



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

Risk Averse and Disinclined:

**WHAT COVID PRISON RELEASES DEMONSTRATE
ABOUT THE ABILITY OF THE UNITED STATES TO
REDUCE MASS INCARCERATION**

Julia Laskorunsky

Kelly Lyn Mitchell

Robina Institute of Criminal Law and Criminal Justice

Sandy Felkey Mullins

NYU Marron Institute of Urban Management

April 2023

Acknowledgements

This report was prepared with funding from Arnold Ventures. We are grateful for their financial support and for the work of their Criminal Justice program staff for recognizing the pandemic as an opportunity to further study back-end release discretion and in helping us to conceive of this project.

Thank you to all the people in each of the six states profiled here who agreed to be interviewed for this report. Everyone we talked to was open and candid and offered unique insight from their position. Our understanding of how the pandemic played out across the country is extremely rich because of the time each person took to tell their story.

Thanks also to our law student research assistants, Lucy Chin and Madison Wadsworth, who did the majority of data collection for the survey report that laid the basis for each of these case studies and continued to provide key research support for this report.

Table of Contents

Executive Summary	iii
Introduction	1
Alabama	3
Illinois.....	13
Kansas.....	23
Minnesota.....	32
Pennsylvania	42
Washington.....	52
Case Study Themes.....	63
What COVID Prison Releases Demonstrate about the Ability of the U.S. to Reduce Mass Incarceration.....	65
Conclusion	69

Executive Summary

This report examines the challenges and opportunities that states faced in deciding whether to release people from prison during the COVID-19 pandemic. It focuses on the legal mechanisms available to jurisdictions and the factors that influenced whether they were willing or able to use those mechanisms to release people from prison.

Our goal is to illuminate whether back-end release mechanisms can be used to reduce prison populations that have been bloated by the policies of the mass-incarceration era or whether relief from mass incarceration must take some other form.

The report presents case studies of six states—Alabama, Illinois, Kansas, Minnesota, Pennsylvania, and Washington—to gain a more in-depth view of how events unfolded during the pandemic. Overall, our study found that the number of individuals released early from prisons during the pandemic was limited due to a variety of factors, including politics, risk-averse decision-making, shifting external pressures, the limited scope of compassionate and medical release statutes and the use of discretion to deny release. In addition, few changes to policy or practice that occurred during the pandemic had a lasting impact on back-end release practices.

We conclude that the back-end release mechanisms offer only a modest opportunity to reduce mass incarceration, and the current system is unlikely to make a substantial difference in addressing mass incarceration due primarily to risk aversion. Instead, state-level carceral policies that focus on diffusing responsibility for back-end release and that reduce incarceration in the first place have the greatest chance of achieving long-term reductions in prison populations.

Introduction

In 2020, the COVID-19 pandemic presented extraordinary challenges in almost every aspect of life. With the virus spreading through close contact, it became apparent that people in congregate living settings were particularly vulnerable to infection. One such setting was prison, which, except for maximum-security facilities, housed people in shared cells or large open rooms with bunk-style living. Incarcerated people eat, recreate, work, learn, and visit in group settings, and these settings are difficult to alter. Additionally, people in prison could not easily be transferred to other locations. Thus, states were forced to choose between keeping people in prison and risking severe illness or death, or releasing people to reduce prison populations, thereby providing space for social distancing.

The purpose of this report is to examine the opportunities and challenges faced by states in considering whether to release people from prison during this national emergency, the legal mechanisms available to jurisdictions, and the factors that influenced whether jurisdictions were willing and/or able to use those mechanisms to release people from prison. Through this process, our goal is to further illuminate whether the laws and policies that determine when people are released from prison—referred to as back-end release mechanisms throughout this report—can be used to reduce prison populations that have been bloated by the policies of the mass-incarceration era or whether relief from mass incarceration must take some other form. This report demonstrates that states that attempted to release people during the pandemic encountered numerous logistical, ethical, legal, and political challenges that significantly hindered their efforts to reduce prison populations. These challenges raise questions about the effectiveness of back-end release mechanisms as a means of reducing mass incarceration.

This report builds on a previous report —[Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration](#)—in which we conducted a survey of publicly available information to determine where COVID-related prison releases occurred, the mechanisms used to achieve these releases, and the factors within jurisdictions that made non-routine prison releases more or less likely to occur. Through this review, we gained insight into the use of back-end prison release mechanisms and whether there might be potential to use similar mechanisms to reduce mass incarceration. We found that while jurisdictions generally had tools available to them to make releases from prison, they were conservative in their approach, primarily releasing people who had been convicted of nonviolent offenses and/or who were close to their release date anyway. Thus, on balance, the COVID experience seemed to indicate that back-end release mechanisms present at best a modest opportunity to reduce mass incarceration.

To further explore this question, we conducted case studies of six states to gain an in-depth view of how events unfolded during the pandemic, and how release mechanisms were or were not used in these states. The six states we focus on in this report are Alabama, Illinois, Kansas, Minnesota, Pennsylvania, and Washington. We chose these states because they are diverse in terms of geography, determinate and indeterminate sentencing, and the presence or absence of a parole board. Additionally, the states varied with regard to releases: four states undertook serious efforts to make releases, one state initially indicated that it would make releases but then released only a handful of people, and one state chose not to make any pandemic-related releases.

For each case study, we utilized the information gathered from the survey in our previous report to create an initial outline of events within the state. We then interviewed key people in the state

who could provide an inside view of decision making during the pandemic. The people interviewed included officials and staff from departments of corrections, parole boards, and governors' offices. To preserve anonymity, throughout this report, these individuals will be referred to collectively as "government officials." We also interviewed advocates and lawyers from area law schools and civil rights advocacy organizations who were involved in litigation to promote releases, legislative efforts to promote releases or other safety measures, or actively worked with prison officials to change policies or practices to support the safety of people serving time in prison facilities during the pandemic. Individuals from this group will be referred to collectively as "advocates."

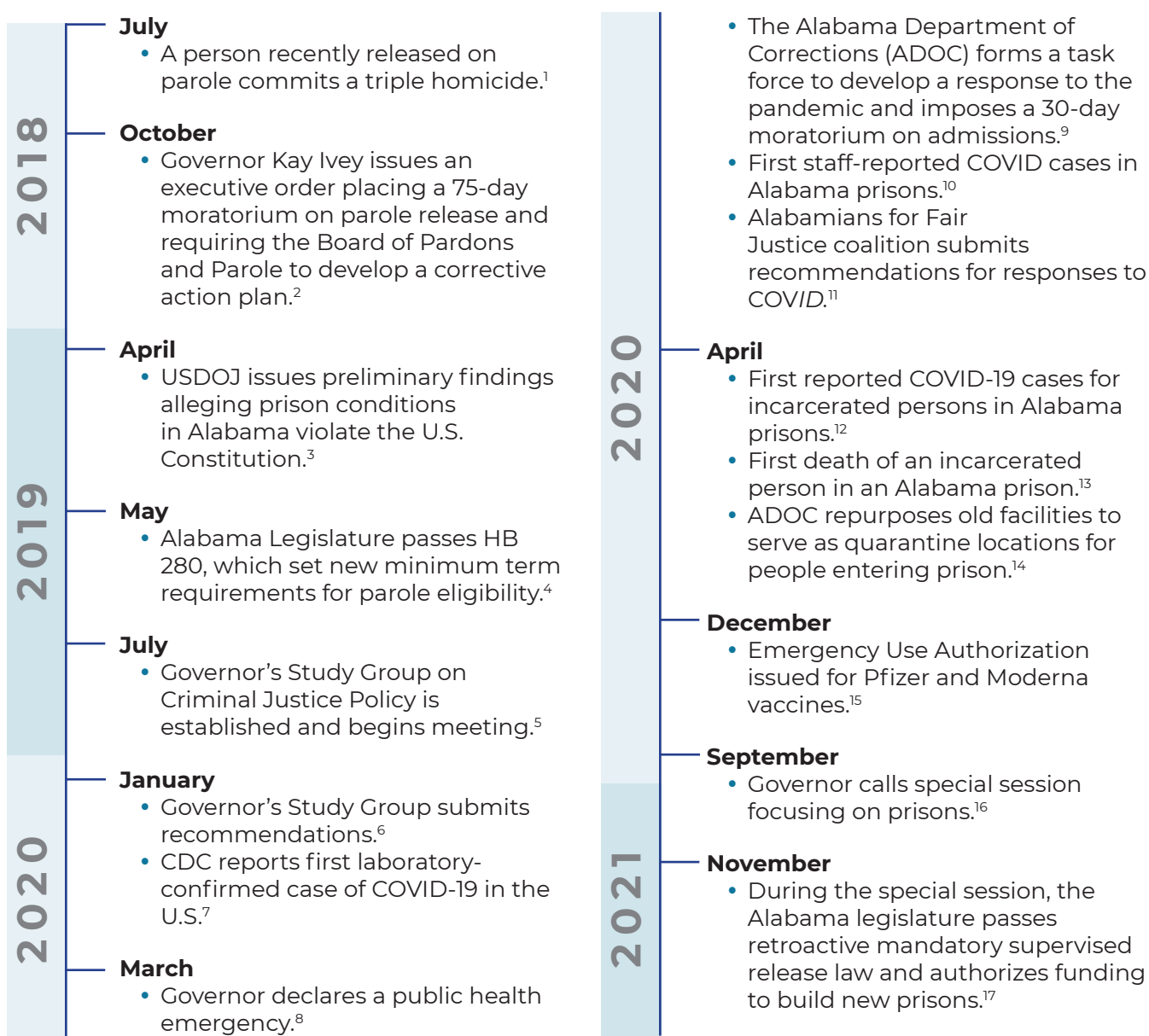
Following the individual case studies, this report presents themes and lessons learned based on the findings from all six states. By examining the efforts made to reduce prison populations during the COVID-19 pandemic, we hope to provide insights into the effectiveness of back-end release mechanisms for reducing mass incarceration.

Alabama

Introduction

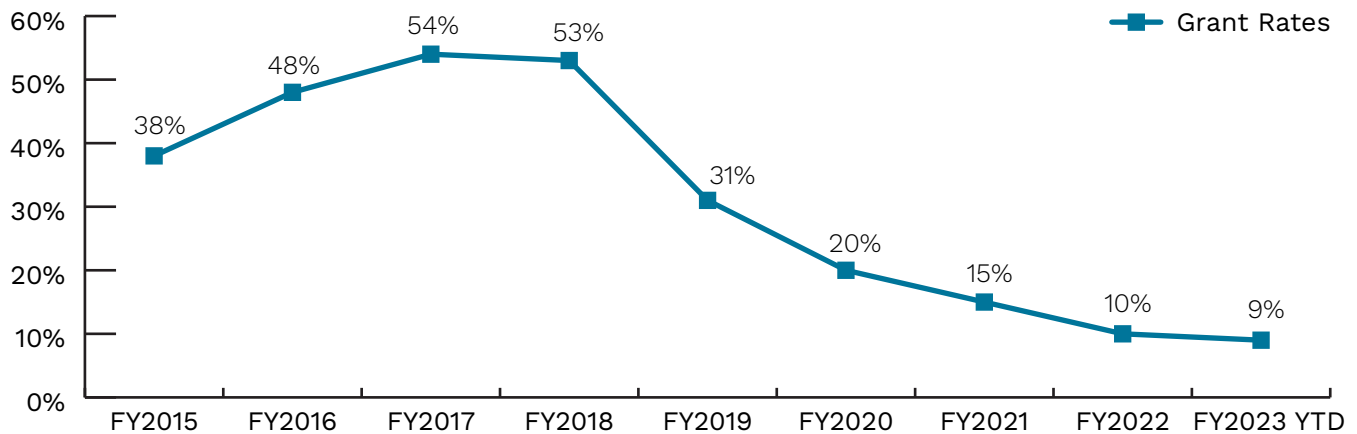
As reported in *Examining Prison Releases in Response to COVID*, Alabama was one of sixteen states that did not make any extraordinary prison releases in response to the pandemic. We chose to include Alabama as a case study to learn more about how that result came about. We wondered whether there were deliberate decisions not to use discretionary authority to release people from prison in response to the pandemic or whether legal limitations made such releases infeasible.

Timeline of Major Events



Notes — Alabama Timeline

- 1 Beth Shelburne, Advocates for Alabama’s Incarcerated Oppose Slowing Parole, May 25, 2019, <https://www.wbr.com/2019/05/25/advocates-alabamas-incarcerated-oppose-slowng-parole/>.
- 2 Executive Order 716, Office of Alabama Governor Kate Ivey, *Imposing a Temporary Moratorium on Early Parole Hearings and Requiring the Submission and Implementation of a Corrective Action Plan for the Board of Pardons and Paroles*, 2 (Oct. 15, 2018), <https://governor.alabama.gov/newsroom/2018/10/executive-order-no-716/>.
- 3 U.S. Dept. of Justice Civil Rights Division, *Investigation of Alabama’s State Prisons for Men 55* (April 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download>.
- 4 An Act Relating to Pardons and Paroles, H.B. 380, Regular Session 2019 (Ala. 2019).
- 5 Press Release, Office of Alabama Governor Kate Ivey, *Governor Ivey Establishes Study Group on Criminal Justice Policy* (July 18, 2019), <https://governor.alabama.gov/newsroom/2019/07/governor-ivey-establishes-study-group-on-criminal-justice-policy/>.
- 6 Letter from Champ Lyons, Jr., Chair of the Governor’s Study Group on Criminal Justice Policy, to Alabama Governor Kate Ivey 3-9 (Jan. 30, 2020) ([detailing the policy group’s recommendations](https://governor.alabama.gov/newsroom/2020/01/governors-study-group-on-criminal-justice-policy-recommendations-and-research/)), <https://governor.alabama.gov/newsroom/2020/01/governors-study-group-on-criminal-justice-policy-recommendations-and-research/>.
- 7 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.
- 8 Alabama Department of Corrections, Annual Report for Fiscal Year 2020 14-17 (July 2021).
- 9 *Id.*
- 10 *Id.*
- 11 Letter from Alabamians for Fair Justice to Jeff Dunn, Alabama Commissioner of Corrections (March 18, 2020), <https://static1.squarespace.com/static/5d6042920df26b000191745c/t/5e73ea12f4c1904a270b9d19/1584654867057/Alabamians+for+Fair+Justice+COVID-19+Recommendations+Letter.pdf>.
- 12 Alabama Department of Corrections, Annual Report for *Fiscal Year 2020 14-17* (July 2021).
- 13 *Id.*
- 14 *Id.*
- 15 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.
- 16 Press Release, Officer of Alabama Governor Kate Ivey, *Governor Ivey Calls Alabama Legislature to Special Session* (Sept. 23, 2021), <https://governor.alabama.gov/newsroom/2021/09/governor-ivey-calls-alabama-legislature-into-special-session-2/>; State of Alabama Proclamation of the Governor (Sept. 23, 2021), <https://governor.alabama.gov/assets/2021/09/2021-First-Special-Session-Proclamation.pdf>, (calling a special session, and limiting legislative action to four areas: consideration of a bonding bill to allow for the construction of additional prison facilities, allocation of federal American Rescue Plan Act (ARPA) funds to help modernize prisons, potential enactment of provisions allowing for resentencing under the 2013 guidelines, and potential enactment of provisions making the mandatory supervised release laws retroactive).
- 17 An Act Relating to the Mandatory Supervised Release of Inmates, H.B. 2, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB2-enr.pdf>; An Act Relating to the Finance and Construction and Renovation of Prisons, H.B. 4, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB4-enr.pdf>; An Act to Make a Supplemental Appropriation of Federal Funds from the American Rescue Plan Act, H.B. 5, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB5-enr.pdf>.

Figure 1. Annual Parole Grant Rates in Alabama

SOURCE: ALABAMA BUREAU OF PARDONS AND PAROLES, *MONTHLY STATISTICAL REPORT AT 9* (NOV. 2022).

Background

At the onset of the pandemic, Alabama was led by Republican Governor Kay Ivey and had Republican majorities in both houses of the state legislature. Alabama is an indeterminate sentencing state, meaning that the amount of time a person will actually serve in prison is uncertain at the time of sentencing. Sentencing for felony offenses in Alabama is governed by the presumptive and voluntary sentencing standards. Presumptive sentencing standards apply to non-violent offenses, which are primarily drug and property offenses.¹⁸ Judges must generally follow the presumptive standards, subject to the ability to depart, and sentencing recommendations under the presumptive sentencing standards are supported by appellate review.¹⁹ Voluntary sentencing standards apply to most other non-capital offenses²⁰ and while they are advisory to the court, judges are freer to impose sentences not recommended under the sentencing standards.²¹ Sentences pronounced pursuant to the voluntary sentencing standards are also not subject to appellate review.²²

For both voluntary and presumptive sentences, judges rely on worksheets and sentencing tables that help them determine, first, sentence disposition (Prison In/Out) and, second, sentence duration (Sentence Length).²³ The worksheets prompt the judge to consider previous crimes (i.e., number of prior convictions as an adult or juvenile, prior incarceration, and prior probation or parole revocation) and seriousness of the current offense (i.e., possession or use of a deadly weapon and victim injury).²⁴

18 Ala. Code § 12-25-32(7) (2022); *contra* Ala. Code § 12-25-32(15) (2022) (listing offenses that qualify as “violent offenses”).

19 Alabama Sentencing Commission, *2013 Report* at 1, <https://sentencingcommission.alacourt.gov/media/1106/2013-report-final.pdf>.

20 Alabama Sentencing Commission, *Recommendations for Reform of Alabama’s Criminal Justice System* at 54, <https://sentencingcommission.alacourt.gov/media/1041/2003-annual-report.pdf>. The sentencing standards are not applicable to convictions for which an individual is required to serve a mandatory life without parole sentence or convictions that result from sex offenses involving a victim under 12 years of age. Alabama Sentencing Commission, *Presumptive and Voluntary Sentencing Standards Manual* at 18 (2019), <https://sentencingcommission.alacourt.gov/media/1089/2019-presumptive-manual.pdf>. Rather, the sentences for these crimes are defined in statute. *Id.* at 27.

21 Alabama Sentencing Commission, *Recommendations for Reform of Alabama’s Criminal Justice System* at 54, <https://sentencingcommission.alacourt.gov/media/1041/2003-annual-report.pdf>.

22 *Id.*

23 Alabama Sentencing Commission, *Presumptive and Voluntary Sentencing Standards Manual* at 26 (2019), <https://sentencingcommission.alacourt.gov/media/1089/2019-presumptive-manual.pdf>.

24 See Prison In/Out Worksheets and Sentence Length Worksheets, *id.* at 37-93.

Once a person has been sentenced to prison, state law determines the timing of first eligibility for a parole hearing,²⁵ taking into account any sentence credits that an individual may earn.²⁶ First eligibility for parole is based on the length of the sentence imposed, and varies from immediate eligibility for sentences under 5 years to eligibility after 13 years for sentences of 15 years or 85% of the sentence for sentences longer than 15 years.²⁷ In order to release a person sooner than the minimum time required to be served by law, the Bureau of Prisons and Parole (BOPP) must gain approval from the Attorney General and Governor.²⁸

The one exception to this process of parole release occurs when a judge orders a split sentence. A split sentence is one in which the person serves a portion of the pronounced sentence in prison—usually three to five years—after which, the remainder of the sentences is suspended, and the person serves an extended period on probation. The judge retains jurisdiction over the case during the period of incarceration and so has the ability to suspend the remainder of the sentence and move the person to probation at any time.²⁹

Heading into the pandemic then, the primary mechanism available for release from prison was parole. But as will be explained in the next section, recent legislative changes aimed at reducing recidivism for people on parole inadvertently created a new pathway in the form of mandatory supervised release.

How Events Unfolded During the Pandemic

Alabama prisons were under intense scrutiny before the pandemic began. In April 2019, the U.S. Department of Justice issued a report finding that the conditions in Alabama’s prisons likely violated the Eighth Amendment and that a federal lawsuit would be filed if Alabama failed to take appropriate remedial action.³⁰ The allegations were extensive, alleging that Alabama failed to protect people in prison from “prisoner-on-prisoner violence and prisoner-on-prisoner sexual abuse,” and that these conditions were exacerbated by serious overcrowding and understaffing.³¹ In response, in July of 2019, the governor established the Governor’s Study Group on Criminal Justice Policy to study the issues raised in the report and offer recommendations.³²

But against this backdrop, public officials were still reacting to a high-profile event from the previous year. In July 2018, a person who had been released from prison absconded from supervision and murdered three members of a family, including a child.³³ The governor issued an executive order placing a temporary moratorium on parole release and requiring the parole board to develop and implement “a corrective action plan designed to restore confidence in the State’s parole system.”³⁴

25 Ala. Code § 15-22-28 (2022)

26 Ala. Code § 14-9-41 (2022).

27 Ala. Code § 15-22-28(e) (2022).

28 Ala. Code § 15-22-28(f) (2022).

29 Ala. Code § 15-18-8(2022). Split sentences can be imposed when the sentence will be 20 years or fewer and the person was not convicted of a sex offense involving a child.

30 U.S. Dept. of Justice Civil Rights Division, *Investigation of Alabama’s State Prisons for Men 55* (April 2, 2019), <https://www.justice.gov/opa/press-release/fie/1150276/download>.

31 *Id.* at 5-49.

32 Press Release, Office of Alabama Governor Kate Ivey, *Governor Ivey Establishes Study Group on Criminal Justice Policy* (July 18, 2019), <https://governor.alabama.gov/newsroom/2019/07/governor-ivey-establishes-study-group-on-criminal-justice-policy/>.

33 Beth Shelburne, *Advocates for Alabama’s Incarcerated Oppose Slowing Parole*, May 25, 2019, <https://www.wbr.com/2019/05/25/advocates-alabamas-incarcerated-oppose-slowng-parole/>.

34 Executive Order 716, Office of Alabama Governor Kate Ivey, *Imposing a Temporary Moratorium on Early Parole Hearings and Requiring the Submission and Implementation of a Corrective Action Plan for the Board of Pardons and Paroles*, 2 (Oct. 15, 2018), <https://governor.alabama.gov/newsroom/2018/10/executive-order-no-716/>.

The following year, the Legislature passed a reform package making the Executive Director of the parole board a governor-appointed position, establishing minimum terms that people had to serve before being eligible for parole, and requiring the parole board to get sign-off from the Governor and Attorney General to parole a person sooner than the law allowed.³⁵ The latter change made parole release more difficult and closed down one of the avenues the state might have had to release additional people from prison in response to the pandemic. But in addition to closing that avenue for release, the horrific murder and gubernatorial and legislative response caused the parole board to act more conservatively in considering parole for all individuals who were eligible for release. Following this incident, the parole board's rate of granting parole dropped precipitously from 53% in fiscal year 2018 to 20% in fiscal year 2020 (Figure 1). The parole board continued to restrict parole releases through the pandemic, and the rate dropped to just 10% by the end of fiscal year 2022 (the most recent full fiscal year).³⁶ Thus, heading into the pandemic, Alabama was experiencing pressure to simultaneously reduce the prison population and be more discerning in granting parole.

As the first cases of COVID-19 were being reported in the U.S. in January 2020,³⁷ in Alabama, the Governor's Study Group on Criminal Justice Policy was wrapping up its work and making its final recommendations to address the concerns raised in the USDOJ report. The Study Group recommended several changes in the staffing and management of prisons, as well as long-term investments aimed at reducing recidivism. In addition, there were several recommendations that had the potential to directly impact the prison population either by reducing the in-flow of people serving prison sentences or increasing the outflow of people leaving prison by affecting the timing of release.³⁸ One recommendation was to make the 2013 Presumptive Sentencing Guidelines retroactive. In that year, the legislature changed the guidelines for drug and property offenses to make them presumptive rather than voluntary, meaning judges had to articulate departure reasons to impose a sentence other than that recommended in the guidelines.³⁹ This had the effect of both limiting who could be sentenced to prison and reducing the length of prison sentences for those who were sentenced to prison.⁴⁰ Making the changes retroactive had the potential to reduce the prison population by bringing the sentences of those convicted of drug and property crimes prior to 2013 in line with the newer guidelines. The Study Group also recommended enacting legal mechanisms to review long sentences.⁴¹ And most significantly, the Study Group recommended making a previously-enacted mandatory supervised release term retroactive.⁴² This recommendation was also significant because it would require that people would be released to a period of transitional supervision at least 6 to 12 months prior to the end of their sentence. In other words, even people who had previously been denied parole would have to be released to serve a minimum period of supervision as they transitioned from prison to the community. Thus, by requiring a minimum period of supervised release, the Legislature could significantly reduce the prison population by reducing time served in prison facilities.

35 An Act Relating to Pardons and Paroles, H.B. 380, Regular Session 2019 (Ala. 2019).

36 Alabama Bureau of Pardons and Paroles, *Monthly Statistical Report* 9 (Nov. 2022).

37 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

38 Letter from Champ Lyons, Jr., Chair of the Governor's Study Group on Criminal Justice Policy, to Alabama Governor Kate Ivey 3-9 (Jan. 30, 2020), <https://governor.alabama.gov/newsroom/2020/01/governors-study-group-on-criminal-justice-policy-recommendations-and-research/> (detailing the policy group's recommendations); [Press Release, Officer of Alabama State Governor Kate Ivey, Governor Announces Support for Bill Package of Study Group for Criminal Justice Policy Recommendations, Feb. 27, 2020, https://governor.alabama.gov/newsroom/2020/02/governor-ivey-announces-support-for-bill-package-of-study-group-for-criminal-justice-policy-recommendations/](https://www.governor.alabama.gov/newsroom/2020/02/governor-ivey-announces-support-for-bill-package-of-study-group-for-criminal-justice-policy-recommendations/) (detailing a suite of bills that resulted from the study group's recommendations).

39 Stephen Rushin, Joseph A. Colquitt & Griffin S. Edwards, *The Effects of Voluntary and Presumptive Sentencing Guidelines* at 24-25 (2019), https://scholarship.law.ua.edu/fac_working_papers/39.

40 *Id.* at 41-47.

41 See Letter from Champ Lyons, Jr. to Alabama Governor Kate Ivey, *supra* note 38 at 4-5.

42 *Id.*

As it turned out, however, there would be little legislative action in 2020. By March, the threat of the pandemic had become more apparent. ADOC created a task force to develop protocols for addressing the pandemic,⁴³ and days later, the governor declared a public health emergency.⁴⁴ At the end of March 2020, ADOC implemented a 30-day moratorium on prison admissions,⁴⁵ primarily to retool the admissions process so ADOC could implement quarantine and testing procedures for people entering prison. Although the official record indicates the moratorium lasted for only 30 days, government officials and advocates had the impression that the moratorium went on for months, resulting in severe overcrowding in county jails. The strength of this impression indicates that the moratorium on admissions was a dramatic and unprecedented policy.

Advocates were also quick to act in March 2020. A coalition of advocacy organizations—Alabamians for Fair Justice—had been following the work of the Study Group, and thus had deep familiarity with the issues facing the Alabama prison system. By mid-March, they submitted a letter to the Commissioner of Corrections, Jeff Dunn, outlining their recommendations for the steps needed to keep people in Alabama prisons safe, such as educating people in prison and prison staff about the virus and the steps they could take to minimize its spread, testing staff and visitors entering prisons to ensure they were not transporting the virus into facilities, and providing adequate hygiene products to people in prison.⁴⁶ In addition, the coalition recommended that the Board of Pardons and Parole and Department of Corrections work together to utilize the medical parole statute to facilitate the release of people who were medically vulnerable or over age 60.⁴⁷ But while the groups in this coalition were calling for the release of people from prison during the pandemic, one government official noted that little attention was paid to them because, as the official put it, “they were always protesting about something, so it was routine to turn a deaf ear to them.”

In April 2020, Alabama reported the first positive COVID-19 test for a person confined in a prison facility as well as the first death from COVID.⁴⁸ In that same month, Alabama reopened previously decommissioned sections of the Draper Correctional Center (men’s facility) and the Julia Tutwiler Prison for Women to serve as quarantine locations for people entering prison.⁴⁹ People in these locations were tested for the COVID-19 virus, and if their test was negative, they would be moved into the regular prison system.⁵⁰ Those interviewed indicated that the legislative session closed down in April as well, thereby foreclosing any option for legislation that might have facilitated any COVID-related releases from prison.

By mid-to late-2020, several drug companies had announced the development of vaccines to protect against severe illness from COVID and had begun testing the vaccines in adults.⁵¹ Both advocates and government officials indicated that this closed the potential policy window for reducing the prison population in Alabama. If vaccines became widely available, then the pandemic would no longer serve as a source of external pressure to change policies and practices that could affect the size of the

43 Alabama Department of Corrections, *Annual Report for Fiscal Year 2020* at 14-17 (July 2021).

44 *Id.*

45 *Id.*

46 Letter from Alabamians for Fair Justice to Jeff Dunn, Alabama Commissioner of Corrections (March 18, 2020), <https://static1.squarespace.com/static/5d6042920df26b000191745c/t/5e73ea12f4c1904a270b9d19/1584654867057/Alabamians+for+Fair+Justice+COVID-19+Recommendations+Letter.pdf>.

47 *Id.* at 2-3.

48 Alabama Department of Corrections, *Annual Report for Fiscal Year 2020* at 14 (July 2021).

49 *Id.* at 17.

50 *Id.*

51 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

prison population. Against this backdrop, the parole board continued to restrict the number of people granted parole. From mid-2020 to mid-2021, the parole grant rate dropped from 20% to 15%.⁵²

With the advent of vaccines, the one remaining source of external pressure to reduce the prison population in Alabama was the threat of a USDOJ lawsuit. In 2021, Governor Ivey called a special session expressly to address some of the reforms that had been recommended by the Study Group.⁵³ With federal money available to address infrastructure issues related to the pandemic, the focus of the session quickly turned to building new prisons. This would solve several issues pointed out in the USDOJ report. Alabama needed to modernize its facilities and alleviate overcrowding. One person we interviewed pointed out that the majority of space in Alabama prisons is dormitory-style open bunking, which contributed to unsafe conditions in two ways: as reported by the USDOJ,⁵⁴ it created an environment where violence could occur between people housed in the dorm without being seen by officers, and during the pandemic, the setup meant that ADOC had few options for implementing social distancing recommendations within the facilities. The Alabama Legislature passed legislation authorizing nearly \$1.2 billion for the construction of new prisons, \$785 million of which would come from state-issued bonds,⁵⁵ \$400 million of which, would come from federal ARPA funding.⁵⁶

In addition, the Legislature enacted a law making mandatory supervised release terms retroactive.⁵⁷ This provision was described by one government official as the most impactful change made during the special session because, as the official stated, it has the potential to become the largest release category for all people leaving prison. And indeed, this does seem likely. These mandatory supervision releases accounted for 2,001 of the people released from prison in fiscal year 2021, compared to just 826 people who were released to parole.⁵⁸ The only categories with more people being released were those being released to serve a term of probation due to a split sentence (3,169) and those who reached the end of their sentence (2,615).⁵⁹

Factors Affecting the Use of Prison Release Mechanisms

So why were there no extraordinary releases in Alabama during the pandemic? A common perception among government officials and advocates was that there are very few mechanisms available for non-routine release from Alabama prisons. In other words, there was a strong perception that the law was an impediment because it provided very few options during this period. In this section, we discuss the dynamics that led to this result, focusing on the use or non-use of four of the main prison releases

52 Alabama Bureau of Pardons and Paroles, *Monthly Statistical Report* at 9 (Nov. 2022).

53 Press Release, Officer of Alabama Governor Kate Ivey, *Governor Ivey Calls Alabama Legislature to Special Session* (Sept. 23, 2021), <https://governor.alabama.gov/newsroom/2021/09/governor-ivey-calls-alabama-legislature-into-special-session-2/>; State of Alabama Proclamation of the Governor (Sept. 23, 2021), <https://governor.alabama.gov/assets/2021/09/2021-First-Special-Session-Proclamation.pdf> (calling a special session, and limiting legislative action to four areas: consideration of a bonding bill to allow for the construction of additional prison facilities, allocation of federal American Rescue Plan Act (ARPA) funds to help modernize prisons, potential enactment of provisions allowing for resentencing under the 2013 guidelines, and potential enactment of provisions making the mandatory supervised release laws retroactive).

54 U.S. Dept. of Justice Civil Rights Division, *Investigation of Alabama's State Prisons for Men* at 26, 48 (April 2, 2019), <https://www.justice.gov/crt/case-document/file/1149971/download>.

55 An Act Relating to the Finance and Construction and Renovation of Prisons, H.B. 4, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB4-enr.pdf>.

56 An Act to Make a Supplemental Appropriation of Federal Funds from the American Rescue Plan Act, H.B. 5, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB5-enr.pdf>.

57 An Act Relating to the Mandatory Supervised Release of Inmates, H.B. 2, First Special Session (Ala. 2021), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021FS/PrintFiles/HB2-enr.pdf>.

58 Alabama Department of Corrections, *Annual Report for Fiscal Year 2021* at 32 (2022), <http://www.doc.state.al.us/docs/AnnualRpts/2021%20Annual%20Report.pdf>.

59 *Id.*

mechanisms—medical parole, medical furlough, parole, and mandatory supervised release—during the pandemic.

Medical parole and medical furlough were apparently never seriously considered. Advocates determined that there were over a thousand people aged 65 or older who were serving time in Alabama prisons who they thought could be eligible for medical parole or medical furlough.⁶⁰ But from their perspective, there was no interest in using either mechanism to review the status of those individuals. Alabama law provides for people deemed to be “geriatric” to be considered for medical parole or furlough, but age is not the sole criteria. The person must also suffer from a “chronic life-threatening infirmity, life-threatening illness, or chronic debilitating disease related to aging” and need assistance with daily care.⁶¹ Therefore, it would have taken some effort to review the more than 1,000 people identified for consideration by advocates. Given the low rate at which the parole board had been granting parole, it stands to reason that there would have been little interest on their part in running special panels to consider people for medical parole. Thus, ADOC’s medical furlough was the only potentially logical mechanism of this type for release. ADOC likely had a review process in place to make medical furlough decisions, but advocates admitted that even in non-pandemic times, the mechanism was rarely used. It would have taken a much more concerted effort to apply the process to the entire population aged 65 or older. As one government official pointed out, neither medical parole nor medical furlough would have worked because the law requires that the person already be sick to gain release. That requirement would have thwarted the point of making such releases—to prevent illness—and it would have worked for only a small group of people.

As described above, the parole board decreased its parole grant rate throughout the pandemic. When pressed about why the parole board did not follow the lead in other states to hold additional panels to speed up the release process, one government official kept returning to the fact that the law had been changed to disallow early release. Though this was true, it did not explain why the parole board refused to parole so many people who were actually eligible for release under normal timelines. Thus, the parole board could have reduced the prison population simply by granting parole in a greater percentage of cases in which the person had served the required minimum term. In fact, the parole board’s own reports show that their grant rate is far lower than their parole guidelines would recommend.⁶² One government official noted that often some sort of outside pressure is necessary to change policy in Alabama, but once the ADOC placed a moratorium on admissions, that dropped the prison population and removed any pressure the parole board may have felt to change its releasing pattern. Thus, the conditions did not appear to be ripe to force action. But it is also possible that the parole board did not want to be responsible for releasing anyone who might subsequently commit a severe a violent crime, as had happened in 2018.

As it turned out, two significant policy changes during the pandemic would have the effect of reducing prison populations. The first was the moratorium on admissions. But it was not undertaken to reduce the prison population. Instead, it was undertaken to buy time while ADOC developed intake procedures in light of the pandemic. The second was passage of the law to make mandatory supervised release retroactive. Here again, the goal was not to reduce the prison population. Instead, mandatory supervised release was originally enacted in 2015 as part of a series of reforms stemming from Alabama’s Justice Reinvestment Initiative (JRI). The research phase of JRI found that the majority

60 Letter from Alabamians for Fair Justice to Jeff Dunn, *supra* note 46 at 4.

61 Ala. Code §§ 14-14-2; 15-22-42 (2022).

62 A quick perusal of the parole board’s monthly statistical reports shows that the board uses parole guidelines that recommend granting parole in 75-85% of cases each month, yet the actual grant rate during the pandemic fell to about 10%. See Alabama Bureau of Pardons and Parole, *Monthly Statistical Reports*, <https://paroles.alabama.gov/monthly-statistical-reports/>.

of people released from Alabama prisons had no post-prison supervision, and that those released with no supervision had higher recidivism rates than those released with supervision.⁶³ Thus, mandatory supervised release was viewed as a tool for reducing recidivism. But incidentally, it also served to reduce the prison population. Moreover, mandatory supervised release is a blameless release mechanism in that even if a person released on such grounds commits a new offense, no entity has to take responsibility for the person's release because the law requires it; no one has to exercise discretion to make it happen.

Conclusion

In Alabama, parole is the least common mechanism for release from prison. Instead, automatic processes that call for release at a specific time such as split sentences, mandatory supervised release, and end of sentence are the most common. This indicates an extreme aversion to making prison-release decisions. This could be in reaction to particularly heinous crimes, such as the murder of a family in 2018 by a person recently released on parole, which set policy and practice in motion to reduce parole releases. No one wanted to be responsible for that happening again. And letting additional people out of prison during the pandemic would increase that risk.

Alternatively, Alabama's aversion to making prison release decisions could be indicative of a systemic "tough on crime" orientation. The conditions in Alabama's prison facilities described in the DOJ report evinced a lack of concern for the safety and living conditions of people who are incarcerated. Yet the parole board's contraction of releases even after issuance of that report may be evidence of a belief that people should be held accountable for their crime by serving the full prison term announced at the timing of sentencing, regardless of those conditions. The one countervailing fact was that the Governor's Study Group on Criminal Justice Policy recommended enactment of second look provisions and making the presumptive sentencing standards retroactive, but these measures were ultimately not adopted into law.

The most impactful policy changes in recent years were those that removed discretion. The first was the implementation of presumptive sentencing standards, which limited judicial discretion by placing rules around who could be sentenced to prison and the length of sentence. The second was enactment of mandatory supervised release, which required a person to be released from prison 6-12 months prior to the end of their sentence. Thus, what we learn from Alabama is that if we are going to reduce mass incarceration, we have to enact policies that occur automatically and that do not require discretion.

Outside pressure can be effective at changing policy, but Alabama demonstrates that one has to take advantage of policy windows when they open. The vulnerability to COVID that people in Alabama prisons faced due to severe overcrowding may have been a compelling argument to policy makers when the pandemic began. But the reduction in the population due to the moratorium on admissions as well as the slowdown in court process couple with the eventual availability of vaccines removed any outside pressure to release people. Thus, it seems like it would take an extreme crisis to yield any action in Alabama that would result in people serving less time in prison than they were originally ordered to serve by the courts.

⁶³ The Council of State Governments, *Justice Reinvestment in Alabama: Analysis and Framework* at 26-29 (March 2015), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG-AlabamaJRFramework.pdf>.

Legal Mechanisms for Prison Release in Alabama

Parole – In Alabama, the main legal mechanism for release from prison prior to the end of a person’s sentence is parole. Receiving parole allows an individual to leave prison for a period of post-prison supervision; however, for the duration of parole, that individual remains in the legal custody of the state and subject to various conditions and terms.⁶⁴ In deciding whether to grant parole, the parole board considers risk to reoffend, conduct while incarcerated, input from third parties, and the severity of the underlying offense which led to the initial incarceration.⁶⁵

Medical Parole/Medical Furlough – A person who is otherwise eligible for parole may be considered by the parole board for release through medical parole if the person is 60 years or older, permanently incapacitated, or terminally ill.⁶⁶ Alternatively, ADOC can release a person on medical furlough under similar conditions as medical parole. However, the person remains under ADOC’s jurisdiction, and if the person’s health improves, ADOC can revoke the furlough.⁶⁷ People who have been convicted of capital murder or sex offenses are categorically ineligible for medical parole or medical furlough.

Work Release – At the discretion of ADOC, people in state custody may be allowed to leave the prison or jail facility, to engage in regular paid employment. This sort of release does not change the person’s confinement status, rather it “extend[s] the limit of the place of confinement” based on a reasonable belief that the person will comply with program expectations. The person may be unaccompanied during their working hours but will otherwise remain confined in a prison or jail facility.⁶⁸ Each county may also coordinate a work release program for people in their custody.⁶⁹

Mandatory Supervised Release – Beginning January 1, 2023, ADOC implemented a new statutory scheme implementing mandatory supervised release. The statute instructs ADOC to release people anywhere from three months to one year before the end of their sentence to a period of transitional post-prison supervision. People convicted of any sex offense involving a child are excluded from this program, and those who are eligible may be subject to different levels of supervision based on a risk and need assessment conducted by the Bureau of Pardons and Parole. All people who are released through this mechanism are subject to electronic monitoring.⁷⁰

Executive Authority to Grant Reprieves and Commutations – The Governor has a constitutionally protected right, “to grant reprieves and commutations to persons under sentence of death.”⁷¹ They may only exercise this power after notifying the Attorney General and making a reasonable effort to notify a member of the victim’s family.⁷² A reprieve is a temporary stay of execution, whereas a commutation changes the sentence from capital punishment to life imprisonment.⁷³ When the Governor commutes one’s sentence, that individual is not eligible for a pardon or parole, unless the following criteria are met: sufficient evidence establishes that person’s innocence for the crime for which they were convicted, the board votes unanimously, and the Governor approves the granting of a pardon or parole.⁷⁴

64 Ala. Code § 15-22-26(b) (2022)

65 Ala. Code § 15-22-26(a) (2022)

66 Ala. Code §§ 15-22-41 to -43 (2022).

67 Ala. Code §§ 14-14-1 to -7 (2022).

68 Ala. Code §§ 14-8-1 to -10 (2022).

69 Ala. Code §§ 14-8-39 to -44 (2022).

70 Ala. Code §§ 15-22-26.2 (2022).

71 Al. Const., Art V, sec. 124 (2022).

72 Al. Const., Art V, sec 124(a)(2) (2022).

73 Office of the Attorney General, *Alabama’s Death Penalty Appeals Process* at 11-12, <https://www.alabamaag.gov/Documents/Files/File-Death-Penalty-Appeals-Process.pdf>.

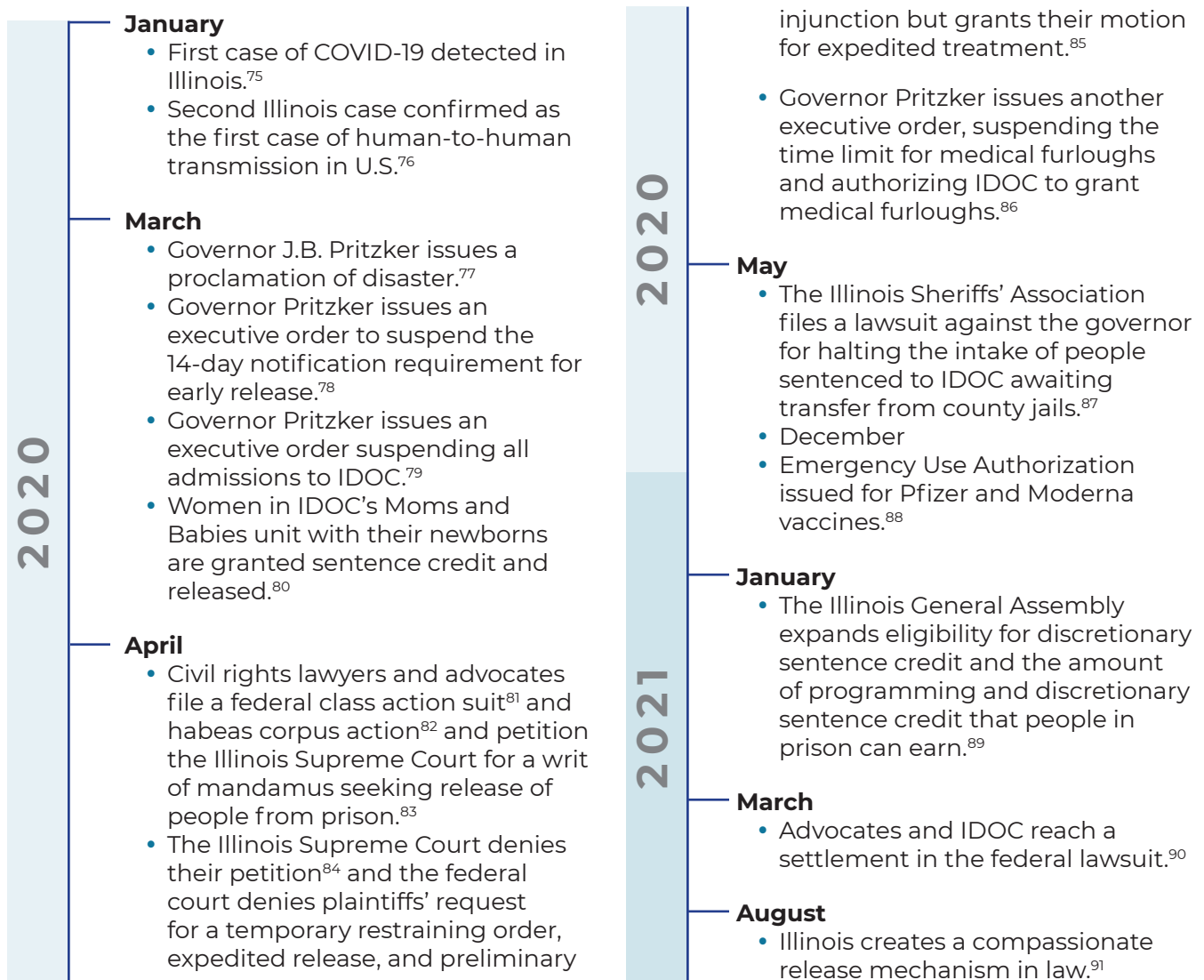
74 Ala. Code § 15-22-27 (2022).

Illinois

Introduction

In 2020, Illinois was one of thirty-four states that made non-routine prison releases. It is a determinate sentencing state with multiple mechanisms for discretionary early release, though public accounts differ as to how many people were released using these mechanisms. According to the Illinois Department of Corrections (IDOC), by the end of that year, 2,487 people had transitioned from its facilities to the community using home detention, furloughs, and discretionary sentence credits. Though non-routine discretionary release impacted less than 7% of the state's prison population, the prison population dropped rapidly through attrition as IDOC stopped admitting new county commitments.

Timeline of Major Events



Notes — Illinois Timeline

- 75 Illinois Department of Public Health, *About COVID-19*, [https://dph.illinois.gov/covid19/about-covid19.html#:~:text=The%20first%20case%20of%20COVID,2020%20\(a%20Chicago%20resident\)](https://dph.illinois.gov/covid19/about-covid19.html#:~:text=The%20first%20case%20of%20COVID,2020%20(a%20Chicago%20resident).).
- 76 Patrick Elwood and Julian Crews, *Chicago woman infects husband with coronavirus, US issues travel warning*, WGN9, January 30, 2020, <https://wgntv.com/news/chicago-woman-infects-husband-with-coronavirus-first-human-to-human-spread-in-us/>.
- 77 Gubernatorial Disaster Proclamation (Mar. 9, 2020), <https://www.illinois.gov/content/dam/soi/en/web/coronavirus/documents/coronavirus-disaster-proc-03-12-2020.pdf>.
- 78 Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 9)* (Mar. 23, 2020), <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrder2020-11.aspx>.
- 79 Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 11)* (Mar. 26, 2020), <https://www.illinois.gov/government/executive-orders/executive-order-executive-order-number-13.2020.html#:~:text=All%20admissions%20to%20the%20Illinois,Corrections%20for%20limited%20essential%20transfers.>
- 80 Annie Sweeney, *Facing growing coronavirus threat, Illinois prison officials release moms jailed with their babies: "Oh my goodness, there was no words,"* Chicago Tribune, March 27, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-woman-babies-released-prison-20200327-t6rfew4m6jbxmw4lrw5v47dfi-story.html>.
- 81 Class Action Complaint, *Money v. Pritzker*, 1:20-cv-02093, (N.D. Ill. 2020), <https://www.uplcchicago.org/what-we-do/prison/money-v-pritzker-complaint.html>.
- 82 Emergency Petition for Writs of Habeas Corpus, *Money v. Jeffreys*, 1:20-cv-02094, (N.D. Ill. 2020), <https://www.uplcchicago.org/what-we-do/prison/richard-v-jeffreys-habeas-corpus-petition.html>.
- 82 Original Petition for Writ of Mandamus, *Money v. Jeffreys*, Case No. 125912 (Ill. 2020), <https://www.macarthurjustice.org/wp-content/uploads/2020/04/Mandamus.pdf>.
- 84 Margo Schlanger, Sheila Bedi, David M. Shapiro, *Incarceration and the Law: Cases and Materials* at 25 (10th Ed. Supp. 2022) (citing Minute Order, *Money v. Jeffreys*, Case No. 125912 (Ill. 2020)), https://incarcerationlaw.com/documents/Teaching-materials/Schlanger_Incarceration_10th_2022_Supplement.pdf.
- 85 *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020), <https://www.uplcchicago.org/what-we-do/prison/money-v-pritzker-opinion.html>.
- 86 Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 19)* (Apr. 6, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-21.aspx>.
- 87 *Illinois Sheriffs Sue Gov. Pritzker for Shutting Prisons to New Inmates During COVID-19 Pandemic*, WTOV, May 28, 2020, <https://www.mystateline.com/news/local-news/illinois-sheriff-sue-gov-pritzker-for-shutting-prisons-to-new-inmates-during-covid-19-pandemic/>.
- 88 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.
- 89 Illinois Safety, Accountability, Fairness, and Equity-Today Act, Public Act 101-0652, 101st Illinois General Assembly (2021), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf> <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>.
- 90 Notice of Voluntary Dismissal, *Richard v. Pritzker* (formerly *Money v. Pritzker*), 1:20-cv-02093, (N.D. Ill. 2020), https://www.uplcchicago.org/file_download/inline/62ee3ad6-062e-4b6b-abaf-600048f05526.
- 91 Joe Coleman Medical Release Act, Pub. Act 102-0494, 101st Illinois General Assembly (2021), <https://www.ilga.gov/legislation/publicacts/fulltext.asp?name=102-0494&GA=102&SessionId=110&DocTypeId=HB&DocNum=3665&GAID=16&SpecSess=&Session=>

Background

In 2020, Illinois was one of fifteen states where Democrats held a government trifecta, controlling the executive branch and holding the majority in the state house of representatives and senate.⁹² Governor Pritzker, however, had only been in office for a year and had been preceded by a Republican, so there was concern about the political risk of early releases. This concern was heightened by an event a decade earlier when discretionary releases were used to reduce the prison population and it created a political maelstrom, yielding a deeply ingrained aversion to using the available mechanisms for early release, including executive clemency.

Illinois is a determinate sentencing state in which there are three classes of misdemeanors and six classes of felonies with presumptive sentencing options and ranges set by the legislature.⁹³ If a person is sentenced to a term of incarceration, the amount of time they must serve varies based on the offense for which they were convicted.⁹⁴ Certain “truth-in-sentencing” convictions are ineligible for good time deductions or other sentence credits. Others require that at least 85, 75, or 70% of the time be served. For all other convictions, dubbed “day-for-day,” a prisoner may receive more than 50% of their sentence off by earning sentence credits for rule compliance i.e. “good time,” programming, educational achievements, and additional credits given at the discretion of the Director.⁹⁵ IDOC also has the ability to place eligible people on home confinement with electronic monitoring⁹⁶ and grant furloughs.⁹⁷

How Events Unfolded During the Pandemic

On March 9, 2020, Governor Pritzker issued a proclamation of disaster, Illinois' version of an emergency declaration,⁹⁸ to address COVID. Two weeks later, the governor issued an executive order that, among other actions, temporarily suspended the requirement that IDOC provide 14 days' notice to the state attorney if an person receives an earlier release date due to discretionary sentence credits.⁹⁹ By March 27, at least six people were granted good-conduct time and released from the Decatur Correctional Center's special wing that houses mothers and their babies.¹⁰⁰ The governor also took early action to mitigate disease transmission in IDOC by suspending all new admissions,¹⁰¹ a decision that riled sheriffs and local elected officials who, faced with controlling COVID in jails, initiated litigation to compel the state to take people committed to their custody.¹⁰² According to government officials, though this battle did deep damage to IDOC's relationship with sheriffs and local law enforcement, the backup in jail populations created greater urgency at a local level to adopt changes to arrest, booking, and charging practices, as well as release practices for local jails.

92 Ballotpedia, *2019 election analysis: State government trifectas* (Nov. 18, 2019), https://ballotpedia.org/2019_election_analysis:_State_government_trifectas.

93 730 Ill. Comp. Stat. 5/5-4.5-10 (2022).

94 730 Ill. Comp. Stat. 5/5-4.5-20 to -85 (2022).

95 730 Ill. Comp. Stat. 5/3-6-3 (2022).

96 730 Ill. Comp. Stat. 5/5-8A-3 (2022).

97 730 Ill. Comp. Stat. 5/3-11-1 (2022).

98 Gubernatorial Disaster Proclamation (Mar. 9, 2020), <https://www.illinois.gov/content/dam/soi/en/web/coronavirus/documents/coronavirus-disaster-proc-03-12-2020.pdf>.

99 Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 9)* (Mar. 23, 2020), <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrder2020-11.aspx>.

100 *Id.*; Annie Sweeney, *Facing growing coronavirus threat, Illinois prison officials release moms jailed with their babies: “Oh my goodness, there was no words,”* Chi. Trib., Mar. 27, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-woman-babies-released-prison-20200327-t6rfew4m6jbxmw4lrw5v47dfi-story.html>.

101 Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 9)* (Mar. 23, 2020), <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrder2020-11.aspx>.

102 *Id.*

Though Illinois did not have a compassionate-release mechanism, IDOC had the authority to grant furloughs to prisoners for specific purposes, including family visits and “to obtain medical, psychiatric or psychological services when adequate services are not otherwise available”¹⁰³ On April 6, Governor Pritzker issued another executive order that, among other actions, suspended the 14-day limit for furloughs and allowed furloughs for medical reasons at IDOC’s discretion.¹⁰⁴ When this action was taken, 62 prisoners and 40 IDOC staff had been confirmed COVID-19 positive, and two prisoners incarcerated at Statesville Correctional Center had died after contracting the disease.¹⁰⁵

The governor’s expansion of IDOC’s furlough authority was broad, but the agency administratively limited its use of that authority regarding medical furloughs, narrowing eligibility to those who had limited physical mobility requiring assistance to complete activities of daily living or who were terminally ill requiring end-of-life care, and, for either circumstance, had been deemed a low risk to community safety following a case review;¹⁰⁶ criteria similar to those used in other states for compassionate release. Though the policy statement in the document outlining the revised medical furlough criteria stated that this was “an effort to protect medically vulnerable offenders from the risk posed by COVID-19 within a correctional setting,” such medical vulnerability was not included in the medical criteria nor was it a factor for consideration anywhere else in the document.¹⁰⁷ Accounts differed as to how many people received medical furloughs in response to COVID. Media reported that as of June, IDOC had granted 12 medical furloughs,¹⁰⁸ while advocates reported that IDOC had released over 100 people via medical furloughs through May 2020.¹⁰⁹ The reports may have conflated different types of furloughs, and this likely explains the differing accounts. According to IDOC, just 18 prisoners were released on medical furlough from March to December 2020.¹¹⁰ However, government officials indicated that furloughs for family visitation,¹¹¹ which had rarely been granted prior to the pandemic, were used to cut the work-release population in half, sending almost 200 people home to serve the remainder of their sentence.

IDOC used another early-release mechanism to reduce their prison density: electronic detention, by which a prisoner can be placed in the community on electronic monitoring or home detention for up to 90 days prior to their release date if they are serving a sentence for a Class X or 1 offense, up to 12 months prior if they are 55 or older and meet other specific requirements, or almost all of their sentence if convicted of a Class 2, 3, or 4 offense.¹¹² Certain classes of offenses are statutorily excluded and IDOC policy further narrowed eligibility. Prior to COVID, the department used electronic detention sparingly, requiring multiple levels of review and approval at the facility level and at headquarters. A three-year early release and supported reentry pilot program that concluded January 2020 used

¹⁰³ 730 Ill. Comp. Stat. 5/3-11-1(a)(2)(2022).

¹⁰⁴ Executive Order 2020-11, Office of Governor JB Pritzker, *Executive Order in Response to COVID-19 (COVID Executive Order No. 19)* (Apr. 6, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-21.aspx>.

¹⁰⁵ Margo Schlanger, Sheila Bedi, David M. Shapiro, *Incarceration and the Law: Cases and Materials* at 25 (10th Ed. Supp. 2022) (citing Minute Order, *Money v. Jeffreys*, Case No. 125912 (Ill. 2020)), https://incarcerationlaw.com/documents/Teaching-materials/Schlanger_Incarceration_10th_2022_Supplement.pdf.

¹⁰⁶ Illinois Department of Corrections, *Medical Furlough Release Criteria*, undated, <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/facilities/documents/covid-19/executiveorder/final-medical-furlough-release-criteria.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ Patrick Smith, *Democrats and Republicans are Critical of Pritzker’s Handling of COVID-19 in Prisons*, WBEZ Chicago, June 29, 2020, <https://www.wbez.org/stories/democrats-and-republicans-are-critical-of-pritzkers-handling-of-covid-19-in-prisons/d4c77f32-e437-4677-8765-8b0e53120b09>.

¹⁰⁹ It was noted, however, that all but 14 were scheduled to be released within a year. Restore Justice, *IDOC release information* (June 1, 2020). <https://www.restorejustice.org/idoc-release-information/>.

¹¹⁰ Illinois Department of Corrections, *IDOC Exits March 1, 2020 to December 31, 2020*, sheet 3, <https://idoc.illinois.gov/offender/communitynotificationofinmateearlyrelease.html>.

¹¹¹ 730 Ill. Comp. Stat. 5/3-11-1(a)(5) (2022).

¹¹² 730 Ill. Comp. Stat. 5/5-8A-3 (2022).

electronic detention as the mechanism for early release for the 60 pilot participants. Through that process, IDOC and their research partner identified criteria in department policy that could be adapted administratively to expand eligibility and developed an accelerated electronic detention review process specifically for the pilot.¹¹³ This experience provided the foundation for the rapid adaptation of IDOC screening practices when COVID hit, changes that were later memorialized in department policy.¹¹⁴ From March through December 2020, IDOC released a total of 155 prisoners using electronic detention.¹¹⁵

Illinois has multiple types of sentence credits,¹¹⁶ including credit for complying with rules (good time), credits earned by participating in programs and for educational achievements (program credit), and earned discretionary sentence credit (EDSC), a credit of up to 180 days that IDOC is authorized to award for service to the institution, community, or state.¹¹⁷ EDSC credits are not presumptive and the statute does not restrict or further define what constitutes an act of service. In fact, prior to the pandemic, use of EDSC had been greatly curtailed. In 2017, Illinois passed the Neighborhood Safety Act, which among other things, expanded IDOC's ability to award EDSC. The new law narrowed the list of disqualifying offenses and required that IDOC consider the results of a validated risk assessment when determining eligibility for EDSC.¹¹⁸ Originally, it was estimated that the amendments would increase EDSC eligibility for people entering prison on a new sentence by 958 to 1,915 people, annually.¹¹⁹ However, actual practices fell short of this goal. IDOC did not award any EDSC in 2018, reporting that this was because the department needed time to develop the necessary "process and procedures."¹²⁰

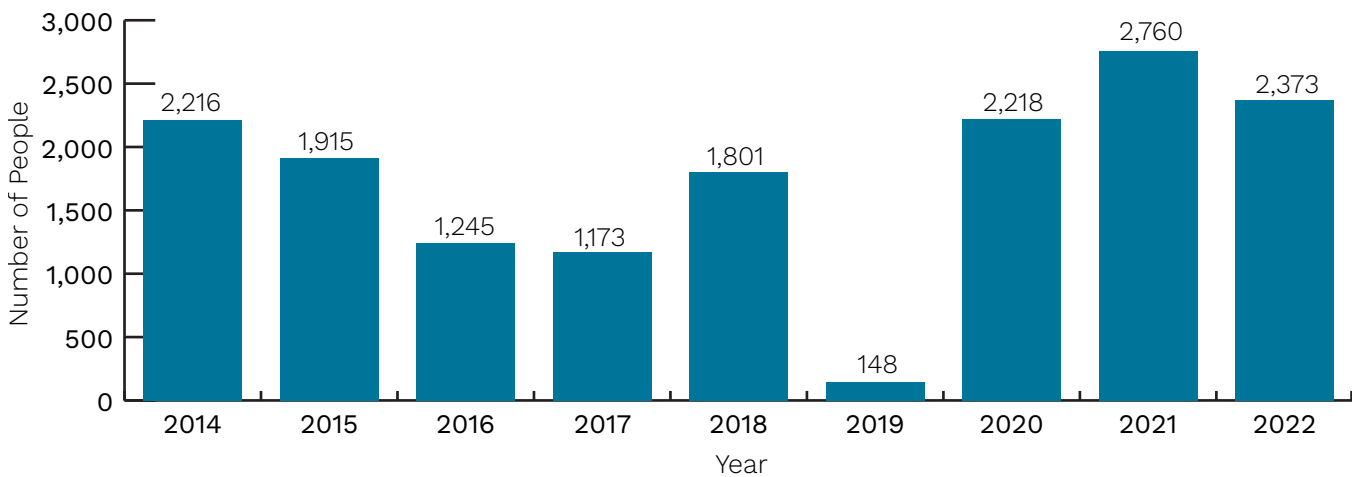
According to government officials, the hesitancy to implement the new legislation was partially due to some confusion in the new language. Thus, in 2019, additional legislation was passed that clarified the legislative intent and applicability of the Neighborhood Safety Act.¹²¹ IDOC moved forward with implementing the law changes, tracking their EDSC awards beginning in July of 2019. However, by the end of 2019, IDOC had only awarded EDSC to only 122 people, falling well below expectations.¹²² Advocates, concerned that the reform they had championed had been implemented in such a way as to have the opposite of its intended effect, approached Acting Director Jeffreys with an offer to assist IDOC in a process and criteria review using outside researchers to determine why this was so. The director welcomed the partnership so fortuitously, by March of 2020, IDOC and their partners had identified ways to improve the awarding of EDSC through administrative changes to policy and practice. This work meant the department was well-positioned to make quick revisions to EDSC processes and eligibility criteria in response to COVID.¹²³

- 113 Angela Hawken, Sandy F. Mullins, Janelle Prueter, Jonathan Kulick, Marron Institute, New York University, *Recommendations for Rapid Release and Reentry during the COVID-19 Pandemic* at 2 (2020), https://marroninstitute.nyu.edu/uploads/content/COVID-19_Rapid_Release_1.1.pdf.
- 114 Illinois Department of Corrections, Administrative Directive on Electronic Detention 04.45.100, 2020, <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/aboutus/documents/445100-electronic-detention.pdf>.
- 115 Illinois Department of Corrections, *IDOC Exits March 1, 2020 to December 31, 2020*, sheet 3, <https://idoc.illinois.gov/offender/communitynotificationofinmateearlyrelease.html>.
- 116 730 Ill. Comp. Stat. 5/3-6-3 (2022).
- 117 730 Ill. Comp. Stat. 5/3-6-3(a)(3) (2022).
- 118 The law also changed the name from Supplemental Sentence Credit (SCC) to Earned Discretionary Sentence Credit (EDSC). We use EDSC throughout this description to limit confusion. Illinois Public Act 099-0938, 2017, <https://www.ilga.gov/legislation/publicacts/99/099-0938.htm>.
- 119 Illinois Sentencing Policy Advisory Council, *Fiscal Impact Analysis of Senate Bill 2872 – House Floor Amendment 2*, 2017, https://spac.icjia-api.cloud/uploads/SB2872_HFA2_Probation_Eligible_FA-PP-20200106T17413055.pdf.
- 120 Illinois Department of Corrections, *Annual Report for Earned Discretionary Sentence Credit*, (Jan 2018-Dec 2018), <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/cy18-edsc-annual-report.pdf>.
- 121 Illinois Public Act 100-0575, 2018, <https://www.ilga.gov/legislation/publicacts/100/100-0575.htm>.
- 122 Illinois Department of Corrections, *Annual Reports for Earned Discretionary Sentence Credit*, (Jan 2019-Dec 2019), <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/cy19-edsc-annual-report.pdf>.
- 123 Angela Hawken, Sandy F. Mullins, Janelle Prueter, Jonathan Kulick, Marron Institute, New York University, *Recommendations for Rapid Release and Reentry during the COVID-19 Pandemic* at 2 (2020), https://marroninstitute.nyu.edu/uploads/content/COVID-19_Rapid_Release_1.1.pdf.

Prior to the pandemic, the review processes required that each request for EDSC go through multiple levels of approval within prison facilities before it was sent to central office for final review. By department policy, those who scored moderate or high on a static risk-to-recidivate assessment and institutional violence predictive assessment, had high-level infractions during their current incarceration, or were incarcerated for a forcible felony¹²⁴ were ineligible to receive EDSC. The revised review process centralized decision-making, removing discretion at the prison level to deny credits to people who were prescreened as eligible based on revised criteria. Under the adapted eligibility criteria, the institutional violence predictive score was no longer used to assess eligibility, and only those who scored high on the risk-to-recidivate assessment, had a high-level infraction in the previous year, or were incarcerated for a violent felony were disqualified.

Though these changes increased the number of people IDOC reviewed for EDSC, Governor Pritzker directed, as did almost every other governor in states that used early releases mechanisms, that people incarcerated for a violent offense would not be released under extraordinary measures. Though this was a broader disqualifier than required by statute that limited the potential of EDSC, with IDOC's revised criteria and streamlined process of review, 2,218 people released in 2020 who had received time off their sentence through EDSC (Figure 2).¹²⁵

Figure 2. Annual Total of People Exiting Prison who Received Discretionary Sentence Credit



SOURCE: DATA RETRIEVED FROM IDOC ANNUAL REPORTS FOR SUPPLEMENTAL SENTENCE CREDIT AND EARNED DISCRETIONARY SENTENCE CREDIT. ¹²⁶

124 720 ILCS 5/2-8 (2023). “Forcible felony” means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and any other felony that involves the use or threat of physical force or violence against any person.

125 Illinois Department of Corrections, *Annual Report for Earned Discretionary Sentence Credit* (Jan 2020-Dec 2020), <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/cy20-edsc-annual-report.pdf>.

126 From 2014-2018, annual SCC totals were counted in the 12-month period between October 1 of the prior year through September 30 of the named year. For example, the annual credit total for 2014 includes credits awarded between October 1, 2013, and September 23, 2014. Annual EDSC totals are counted between January 1 through December 31 of a given year. On this chart, the count for 2019 includes SCC and EDSC credits awarded in the 15-month period between October 1, 2018, and December 31, 2019, as IDOC transitioned from SCC to EDSC. Illinois Department of Corrections, *Annual Reports for Supplemental Sentence Credit*, (2014-2018), <https://idoc.illinois.gov/reportsandstatistics/annualreportsforscc.html>; Illinois Department of Corrections, *Annual Reports for Earned Discretionary Sentence Credit* (2019-2022), <https://idoc.illinois.gov/reportsandstatistics/annual-report-for-earned-discretionary-sentence-credit.html>.

Factors Affecting the Use of Prison Release Mechanisms

Institutional Memory Impacts Actions

In 1980, Illinois authorized the first version of EDSC, Meritorious Good Time (MGT), which was considered a model for other states. Thirty years after this mechanism was created and facing a budget crisis, in 2009, IDOC used their discretion to expedite the application of these credits to reduce costs by reducing their population in custody. To achieve this, they dropped a longstanding but unwritten practice of requiring that a prisoner serve at least 60 days in IDOC custody before the discretionary credit could be applied. Four months into the “MGT Push,” the Associated Press released a story about these releases, creating a political crisis for then-Governor and former Lieutenant Governor Pat Quinn.

Governor Quinn, a Democrat, had assumed office earlier that year after Governor Rod Blagojevich, also a Democrat, was charged with corruption and subsequently impeached. Governor Quinn was facing a tough election, his first for governor, and his party was already fighting an uphill battle to maintain the office. The governor quickly distanced himself from the releases, blaming the IDOC director he had appointed just six months prior and, rather than simply requiring the department to reinstate the mandatory 60 days of incarceration before applying the credit, instead ordered IDOC to stop awarding discretionary credit altogether.¹²⁷ The IDOC Director resigned not long after.¹²⁸ No further discretionary credit was awarded until 2013, when the Illinois General Assembly passed the revised version of MGT,¹²⁹ which became EDSC in 2017 as described above.

Despite these renewed endorsements of discretionary sentence credits by the state legislature, the fallout from the 2009 early releases had an indelible impact on IDOC staff, resulting in extremely risk-averse policies and practices related to any of their discretionary release authority. The IDOC Director had been in that role for less than a year when the pandemic hit, but he had been aggressive in his pursuit to expand opportunities for people to earn programming and discretionary sentence credit or release on electronic detention to incentivize personal change and reduce recidivism. In the opinion of some government officials and advocates we spoke with, the IDOC Director would have expanded eligibility for early release if the Governor’s Office had allowed it.

The Governor made minimal use of his executive clemency power and was quiet about it when he *did*. His office requested that IDOC stop including clemencies in the numbers they were reporting as COVID-related early releases. Estimates of clemencies granted in the first few months of the pandemic ranged from 13 to 20, two of which were named plaintiffs in litigation, and Governor Pritzker’s office reported that some of the clemency petitions he granted in the first few months of the pandemic were unrelated to COVID. Despite repeated requests from advocates and some legislators for the governor to review more petitions for clemency, especially from medically-vulnerable individuals, these pleas

127 Bill Schramm, *Early Release Programs in Illinois: Justifiable or Objectionable?*, 15 *Pub. Int. L. Rep.* 104 (2010).

128 Associated Press, *Illinois prisons shave terms, secretly release inmates*, *Journal-Standard*, Dec. 13, 2009, <https://www.journalstandard.com/story/news/state/2009/12/14/illinois-prisons-shave-terms-secretly/45124282007/>; Gov. Quinn: Early release program “very big mistake,” *ABC13*, Dec. 30, 2009, <https://abc13.com/archive/7194474/>.

129 Patrick Yeagle, *Illinois starts giving prison inmates release credits*, *Illinois Times*, Feb. 28, 2013, <https://www.illinoistimes.com/springfield/illinois-starts-giving-prison-inmates-release-credits/Content?oid=11449974>.

did not outweigh the political risk, which was made all the more salient given the immediate criticism he received from Republicans and law enforcement over the few petitions he granted early on.¹³⁰

Confusion Sparks Outrage

In late April, a detailed spreadsheet listing the people who had been released from prison in March and April was posted without fanfare or explanation on a page of IDOC's website titled "Community Notification of Inmate Early Release," one of many subsections under the heading "Individuals in Custody." According to government officials and advocates, the spreadsheet was posted without full internal vetting and there was no communication plan in place. The list included the information for all people released in those months, routine and non-routine, and though the list could be easily sorted to show this distinction, because there was no clear narrative on the website explaining the information that had been posted, the media reported that the almost 4,000 people on that list were discretionarily released by IDOC. In fact, fewer than 900 of those releases were non-routine, but those were not the cases that made the news. Media and policymakers from around the state reacted in anger to IDOC's seemingly, albeit mistaken, broad use of discretionary-release authority, while IDOC and the Governor's Office scrambled to correct the record. Advocates also stepped into the fray, attempting to walk the difficult line of pushing IDOC and the governor to broaden release eligibility and educating the public as to the fact that people convicted of violent offenses routinely return to the community when they have served their mandatory sentence.¹³¹ No amount of correcting could overcome the damage this caused as government officials became even more leery in their release decision making.

Prison Population Drops

Though accounts differ as to how many people were released early using IDOC's discretionary release mechanisms, court documents state that using these tools, 644 people were released earlier than anticipated from the department's custody between March 2 and April 10, 2020. However, in most cases, these were people who were scheduled to be released within the next six months, many of whom were just weeks from their routine release date. To expedite individual reviews, IDOC created a population management task force that met daily to review individuals' records to determine if they were eligible for early release. For electronic detention, the task force focused on people 55 years or older who had served at least a fourth of their sentence and were within 12 months of their expected release date. For EDSC, it reviewed people who were within six months of their mandatory statutory release date, scored low or moderate on a static risk tool, did not have recent serious disciplinary infractions, and did not have a current or previous offense coded as violent. By the end of 2020, 2,259 people had received EDSC credit that shortened their sentence.¹³²

¹³⁰ Cole Lauterbach, *Pritzker criticized over quiet commutations, not releasing medically vulnerable*, The Center Square, April 16, 2020, https://www.thecentersquare.com/illinois/pritzker-criticized-over-quiet-commutations-not-releasing-medically-vulnerable/article_5253e0ba-801b-11ea-bd2d-1391fa60ea35.html; *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020), *First amended class action complaint*, (May 20, 2020), <https://news.wttw.com/sites/default/files/article/file-attachments/Doc%2048%20Complaint%201st%20Amended.pdf>.

¹³¹ Nexstar Media Wire, *Illinois has released almost 4,000 prisoners, including 64 murderers*, April 29, 2020, <https://www.centralillinoispride.com/news/illinois-news/illinois-has-released-almost-4000-prisoners-including-64-murderers/>; Rebecca Hughes, *Convicted murderers among 4,000 released inmates in IL*, April, 30, 2020, <https://patch.com/illinois/rockford/coronavirus-convicted-il-murderers-among-4-000-released-inmates>; Alissa Rivera, Restore Justice, *The facts about Illinois's 848 (not 4,000) COVID-19 related early prison releases*, (May 1, 2020), <https://www.restorejustice.org/the-facts-about-illinois-848-not-4000-covid-19-related-early-prison-releases/>.

¹³² Illinois Department of Corrections, *IDOC Exits March 1, 2020 to December 31, 2020*, sheet 3, <https://idoc.illinois.gov/offender/communitynotificationofinmateearlyrelease.html>.

Illinois' prison population did drop significantly as a result of the pandemic, from 38,259 at the beginning of 2019 to 29,224 at the end of that year,¹³³ but two other factors contributed to this reduction. Though IDOC had, in that timeframe, accepted the backlog of people serving time in local jails while awaiting transfer to prison, many served the entirety of their prison sentence, after good time was applied, in jail. Also, changes in front-end criminal justice system practices (e.g., arrests, charging, court hearings), cumulatively reduced new prison commitments.

Conclusion

In *Examining Prison Releases in Response to COVID*, we found that when states had the will to do so, they had mechanisms available to them to make prison releases during the pandemic.¹³⁴ Illinois is an example of how determinate sentencing states were able to use their existing legal mechanisms to grant sentence credits to shorten their prison sentence, and/or place people in the community on electronic monitoring, releasing them from prison prior to the date they would normally have released.

Despite the Democrats holding a state government trifecta, political risk, made especially salient due to past experiences with early release, led to a very cautious approach resulting in modest releases. Also, like other states, Illinois made an initial push to release, driven largely by outside pressure, which tapered off as their prison population dropped and vaccines became available.

In their initial response to COVID, IDOC streamlined the processes they used to award discretionary sentence credit and permit people to be released to home detention on electronic monitoring. They also expanded eligibility for these mechanisms. These changes were subsequently made permanent in department policy. The COVID crisis spurred internal changes that would not otherwise have occurred to the same degree or within the same time frame given the department's deep risk aversion based on their past experiences with discretionary releases. Since 2020, Illinois has expanded eligibility for sentence credit, the number of days that can be awarded, and ways to earn sentence credit.¹³⁵

133 Illinois Department of Corrections, *CY 2022 Fact Sheet*, (December 31, 2022), <https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/CY22-Fact-Sheet.pdf>.

134 See Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, & Madison Wadsworth, Robina Institute of Criminal Law and Criminal Justice, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration at 29* (2022), <https://robinainstitute.umn.edu/publications/examining-prison-releases-response-covid-lessons-learned-reducing-effects-mass>.

135 Illinois Safety, Accountability, Fairness, and Equity-Today Act, Public Act 101-0652, 101st Illinois General Assembly (2021), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf> <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>.

Legal Mechanisms for Prison Release in Illinois

Statutory, Program, and Discretionary Sentence Credits – Individuals may receive up to 50% off their sentence by complying with the rules while in custody through statutory sentence credits (aka “good time”). They may also earn up to a day of credit for each day they participate in programming while in custody and half a day of credit for each day they are engaged in self-improvement programs, volunteer work, and other work assignments. IDOC is also authorized to give discretionary sentence credit of up to 180 days on a sentence that is less than five years, or up to 365 days on a sentence of five years or longer. People with convictions for certain “truth-in-sentencing” offenses are not eligible to receive any sentence credits or are required to serve at least 60, 75, or 85% of their sentence, depending on the offense.¹³⁶

Electronic Detention – People who have been convicted of eligible offenses can be released on electronic monitoring and home confinement under strict restrictions, up to 90 days prior to their mandatory release dates for Class X and Class 1 convictions, and at any point during their sentence for Class 2, 3, and 4 convictions. People over 55 who have served at least 25% of their sentence are eligible to serve the last 12 months of their sentence on electronic detention.¹³⁷

Furlough – A temporary release from prison may be granted for a period of time not to exceed 14 days, to visit family, attend a family member’s funeral, obtain medical or mental health services if not available in a prison facility, make contacts for employment, secure a residence for post-release, or make an appearance for public education purposes.¹³⁸

Executive Clemency – The Illinois Constitution states that “The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law.”¹³⁹ The Governor has unfettered authority to modify any sentence in any way or to vacate any conviction, subject to a procedure established in statute. Petitions are filed with the Prisoner Review Board, which notifies victims, conducts hearings, and makes recommendations to the governor.¹⁴⁰

136 730 Ill. Comp. Stat. 5/3-6-3 (2022).

137 730 Ill. Comp. Stat. 5/5-8A-3(2022).

138 730 Ill. Comp. Stat. 5/3-11-1 (2022).

139 SECTION 12. GOVERNOR-PARDONS <https://www.ilga.gov/commission/lrb/con5.htm>

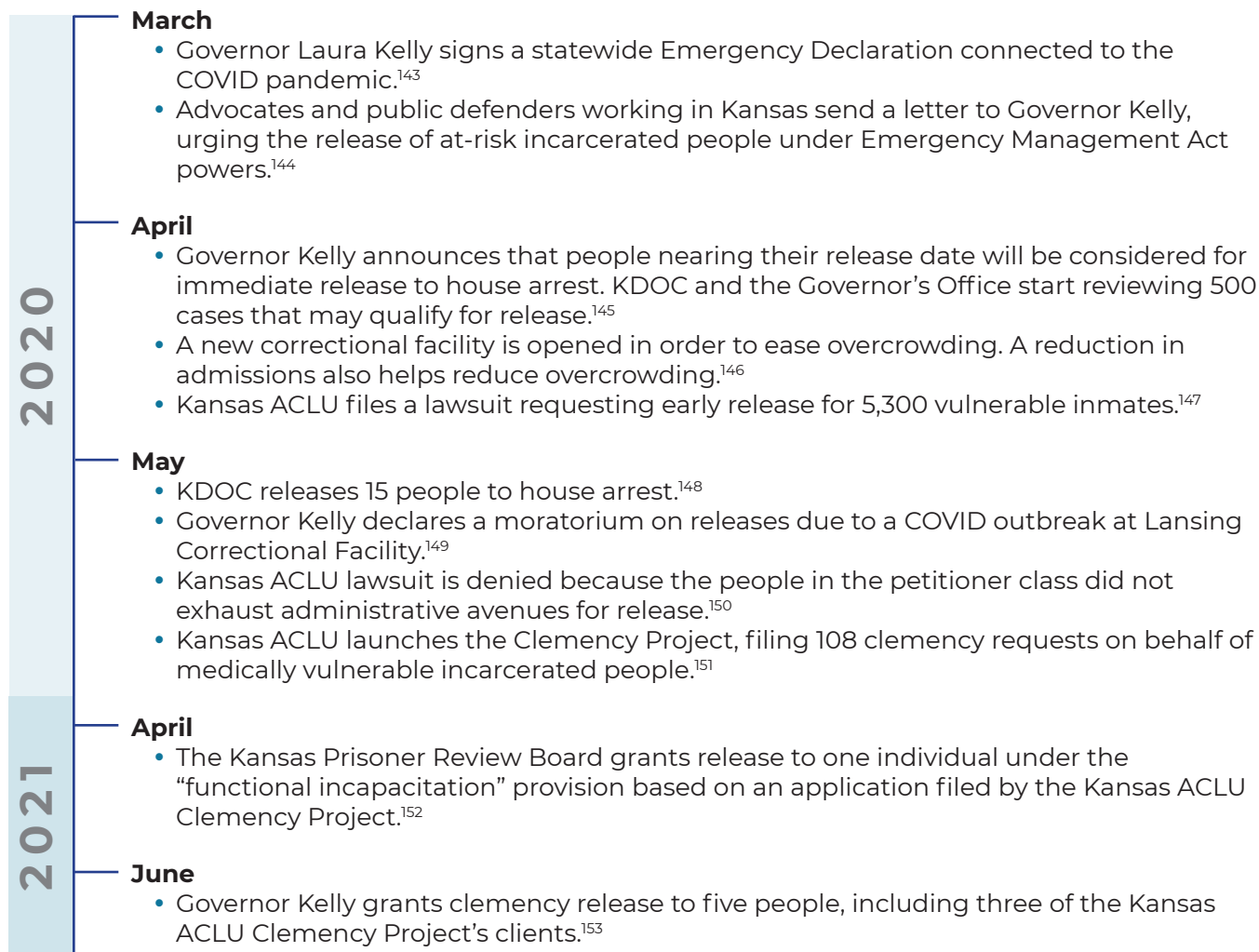
140 730 Ill. Comp. Stat. 5/3-3-13 (2022).

Kansas

Introduction

During the pandemic, Kansas was among the 34 states that made non-routine releases from prisons, although the total number of releases was relatively small. In May 2020, the Kansas Department of Corrections (KDOC) released fifteen people to house arrest.¹⁴¹ The following year, six more people were released under the functional incapacitation provision and through clemency release, although it is unclear whether COVID played a role in these releases.¹⁴² Kansas provides an example of a state that attempted non-routine releases, but, as we will examine below, did not release many people.

Timeline of Major Events



141 Kan. Dep't of Corr., *Population Report* (2020), <https://www.doc.ks.gov/publications/pop/POP%2005-08-2020.pdf/view>.

142 Luke Nozicka, *Kansas prisoner with terminal cancer is released, ACLU says*, Kan. City Star, Apr. 13, 2021, <https://www.kansascity.com/news/local/crime/article250606219.html>; Sherman Smith, *Kansas governor grants clemency to 8, embracing "political risk" in rare use of power*, Kansas Reflector, June 24, 2021, <https://kansasreflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power>.

Notes — Kansas Timeline

- 143 Exec. Order No. 20-04, State of Kansas Governor Laura Kelly, *Temporarily Prohibiting Mass Gatherings to Limit the Spread of Covid-19* (Mar. 17, 2020), <https://cms9files1.revize.com/ricecountyks/News/Governor's%20Executive%20Order-%20CoVID%2019.pdf>.
- 144 Letter from Jennifer Roth, Kan. Ass'n of Crim. Def. Lawyers, et al., to Laura Kelly, Governor, Kansas (Mar. 31, 2020), https://drive.google.com/file/d/1S126zQKRjEZJzTqRtAg2hU_Xo9HtGkCt/view.
- 145 Alice Speri, *Prison Officials in Kansas Ignored the Pandemic. Then People Started Dying*, *The Intercept*, July 2, 2020, <https://theintercept.com/2020/07/02/coronavirus-kansas-prison-lansing-correctional/>.
- 146 John Hanna & Heather Hollingsworth, *Coronavirus Outbreak Prompts Kansas to Stop Prison Releases*, *U.S. News*, May 1, 2020, <https://www.usnews.com/news/best-states/kansas/articles/2020-05-01/coronavirus-outbreak-prompts-kansas-to-stop-prison-releases>
- 147 Nomin Ujjiyediin, *Kansas Prisons Are Fighting A Lawsuit To Release Prisoners To Reduce COVID-19 Spread*, *KCUR*, Apr. 30, 2020, <https://www.kcur.org/news/2020-04-30/kansas-prisons-are-fighting-a-lawsuit-to-release-prisoners-to-reduce-covid-19-spread>.
- 148 Kan. Dep't of Corr., *Population Report* (2020), <https://www.doc.ks.gov/publications/pop/POP%2005-08-2020.pdf/view>.
- 149 John Hanna & Heather Hollingsworth, *Coronavirus Outbreak Prompts Kansas to Stop Prison Releases*, *U.S. News*, May 1, 2020, <https://www.usnews.com/news/best-states/kansas/articles/2020-05-01/coronavirus-outbreak-prompts-kansas-to-stop-prison-releases>.
- 150 ACLU Kan., *Hadley v. Zmuda* (Apr. 2020), <https://www.aclukansas.org/en/cases/hadley-et-al-v-zmuda-et-al>.
- 151 ACLU Kan., *Clemency Q&A with Sharon Brett, Legal Director*, (June 15, 2021), <https://www.aclukansas.org/en/publications/clemency-ga-sharon-brett-legal-director>; Press Release, ACLU Kan., *Gov. Kelly Releases Three ACLU Kansas Clemency Project Clients, Paving the Way for Many More Such Releases* (June 24, 2021), <https://www.aclukansas.org/en/press-releases/gov-kelly-releases-three-aclu-kansas-clemency-project-clients-paving-way-many-more>.
- 152 Luke Nozicka, *Kansas prisoner with terminal cancer is released, ACLU says*, *Kan. City Star*, Apr. 13, 2021, <https://www.kansascity.com/news/local/crime/article250606219.html>.
- 153 Sherman Smith, *Kansas governor grants clemency to 8, embracing 'political risk' in rare use of power*, *Kansas Reflector*, June 24, 2021, <https://kansasreflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power/>.

Background

In 2020, Kansas was led by Governor Kelly, a Democrat, and a Republican-majority House and Senate. While the relationship between the executive branch and the legislature was somewhat contentious due to the split party control,¹⁵⁴ Governor Kelly largely compromised with the legislature, and both sides were able to reach agreement on a COVID response bill in June of 2020.¹⁵⁵

Kansas is considered a “determinate” sentencing state, meaning that once a sentence has been imposed, the actual time that will be served is highly predictable within a small range. Most felony sentences are governed by the Kansas Sentencing Guidelines, which establish presumptive sentences based on the seriousness of the crime and the criminal history of the person being sentenced.¹⁵⁶

Individuals sentenced under the guidelines may decrease their prison sentence in two ways. Depending on the severity level of the crime of conviction, a person can earn a good-time reduction of up to 15% or 20% of their prison sentence.¹⁵⁷ Additionally, people convicted of certain low-severity crimes can earn a one-time program credit for “successful completion of requirements for a general education diploma, a technical or vocational training program, a substance abuse treatment program, or any other program designated by the secretary of corrections which has been shown to reduce offenders’ risk after release.”¹⁵⁸ While the statute allows up to 120 days of credit for program completion, a KDOC regulation caps credit at 60 days.¹⁵⁹ The time subtracted from the sentence length for good time and program completion are not added to post-release supervision unless the crime of conviction was sexually motivated or sexually violent.¹⁶⁰

Once a person has served the prison sentence pronounced at sentencing less any good time or program time, the person will transition to post-release supervision.¹⁶¹ Generally, for crimes committed after 1993, there is no parole board to satisfy to be released from prison; instead release is based on time served.¹⁶² The guidelines provide the exact length of post-release supervision based on the severity level of the crime.¹⁶³

Some felonies are not included in the sentencing guidelines. These offenses are referred to as “off-grid” crimes, and nearly all are subject to life sentences.¹⁶⁴ The crimes include capital murder, murder in the first degree, terrorism, illegal use of weapons of mass destruction, and treason.¹⁶⁵ An additional list of crimes relating to sex trafficking, sexual assault, and child pornography “become” off-grid if

154 John Hanna, *Governor’s aide: GOP plan may slow Kansas emergency response*, KSHB14, February 25, 2021, <https://www.kshb.com/news/coronavirus/governors-aide-gop-plan-may-slow-kansas-emergency-response>.

155 John Hanna and Tsubasa Field, A. Gov. Kelly says she will sign compromise COVID-19-response bill, 12 News, June 3, 2020, <https://www.kwch.com/content/news/Kansas-lawmakers-governor-working-on-new-COVID-19-measure-570986481.html>.

156 Kan. Stat. Ann. §§ 21-6801 through 21-6824 (2022).

157 Kan. Stat. Ann. § 21-6821(b)(2) (2022). The criteria for earning good-time credits are left to rulemaking by the department of corrections rather than listed in the statute. *Id.*, § 21-6821(a). Individuals can also earn up to 90 days of good time credit any time they do a “heroic act,” such as saving someone’s life in prison. Kan. Stat. Ann. § 22-3717(r) (2022).

158 Kan. Stat. Ann. § 21-6821(e)(1)(A) (2022).

159 Kan. Stat. Ann. § 21-6821(e)(1)(B) (2022) (“the amount of time which can be earned and retained by an inmate for the successful completion of programs and subtracted from any sentence is limited to not more than 120 days.”); Kan. Admin. Regs. § 44-6-127(d) (2022) (“Program credits shall not exceed 60 days on any one eligible controlling sentence, regardless of the number of programs completed”).

160 Kan. Stat. Ann. § 21-6821(c) (good time credit) and (e)(2) (program credit) (2022).

161 Kan. Stat. Ann. § 22-3717(d) (2022).

162 Kan. Stat. Ann. §§ 21-6802(c); 22-3717(d)(1) (2022).

163 Kan. Stat. Ann. § 22-3717(d)(1) (2022).

164 Kan. Stat. Ann. § 21-6806 (2022).

165 Kan. Stat. Ann. § 21-6806(c) (2022). Felony driving under the influence is also an off-grid crime, but is subject to different sentencing provisions. Kan. Stat. Ann. § 8-1567(b)(1)(D) (2022).

the perpetrator is an adult and the victim is under 14.¹⁶⁶ People sentenced to life with the possibility of parole for an off-grid crime may be reviewed for release to parole by the Kansas Prisoner Review Board.¹⁶⁷ All off-grid crimes carry minimum terms ranging from 15 to 50 years that must be served before the person is eligible for parole consideration.¹⁶⁸ People convicted of “off-grid” crimes may not earn any time reductions through good time or program completion.¹⁶⁹

How Events Unfolded During the Pandemic

Like many other states, Kansas also witnessed a demand for pandemic-related prison releases initiated by advocates. On March 31, 2020, public defenders and advocates operating in Kansas drafted a letter to Governor Kelly, urging the release of incarcerated people who had less than six months remaining on their sentence, those who were medically vulnerable, and those who had returned due to technical violations of supervision.¹⁷⁰ They also recommended additional measures to manage local jail populations and improve safety protocols to safeguard the health of people in prison. Advocates highlighted that three out of nine KDOC correctional facilities were currently over capacity, making it difficult or impossible to ensure adequate social distancing. The letter urged the Governor’s Office to “take additional decisive action under the authority of the Emergency Management Act and [the] March 12, 2020 Emergency Declaration.”¹⁷¹

The letter sent to the governor referred to Kansas Statutes Annotated-925(c)(5), which is a provision of the Emergency Management Act that authorizes the governor to “direct and compel the evacuation of all or part of the population from any area of the state stricken or threatened by a disaster, if the governor deems this action necessary for the preservation of life or other disaster mitigation, response or recovery.”¹⁷² Additionally, the Act enables the governor to (c)(10) “require and direct the cooperation and assistance of state and local governmental agencies and officials,”¹⁷³ and (c)(11) “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”¹⁷⁴ Despite having this power, Governor Kelly did not use it to release people from prison, and we were unable to obtain a comment from the Governor’s Office on why they chose not to exercise this option.

¹⁶⁶ Kan. Stat. Ann. § 21-6806(d) (2022).

¹⁶⁷ See Kan. Stat. Ann. § 22-3717 (2022).

¹⁶⁸ Sex crimes involving a victim under the age of 14 require a service of 25 years or 40 years before parole eligibility. Kan. Stat. Ann. § 21-6627(a)(1), (b)(1) (2022). Capital murder and murder in the first degree also requires services of 25 years before parole eligibility. Kan. Stat. Ann. § 22-3717(b)(2) (2022). Some cases of premeditated murder in the first degree require services of 40 and 50 years before parole eligibility. See Kan. Stat. Ann. § 21-6620 (2022). Felony DUI is treated separately, and sentencing is set by its defining statute. Kan. Stat. Ann. § 8-1567(b)(1)(D) (2022). The remainder of the off-grid crimes are considered Class A felonies and require that a person serve 15 years (if convicted prior to 1999) or 20 years (if convicted after 1999) before parole eligibility. Kan. Stat. Ann. § 22-3317(b)(4) (2022); Kan. Admin. Regs. § 44-6-114c(d)(1) (2022).

¹⁶⁹ Kan. Stat. Ann. § 22-3717(b) (2022); Kan. Admin. Regs. § 44-6-114e(a)-(c) (2022).

¹⁷⁰ Letter from Jennifer Roth, Kan. Ass’n of Crim. Def. Lawyers, et al., to Laura Kelly, Governor, Kansas (Mar. 31, 2020), https://drive.google.com/file/d/1S126zQKRjEZJzTqRtAg2hU_Xo9HtGkCt/view.

¹⁷¹ *Id.*

¹⁷² Kan. Stat. Ann. § 925(c)(5)

¹⁷³ Kan. Stat. Ann. § 925(c)(10)

¹⁷⁴ Kan. Stat. Ann. § 925(c)(11)

Some People are Released to House Arrest

In April 2020, Governor Kelly and KDOC announced that they had started reviewing inmates for early release to house arrest.¹⁷⁵ The house-arrest program, introduced in 2016, empowers the secretary of corrections to transfer inmates to house arrest in order to “promote offender management, transitional and release planning, and risk reduction.”¹⁷⁶ According to government officials, it had previously never been used. The house-arrest program outlines numerous criteria for eligibility, including people in minimum custody who have less than four months left on their sentence, and excludes those serving time for violent or sex offenses, people with recent prison infractions, or anyone scoring moderate or above on a risk-assessment instrument (among other specific requirements).¹⁷⁷ Most important, perhaps, is that people who do qualify must have an approved home plan. During the pandemic, home plans were particularly scrutinized and excluded people moving into any type of congregate setting. Despite these limitations, KDOC and the Governor’s Office were hopeful that this tool could be used to quickly reduce the prison population. In an interview with a local television news station, Governor Kelly mentioned that after the review, “hopefully we’ll be able to move quite a few of those folks back into their communities.”¹⁷⁸

However, the number of releases resulting from the review process turned out to be minimal. Out of 500 cases reviewed, only 15 people were eligible to serve the remainder of their sentence under house arrest.¹⁷⁹ According to government officials, all those released were already within five weeks of their original release date. In early May, the Governor announced a temporary halt on prison releases due to a severe COVID outbreak at the Lansing Correctional Facility.¹⁸⁰ Although she indicated that future releases would occur on a “rolling basis,” no additional people were released to house arrest after the first week of May.¹⁸¹

ACLU of Kansas Lawsuit and Clemency Release Project

On April 9, 2020, the ACLU of Kansas filed a class action lawsuit against the KDOC due to what they deemed as unconstitutional overcrowding in the face of COVID.¹⁸² They requested the release of people convicted of minor crimes, those with less than 18 months remaining on their sentences, and medically vulnerable individuals due to age or medical conditions. At the time, the prison population in Kansas was nearly 10,000,¹⁸³ and under this criterion, over 5,300 people would qualify for release.

175 John Hanna & Heather Hollingsworth, *Coronavirus Outbreak Prompts Kansas to Stop Prison Releases*, U.S. News, May 1, 2020, <https://www.usnews.com/news/best-states/kansas/articles/2020-05-01/coronavirus-outbreak-prompts-kansas-to-stop-prison-releases>; Alice Speri, *Prison Officials in Kansas Ignored the Pandemic. Then People Started Dying*, The Intercept, July 2, 2020, <https://theintercept.com/2020/07/02/coronavirus-kansas-prison-lansing-correctional/>.

176 Kan. Stat. Ann. § 21-6609 (2022).

177 Kan. Stat. Ann. § 22-3728 (2022).

178 Melissa Greenstein, *Gov. Kelly: Kansas will review inmates for possible release*, KSHB, Apr. 7, 2020, <https://www.kshb.com/news/coronavirus/gov-kelly-kansas-will-review-inmates-for-possible-release>.

179 Kan. Dep’t of Corr., *Population Report* (2020), <https://www.doc.ks.gov/publications/pop/POP%2005-08-2020.pdf/view>.

180 John Hanna & Heather Hollingsworth, *Coronavirus Outbreak Prompts Kansas to Stop Prison Releases*, U.S. News, May 1, 2020, <https://www.usnews.com/news/best-states/kansas/articles/2020-05-01/coronavirus-outbreak-prompts-kansas-to-stop-prison-releases>.

181 Associated Press, *Kansas Still Mulling Inmate Releases Despite Prison Outbreak*, KMUW, May 7, 2020, <https://www.kmuw.org/crime-and-courts/2020-05-07/kansas-still-mulling-inmate-releases-despite-prison-outbreak>.

182 Nomin Ujijediin, *Kansas Prisons Are Fighting A Lawsuit To Release Prisoners To Reduce COVID-19 Spread*, KCUR, Apr. 30, 2020, <https://www.kcur.org/news/2020-04-30/kansas-prisons-are-fighting-a-lawsuit-to-release>.

183 Kan. Legis. Rsch. Dep’t., *Briefing Book 2021: Kansas Prison Population, Capacity, and Related Facility Issues* (2021), <https://klrd.org/publications/briefing-book-2021/kansas-prison-population-capacity-and-related-facility-issues/#:~:text=However%2C%20the%20double%20bunking%20did,162%20inmates%20and%209.4%20percent>.

KDOC argued that such a large release would be impractical and dangerous, potentially resulting in the release of people convicted of violent crimes.¹⁸⁴

On May 8, 2020, the Leavenworth County District Court ruled that the plaintiffs failed to exhaust administrative remedies before pursuing a claim for relief in court and failed to show that pandemic conditions in Kansas prisons violated constitutional standards to the extent that they required depopulation.¹⁸⁵ Following the dismissal of their case, Kansas ACLU launched The Clemency Project, submitting over 108 clemency petitions and several “functional incapacitation” requests for the release of medically vulnerable people.¹⁸⁶ The project prioritized people with complex medical needs and those at extraordinary risk from COVID due to continued incarceration.

Clemency petitions can be based on various factors, but generally center on rehabilitation efforts and the strength of a person’s release plan. After review by a three-person panel appointed by the corrections secretary, called the Kansas Prisoner Review Board, recommendations for release are sent to the Department of Administration and then to the Governor’s Office. However, functional-incapacitation release criteria are much narrower, allowing for early release when an illness permanently causes physical or mental incapacitation to the extent that a person is no longer able to cause physical harm.¹⁸⁷ The Prisoner Review Board makes recommendations for release in such cases. According to the ACLU, both mechanisms are rarely successful, with functional incapacitation requests almost never resulting in a release and only 10% of clemency petitions resulting in a recommendation for release (prior to the pandemic). Even if a recommendation for release is made, the Governor is not required to act on it, and historically, this power has been used only a few times.

Despite these statistics, the Kansas ACLU’s Clemency Project efforts resulted in several releases the following year. In April 2021, the Prisoner Review Board approved one release under the functional-incapacitation provision.¹⁸⁸ Unfortunately, the person passed away several months later. In June 2021, Governor Kelly granted clemency to five people, three of whom were clients of the ACLU’s Clemency Project.¹⁸⁹ The Governor’s website does not cite COVID as a reason for the releases, but it does state that the people fit the following criteria: “[serving a sentence for] a non-violent drug crime, demonstration of rehabilitation, minimal disciplinary issues, and strong indicators of success upon release.”¹⁹⁰ Therefore, while the clemency petitions were filed in response to the pandemic, it is unclear whether that was a consideration for release.

184 Nomin Ujijediin, *Kansas Prisons Are Fighting A Lawsuit To Release Prisoners To Reduce COVID-19 Spread*, KCUR, Apr. 30, 2020, <https://www.kcur.org/news/2020-04-30/kansas-prisons-are-fighting-a-lawsuit-to-release>.

185 ACLU Kan., *Hadley et al. v. Zmuda et al.* (Apr. 2020), <https://www.aclukansas.org/en/cases/hadley-et-al-v-zmuda-et-al>.

186 ACLU Kan., *Clemency Q&A with Sharon Brett, Legal Director* (June 15, 2021), <https://www.aclukansas.org/en/publications/clemency-qa-sharon-brett-legal-director>; Press Release, ACLU Kan., *Gov. Kelly Releases Three ACLU of Kansas Clemency Project Clients, Paving the Way for Many More Such Releases* (June 24, 2021), <https://www.aclukansas.org/en/press-releases/gov-kelly-releases-three-aclu-kansas-clemency-project-clients-paving-way-many-more>.

187 Kan. Stat. Ann. § 22-3728 (2022).

188 Luke Nozicka, *Kansas prisoner with terminal cancer is released, ACLU says*, Kan. City Star, Apr. 13, 2021, <https://www.kansascity.com/news/local/crime/article250606219.html>.

189 Sherman Smith, *Kansas governor grants clemency to 8, embracing “political risk” in rare use of power*, Kansas Reflector, June 24, 2021, <https://kansasreflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power/>.

190 *Id.*

Factors Affecting the Use of Prison Release Mechanisms

The Governor supported early release at the beginning of the pandemic, but the narrow release criteria and scrutiny of home plans likely limited the pool of eligible people for release to house arrest. Other early-release mechanisms available to the KDOC, such as Early Release or Community Parenting Release, are also limited to a small pool of people, so house arrest may have been the most viable option. It's possible that the governor could have made use of the powers afforded to her under the Emergency Management Act. However, these powers do not directly reference early prison release and thus may have been vulnerable to legal challenge. Despite these limitations, the efforts of the Kansas ACLU Clemency Project did result in some releases, including one person released under the functional-incapacitation provision and five granted clemency by the Governor.

While the Governor did announce a moratorium on prison releases in early May, all official comments indicated that the moratorium was temporary in order to address a breakout of COVID at one institution and that prison releases were likely to continue throughout the year.¹⁹¹ However, no more people were released to house arrest after the initial 15. While the reason for this was not entirely clear, it is likely that the reduction in the Kansas correctional population due to decreased admissions made early release less urgent. At the beginning of April, when Governor Kelly and KDOC began reviewing cases for release, the prison population was about 9,800 and three correctional facilities were over capacity.¹⁹² By the end of the first week of May, when the releases occurred, the population had already dropped by approximately 300 people.¹⁹³ The reduction in the prison population due to decreased admissions dwarfed any efforts made by officials to use early release.

Contextually, it is important to note that Governor Kelly is a Democrat in Kansas, a state where the legislature is led by Republicans. Throughout the pandemic, she faced opposition and criticism for her COVID-related decisions, including her choice to prioritize vaccine distribution in prisons.¹⁹⁴ According to government officials, the Republican-controlled legislature, Attorney General, some prosecutors, and law enforcement personnel were all against early prison releases. Both advocates and government officials agreed that Kansas politics were generally opposed to any form of early release. As a result, it is likely that the Governor's initial support for early prison releases weakened in the face of mounting criticism and an ongoing crisis with numerous competing priorities. Additionally, the strict criteria for house arrest and a declining prison population both contributed to Kansas releasing only a small number of individuals.

Conclusion

Kansas made some effort to release people from prison during the pandemic, but the resulting number was small. All people released to house arrest—15 in a prison system of 10,000—had 5 months or less left on their sentence, indicating that the releases did not significantly reduce the prison

¹⁹¹ John Hanna & Heather Hollingsworth, *Coronavirus Outbreak Prompts Kansas to Stop Prison Releases*, U.S. News, May 1, 2020, <https://www.usnews.com/news/best-states/kansas/articles/2020-05-01/coronavirus-outbreak-prompts-kansas-to-stop-prison-releases>; Alice Speri, *Prison Officials in Kansas Ignored the Pandemic. Then People Started Dying*, The Intercept, July 2, 2020, <https://theintercept.com/2020/07/02/coronavirus-kansas-prison-lansing-correctional/>.

¹⁹² Letter from Jennifer Roth, Kan. Ass'n of Crim. Def. Lawyers, et al., to Laura Kelly, Governor, Kansas (Mar. 31, 2020), https://drive.google.com/file/d/1S126zQKRjEZJzTqRtAg2hU_Xo9HtGkCt/view.

¹⁹³ Kan. Dep't of Corr., *Population Report* (2020), <https://www.doc.ks.gov/publications/pop/POP%2005-08-2020.pdf/view>.

¹⁹⁴ John Hanna, *Kansas working through details of who gets vaccinated when*, AP News, Dec. 24, 2020, <https://apnews.com/article/prisons-kansas-el-dorado-coronavirus-pandemic-winfield-db07379397a2eec24acf7588a95344c4>.

population or address social-distancing concerns. While most states released less than 10% of their prison populations, Kansas' release numbers were particularly small in comparison to other states that made a release.¹⁹⁵ Given its small release numbers, Kansas functioned more like a non-release state during the pandemic.

195 Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, Robina Institute of Criminal Law and Criminal Justice, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration*. Robina Institute of Criminal Law and Criminal Justice (2022), <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-07/Examining%20Prison%20Releases%20in%20Response%20to%20COVID%20-%20July%202022.pdf>.

Legal Mechanisms for Prison Release in Kansas

Clemency – The Governor, after advisement from the Prisoner Review Board, has the power to grant pardons and commute sentences. A pardon is considered a release from punishment for a conviction (i.e., early release), but it does not erase the conviction itself. A commutation is a time reduction from a sentence.¹⁹⁶

Functional Incapacitation Release – This is one of the two measures of compassionate release, whereby the Prison Review Board is authorized to release incarcerated individuals based on severe medical conditions.¹⁹⁷ “Functionally incapacitated” refers to individuals who from “injury, disease, or illness” are permanently “physically or mentally incapacitated to the extent that” they “lacks effective capacity to cause physical harm.”¹⁹⁸ This type of release is conditional and may be revoked.¹⁹⁹

Terminal Medical Release – The second type of compassionate release, still controlled by the Prisoner Review Board, is for those suffering from terminal medical conditions that are likely to cause death within 30 days. The person must not pose a “future risk to public safety.” Again, this release is conditional, and it may be revoked if the person’s condition improves.²⁰⁰

House Arrest – A person may be released from incarceration within 120 days of their scheduled release and serve out the remainder of their sentence under house arrest if they can satisfy a host of eligibility criteria. House arrest generally involves being restricted to a non-institutional residence, sometimes in addition to electronic monitoring. People on house arrest are supervised by a parole officer and are subject to various conditions.²⁰¹

Early Release – The Secretary of Corrections can release individuals from prison early when they have 20 days or less remaining on their sentence.²⁰²

Community Parenting Release – The Secretary of Corrections may give early release to parents who had physical custody of a minor child prior to entering prison, so long as the parent had not been convicted of certain crimes. The last 12 months of their sentence may be served under home confinement, which operates as parole.²⁰³

Parole Release – Available to some “off-grid” crimes²⁰⁴ and people who committed a crime prior to 1993,²⁰⁵ parole is a release from prison to post-prison supervision following a hearing and decision to grant parole by the Prisoner Review Board.

196 Kan. Stat. Ann. § 22-3701 (2022).

197 Neither form of compassionate release is available to people sentenced for “off-grid” crimes. Kan. Stat. §§ 22-3728(d), (e) (2022); Kan. Stat. Ann. § 22-3729(d) (2022).

198 Kan. Admin. Regs. § 45-700-1(b) (2022).

199 Kan. Stat. Ann. § 22-3728 (2022).

200 Kan. Stat. Ann. § 22-3729 (2022).

201 KDOC, Internal Management Policy & Procedure 11-126A, *Decision Making: House Arrest Program* (eff. Mar. 28, 2022), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-11/11-126a-house-arrest-program-eff-3-28-22.pdf/view>.

202 Kan. Stat. Ann. § 75-5220(f) (2022).

203 Kan. Stat. Ann. § 22-3730 (2022).

204 Kan. Stat. Ann. §§ 21-6806(c), (d) (2022).

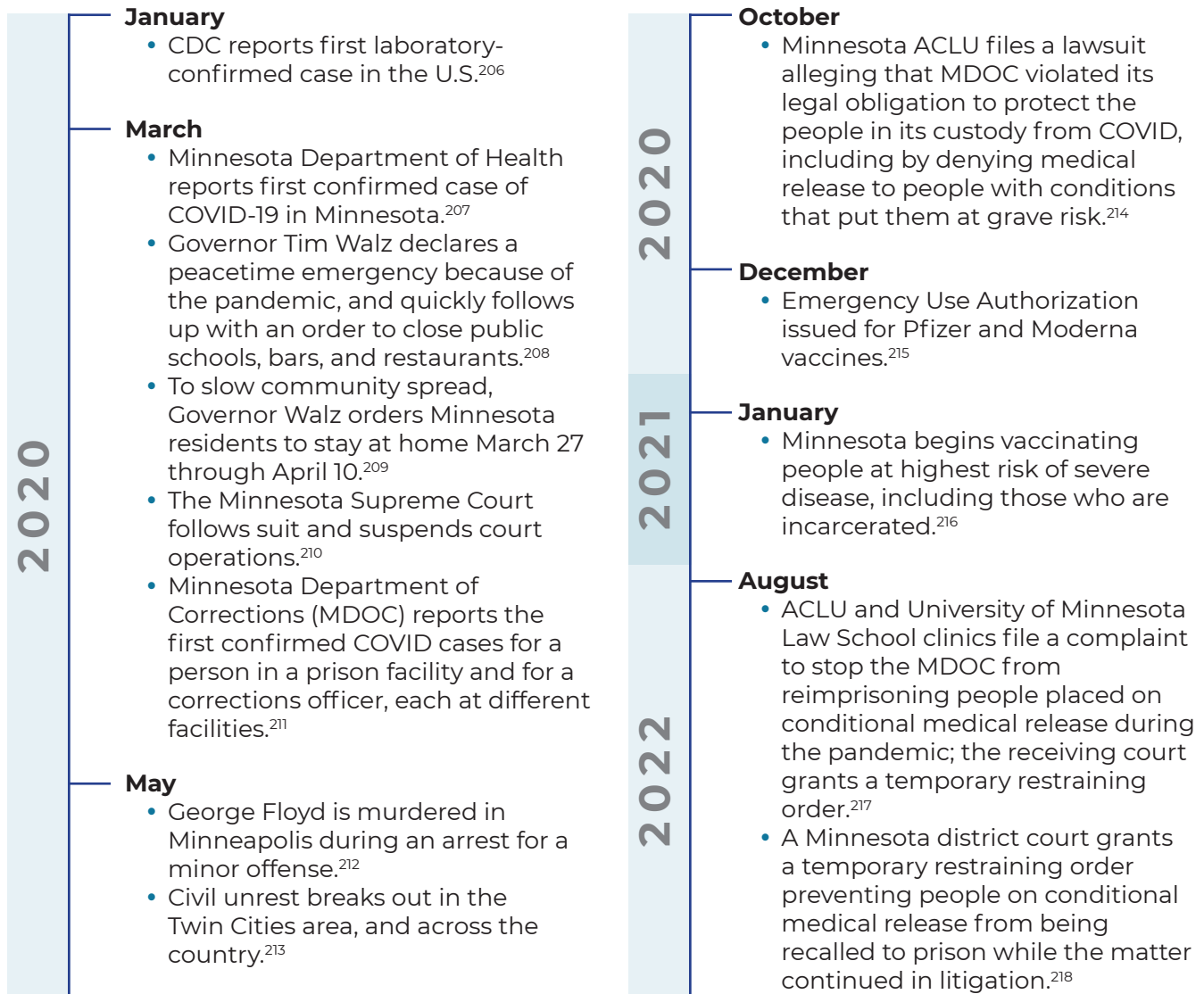
205 See Kan. Stat. Ann. § 22-3717 (2022); Kan. Stat. Ann. § 21-6802(c) (2022).

Minnesota

Introduction

Minnesota was one of 34 states that made releases from prison during the pandemic. Minnesota is an interesting case study because sentencing in the state is highly determinate, meaning that the length of time a person will serve in prison is highly predictable based on the sentence pronounced in court. There are very few back-end discretionary levers to facilitate releases from prison. But as this case study shows, more discretion was available than was widely understood, but politics greatly affected the use of that discretion.

Timeline of Major Events



Notes — Minnesota Timeline

- 206 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.
- 207 Press Release, Minnesota Department of Health, *Health Officials Confirm First Case of Novel Coronavirus in Minnesota* (March 6, 2020), <https://www.health.state.mn.us/news/pressrel/2020/covid19030620.html#:~:text=The%20Minnesota%20Department%20of%20Health,a%20known%20COVID%2D19%20case>.
- 208 Executive Order 20-01, State of Minnesota Executive Department, *Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (March 13, 2020), https://mn.gov/governor/assets/EO%2020-01_tcm1055-422957.pdf; Executive Order 20-02, State of Minnesota Executive Department, *Authorizing and Directing the Commissioner of Education to Temporarily Close Schools to Plan for a Safe Educational Environment* (March 15, 2020), https://mn.gov/governor/assets/EO%2020-02%20Final_tcm1055-423084.pdf; Executive Order 20-04, State of Minnesota Executive Department, *Providing for Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation* (March 16, 2020), https://mn.gov/governor/assets/2020_03_16_EO_20_04_Bars_Restaurants_tcm1055-423380.pdf.
- 209 Executive Order 20-20, State of Minnesota Executive Department, *Directing Minnesotans to Stay at Home* (March 25, 2020), https://mn.gov/governor/assets/3a.%20EO%2020-20%20FINAL%20SIGNED%20Filed_tcm1055-425020.pdf.
- 210 Administrative Order ADM20-8001, Minnesota Supreme Court, *Continuing Operations of the Court of the State of Minnesota Under Statewide Peacetime Declaration of Emergency* (March 20, 2020).
- 211 Liz Sawyer, *Minnesota Correctional Facilities See First Coronavirus Cases*, Star Tribune, March 30, 2020, <https://www.startribune.com/minnesota-correctional-facilities-see-first-coronavirus-cases/569228712/>.
- 212 Anna Boone, *One Week in Minneapolis*, Star Tribune, June 3, 2020, <https://www.startribune.com/george-floyd-death-ignited-protests-far-beyond-minneapolis-police-minnesota/569930771/>.
- 213 *Id.*
- 214 Press Release, ACLU Minnesota, *ACLU-MN Files Lawsuit to Protect People in Minnesota Prisons from COVID-19* (Oct. 22, 2020), <https://www.aclu-mn.org/en/press-releases/aclu-mn-files-lawsuit-protect-people-minnesota-prisons-covid-19>.
- 215 Centers for Disease Control, *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.
- 216 Liz Sawyer, *For Some Minnesota Prisoners, Vaccines a Turning Point in Grueling Fight with COVID-19*, Star Tribune, Jan 5, 2021, <https://www.startribune.com/for-some-minnesota-prisoners-vaccine-a-turning-point-in-grueling-fight-with-covid-19/600006785/>.
- 217 Press Release, ACLU Minnesota, *ACLU-MN and Legal Clinics Sue to Stop MNDoc From Reincarcerating People at High COVID-19 Risk* (Aug. 9, 2022), <https://www.aclu-mn.org/en/press-releases/mndoc-lawsuit-covid>.
- 218 *Id.*

Background

As 2020 began, Minnesota was one of the few states in the country with a divided government in that Minnesota had a Democratic governor and a Democratic majority in the House, but Republican leadership in the Senate. This division made some aspects of governing contentious. For example, the divided government struggled to reach agreement on the two-year budget during the 2019 legislative session,²¹⁹ and had to return for a one-day special session to get that work done.²²⁰ This uneasy relationship served as the backdrop for all of the actions that would be taken to respond to the looming threat of the pandemic.

Minnesota is a determinate sentencing state, meaning that the amount of time a person will serve in prison is highly predictable at the time of sentencing. Sentencing for felony offenses is governed by the Minnesota Sentencing Guidelines, which are based on a grid structure. The vertical axis of the guidelines grid represents the severity of the offense for which the person was convicted. The horizontal axis represents a measure of the person's criminal history, which is a composite score derived from the number and weight of prior felony, gross misdemeanor, and misdemeanor convictions, prior juvenile adjudications, and whether the person committed the offense while serving a prior sentence.²²¹ The presumptive guidelines sentence is found in the cell where the individual's criminal history score and the severity level of the offense intersect. Each cell indicates whether the sentence type should be prison or probation, and if prison, the recommended length of the prison term.

If a person is sentenced to prison, state law provides that a person must serve two-thirds of the sentence in prison and one-third of the sentence on supervised release.²²² The prison time can be extended for disciplinary reasons while serving that portion of the sentence. Otherwise, once a person reaches the two-thirds mark, release to community supervision is automatic.

How Events Unfolded During the Pandemic

At the start of the pandemic, the MDOC's first instinct was to try to contain and prevent the spread of COVID throughout its facilities. Some facilities were bunk-style while others had cells with traditional open bars for doors, and figuring out a way to stop the spread in these facilities was of particular concern. Though MDOC had developed a pandemic plan when H1N1 (bird flu) was a threat, they quickly realized the plan was not adequate to address the situation. However, the plan did require MDOC to coordinate with the Department of Health, which assigned a team of epidemiologists to help them work through issues as the pandemic progressed. Some of the practical steps MDOC took to minimize spread were to close its facilities to visitors, eliminate group meal service, and rearrange the population to minimize interaction between units. For example, all people who needed to go to a particular class or service were grouped in the same unit rather than being spread across multiple units.

There appeared to be several concerns that prompted thinking about prison release as an option. First, MDOC kept an eye on the progress of the disease in other states. As it became apparent that prisons were a congregate setting that made people vulnerable to disease, several states began to

219 Peter Callaghan, *Special Session Looms as Budget Impasse Continues at the Legislature*, MinnPost, May 18, 2019, <https://www.minnpost.com/state-government/2019/05/special-session-looms-as-budget-impasse-continues-at-the-legislature/>.

220 Peter Callaghan, *Special Session Adjourns After Minnesota Legislature Passes \$48.3 Billion Budget*, MinnPost, May 25, 2019, <https://www.minnpost.com/state-government/2019/05/special-session-adjourns-after-minnesota-legislature-passes-48-3-billion-budget/>.

221 Minn. Sent. Guidelines § 2.B.

222 Minn. Stat. §§ 244.01, subd. 8; 244.05, subd. 1b (2022).

think about ways to release people from prison to reduce the population and mitigate the risk for those who remained. Second, though the prison population was falling during the pandemic, it was not falling fast enough to address the dangers presented by some of the prison infrastructure, such as double bunking and open cells. Early in the pandemic, the courts had suspended operations,²²³ and this had stopped the inflow of people to prison. Government officials stated that at the time, an average of 500 to 600 people would enter and exit Minnesota prisons each month. Thus, when the courts shut down, the reduced inflow along with the regular outflow of 500 to 600 people leaving prison each month helped to reduce the population somewhat, but not sufficiently. And third, MDOC was concerned they would not be able to provide adequate healthcare if many people became sick with COVID. They were also concerned that if multiple people had significant hospital stays, that would be very costly. Thus, moving people who might be vulnerable to COVID out of the prisons would militate both concerns.

Because Minnesota is a determinate sentencing state where sentence length is fixed, there were few additional mechanisms for release in state law. The two primary mechanisms available to government officials were conditional medical release and work release. MDOC reviewed the laws and policies related to these two mechanisms to determine if they had any room to use the mechanisms in a more expansive way than they were being used at the time. A third option was to limit revocations for people on post-prison supervised release.

Conditional Medical Release

Minnesota law provides that “the commissioner [of corrections] may order that any offender be placed on conditional medical release before the offender's scheduled supervised release date or target release date if the offender suffers from a grave illness or medical condition and the release poses no threat to the public.”²²⁴ Prior to the pandemic, the authority to release a person on conditional medical release had been used only sparingly. The term “grave illness” had been interpreted narrowly, applying primarily to cases where the person suffered from a terminal illness or needed complex medical care beyond that which could be provided in a prison facility. Thus, one option was to reconsider that definition.

MDOC determined that it could develop a COVID-specific form of conditional medical release, applicable to people who had diagnoses that could make them gravely ill if they were to get COVID.²²⁵ Ordinarily, MDOC's medical staff would identify people for conditional medical release. But because there was concern that MDOC did not have enough medical staff to both screen people for eligibility and handle the increased medical care due to COVID, the MDOC chose to turn the process around by having people in prison self-identify as being medically vulnerable and submit applications for conditional medical release. This method would help to narrow the field for review and also give people the ability to advocate for themselves. Advocates from Minnesota law schools helped in this effort by developing an application form, staffing a hotline to answer questions about the process, and helping people in prison complete the application. MDOC allowed people in prison to make calls to the hotline at no charge.

223 Administrative Order ADM20-8001, Minnesota Supreme Court, *Continuing Operations of the Court of the State of Minnesota Under Statewide Peacetime Declaration of Emergency* (March 20, 2020).

224 Minn. Stat. § 244.05, subd. 8 (2022).

225 MDOC Policy 203.200.

Each application required two reviews: medical, and public safety and housing. The medical review was based on CDC guidelines for vulnerability to COVID. Government officials and advocates both noted that the medical review was one bottleneck in the process. Initially, because MDOC just had one physician—the medical director—serving the agency, MDOC wanted to create a panel of physicians to assist with the medical determination for release. However, MDOC encountered legal hurdles in bringing in contract physicians to assist with the role. Essentially, there was no way to protect MDOC from the potential legal liability flowing from decisions made by outside physicians, so they had to drop that idea, and the medical director became the sole reviewer for the medical determination in all cases.

The conditional-medical-release statute requires that a person released in this manner “poses no threat to the public,”²²⁶ so it was critical to have a robust public safety review in place. Unlike the work release process, which excluded people convicted of person offenses, there were no exclusion criteria based on type of offense, except that people who were sentenced to life without parole were not considered for release. When somebody was declared eligible from the medical perspective, four units looked at the application for the public-safety and housing review and if the person got two yesses, the application would move on to the Commissioner of Corrections for a final decision. The MDOC Office of Special Investigation looked at disciplinary issues while in prison; the Hearings and Release Unit looked at the timing of the person’s confinement-release date and how the person had done on supervision in the past; the Risk Assessment and Community Notification Unit reviewed the person’s risk to reoffend (and what factors contributed to the person’s score) and whether there were victims that would need to be notified; and Reentry Services verified whether the person had a safe and stable place to go upon release.

Housing was one of the more challenging aspects of release planning. Applicants were asked to self-identify where they would live and how they would do on supervised release, and that information was helpful, but did not always pan out during the review. It became apparent that some people lacked the social support needed to be successful for early release. Additionally, though MDOC often relied on halfway houses for transitional housing, there were fewer spaces available because halfway houses also needed to keep their populations down to reduce risk. It was easier to release people when they had their own apartment or home to go to, but MDOC was cognizant that they might inadvertently be discriminating against people with fewer means, so they watched that closely. They also monitored the demographics of denials to ensure they weren’t creating disparate racial impact.

A second area government officials and advocates identified as a bottleneck was the final release decision. The MDOC Commissioner chose to personally make the final decision for every case that made it through the other stages of review. Advocates perceived that this made the process less transparent and thought the MDOC should have included neutral outside voices in the process. Some government officials also thought a committee structure for release might have been more efficient and taken some of the pressure off the commissioner; however, they understood the commissioner’s desire to take on that responsibility, especially given that most cases were not clear-cut. Advocates thought that outsiders participating in the release decision would be freer to make decisions without fear of repercussions for their jobs. In contrast, government officials noted that because the commissioner took public safety and public perception so seriously, the Governor’s Office was very comfortable with MDOC’s actions.

226 Minn. Stat. § 244.05, subd. 8 (2022).

Data posted on MDOC's website reveal that of 2,292 applications for conditional medical release, only 165 were approved and 158 people were released. Most applications—1,314—were denied on medical grounds, while 635 were denied on public-safety grounds. Other reasons included that the person did not have a housing placement or was serving life without parole. Five of those who were approved were not released because they were involved in a disciplinary incident following approval.²²⁷

Advocates had mixed reviews about the conditional medical release process. MDOC had provided unprecedented access to information by holding weekly calls and inviting the advocates in to assist with the application process. At the same time, advocates felt there was a lack of transparency. The criteria for release seemed to be a moving target. The medical criteria shifted, and this is understandable given that the medical profession was learning about vulnerabilities to severe disease from COVID in real time. But it seemed to advocates that other criteria should be less dynamic. For example, at first advocates were told no one would be excluded from consideration; then people serving life sentences were excluded. At first, they were told releases to other states would be possible; then they were told such releases were not possible. Moreover, there was no information provided when a person was denied release and no appeal process for that decision. Advocates were never sure if the denials were based on legitimate concerns, or if the applications they helped people put together were missing key information they could have provided.

Work Release

Minnesota law also allows for a work release program, stating that MDOC may conditionally release people “to work at paid employment, seek employment, or participate in a vocational training or educational program.”²²⁸ The statute does not include specific criteria for work release, so MDOC used their authority under the statute to create a special COVID work release program for people convicted of nonviolent offenses who had served at least half of their sentence, were low or medium risk to reoffend, and were within three months of release.²²⁹ The individuals targeted for this type of release were different from the normal work release population in that they might not have had a long enough sentence to ordinarily be considered for work release, they may have needed to be released to areas of the state where there were no work release contracts in place, or they may have had some disciplinary violations in their past that would have ordinarily disqualified them. MDOC was willing to lift some of those restrictions and look more broadly, because they were looking to release people only a short time before their usual release date. In other words, these were people who were going to be released anyway.

The COVID work release program presented some unique challenges. First, some prosecutors objected to this practice. MDOC tried to assuage them by providing notice when people were being released to their county. Second, supervision was more challenging. Supervision officers struggled to supervise people who were released to counties where they did not ordinarily provide supervision. MDOC staff who usually provided job training were instead providing remote supervision, and lacked knowledge about what resources were available in all areas of the state. Their responsibility for supervision was relatively short, however, because people would transition to regular supervised release after the work release period was over.

227 MNDOC COVID-19 Updates, <https://mn.gov/doc/about/covid-19-updates/>.

228 Minn. Stat. § 241.26, subd. 1 (2022).

229 MDOC Policy 205.122, <https://policy.doc.mn.gov/docpolicy/PolicyDoc.aspx?name=205.122.pdf>. Individuals we interviewed indicated that COVID work release was used for people who were within 90 days of release, but the policy says they had to have been within 30 days of release.

The COVID work release program ran through June or July of 2021. By then, the prison population had dropped significantly from a high of 9,381 just prior to the pandemic to 7,369 in July of 2021,²³⁰ and there were not enough eligible people to justify the amount of work needed to keep the program going. Data posted on MDOC's website reveals that of 372 people eligible for release under the expanded work release criteria, 298 were approved and released. The majority of those who were denied released (55) had an active detainer or pending felony. Other reasons for denial included that the person did not have a housing placement or that the person was on interstate supervision.²³¹

Sanctions Reduction Program

A third population reduction strategy was called the sanctions reduction program in which people were release from prison who were serving time for technical violations.²³² Only 28 people were reported to have been released through this method.²³³ However, it is likely that the existence of the program also resulted in several people remaining in the community after a violation because MDOC was limiting revocations to more serious violations that posed a threat to public safety. Thus, supervision officers were challenged to find ways to restructure supervised release and to stabilize individuals in the community.

Victim Notification Efforts

For all of the releases, a key component was figuring out a process for victim notification. Here too, MDOC had regular calls with victim's organizations. Minnesota is an opt-in state, meaning victims must let MDOC know they want to be notified of a person is released from prison.²³⁴ MDOC did not want victims to be taken by surprise when people were released due to the pandemic, so the agency took extra steps to ensure victim notification during this process. MDOC would share with victims' advocacy groups a list of names of people who were slated for release and the organizations helped by reaching out to notify any victims they were currently working with.

Factors Affecting the Use of Back-End Release Mechanisms

Releases in Minnesota were relatively conservative. Advocates attributed the low release rate to outside pressure. They perceived MDOC was getting pushback from prosecutors on public safety grounds and from supervised officers who were concerned about increasing their caseloads, especially during such uncertain times. Advocates perceived that the governor supported the idea of making releases but may have also been concerned about the pushback. Advocates also perceived that the MDOC was not completely confident it had the authority under the medical release statute to make releases due to COVID, and this was confirmed by government officials. Both the conditional medical release and work release statutes were vague and left a great deal of discretion to the MDOC. Government officials

230 MDOC Population reports showed the overall population was down to 7,369 by July 1, 2021, compared to 9,381 on January 1, 2020, before the pandemic started. Compare MDOC, *Adult Prison Population Summary* (July 1, 2021), https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%207-1-2021_tcm1089-493212.pdf, with MDOC, *Adult Prison Population Summary* (Jan 1, 2020), https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%201-1-2020_tcm1089-418232.pdf.

231 DOC COVID-19 Updates, <https://mn.gov/doc/about/covid-19-updates/>.

232 Office of the Ombuds for Corrections, *Research Summary: Prison Population Management, Responses to COVID-19 in Minnesota Prisons* at 38 (Dec. 21, 2020), https://mn.gov/obfc/assets/Appendix%20A%20Ombuds%20for%20Corrections%20COVID%20Report_tcm1157-470275.pdf.

233 DOC COVID-19 Updates, <https://mn.gov/doc/about/covid-19-updates/>.

234 Minn. Stat. § 611A.06, subd. 1 (2022).

were cognizant of that discretion, and MDOC did not want to engage in any actions that would be perceived as overstepping their authority. The Minnesota Senate, which had a Republican majority, had already attempted to end Governor Walz’s emergency powers, and failing that, had ousted the governor’s Commissioner of Labor and Industry by holding a confirmation hearing during a special session and voting against it.²³⁵ Similar threats to hold confirmation hearings for the Commissioner of the Department of Health²³⁶ and the Commissioner of Corrections were constantly in the backdrop, so it was important for MDOC to move carefully during this period.

But while MDOC was concerned they might be exceeding their authority, the ACLU brought suit alleging they were not exercising their authority to protect the safety and well-being of incarcerated people.²³⁷ Government officials reported that during settlement discussions MDOC offered to release about 600 to 700 people from prison who were within 6 months of release and up to moderate risk. Such a settlement would have alleviated the MDOC’s concern about its authority by providing the cover of court process for those releases. But the ACLU did not accept the offer. As government officials explained, the ACLU wanted broader releases in the range of 2,000 to 3,000 people—which would have been 20-30% of the pre-COVID population of 9,381.²³⁸ The ACLU may have thought the governor would issue a broader executive order for releases if the right pressure were exerted. However, that never occurred.

A few months before the ACLU filed this lawsuit another significant event occurred in Minnesota that changed the political dynamic in the state: the murder of George Floyd.²³⁹ His death sparked an extended period of civil unrest in the Twin Cities and turned all eyes on policing. The Democratic governor was already facing stiff opposition from Republicans on his use of emergency powers to close schools, bars, and restaurants, and to implement a statewide mask mandate during the pandemic.²⁴⁰ With the addition of Floyd’s murder and the subsequent civil unrest, government officials noted that there was not enough decision-making bandwidth to prioritize the release of incarcerated individuals. So long as MDOC was using its powers within justifiable limits, and weighing each decision carefully, the governor was content to let the MDOC handle release decisions.

MDOC’s concern about overstepping its authority is likely what led to the eventual recall of some people who had been released from prison. Once vaccines became widely available, it was hard to justify continuing a person’s conditional medical release. The basis for that release had been that the person’s underlying medical conditions made them particularly vulnerable to grave illness should they become sick with COVID. But the development of vaccines and effective medical treatments alleviated that risk, and MDOC was mindful that overuse, or inappropriate use of their authority could have a lasting impact on their ability to exercise discretion in the future.

235 Jeremiah Jacobsen, John Croman, *Republican-Led Minnesota Senate Ousts Labor and Industry Commissioner Nancy Leppink*, Kare 11, Aug. 13, 2020, <https://www.kare11.com/article/news/politics/republican-led-minnesota-senate-ousts-labor-and-industry-commissioner-nancy-leppink/89-58176623-b832-41c9-a5d6-81e0f18b2677>.

236 Tim Pugmire, Tim Nelson, *Malcolm Next? GOP Senators Threaten Another Commissioner’s Job*, MPR News, Aug. 30, 2021, <https://www.mprnews.org/story/2021/08/30/malcolm-next-gop-senators-threaten-another-commissioners-job>.

237 Press Release, ACLU Minnesota, *ACLU-MN Files Lawsuit to Protect People in Minnesota Prisons from COVID-19* (Oct. 22, 2020), <https://www.aclu-mn.org/en/press-releases/aclu-mn-files-lawsuit-protect-people-minnesota-prisons-covid-19>.

238 MDOC, *Adult Prison Population Summary*, (Jan 1, 2020), https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%201-1-2020_tcm1089-418232.pdf.

239 Anna Boone, *One Week in Minneapolis*, Star Tribune, June 3, 2020, <https://www.startribune.com/george-floyd-death-ignited-protests-far-beyond-minneapolis-police-minnesota/569930771/>.

240 Jeremiah Jacobsen, *MN Senate Republicans Claim Gov. Walz Exceeded Authority*, Kare 11, May 20, 2020, <https://www.kare11.com/article/news/politics/mn-senate-republicans-claim-gov-walz-exceeded-authority/89-052cc7a8-fcc9-4fae-b5c0-38a31b24bd0e>.

This turn of events highlighted a weakness of many compassionate release statutes in place across the country. Most build in a contingency that when the release is granted for the purpose of obtaining medical care, the person is required to return to prison once that care has been provided and their condition has been stabilized.²⁴¹ Advocates acknowledged that Minnesota’s statute contained a similar provision—in Minnesota, release “may be rescinded without hearing by the commissioner if the offender’s medical condition improves to the extent that the continuation of the conditional medical release presents a more serious risk to the public”²⁴²—but advocates argued that the MDOC did not comply with due process because the agency did not reevaluate each person’s public safety risk before recalling them to prison. Advocates asserted that if the person was doing well on in the community, there was no public safety risk; however, COVID levels were still high, so the health risks that justified the initial releases continued to exist for these individuals.²⁴³ The district court granted a temporary injunction to prevent reimprisonment while the litigation continued.²⁴⁴

Conclusion

In *Examining Prison Releases in Response to COVID*, we found that when states had the will to do so, they generally already had mechanisms available to them to make prison releases during the pandemic.²⁴⁵ Minnesota is an example of how even very determinate states found ways to make releases using legal mechanisms that operated outside of the usual legal requirements for serving minimum prison terms before release. Though officials had to read their statutes broadly, the power was there for MDOC to make releases through work release and conditional medical release statutes if the agency chose to exercise that discretion.

The steps taken in Minnesota were extremely cautious and reflected the same risk aversion we saw in most jurisdictions that made releases from prison during the pandemic. In *Examining Prison Releases in Response to COVID*, we posited that this risk aversion might stem from concerns about public perception and public safety. The experience in Minnesota confirms that these concerns were omnipresent throughout the decision-making process. Because Minnesota had a divided government and Republicans in the Senate had a track record of using their confirmation power to remove government officials when they did not agree with their decisions, MDOC was on precarious footing. As a result, MDOC officials weighed every decision with an eye towards staying firmly within the scope of their authority. The agency seemed to welcome the ACLU lawsuit as a form of outside pressure that could provide cover and allow them to exercise their release discretion more broadly, but the lawsuit did not pan out in that way because ACLU refused their initial offer. Though government officials in Minnesota appeared to see the pandemic as an emergency calling for extraordinary action, when it came to deciding whether to release people from prison, the emergent nature of the situation was not enough to overcome countervailing political pressure.

241 See Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, & Madison Wadsworth, Robina Institute of Criminal Law and Criminal Justice, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration at 4* (2022), <https://robinainstitute.umn.edu/publications/examining-prison-releases-response-covid-lessons-learned-reducing-effects-mass>.

242 Minn. Stat. § 244.05, subd. 8 (2022).

243 See Complaint posted with Press Release, ACLU Minnesota, *ACLU-MN and Legal Clinics Sue to Stop MNDOC From Reincarcerating People at High COVID-19 Risk* (Aug. 9, 2022), <https://www.aclu-mn.org/en/press-releases/mndoc-lawsuit-covid>.

244 Press Release, ACLU Minnesota, *ACLU-MN and Legal Clinics Sue to Stop MNDOC From Reincarcerating People at High COVID-19 Risk* (Aug. 9, 2022), <https://www.aclu-mn.org/en/press-releases/mndoc-lawsuit-covid>.

245 See Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, & Madison Wadsworth, Robina Institute of Criminal Law and Criminal Justice, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration at 29* (2022), <https://robinainstitute.umn.edu/publications/examining-prison-releases-response-covid-lessons-learned-reducing-effects-mass>.

Legal Mechanisms for Prison Release in Minnesota

Supervised Release – Supervised release is a period of post-prison community supervision. All people sentenced to prison except those serving a life sentence or life without the possibility of release serve two-thirds of the pronounced sentence in prison and one-third of the pronounced sentence on supervised release. The supervised release period can be reduced for any disciplinary violations occurring during the prison term.²⁴⁶

Conditional Medical Release – Conditional medical release is a form of release from prison for people who suffer from “a grave illness or medical condition.” The release is intended to allow the individual to receive a level of medical care that is not available in the prison facility, or if they have a terminal illness, to allow them to spend their remaining time outside the facility. Releases of this type require that the release “poses no threat to the public.”²⁴⁷

Work Release – Work release is a structured program allowing full- or partial-day release from prison or other facilities such as halfway houses for the purpose of working at paid employment, seeking employment, or participating in vocational training or other education.²⁴⁸

²⁴⁶ Minn. Stat. §§ 244.01, subd 8; 244.05, subd. 1b (2022).

²⁴⁷ Minn. Stat. § 244.05, subd. 8 (2022).

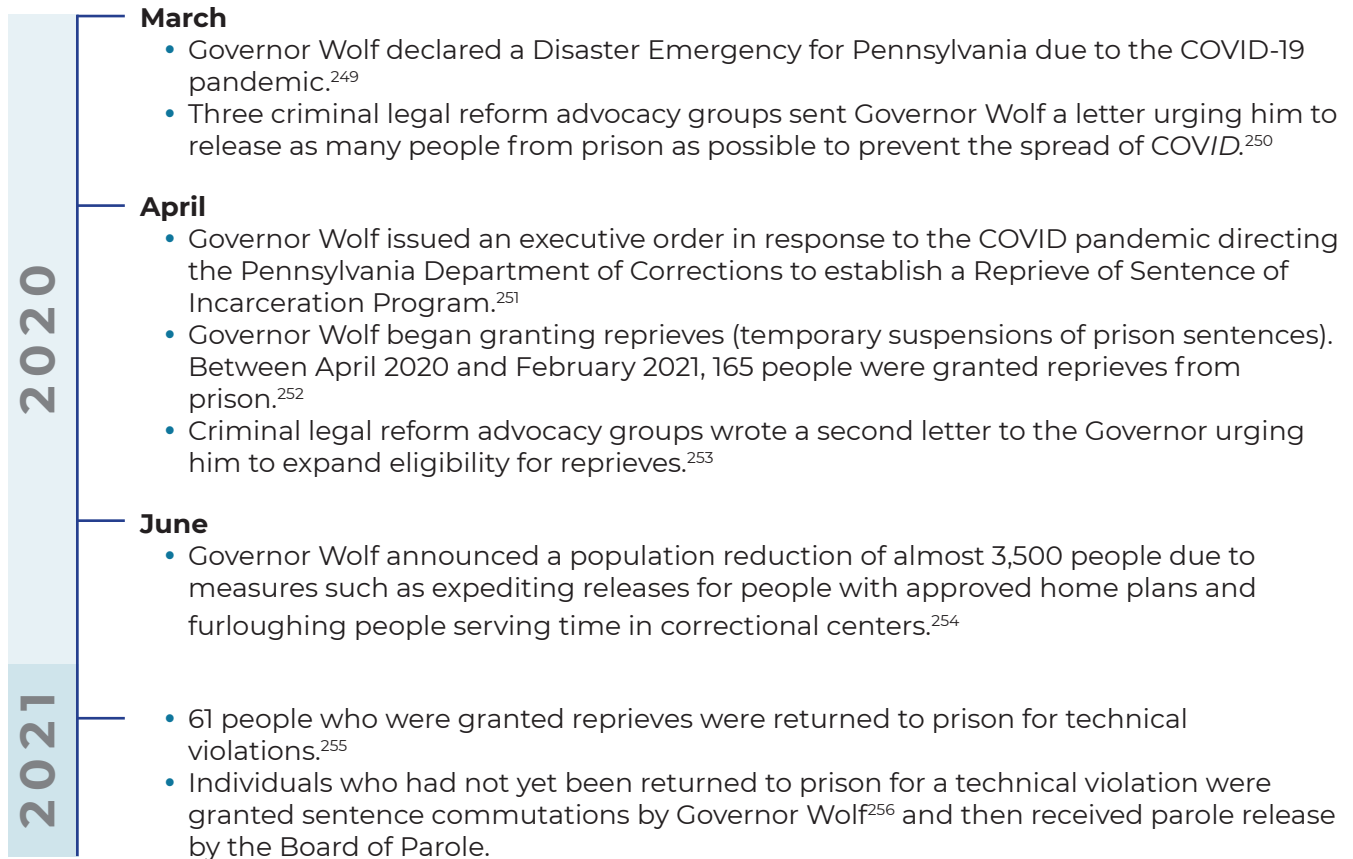
²⁴⁸ Minn. Stat. § 241.26, subd. 1 (2022).

Pennsylvania

Introduction

In 2020, Pennsylvania was one of 34 states that made pandemic-related prison releases. To this end, the Pennsylvania Department of Corrections (PDOC) and the Board of Parole accelerated the rate of parole releases. However, the state faced significant challenges in releasing individuals who were not yet eligible for parole, including individuals who were medically vulnerable. Governor Tom Wolf's administration aimed to release as many as 1,800 people through the reprieve program; however, restrictive criteria and logistical obstacles limited the actual number of releases to less than 200.

Timeline of Major Events



Notes — Pennsylvania Timeline

- 249 Pa. Proclamation: Amendment to Proclamation of Disaster Emergency, Tom Wolf (May 20, 2021), <https://www.pema.pa.gov/Governor-Proclamations/Documents/Proclamation-Amending-Disaster-Emergency-COVID19-052021.pdf>.
- 250 Press Release, ACLU Pennsylvania, *Criminal Legal Reform Advocates Urge Governor Wolf to Take Immediate Action to Release People from State Prisons* (Mar. 28, 2020), <https://www.aclupa.org/en/press-releases/criminal-legal-reform-advocates-urge-governor-wolf-take-immediate-action-release>; Letter from ACLU Pa., et. al., to Tom Wolf, Governor, Pennsylvania (Mar. 18, 2020), https://www.aclupa.org/sites/default/files/ltr_governor_wolf_-_immediate_action_required_for_covid-19_final3.pdf.
- 251 Pa. Proclamation: Order of the Governor of the Commonwealth of Pennsylvania Regarding Individuals Incarcerated in State Correctional Institutions, Tom Wolf (Apr. 10, 2020), <https://famm.org/wp-content/uploads/2020.4.10-TWW-SCL-reeprieve-release-order-COVID-19.pdf>.
- 252 J.D. Prose, *PA legislators to Wolf: Give more reprieves to inmates vulnerable to COVID-19. His response*, *The Times*, Feb. 10, 2021, <https://www.timesonline.com/story/news/2021/02/10/pennsylvania-inmates-release-covid-19/4455476001/>.
- 253 Letter from ACLU Pa., et. al., to Tom Wolf, Governor, Pennsylvania (Apr. 22, 2020), https://www.aclupa.org/sites/default/files/wysiwyg/letter_gov_wolf_reeprieve_next_steps_2020-04-22.pdf.
- 254 *Pennsylvania's Prison Population Reduced by Nearly 3,500 Since March 1*, *Erie News Now*, June 22, 2020, <https://www.erienewsnow.com/story/42276002/pennsylvanias-prison-population-reduced-by-nearly-3500-since-march-1>.
- 255 *Despite high vaccination rates among Pennsylvania prisoners, some COVID restrictions remain in place*, *The Morning Call*, May 18, 2022, <https://www.mcall.com/2022/05/18/despite-high-vaccination-rates-among-pennsylvania-prisoners-some-covid-restrictions-remain-in-place/>.
- 256 *Id.*

Background

At the start of 2020, Pennsylvania was one of the few states where the executive and legislative branches were controlled by different political parties. Democratic Governor Wolf led the state's response to COVID, while facing opposition from the Republican-majority House and Senate. The relationship was contentious before 2020, but it intensified during the pandemic, resulting in a full-blown power struggle around early prison releases and other pandemic measures.²⁵⁷ In 2020, Governor Wolf vetoed 19 bills, most of which aimed to undo parts of his administration's pandemic response, leading the legislature to resort to constitutional amendments as a means to bypass him.²⁵⁸

Pennsylvania is an indeterminate sentencing state, meaning that how long a person will remain incarcerated is less predictable at the time of sentencing. All crimes are sentenced according to sentencing guidelines,²⁵⁹ which provide a range of months for a “minimum sentence” based on the seriousness of the offense and the person’s criminal history score.²⁶⁰ At sentencing, the judge announces a sentence range rather than a fixed sentence. The range includes the minimum sentence as provided by the guidelines, and a maximum sentence.²⁶¹ The minimum sentence can be no more than half the maximum sentence, and the maximum sentence can be any period up to the maximum allowed by law.²⁶² Once an individual has completed their minimum sentence, they are eligible for parole.²⁶³ The parole board manages parole files and timelines, so individuals do not have to apply for a hearing.²⁶⁴ If granted parole release, a person may remain on parole supervision until their maximum sentence was set to expire.²⁶⁵ If denied, the parole board must consider a renewed application after one year, and up to three years for more serious offenses.²⁶⁶ All people are released upon reaching their maximum sentence, except that parole is not available to those sentenced to death or life without parole.²⁶⁷

Pennsylvania does not have good time or earned time credit. There are two limited methods for reducing the period of time served in prison, but eligibility for both is determined at sentencing and is not revisited. First, Pennsylvania utilizes a “recidivism risk reduction incentive” (RRRI). At sentencing, the judge determines whether a person is eligible for RRRI, which is generally reserved for less serious, nonviolent offenses.²⁶⁸ If so, they pronounce two minimum sentences: the standard minimum sentence discussed above and the RRRI minimum sentence. If the person’s standard minimum sentence is under three years, their RRRI minimum sentence will be three-fourths that length. If longer than three

257 *Partisan fights dominated the Pa. legislature’s recent session, eclipsing some major accomplishments*, Spotlight PA, December 27, 2022, <https://www.spotlightpa.org/news/2022/12/pa-legislature-tom-wolf-session-lookback/>.

258 *Id.*

259 204 Pa. Code § 303.1(a) (2023); 42 Pa. Cons. Stat. § 2154(a) (2023).

260 See Pa. Comm’n on Sent’g, *Sentencing*, <https://pcs.la.psu.edu/guidelines-statutes/sentencing/> (last visited Mar. 17, 2023). The guidelines establish seven grids: the main grid, and six that provide specialized ranges for specific types of crimes or offenders, such as murder convictions where the offender was under 18, firearms offenses, and crimes that contain certain enhancements. 204 Pa. Code §§ 303.16–18 (2023)

261 42 Pa. Cons. Stat. § 9756(b)(1) (2023).

262 *Id.* at (a).

263 61 Pa. Cons. Stat. § 6137 (2023).

264 Pa. Dept’ of Corr., *Your Parole Handbook* (Jan. 2021), <https://www.cor.pa.gov/parole-supervision/Documents/Parole%20Publications/Final%20Parole%20Handbook.pdf>.

265 37 Pa. Code § 63.2 (2023) (stating that a parolee shall remain in the legal custody of the Board of Probation and Parole until the expiration of the maximum sentence or until legally discharged).

266 61 Pa. Cons. Stat. § 6139(a)(3) (2023).

267 61 Pa. Cons. Stat. § 6137(a)(1) (2023).

268 According to the most recent reports, only about 10% of prisoners were RRRI eligible. Pennsylvania Department of Corrections, *Recidivism Risk Reduction Incentive: 2018 Report* at 4 (2018); Pennsylvania Department of Corrections, *Annual Statistical Report* at 12 (2018).

years, their RRR minimum sentence will be five-sixths of the standard minimum sentence. At the completion of the RRR minimum sentence, a person is eligible for parole if they have completed all necessary programming,²⁶⁹ have a record of good conduct, have a reentry plan, and do not pose a risk to public safety.²⁷⁰ While the statute proposes that the parole board “shall issue a decision to parole, without further review by the board,” a recent report shows that only 12.5% of eligible RRR individuals were actually released at their RRR minimum sentence. Still, over 60% were released before their standard minimum sentence.²⁷¹ Second, a subset of those eligible for the RRR program—those whose RRR sentence is less than two years—may be eligible for “short sentence parole.” This program, started in 2019, allows these people to be automatically released to parole upon completion of the minimum sentence.²⁷²

How Events Unfolded During the Pandemic

In March 2020, three advocacy groups—the ACLU of Pennsylvania, the Amistad Law Project, and the Abolitionist Law Center—sent a letter to Governor Wolf, urging him to take measures to protect incarcerated populations from the pandemic.²⁷³ Among the recommendations were the release of elderly and vulnerable people, the granting of furloughs to those serving their sentence in Community Correction Centers, and the expedited release of medically vulnerable people. The letter also suggested the expedited release of people who had served their minimum sentence, along with waiving hearings and moving to a presumption of parole for medically vulnerable people meeting certain criteria. Finally, the letter urged Lt. Governor Fetterman to convene an emergency session of the Board of Pardons in order to review cases for commutation.

During this time, the PDOC and Governor Wolf’s office were reviewing options to decrease prison populations and get medically vulnerable people out of prison. To achieve the most straightforward path to early release, Secretary of Corrections John Wetzel and Governor Wolf’s office requested that the state legislature create a mechanism for early release.²⁷⁴ Potential release criteria were established in consultation with the District Attorneys’ Association and victims’ advocates who, while leery about early release, were willing to agree on specific criteria. Ultimately, the criteria focused on people serving time for nonviolent offenses who were within 9 months of their parole-eligibility date;²⁷⁵ medically vulnerable people within 12 months of their parole-eligibility date would also have been eligible. However, the Republican-led legislature opposed large-scale releases, and the proposed bill, which would have capped releases at 450 people, was never introduced.²⁷⁶

269 The programs someone must complete to qualify for RRR release are established in a “program plan,” individually designed for them by the Department of Corrections.

270 61 Pa. Cons. Stat. §§ 4501-12 (2023).

271 Pa. Comm’n on Sent’g, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* at 9 (2019).

272 61 Pa. Cons. Stat. § 6137.1 (2023).

273 Press Release, ACLU Pennsylvania, *Criminal Legal Reform Advocates Urge Governor Wolf to Take Immediate Action to Release People from State Prisons*, <https://www.aclupa.org/en/press-releases/criminal-legal-reform-advocates-urge-governor-wolf-take-immediate-action-release>; Letter from ACLU Pa., et. al., to Tom Wolf, Governor, Pennsylvania (Mar. 18, 2020), https://www.aclupa.org/sites/default/files/ltr_governor_wolf_-_immediate_action_required_for_covid-19_final3.pdf.

274 Cynthia Fernandez & Matt McKinney, *Hundreds could be released from Pa. state prisons under draft plans to help prevent a coronavirus outbreak*, Spotlight PA, Mar. 31, 2020, <https://www.spotlightpa.org/news/2020/03/pennsylvania-coronavirus-prisons-release-outbreak-bill/>.

275 *Despite high vaccination rates among Pennsylvania prisoners, some COVID restrictions remain in place*, The Morning Call, May 18, 2022, <https://www.mcall.com/2022/05/18/despite-high-vaccination-rates-among-pennsylvania-prisoners-some-covid-restrictions-remain-in-place/>.

276 *Id.*

In response, the governor issued an Executive Order on April 10, 2020, directing the PDOC to establish a Reprieve of Sentence of Incarceration Program to identify individuals who fit within the criteria established for early release.²⁷⁷ Instead of counting on the legislature to provide an early release mechanism, the governor would use his reprieve power to temporarily suspend their sentence, leading to their release.²⁷⁸ The administration estimated that up to 1,800 people would be eligible.²⁷⁹

Reprieves Granted to Fewer than Anticipated

Out of the 47,000 people serving time in Pennsylvania correctional facilities at the time, the PDOC was able to identify approximately 1,248 who were eligible for early release under the criteria set forth by the Executive Order.²⁸⁰ A second pass of the list by PDOC whittled the list to 851. However, case-by-case review resulted in only 165 people ultimately receiving a reprieve.²⁸¹

There were several reasons the number of final releases was so much smaller than what was originally estimated. First, the case review process included the input of the Pennsylvania Attorney General's Office and the district attorney's office in the county where the person was sentenced.²⁸² Cases where a violent offense may have been pled down to a nonviolent offense were excluded, and the district attorney's offices rejected the release of people who possessed a firearm while committing a nonviolent crime.²⁸³ Second, according to government officials, a certain number of people were eligible but had high needs, such as drug dependencies or mental-health issues, and PADC had difficulty finding appropriate treatment for them in the community during the pandemic. Third, the pandemic complicated people's abilities to get an approved home plan, even though the criteria for approval were relaxed. People couldn't be released to congregate settings, which proved to be another barrier to release. Finally, a small number of people simply chose to wait for parole release rather than temporarily suspend their sentence.

On April 22, 2020, representatives from the ACLU of Pennsylvania, the Amistad Law Project, and the Abolitionist Law Center sent a second letter to Governor Wolf urging him to expand eligibility for early releases.²⁸⁴ In it, advocates urged the governor to consider anyone over the age of 60 and people who were medically vulnerable, regardless of crime type, for early release. This was a sticking point in the release plan, because most geriatric people were serving sentences for violent crimes, and thus the agreed-upon criteria meant these people were not eligible for early release. Advocates also suggested that technical parole violators, who make up approximately 15% of the prison population, be released from prison. The latter recommendation was taken up by the PDOC.

²⁷⁷ Pa. Proclamation: Order of the Governor of the Commonwealth of Pennsylvania Regarding Individuals Incarcerated in State Correctional Institutions, Tom Wolf (Apr. 10, 2020), <https://famm.org/wp-content/uploads/2020.4.10-TWW-SCI-reprieve-release-order-COVID-19.pdf>.

²⁷⁸ *Id.*

²⁷⁹ Matt McKinney, *Gov. Tom Wolf will temporarily release Pa. state inmates as legislative effort falls apart*, Spotlight PA, Apr. 10, 2020, <https://www.spotlightpa.org/news/2020/04/pennsylvania-coronavirus-state-prisons-inmate-reprieves/>.

²⁸⁰ Matt McKinney & Joseph Jaafari, *Why Gov. Tom Wolf's big effort to grant coronavirus reprieves to Pa. inmates came up small*, Spotlight PA, June 11, 2020, <https://www.spotlightpa.org/news/2020/06/pennsylvania-coronavirus-reprieves-state-prisons>.

²⁸¹ J.D. Prose, *PA legislators to Wolf: Give more reprieves to inmates vulnerable to COVID-19. His response*, The Times, Feb. 10, 2021, <https://www.timesonline.com/story/news/2021/02/10/pennsylvania-inmates-release-covid-19/4455476001/>.

²⁸² Dylan Segelbaum, *Wolf announced a temporary reprieve program. Fewer than 150 prisoners have been released*, York Daily Record, May 8, 2020, <https://www.ydr.com/story/news/watchdog/2020/05/08/temporary-reprieve-program-state-prison-pennsylvania-one-month-later/3061010001/>.

²⁸³ *Id.*

²⁸⁴ Letter from ACLU Pa., et. al., to Tom Wolf, Governor, Pa. (Apr. 22, 2020), https://www.aclupa.org/sites/default/files/wysiwyg/letter_gov_wolf_reprieve_next_steps_2020-04-22.pdf.

In February 2021, Democratic lawmakers urged the Governor to use his reprieve powers to release more individuals.²⁸⁵ However, a spokesman for the PDOC stated that "absent changes from the General Assembly, it is not an effective tool for population reduction during the COVID pandemic."²⁸⁶ No new reprieves occurred after April 2020, as it was difficult to justify putting major effort into enacting large-scale prison releases during a public crisis.

Reprieves as a Temporary Solution

The reprieve program, which temporarily suspended the sentences of released people, was designed to be a temporary solution and did not permanently reduce the sentence length as a commutation would. The reprieve would be valid only until the end of the Disaster Emergency declaration, at which time people would have to return to prison.²⁸⁷ In addition, it did not provide time-served credit for people while on reprieve. However, PDOC began to search for ways to keep successful people out of prison.

Although 165 people were released on reprieve, 61 of them were returned for parole violations over the course of the year.²⁸⁸ Government officials confirmed that this group had a lower threshold for parole revocation, which meant they were returned for technical violations much more quickly than regular parole releases, to reduce the risk to public safety. Officials understood that a new crime by a person in this group would put a stop to the reprieves as well as generate negative publicity for the Governor's office. However, no one in the group was returned for serious or violent crimes.

To avoid returning successful people back to prison once the Emergency Declaration ended, the governor's office and PDOC sought a workaround. They asked the Board of Pardons to approve commutations for those released,²⁸⁹ which essentially gave released people retroactive credit for the time they spent out of prison. By the end of 2021, all but one of the remaining people released on reprieve received a commutation and was able to remain on parole. According to government officials, once they received credit for time served, all of the remaining individuals were eligible for and received a parole release from the Board of Parole.

Population Reductions Decrease Urgency of Release

As of June 2020, the prison population in Pennsylvania had decreased by 3,471 individuals, reducing the urgency for further release efforts.²⁹⁰ The reduction was largely the result of a decrease in admissions; overall, Pennsylvania had 7,000 fewer prison admissions in 2020 than in 2019.²⁹¹ However, a portion of the immediate population reduction was due to back-end release efforts under PDOC authority.²⁹²

285 Letter from Members of Pa. State Senate to Tom Wolf, Governor, Pennsylvania (Feb. 8, 2021), <https://www.senatorsarifstreet.com/wp-content/uploads/2021/02/ReprieveLtrFinal.pdf>.

286 J.D. Prose, *PA legislators to Wolf: Give more reprieves to inmates vulnerable to COVID-19. His response*, The Times, Feb. 10, 2021, <https://www.timesonline.com/story/news/2021/02/10/pennsylvania-inmates-release-covid-19/4455476001/>.

287 Pa. Proclamation: Order of the Governor of the Commonwealth of Pennsylvania Regarding Individuals Incarcerated in State Correctional Institutions, Tom Wolf (Apr. 10, 2020), <https://famm.org/wp-content/uploads/2020.4.10-TWW-SCI-reprieve-release-order-COVID-19.pdf>.

288 J.D. Prose, *PA legislators to Wolf: Give more reprieves to inmates vulnerable to COVID-19. His response*, The Times, Feb. 10, 2021, <https://www.timesonline.com/story/news/2021/02/10/pennsylvania-inmates-release-covid-19/4455476001..>

289 *Despite high vaccination rates among Pennsylvania prisoners, some COVID restrictions remain in place*, The Morning Call, May 18, 2022, <https://www.mcall.com/2022/05/18/despite-high-vaccination-rates-among-pennsylvania-prisoners-some-covid-restrictions-remain-in-place/>.

290 *Pennsylvania's Prison Population Reduced by Nearly 3,500 Since March 1*, Erie News Now (June 22, 2020), <https://www.erienewsnow.com/story/42276002/pennsylvanias-prison-population-reduced-by-nearly-3500-since-march-1>.

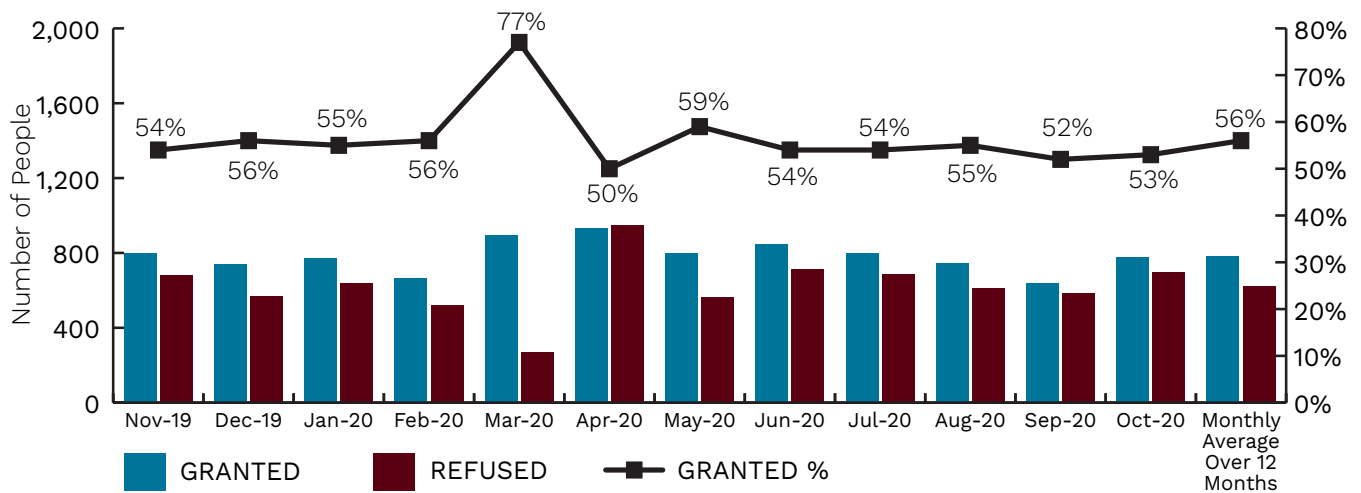
291 Ann Carson, *Prisoners in 2020 – Statistical Tables 18* (U.S. Dep't of J., Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

292 *Id.*

This included furloughing people who were serving their time in community corrections centers, releasing people who were already granted parole but had a pending home plan, and allowing some technical parole violators serving prison terms to be released.²⁹³ According to government officials, the total number of population reductions due to these initiatives was modest because the PDOC had no authority to release anyone before they had served their minimum sentence.

PDOC also expedited case reviews for those already eligible for parole and got them in front of the parole board more quickly.²⁹⁴ Government officials and advocates noted that the Board of Parole became more lenient with its release decisions during this time period. Figure 3, which uses monthly statistics reported by the Pennsylvania parole board, shows that the first two months of the pandemic (March and April 2020) differed in pattern from the preceding months.²⁹⁵ In March, the parole board reviewed a number of cases that was on par with previous months (1,116), but granted release to an unusually high percentage of people (77%). In contrast, the following month, April, showed a spike in the number of cases heard (1,885), but a return to a lower grant rate (50%). It's likely that during the first month of the pandemic PDOC prioritized scheduling hearings for people who had a high chance of being released. That is, individuals who had completed their programming requirements or who had high readiness for release. The case composition of the hearings may have changed the following month to include higher-risk individuals or those who had not appeared before the parole board before, resulting in a lower grant rate. Despite the decrease in the grant rate from March to April, the total number of people (1,829) released during those two months was significantly higher than in the preceding two months combined (January and February 2020; 1,436). After April 2020, the discretionary release pattern returned to normal.

Figure 3. Pennsylvania Board of Parole Monthly Parole Decisions 2019/2020



SOURCE: PENNSYLVANIA PAROLE BOARD, MONTHLY STATISTICS REPORT AT 7 (OCT. 2020).

293 *Id.*

294 *Id.*

295 Pennsylvania Parole Board, *Monthly Statistics Report at 7* (Oct. 2020), <https://www.parole.pa.gov/Information/Documents/Monthly%20Program%20Reports/FY%2020%2021/OCTOBER%20Stats%20Report%202020.pdf>.

Ultimately, the reduction in prison populations was driven by a steep reduction in prison admissions, which was more effective and less politicized than the attempts at early release. This population reduction remained in place well into the pandemic. By October 2021, the prison population had been reduced by 8,000 people compared to the population at the start of the pandemic.²⁹⁶ This amounted to the largest drop in prison history. In addition, PDOC made efforts to contain the spread of COVID, such as testing groundwater for viral load at each facility and spacing out people across facilities.²⁹⁷ The reduction in prison admissions and COVID containment measures reduced the urgency to make early releases.

Factors Affecting the Use of Prison Release Mechanisms

In Pennsylvania, as in many other states, there are limited mechanisms for early release from prison.²⁹⁸ The state Constitution grants the governor the sole authority to grant reprieves, commutations, and pardons. However, in order to issue commutations or pardons, the governor must first receive approval from a Board of Pardons, which is a time consuming and cumbersome process. Reprieves can be issued without approval, which is why this option ended up being the one used. However, expediency comes at another cost: reprieves are temporary. As described above, the Governor's office and PDOC had to piece together a solution involving the Board of Pardons and the Board of Parole in order to keep people from being returned to prison. While ultimately, the Governor's Office and PDOC were successful in releasing some people, the process was so cumbersome and inefficient, it is unlikely that it will be used again to effect large-scale releases.

The other major mechanism for release is parole, which requires that an individual reach their minimum sentence and receive approval from the parole board. Monthly data suggests that the parole board responded to the pandemic by hearing more cases and releasing more people, at least temporarily. However, we cannot say definitively that the board maximized releases because it still denied release to about half of the individuals it saw in April 2020 and promptly returned to its usual release patterns after the first two months of the pandemic. In fact, analysis by the Prison Policy Initiative shows that the overall number of releases and the parole grant rate in Pennsylvania decreased in 2020 compared to 2019.²⁹⁹ However, this could have been due to decrease in prison admissions, as well as legislative changes in 2019 that reduced the number of people eligible for presumptive parole release.³⁰⁰ These facts highlight the complex nature of parole release discretion: while parole release powers could serve as powerful mechanisms for release, changes to the typical patterns of release are generally not sustained over the long term.

296 J. D. Prose, "Decarceration: Here's how Pa. has reached a 20-year low in its state prison population," *Go Erie*, Oct. 8, 2021, <https://www.goerie.com/story/news/2021/10/08/gov-tom-wolf-says-pa-reaches-20-year-low-state-prison-population/6039583001/>.

297 Pa. Dep't or Corr., COVID-19, <https://www.cor.pa.gov/Pages/COVID-19.aspx> (last visited Mar. 6, 2023).

298 Joshua Vaughn, *Pennsylvania Has Few Options to Release Elderly Prisoners as Covid-19 Spreads*, *The Appeal*, Mar. 23, 2020, <https://theappeal.org/pennsylvania-has-few-options-to-release-elderly-prisoners-as-covid-19-spreads/>.

299 Tiana Herring, Prison Policy Initiative, *Parole Boards Approved Fewer Releases in 2020 Than in 2019, Despite the Raging Pandemic* (Feb. 3, 2021), <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/>.

300 Act of Dec. 18, 2019, P.L. 776, No. 115, <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=115>. In particular, the legislative changes significantly narrowed the eligibility criteria for Short Sentence Parole (61 Pa. Const. Stat. Ann § 6137.1), which allows for parole without a hearing at a person's minimum for individuals serving sentences of 2 to 4 or less years. See ACLU Pennsylvania, *ACLU-PA Analysis of SB 501/Act 115*, https://www.aclupa.org/sites/default/files/field_documents/aclu-pa_analysis_of_sb_501_-_act_115_2019-12-19_1.pdf.

Pennsylvania also has a fairly restrictive compassionate release program that applies only to people who are both non-ambulatory and have a terminal diagnosis.³⁰¹ The compassionate release requirements are so stringent that only nine people were released through the program between January 2010 and June 2015.³⁰² Then Secretary of Corrections John Wetzel has criticized the program, stating that it is neither compassionate nor effective in releasing individuals.³⁰³ Moreover, there is no option for furlough for people in prison.

Ultimately, no permanent law or policy changes resulted from the pandemic. Government officials agreed that Pennsylvania would likely benefit from having the power to release people in case of an emergency. Several government officials mentioned the utility of the Early Release Program which was rescinded in 2012.³⁰⁴ That law allowed PDOC to release eligible individuals up to two years before their minimum sentences. However, district attorneys and victim advocates were generally opposed to this law, which went against the state's "truth in sentencing" philosophy. Other government officials mentioned strengthening the Emergency Management laws to include specific language that would allow the Governor to evacuate people from prison in case of an emergency. However, bringing back the Early Release Program or creating any new mechanism would of course require legislation, which, according to government officials, would be unlikely to come from a Republican controlled General Assembly.

Conclusion

Pandemic related events in Pennsylvania show how the early release of incarcerated people is a complex issue with no easy solutions. There are a number of factors to consider, including the safety of the public, the well-being of the incarcerated, and the legal framework within which decision can be made. PDOC took several steps to reduce prison populations during the COVID pandemic. They worked with the parole board to speed up releases and released some technical parole violators serving time in prison. However, efforts at releasing individuals before their minimum sentence, including some who were medically vulnerable, were hampered by political and procedural issues. This was due to a number of factors that were unique to the pandemic, such as the increased difficulty in finding treatment and housing. As well as factors that are likely to remain a barrier to early release, such as a lack of appropriate early release mechanisms, a general assembly that was reluctant to support early release, and the opposition to early release from local district attorneys.

301 42 Pa. Stat. and Cons. Stat. Ann. § 9777 (2022).

302 Joshua Vaughn, *Pennsylvania Has Few Options to Release Elderly Prisoners as Covid-19 Spreads*, The Appeal, Mar. 23, 2020, <https://theappeal.org/pennsylvania-has-few-options-to-release-elderly-prisoners-as-covid-19-spreads/>.

303 *Id.*

304 Kristen Doerschner, *New law ends early release of prisoners*, The Times, Oct. 28, 2012, <https://www.timesonline.com/story/news/crime/2012/10/28/new-law-ends-early-release/18383726007/>.

Legal Mechanisms for Prison Release in Pennsylvania

Parole release – People serving a prison sentence in Pennsylvania are eligible for parole release upon completion of their minimum sentence. Standard parole release requires a hearing before and approval from the parole board.³⁰⁵

Compassionate release – Non-ambulatory, terminally ill individuals “likely to die in the near future” are eligible for release to receive hospice care. Releases are initiated by PDOC and must be filed with the courts.³⁰⁶

Clemency – The Governor has the ability to pardon or commute a person’s sentence in all cases except impeachment. However, both commutations and pardons must receive the written recommendation from a majority of the Board of Pardons.³⁰⁷

Recidivism Risk Reduction Incentive (RRRI) – People convicted of certain nonviolent, less serious offenses are eligible for this program upon sentencing. In effect, eligible individuals are given an additional “RRRI” minimum sentence in addition to their standard minimum sentence. Depending on the length of the standard minimum sentence, the RRRI minimum sentence will be either three-fourths or five-sixths of that sentence length. Parole is available upon completion of the RRRI minimum sentence with minimal review by the parole board.³⁰⁸

Reprieves – The Governor may temporarily suspend a person’s sentence for whatever reason necessary. This release mechanism does not require approval from the parole board or the Board of Pardons.³⁰⁹

Short Sentence Parole – Those eligible for RRRI who receive a standard minimum sentence of less than two years are automatically released to parole upon reaching that minimum.³¹⁰

305 61 Pa. Cons. Stat. § 6102 (2022).

306 42 Pa. Cons. Stat. § 9777 (2022).

307 Pa. Const. art. IV, § 9(a).

308 61 Pa. Cons. Stat. §§ 4501-12 (2023).

309 *Id.*

310 61 Pa. Cons. Stat. § 6137.1 (2023).

Washington

Introduction

Washington made 1,016 extraordinary prison releases in response to the pandemic, which was equivalent to 5% of its incarcerated population at the time. The release mechanisms used were commutation of sentence (422 people), work-release furlough (66 people), and a “rapid reentry” process (528 people), by which those released served the remainder of their sentences at home with electronic monitoring. Washington was one of five states (along with Georgia, Kentucky, Oklahoma, and Oregon) that used commutation on a large scale as a means of release. Washington also applied two existing early-release mechanisms, work furlough and graduated reentry, available at the discretion of the Department of Corrections.

Timeline of Major Events

2020	January	<ul style="list-style-type: none">The Centers for Disease Control report the first laboratory-confirmed case of COVID in the U.S. from samples taken in Washington State.³¹¹
	February	<ul style="list-style-type: none">Washington Governor Jay Inslee issues a statewide-emergency proclamation.³¹²
	March	<ul style="list-style-type: none">The Washington Supreme Court suspended most in-person court proceedings.³¹³Advocates, on behalf of incarcerated petitioners, petition the Washington State Supreme Court, seeking release.³¹⁴Washington State Department of Corrections (WDOC) adapted community-supervision standards, reducing in-person contacts and suspending warrant sweeps and other apprehension activities.³¹⁵
	April	<ul style="list-style-type: none">The first case of COVID in WDOC was confirmed at the Minimum Security Unit (MSU) at the Monroe Correctional Complex.³¹⁶A major prisoner disturbance occurred at MSU, precipitated by measures the facility put in place in response to the unit outbreak.³¹⁷Advocates filed an emergency petition to the Washington State Supreme Court, requesting accelerated review of their request for a special master and immediate relief.³¹⁸Governor Inslee issued both a commutation order and an emergency proclamation aimed at reducing the prison population.^{319 320}The Washington State Supreme Court denied the petitioners’ request for a writ of mandamus.³²¹

Notes — Washington Timeline

- 311 Centers for Disease Control and Prevention, *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html#:~:text=January%20%2C%202020,respond%20to%20the%20emerging%20outbreak>.
- 312 Proclamation by the Governor 20-50 , State of Washington Office of the Governor, (February 29, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf>.
- 313 Sup. Ct. WA. Amend. Order No.25700-B-607, *In the matter of statewide response by Wa. State courts to the COVID-19 public health emergency*, (2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>.
- 314 Petition for a Writ of Mandamus, *Colvin v. Inslee*, No. 98317-8, (Wash. March 24, 2020), https://columbialegal.org/wp-content/uploads/2020/03/Petition_Against_Gov_Inslee_and_Sinclair.pdf; Jim Brunner, *Inmates with health problems sue Inslee to force release of thousands from prison over coronavirus fears*, Seattle Times, March 25, 2020, <https://www.seattletimes.com/seattle-news/law-justice/inmates-with-health-problems-sue-inslee-to-force-release-of-thousands-from-prison-over-coronavirus-fears/>.
- 315 Washington Department of Corrections, *Community corrections division reduces some supervision in response to COVID-19*, (March 24, 2020), <https://doc.wa.gov/news/2020/03242020p.htm>.
- 316 Jim Brunner, *First Washington inmate inside Monroe prison tests positive for coronavirus, stoking family concerns*, Seattle Times, April 6, 2020, <https://www.seattletimes.com/seattle-news/health/first-washington-inmate-inside-monroe-prison-tests-positive-for-coronavirus-stoking-family-concerns/>.
- 317 Jim Brunner, *First Washington inmate inside Monroe prison tests positive for coronavirus, stoking family concerns*, Seattle Times, April 6, 2020, <https://www.seattletimes.com/seattle-news/health/first-washington-inmate-inside-monroe-prison-tests-positive-for-coronavirus-stoking-family-concerns/>.
- 318 Emergency Motion to Accelerate Review, *Colvin v. Inslee*, No. 98317-8, (Wash. April 9, 2020), <https://columbialegal.org/wpcontent/uploads/2020/04/Colvin-v-Inslee-Petitioners-Emergency-Motion.pdf>.
- 319 Washington Governor Jay Inslee, *Emergency Commutation Due to COVID-19* (April 15, 2020), <https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf>.
- 320 Proclamation by the Governor Amending Proclamation 20-05, State of Washington Office of the Governor (April 15, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-50%20-%20COVID-19%20Reducing%20Prison%20Population.pdf>.
- 321 Wash. Supreme Court Order in the matter of *Shyanne Colvin, et al. v. Jay Inslee, et al.*, No. 98317-8, April 23, 2020, <https://columbialegal.org/wp-content/uploads/2020/04/Colvin-v.-Inslee-Public-Order.pdf>.

Background

In 2020, Washington had a Democratic government trifecta, controlling the executive branch and the majority in the House of Representatives and Senate. This configuration was not new; Washington had had a Democratic majority in both houses since 2018 and a Democratic governor since 1986. Governor Jay Inslee was in the last year of his second term and may have faced less political risk than other governors if prisoners were released early due the pandemic; he also would have faced public backlash had he not agreed to effectuate early releases. However, a crisis he experienced earlier in his tenure as governor involving early releases due to a WDOC sentencing-calculation error made the potential risks of early release more salient. At the same time, this experience made it easier for his office and WDOC to engage in the review process necessary to identify those who would meet criteria for release.

Washington is a determinate sentencing state, utilizing sentencing guidelines to determine appropriate sentences. Washington uses multiple sentencing grids,³²² and on each the vertical axis represents the severity of the offense³²³ and the horizontal axis represents the “offender score,” which is calculated using prior criminal history and other factors.³²⁴ The possible sentence type (supervision and/or incarceration) and the range of time possible are determined by finding the cell where these attributes of offense seriousness and the person’s criminal history intersect.³²⁵ Certain sex offenses are indeterminate, requiring a release decision from the Indeterminate Sentence Review Board.³²⁶ There are also sentencing alternatives in statute for certain drug³²⁷ and sex offenses,³²⁸ for people being prosecuted for their first offense, or for defendants who are parents or caregivers.³²⁹

Incarcerated people convicted after July 1, 2010 can receive earned release time for good behavior or good performance, reducing their sentence by up to one-third,³³⁰ with limitations based the crime of commitment and the law at the time of commitment.³³¹ Those sentenced prior to July 1, 2010 can receive up to 50% of their sentence off, with exceptions based on the offense.³³² Sentences with enhancements for deadly weapons, impaired driving, or endangering a minor child may not receive any of the reductions in time for the portion of the sentence that resulted from the enhancement.³³³

How Events Unfolded During the Pandemic

On January 20, 2020, the first confirmed case of COVID in the United States was in Washington State, and on February 29, Governor Inslee issued a statewide-emergency proclamation, two weeks before President Donald Trump declared a national emergency on March 13.³³⁴ Anticipating the impact of the

³²² Wash. Rev. Code §§ 9.94A.510; 9.94A.515; 9.94A.517; 9.94A.518 (2023).

³²³ Wash. Rev. Code § 9.94A.520 (2023).

³²⁴ Wash. Rev. Code § 9.94A.525 (2023).

³²⁵ Wash. Rev. Code § 9.94A.530 (2023).

³²⁶ Wash. Rev. Code § 9.95.011 (2023).

³²⁷ Wash. Rev. Code §§ 9.94A.660; 9.94A.662 (2023).

³²⁸ Wash. Rev. Code § 9.94A.670 (2023).

³²⁹ Wash. Rev. Code § 9.94A.655 (2023).

³³⁰ Wash. Rev. Code § 9.92.151 (2023).

³³¹ Wash. Rev. Code § 9.94A.729(3)(a)-(c) (2023).

³³² Wash. Rev. Code § 9.94A.729(3)(d) (2023).

³³³ Wash. Rev. Code § 9.94A.729(2)(a)&(b) (2023).

³³⁴ Presidential Proclamation 9994, Executive Office of the President, *Declaring a national emergency concerning the Novel Coronavirus disease (COVID-19) outbreak*, (March 13, 2020), <https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak>.

disease in prisons, advocates organized quickly. On March 16, a coalition that included community-based organizations, legal-services providers, and other advocates issued a joint letter to Governor Inslee requesting his immediate action to prevent the spread of COVID in prisons. They noted his broad authority in a state of emergency and made specific recommendations, including granting clemencies, waiving timelines, and directing WDOC to use the mechanisms available to it to release people early and to identify medically fragile people for referrals for commutation. WDOC responded that it was unable to release people into the community unless people had completed their sentence or otherwise met their criteria for an Extraordinary Medical Placement.³³⁵

WDOC did modify its responses to technical violations of community supervision, foregoing arrest and brief jail stays for most,³³⁶ though this was done primarily to protect community-corrections officers from COVID exposure and to address the fact that jails were not accepting WDOC violation bookings to mitigate their own risk.³³⁷ A Washington State Institute for Public Policy (WSIPP) report found that from March to December 2020, the average daily population of people in DOC custody for community-supervision violations, primarily in jail beds, fell by 53% from the same time period in 2019.³³⁸

On March 24, 2020, Columbia Legal Services, which led the advocate coalition, filed a petition for a writ of mandamus on behalf of five individuals, seeking the release of people in WDOC custody aged 50 or older, those with serious health problems, and anyone with release dates within the next 18 months.³³⁹ Less than a month later, on April 6, the first case of COVID in the incarcerated population was confirmed at the Minimum Security Unit (MSU) at the Monroe Correctional Complex. In the next two days, as more cases were identified, there were more calls for WDOC and the governor to act, and families of people incarcerated at MSU picketed outside the prison.³⁴⁰ After the facility was placed in quarantine and bed placements were changed to place older and medically fragile people in cells and younger people in the open dorms, tensions rose inside the facility too, culminating in a major disturbance on April 8, involving hundreds of inmates in two housing units and lasting several hours.³⁴¹

On April 9, Columbia Legal Services filed an emergency petition with the Washington State Supreme Court, requesting accelerated review of their request for a special master and immediate relief.³⁴² The court subsequently ordered Governor Inslee and WDOC Secretary Stephen Sinclair to immediately exercise their authority to take all necessary steps to protect the health and safety of the named

- 335 Merf Ehman, et al, Letter from a coalition of advocates to Governor Inslee, (March 16, 2020), <https://columbialegal.org/wp-content/uploads/2020/03/Letter-to-Gov-Inslee-re-COVID-19.pdf>; Jim Brunner, *Advocacy groups urge Inslee to release thousands from Washington prisons due to coronavirus risks*, Seattle Time, March 17, 2020, <https://www.seattletimes.com/seattle-news/advocacy-groups-urge-inslee-to-release-thousands-from-washington-prisons-due-to-coronavirus-risks/>.
- 336 Washington Department of Corrections, *Community corrections division reduces some supervision in response to COVID-19*, (March 24, 2020), <https://doc.wa.gov/news/2020/03242020p.htm>.
- 337 Austin Jenkins, *The COVID-19 crisis struck and Washington jails emptied out*, NW News Network, April 24, 2020, <https://www.nwnewsnetwork.org/crime-law-and-justice/2020-04-24/the-covid-19-crisis-struck-and-washington-jails-emptied-out>.
- 338 M. Hirsch, Washington State Institute for Public Policy, *COVID-19 and adult criminal justice: A quantitative look at affected systems* (July 2021), https://www.wsipp.wa.gov/ReportFile/1739/Wsipp_COVID-19-and-Adult-Criminal-Justice-A-Quantitative-Look-at-Affected-Systems_Report.pdf.
- 339 Petition for a Writ of Mandamus, *Colvin v. Inslee*, No. 98317-8, (Wash. March 24, 2020), https://columbialegal.org/wp-content/uploads/2020/03/Petition_Against_Gov_Inslee_and_Sinclair.pdf.
- 340 Jim Brunner, *First Washington inmate inside Monroe prison tests positive for coronavirus, stoking family concerns*, Seattle Times, April 6, 2020, <https://www.seattletimes.com/seattle-news/health/first-washington-inmate-inside-monroe-prison-tests-positive-for-coronavirus-stoking-family-concerns/>.
- 341 Jim Brunner & Elise Takahama, *Police respond to disturbance involving hundreds of inmates at Monroe Correctional Complex*, Seattle Times, April 8, 2020, <https://www.seattletimes.com/seattle-news/crime/police-respond-to-disturbance-involving-hundreds-of-inmates-at-monroe-correctional-complex/>.
- 342 Petitioner's Emergency Motion to Accelerate Review, for Appointment of a Special Master and for Immediate Relief, *Colvin v. Inslee*, No. 98317-8 (Wash. April 9, 2020), <https://columbialegal.org/wp-content/uploads/2020/04/Colvin-v-Inslee-Petitioners-Emergency-Motion.pdf>.

petitioners and all people in WDOC custody in response to the COVID outbreak, and to report to the Court, by April 13, all steps that had been taken and would be taken and their emergency plan for implementation.³⁴³

At the same time, the relatively new Washington Office of the Corrections Ombuds (OCO), in response to the disturbance, conducted a monitoring visit at MSU on April 10. The chair of the Washington House Public Safety Committee and the governor’s criminal-justice policy advisor were included in this visit. The OCO was created by the legislature in 2018 as an “independent and impartial office,” “to assist in strengthening procedures and practices that lessen the possibility of actions occurring within the department of corrections that may adversely impact the health, safety, welfare, and rehabilitation of offenders, and that will effectively reduce the exposure of the department to litigation.”³⁴⁴ The OCO director reports directly to the governor, independent of the WDOC secretary,³⁴⁵ creating a dilemma for the governor should he receive information or recommendations from the OCO director that conflict with information or recommendations from his appointed WDOC secretary.

In her final report, issued on April 17, 2022, the OCO director reported that due to its layout and population, the MSU at MCC could not effectively impose social distancing. The monitoring team observed tense interactions between staff and the people in their care. Both staff and people in prison had requested that people be released early to allow for social distancing and to lessen the stress on staff.³⁴⁶ In her cover letter, the OCO director noted that since their visit, WDOC had made some “positive decisions” regarding early release.³⁴⁷

Governor Inslee and WDOC Secretary Sinclair had reported these decisions to the State Supreme Court on April 13, 2020, stating that they were finalizing a plan for the expeditious implementation of early releases for 600 to 950 people serving sentences for nonviolent or drug-or-alcohol offenses, who had release dates within 75 days to 8 months or who were on work release.³⁴⁸ The same day, the governor held a press conference³⁴⁹ to discuss the measures that WDOC had taken to protect people in its custody, such as limiting (then eliminating) visitation, screening all new admissions to prison with temperature checks, reducing inter-facility transfers, supplying inmates with additional hygiene supplies, isolating sick inmates, and “teaching” social distancing. He also announced that he would proceed with a plan to release people in custody for nonviolent offenses, using commutation and a modified graduated-reentry program.³⁵⁰

On April 15, Governor Inslee issued an order for commutation of sentences for people who were not currently serving time for a violent offense, serious violent offense, or sex offense, and who had a

343 Order on Motion, *Colvin v. Inslee*, No. 98317-8 (Wash. April 10, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/983178%20Public%20Order%20Motion%20041020.pdf>.

344 Wash. Rev. Code § 43.06C.005 (2022).

345 Wash. Rev. Code § 43.06C.020 (2022).

346 Office of the Corrections Ombuds, *Monroe Correctional Complex Monitoring Report* at 2 (April 17, 2020), <https://oco.wa.gov/sites/default/files/OCO%20Monitoring%20Visit%20to%20Monroe%20Correctional%20Complex.pdf>.

347 *Id.* at 1.

348 Respondent’s Report on the Department of Corrections’ COVID-19 Response, *Colvin v. Inslee*, No. 98317-8 (Wash. April 13, 2020), <https://columbialegal.org/wp-content/uploads/2020/04/Colvin-v-Inslee-States-DOC-Report.pdf>.

349 King 5 Seattle, *Gov. Inslee speaks out about early release of some Washington inmates due to COVID-19* (April 13, 2020), <https://www.youtube.com/watch?v=8pFo0ZHvQU8&t=79s>.

350 Press Release, Washington Governor Jay Inslee, *Inslee announces strategies for reducing the number of individuals incarcerated to address COVID-19 in DOC system* (April 13, 2020), <https://www.governor.wa.gov/news-media/inslee-announces-strategies-reducing-number-individuals-incarcerated-address-covid-19-doc>.

release date before or on June 29, 2020.³⁵¹ In his emergency proclamation,³⁵² the governor waived and suspended the 30 day time limitation on work-release furloughs,³⁵³ requirements for notifications of release,³⁵⁴ approvals of release address,³⁵⁵ electronic monitoring for people released on extraordinary medical placement,³⁵⁶ and minimum time-served requirements for release eligibility.³⁵⁷ The proclamation also directed WDOC to continue to identify people in state custody for potential release through furlough, commutation, emergency medical release, or rapid reentry.

Washington also utilized a program called Graduated Reentry, which had been created by the legislature in 2018. Graduated Reentry is a partial-confinement option by which WDOC could transfer people to home detention to serve the last six months of their sentence if they have served at least 12 months in state custody. The 2018 legislation also expanded work-release eligibility from 6 months to 12 months prior to release.³⁵⁸ The Rapid Reentry releases Governor Inslee referenced in his press conference used the authority granted through Graduated Reentry. People in work release and Graduated Reentry do not earn time off of their sentence but, rather, are allowed to serve the remainder of their sentence in the community under strict conditions and can be returned to prison at any time. In 2021, the Legislature passed a bill significantly expanding eligibility for graduated reentry, allowing for release to partial confinement for up to 18 months.³⁵⁹

Factors Affecting the Use of Prison Release Mechanisms

Two events prior to the pandemic likely influenced the governor's and WDOC's choice of release mechanisms. In January 2019, Governor Inslee announced an initiative to streamline petitions for clemency for eligible people with misdemeanor marijuana-possession convictions. The process allowed people to apply for clemency directly via a webform on the governor's office website. This bypassed the typical process of petitioning the Clemency and Pardons Board for a recommendation that would then be sent to the Governor's General Counsel for review. This expedited process, without the application but with defined eligibility criteria, made commutation a more familiar and effective tool for quick releases.

Another event, four years earlier, also created useful historical knowledge. In December 2015, new leadership at WDOC discovered that an error in the department's sentence-calculation software had resulted in some people receiving more good time than allowed by law. The error had been identified years earlier but had never been corrected.³⁶⁰ The governor was notified, and the press was informed,

351 Washington Governor Jay Inslee, *Emergency Commutation Due to COVID-19* (April 15, 2020), <https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf?>

352 Proclamation by the Governor Amending Proclamation 20-05, State of Washington Office of the Governor (April 15, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-50%20-%20COVID-19%20Reducing%20Prison%20Population.pdf>.

353 Wash. Rev. Code § 72.66.036 (2023).

354 Wash. Rev. Code §§ 72.09.710(1); 72.09.712(1)&(2) (2023).

355 Wash. Rev. Code §§ 9.94A.729(5)(b)&(c); 9.94A.733(1)&(2); 72.09.270(8)(a),(b)&(c) (2023).

356 Wash. Rev. Code § 9.94A.728(1)(c)(iii) (2023).

357 Wash. Rev. Code §§ 9.94A.733(1); § 9.94A.728(1)(e)&(f) (2023).

358 Substitute House Bill 2638 (2018 Regular Session). <https://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2638-S.SL.pdf?q=20211021143222>.

359 Washington Department of Corrections, *Graduated Reentry Participation Eligibility: 2022 Report to the Legislature* (Dec. 2022), <https://www.doc.wa.gov/docs/publications/reports/500-SR004.pdf>.

360 Washington Department of Corrections, *Good time compliance computation Q&A*, (December 2015), <https://www.doc.wa.gov/corrections/justice/sentencing/docs/error/good-time-compliance-faq.pdf>, see also *In re Pers. Restraint of King*, 146 Wash.2d 658 (2002).

as WDOC responded to this crisis. They activated a team of their data analysts, records staff, legal counsel, and operational leads to identify people currently and formerly in prison whose prison terms were impacted by the error. Using caselaw guidance and discretionary-release mechanisms, each case was evaluated to determine the best course of action. For those who were doing well in the community but still had time left to serve, WDOC used its furlough authority or work-release partial confinement to keep them in the community. In hindsight, one positive impact of the crisis was the historical knowledge gained—rapid data analysis, records review, emergency policy development, adapted procedures, and logistical practices—that informed WDOC’s COVID release response.

Ultimately, 1,016 people in state custody were released early during the pandemic. They were released through commutation of their sentence (422), work-release furlough (66), or Graduated Reentry/Rapid Release (528).³⁶¹ As was found in most states, compassionate release was an ineffective release option in Washington. When WDOC identified people whom they were willing to release (many of whom would not have been found releasable pre-COVID), WDOC nurses were prohibited from conducting the home assessments required in policy for compassionate release, and this requirement was not waived in response to COVID. They were also unable to place prospective releasees in group care and assisted-living facilities as these facilities were struggling to contain the disease within their own walls. There was also a belief, not without merit, that medically vulnerable people would have better and safer access to care in WDOC facilities than in the community at that time.

The media, especially news stations in more conservative Eastern Washington, dug into the criminal records of those who were released early, showcasing those who had been previously incarcerated for sex or violent crimes, even if they had been released only a few weeks prior to their expected release date. The Spokane County Sheriff told the media that the governor was “trading the safety of his prison population for the safety of Spokane residents.”³⁶² The Spokane Police Guild issued a statement admonishing the governor, stating that those “who have served their time deserve the right to reintegrate back into society,” but the governor’s early releases “will only cause crime to rise... by demonstrating there are little to no consequences when someone breaks the law.” “These inmates have already shown their disregard for the laws of our state and city, and will only continue to commit crimes in our area.”³⁶³

On April 23, 2020, in a 5–4 decision, the Washington State Supreme Court denied the petitioners’ request for a writ of mandamus, because they had not proven that WDOC was currently failing to perform their duty to protect people in state custody from COVID, nor had they proven deliberate indifference.³⁶⁴ Following the decision, the executive director of the Washington Association of Sheriffs & Police Chiefs told the media that a “sudden mass release would have increased the number of new crimes committed, creating public safety concerns.” He also seemed, though not explicitly, to support the governor’s strategy, stating that the state “has a case-by-case release system to reduce inmate

361 Washington Department of Corrections, *COVID-19 incarcerated population reduction efforts-commutations*, (May 4, 2020), <https://www.doc.wa.gov/corrections/covid-19/docs/reduction-efforts-commutation.pdf>; *COVID-19 incarcerated population reduction efforts-rapid reentry*, (May 15, 2020), <https://www.doc.wa.gov/corrections/covid-19/docs/reduction-efforts-rapid-reentry.pdf>; *COVID-19 incarcerated population reduction efforts-work release furloughs*, (May 7, 2020), <https://www.doc.wa.gov/corrections/covid-19/docs/reduction-efforts-work-release-furlough.pdf>; <https://www.doc.wa.gov/corrections/covid-19/faq.htm#reentry>.

362 KHQ Exclusive: Second sex offender put up for early release, Spokane list includes gang members, others connected to homicides, KHQ, April 27, 2020, https://www.khq.com/coronavirus/khq-exclusive-second-sex-offender-put-up-for-early-release-spokane-list-includes-gang-members/article_c307821a-8423-11ea-b7e3-03eca4c3ea58.html.

363 Spokane police guild: Early release of DOC inmates ‘unfair to victims of their crimes and citizens,’ KHQ, April 27, 2020, https://www.khq.com/news/spokane-police-guild-early-release-of-doc-inmates-unfair-to-victims-of-their-crimes-and/article_6589f7de-8889-11ea-9fb5-eff34c2c877b.html.

364 Order, *Colvin v. Inslee*, No. 98317-8 (Wash. April 23, 2020), <https://columbialegal.org/wp-content/uploads/2020/04/Colvin-v.-Inslee-Public-Order.pdf>.

populations in response to COVID and it should be maintained in support of public safety.”³⁶⁵ Though they had not received the outcome they had hoped for, the advocacy coalition, through their appeals to the governor and WDOC and their pursuit of relief from the State Supreme Court, moved WDOC and the governor to develop and implement a plan for early release much sooner than they would have without the public escalation. The coalition’s request for a broader release also helped lessen criticism of the state’s much more conservative use of their mechanisms for early release.

COVID Release Processes Applied One Year Later

On February 25, 2021, the Washington State Supreme Court issued its opinion in *State v. Blake*,³⁶⁶ finding that the state’s strict-liability drug-possession statute violated due process under the United States and Washington State constitutions.³⁶⁷ This created another expedited-release challenge for DOC; their early estimates were that there were about 100 people incarcerated for simple drug possession and another 2,600 people incarcerated for simple possession and at least one other conviction. Additionally, nearly 11,000 were on community supervision for simple possession (about 7,000) or simple possession and at least one other conviction (about 3,900).³⁶⁸ In August 2021, for those on community supervision for simple possession only, the Governor’s Office created a new process to streamline petitions for commutations.³⁶⁹

By September 22, 2021, Governor Inslee had commuted 350 sentences, relieving people of community supervision without having to wait for their sentences to be vacated by the overburdened courts.³⁷⁰ WDOC expanded its capacity to facilitate virtual resentencing hearings for courts throughout the state and developed staff training on the streamlined release, reentry, and recordkeeping processes for people who, as a result of their resentencing, were to be released immediately or sooner than expected.³⁷¹ Although the *Blake* decision required another massive effort by WDOC to develop and implement a plan to identify people impacted by the decision who were incarcerated or on community supervision, it was made easier because of the additional institutional knowledge gained through commutation and other early-release processes, further refined for COVID-mitigation releases the year before.

365 Lilly Fowler, *WA inmates say they’re retaliated against for getting COVID-19*, Crosscut, December 9, 2020, <https://crosscut.com/news/2020/12/wa-inmates-say-theyre-retaliated-against-getting-covid-19>; James Drew, *State won’t release more vulnerable inmates after split Supreme Court ruling*, The News Tribune, April 23, 2020, <https://www.thenewstribune.com/news/coronavirus/article242246746.html>.

366 *State v. Blake*, 481 P.3d 521, 197 Wash. 2d 170 (2021).

367 Wash. Rev. Code § 69.50.4013 (2023).

368 Washington Department of Corrections, *Update on supreme court ruling that voids statute has potential implications for sentences imposed by the courts*, (March 12, 2021), <https://www.doc.wa.gov/news/2021/03122021p.htm>.

369 Governor’s Office, *Inslee to provide clemency relief to individuals still serving community supervision solely on invalid drug possession convictions*, (August 16, 2021), <https://www.governor.wa.gov/news-media/inslee-provide-clemency-relief-individuals-still-serving-community-supervision-solely>.

370 KAPP-KVEW Staff, *Inslee commutes sentence of 350th low-level drug offender*, (September 22, 2021), <https://www.yaktrine.com/inslee-commutes-sentence-of-350th-low-level-drug-offender/>.

371 Washington State Department of Corrections, *Resentencing Training*, (Oct. 2021), <https://www.doc.wa.gov/docs/publications/400-GU002.pdf>.

Conclusion

Washington was an example of a state that actively used its back-end release authority to respond to the pandemic. Unlike most other states, Washington had already had a great deal of experience in using these back-end mechanisms, so it was able to bring them to bear quickly, though advocates thought more releases should have resulted.

Washington has multiple mechanisms to make nonroutine releases (compassionate release, furlough, home detention, commutation), but modifications to eligibility and notification requirements were necessary and possible under emergency authority. Though Governor Inslee and WDOC used several of the release mechanisms available to them, primarily commutation and “rapid reentry” home confinement, the number of people released was modest and likely driven by the external pressure of litigation. The OCO report, a firsthand and public account of what was happening in a prison from an oversight body rather than WDOC, also motivated executive action. When the Washington State Supreme Court denied the petition for writ of mandamus, however, very few early releases followed. Though the court’s denial was not the result that advocates had hoped for, the litigation also provided cover for the governor and WDOC. The early-release criteria and numbers they chose to release seemed conservative when compared with what advocates were requesting.

Despite this more active use of back-end releases, WSIPP found that reductions in the Washington prison population due to COVID-related responses were primarily due to fewer new court sentences to prison. When compared to the same time period in 2019, from March to December 2020 admissions dropped by 44%. Releases in 2020 actually decreased by 8%, from 2019 releases in the same period.³⁷²

Nevertheless, following the pandemic, some of the modifications made during the pandemic have had lasting effects. Since 2020, the Legislature has expanded WDOC’s authority to release, creating two tracks for Graduated Reentry, one requiring 6 months of incarceration before serving the last 5 months on home detention and another requiring at least 4 months served in prison, then up to 18 months on home detention.³⁷³ WDOC’s modified approach to technical violations also endured. During the pandemic, WDOC avoided using arrest and brief jail stays for most. Though WDOC resumed arrests for most violations, 2021 legislation clarified that the department could choose non-confinement sanction responses for technical violations.³⁷⁴

372 M. Hirsch, Washington State Institute for Public Policy, *COVID-19 and adult criminal justice: A quantitative look at affected systems* (July 2021), https://www.wsipp.wa.gov/ReportFile/1739/Wsipp_COVID-19-and-Adult-Criminal-Justice-A-Quantitative-Look-at-Affected-Systems_Report.pdf.

373 Engrossed Substitute Senate Bill 5121, 2021, <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5121-S.SL.pdf?q=20221227142816>.

374 Substitute House Bill 2417, 2020, <https://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2417-S.SL.pdf?q=20230327214241>.

Legal Mechanisms for Prison Release in Washington

Clemency – The governor has constitutional authority to grant pardons, and various statutory provisions grant the governor power to grant reprieves or commutations.³⁷⁵ The Clemency and Pardons Board reviews and holds hearings on petitions for such relief and makes recommendations to the governor.³⁷⁶ The governor makes the final decision in all cases.

Furlough – This temporary release from prison³⁷⁷ may be granted for purposes ranging from obtaining medical care and seeking employment or housing plans, to visiting family and caring for business affairs.³⁷⁸ Emergency furlough is an expedited process in order for a person to “meet an emergency situation, such as the death or critical illness of a member of their family.”³⁷⁹ Certain people are ineligible for furlough, including those not classified as or eligible to be classified as minimum-security, those who haven’t served their minimum term of imprisonment,³⁸⁰ or those who have a valid detainer pending.³⁸¹ In emergency-furlough situations, certain eligibility requirement may be waived by WDOC.³⁸²

Graduated Reentry – This program allows early release to home confinement to serve the final 5 to 18 months, depending on offense type and the duration of their sentence.³⁸³ People who are categorically ineligible include: those found guilty of a sex offense, a violent offense, or a crime against a person, those subject to a deportation order or civil commitment, individuals supervised under the interstate compact for adult offenders, and individuals under the jurisdiction of the Indeterminate Sentence Review Board.³⁸⁴ People serving time in Graduated Reentry may be returned to prison at any time for noncompliance.³⁸⁵ The current two-track Graduated Reentry system resulted from the pandemic experience. Prior to 2021, Graduated Reentry was only available to people during the last six months of their sentence.³⁸⁶

Extraordinary Medical Placement – The Secretary of Corrections may authorize the release of a prisoner to extraordinary medical placement if: they have a serious medical condition that is expected to require costly care or treatment; they are considered low-risk because of their physical incapacitation; and placement would result in cost savings to the state.³⁸⁷ People sentenced to life without parole are ineligible, as are “persistent offenders.”³⁸⁸ People on extraordinary medical placements are subject to electronic monitoring and may have their placement revoked at any point.³⁸⁹

375 Wash. Const. art 3, § 9; Wash. Rev. Code §§ 10.01.120; 9.94A.728 (4), (6) (2023).

376 Wash. Rev. Code § 9.94A.885 (2023).

377 Wash. Rev. Code § 72.66.010(3) (2023).

378 Wash. Rev. Code § 72.66.018 (2023).

379 Wash. Rev. Code § 72.66.010(2) (2023).

380 Wash. Rev. Code § 72.66.016 (2023) (outlining the various minimum time served requirements, which depend on severity and offense type).

381 Wash. Rev. Code § 72.66.014 (2023).

382 Wash. Rev. Code § 72.66.042 (2023).

383 Wash. Rev. Code §§ 9.94A.728(f); 9.94A.733(1) (2023).

384 Wash. Rev. Code § 9.94A.733(1)(a)–(b) (2023).

385 Wash. Rev. Code § 9.94A.733(6) (2023).

386 Washington Department of Corrections, *Graduated Reentry Participation Eligibility: 2022 Report to the Legislature* (Dec. 2022), <https://www.doc.wa.gov/docs/publications/reports/500-SR004.pdf>.

387 Wash. Rev. Code § 9.94A.728(c) (2023).

388 Wash. Rev. Code § 9.94A.728(c) (2023).

389 Wash. Rev. Code § 9.94A.728(c) (2023).

In addition to the Department of Corrections, the Governor also retains authority to grant extraordinary releases for reasons of serious health problems, senility, and advanced age.³⁹⁰ Such cases will be taken into consideration by the Governor based on recommendations from the Clemency and Pardons Board.³⁹¹

Work Release – Work release is a program of partial release from confinement for the purpose of working at paid employment or participating in a vocational training program. People participating in the work release program must remain confined during non-work or schooling hours in prison, city or county jail, or some other appropriate supervised location.³⁹²

Proximity to Release Date – The Department of Corrections has discretion to release a person any time within ten days of their release date.³⁹³

Emergency Release when Facility Capacity is Exceeded – In the event that the prison population exceeds capacity, the governor may convene the Sentencing Guidelines Commission to amend the guidelines ranges or the Clemency and Pardons Board to recommend whether the governor's commutation or pardon power should be exercised to address the emergency.³⁹⁴

390 Wash. Rev. Code § 9.94A.728(d) (2023).

391 Wash. Rev. Code § 9.94A.728(d) (2023).

392 Wash. Rev. Code § 72.65.020 (2023).

393 Wash. Rev. Code § 9.94A.728(h) (2023)

394 Wash. Rev. Code § 9.94A.870 (2023).

Case Study Themes

The COVID-19 pandemic has highlighted the varying responses of different states and the federal government to the crisis. Each jurisdiction's approach, including the number of early releases and the obstacles encountered, was influenced by a range of pre-existing structural factors. These factors included the political affiliations of those in power at the executive and legislative branches, the release mechanisms available, and prior events that shaped prevailing opinions on early release. In this section, we will explore the common themes that emerged across six states' responses. We explore these themes against the backdrop of mass incarceration, seeking to understand the factors that influence decision-making surrounding early prison release during the pandemic and beyond.

Efforts to release people from prison became politicized, particularly in states with divided governments. COVID was not just a novel public health crisis, but also a novel political crisis. Government officials in most states worried about the potential public backlash from releasing people early from prison—especially if any of the individuals released were to commit a violent offense. Thus, government officials' sensitivities to public perception caused them to weigh every decision carefully and act conservatively. Governors who exercised their emergency authority for a number of COVID-related measures, such as government-mandated business and school closures and vaccine distribution, received strong cross-party criticism. For those in states with divided governments, meaning the executive and legislature were controlled by different parties as in Pennsylvania and Kansas, or each house of the legislature was controlled by different parties as in Minnesota, and for those in states that had a trifecta but were vulnerable to losing the governor's office as in Illinois, efforts to release individuals from prison early were equally controversial and required administrations to open themselves up to additional criticism. As one government official told us after receiving intense pushback for the governor's release effort: "it wasn't a hill we wanted to die on." This politicization also served as a nonstarter for legislation that would have given additional release powers to the state's corrections department or governor, which would have been the most efficient mechanism for early release.

Risk averse decision-making prevailed. State officials knew that keeping vulnerable people in crowded prison conditions during the pandemic was risky. However, as explained above, they were also afraid of public backlash if they released someone who had been convicted of a violent crime or, more importantly, who would reoffend while on release. Across all the case studies where releases were made, government officials exhibited a lower tolerance for risk by developing narrow release eligibility criteria that targeted people who were already close to release, who were low risk for reoffending, and/or who were serving sentences for lower-level offenses. Those convicted of violent crimes, and in some cases people with prior convictions for violent crimes, were excluded from the criteria, significantly reducing the pool of eligible individuals. This approach reduced the risk of public backlash but also limited the potential benefits. In particular, it largely excluded older people most at risk for serious illness because they tended to be serving longer sentences for violent offenses. In almost all case studies, the number of people who were actually released was smaller than the number expected to be released.

The urgency to release people from prison decreased as prison populations shrank and external pressures shifted. At the onset of the pandemic in March and April 2020, advocates and governors called for the quick release of people from prisons, and in most states, litigation was filed to require executive action. Although these external pressures motivated some early releases in certain states, these efforts tapered off as the pandemic progressed. The courts did not compel states to act more aggressively to reduce their prison populations, but these populations were declining regardless, due

to attrition from regularly scheduled releases and postponed criminal court proceedings. Moreover, in some states, prisons temporarily stopped admitting new commitments. This additional capacity, coupled with COVID-responsive operational adaptations, reduced the urgency for release. Ultimately, reductions in admissions yielded greater overall population reductions compared to early releases and were significantly less controversial. This explains why most states released few individuals and why most release efforts stopped after the first few months of the pandemic.

Compassionate and medical release statutes were not effective for COVID release efforts, as they were not designed for large-scale releases. While most states have some form of compassionate release or medical parole or furlough, they typically require that the person already be sick, sometimes to the point of incapacitation in order to be considered for release. In contrast, pandemic-related releases were primarily preventive, aimed at moving vulnerable people out of prison and increasing social distancing for others. Minnesota modified its compassionate release mechanisms to include COVID vulnerability as a risk factor. However, once vaccines became widely available, there was no longer justification for medical release, and efforts were made to recall people who had been released in this manner back to prison.

Releases turned on use of discretion rather than whether the state had a determinate or indeterminate sentencing and release structure. The Robina Institute's [Degrees of Indeterminacy project](#) revealed that all jurisdictions have some amount of discretion built into the back end of the system that affects the length of time a person will serve in prison. Determinacy—the predictability of time served—is affected by laws determining the minimum time required to be served, the earning of good time or sentence credits, or the decision of a parole board to grant or deny parole. COVID-related releases demonstrated the power of these back-end mechanisms. Though we would have thought that states with parole boards would have the easiest time making non-routine releases, such releases did not occur when in jurisdictions like Alabama, the parole board chose not to use its discretion to grant parole. In contrast, even jurisdictions like Minnesota with very determinate sentences were able to make releases by using discretion vested in the corrections department to broadly interpret their work release and medical release authority. Thus, discretion was a double-edged sword. While advocates in Minnesota were pushing authorities to exercise their discretion, advocates in Alabama sought mechanisms that would remove discretion so they could bypass the parole board and make releases more automatic.

Few changes to policy or practice that occurred during the pandemic had a lasting impact on back-end release practices. As reported above, a few states made permanent changes following their experience with COVID. Washington expanded Graduated Reentry to create a second track allowing people to serve up to 18 months on home detention³⁹⁵ while Illinois expanded eligibility for sentence credit, the number of days that can be awarded, and ways to earn sentence credit.³⁹⁶ But despite changes to policy and practice during the pandemic, it appears that the more common experience was a return to business as usual. The pandemic provided an opportunity to test out new release mechanisms or nontraditional uses of those mechanisms, but ultimately, officials' willingness to use their discretion to grant early release appears to have waned. As a result of this and a return to normal prison admissions, the prison populations in all case study states have been inching back up after briefly decreasing in 2020.

395 Engrossed Substitute Senate Bill 5121, 2021, <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5121-S.SL.pdf?q=20221227142816>.

396 Illinois Safety, Accountability, Fairness, and Equity-Today Act, Public Act 101-0652, 101st Illinois General Assembly (2021), <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf><https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>.

What COVID Prison Releases Demonstrate about the Ability of the U.S. to Reduce Mass Incarceration

The causes of mass incarceration in the U.S. are complex, but at its core, it is mainly the result of more people being sent to prison.³⁹⁷ In 2020, there were 1.2 million people incarcerated at the state and federal level.³⁹⁸ Although there have been recent reductions in the U.S. prison population, research suggests that at the current rate of decline it will take 60 years to halve the prison population.³⁹⁹ Consequently, without dramatic changes to state level carceral policies, America's rate of incarceration is likely to remain an outlier compared to other Western democratic countries for decades to come.⁴⁰⁰ These policies could take on many forms, but releasing people from prison earlier in their sentence is one way to achieve reductions. Done on a large scale, reducing time served could have a dramatic effect on the prison population.⁴⁰¹

This report examined COVID-related prison releases to determine whether states have the capacity to substantially decrease their prison populations through back-end release discretion. If mass incarceration was seen as an impetus to reduce prison populations, much like the pandemic, would states have the political will and legal mechanisms to respond appropriately? The findings show that the current system of back-end prison release is unlikely to make a substantial difference in addressing mass incarceration due primarily to risk aversion.

The case studies revealed that there were legal mechanisms available to release people from prison in every jurisdiction. Possible mechanisms included increasing the grant rate for people who were eligible for parole, applying sentence credits more broadly to people who had previously been unable to earn them, and reading a work release or medical release statute more broadly than it had traditionally been used. In some jurisdictions, executive authority was required to temporarily suspend limitations on the use of these mechanisms, but those steps could be and were taken. Thus, across all the case studies, the power and discretion to release people did exist in the back end of the system.

But although the discretion existed, releasing individuals from prison before their sentence is complete comes with political and public safety risks, which discourages government officials from using the

397 John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13(2) *Am. L. & Econ. Rev.* 491–531 (2011).

398 Carson, A. 2021. *Prisoners in 2020 – Statistical Tables*. Bureau of Justice Statistics. Washington, DC. <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>

399 Ghandnoosh, N. 2021. *Can We Wait 60 Years to Cut the Prison Population in Half?* The Sentencing Project. Washington, DC. <https://www.sentencingproject.org/app/uploads/2022/08/60-Years-to-Cut-the-Prison-Population-in-Half.pdf>.

400 Waldra, E. and Herring, T. 2021. *States of Incarceration: The Global Context 2021*. Prison Policy Initiative. Northampton, Massachusetts. <https://www.prisonpolicy.org/global/2021.html>.

401 Gerry Gaes and Julia Laskorunsky, Council on Criminal Justice, *The Relationship Between Sentence Length, Time Served, and State Prison Population Levels (2023)*, <https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/the-relationship-between-sentence-length-time-served-and-state-prison-population-levels>.

legal mechanisms available for early release. Our case studies showed that government officials feared the public backlash that would come if a person released early committed a serious crime. Their fears are not without merit.⁴⁰² As we saw in Alabama, when a person on parole murdered a family of three, it was the parole process that was blamed for the crime.⁴⁰³ Though no one should take the commission of any offense lightly, there is risk of re-offense with every release from prison. Though we can make predictions about how people are likely to behave upon being released from prison, there is no way to reduce the risk of re-offense to zero.⁴⁰⁴ It is therefore disingenuous when the media and public officials focus on the judgement of a corrections official or parole board in granting release as the pivotal factor resulting in criminal behavior, especially given the fact that determinate sentencing jurisdictions release people automatically every day, including people who have been convicted for violent offenses. There are other decisions state officials make that can affect reoffending, such as the level of investment in rehabilitative treatment and reentry support, but these topics do not usually garner media attention, and so officials are rarely held accountable for these types of decisions, which can in fact impact criminal behavior.

Government officials also felt a responsibility to crime victims. Some saw attempts at early release as unfair and even dangerous to victims. This concern often extended past the crime of conviction to exclude individuals that had any prior violent offending from early release. Public opinion research conducted in California showed mixed support for large scale early release during the pandemic, and stronger support for releasing people near their sentence end date or who had committed victimless crimes.⁴⁰⁵ Coincidentally, this is the low risk approach most states took, which ultimately kept the total number of releases low.

Some jurisdictions have an emergency relief valve in law to address disasters or over-capacity in prisons, but to our knowledge, these were not used to respond to COVID, nor have they been used to respond to dangerous and well-documented prison overcrowding. Prison overcrowding creates unsafe conditions within prisons that can affect the physical and mental well-being of those who are incarcerated. Overcrowding can lead to increased tension between incarcerated people resulting in incidents of violence and sexual assault. It also affects the quality of sanitation and healthcare, and the provision of programming and services. Moreover, the risk of harm to the physical and mental well-being of prison staff is equally high,⁴⁰⁶ which is a cost few prison systems can afford given nationwide staffing shortages.⁴⁰⁷ This begs the question as to what constitutes a crisis in prisons that should trigger an extraordinary response to use back-end discretion to release people from prison. A pandemic caused by an unknown deadly pathogen triggered an emergency response, including

402 See, e.g., Robert Reiner, *Media Made Criminality: The Representation of Crime in the Mass Media*, in *The Oxford Handbook of Criminology* (Mark Maguire, Rod Morgan, and Robert Reiner eds, 2002); Lauren Ducat, Stuart Thomas, and Warwick Blood, *Sensationalising Sex Offenders and Sexual Recidivism: Impact of the Serious Sex Offender Monitoring Act 2005 on Media Reportage*, 44(3) *Australian Psychologist* 156-165 (2009).

403 Beth Shelburne, *Advocates for Alabama's Incarcerated Oppose Slowing Parole*, May 25, 2019, <https://www.wbr.com/2019/05/25/advocates-alabamas-incarcerated-oppose-slowng-parole/>.

404 See, e.g., James Bonta and D.A. Andrews, *The Psychology of Criminal Conduct* (6th Ed., Routledge 2017).

405 Bazelon, L., and Barry, K. 2020. California Voters Support Releasing People from Jails & Prisons to Protect Communities from Covid-19. Data for Progress. <https://www.filesforprogress.org/memos/california-voters-support-releasing-people-from-jails-and-prisons-to-protect-communities-from-covid-19.pdf>.

406 See, e.g., U.S. Dept. of Justice Civil Rights Division, *Investigation of Alabama's State Prisons for Men* 55 (April 2, 2019) (detailing findings from the DOJ's investigation into overcrowding conditions in Alabama's prison system), <https://www.justice.gov/opa/press-release/file/1150276/download>; United Nations Office on Drugs and Crime, *Handbook on Strategies to Reduce Overcrowding in Prisons* ch. A (2013) (describing the impacts of prison overcrowding), https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.

407 David Montgomery, *Prison Staff Shortages Take Toll on Guards, Incarcerated People*, Stateline, Sept. 26, 2022, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/26/prison-staff-shortages-take-toll-on-guards-incarcerated-people>.

early releases in some states, but arguably no state, other than perhaps New Jersey,⁴⁰⁸ made releases to the degree that should be characterized as extraordinary.

The experience of prison releases during the pandemic teaches us that the U.S. is disinclined to use back-end discretion to reduce the mass incarceration, even if mass incarceration were to be viewed as a crisis requiring an extraordinary response. Instead, the pandemic taught us that discretion in the back end of the system is powerful, but also vulnerable to criticism should it be used. Though nearly all jurisdictions had some avenue for utilizing discretion to make prison releases, nearly all were risk-averse in their approach to releases during the pandemic, indicating they would be unlikely to take on the responsibility of reducing prison sentences in order to reduce overall prison populations. **Thus, one lesson learned from this experience is that in order to affect mass incarceration, back-end release mechanisms need to be routine and automatic rather than grounded in discretion.**

One way to encourage early releases is to implement policies that diffuse the responsibility of decision-making for early release. Automated early release programs, such as the administrative parole programs found in 12 states, can reduce procedural steps and eliminate the need for case-by-case discretion by parole board members.⁴⁰⁹ People who accomplish predetermined steps are automatically released when those steps are completed. This provides some cover to risk-averse parole boards by removing the responsibility of a release decision from individual board members. Another way to achieve this is to expand the award of sentence credits for participation in programming while in prison. This type of expansion is often more politically palatable, and it is in keeping with research indicating that programming, treatment and other pro-social activities improve prison and community safety and that incentives, such as reduced time in prison, motivate participation and behavior change.⁴¹⁰ However, to have a sizable impact on prison population, programs permitting sentence credits for participation in programming must allow for broad eligibility—including people who have been convicted of violent offenses, who arguably need and would most benefit from the programming. It should also create presumptions in favor of release if people are unable to participate in or complete programs through no fault of their own (i.e., when programming is unavailable at the facility, there is a long waitlist, or language barriers exist).

However, even if all of the back-end releasing policy and practice changes used during the pandemic had been made permanent, it would not be enough to significantly reduce mass incarceration. An estimated 80,658 people were released non-routinely from prisons during the pandemic, which was equivalent to about 5-1/2% of the total state and federal prison population in 2019.⁴¹¹ At the same time, however, it is estimated that roughly 200,000 fewer people were admitted to U.S. prisons in 2020.⁴¹² Thus, the drop in prison admissions drove the decrease in prison populations to a far greater degree than prison releases. Though states could have released more people, for example, by increasing

408 Micah J. Bowden, Note, *Incarcerated During COVID-19: A Look at New Jersey*, 23 Rutgers Race & L. Rev. 355 (2022); Tracey Tully, 2,258 N.J. prisoners will be released in a single day, New York Times, November 4, 2020, <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html>.

409 Reitz, K., Rhine, E., Lukac, A., & Griffith, M. (2022). *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size*. University of Minnesota Robina Institute of Criminal Law and Criminal Justice.

410 See e.g., Duwe, Grant. The use and impact of correctional programming for inmates on pre- and post-release outcomes. Vol. 48. US Department of Justice, Office of Justice Programs, National Institute of Justice, 2017.; Polinsky, A. Mitchell. "Deterrence and the optimality of rewarding prisoners for good behavior." *International Review of Law and Economics* 44 (2015): 1-7.

411 Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, & Madison Wadsworth, Robina Institute of Criminal Law and Criminal Justice, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing the Effects of Mass Incarceration at iii* (2022), <https://robinainstitute.umn.edu/publications/examining-prison-releases-response-covid-lessons-learned-reducing-effects-mass>.

412 Council of State Governments, *National Report: More Community Less Confinement*, <https://csjjusticecenter.org/publications/more-community-less-confinement/national-report/>.

their grant rates for parole, they chose not to, instead acting conservatively in the way they exercised back-end discretion. **Thus, a second lesson learned is that policies and practices that prevent imprisonment in the first place have the greatest chance of achieving long-term reductions in prison populations.**

Some jurisdictions are reconsidering key provisions that have contributed to mass incarceration. For example, California revised its felony murder law to prohibit collateral murder convictions for people who were not key principles in the crime,⁴¹³ and other states are beginning to follow suit. Moreover, provisions such as the three-strikes law have fallen out of favor as people have become aware of the disproportionality of the penalty in relation to the crime and the disproportionate impact of these laws on non-white communities.⁴¹⁴ Removing these laws or enacting laws to remove such practices can reduce the prison population going forward. But in order to reduce the existing prison population, they need to also be applied retroactively. Thus, as legislation is enacted, it must include retroactivity provisions allowing for resentencing in line with the new legal doctrine.

There are numerous other ways to respond to the lessons learned during the course of this project. This report does not purport to have all those answers; it simply offers examples of some of the ways that we might use these lessons to reduce mass incarceration.

413 Jasmine Ulloa, *California Sets New Limits on Who Can be Charged with Felony Murder*, Los Angeles Times, Sep. 30, 2018, <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html>.

414 See, e.g., Elizabeth Hinton, LeShae Henderson, and Cindy Reed, Vera Institute of Justice, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (May 2018), <https://www.issuelab.org/resources/30758/30758.pdf>.

Conclusion

The findings of this report show that although jurisdictions have the power to make releases from prison using back-end discretion, they are unlikely to use it due to risk aversion. Even if they did use it, the same risk aversion would result in releases too low in proportion to the population to make a substantial difference in addressing mass incarceration. Thus, state level carceral policies that focus on diffusing responsibility for back-end release and that reduce the rate of imprisonment in the first place have the greatest chance of achieving long-term reductions in prison populations.