



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: SOUTH DAKOTA

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This report is part of a larger *Prison Release: Degrees of Indeterminacy Project* funded by Arnold Ventures. For other publications from the project, including additional state-specific reports, go to the Robina Institute of Criminal Law and Criminal Justice’s website at <https://robinainstitute.umn.edu>.

Definitions and Concepts

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

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

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

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

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

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

Rankings of “Degrees of Indeterminacy”

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

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

Benchmarks for rankings of “degrees of indeterminacy”

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

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

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board’s release decisions would be 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *longest-time-served scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (a *shortest-time-served scenario*).

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

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Overall, we rank the South Dakota prison-sentencing system as operating with a *moderate degree of indeterminacy* on the scale developed for this project (see pp. v-vi). This ranking reflects a continuum of staggered parole-release formulas: from first eligibility at the 25-percent mark of judicial maximum sentences to the 75-percent mark, with 5-percent gradations in between. Effective for crime committed after July 1, 2023, sentences for designated serious crimes have been made non-parolable. South Dakota's different sentence classes thus vary from *high* to *extremely low indeterminacy*, with an overall center of gravity in the range of *moderate indeterminacy*.

South Dakota has created a unique “administrative parole release” (APR) system that streamlines the procedural path to release compared with traditional parole frameworks. A large percentage of prisoners in South Dakota are assigned “initial parole dates” shortly after admission, with the expectation that they will be released without a hearing before the parole board if they comply with the requirements of their “individual program directives” (IPDs) as drawn up by the department of corrections. Automatic release occurs on a prisoner's initial parole date when the department raises no questions about a prisoner's compliance with their IPD. If the department reports noncompliance or insufficient information in a specific case, however, questions of compliance and release must be determined in an individualized parole-board hearing.

South Dakota also maintains a system of “discharge credits,” mainly for work and program completion. These credits are subtracted from the judicial maximum sentence to advance prisoners' dates of mandatory release. Effective for acts committed after July 1, 2023, sentences for a substantial number of serious crimes were made ineligible for credit-based sentence reductions or were made eligible only for “limited” reductions.

Terminology note

This report will refer to the South Dakota Board of Pardons and Parole as the “parole board.” The South Dakota Department of Corrections will be referred to as the “department of corrections.”

¹ This report was prepared with support from Arnold Ventures. For a broad overview of the law of parole release and supervision in South Dakota, see Alexis Lee Watts, Brendan Delaney, & Kevin R. Reitz, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: South Dakota* (Robina Institute of Criminal Law and Criminal Justice, 2019).

Introduction

South Dakota's prison-rate history, 1972 to 2020

In 2020, South Dakota's prison rate was 362 per 100,000 general population, with a yearend prison population of 3,242.² South Dakota's prison rate was 15th largest among all states (tied with Montana).

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

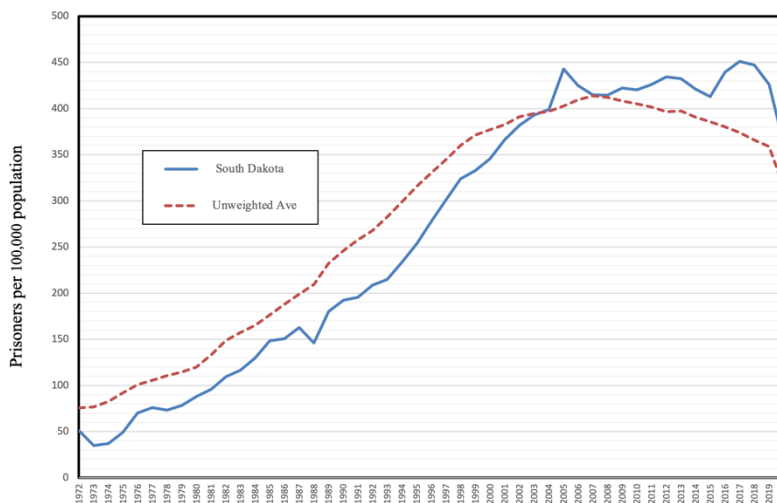
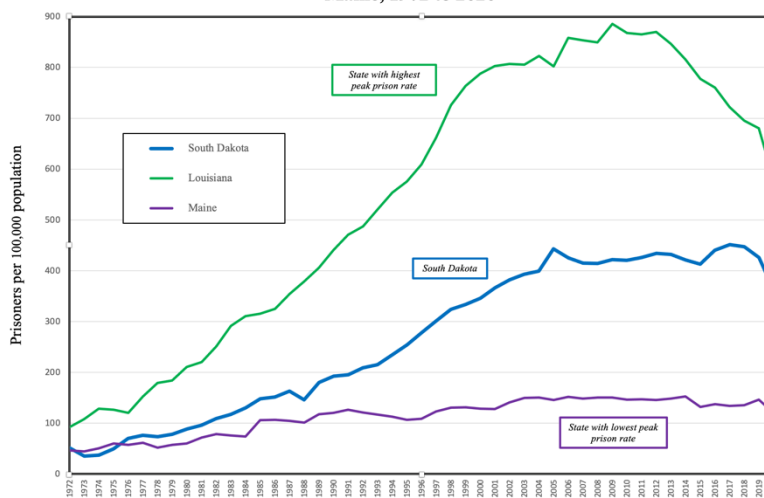


Figure 2. Prison Rate Change in South Dakota, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-

² E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 21 table 4, 16 table 7.

1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

South Dakota reached its peak prison rate in 2017 at 451 per 100,000, which dropped to 362 per 100,000 in 2020. This is a net difference of -89 per 100,000, which was the 33rd largest (eighth lowest) prison-rate drop among all states from their peak prison rate (in various years) through 2020.

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

The COVID period

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.³

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend 2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000

³ In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

general population, for an average incremental downturn of -51 per 100,000.⁴ We believe this was the largest one-year decline in state prison rates in American history.⁵

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic pace. Preliminary data from the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021. Prison populations actually rose in 19 states.⁶

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

Nationwide, COVID-driven changes in prison-release practices were not the main driving force of prison population shrinkage from early 2020 through the end of 2021. This is not to say that there was no expansion of prison release during the pandemic. Thirty-six states and the federal government did at least *something* to expedite releases, each jurisdiction choosing from a grab bag of different strategies—e.g., expedited parole release, loosened release criteria, increased or restored credit awards, early release of prisoners already close to their mandatory release dates, expanded compassionate release for the elderly or medically infirm, increases in clemency grants, invocation of overcrowding emergency provisions, and court orders. Such steps did not yield large numbers of “COVID releases” in most states, however, and many COVID releases were not much earlier than they would have been in the pandemic's absence.⁷

⁴ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 1, 7 table 2. Across 2020, prison rates fell in every state except Alaska, where the rate increased by 1.2 percent.

⁵ Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 *Crime & Delinq.* 9 (1979).

⁶ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021).

⁷ For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons' embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.⁸

The COVID period in South Dakota

In calendar year 2020, South Dakota's prison rate fell from 426 to 362 per 100,000—a one-year decline of -64 per 100,000. This was the 14th largest one-year drop reported among all 50 states

prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions was “short time left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

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

for that year.⁹ Measured in percentage terms, it was a 15 percent reduction in the state's prison rate. The state's total prison population fell by 555 people, from 3,797 to 3,242.¹⁰

COVID releases did not contribute to this drop. In a separate study, the Robina Institute found no (zero) COVID-influenced releases in South Dakota from March 2020 through December 2021. South Dakota was one of 14 states that made no special effort to expedite prison releases in response to the pandemic.¹¹

Falling admissions appear to have been the overwhelming factor in South Dakota's falling prison population in 2020. The number of prison admissions in the state dropped by 25.6 percent during 2020 compared with the previous year (from 4,434 to 3,300).¹² Total numbers of releases did not increase in COVID's first year, but fell by 14.9 percent (from 4,549 in 2019 to 3,873 in 2020).¹³

From yearend 2020 to December 2021, the Vera Institute reported that South Dakota saw an increase in its prison population, from 3,226 to 3,303—or 2.4 percent.¹⁴ As of June 30, 2022, the South Dakota Department of Corrections reported a total prison population of 3,370.¹⁵

⁹ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 16 table 7.

¹⁰ *Id.*, at 12 table 4.

¹¹ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022), Appendix A.

¹² E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8.

¹³ *Id.*, at 20 table 9.

¹⁴ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 table 2.

¹⁵ South Dakota Department of Corrections, *June 30, 2022 Adult Corrections*, at <https://doc.sd.gov/documents/AdultPopulationJune2022.pdf>.

I. General Rules of Prison-Release Discretion in South Dakota

A. General rules of parole-release eligibility

1.1. General rules of presumptive parole release

a. Presumptive release date

The department of corrections sets an *initial parole date* for most newly admitted prisoners according to a grid set out in statute (see next page).¹⁶ Unlike most states, this is an expected release date and not merely a date of *eligibility* for release in the discretion of the parole board. By statute, prisoners must be released on their initial parole dates—without a hearing before the parole board—if they have met the requirements of their “individual program directives” (IPDs), have an approved parole release plan, and have agreed to their conditions of supervision.¹⁷

Seven of the nine classes of felonies in South Dakota carry sentences with presumptive parole release. For these felony classes, formulas for initial parole dates range from 25 to 75 percent of judicial maximum sentences, depending on the grade of prisoners’ current convictions, prior felony convictions, and whether the current offenses are classified as “violent crimes” (see Table 1 below).¹⁸

¹⁶ S.D. Codified Laws § 24-15A-32. See also S.D. Dep’t of Corr., *Policy 1.1.E.2, Date Computation* (April 29, 2021), <https://doc.sd.gov/documents/Date%20Computation4262021.pdf>.

¹⁷ S.D. Codified Laws § 24-15A-38 (“Each inmate shall be released from incarceration to parole supervision, without a hearing with the board, at the time of the inmate’s initial parole date, if the inmate has substantively met the requirements of the individual program directive established by the department, agreed to the conditions of supervision and has an approved parole release plan.”).

¹⁸ S.D. Codified Laws § 24-15A-32. In South Dakota, felonies are divided into nine classes. S.D. Codified Laws § 22-6-1.

Table 1. South Dakota Initial-Parole-Date Grid ¹⁹

Felony Class	Felony Convictions		
	First	Second	Third
Nonviolent			
Class 6	.25	.30	.40
Class 5	.25	.35	.40
Class 4	.25	.35	.40
Class 3	.30	.40	.50
Class 2	.30	.40	.50
Class 1	.35	.40	.50
Class C	.35	.40	.50
Violent			
Class 6	.35	.45	.55
Class 5	.40	.50	.60
Class 4	.40	.50	.65
Class 3	.50	.60	.70
Class 2	.50	.65	.75
Class 1	.50	.65	.75
Class C	.50	.65	.75
Class B	1.0	1.0	1.0
Class A	1.0	1.0	1.0
§ 24-15-4.1	1.0	1.0	1.0
§ 24-15-4.2	1.0–.85	1.0–.85	1.0–.85

For purposes of the above matrix, “violent crimes” are defined as:

Murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first degree, burglary in the second degree if committed before July 1, 2006, arson, kidnapping, felony sexual contact, child abuse, felony stalking, photographing a child in an obscene act, felony assault, felony simple assault, aggravated criminal battery of an unborn child, aggravated battery of an infant, assault with intent to cause serious permanent disfigurement, commission of a felony while armed, discharging a firearm at an occupied structure or motor vehicle, discharging a firearm from a moving vehicle, criminal pedophilia,

¹⁹ Reprinted from S.D. Codified Laws § 24-15A-32 (effective for crimes committed after July 1, 2023).

threatening to commit a sexual offense, abuse or neglect of a disabled adult, and aggravated incest.²⁰

b. “Truth in sentencing” amendments of 2023

South Dakota enacted a “truth in sentencing” (TIS) law to take effect for designated crimes committed after July 1, 2023. Under the TIS act, the following offenses are no longer parole eligible *and* their maximum terms may not be reduced by the earning of “discharge credits”:

First and second degree rape; first degree manslaughter; torture of a human trafficking victim; commission of felony while armed with firearms; aggravated assault against a law enforcement officer, firefighter, etc.; aggravated battery of an infant; assault with intent to cause serious permanent disfigurement; first degree robbery; first degree kidnapping; first degree burglary; first degree arson; and first degree human trafficking.²¹

This group of offenses is sometimes referenced with the section number of the statute that enumerates them, as “§ 24-15-4.1 offenses.”

Under the TIS law, sentences for the following offenses no longer carry parole-release eligibility, but prisoners may earn “limited discharge credits” to reduce their judicial maximum sentences up to a statutory cap of 15 percent:

Vehicular homicide; aggravated assault; aggravated criminal battery of an unborn child; second degree kidnapping; second degree burglary; riot; second degree manslaughter; second degree human trafficking; felony child abuse; and attempt, conspiracy, or solicitation to commit any offense listed in § 24-15-4.1.²²

A shorthand for this list is: “§ 24-15-4.2 offenses.”

c. Loss of presumptive release

A prisoner’s automatic release on their initial parole date is derailed if the warden reports that the prisoner has not substantively complied with their IPD, or if there is insufficient information for the warden to determine compliance. In these circumstances, the prisoner must have a hearing before the parole board on the question of compliance. If the board finds the prisoner “has substantively complied with the individual program directive,” the board must

²⁰ The statutory definition of violent crime also includes attempts, conspiracies, or solicitations to commit one of the listed crimes. S.D. Codified Laws § 24-15A-32.

²¹ See S.D. Codified Laws § 24-15A-32. The offenses above are detailed in S.D. Codified Laws § 24-15-4.1. Three offenses listed above were already ineligible for parole release under pre-TIS law: first degree manslaughter, first degree rape, and first degree kidnapping.

²² See S.D. Codified Laws § 24-15-4.2.

order the prisoner's release on the initial parole date or as soon afterward as reasonably possible. The parole board may deny release if the board finds that the prisoner "has not substantively met the requirements of their individual program directive."²³ As explained later, we classify this arrangement as an "administrative parole release" (APR) program.

1.2. Reconsideration after denial of release

Prisoners denied release on their initial parole dates must thereafter be given a "discretionary parole hearing" at least once every two years.²⁴ Now outside the APR program, they do not receive a new date of presumptive release comparable to the initial parole date.

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

1.3. Generally-available credits: types and amounts

At the discretion of the department of corrections, prisoners may earn three types of "discharge credits" in South Dakota:

- (1) up to 90 days of discharge credits for each program completion;
- (2) up to 90 days of discharge credits for 365 hours of satisfactory work, not to exceed 180 days of discharge credits for work in a 12-month period; and
- (3) up to 365 days of earned discharge credits for heroic acts, disaster response, or for "exceptional assistance in maintaining the safety and security of a prison."²⁵

Under the TIS act of 2023, prisoners sentenced for "24-15-4.1 offenses" are no longer eligible for discharge credits of any kind, but people sentenced for "24-15-4.2 offenses" may earn credits up to an earnings cap of 15 percent of their judicial maximum sentences.

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

Discharge credits do not affect a prisoner's first eligibility date for discretionary parole release.

²³ S.D. Codified Laws § 24-15A-39. The prisoner has the option of admitting noncompliance and waive appearance at the hearing.

²⁴ S.D. Codified Laws § 24-15A-39.

²⁵ S.D. Codified Laws § 24-15A-50.1. The statute also says that discharge credits awarded to a prisoner are "applied before calculation of their initial parole date."

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

Discharge credits are deducted from prisoners' "sentence discharge" dates.²⁶ As credits accrue, they advance a prisoner's date of mandatory release, moving it back from the expiration of the judicial maximum sentence.²⁷ There is no standard earning rate for discharge credits in South Dakota, so their impact upon sentence varies with prisoners' participation in work assignments and completion of programs. For example, earnings of 180 credits per year would result in a mandatory release date (MRD) at the two-thirds mark of the judicial maximum sentence. For a "high-achieving" prisoner who steadily earns a total of 270 credits during every year of confinement (e.g., 180 days of work credits and 90 days for one program completion each year), such earnings would subtract 43 percent from the judicial maximum term, creating a mandatory release date (MRD) at the 57-percent mark of the maximum.

1.4. Loss of good-time credits

There is no statutory provision governing the forfeiture or restoration of earned discharge credits.

II. Prisoners Outside the General Rules in South Dakota

2.1. Life without parole

There are no parolable life sentences in South Dakota law for adult offenders; all life sentences are life without parole (LWOP). Life sentences for adult offenders can gain parole eligibility only if first commuted by the governor to a term of years.²⁸

2.2. Juvenile life sentences

South Dakota has abolished LWOP sentences for juvenile offenders. LWOP "may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age."²⁹

²⁶ S.D. Codified Laws § 24-15A-50(5). See also, S.D. Dep't of Corr., *Policy 1.4.B.17, Inmate Earned Discharge Credits* (June 18, 2021), <https://doc.sd.gov/documents/Inmate%20Earned%20Discharge%20Credits6182021.pdf>.

²⁷ S.D. Dep't of Corr., *Policy 1.1.E.2, Date Computation* (Apr. 26, 2021), <https://doc.sd.gov/documents/Date%20Computation4262021.pdf>.

²⁸ S.D. Codified Laws § 24-15A-32.

²⁹ S.D. Codified Laws § 22-6-1.3.

2.3. Sex offenders

Sex offender treatment program staff may recommend to the warden that parole eligibility be withheld for prisoners convicted of a felony sex offenses.³⁰ After a review of the prisoner's history, treatment status, risk of re-offense, and psycho-sexual assessment, the warden may forward the recommendation to the parole board. Following a hearing, the board has authority to decide whether parole eligibility should be withheld.³¹

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

3.1. Medical or “compassionate” release

In South Dakota, “compassionate parole” is the equivalent to what other states refer to as compassionate or medical release.³² Prisoners are eligible if they:

- 1) Have a terminal illness;
- 2) Are seriously ill and unlikely to recover;
- 3) Require extensive or significant chronic medical care;
- 4) Are at least sixty-five years old, served at least ten consecutive years of their sentence for a conviction of a Class 3 felony or below, and their medical needs cost at least double the average annual medical cost of the inmate population; or
- 5) Are at least seventy years old, served at least thirty consecutive years of their sentence; and
- 6) Are not serving a capital punishment sentence.³³

The warden may recommend to the Secretary of Corrections that the limits of a prisoner's confinement be extended and that the prisoner be released from custody to serve a portion of their sentence in the community.³⁴ Prisoners may be considered on an individual, case by case basis for extended confinement upon meeting eligibility criteria and requirements for either a pre-release or services release.³⁵ Extended confinement is reserved for terminally ill prisoners

³⁰ S.D. Codified Laws § 24-15A-32.1; *see also* S.D. Bd. of Pardons & Parole, *Policy 8.1.A.11, Withholding of Parole Eligibility* (Oct. 21, 2021), <https://doc.sd.gov/documents/81A11WithholdingParoleEligibility10212021.pdf>.

³¹ *Id.*

³² S.D. Codified Laws § 24-15A-55.

³³ *Id.*; *see also*, S.D. Codified Laws § 24-15A-58 (a prisoner that meets the eligibility requirements of a medically indigent person under S.D. Codified Laws § 28-13-1.3 is not eligible for compassionate parole).

³⁴ S.D. Codified Laws § 24-2-25; *see also* South Dakota Department of Corrections, *Policy 1.4.G.7, Extension of Confinement* (Nov. 6, 2019), <https://doc.sd.gov/documents/Extension%20of%20Confinement1162019.pdf>.

³⁵ S.D. Dep't of Corr., *Policy 1.4.G.7, Extension of Confinement* (Nov. 6, 2019), <https://doc.sd.gov/documents/Extension%20of%20Confinement1162019.pdf>.

who need access to specialized medical care upon release from custody.³⁶ Those released to extension of confinement must live at a private residence or an approved residential facility.³⁷

3.2. *Executive clemency*

The governor may grant or deny requests for clemency, including pardons, commutation, reprieves, or remission of a fine or forfeiture.³⁸ The governor has statutory power to delegate the initial review of clemency applications to the Board of Pardons and Parole.³⁹ After reviewing a clemency application, the board provides nonbinding recommendations to the governor.⁴⁰

3.3. *Emergency release for prison overcrowding*

There is no statutory emergency release mechanism in South Dakota to respond to circumstances of prison overcrowding.

IV. *Overall assessment of indeterminacy in South Dakota’s prison-sentencing system*

The general rules of prison release apply to a large percentage of prisoners in the South Dakota system. Prisoners serving life sentences and some sex offenders fall outside the general rules. In addition, under new “truth in sentencing” legislation effective July 2023, sentences for an expanded list of offenses no longer carry parole release eligibility, and only some are modestly reducible by earned discharge credits.

For general-rules prisoners, the system starts out as one of presumptive release without a parole board hearing, with release to occur at first release eligibility. In this project, we refer to such systems as *administrative parole release* (APR).⁴¹

The presumption of release in South Dakota’s system is not terribly strong. It evaporates if the warden raises questions about a prisoner’s compliance with their “individual program directive” (IPD)—a set of requirements placed on each prisoner by the department of

³⁶ See S.D. Dep’t of Corr., *Extension of Confinement Program* (Sept. 11, 2017), <https://doc.sd.gov/documents/EC%20Information.pdf>.

³⁷ *Id.*

³⁸ S.D. Codified Laws §§ 24-14-5, 24-14-10.

³⁹ S.D. Codified Laws § 24-14-5; see also, South Dakota Board of Pardons and Paroles, *Policy 8.1.A.10, Executive Clemency – Commutation of Sentence* (Sept. 16, 2021), <https://doc.sd.gov/documents/81A10ExecutiveClemencyCommutation9162021.pdf>.

⁴⁰ *Id.*

⁴¹ See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Ch. 5 and pp. 36-43 table 6.

corrections. If the warden reports that a prisoner has not complied with their IPD or that there is insufficient information to make that determination, then the prisoner must come before the parole board for an individualized release hearing. No further presumption of release carries forward to the hearing.

If the warden raises no such questions, however, general-rules prisoners *must be* released on their “initial parole dates” by statutory command. The parole board has no legal authority to impede presumptive release on its own. This arrangement places an unusual amount of power in the department of corrections, not seen in other states.⁴² Prison officials in South Dakota have full authority to ensure that general-rules prisoners will be released on their initial parole dates. This unilateral release discretion cannot be overridden by the parole board. In this sense, the department of corrections is the superintendent of South Dakota’s APR system.

If a warden raises questions about a prisoner’s compliance with their IPD, discretion to release or deny release is transferred to the parole board for the remainder of the prisoner’s term—at least until prisoners have reached their mandatory release dates. This removes prisoners from the jurisdiction of the APR program and shifts them into a more traditional system of discretionary parole release.

In the above framework, there is a sharp division of authority among back-end decision makers. While the department of corrections has enormous power over initial release decisions, it is a power with a single on-off switch. If the department decides to interfere with a prisoner’s presumptive release, then the parole board’s release discretion springs to life and the department’s early-release authority is extinguished. It is striking that South Dakota’s parole board has no release discretion in most cases unless such discretion is ceded to it by the actions or inactions of prison officials.

South Dakota has no overarching formula for fixing the relationship between judicial minimum and maximum terms. Instead, by statute, there is a 54-cell grid that sets various percentages of judicial maximum terms that must be served before prisoners reach their initial parole dates.⁴³ Prisoners fall into specific grid cells depending on the felony grade of their current conviction, their prior record of felony convictions, and the classification of their current offense as violent or nonviolent. The percentages vary across the grid from 25 percent to 100 percent. (100 percent indicates no eligibility for parole release.)

This continuum of release formulas makes the system’s overall degree of indeterminacy difficult to characterize. At one extreme, the 25-percent cases are 75 percent indeterminate. They have a population-multiplier potential (PMP) of 4:1 (see p. vii).⁴⁴ On the scale developed

⁴² See *id.* at 36-43 table 6 (describing systems of parole release in each state).

⁴³ See S.D. Codified Laws § 24-15A-32. See *supra* at 8.

⁴⁴ That is, for all South Dakota prisoners subject to the 25-percent formula, the size of this subpopulation in the prison system would be X in a sustained always-release regime (in which all back-end actors exercised their

for this project for all 50 states, such sentences would carry a *high degree of indeterminacy*. In contrast, the 75-percent cases have a *low degree of indeterminacy*. The PMP at this end of the continuum is only 1.33:1. And at the furthest extreme, under South Dakota's truth-in-sentencing (TIS) legislation, "§ 24-15-4.1 cases" have no prospect of release before expiration of the full judicial sentence, while "§ 24-15-4.2 cases" allow earnings of limited discharge credits (see p. 9). "Section 24-15-4.1" sentences carry a PMP of 1:1. "Section 24-15-4.1" sentences (with a possible 15 percent reduction for earned credits) have a PMP of 1.18:1.

Another feature that makes it hard to classify the degree of indeterminacy in South Dakota's prison-sentencing system as a whole is its system of earned-time credits ("discharge credits"). Credit earnings do not depend entirely on the monthly buildup of credits as in many other states. Instead, credits are keyed entirely to the performance or completion of certain work assignments or programs. There is no baseline expectation of a steady rate of earning over time, and no limit on the number of total credits that may accrue for most prisoners.⁴⁵

Looking only to credits for in-prison work, it appears that some prisoners could realistically earn 180 days of credits per year (the limit for this kind of credits).⁴⁶ These credits would be subtracted from their judicial maximum sentences to produce earlier mandatory release dates (MRDs). At a steady earning rate of 180 days per year, prisoners' MRDs would move back to the two-thirds mark of their judicial maximum terms. Additional credits can be earned by prisoners who complete in-prison programming, at the rate of 90 days of credit per program completion.⁴⁷ Still more credits could be granted for "heroic acts" and the like, but we believe these are rarely bestowed and do little to affect the operation of the system as a whole.

In modeling the South Dakota system, we select plausible scenarios within many possible layers and configurations. Figures 3, 4, and 5 depict the South Dakota system for general-rules prisoners subject to three different release formulas: 25, 50, and 75 percent. (These figures omit eight additional formulas in South Dakota's "initial-parole-date" grid: 30, 35, 40, 45, 55, 60, 65, and 70 percent.) In Figures 3, 4, and 5, we assume that no discharge credits have been earned. Figures 6, 7, and 8 then illustrate cases of prisoners subject to the same 25, 50, and 75-

discretion as strenuously as possible to produce the earliest possible releases for everyone) and would be 4X in a sustained never-release regime (in which all back-end actors exerted themselves to the fullest extent of their powers to delay all prisoners' releases as long as legally possible).

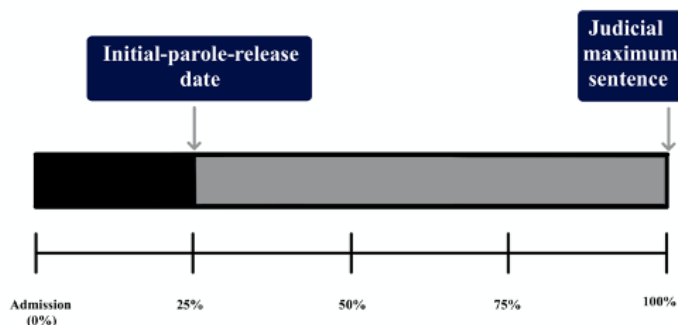
⁴⁵ As discussed earlier, "truth in sentencing" legislation effective in 2023 exempted certain offenses from the earning of discharge credits and limited total earnings for other offenses to 15 percent of the judicial maximum sentence.

⁴⁶ Work credits are earned at a rate of 90 days per 360 hours of work—which is the equivalent of nine 40-hour work weeks. This particular kind of discharge credits cannot exceed 180 days per year. Over an entire year, 180 days of work credits can be earned through the equivalent of 18 weeks of full-time work.

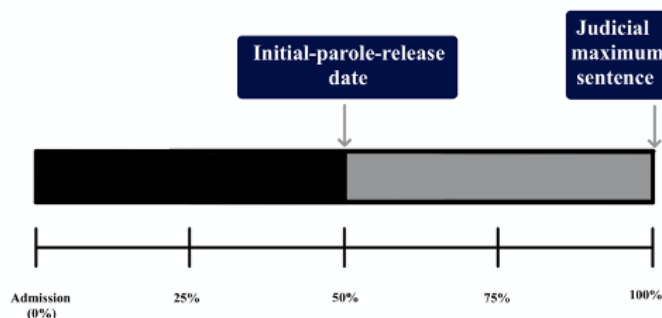
⁴⁷ A prisoner who earned 180 work credits and 180 program credits during every year of confinement would reach a mandatory release date at 50 percent of the maximum term. This would probably require an unusually high-performing prisoner in a prison with a good supply of available programming.

percent rules of parole eligibility, but who have earned discharge credits of 270 days per each year of confinement. We associate such earning levels with “high-achieving” prisoners rather than average earnings. We make the educated guess that such high achievement is only within reach of a small minority of all prisoners.

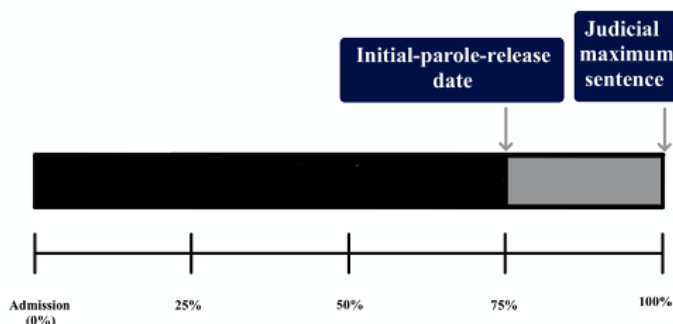
South Dakota Figure 3. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 25 Percent of Maximum and No Discharge Credits



South Dakota Figure 4. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 50 Percent of Maximum and No Discharge Credits



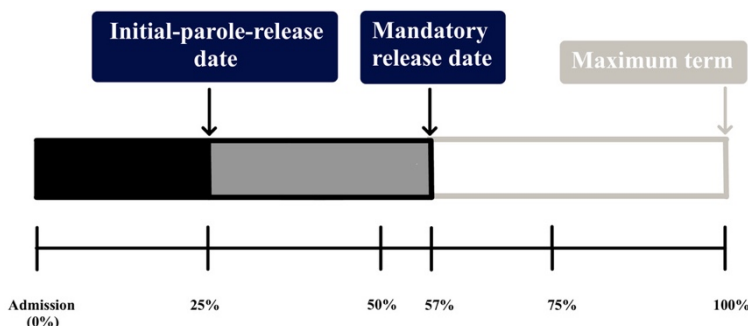
South Dakota Figure 5. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 75 Percent of Maximum and No Discharge Credits



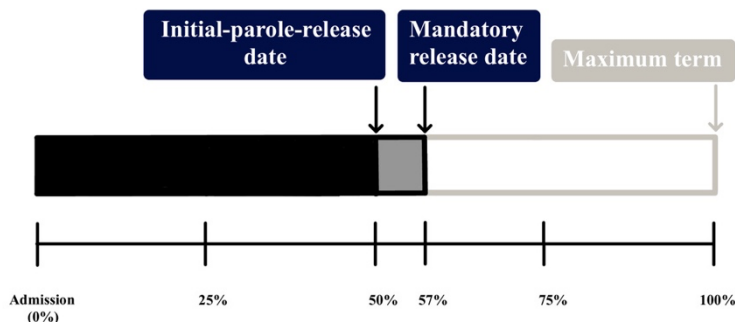
Figures 6, 7, 8 have been altered by prison officials’ decisions to award a total of 270 days per year of discharge credits. Such earnings—if fully credited— would create a mandatory release

date (MRD) at the 57-percent mark of the judicial maximum term. In this project, we have named this type of release mechanism a “movable MRD.”

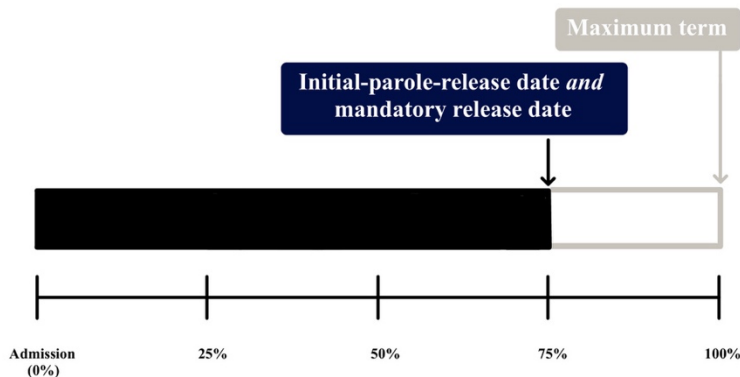
South Dakota Figure 6. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 25 Percent of Maximum and 270 Days/Year Discharge Credits



South Dakota Figure 7. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 50 Percent of Maximum and 270 Days/Year Discharge Credits



South Dakota Figure 8. Prison-Release Timeline for Prisoners With Initial-Parole-Release Dates at 75 Percent of Maximum and 270 Days/Year Discharge Credits



In Figures 6, 7, and 8, we posit a high-achieving prisoner who has earned the greatest possible work credits per year (180 days) plus an additional 90 days of credit in each year for program

completions. Mathematically, it is possible for South Dakota prisoners to earn even more credits than this, but we think it would be a rare prisoner who could exceed 270 credits per year.

In Figures 6 and 7, discharge credits have been fully counted, producing MRDs at the 57-percent mark of the judicial maximum sentence. Throughout this project, we have noted a great diversity of practices among the 40 states that use movable MRDs as a prison-release mechanism. The 43-percent discount in Figures 6 and 7 falls within the “generous category” in our comparative classification system because it allows for a sentence discount greater than 40 percent that is realistically within reach of at least some (high-achieving) prisoners.⁴⁸ However, high credit earnings are more difficult for prisoners to accumulate in South Dakota than in many other states because South Dakota offers no steady allowance of “good-time” credits for prisoners who stay out of serious trouble. Instead, credit earnings depend on the availability of slots in prison work and treatment programs—and the good luck of prisoners to be admitted into programs as needed without administrative delays.

In Figure 8, discharge credits are not fully counted as shown in Figures 6 and 7. This is because the sentences illustrated in Figure 8 do not allow for release earlier than the 75-percent mark of the judicial maximum sentence.⁴⁹ So high-achieving prisoners would be foreclosed from “cashing in” a substantial share of their earnings. (The 75-percent cap on credit discounts would be met at about 120 days per year, rendering the additional 150 credits superfluous.)

In the Figure 8 scenario, ample credit earnings would force release at the 75-percent mark through the operation of a movable MRD. It should be noted, however, that 75-percent prisoners also reach their expected date of release under the APR program on the same date. Figure 8 thus allows three independent avenues of release at the 75-percent mark: two controlled unilaterally by corrections officials (movable MRDs and uncontested APR releases);

⁴⁸ For more on the uses of movable MRDs across 40 states, see Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Ch. 7 and table 9 at pp. 89-93. Our classification system for available credit earnings (id. at 88) is as follows:

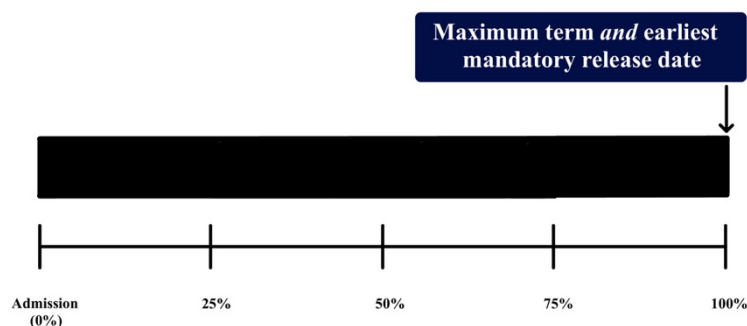
[Sixteen] of the states included in Table 9 authorize “generous” deductions from maximum terms through movable MRDs, which we define as deductions of 40 percent or more that are realistically achievable by prisoners. (We do not count credit earnings that are available on paper but would be nearly impossible to earn.) Fifteen states and the District of Columbia allow “average” deductions of 20 to 39 percent. Nine states and the federal system allow only “minimal” deductions of 19 percent or less.

⁴⁹ In Figure 8, we are guessing that South Dakota’s statutes would be interpreted to preclude release prior to a prisoner’s first parole eligibility date. However, although an uncommon arrangement, it is conceivable that the accrual of discharge credits could mandate release earlier than parole eligibility. The statutes are silent on this question, and we have found no applicable caselaw.

and one controlled by the parole board (release decisions for prisoners who have been blocked from APR and shifted into the discretionary parole release system).

With the advent of “truth in sentencing” (TIS) legislation effective for offenses after July 1, 2023, an enlarged category of crimes were removed from the general rules of prison release illustrated in the figures above. As noted earlier, sentences for TIS offenses carry no prospect of parole release. Further, sentences for the most serious TIS crimes (“§ 24-15-4.1 offenses”) allow no sentence reductions for discharge credits. Figure 9 depicts sentences of this class. The judicial maximum term and the earliest possible release date are the same, barring a rare intervention such as executive clemency or a retroactive change in law.

South Dakota Figure 9. Prison-Release Timeline for Prisoners with Truth-in-Sentencing Sentences with No Eligibility for Discharge Credits



South Dakota Figure 10. Prison-Release Timeline for Prisoners with Truth-in-Sentencing Sentences with Eligibility for Discharge Credits and Earnings Up to 15% Cap

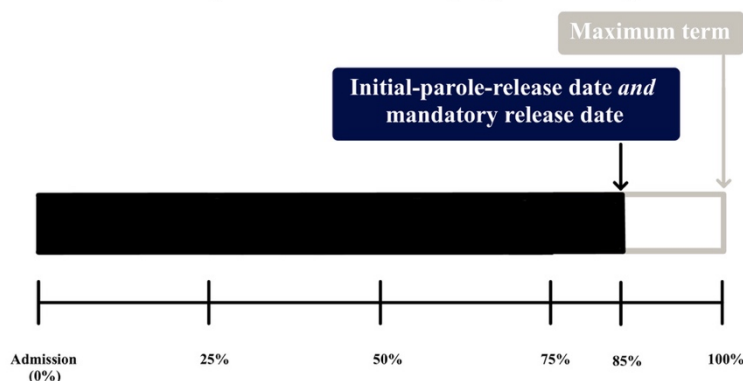


Figure 10 shows the timeline for people convicted of the lesser grade of TIS crimes (“§ 24-15-4.2 offenses”). While not parolable, sentences under § 24-15-4.2 allow “limited” sentence discounts for discharge credits capped at 15 percent of the judicial maximum term. Mathematically, this cap is reached when prisoners earn an average of 64 credits per year.

Under the scale developed for this project (see pp. v-vi), all TIS sentences carry an *extremely low degree of indeterminacy*—or, one could just as easily say, an *extremely high degree of*

determinacy. The 2023 TIS act—under either Figure 9 or 10 above—will eventually yield a significant number of prison sentences in South Dakota that are in the lowest possible tier of indeterminacy.

Overall, we rank the South Dakota prison-sentencing system as having a *moderate degree of indeterminacy* on the scale developed for this project (see pp. v-vi). This ranking “averages out” a continuum of staggered parole-release formulas: from first eligibility as early as the 25-percent mark of judicial maximum sentences to the total absence of parole-release eligibility under the TIS legislation. South Dakota’s different sentence classes vary from *high* to *extremely low indeterminacy*. In our best judgment, the system’s overall center of gravity falls in the ballpark of *moderate indeterminacy*. Without admissions and population data showing the prevalence of different sentence classes, however, this is only our best guess. It is quite possible we have overestimated the degree of indeterminacy in South Dakota’s system. The system as a whole may in fact operate with a *low degree of indeterminacy*, especially as new TIS sentences enter and remain in the state’s prisons.

A *moderate degree of indeterminacy* suggests that control of prison population size in South Dakota is spread roughly equally across front-end and back-end decisionmakers. For many general-rules sentences (those with minimum sentences shorter than the 50-percent mark of the maximum), the percentage of time-actually-served served within the maximum is more under the control of the parole board and department of corrections than with the sentencing judge and other front-end actors who fashion courtroom outcomes (such as prosecutors in the exercise of their charging discretion and both parties through plea bargaining). In contrast, for cases with long minimum terms—and those that will arrive under South Dakota’s TIS legislation, the determination of prison population size is tilted heavily to the front end of the system.