



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

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

***STATE REPORT: COLORADO***

**Kevin R. Reitz, Melanie Griffith, and Edward E. Rhine**

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# Prison-Release Discretion and Prison Population Size

## State Report: Colorado

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### 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.

## *Executive Summary*<sup>1</sup>

Overall, we rank the Colorado prison-sentencing system as one of *high indeterminacy* on the scale developed for this project (see pp. v-vi). 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. For most prisoners, the accrual of earned time credits can shorten the amount of time they must serve to their mandatory release dates. The general rules of prison release give more time-served discretion to back-end authorities than to the front-end actors who shape judicial prison sentences.

Back-end power over sentence length is distributed in nearly equal shares between the parole board and department of corrections.

Colorado has a uniquely indeterminate approach to prison sentences for many sex offenders. In some cases, sentences for this group of prisoners reach levels of *extremely high indeterminacy* (such as sentences of two or four years to life).

### *Terminology note*

This report will refer to the Colorado State Parole Board as the “parole board.” The Colorado Department of Corrections will be referred to as the “department of corrections.”

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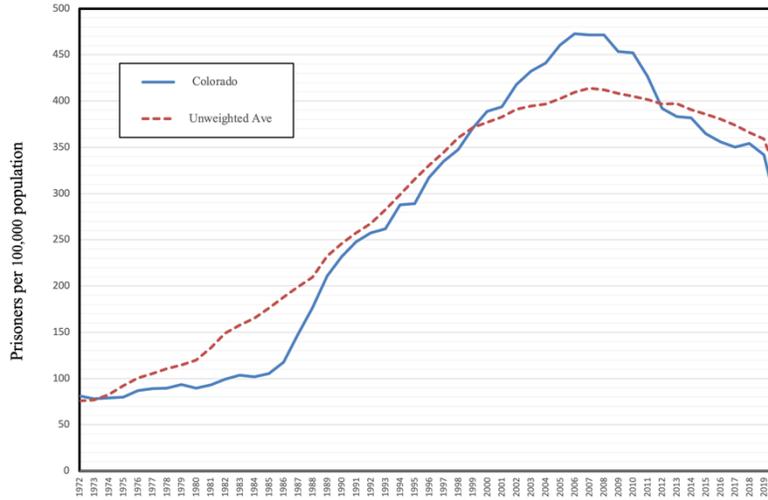
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Colorado, see Kevin R. Reitz, Edward E. Rhine, Alexis Lee Watts, Mariel E. Alper, & Cecelia Klingele, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Colorado* (Robina Institute of Criminal Law and Criminal Justice, 2016) (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). In connection with this project, the Robina Institute has also released a study on parole release data and practices in Colorado. See Gerald G. Gaes & Julia Laskorunsky, *Factors Affecting Colorado Parole Release Decisions: Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022).

**Introduction**

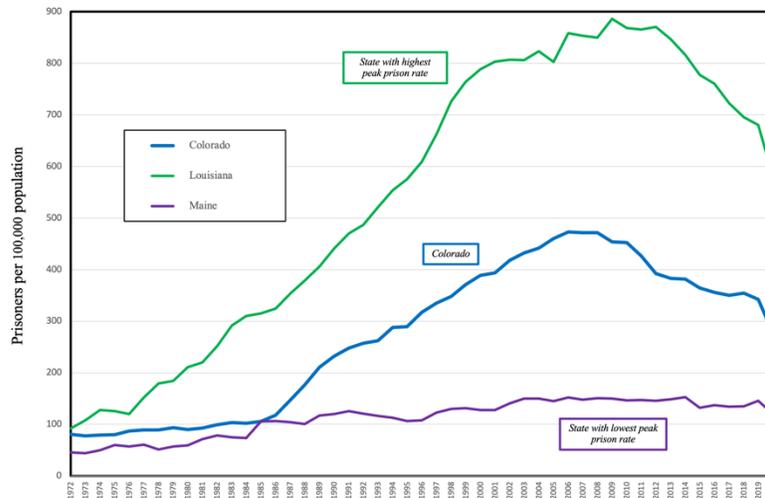
*Colorado’s prison-rate history, 1972 to 2020*

At yearend 2020, Colorado’s prison rate was 277 per 100,000 general population, with a prison population of 16,168.<sup>2</sup> Colorado’s prison rate was 29<sup>th</sup> highest among all states.

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



**Figure 2. Prison Rate Change in Colorado, 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

<sup>2</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7. Preliminary information about changes in Colorado’s imprisonment rates after 2020 is presented below in the section on “The COVID period in Colorado.”

December 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>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

From its peak position in 2006 through yearend 2020, Colorado’s prison rate fell from 473 per 100,000 to 277, for a net change of -196 per 100,000. This is the 10<sup>th</sup> largest prison-rate drop among all states from their peak rates (in various years) through 2020.

During most of the years shown in Figures 1 and 2, Colorado had an “indeterminate” sentencing system with parole-release discretion for most prisoners. From 1979 to 1985, the state switched briefly to a system with no parole release discretion for most sentences—afterward switching back to a paroling system.<sup>3</sup>

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.

### *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 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>4</sup>

<sup>3</sup> See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (Oxford University Press, 2003), at 65 table 3.1; Marianne Wesson, *Sentencing Reform in Colorado—Many Changes, Little Progress*, in Michael Tonry & Kathleen Hatlestad eds., *SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* (Oxford University Press, 1997). (Kevin- I have not noticed small and large caps used for other book publications in this project – just wanted to double check to see if you want them used, I may be misremembering)

<sup>4</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).

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>5</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>6</sup>

In calendar year 2021, U.S. prison rates did not continue downward 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, with considerable variation across the states. Prison populations actually rose in 19 states.<sup>7</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 early 2020 through the end of 2021. 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 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>8</sup>

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<sup>5</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, where the rate increased by 1.2 percent.

<sup>6</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>7</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.

<sup>8</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:*

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>9</sup>

### *The COVID period in Colorado*

Colorado increased the availability of earned time credits and eased criteria for parole release for some prisoners in the early months of the pandemic, but with limited effects on the state's prison population size.

In calendar year 2020, Colorado's prison rate fell from 342 to 277 per 100,000—a one-year decline of -65 per 100,000. This was the 12<sup>th</sup> largest one-year drop reported among all 50 states for that year.<sup>10</sup> Measured in percentage terms, it was a 19-percent reduction in the state's prison rate. The state's total prison population fell by 3,617 people, from 19,785 to 16,168.<sup>11</sup>

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*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>9</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.

<sup>10</sup> The largest single-state 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 16 table 7.

<sup>11</sup> *Id.*, at 11 table 4.

COVID releases made up less than 10 percent of this drop. In a separate study, the Robina Institute found 310 releases in Colorado from March 2020 through December 2021 that were accelerated in response to the pandemic. This number is the equivalent of about two percent of Colorado’s pre-COVID prison population (at yearend 2019). The COVID releases occurred under two executive orders issued by the governor that eased and expanded the availability of earned time credits; and eased some criteria for release to intensive supervision programs and “special needs parole.”<sup>12</sup>

Falling admissions appear to have been the dominant factor in Colorado’s decreasing prison population in 2020. The number of prison admissions in the state dropped by 37.5 percent in 2020 compared with the previous year (from 9,413 to 5,883). Total releases in 2020 did not increase, but declined by 3.3 percent over 2019 (from 9,891 to 9,568).<sup>13</sup>

The velocity of Colorado’s prison-rate drop slowed after calendar year 2020, and may have turned toward population growth in recent months. From yearend 2020 to December 2021, the Vera Institute reported that Colorado saw a decrease in its prison population, from 16,090 to 15,649—or 2.7 percent.<sup>14</sup> As of May 31, 2022, the Colorado Department of Corrections reported a total prison population of 16,271. According to the department, this represented a population increase of 629 prisoners since yearend 2021—or growth of four percent over the first five months of 2022.<sup>15</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

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<sup>12</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, Appendix E.

<sup>13</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17 table 8, 19 table 9.

<sup>14</sup> See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 table 2. As a general matter, Vera’s *People in Prison* reports should not be treated uncritically as “updates” of BJS’s annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau’s July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

<sup>15</sup> Colorado Department of Corrections, *Monthly Population and Capacity Report as of May 31, 2022*, at <https://drive.google.com/file/d/1kIeIzi5lQ5B22oN8j6-PMUDnePmn2njv/view>; Colorado Department of Corrections, *Monthly Population and Capacity Report as of December 31, 2021*, at [https://drive.google.com/file/d/1WA0oo-6gO5Sd\\_8EAgDu793y8WhM1FI9l/view](https://drive.google.com/file/d/1WA0oo-6gO5Sd_8EAgDu793y8WhM1FI9l/view) (reporting a total prison population of 15,642).

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.

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

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

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

As a general rule, Colorado 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>16</sup> The department of corrections has discretion to delay first release eligibility for a prisoner's misconduct, a power that extends to the judicial maximum term.<sup>17</sup>

A prisoner otherwise eligible for parole release loses their eligibility if, within the 12 months preceding their scheduled parole hearing date, they are convicted of a "class 1 code of penal discipline violation" or if they decline to participate in recommended programs.<sup>18</sup>

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

In general, prisoners who have been denied release by the parole board are entitled to reconsideration within one year.<sup>19</sup> For certain classes of prisoners, the period before required reconsideration is longer:

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<sup>16</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 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>17</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>18</sup> Colo. Rev. Stat. § 17-2-201(3.7)(a).

<sup>19</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

Prisoners convicted of a class 3 sexual offense, habitual offenders subject to life imprisonment,<sup>20</sup> and sex offenders subject to an indeterminate commitment are reviewed every three years.<sup>21</sup>

Reconsiderations for those convicted of a class 1 or class 2 felony deemed a crime of violence are only required every five years.<sup>22</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, earned time credits of as much as 12 days per month may be awarded for “consistent progress” in prison living and programming.<sup>23</sup> Juveniles sentenced as adults for a class 1 felony may earn only 10 days per month.<sup>24</sup>

Prisoners working at a disaster site are entitled to additional credits of one day per day worked.<sup>25</sup> “Achievement earned time” may also be awarded for successful completion of

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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>20</sup> See section. 2.2 for the statutory definition of “habitual offender.”

<sup>21</sup> Colo. Rev. Stat. § 17-2-201(4)(a).

<sup>22</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)(I).

<sup>23</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, progress in the correctional education program, and exemplary leadership. *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>24</sup> Colo. Rev. Stat. § 17-22.5-405(1.2).

<sup>25</sup> Colo. Rev. Stat. § 17-22.5-405(3.5).

program milestones or instances of exceptional conduct, up to 60 days per event subject to a total maximum of 120 days.<sup>26</sup>

*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>27</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>28</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>29</sup>

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<sup>26</sup> Colo. Rev. Stat. § 17-22.5-405(9)(a). 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.* § 17-22.5-405(9)(b).

<sup>27</sup> Colo. Rev. Stat. § 17-22.5-403 (defining parole eligibility as serving the statutory percentage of time less earned time).

<sup>28</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>29</sup> Colo. Rev. Stat. § 17-22.5-405(3).

## II. Prisoners Outside the General Rules in Colorado

### 2.1. Life without parole

Life sentences for class 1 felonies carry no eligibility for discretionary parole release.<sup>30</sup>

### 2.2. Life sentences with possibility of parole

Many 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>31</sup> These include designated “habitual offenders.”<sup>32</sup>

### 2.3. Juvenile life sentences

The mandatory penalty for juveniles convicted as adults<sup>33</sup> of class 1 felonies is a life sentence with eligibility for discretionary parole release after 40 years, with reductions for earned time credits.<sup>34</sup> In addition, Colorado has enacted a provision for “specialized program placement” of offenders who were “juveniles or young adults” (under age 21) at the time of their offenses. If admitted to the program by the department of corrections, prisoners with life sentences may

<sup>30</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.”). Colo. Rev. Stat. §§ 18-3-102, 18-3-301, 18-8-206(1)(a), 18-11-101. (Class 1 felonies include first-degree murder, first-degree kidnapping, assault during an escape if the person has been convicted of a class 1 felony, and treason.)

<sup>31</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>32</sup> Colo. Rev. Stat. § 18-1.3-801(1)(c). 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 and some prior escape convictions. *Id.* § 18-1.3-801(2)–(2.5).

<sup>33</sup> Juveniles convicted as adults include any prisoner who was under the age of 21 at the time of the offense. *See* Colo. Rev. Stat. § 17-22.5-403.7(1).

<sup>34</sup> Colo. Rev. Stat. § 18-1.3-401(4)(b)(I). However, some juveniles sentenced under this provision may become eligible for parole prior to their parole eligibility date if the governor determines that “extraordinary mitigating circumstances exist and the inmate’s release from institutional custody is compatible with the safety and welfare of society.” Colo. Rev. Stat. § 17-22.5-403.7(2).

become eligible for parole release after 20, 25, 30, or 35 years, depending on their offenses of conviction.<sup>35</sup>

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

For mandatory minimum sentences required or authorized by statute, parole release eligibility occurs after prisoners have served the statutory or court-imposed minimum term.<sup>36</sup>

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

Prisoners convicted of certain violent offenses<sup>37</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>38</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>39</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>40</sup>

#### *2.6. Sex offenders with indeterminate life sentences*

Most sex offenders who commit crimes graded as Classes 2, 3, and 4 felonies in Colorado receive “indeterminate sentences” that differ in framework from other prison sentences in the state.<sup>41</sup> The indeterminate sentence statute requires a judicially-imposed maximum sentence of life in

<sup>35</sup> See Colo. Rev. Stat. §§ 17-34-101; 17-34-102; 17-22.5-403.7; 18-1.3-404.

<sup>36</sup> Colo. Rev. Stat. § 17-2-204(1).

<sup>37</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, if the offense was committed on or after July 1, 1987. Colo. Rev. Stat. § 17-22.5-303.3(1).

<sup>38</sup> *Id.* A “crime of violence” has been interpreted as a crime in which a deadly weapon was used or possessed and threatened to be used. *Busch v. Gunter*, 870 P.2d 586, 587 (Colo. App. 1993).

<sup>39</sup> Colo. Rev. Stat. § 17-22.5-303.3(2).

<sup>40</sup> Colo. Rev. Stat. § 17-22.5-303.3(3).

<sup>41</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 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) at 4 n.2 (noting the existence of different international usages of the terms “indeterminate” and “determinate” sentences).

prison for sex offenses, regardless of their felony grade.<sup>42</sup> The statute also includes a variety of formulas for the minimum terms to parole eligibility. 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 (MRD) and there is no mechanism for them to earn an MRD during their prison stays.

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>43</sup>

There is no statutory ceiling on minimum terms sentencing judges may select in individual cases so long as they are longer than the minimums required by statute. On paper, judges have substantial control over the degree of indeterminacy in these sentences.

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

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<sup>42</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 also* Table 1.

<sup>43</sup> *See* Colo. Rev. Stat. § 18-1.3-401(1)(a)(V.5)(A) (defining presumptive sentence ranges for felonies committed on or after July 1, 2020, 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(1) 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 four years for class 4 felonies, eight years for class 3 felonies, and sixteen 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 18 years for class 4 felonies, 36 years for class 3 felonies, and 72 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 six years for class 4 felonies, 12 years for class 3 felonies, and 24 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>
<p>§ 18-3-402 (sexual assault)</p> <p>§ 18-3-405 (sexual assault on a child)</p> <p>§ 18-3-405.3 (sexual assault on a child by one in a position of trust);</p> <p>§ 18-3-405.5(1) (aggravated sexual assault on client by psychotherapist)</p>	Class 2–4
§ 18-3-404(2) (felony unlawful sexual contact)	Class 4
§ 18-3-305 (enticement of a child)	Class 3–4
<p>§ 18-6-301 (incest)</p> <p>§ 18-6-302 (aggravated incest)</p>	Class 3–4
§ 18-7-406 (patronizing a prostituted child)	Class 3
§ 18-3-306(3) (class 4 felony internet luring of a child)	Class 4
§ 18-3-405.4 (internet sexual exploitation of a child)	Class 4
§ 18-3-405.7 (class 3 felony unlawful sexual conduct by a peace officer)	Class 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>44</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” that has been diagnosed by a licensed healthcare provider; (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;” (3) is 64 years of age or older and has served at least 20 years of their sentence, except for those convicted of class 1 or class 2 felonies, unlawful sexual behavior, a crime that includes domestic violence, or stalking; or (4) “is incompetent to proceed and does not have a substantial probability of being restored to competency<sup>45</sup> for the completion of any sentence,” including an offender diagnosed with dementia that renders them incompetent.<sup>46</sup>

Prisoners are not eligible for classifications as special needs offenders if they were convicted of (1) a class 1 felony and sentenced to life with the possibility of parole who have served fewer than twenty years, (2) a class 1 felony and sentenced to life without parole, or (3) a class 2 felony “crime of violence” who have served fewer than ten years.<sup>47</sup>

#### ***3.2. Executive clemency***

Colorado’s governor has the authority to commute sentences of prisoners and pardon those convicted of crimes.<sup>48</sup> In 2012, the Executive Clemency Advisory Board was “recreated” by

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<sup>44</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>45</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>46</sup> Colo. Rev. Stat. § 17-1-102(7.5)(a).

<sup>47</sup> Colo. Rev. Stat. § 17-1-102(7.5)(b).

<sup>48</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.”).

executive order to make recommendations on clemency applications to the governor.<sup>49</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 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; (4) the offender must not have serious misconduct issues within the last year; (5) the offender must not be in Restrictive Housing; (6) the offender must not have been convicted of an offense involving assaultive behavior against officers or staff within the department of corrections; (6) the offender must not have unresolved criminal charges potentially affecting their current sentence or resulting in imprisonment; and (7) the offender must not have a judicial appeal or reconsideration of sentence pending.<sup>50</sup>

### 3.3. *Judicial reduction of sentence*

Like most other states, the Rules of Criminal Procedure in Colorado give judges jurisdiction to reconsider sentences for a short period of time after their original sentencing decisions. Colorado has a provision of this kind—Rule 35(b)—that allows defendants to file a motion for reduction of sentence within 126 days (18 weeks) after the sentence is first imposed. Also, a “court may reduce a sentence on its own initiative” whenever a 35(b) motion is permitted.<sup>51</sup>

Colorado’s provision is unusually broad in two notable ways. First, it allows courts to reduce sentences for substantive reasons grounded in the purposes of sentencing and may consider events occurring after the original sentencing. The authority is not confined to correction of mathematical or technical errors, as in some other jurisdictions.<sup>52</sup> Second, the sentence reduction power can come back to life later in the sentence, creating new 126-day timelines during which prisoners can file motions to reduce sentences under “alternative deadlines.” Altogether, there are four different triggering circumstances that initiate 126-day periods for the filing of a Rule 35(b) motion:

The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is imposed, or (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 126 days (18 weeks)

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<sup>49</sup> Colo. Exec. Order No. B 2012-003 (Oct. 19, 2012), <https://drive.google.com/file/d/1rCMoJOwKXMCj-LNmWhxBfv7loXYk43cl/view>.

<sup>50</sup> *Application Eligibility Criteria, Commutation of Sentence*, EXECUTIVE CLEMENCY ADVISORY BOARD, <https://drive.google.com/file/d/1QE0ihtQW5oHMNKAMnfJoMjMVTbbSrt4-/view> (last visited July 13, 2022).

<sup>51</sup> Colo.R. Crim. Pro. 35(b).

<sup>52</sup> See *Hunsaker v. People*, 351 P.3d 388 (Colo. 2015); *Delgado v. People*, 105 P.3d 634 (Colo. 2005); *People v. Bryce*, 474 P.3d 175 (Colo. App. 2020). Compare Fed. R. Crim. Procs. 35(b).

after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence, or (4) at any time pursuant to a limited remand ordered by an appellate court in its discretion during the pendency of a direct appeal.<sup>53</sup>

Some of these triggering circumstances can create new “Rule 35(b) windows” following appellate proceedings that conclude years after the original sentence was imposed. The Colorado courts have not yet ruled on whether decisions in postconviction proceedings act as triggering events under Rule 35(b).

Trial courts act as discretionary gatekeepers and ultimate decision makers under this rule. They may deny Rule 35(b) motions without a hearing.<sup>54</sup> Anecdotally, we have heard reports of Rule 35(b) reductions of sentences granted years after the original sentence by a different judge from the original sentencing judge.

We know of no data on the frequency of Rule 35(b) motions or their rates of success. We suspect that the Colorado defense bar produces a steady supply of motions when the relevant triggering circumstances occur.

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

If Colorado’s prison system capacity exceeds 97 percent for 30 consecutive days, the parole board is to review the files of prisoners who (1) are within 90 days of their mandatory release date, and do not require full board review or victim notification, (2) have satisfied conditions for conditional release, have satisfied conditions for parole, and do not require full board review or victim notification, and (3) are low to medium risk based on the department of public safety’s risk assessment tool and have a favorable parole plan. After conducting a file review, the parole board shall set conditions and a date of release, many within 30 days after the board conducts the review.<sup>55</sup>

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<sup>53</sup> Colo.R. Crim. Pro. 35(b).

<sup>54</sup> *Id.*

<sup>55</sup> Colo. Rev. Stat. § 17-1-119.7(2). Exceptions are for those prisoners who have been convicted of offenses listed in Colo. Rev. Stat. § 24-4.1-302 and “unlawful sexual behavior” as defined in Colo. Rev. Stat. § 16-22-102(9), those with prison disciplinary issues within the last 12 months, have been terminated or declined to participate in programming within the last 12 months, have been regressed from community corrections or revoked from parole within the last 180 days, or have a pending felony charge, detainer, or extraditable warrant. 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 2020, average time served as a percentage of judicial maximum sentences was slightly under 50 percent, a relationship that held true across most felony levels, from felony class 2 (46 percent), felony class 3 (51 percent), felony class 4 (45 percent), felony class 5 (44 percent), and felony class 6 (37 percent).<sup>56</sup>

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, although the figure gives an incomplete account of back-end discretion in the system. For most prisoners, the accrual of good-time credits advances the date of first parole-release eligibility *and* generates a mandatory release date (MRD) that is earlier than the expiration of the judicially-imposed maximum term. In other words, the date of first release eligibility and the MRD are both *movable milestones* within the prison-sentence timeline.<sup>57</sup>

Figure 4 illustrates the effects of earned 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 36-percent mark of the judicial maximum term. For the movable MRD, Colorado limits the total good-time reduction to 25 percent of the judicial maximum sentence.

Colorado Figure 5 refines Figure 4 by adding in 120 days of “achievement earned time,” which is the largest sum available during a single sentence. In order to compute the effect of an additional four months of credits, Figure 5 assumes a five-year judicial maximum term.<sup>58</sup> With this total sentence length, the combination of “earned time” and “achievement earned time”

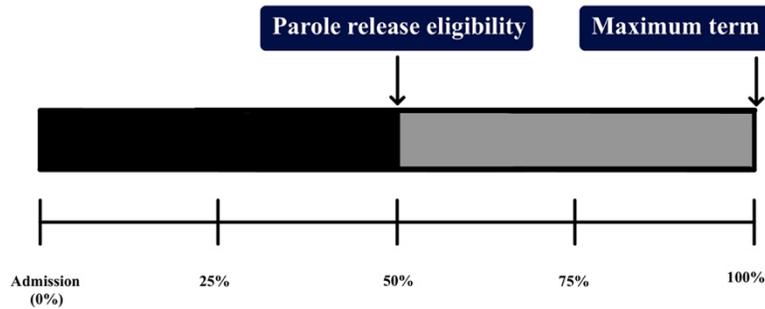
<sup>56</sup> Colorado Department of Corrections, *Statistical Report FY2020* (undated), at 22 figure 27. Other categories not listed above were releasees who had been serving life sentences for class 1 felonies, habitual offenders serving life sentences, lifetime sex offenders, and other habitual offenders. *See also* Gerald G. Gaes & Julia Laskorunsky, *Factors Affecting Colorado Parole Release Decisions: Final Report* (Robina Institute of Criminal Law and Criminal Justice, April 2022) at 17.

<sup>57</sup> For an extended discussion of movable MRDs, *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 (“Highlighted topic: Movable mandatory release dates”).

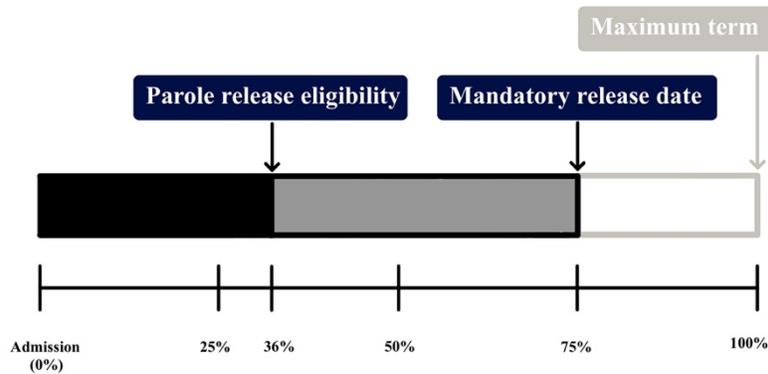
<sup>58</sup> A maximum term must be specified because credits of 120 days are a different percentage of sentences with different maximum terms. Throughout the state reports in this project, we make a practice of using five-year maximum terms when necessary to estimate the effects of block credit awards.

credits can bring the date of parole release eligibility back as far as the 30-percent mark of the maximum term.

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



**Colorado Figure 4. Prison-Release Timeline for Prisoners with General-Rules Sentences and Earned Time Credits of 12 Days/Month**



**Colorado Figure 5. Prison-Release Timeline for Prisoners with General-Rules Sentences of 5 Years and Earned Time Credits of 12 Days/Month and 120 Days of Program Milestone Credits**

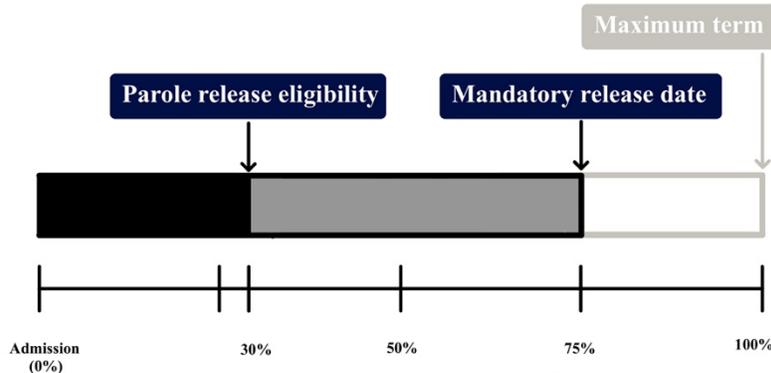
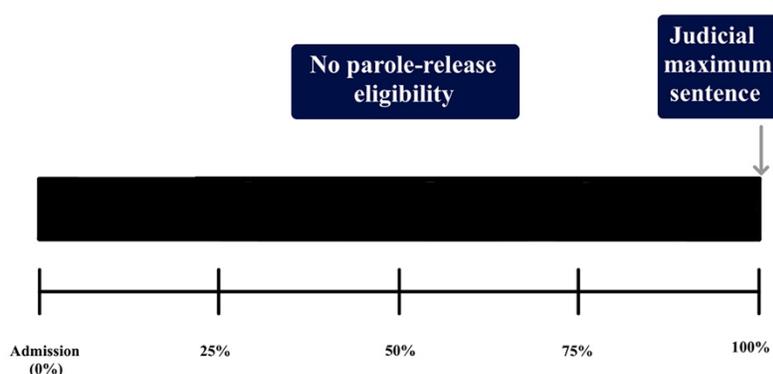


Figure 5 is the timeline for a general-rules prisoner with a very good record while incarcerated, but the figure does assume an unrealistic level of achievement. We are interested in looking at plausible outcomes that are available to substantial percentages of prisoners. As a matter of law, additional credits are potentially available, *e.g.*, for work at a disaster site or instances of “exceptional conduct.” We assume that such credits are rarely bestowed and do not have an important effect on the state’s prison-sentencing system as a whole.<sup>59</sup>

In the terminology of this project, Figures 4 and 5 show that prison officials have authority to increase the *release discretion* of the parole board by giving the board power to release earlier than would otherwise be legally permitted. At the same time, the figures depict the department’s authority to erase some of the parole board’s *release-denial discretion*. If enough credits are awarded, prisoners must be released at the 75-percent mark of their original sentences even in the face of unrelenting denials of discretionary release by the parole board.

Colorado also has a version of “bad-time” penalties for prisoner misconduct that can dramatically alter the baseline rules of prison release shown above in Figure 3. As illustrated in Figure 6, the department of corrections has the power to delay a prisoner’s date of parole release eligibility for reasons of “misconduct while incarcerated.” Figure 6 shows the most extreme exercise of this power, per 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 rare, 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 6, the department has erased the entirety of the board’s release discretion in an individual case.

Colorado Figure 6. Prison-Release Timeline for General-Rules Prisoners With Sufficient Misconduct Per DOC



<sup>59</sup> If earned, these supplemental discounts would move the first date of parole-release eligibility even earlier than the 30-percent mark shown in Figure 5. However, they would have no effect on a prisoner’s MRD once the statutory cut-off of 25 percent from the maximum term has been reached.

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, 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 relatively powerful player in Colorado's framework for prison-release decisions. The department has greater authority to carve away at the parole board's authority than it has authority 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" (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 of prisoners who have received those different classes of sentence.

For general-rules cases in Colorado, there is no single calculation that represents the population-multiplier potential (PMP) 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 full PMP of back-end authorities in general-rules cases, we adopt the estimate shown in Figure 6, which assumes the full "regular" earned time allocation of 12 days of credit per month plus a total award of 120 days for "achievement earned time" credits. In such cases, the court's sentence "determines" that prisoners will serve at least 30

percent of the maximum sentence, while the remaining 70 percent of potential time served falls within the combined discretionary control of the parole board and department of corrections. In the scale developed for this project (see pp. iv-v), we classify such sentences as having a *high degree of indeterminacy*.

For all prisoners who fall within this range of possible time served, the PMP of the two major back-end players is 3.33:1. That is, if they were to use their discretions at every turn to produce the longest possible prison stays for all prisoners (a *longest-time-served scenario*), the total population of the general-rules group would eventually rise to 3.33 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 (a *shortest-time-served scenario*).

#### *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 June 30, 2022, the Colorado Department of Corrections reported that, among all prisoners, 16.7 percent were serving life sentences of one kind or another. This total included 1,644 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 (849) were serving sentences of *life without parole*. An additional 190 were serving life sentences with parole eligibility after 40 years. There were 51 non-sex offenders with life terms carrying minimum sentences of 10 or 20 years.<sup>60</sup>

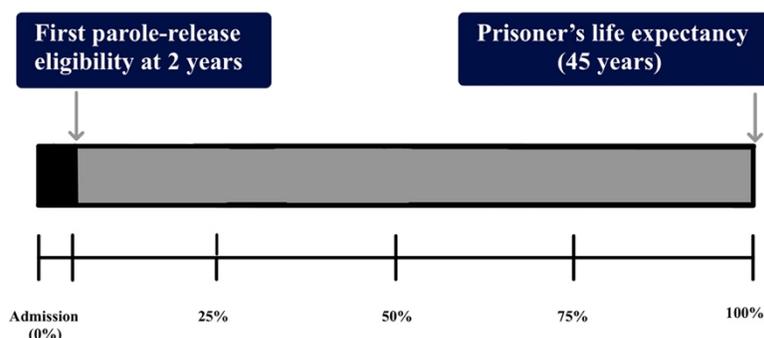
#### *4.3. Sex offenders with indeterminate life sentences*

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 *extremely-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.

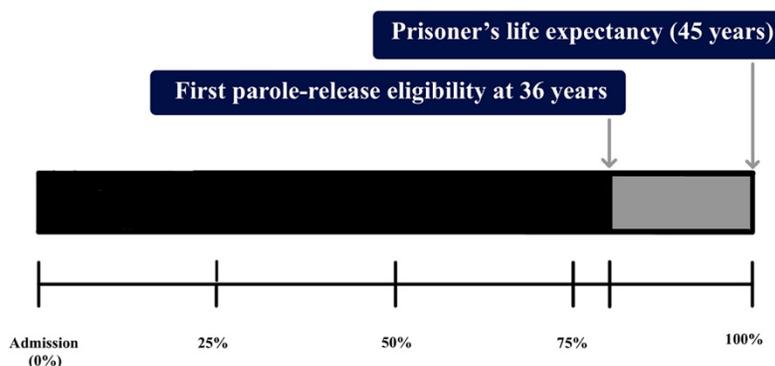
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<sup>60</sup> Colorado Department of Corrections, *Inmates Serving Life Sentences*, at <https://cdoc.colorado.gov/about/data-and-reports/statistics> (statistics posted for June 30, 2022). The lifers with parole eligibility after 10 or 20 years were sentenced under laws effective prior to 1977 and 1985, respectively.

Colorado Figure 7. Prison-Release Timeline for Sex Offenders with Exceptionally-Indeterminate Sentences of 2 Years to Life



Colorado Figure 8. 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>61</sup> The indeterminate portion of the 45-year timeline in Figure 6 spans 43 years. We classify this as sentence with an *extremely high degree of indeterminacy*. Indeed, it has an unusual quotient of indeterminacy on two scores: first, because of the high percentage of the possible 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. Figure 7 shows the prison-release timeline for a Class 3 sex

<sup>61</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.

offender found to be a habitual offender against children, for which the minimum term is 36 years. Using the same life-expectancy assumptions as Figure 6, we 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 falls on the borderline between *low indeterminacy* and *extremely low indeterminacy*.<sup>62</sup>

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 June 30, 2022, the Colorado Department of Corrections reported statistical breakdowns for a total prisoner population of 16,361.<sup>63</sup> Ten percent of the total (1,613) were reported as serving indeterminate life sentences for sex offenses.<sup>64</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>65</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>66</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>62</sup> On our scale, the cut point between low and extremely low indeterminacy is for sentences that are 20-percent indeterminate (see pp. v-vi).

<sup>63</sup> Colorado Department of Corrections, *Monthly Population and Capacity Report*, at <https://cdoc.colorado.gov/about/data-and-reports/statistics> (report posted for June 30, 2022).

<sup>64</sup> Colorado Department of Corrections, *Inmates Serving Life Sentences*, at <https://cdoc.colorado.gov/about/data-and-reports/statistics> (statistics posted for June 30, 2022).

<sup>65</sup> As share of the total prison population, this subgroup grew fairly steadily from 2003 to 2021. See Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2021), 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. However, in FY 2021, the total number of releases ordered by the parole board (128) outpaced new admissions (59). *Id.* at 3, 7. See also Colorado Department of Corrections, *Statistical Report FY 2020* (undated), at 28 figure 35 (figure showing 10-year growth in “lifetime supervision” population).

<sup>66</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].”). See also Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2021), at 3, 15 (reporting that on June 30, 2021 there were 239 lifetime supervision sex offenders participating in treatment while 328 offenders were eligible and waiting for treatment).

releases increased beginning in FY 2012, however, when 88 were released in one year; and there was a high of 173 first releases in FY 2020.<sup>67</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 128 of the 675 lifetime supervision sex offenders who came to hearing in FY 2021, for a release rate of 19 percent.<sup>68</sup> This compares to a release rate for all prisoners of just under 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 2020, the average time served was 125 months (12 years and 5 months).<sup>69</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>70</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. Overall assessment

Overall, we rank the Colorado prison-sentencing system as one of *high indeterminacy*. The vast majority of prisoners are governed by general rules of prison-release discretion that give 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 (PMP) of back-end officials for this group is estimated to be in the ballpark of 3.33:1 (see Figures 4 through 6 and accompanying discussion).<sup>71</sup>

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

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<sup>67</sup> Colorado Department of Corrections, *Lifetime Supervision of Sex Offenders Annual Report* (November 1, 2021), at 5 figure 3.

<sup>68</sup> *Id.*, at 7.

<sup>69</sup> Colorado Department of Corrections, *Statistical Report FY 2020* (undated), at 22 figure 27.

<sup>70</sup> In FY 2020, there were 131 admissions under the Lifetime Supervision Act: 57 were class 4 felonies, 67 were class 3, 6 were class 2, and 1 was class 1. *Id.*, at 16 table 6.

<sup>71</sup> A PMP of 2:1 would indicate perfectly balanced control over prison-sentence length as between front-end and back-end decision makers.

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 shortest-time-served or longest-time-served extremes would require the sustained and coordinated efforts of two independent agencies.

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 ten percent of the total Colorado prison population in 2022. Within that group, some prisoners have sentences with *extremely high indeterminacy*, while others have sentences we would classify at the level of *low or extremely low indeterminacy*.<sup>72</sup>

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<sup>72</sup> For a discussion on actual releases to parole supervision in Colorado, see Gerald G. Gaes & Julia Laskorunsky, *Factors Affecting Colorado Parole Release Decisions: Final Report* (Robina Institute of Criminal Law and Criminal Justice, April 2022) at 5-6.