



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

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# PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

*STATE REPORT: OKLAHOMA*

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# Prison-Release Discretion and Prison Population Size

## State Report: Oklahoma

### Table of Contents

#### Executive Summary

#### Introduction

Oklahoma's prison-rate history, 1972 to 2021

Oklahoma's 2018 prison-release reforms

Organization of this report

#### I. General Rules of Prison Release in Oklahoma

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

1.1. General rules of first release eligibility

1.2. Administrative parole

1.3. Violent offenders

1.4. Violent offenders subject to extended 85-percent minimum terms

1.5. Reconsideration after denial of release

##### B. General Rules on the Effects of Good-Time, Earned-Time, and Other Discounts

1.6. Generally-available credits: types and amounts

a. Effects of earned credits on parole-release eligibility

b. Effects of earned credits on the judicial maximum term

1.7. Loss of earned credits

#### II. Life Sentences in Oklahoma

2.1. Life without parole

2.2. Life sentences with possibility of parole

2.3. Juvenile life sentences

### **III. Infrequently Used Forms of Prison Release in Oklahoma**

- 3.1. Medical or “compassionate” release
- 3.2. Executive clemency
- 3.4. Emergency release for prison overcrowding

### **IV. Overall Assessment of Oklahoma’s Prison-Sentencing System**

- 4.1. The two major general-rules groups
- 4.2. Allocation of releasing authority
- 4.3. Pockets of high determinacy
- 4.4. Overall assessment

### Definitions and Concepts

“Indeterminacy” means “unpredictability of time served.” Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve before the sentence’s expiration? If actual time-that-will-be-served is highly unpredictable based on the pronounced judicial sentence, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. “Determinacy” means “predictability of time served” at the time of judicial sentencing.

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across hundreds and thousands of individual sentences add up to greater control over prison population size by “back-end” agencies such as parole boards and departments of correction. These structural features vary enormously across U.S. jurisdictions.

### *Note on the project’s rankings of “degrees of indeterminacy”*

To compare the degrees of indeterminacy in individual prison sentences or across the prison-sentencing systems of different jurisdictions, we use a qualitative ranking framework based on our cumulative learning while preparing the project’s 52 jurisdiction-specific reports. To avoid false precision, we place all systems within one of five categories (see table below).

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present.

The ranking scale is subjective, although the reasoning that supports our judgments is laid out in each report. Ultimately, the rankings indicate only the rough position of specific prison-sentencing systems vis-à-vis each other. No two American prison-release systems are alike and all are highly complex, so nuanced comparative analysis requires closer inspection.

### *Rankings of “Degrees of Indeterminacy”*

<b>Ranking</b>	<b>Alternative terminology</b>	
1	Extremely-high indeterminacy	Extremely-low determinacy
2	High indeterminacy	Low determinacy
3	Moderate indeterminacy	Moderate determinacy
4	Low indeterminacy	High determinacy
5	Extremely-low indeterminacy	Extremely-high determinacy

For individual classes of sentences, we use the following benchmarks for our classifications of higher versus lower degrees of indeterminacy:

***Benchmarks for rankings of “degrees of indeterminacy”***

- *Extremely high indeterminacy:* >80-100 percent indeterminacy (first prospect of release at 0-19.99 percent of judicial maximum)
- *High indeterminacy:* >60-80 percent indeterminacy (first prospect of release at 20-39.99 percent of judicial maximum)
- *Moderate indeterminacy:* >40-60 percent indeterminacy (first prospect of release at 40-59.99 percent of judicial maximum)
- *Low indeterminacy:* >20-40 percent indeterminacy (first prospect of release at 60-79.99 percent of judicial maximum)
- *Extremely low indeterminacy:* 0-20 percent indeterminacy (first prospect of release at 80-100 percent of judicial maximum)

Classifying entire sentencing systems on our five-point scale is an imprecise exercise largely because all jurisdictions have multiple different sentence classes with varying degrees of indeterminacy attached to each class. Prisoners who are present within a system at any moment in time represent a broad mixture of sentence classes, and this mixture is constantly changing with releases and new admissions. Thus, our systemwide rankings cannot reflect mathematical precision.

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified 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 would be 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *longest-time-served scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (a *shortest-time-served scenario*).

Most states have several different classes of sentences, each with their own rules of prison release. Each sentence class carries its own PMP. Application of the PMP measure to entire prison systems is, at best, an approximation that requires the proration of multiple classes of sentences and their PMPs according to the numbers and percentages of prisoners who have received those different classes of sentence.

## Prison-Release Discretion and Prison Population Size

### State Report: Oklahoma<sup>1</sup>

#### *Executive Summary*

Overall, Oklahoma’s prison-sentencing system operates with a *high degree of indeterminacy* under the classification system developed for this project. Most judicial sentences are 25 percent determinate and 75 percent indeterminate. Within the indeterminate segment of such sentences, the department of corrections is an especially powerful player. Through credit earnings at different levels administered by the DOC, high-achieving prisoners are eligible to win substantial reductions from their judicial maximum terms, which produce “movable mandatory release dates” (or “movable MRDs”) as credits accumulate. We estimate that high-achieving prisoners convicted of nonviolent crimes in Oklahoma could realistically earn 58-percent reductions from their maximum terms. Prisoners with average or below average performance records would earn less.

Oklahoma’s parole board holds unusually limited powers with respect to sentences for statutorily-defined violent offenses, even though release eligibility technically occurs at the 25-percent mark of most sentences. For violent offenders in Oklahoma, release requires both a recommendation from the parole board and an affirmative decision to release by the governor. Such twin favorable decisions have historically been a rare occurrence. Movable MRDs are thus an especially consequential release mechanism for Oklahoma prisoners convicted of violent crimes. We estimate that high-achieving prisoners convicted of violent crimes could realistically earn 48-percent reductions from their maximum terms. Prisoners with average or below average performance records would earn less.

Prisoners convicted of statutorily-enumerated serious violent offenses serve sentences with parole eligibility delayed until the 85-percent mark of their judicial maximum sentences. These sentences are *extremely low in indeterminacy* (or *extremely high in determinacy*). In our judgment, this sentence class is probably not large enough to alter our overall system classification of high indeterminacy.

In 2018, Oklahoma introduced a streamlined “administrative parole release” or “APR” process for most prisoners convicted of nonviolent crimes. Prisoners who successfully navigate the

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<sup>1</sup> For a broad overview of the law of parole release and supervision in Oklahoma, see Alexis Lee Watts, Brendan Delaney, Edward E. Rhine, Mike McBride, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Oklahoma* (Robina Institute of Criminal Law and Criminal Justice, 2019) (including surveys of parole release criteria, procedures for release decisions, laws relating to parole supervision and revocation, and the institutional attributes of the parole board).

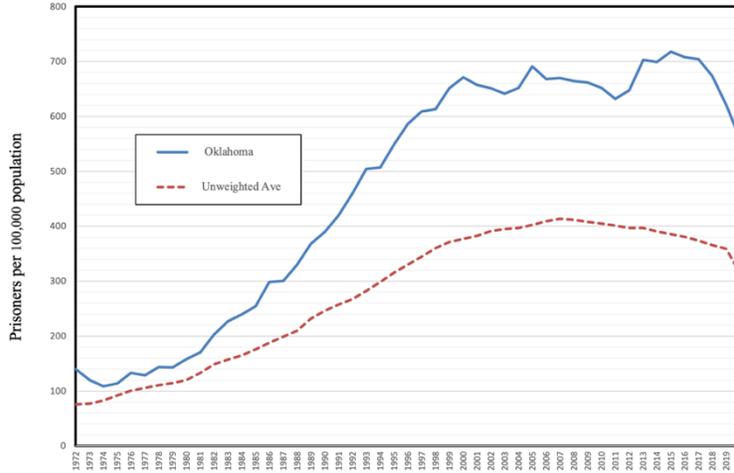
APR process are released at first eligibility without an individualized hearing before the parole board. It is too early to assess the long-term impact of this law.

**Introduction**

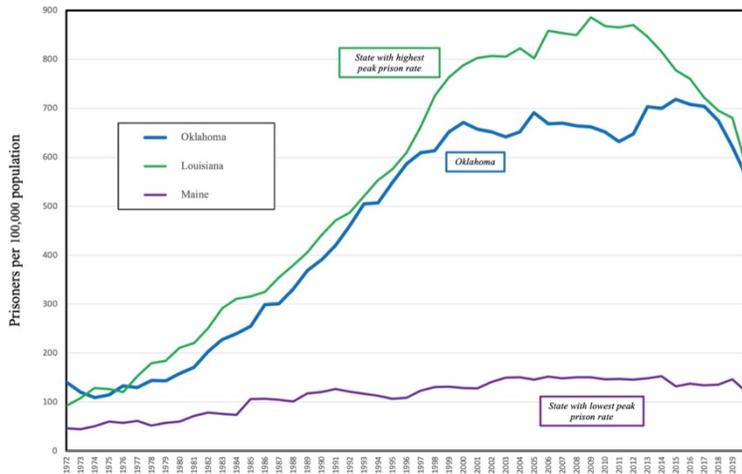
*Oklahoma’s prison-rate history, 1972 to 2020*

At yearend 2020, Oklahoma’s prison rate was 559 per 100,000 general population, with a prison population of 22,309.<sup>2</sup> Oklahoma’s prison rate was 3<sup>rd</sup> highest among all states.

**Figure 1. Prison Rate Change in Oklahoma and (Unweighted) Average Among All States, 1972 to 2020**



**Figure 2. Prison Rate Change in Oklahoma, Louisiana, and Maine, 1972 to 2020**



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 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991)

<sup>2</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 15 table 7. Preliminary information about changes in Oklahoma’s imprisonment rates after 2020 is presented below in the section on “The COVID period in Oklahoma.”

(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).

Oklahoma reached its peak prison rate in 2015 at 718 per 100,000, which dropped to 559 per 100,000 in 2020. This is a net difference of -159 per 100,000, which was the 18<sup>th</sup> largest prison-rate drop of all states from their peak positions to yearend 2020. Notably, this decline in Oklahoma's prison rate happened in a compressed five-year period. In many other states, reductions in prison rates from their mass incarceration peaks have unfolded over 15 or 20 years.

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States saw 35 years of uninterrupted growth in the nationwide aggregated prison rate. This might be called the Great Prison Buildup. Since 2007, national prison rates have been falling. From 2007 through yearend 2019 (prior to the COVID pandemic), the average drop in states' prison rates was about 1.2 percent per year, with much variation across individual states.

### *Recent changes in law*

In November 2018, a new “administrative parole” process took effect for most prisoners convicted of nonviolent crimes (see section 1.2 below).<sup>3</sup> In January 2019, the Oklahoma legislature created an expedited commutation process for many prisoners convicted of low-level drug and property offenses (see section 3.2 below).<sup>4</sup> It is too early to assess the long-term impacts of these laws.

### *The COVID period*

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine

<sup>3</sup> Jeff Raymond, *Pardon and Parole Board Approves First Inmates for Streamlined Parole*, Oklahoma Watch, March 8, 2019, <https://oklahomawatch.org/2019/03/08/first-inmates-to-come-before-pardon-and-parole-board-under-new-law/>.

<sup>4</sup> Damion Shade, *HB 1269 makes 780 retroactive but leaves issues unresolved*, Oklahoma Policy Institute, May 19, 2019.

state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.<sup>5</sup>

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend 2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000 general population, for an average incremental downturn of -51 per 100,000.<sup>6</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>7</sup>

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic speed. Preliminary data from the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021. Prison populations actually rose in 19 states.<sup>8</sup>

Given the focus of this project and the unprecedented size of prison-rate change during COVID’s first year or so, it is relevant to ask whether indeterminacy in American prison sentences played a consequential role in events. An adequate history cannot yet be written, but considerable data has already been assembled.

Nationwide, COVID-driven changes in prison-release practices were not the main driving force of prison population shrinkage from March 2020 forward. This is not to say that there was no expansion of prison release during the pandemic. Thirty-six states and the federal government did at least *something* to expedite releases, each jurisdiction choosing from a grab bag of different strategies—e.g., expedited parole release, loosened release criteria, increased or

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<sup>5</sup> In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

<sup>6</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 1, 7 table 2. Across 2020, prison rates fell in every state except Alaska.

<sup>7</sup> Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 *Crime & Delinq.* 9 (1979).

<sup>8</sup> Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021). The states reported to have had increases in prison populations in 2021 were: Alaska (up 7.7 percent), Arkansas (up 5.8 percent), California (up 3.9 percent), Connecticut (up 3.4 percent), Delaware (up 2.0 percent), Idaho (up 8.8 percent), Iowa (up 9.1 percent), Kentucky (up 0.2 percent), Missouri (up 1.5 percent), Montana (up 9.8 percent), Nebraska (up 5.9 percent), North Carolina (up 0.9 percent), North Dakota (up 20.6 percent), Ohio (up 0.04 percent), Rhode Island (up 2.1 percent), South Dakota (up 2.4 percent), Utah (up 8.4 percent), West Virginia (up 12.9 percent), and Wyoming (up 3.7 percent). *Id.* at 3-4 table 2.

restored credit awards, early release of prisoners already close to their mandatory release dates, expanded compassionate release for the elderly or medically infirm, increases in clemency grants, invocation of overcrowding emergency provisions, and court orders. Such steps did not yield large numbers of “COVID releases” in most states, however, and many COVID releases were not much earlier than they would have been in the pandemic’s absence.<sup>9</sup>

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons’ embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.<sup>10</sup>

### *The COVID period in Oklahoma*

The state-specific experience of Oklahoma does not suggest a dramatic mobilization of new or old prison-release processes in the immediate period of COVID shock.

In calendar year 2020, Oklahoma’s prison rate fell from 621 to 559 per 100,000—a one-year decline of 62 per 100,000. This was the 16<sup>th</sup> largest one-year drop reported among all 50 states

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<sup>9</sup> For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000 prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions was “short time left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

<sup>10</sup> See E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17, 17 table 8 (admissions fell from 530,905 to 319,346). There was no comparable upswing in prison releases. Total releases from state prisons actually fell in 2020, dropping 9.8 percent from the previous year. *Id.* at 19 table 9 (nationwide releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

for that year.<sup>11</sup> Measured in percentage terms, it was a 10-percent fall in Oklahoma’s prison rate. The state’s total prison population fell by 2,383 people, from 24,692 to 22,309.<sup>12</sup>

COVID releases made up a small portion of the drop. In a separate study, the Robina Institute identified only 464 COVID-influenced releases in Oklahoma from March 2020 through December 2021.<sup>13</sup> Instead, falling admissions appear to have been the critical factor in the state’s loss of prison population. The number of prison admissions in Oklahoma dropped by 37.5 percent in 2020 compared with the previous year (from 7,491 in 2019 to 4,682 in 2020). Total numbers of releases did not grow in 2020, but fell by 5.6 percent from 2019 (from 9,332 to 8,100).<sup>14</sup>

From yearend 2020 to December 2021, the Vera Institute reported that Oklahoma saw a decrease in its prison population, from 22,854 to 22,342—or 2.2 percent.<sup>15</sup> From January 1 through June 13, 2022, the Oklahoma Department of Corrections reported a further 1.4-percent decline in the state’s total prison population.<sup>16</sup>

### *Terminology note*

This report will refer to the Oklahoma Parole Board as the “parole board.” The Oklahoma Division of Corrections and Rehabilitation will be referred to as the “department of corrections.”

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<sup>11</sup> The largest reported drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7.

<sup>12</sup> *Id.*, at 12 table 4.

<sup>13</sup> Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022), Appendix A. Almost all of the COVID releases in Oklahoma were through executive commutations of sentences for drug and property crimes. However, 341 of the commutation-based “releases” were not immediate “due to other charges that were not commuted.” Instead, the commutations advanced the expected release rates of these 341 prisoners, to occur at some point in the future. *Id.*, Appendix E.

<sup>14</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8, 20 table 9.

<sup>15</sup> Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a drop from 22,854 to 22,342). For unknown reasons, the prisoner counts reported by Vera are different from those released by the Oklahoma Department of Corrections on its website. For both the beginning of 2021 and December 2021, Vera reports about 1,000 more prisoners than included in DOC weekly counts.

<sup>16</sup> Oklahoma Department of Corrections, *Incarcerated Inmates and Community Supervision Offenders Daily Count Sheet* (January 3, 2022), at <https://oklahoma.gov/content/dam/ok/en/doc/documents/population/count-sheet/2022/OMS%20Count%2001.03.2022.pdf>; Oklahoma Department of Corrections, *Incarcerated Inmates and Community Supervision Offenders Daily Count Sheet* (June 13, 2022), at <https://oklahoma.gov/content/dam/ok/en/doc/documents/population/count-sheet/2022/OMS%20Count%2006.13.2022.pdf>.

## ***I. General Rules of Prison Release in Oklahoma***

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

As a matter of state constitutional law, the Oklahoma parole board has authority to grant discretionary parole release only to prisoners convicted of nonviolent offenses. For prisoners convicted of “violent offenses” as defined by Oklahoma law, the parole board is limited only to making recommendations to release. The release decision itself must be made by the governor.<sup>17</sup> This is a highly unusual arrangement. While governors are typically the final authority for uses of the clemency power, Oklahoma is the only state that makes the governor the ultimate decisionmaker in ordinary parole-release cases for large numbers of prisoners.<sup>18</sup>

Despite this unique institutional structure, the applicable formulas for the time that must elapse for prisoners to reach first parole eligibility are often the same for violent and nonviolent offenders (see section 1.4. for exceptions).

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

Oklahoma’s general rules of parole-release eligibility were amended in 2018, and a new system of administrative parole for prisoners convicted of nonviolent offenses was created. As of 2022, however, large numbers of prisoners were still subject to the former law. The general rules for prisoners sentenced under the “old” and “new” systems are set out below.<sup>19</sup>

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<sup>17</sup> The relevant constitutional provision is Okla. Const. Art. VI, § 10, which provides in part:

The Pardon and Parole Board by majority vote shall have the power and authority to grant parole for nonviolent offenses after conviction, upon such conditions and with such restrictions and limitations as the majority of the Pardon and Parole Board may deem proper or as may be required by law. The Pardon and Parole Board shall have no authority to grant but may recommend parole for persons sentenced pursuant to Section 13.1 of Title 21 of the Oklahoma Statutes or the exceptions to nonviolent offenses as defined by Section 571 of Title 57 of the Oklahoma Statutes.

<sup>18</sup> California requires the governor’s approval for parole release of lifers convicted of murder. See Kevin R. Reitz, Allegra Lukac, & Edward E. Rhine, *Prison-Release Discretion and Prison Population Size State Report: California* (Robina Institute of Criminal Law and Criminal Justice, 2021)

<sup>19</sup> Oklahoma is one of six states to use jury sentencing in noncapital cases. Nancy J. King and Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 886 (2004) (the six states are Arkansas, Kentucky, Missouri, Texas, Oklahoma, and Virginia). In Oklahoma, jury sentencing occurs in a noncapital case only when affirmatively requested by defendant, see Okla. Stat. tit. 21, § 926.1. See *Bever v. State*, 467 P.3d 693 (Okla. Ct. Crim. App. 2020) (“[u]nder state law [citing § 926.1], criminal defendants have a statutory right to have a jury help determine the sentence.”); *Mitchell v. State*, 270 P.3d 160, 185 n. 12 (Okla. Ct. Crim. App. 2011) (stating that § 926.1 “requires a defendant to affirmatively request jury sentencing.”). When requested, the jury must “assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict.” Okla. Stat. tit. 21, § 926.1. This report will make no distinction between jury- and judge-sentenced cases, and for both will refer to the “judicial maximum sentence” as the sentence pronounced in court.

For offenses committed between July 1, 1998 and November 1, 2018: Prisoners become eligible for discretionary parole release after serving one-third of their judicial maximum sentences.<sup>20</sup>

For offenses committed on or after November 1, 2018: Under the new law, prisoners become eligible for discretionary parole release after serving one-fourth of their judicial maximum terms.<sup>21</sup> In addition, prisoners convicted of nonviolent offenses are eligible for “administrative parole,” a procedure that is not available for those convicted of violent crimes.<sup>22</sup>

### 1.2. Administrative parole

Nonviolent offenders are eligible for administrative parole.<sup>23</sup> Prisoners may be released on their first release eligibility dates without a hearing if a majority of the parole board votes to release at that time.<sup>24</sup> There is no legal presumption that release should be granted.<sup>25</sup>

The department of corrections acts as primary gatekeeper of administrative parole in Oklahoma. Prisoners become eligible when the department notifies the parole board that they have been in “substantial compliance” with their case plans.<sup>26</sup> In addition, disciplinary

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<sup>20</sup> Okla. Stat. Ann. tit. 57, § 332.7(B).

<sup>21</sup> Okla. Stat. Ann. tit. 57, § 332.7(C) (applies only to offenses committed after November 1, 2018).

<sup>22</sup> Okla. Stat. Ann. tit. 57, § 332.7(C)(1) (“A person eligible for parole under this subsection shall be eligible for administrative parole ... once the person serves one-fourth (1/4) of the sentence or consecutive sentences imposed; provided, however, no inmate serving a sentence of life imprisonment without parole, a sentence for a violent crime as set forth in Section 571 of this title or any crime enumerated in Section 13.1 of Title 21 of the Oklahoma Statutes shall be eligible for administrative parole.”).

<sup>23</sup> See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Chapter 7 (“Highlighted topic: Administrative parole release”).

<sup>24</sup> Okla. Stat. tit. 57, § 332.7(R) (requiring a “majority vote” of the board to “grant administrative parole”); id., (“Any person granted [administrative parole] shall be released from the institution at the time of the parole eligibility date of the person”); id., § 332.7(U) (“The Pardon and Parole Board shall not be required to conduct a hearing before granting administrative parole”).

<sup>25</sup> One report in the early months of the new law suggested that the parole board voted to release about 53 percent of the administrative parole candidates sent forward to them from the department of corrections. See Jeff Raymond, *Pardon and Parole Board Approves First Inmates for Streamlined Parole* (March 8, 2019), Oklahoma Watch, <https://oklahomawatch.org/2019/03/08/first-inmates-to-come-before-pardon-and-parole-board-under-new-law/> (“The Department of Corrections in December sent a list of 138 potential administrative parolees. The list was whittled down to 73.”). The year before, the parole board’s grant rate for prisoners convicted of nonviolent offenses had been 33 percent. Oklahoma Pardon and Parole Board, *Voting for Fiscal Year 2018 – Annual Report*, at 1 table 1.

<sup>26</sup> Okla. Stat. tit. 57, § 332.7(R)(1). “Inmate rehabilitation case plans” must be developed by the department within 60 days of a prisoner’s admission. Okla. Stat. Ann. tit. 57, § 530.5 (I)

infractions within the prior two years can render prisoners ineligible.<sup>27</sup> The department of corrections must notify the parole board of prisoners' administrative-parole-eligibility status 90 days before their first release-eligibility dates.<sup>28</sup>

Victims may block prisoners' eligibility for administrative parole by filing an objection, personally or through a district attorney.<sup>29</sup>

If prisoners are denied administrative-parole release, they become “otherwise eligible for parole” for the remainder of their prison terms.<sup>30</sup>

### *1.3. Violent offenders*

Under the Oklahoma Constitution, the parole board has no authority to release prisoners convicted of violent offenses. For such cases, parole-release discretion is held exclusively by the governor.<sup>31</sup> The board's role is limited to the gatekeeping function of deciding which cases to recommend to the governor for release. Except in narrow circumstances, the governor may not grant parole release in the absence of such a recommendation.<sup>32</sup>

The statutory definition of “violent offenses” in Oklahoma enumerates the following offenses:

Assault, battery, or assault and battery with a dangerous or deadly weapon; assault, battery, or assault and battery with a deadly weapon or by other means likely to produce death or great bodily harm; aggravated assault and battery on a police officer, sheriff, highway patrolman, or any other officer of the law; poisoning with intent to kill; shooting with intent to kill; assault with intent to kill; assault with intent to commit a felony; assaults with a dangerous weapon while masked or disguised; murder in the first degree or second degree; manslaughter in the first degree or second degree; kidnapping; burglary in the first degree; burglary with explosives; kidnapping for extortion; maiming; robbery in the first or second degree; armed robbery; robbery by two or more persons; robbery with dangerous weapon or imitation firearm; child abuse;

<sup>27</sup> Okla. Stat. tit. 57, § 332.7(R)(3)-(5).

<sup>28</sup> Okla. Stat. tit. 57, § 332.7(T).

<sup>29</sup> Okla. Stat. tit. 57, § 332.7(R)(2). Victims are given similar veto power in several other states with administrative parole systems. See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Chapter 7, table 7.

<sup>30</sup> Okla. Stat. tit. 57, § 332.7(V) (“Any person who is not granted administrative parole shall be otherwise eligible for parole pursuant to this section.”).

<sup>31</sup> The governor has authority to grant parole release in all cases except “cases of impeachment,” but the governor's power is exclusive for prisoners convicted of violent offenses. See Okla. Stat. tit. 57, § 332.

<sup>32</sup> Okla. Const. Art. VI, § 10.

wiring any equipment, vehicle or structure with explosives; forcible sodomy; rape in the first or second degree; rape by instrumentation; lewd or indecent proposition or lewd or indecent act with a child under sixteen years of age; use of a firearm or offensive weapon to commit or attempt to commit a felony; pointing firearms; rioting; inciting to riot; arson in the first degree; injuring or burning public buildings; sabotage; criminal syndicalism; extortion; obtaining signature by extortion; seizure of a bus, discharging firearm or hurling missile at bus; mistreatment of a mental patient; using a vehicle to facilitate the discharge of a weapon; bombing offenses; child pornography or aggravated child pornography; child prostitution; abuse of a vulnerable adult who is a resident of a nursing facility; aggravated drug trafficking; aggravated assault and battery upon any person defending another person from assault and battery; human trafficking; terrorism crimes; eluding a peace officer; domestic abuse by strangulation; domestic assault with a dangerous weapon; domestic assault and battery with a dangerous weapon; and domestic assault and battery with a deadly weapon.<sup>33</sup>

By statute, the governor has 30 days to act on the parole board's recommendations to release, and parole is deemed to be granted if the governor fails to act within this time.<sup>34</sup> However, there is a list of 53 categories of crimes that are not subject to this 30-day default rule, which covers the majority of the state's enumerated violent offenses.<sup>35</sup>

#### *1.4. Violent offenders subject to 85-percent minimum terms*

Prisoners convicted of 22 statutorily-designated offense categories do not become eligible for discretionary parole release until they have served 85 percent of their judicial maximum sentences. The offenses that carry such extended minimum terms are:

First and second degree murder; manslaughter in the first degree; poisoning with intent to kill; shooting with intent to kill; use of a vehicle to facilitate use of a firearm, crossbow or other weapon; assault, battery, or assault and battery with a deadly weapon or by other means likely to produce death or great bodily harm; assault with intent to kill; conjoint robbery; robbery with a dangerous weapon; first degree robbery; first degree rape; first degree arson; first degree burglary; bombing; any crime against a child; forcible sodomy; child pornography or

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<sup>33</sup> Okla. Stat. Ann. tit. 57, § 571(2). This statutory definition is expressly referenced in the Oklahoma Constitution as the dividing line between the governor's and the board's releasing powers.

<sup>34</sup> Okla. Stat. tit. 57, § 332.16(A) ("No recommendation to the Governor for parole shall remain under consideration and in the possession of that office for a time longer than thirty (30) consecutive calendar days. Except as provided for in subsection B of this section, if upon expiration of the thirty-day time period no action is taken by the Governor to grant or deny parole, the recommendation for parole shall be deemed granted.").

<sup>35</sup> Okla. Stat. tit. 57, § 332.16(B).

aggravated child pornography; child prostitution; lewd molestation of a child; abuse of a vulnerable adult; aggravated drug trafficking; aggravated assault and battery upon any person defending another person from assault and battery; and human trafficking.<sup>36</sup>

### *1.5. Reconsideration after denial of release*

After a denial of parole release, the parole board must reconsider nonviolent offenders for release within one year. Violent offenders must generally be reconsidered within two or three years of their last denial, but must also be considered for release one year before their dates of mandatory release.<sup>37</sup>

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

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

Prisoners can accrue “earned credits” each month, with available amounts depending on prisoners’ assignments into one of four “class levels” by prison officials.<sup>38</sup> At each level, the

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<sup>36</sup> Okla. Stat. tit. 21, § 13.1(1) through (22).

<sup>37</sup> Okla. Admin. Code § 515:225-11-1.

The reconsideration rules for violent offenders are a bit convoluted after parole release has been denied by the board or the governor. Under Okla. Admin. Code § 515:25-11-1(b), such prisoners must be reconsidered:

- (1) Upon the completion of one-third (1/3) of the sentence, unless the one-third date is within twenty-four months of the initial consideration. If the one-third date is within twenty-four months of the initial consideration then the offender will be reconsidered two years from the date of denial.
- (2) Once the offender has passed their one-third date, reconsideration shall be three years from the date of denial, unless the offender is within one year of discharge.
- (3) One year prior to discharge.

<sup>38</sup> Okla. Stat. tit. 57, § 138. The four levels are defined in subsection (D)(1) as follows:

- a. Class level 1 shall include inmates not eligible to participate in class levels 2 through 4, and shall include, but not be limited to, inmates on escape status.
- b. Class level 2 shall include an inmate who has been given a work, education, or program assignment, has received a good evaluation for participation in the work, education, or program assignment, and has received a good evaluation for personal hygiene and maintenance of living area.
- c. Class level 3 shall include an inmate who has been incarcerated at least three (3) months, has received an excellent work, education, or program evaluation, and has received an excellent evaluation for personal hygiene and maintenance of living area.
- d. Class level 4 shall include an inmate who has been incarcerated at least eight (8) months, has received an outstanding work, education, or program evaluation, and has received an outstanding evaluation for personal hygiene and maintenance of living area.

earning rate is lower for prisoners with a current or prior conviction of one of 65 designated violent offenses.<sup>39</sup> Essentially, this creates different earning rates for nonviolent and violent offenders. Table 1 displays the various earning rates, which reach 60 days per month for prisoners convicted of nonviolent crimes who are evaluated as “outstanding” in program participation, hygiene, and maintenance of living area. The highest earning rate for violent offenders is 44 days per month.

**Table 1. Earning rates for earned credits**

<b>Class level</b>	<b>Credit earning rate for prisoners convicted of nonviolent offenses and no prior convictions of violent offenses</b>	<b>Credit earning rate for prisoners with current or prior convictions of violent offenses</b>
Level 1	0 credits per month	0 credits per month
Level 2	22 credits per month	22 credits per month
Level 3	45 credits per month after serving three months	33 credits per month after serving three months
Level 4	60 credits per month after serving eight months	44 credits per month after serving eight months

Source: Okla. Stat. tit. 57, § 138(D)(2)(b) and (c).

In addition to earned credits that accrue monthly, prisoners may receive “achievement earned credits” as shown below in Table 2.

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Earned credits are not available to prisoners serving life sentences, or convicted of a crime that resulted in the death of a law enforcement officer, an employee of the department of corrections, or an employee of a private prison contractor. Okla. Stat. tit. 57, § 138(A).

<sup>39</sup> The list is set out in Okla. Stat. tit. 57, § 138(E). It is nearly identical to the list of “violent crimes” in Okla. Stat. Ann. tit. 57, § 571(2), which separates violent and nonviolent offenders for purposes of Oklahoma’s parole procedures.

**Table 2. Achievement earned credits**

<b>Achievement</b>	<b>Credits awarded</b>
Bachelor's degree	200
Associate's degree	100
High School Diploma or High School Equivalency Diploma	90
Certification of Completion of Vocational Training	80
Successful completion of Alcohol/Chemical Abuse Treatment Program of not less than four months continuous participation	70
Successful completion of other Educational Accomplishments or other programs not specified	10-30

Source: Okla. Stat. tit. 57, § 138(H).

Prisoners may also earn up to 100 credits for “meritorious acts in the public interest of enhancing public safety and life”—probably a rare occurrence.<sup>40</sup>

*a. Effects of earned credits on parole-release eligibility*

Earned credits have no effect on prisoners' dates of first parole-release eligibility.

*b. Effects of earned credits on the judicial maximum term*

Earned credits are subtracted from prisoners' judicial maximum sentences to produce earlier dates of mandatory release.<sup>41</sup> In this project, we refer to this as a “movable mandatory release date” or “movable MRD.”<sup>42</sup> For most prisoners, there is no statutory ceiling on the potential deductions from their maximum terms through accrued earned time.

For the groups of offenders subject to extended minimum terms of 85 percent of their judicial maximum sentences, the total effect of earned credits or other credits cannot exceed a 15-

<sup>40</sup> Okla. Stat. Ann. tit. 57, § 138.1.

<sup>41</sup> Okla. Stat. Ann. tit. 57, § 138. Released prisoners are subject to parole supervision for the remainder of their judicial maximum terms.

<sup>42</sup> See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Ch.7 (extended discussion of movable MRDs across U.S. jurisdictions).

percent reduction in their judicial maximum sentences.<sup>43</sup> For drug offenders subject to extended minimum terms of 50 percent of their judicial maximum sentences, the total effect of earned credits or other credits cannot exceed a 50-percent reduction in their judicial maximum sentences.<sup>44</sup>

### *1.7. Loss of earned credits*

If a prisoner is subject to misconduct, nonperformance, or disciplinary action, they may lose earned credits according to policies and procedures established by the department of corrections.<sup>45</sup> Prisoners may also lose credits as a sanction for frivolous or malicious lawsuits.<sup>46</sup> Credits earned for “meritorious acts” are not subject to forfeiture.<sup>47</sup> Lost credits may be restored to prisoners in the discretion of prison officials.

## *II. Life Sentences in Oklahoma*

### *2.1. Life without parole*

Prisoners serving sentences of life without parole are not eligible for discretionary parole release.<sup>48</sup> In FY 2015, prisoners serving LWOP sentences made up 3 percent of Oklahoma’s prison population.<sup>49</sup> No more-recently reported statistics are publicly available.

### *2.2. Life sentences with possibility of parole and sentences longer than 45 years*

For life sentences with the possibility of parole and for any sentence longer than 45 years, the date of eligibility for discretionary parole release is calculated as though the sentence were for a term of 45 years. Thus, a person sentenced to life with the possibility of parole generally

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<sup>43</sup> Okla. Stat. Ann. tit. 21, § 13.1 (“Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.”).

<sup>44</sup> Okla. Stat. tit. 63, § 2-415(D) (“Persons convicted of trafficking shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of sentence to less than fifty percent (50%) of the sentence imposed”).

<sup>45</sup> Okla. Stat. Ann. tit. 57, § 138.

<sup>46</sup> Okla. Stat. Ann. Tit. 57, § 566.

<sup>47</sup> Okla. Stat. Ann. tit. 57, § 138.1 (“The Department of Corrections shall not have the authority to revoke such credit awarded to an inmate.”).

<sup>48</sup> Okla. Stat. tit. 57, § 332.7(C)(2).

<sup>49</sup> See Oklahoma Department of Corrections, *Agency-Wide FY2015 Annual Report*, at <http://doc.ok.gov/2015-annual-report#incarceratedinmates>. This is the most recent annual report available. Although the report provided no exact numbers of prisoners serving LWOP sentences, the 3 percent statistic translates into roughly 866 prisoners out of the total prison population of 28,871 at midyear 2015.

becomes eligible for parole release after serving 85 percent of a 45-year term, or 38 years and three months. The maximum sentence for such a prisoner remains life imprisonment, however, and is unaffected by the 45-year rule for release eligibility.<sup>50</sup>

### 2.3. Juvenile life sentences

Oklahoma is not among the states that have banned all sentences of life without parole for juvenile offenders.<sup>51</sup> The U.S. Supreme Court has allowed such sentences to be imposed in homicide cases provided the sentencing court has considered mitigating circumstances appropriate to the defendant's age.<sup>52</sup> The Oklahoma Court of Criminal Appeals has held that such a procedure must be followed by sentencing courts or sentencing juries in juvenile LWOP cases.<sup>53</sup>

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<sup>50</sup> See *Runnels v. State*, 426 P.3d 614 (Okla. Crim. App. 2018); *Gobert v. Newton-Embry*, 19-6159, 2020 WL 3982558, at \*2 (10th Cir. July 15, 2020) (quoting *Runnels*). The *Runnels* court, 436 P.3d at 621, directed trial courts to make use of the following jury instruction:

A person convicted of [Specify Crime] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.

If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for parole after thirty eight (38) years and three (3) months. However, if a person is not granted parole, he or she will be imprisoned for the remainder of his or her natural life while serving a sentence of life imprisonment.

<sup>51</sup> Twenty-three states and the District of Columbia have abolished such sentences. Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project, 2020).

<sup>52</sup> See *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, “[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”). See also *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required “a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.”); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of “permanent incorrigibility” before sentencing a juvenile offender to life without parole so long as court has considered the defendant's youth before imposing the LWOP sentence).

<sup>53</sup> See *Luna v. State*, 387 P.3d 956 (Okla. Ct. Crim. App. 2016) (overturning sentence of life without parole imposed on defendant who was 16 at the time of his crime because sentencing jury had not adequately considered mitigating circumstances associated with defendant's youth); *White v. State*, 499 P.3d 762, 769 (Okla. Ct. Crim. App. 2021) (holding that the state no longer has the burden to prove a juvenile defendant is irreparably corrupt and permanently incorrigible beyond a reasonable doubt in order to sentence a juvenile to JLWOP).

### *III. Infrequently Used Forms of Release Discretion in Oklahoma*

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

At the department of corrections’ request, the parole board may consider a prisoner for medical parole. Prisoners serving life sentences are ineligible. Eligible prisoners are those who are dying, near death, medically frail or medically vulnerable, or whose medical condition has rendered them no longer an unreasonable threat to public safety. Eligible prisoners shall be placed on the first available parole review docket for compassionate parole consideration.<sup>54</sup>

Senate Bill 320, signed by the governor in April 2021 and effective November 1, 2021, reformed the medical parole process in Oklahoma. Prisoners no longer need to be near death or dying to become eligible; SB 320 created new categories of eligibility in “medically frail” and “medically vulnerable.” “Medically frail” means an individual with a medical condition which precludes the individual from performing two or more activities of daily living on their own. “Medically vulnerable” means an individual with one or more medical conditions which makes the individual more likely to contract an illness or disease while incarcerated that could lead to death or cause an individual to become medically frail.<sup>55</sup>

Oklahoma also has a provision for geriatric parole release. The parole board has authority to release prisoners convicted of nonviolent crimes who are age 60 or older after they have served the shorter of: ten years or one-third of their judicial maximum terms. To release, the board must be satisfied the prisoner “[p]oses minimal public safety risks.” Prisoners convicted of violent crimes and registrable sex offenses are not eligible.<sup>56</sup>

#### *3.2. Executive clemency*

Provided there has been a favorable recommendation by the parole board, the governor has the power to grant commutations, pardons, and paroles for all offenses, except in cases involving conviction for impeachment. Oklahoma is one of the few states that interpose the parole board as gatekeeper of the executive clemency power.<sup>57</sup> The governor has limited independent authority to grant “reprieves or leaves of absences” in the absence of a recommendation from the parole board.<sup>58</sup>

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<sup>54</sup> Okla. Stat. Ann. tit. 57, § 332.18

<sup>55</sup> S.B. 320, 58th Leg., 1st Reg. Sess. (Okla. 2021).

<sup>56</sup> Okla. Stat. tit. 57, § 332.21.

<sup>57</sup> We’re keeping track of states that do so.

<sup>58</sup> Okla. Const. art. VI, § 10 (“The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the Pardon and Parole Board, commutations, pardons and paroles for all offenses, except cases of impeachment ... The Governor shall have power to grant after conviction, reprieves or leaves of absence not to exceed sixty (60) days, without the action of the Pardon and Parole Board.”).

In early 2019, the Oklahoma legislature created an expedited commutation process for prisoners serving time for simple drug possession and low-level property crimes. These crime classes had been downgraded by voter initiative in 2016 from felonies to misdemeanors, but the initiative did not extend to prior cases.<sup>59</sup> In November 2019, on the day that the new commutation law became effective, the parole board sent 527 commutation recommendations to the governor,<sup>60</sup> 462 of whom were released the following week. The media called this the “largest mass release in US history.”<sup>61</sup> The parole board sent an additional 147 recommended commutations for drug offenders to the governor in February 2020.<sup>62</sup>

The new commutation law will run its course once all affected prisoners have passed through the system, so its elevation of release numbers will not be a permanent feature of Oklahoma prison policy.<sup>63</sup>

### 3.3. Emergency release for prison overcrowding

“[W]henver the population of the prison system exceeds ninety-five percent (95%) of the capacity as certified by the State Board of Corrections, the Pardon and Parole Board may, at its discretion, recommend to the Governor for parole any person who is incarcerated for a nonviolent offense not involving injury to a person and who is within six (6) months of his or her statutory parole eligibility date.”<sup>64</sup>

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<sup>59</sup> Stephen R. Galoob, Colleen McCarty, and Ryan Gentzler, *Oklahoma’s State Question 780: Criminal Justice Reform and Resistance*, 31 Fed. Sent’g Rep. 182 (2019) (“State Question 780 made possession of any controlled dangerous substance ... a misdemeanor and eliminated all sentencing enhancements based on prior drug possession offenses or location. [It] also raised the threshold for felony property crimes from \$500 to \$1000.”) (footnotes omitted). The ballot initiative was not retroactive, so prior felony convictions remained fixed at the felony level. Damion Shade, *HB 1269 makes 780 retroactive but leaves issues unresolved*, Oklahoma Policy Institute, May 19, 2019 (reporting that new commutation process will affect almost 1,000 prisoners with drug possession convictions); Darla Slipke, *Governor signs legislation to make State Question 780 retroactive*, The Oklahoman, May 28, 2018 (eligible prisoners will be placed on an “accelerated, single-stage commutation docket”).

<sup>60</sup> Staff Reports, *Oklahoma Pardon and Parole Board recommends largest single-day commutation in U.S. history*, Skiatook Journal, November 1, 2019 (also reporting that, “Had these inmates served their full uncommuted sentence, it could have cost the State of Oklahoma approximately \$11.9M for continued incarceration.”).

<sup>61</sup> Joshua Bote, *Hundreds of Oklahoma inmates to be freed, the largest mass release in US history*, USA Today, November 4, 2019; Quinton Chandler, *Oklahoma Prisons Releasing Hundreds Of Non-Violent Offenders* National Public Radio, November 4, 2019.

<sup>62</sup> Darla Slipke, *Governor signs commutations for 147 more drug offenders eligible under HB 1269*, The Oklahoman, February 8, 2020.

<sup>63</sup> There may be continued savings in prison spaces because of lowered admissions for former felonies that were downgraded to misdemeanors, but there is evidence that some Oklahoma prosecutors have adapted to the new grading scheme by use of alternative felony charges. In the year following passage of the ballot measure, prison admissions actually increased by 10 percent, see Stephen R. Galoob, Colleen McCarty, and Ryan Gentzler, *Oklahoma’s State Question 780: Criminal Justice Reform and Resistance*, 31 Fed. Sent’g Rep. 182, 183 (2019).

<sup>64</sup> Okla. Stat. tit. 57, § 332.7(H).

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

### 4.1. The two major general-rules groups

Virtually all Oklahoma prisoners become eligible for discretionary parole release at some point during their prison terms.<sup>65</sup> The great majority become eligible at the 25-percent mark of their judicial maximum sentences.

Figure 3 illustrates the general rules of the Oklahoma prison-release system for both nonviolent and violent offenders. The formula for first parole-release eligibility, which is fixed at 25 percent of the judicial maximum sentence for all offenders whose crimes were committed on or after November 1, 2018. (The prior law placed parole-release eligibility at the 33-percent mark.) Figure 3 takes no account of the possibility that the prisoner might receive earned credits.

Oklahoma Figure 3. Prison-Release Timeline for Prisoners with General-Rules Sentences and No Earned Credits

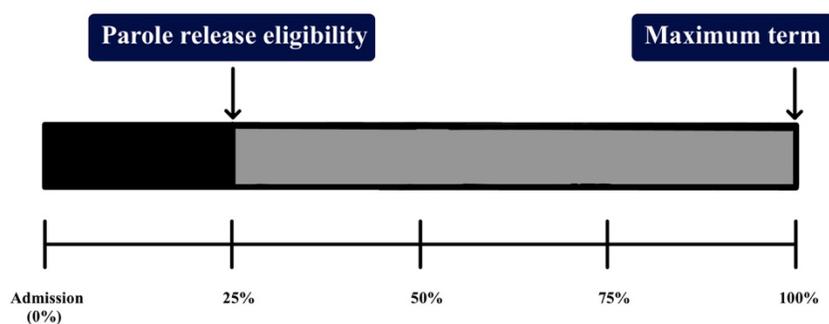
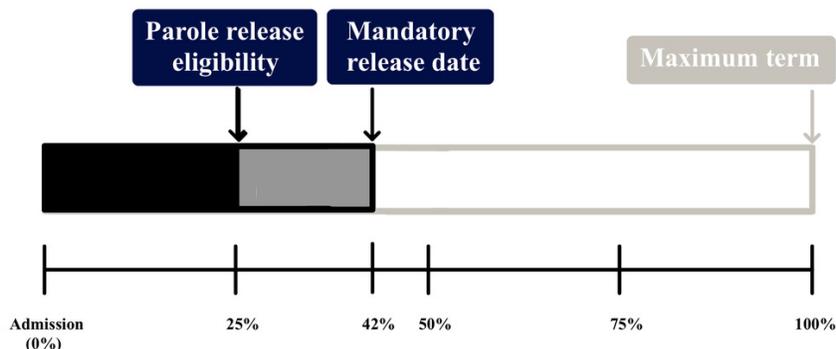


Figure 4 adds in the effects of earned credits, using as an illustration the credits available to a “Level 3” prisoner convicted of a nonviolent offense, which accrue at a rate of 45 days per

<sup>65</sup> Oklahoma Justice Reform Task Force, *Final Report* (Feb.2017), at 9 (“Almost all inmates in Oklahoma are eligible to be released on parole once they have served 33 percent of their sentence, with a small number of drug crimes eligible at 50 percent, and very serious crimes eligible at 85 percent.”). (“[V]ery few people are released on parole in Oklahoma. In FY2015, only six percent of offenders released from prison were released onto parole, a decline from 12 percent in FY2011. This is a very low parole rate given the high level of eligibility in the population.”) In 2018, parole eligibility for nonviolent offenders was moved back from 33 to 25 percent if their judicial maximum terms (see section 1.1).

month. The credits are applied against the judicial maximum term to generate an earlier mandatory release date (MRD). In this project, we call such a mechanism a “movable MRD.”<sup>66</sup>

**Oklahoma Figure 4. Prison-Release Timeline for Prisoners  
Convicted of Nonviolent Crimes with Earned Credits of  
45 Days Per Month\***



\* Note: Earned credits accrue at a rate of 22 days per month for the first three months before going up to 45 days per month. The calculation of time served to mandatory release in the figure is based on a five-year sentence. The longer the judicial maximum sentence, the closer the mandatory release date will get to 40 percent.

In Oklahoma, both higher and lower earning rates than shown above are possible, depending on how a prisoner is classified by the department of corrections. The highest earning rate is given to “Level 4” prisoners. Figure 4 might be seen as portraying a prisoner convicted of a nonviolent crime who has maintained a good record through their stay. In theory, even greater reductions are possible for super-achieving prisoners.

To reach the earning rate of 45 days per month, prisoners must first spend three months at the lower earning rate of 22 days (see section 1.7, table 1). In the case of a five-year sentence, as shown in Figure 4, the prisoner would become eligible for discretionary parole release after serving 15 months, and would reach a date of mandatory release after serving 25 months.<sup>67</sup>

In this scenario, the “determinate” portion of the five-year judicial sentence is 15 months, followed by 45 months of indeterminacy. Of the 45 months in the indeterminate segment,

<sup>66</sup> See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Ch.7 (extended discussion of movable MRDs across U.S. jurisdictions).

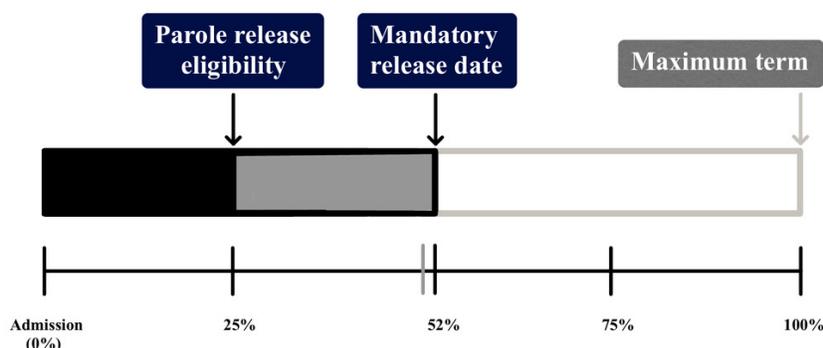
<sup>67</sup> Because of the step-up of the earning rate from 22 to 45 days per month after three months, the exact percentage of time a prisoner must serve to reach a mandatory release date will vary with the length of the judicial maximum term. As the judicial maximum becomes longer and longer, the mandatory-release milestone will move closer and closer to the 40-percent mark. For a sentence as short as one year, the prisoner’s mandatory release date would not occur until the halfway point of the judicial maximum term.

Figure 4 shows time served during the first 10 months under the full control of the parole board. The board has both release and release-denial discretion over these 10 months. Potential time served for the remaining 35 months has been resolved in Figure 4 by the department of corrections through the award of earned credits.<sup>68</sup> That is, the department of corrections has exercised release authority at the 25-month mark (if the parole board has not allowed an earlier release) and has acted to remove the parole board’s release-denial discretion beyond that point.

In percentage terms, the original judicial sentence was 25 percent determinate and 75 percent indeterminate. This yields a population-multiplier capacity of 4:1.

Figure 5 amends Figure 4 to reflect the somewhat lower accrual rate of earned credits for prisoners convicted of violent crimes (see section 1.7).

**Oklahoma Figure 5. Prison-Release Timeline for Prisoners  
Convicted of Violent Offenses with Earned Credits of  
33 Days Per Month\***



\* Note: Earned credits accrue at a rate of 22 days per month for the first three months before going up to 33 days per month. The calculation of time served to mandatory release in the figure is based on a five-year sentence. The longer the judicial maximum sentence, the closer the mandatory release date will get to 48 percent

For prisoners convicted of violent offenses who are classified at “Level 3,” the earning rate is 33 days of credits per month (as opposed to the 45 days available to Level 3 prisoners convicted of nonviolent offenses). We posit identical offenders in Figures 4 and 5 except for the nature of their convictions. The calculations in Figure 5 are also based on a judicial maximum term of five years.<sup>69</sup> Parole eligibility occurs at the 25 percent mark—the same percentage as in Figure

<sup>68</sup> At the higher earning rate of 60 credits per month, a prisoner’s mandatory release date would approach the one-third mark of the judicial maximum sentence, further “tightening” the period over which the parole board has uncontested time-served discretion.

<sup>69</sup> The exact position of the mandatory release date depends on the actual length of the judicial maximum sentence, because the first three months carry a slower credit-earning rate than the remainder of the prisoner’s

4, but the violent offender's mandatory release date comes after 31 months—six months later than for the nonviolent counterpart.

#### *4.2. Allocation of releasing authority*

In both Figures 4 and 5 we see a department of corrections with definitive control over a greater percentage of potential time served than the parole board. On the face of things, the credit-award process is a more muscular component of Oklahoma's back-end decisionmaking framework than the parole-release process.

This impression is intensified when we consider the mechanics of Oklahoma's administrative parole system for nonviolent offenders—as well as the forbidding process for the parole release of violent offenders (which requires favorable decisions by both the parole board and governor).

Under the administrative parole scheme, the department of corrections is gatekeeper via its power to declare prisoners compliant or noncompliant with required conditions. (Victims are also gatekeepers, since their objections also make prisoners ineligible.) For prisoners who get past the gatekeepers, the parole board is the final decisionmaker. The board's power to deny release is encumbered, however, by the intent of the administrative parole system to make many release decisions *pro forma*.<sup>70</sup> If the system works according to plan, the gatekeeping decisions of prison officials are more consequential than the parole board's comparatively pre-programmed actions.

In sum, for prisoners convicted of nonviolent crimes, corrections officials are powerful players at the point of first release eligibility *and* through their authority to foreshorten prisoners' dates of mandatory release. For instance, prisoners who are denied early parole release may not care very much if they are high credit earners. Being in the good graces of prison officials is the surest ticket to the earliest possible release.

The picture is different for prisoners convicted of violent crimes but, again, the department of corrections emerges as the most important time-served authority at the back end of Oklahoma's prison-sentencing system. For this set of prisoners, parole release is rarely granted—so rarely, in fact, that parole release can be considered a marginal component of the system. For violent offenders, no discretionary parole release is possible unless approved by

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stay. If we assume a 20-year judicial maximum sentence under Figure 5's operative assumptions, the prisoner's mandatory release date would come at the 49-percent mark of the maximum sentence.

<sup>70</sup> The projected fiscal impact of the administrative parole legislation was “to save around 3,750 beds.... Not including the capital savings, this would save around \$16.7 million per year once fully implemented.” Oklahoma House of Representatives, Bill Summary: 1st Session of the 56th Legislature, HB 2286 (2017), at [http://webserver1.lsb.state.ok.us/cf\\_pdf/2017-18%20SUPPORT%20DOCUMENTS/impact%20statements/fiscal/senate/HB2286%20CS%20BILLSUM.PDF#page=2](http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20SUPPORT%20DOCUMENTS/impact%20statements/fiscal/senate/HB2286%20CS%20BILLSUM.PDF#page=2).

the governor. The parole board has no release authority in its own right, and can only choose which prisoners to recommend to the governor for favorable decision.<sup>71</sup> The recent practice of Oklahoma governors has been to approve parole release of violent offenders in very few cases, with release rates in the single digits. This mostly eliminates the mechanism of parole release for violent criminals, most of whom will remain confined until their mandatory release dates.

From the point of view of prisoners convicted of violent crimes, therefore, the most meaningful chance of release before expiration of their maximum terms is to accumulate earned credits. As illustrated in Figure 5, these credits can greatly shorten a prisoner's stay. For most purposes, the judge's sentence and the predictable use of release-denial power by the governor will ensure that violent criminals serve somewhere around 50 percent of their judicial maximum terms (with a considerable plus-minus factor due to the dizzying range of possible earned credits). Beyond the roughly-50-percent mark, prison officials control every day of actual time served by violent offenders in individual cases.

This analysis requires a modification of the PMP estimate presented earlier. Although in theory there is a PMP of 4:1 for violent and nonviolent offenders alike, the practical constraints of Oklahoma's system for violent offenders suggests that the realistic PMP for that group is closer to 2:1.

#### *4.3. Pockets of high determinacy*

There is a meaningful share of the violent-offender population in Oklahoma's prisons who have extended minimum terms of 85 percent of their judicial maximum sentences, or who have no release eligibility at all. Figures 6 and 7 examine the prison-release timeline for the 85-percent group.

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<sup>71</sup> We have seen in a number of reports that any decision requiring the concurrence of two different agencies or decision makers is less likely to happen than a decision that can be made by a single entity. This effect is especially strong if one or both of the double decision makers is a tough sell. We have called this a "checks-and-balances phenomenon." That may be a term that is too positive in its connotations. Whether one favors the checks in place depends on the status quo that the checks are protecting. In Oklahoma, for violent prisoners, the checks are arrayed to make release more unlikely.

**Oklahoma Figure 6. Prison-Release Timeline for Prisoners Convicted of Serious Violent Offenses with No Earned Credits**

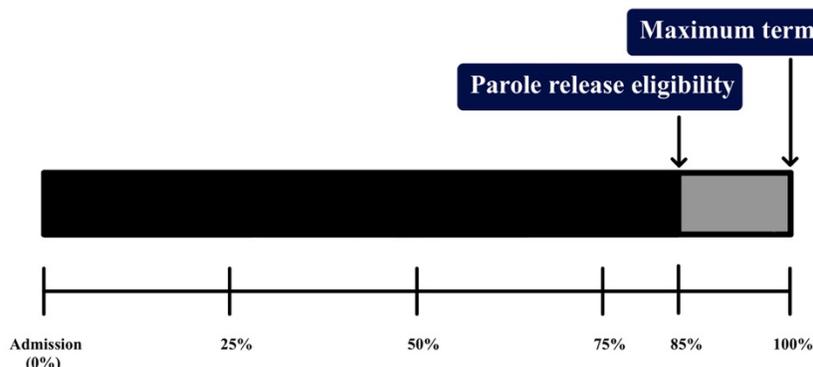
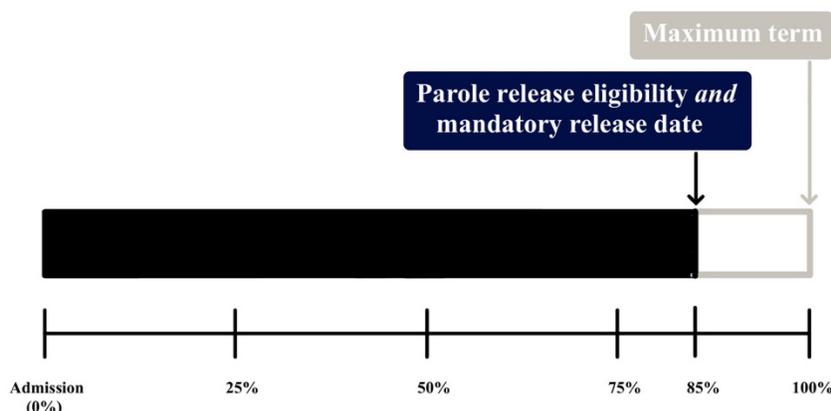


Figure 6 illustrates sentences that are 85 percent determinate and 15 percent indeterminate. This is a sharp contrast with the 25:75 ratio that is present across the bulk of the system—or even the roughly 50:50 ratio that operates for prisoners convicted of violent offenses who fall outside the 85-percent group. The 15-percent segment of indeterminacy allows for release by discretionary decision of the parole board or through earned-credit awards administered by prison officials. As shown in Figure 7, earned credits do not have to amass to a large total number in order to completely extinguish the parole board’s release and release-denial discretion. As we have seen for general-rules cases, the 85-percent group of prisoners would be wise to focus their attention on the accumulation of earned credits. This is their most reliable route to release at earliest eligibility.

**Oklahoma Figure 7. Prison-Release Timeline for Prisoners Convicted of Serious Violent Offenses with Full Earned Credits**



The population-multiplier capacity for the 85-percent group is 1.17:1. For the three percent of violent prisoners serving LWOP sentences, the PMP is 1:1 (that is, back-end officials have no power to influence the size of the LWOP population in any direction).

#### 4.4. Overall assessment

Overall, Oklahoma’s prison-sentencing system operates with a *high degree of indeterminacy* under the classification system developed for this project. Most judicial sentences are 25 percent determinate and 75 percent indeterminate. Within the indeterminate segment of such sentences, the department of corrections is an especially powerful player. Through credit earnings at different levels administered by the DOC, high-achieving prisoners are eligible to win substantial reductions from their judicial maximum terms, which produce “movable mandatory release dates” (or “movable MRDs”) as credits accumulate. We estimate that high-achieving prisoners convicted of nonviolent crimes in Oklahoma could realistically earn 58-percent reductions from their maximum terms. Prisoners with average or below average performance records would earn less.

Oklahoma’s parole board holds unusually limited powers with respect to sentences for statutorily-defined violent offenses, even though release eligibility technically occurs at the 25-percent mark of most sentences. For violent offenders in Oklahoma, release requires both a recommendation from the parole board and an affirmative decision to release by the governor. Such twin favorable decisions have historically been a rare occurrence. In the three most recent fiscal years of data (2016 thru 2018), parole-release rates for violent offenders were extremely low, in the single digits.<sup>72</sup> If we conceive of indeterminacy as an expression of the unpredictability of time-to-be-served under judicial sentences, then the parole-release function for violent offenders in Oklahoma creates little such uncertainty. The actual practice within the parole-release system is close to a *longest-time-served* scenario. Another way of putting this is that parole-release decisionmakers are using almost all of their *release-denial* discretion and almost none of their *release* discretion.<sup>73</sup>

Because of the low prospects of discretionary parole release for Oklahoma prisoners convicted of violent crimes, movable MRDs become an especially consequential release mechanism. We estimate that high-achieving prisoners convicted of violent crimes could realistically earn 48-percent reductions from their maximum terms. Prisoners with average or below average performance records would earn less. For all Oklahoma prisoners convicted of violent offenses, the degree of indeterminacy that matters is the part under the control of prison officials through the granting, withholding, removal, and restoration of earned credits.

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<sup>72</sup> See Oklahoma Pardon and Parole Board, *Voting for Fiscal Year 2018 – Annual Report*, at 1 table 1 (reporting release rate of 6.3 percent for violent offenders); Oklahoma Pardon and Parole Board, *Voting for Fiscal Year 2017*, at 1 table 1 (release rate of 2.5 percent for violent offenders); Oklahoma Pardon and Parole Board, *Voting Statistics: Fiscal Year 2016*, at 1 table 1 (release rate of 1.9 percent for violent offenders).

<sup>73</sup> The existence of indeterminacy on paper is not completely meaningless, however. So long as there is room in the law to do so, responsible decision makers could in theory change their practices at any point to begin exercising their previously-unused release discretion. One theme of the DOI project is that current practices do not necessarily define a prison-sentencing system’s potential to swing in a new direction. They do so only if we have reason to believe in their long-term stability, not just in the past, but reaching into the future.

Some prisoners convicted of especially serious violent offenses (as enumerated in statute) serve sentences with parole eligibility delayed until the 85-percent mark of their judicial maximum sentences. Credit earnings cannot reduce such minimum terms. Under this project's classification scheme, these sentences are *extremely low in indeterminacy* (or *extremely high in determinacy*). In our judgment, this sentence class is probably not sizable enough to alter our overall system classification of high indeterminacy.

In 2018, Oklahoma introduced a streamlined “administrative parole release” or “APR” process for most prisoners convicted of nonviolent crimes. Prisoners who successfully navigate the APR process are released at first eligibility without an individualized hearing before the parole board. It is too early to assess the long-term impact of this law.