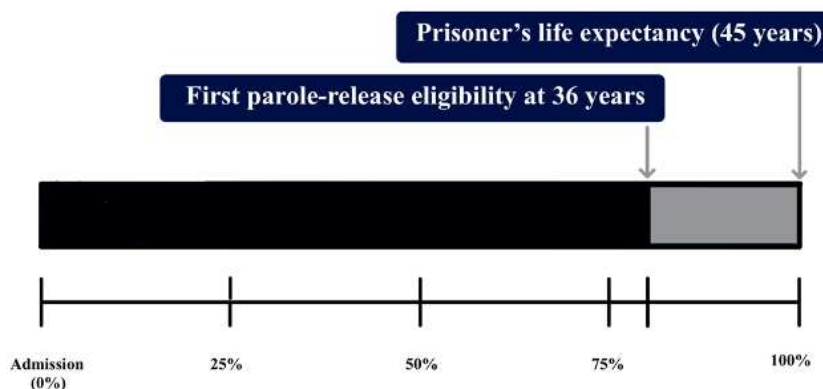
<sup>41</sup> See, e.g., Kevin R. Reitz, *Prison-Release Discretion and Prison Population Size, State Report: Minnesota* (Robina Institute of Criminal Law and Criminal Justice, 2020); Kevin R. Reitz, *Prison-Release Discretion and Prison Population Size, State Report: Virginia* (Robina Institute of Criminal Law and Criminal Justice, 2020). Virginia, which perhaps has the most determinate system in the country, operates with a PMP for most prisoners of only 1.15:1. In other words, the total time-served discretion that exists at the back end of Virginia’s sentencing system has the capacity to swing the state’s prison population in one direction or the other by no more than 15 percent.

<sup>42</sup> Colorado Department of Corrections, *Inmates Serving Life Sentences*, at <https://www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics> (statistics posted for March 31, 2020). The lifers with parole eligibility after 10 or 20 years were sentenced under laws effective prior to 1977 and 1985, respectively.

**Colorado Figure 6. Prison-Release Timeline for Sex Offenders with Exceptionally-Indeterminate Sentences of 2 Years to Life**



**Colorado Figure 7. Prison-Release Timeline for Sex Offenders with Indeterminate Sentences of 36 Years to Life**



If we indulge the conservative assumption that average prisoners have a life expectancy of 45 years at admission, then the sentence in Figure 6 is about 4.4 percent determinate and nearly 96 percent indeterminate. For sex offenders with terms of four years to life, their sentences are about 9 percent determinate and 91 percent indeterminate.<sup>43</sup> The indeterminate portion of the 45-year timeline in Figure 6 spans 43 years. We would denote this as an *exceptionally-high indeterminate sentence* on two scores: first, because of the high percentage of the possible

<sup>43</sup> Because Colorado law does not limit the minimum sentences judges may impose on sex offenders, higher minimum terms and lower degrees of indeterminacy are possible in individual cases.

maximum term that is subject to discretionary release, and second, the absolute number of years in the indeterminate segment of the timeline.

On the other end of the spectrum, the required minimum terms for some sex offenders can be much longer than two or four years, including one statutory provision requiring that sex offenders found to be habitual offenders against children must receive minimum terms of at least 36 years. Figure 7 shows the resulting prison-release timeline for such a sentence. Using the same life-expectancy assumptions as Figure 6, we would measure this sentence as 80-percent determinate and 20-percent indeterminate. The indeterminate portion of the timeline is nine years. In contrast with Figure 6, the sentence in Figure 7 is only *moderately indeterminate*.

Compared with most other states, an unusually-high share of prisoners serving life sentences in Colorado are those who have been convicted of sex offenses. As of March 31, 2020, the Colorado Department of Corrections reported statistical breakdowns for a total prisoner population of 19,357. Nine percent of the total (1,784) were reported as serving indeterminate life sentences for sex offenses.<sup>44</sup> Since the turn of the century, this percentage has been slowly growing as annual admissions have generally outnumbered releases, and as the state's prison population as a whole began to drop in the 2010s.<sup>45</sup>

Some of the growth in this subpopulation may be due to long minimum sentences that are required by some provisions of the Lifetime Supervision Act. It is clear, however, that discretionary-release patterns have also had effects on prison population size. Release rates for sex offenders serving indeterminate life sentences were extremely low for more than a decade after passage of the Act in 1998.<sup>46</sup> Over nine years from FY 2003 through FY 2011, there were a total of only 102 releases—for an average of less than 12 releases per year. Numbers of

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<sup>44</sup> Colorado Department of Corrections, *Inmates Serving Life Sentences*, at <https://www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics> (statistics posted for March 31, 2020).

<sup>45</sup> As share of the total prison population, this subgroup grew fairly steadily from 2003 to 2019. See Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2019), at 5 figure 2. The rate of growth slowed after FY 2012, when the annual numbers of releases of sex offenders with indeterminate life sentence began to increase. *Id.* at 5 figure 3. Still, in FY 2019, the total number of releases ordered by the parole board (86) were outnumbered by new admissions (127). *Id.* at 3, 7. See also Colorado Department of Corrections, *Statistical Report FY 2018* (undated), at 28 figure 35 (figure showing 10-year growth in “lifetime supervision” population).

<sup>46</sup> See Jessica Fender, *Family members of sex offenders organize lawsuit against Colorado's indeterminate sentences*, *The Denver Post*, August 13, 2011 (reporting that, as of June 30, 2010, only 66 of the 1,659 sex offenders who had received indeterminate life sentences under the 1998 Lifetime Supervision Act had been released on parole; “[a]s of March [2011], that number had grown to 82.”). Part of the reason for the low release rate was the shortage of treatment resources, which led to small numbers of prisoners able to complete required sex offender treatment programs. *Id.* (“In 2002, for every sex offender treatment program employee, there were 73 inmates who needed therapy. By 2010, that ratio was one to 108. ... In the 13 years the lifetime law has been in place, 159 people had completed treatment as of March [2011]”). Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2019), at 15.

releases increased beginning in FY 2012, however, when 88 were released in one year; and there was a high of 169 first releases in FY 2018.<sup>47</sup>

Despite the enlarged numbers of releases beginning in 2012, the odds of release for an eligible lifetime sex offender remain low. The Parole Board granted discretionary release for 86 of the 717 lifetime supervision sex offenders who came to hearing in FY 2019, for a release rate of 12 percent.<sup>48</sup> This compares to a release rate for all prisoners of just over 50 percent.

If these assumptions are sound, then the state's corrections data give us some indication of the amount time actually served by lifetime sex offenders who fall into the lower ranges of crime severity encompassed by the Lifetime Supervision Act (that is, prisoners with sentences closer to the scenario in Figure 6 than Figure 7). Among all lifetime sex offenders released in FY 2018, the average time served was 130 months (12 years and 10 months).<sup>49</sup>

Overall, sentences under the Lifetime Supervision Act carry widely-ranging degrees of indeterminacy, from those with an exceptionally-high DOI to those with a moderate DOI (compare Figures 6 and 7). Based on admissions data, we believe most of these sentences fall within the categories of exceptionally-high or high indeterminacy.<sup>50</sup> But it is impossible to know for sure without information about the spread of the minimum sentences that have been imposed across the entire population of lifetime sex offenders.

#### *4.4. Infrequently-used indeterminate prison-release mechanisms*

Colorado's prison-release mechanisms that fall outside the normal operations of parole release and earned-time discounts have not been important determinants of the state's prison population size in recent years. These infrequently-used mechanisms include medical or compassionate release (subsumed under the heading of "special needs parole" in Colorado),<sup>51</sup> executive clemency, and the emergency release powers that exist in the state to meet conditions of prison overcrowding.

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<sup>47</sup> Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2019), at 5 figure 3.

<sup>48</sup> *Id.*, at 7.

<sup>49</sup> Colorado Department of Corrections, *Statistical Report FY 2018* (undated), at 22 figure 27.

<sup>50</sup> In FY 2018, there were 114 admissions under the Lifetime Supervision Act: 44 were class 4 felonies, 66 were class 3, and 4 were class 2. *Id.*, at 16 table 6.

<sup>51</sup> The Colorado prisons have seen a growing elder population, see Colorado Department of Corrections, *Statistical Report FY 2018* (undated), at 31 figure 39 (7.6 percent of all prisoners were over 50 in 1999, increasing to 20.1 percent in 2018). Despite this ageing trend, special needs parole is a de minimus factor in the determination of Colorado's prison population size. In 2016, the parole board reported that only 25 prisoners had been granted special needs parole in the five years 2011 through 2015, with only three such grants in FY 2015. Colorado State Board of Parole, *Presumptive Parole: FY 2015 Report* (2016), at xx.

In stating our assessments, we set aside the COVID period beginning in Spring 2020, which has prompted some states to consider greater use of avenues of prisoner release than in the past. It is too early to assess the history of the COVID era in any state, or to speculate on its possible lasting effects within the broader field of prison release discretion.

#### 4.5. Overall assessment

Overall, we rank the Colorado prison-sentencing system as one of moderate indeterminacy. The vast majority of prisoners are governed by general rules of prison-release discretion that give somewhat more discretion over time served to back-end authorities than to the front-end authorities who shape judicially-pronounced prison sentences. The population-multiplier potential of back-end officials for this group is estimated to be in the ballpark of 2.33:1 (see Figures 3 and 4 and accompanying discussion).<sup>52</sup> Compared with most other paroling states, there is no pronounced concentration of time-served discretion at the back end of the prison-sentence chronology. For example, the PMP of back-end officials for general-rules prisoners in Texas is 10:1—an illustration of an arrangement we have ranked at the high-indeterminacy level.<sup>53</sup>

Moreover, back-end power over sentence length is not consolidated in any single agency, but is distributed in almost equal shares between the parole board and department of corrections. Together, the parole board and department of corrections control about 70 percent of time served in general-rules cases, but the parole board's power over 20 percent of total time served exists only if corrections officials have chosen to bestow earned-time credits, and it is also within the department of corrections' power to remove the parole board's control over 25 percent of most judicial sentences through earned-time administration. This sharing of authority, including the creation and cancellation of increments of prison-release discretion, means that the ability of the system to lurch toward always-release or never-release extremes would require the sustained and coordinated efforts of two independent agencies. Colorado's bifurcated structure provides more of an anchor against sudden changes in prison-release practices than found in many states.

As an important qualification to our ranking, it should be noted that Colorado has a unique and highly-indeterminate approach to prison sentences for many sex offenders. In some cases, sentences for this group of prisoners reach levels of exceptionally-high indeterminacy, such as sentences of two-years-to-life or four-years-to-life. Although "lifetime sex offenders" have been a slowly-growing subpopulation over the past 20 years, people with this class of sentence made up only 9 percent of the total Colorado prison population in 2020. Within that 9 percent, only some prisoners have sentences at the highest levels of indeterminacy, while others have

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<sup>52</sup> A PMP of 2:1 would indicate perfectly balanced control over prison-sentence length as between front-end and back-end decision makers.

<sup>53</sup> See Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Texas* (Robina Institute of Criminal Law and Criminal Justice, 2020).



sentences we would classify at the level of moderate indeterminacy. In our view, even if highly-indeterminate sentences predominate, this group is not yet large enough to change our overall assessment that the Colorado prison-sentencing system is one of moderate indeterminacy.