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MEMORANDUM

August 20, 2017

TO: Sentencing in the Criminal Justice System Interim Study Committee

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SUBJECT: Sentencing Scheme Comparison

Summary

This memo compares Colorado's felony sentencing laws with those of Minnesota, Nebraska, New Mexico, Oregon, and Washington. It provides an overview of determinate versus indeterminate sentencing schemes and incarceration rates.

Sentencing Schemes

Criminal codes and sentencing laws and schemes vary greatly from state to state. According to the National Conference of State Legislatures (NCSL), sentencing schemes can be categorized generally as either determinate or indeterminate. NCSL defines determinate sentencing systems as those with fixed sentence lengths where the amount of time an offender serves is determined primarily by the courts. Determinate schemes do not have parole boards or discretionary release options. Indeterminate systems use a more case-by-case approach to sentencing, in which courts typically impose a sentence from within a broad range defined in statute, and parole boards determine when an offender should be released from prison. According to NCSL, 17 states and the District of Columbia have determinate systems, and 33 states (including Colorado) have indeterminate systems, though no state's system is strictly defined as either. Each contains elements of both types.

Incarceration Rates

Sentencing schemes, among other factors, play an important role in determining a state's incarceration rate. The Bureau of Justice Statistics within the U.S. Department of Justice (DOJ) collects survey data related to criminal justice for all 50 states. The DOJ tracks the prison jurisdiction population for each state, defined as the estimated number of prisoners under the

jurisdiction or legal authority of state or federal officials, including offenders held in prisons, local jails, penitentiaries, private correctional facilities, halfway houses, boot camps, farms, training or treatment centers, and hospitals, and those in court or on work release.¹ Appendix A lists the total incarcerated population and the incarceration rate per 100,000 residents for all 50 states. According to the DOJ, in 2015, the state with the lowest incarceration rate was Delaware (270 per 100,000) and the state with the highest incarceration rate was Louisiana (1,050 per 100,000).

Sentencing schemes and incarceration rates for Colorado, Minnesota, Nebraska, New Mexico, Oregon, and Washington are described below. These states were selected due to either their population or demographics being similar to, or proximity to Colorado. All population data cited below come from the U.S. Census Bureau's 2015 estimates and incarceration rates come from DOJ data.

Colorado (2015 population: 5.4 million. 2015 incarceration rate: 580 per 100,000)

Colorado's indeterminate sentencing scheme is guided by the presumptive penalty ranges specified in state law for each offense classification. Certain aggravating or mitigating factors, specific criminal actions, or an offender's criminal history can trigger a sentence outside of the presumptive range. Unless a mandatory minimum sentence is required by law, courts generally have discretion in what type of sentence to impose, which can include:

- a deferred judgment or diversion option, which allows an offender to avoid incarceration if he or she meets certain conditions;
- probation or another form of community supervision;
- prison or jail time;
- a fine; or
- some combination of the above.

For more information on sentencing in Colorado, please see Legislative Council Staff's memoranda: [Overview of Colorado's Sentencing Scheme](#) and *Overview of Colorado's Mandatory Minimum Sentencing Scheme* (forthcoming).

Minnesota (2015 population: 5.5 million. 2015 incarceration rate: 300 per 100,000)

According to NCSL, Minnesota has a primarily determinate sentencing scheme and one of the lowest incarceration rates in the country.

Minnesota sentencing guidelines. The Minnesota sentencing guidelines, developed and maintained by the state's 11-member Minnesota Sentencing Guidelines Commission and its six full-time staff, provide a set of rules that judges must apply to felony sentences. These rules are laid out in grid form, with presumptive sentences determined by the severity of the offense on the vertical axis and the offender's criminal history on the horizontal axis. (See Appendix B for Minnesota's standard sentencing grid. Sentencing for sex and drug offenses have separate grids.) The guidelines provide recommendations to the court; cases with unusual circumstances may warrant sentencing outside of the grid, known as a departure. When a court enters a departure sentence, the judge must state the reasons for the departure, and either the prosecution or the defense may appeal the sentence.²

¹Bureau of Justice Statistics. "Correctional Populations in the United States, 2015." Department of Justice, 2016.

²<https://mn.gov/sentencing-guidelines/guidelines/about/>.

Automatic release. State law requires that when a felony offender is sentenced to a fixed sentence for an offense committed after 1993, the sentence consist of two parts: 1) a specified minimum term of imprisonment equal to two-thirds of the executed sentence and 2) a specified maximum term of supervised release equal to one-third of the executed sentence. Unless an offender is subject to disciplinary sanctions while in prison that require additional time to be added to his or her sentence, he or she is automatically released to community supervision after serving two-thirds of his or her prison sentence.³

Mandatory minimums. Several crimes are subject to mandatory minimum sentences in Minnesota. Some of these offenses and their penalties are listed in Table 1. There are other crimes that carry mandatory minimum sentences; the exact sentence depends on the offender's criminal history score and the exact nature of the offense.⁴

**Table 1
Mandatory Minimum Sentences in Minnesota**

Crime	Minimum Sentence
Certain murders (second and third degree)	Statutory maximum for the offense
Assault 1 – peace officer	10 years
Dangerous weapon or firearm	1 to 5 years
Felony driving while impaired	3 years

Nebraska (2015 population: 1.9 million. 2015 incarceration rate: 450 per 100,000)

Nebraska has a primarily indeterminate sentencing scheme. Penalties for the ten classes of felonies under Nebraska law are shown in Table 2.

**Table 2
Minimum and Maximum Sentencing for Felonies in Nebraska**

Class of Crime	Minimum	Maximum	Fine
I	-	Death	-
IA	-	Life in prison	-
IB	20 years	Life in prison	-
IC	5 years (mandatory minimum)	50 years	-
ID	3 years (mandatory minimum)	50 years	-
II	1 year	50 years	-
IIA	-	20 years	-

³“Minnesota Sentencing Guidelines and Commentary, August 2017”. Minnesota Sentencing Commission. <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf>.

⁴<https://mn.gov/sentencing-guidelines/assistance/mandatory-sentences/>.

**Table 2 (Cont.)
Minimum and Maximum Sentencing for Felonies in Nebraska**

Class of Crime	Minimum	Maximum	Fine
III	Nine months parole if imprisonment imposed	4 years in prison, 2 years parole	\$25,000
IIIA	Nine months parole if imprisonment imposed	3 years in prison, 18 months parole	\$10,000
IV	Nine months parole if imprisonment imposed	2 years in prison, 12 months parole	\$10,000

Source: Neb.Rev. Stat. § 28-105.

Habitual offenders. Anyone convicted of a felony in Nebraska who has two previous convictions resulting in at least a year of prison time is deemed a habitual criminal and must be punished by a mandatory minimum prison term of 10 years to a maximum of 60 years. For certain crimes, the mandatory minimum is 25 years.⁵

New Mexico (2015 population: 2.1 million. 2015 incarceration rate: 720 per 100,000)

New Mexico's sentencing scheme can be categorized as primarily determinate. Sentences of imprisonment and fines for felony offenses are shown in Table 3 below.

**Table 3
Determinate Sentencing for Felonies in New Mexico**

Class of Crime	Determinate Sentence	Fine
First degree felony, death of a child	Life in prison	\$17,500
First degree felony, aggravated criminal sexual penetration	Life in prison	\$17,500
First degree felony	18 years	\$15,000
Second degree felony, death of a human being	15 years	\$12,500
Second degree felony, sexual offense against a child	15 years	\$12,500
Second degree felony, sexual exploitation of children	12 years	\$5,000
Second degree felony	9 years	\$10,000
Third degree felony, death of a human being	6 years	\$5,000
Third degree felony, sexual offense against a child	6 years	\$5,000
Third degree felony, sexual exploitation of children	11 years	\$5,000
Third degree felony	3 years	\$5,000
Fourth degree felony, sexual exploitation of children	10 years	\$5,000
Fourth degree felony	18 months	\$5,000

Source: N.M. Stat. § 31-18-15.

⁵Neb.Rev. Stat. § 29-2221

Alteration of sentences. After an offender is found guilty of a felony offense, the court must hold a sentencing hearing to determine if mitigating or aggravating circumstances exist. The judge can alter the offender's basic sentence upon a finding of either mitigating or aggravating circumstances (a jury must find beyond a reasonable doubt that aggravating circumstances were present, unless the offender has waived his or her right to a jury trial). The judge must issue a brief statement on the record any time he or she alters a basic sentence. In no case can a judge alter a sentence by more than one-third except for serious youthful offenders or youthful offenders.⁶

Mandatory parole. The court must include in the sentence of anyone sent to a correctional facility a period of parole, to be served after an offender has completed his or her entire sentence, less any earned time. Offenders serving life sentences with the possibility of parole become eligible after 30 years and, when released, must serve a minimum of five years on parole. Except for certain sex offenders, inmates convicted of a first, second, or third degree felony who have served their entire sentences must serve an additional two years on parole. Those completing sentences for fourth degree felonies must serve one year on parole.

Oregon (2015 population: 4.0 million. 2015 incarceration rate: 520 per 100,000)

Oregon has a primarily determinate sentencing scheme. With some important exceptions, discussed below, offenders are sentenced under Oregon's felony sentencing guidelines, which are in grid form (see Appendix C). A judge sentences an offender using the presumptive sentences found in the grid, by determining the severity of the crime on the grid's vertical axis, with 11 being the most serious and 1 being the least, and the offender's criminal history on the grid's horizontal axis, from A (three or more person felonies) to I (no history of any juvenile adjudication for a felony or any adult felony or Class A misdemeanor conviction). During sentencing, a jury may find grounds for a departure from the presumptive sentence, in terms of prison or probation or the length of the sentence. All prison sentences in Oregon are followed by a period of mandatory supervision.

Exceptions to the sentencing guidelines. Oregon law requires mandatory minimum prison sentences for certain serious crimes against persons, known as "Measure 11 offenses" for the 1994 ballot measure that amended state statute. There are 21 Measure 11 offenses, which include crimes such as assault, rape, kidnapping, and murder. Offenders convicted of one of these offenses receive no parole or reduction of their sentences while in prison. Juveniles aged 15 or older charged with a Measure 11 felony must be tried as adults. For crimes committed after 2008, other exceptions to the presumptive sentencing guidelines include increased penalties for certain drug crimes, enhanced sentences for repeat property offenders and identity theft, and increased prison sentences of two months for each additional previous conviction, with a cap of 12 months. In addition, increased penalties can apply to any person convicted of using or threatening the use of a firearm while committing a felony or any person determined to be a dangerous offender. Dangerous offenders are those found to suffer from a serious personality disorder indicating a propensity toward violent crime.

⁶N.M. Stat. § 31-18-15.1

Washington (2015 population: 7.2 million. 2015 incarceration rate: 410 per 100,000)

Washington has a primarily determinate sentencing scheme. Table 4 shows the maximum penalties for felonies.

Table 4
Determinate Sentencing for Felonies in Washington

Class of Crime	Maximum Sentence	Fine
Class A	Life in prison	\$50,000
Class B	10 years	\$20,000
Class C	5 years	\$10,000

Source: Wash. Rev. Code § 9A.20.021.

Some felonies are defined without an explicit felony class and instead categorized according to the maximum period of incarceration for a first conviction. Any uncategorized felony carrying a sentence of 20 years or more is classified as Class A; any felony carrying a sentence of eight or more years but less than 20 is classified as Class B; and any felony carrying a sentence of less than eight years is classified as Class C.

Sentencing guidelines. The state’s Sentencing Guidelines Commission developed Washington’s sentencing guidelines and continues to advise the legislature on adjustments. Sentences are laid out in grid form based on severity of offense and the offender’s criminal history. Different guidelines determine sentences for drug and sex offenders. The court can impose a sentence outside of the standard sentence range if it finds substantial and compelling reasons. Any sentence outside of the range—known as an exceptional sentence—must be for a determinate term that does not exceed the statutory maximum for the offense. Any time a court imposes an exceptional sentence it must set forth the reasoning on the record, and either the state or the offender can appeal the sentence.

Mandatory minimum sentences. Washington imposes a penalty of life without parole for those deemed “persistent offenders.” To qualify as a persistent offender, an individual must be convicted of a “most serious offense” and have at least two prior convictions for most serious offenses. Several dozen crimes fall into the “most serious offense” category; most involve violent crimes against persons. Any offender with two separate convictions of specified sex offenses can also be classified a persistent offender and sentenced to life in prison without parole. Washington also imposes the following mandatory minimum prison sentences, shown in Table 5.

Table 5
Mandatory Minimum Sentences

Crime	Minimum Sentence
First degree murder	20 years
First degree assault	5 years
First degree rape	5 years
Sexually violent predator escape	60 months
Aggravated first degree murder by a juvenile	25 years

Source: Wash. Rev. Code § 9.94A.540.

Appendix A
Incarceration Rate by State, 2015

State	Population ⁷	Incarcerated Population ⁸	Incarceration Rate per 100,000 ⁹
Alabama	4,853,875	42,900	880
Alaska	737,709	5,400	730
Arizona	6,817,565	54,900	800
Arkansas	2,977,853	24,000	800
California	38,993,940	201,000	510
Colorado	5,448,819	31,800	580
Connecticut	3,584,730	15,800	440
Delaware	944,076	6,700	700
Florida	20,244,914	153,000	750
Georgia	10,199,398	88,500	860
Hawaii	1,425,157	5,900	410
Idaho	1,652,828	10,900	660
Illinois	12,839,047	63,900	500
Indiana	6,612,768	43,500	650
Iowa	3,121,997	12,900	410
Kansas	2,906,721	16,600	570
Kentucky	4,424,611	33,800	760
Louisiana	4,668,960	49,000	1,050
Maine	1,329,453	4,000	300
Maryland	5,994,983	29,700	490
Massachusetts	6,784,240	20,100	300
Michigan	9,917,715	57,700	580
Minnesota	5,482,435	16,500	300
Mississippi	2,989,390	28,000	940
Missouri	6,076,204	43,400	710
Montana	1,032,073	5,600	540
Nebraska	1,893,765	8,600	450
Nevada	2,883,758	19,100	650
New Hampshire	1,330,111	4,600	340

⁷Source: U.S. Census Bureau, Population Division. 2015 estimates.

⁸Source: Bureau of Justice Statistics, Correctional Populations in the United States, 2015. Incarcerated population includes prisoners held in prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms, training or treatment centers, and hospitals. Counts also include prisoners who were temporarily absent, in court or on work release, housed in private facilities, local jails, or other state or federal facilities and serving concurrent sentences for more than one correctional authority.

⁹Incarceration rate per 100,000 U.S. residents of all ages. Rates calculated do not reflect population estimates shown in this table.

**Appendix A (Cont.)
Incarceration Rate by State, 2015**

State	Population¹⁰	Incarcerated Population¹¹	Incarceration Rate per 100,000¹²
New Jersey	8,935,421	33,900	380
New Mexico	2,080,328	15,100	720
New York	19,747,183	75,900	380
North Carolina	10,035,186	53,800	530
North Dakota	756,835	3,200	410
Ohio	11,605,090	70,700	610
Oklahoma	3,907,414	39,700	1,010
Oregon	4,024,634	21,000	520
Pennsylvania	12,791,904	83,900	650
Rhode Island	1,055,607	3,200	310
South Carolina	4,894,834	31,600	640
South Dakota	857,919	5,300	620
Tennessee	6,595,056	48,000	720
Texas	27,429,639	214,800	780
Utah	2,990,632	11,700	390
Vermont	626,088	1,800	280
Virginia	8,367,587	57,300	680
Washington	7,160,290	29,700	410
West Virginia	1,841,053	10,100	550
Wisconsin	5,767,891	35,000	610
Wyoming	586,555	3,900	670

¹⁰Source: U.S. Census Bureau, Population Division. 2015 estimates.

¹¹Source: Bureau of Justice Statistics, Correctional Populations in the United States, 2015. Incarcerated population includes prisoners held in prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms, training or treatment centers, and hospitals. Counts also include prisoners who were temporarily absent, in court or on work release, housed in private facilities, local jails, or other state or federal facilities and serving concurrent sentences for more than one correctional authority.

¹²Incarceration rate per 100,000 U.S. residents of all ages. Rates calculated do not reflect population estimates shown in this table.

Appendix B
Minnesota Standard Sentencing Guideline Grid

Severity Level and Example Crime		Criminal History Score ¹³						
		0	1	2	3	4	5	6 or more
11	Second degree murder	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480¹⁴</i>	426 <i>363-480¹⁴</i>
10	Third degree murder	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
9	First degree assault	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
8	First degree aggravated robbery	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>91-129</i>
7	Felony DWI	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84¹⁵</i>
6	Second degree assault	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
5	Residential burglary	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
4	Nonresidential burglary	12¹⁶	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
3	Theft crimes over \$5,000	12¹⁶	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
2	Theft crimes \$5,000 or less	12¹⁶	12¹⁶	13	15	17	19	21 <i>18-25</i>
1	Assault	12¹⁶	12¹⁶	12¹⁶	13	15	17	19 <i>17-22</i>

All numbers represent sentences in months.

Non-shaded boxes: Presumptive commitment to state prison. First degree murder has a mandatory life sentence and is excluded from the Guidelines. See Minn. Stat. § 609.185-2.E.

Shaded boxes: Presumptive stayed range; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation; however, certain offenses in the shaded area of the grid always carry a presumptive commitment to state prison. See Minn. Stat. § 609.185-2.C and 2.E.

¹³An offender's criminal history score is the sum of points from eligible prior felonies, custody status at the time of the offense, prior misdemeanors, and prior juvenile adjudications. Information about how the score is calculated is provided by the Minnesota Sentencing Guidelines Commission, at this link: <https://mn.gov/sentencing-guidelines/assistance/criminal-history-calculation/>.

¹⁴The bold number is the fixed sentence duration. Minn. Stat. § 244.09 requires that the guidelines provide a range for sentences to act as a presumptive range of commitment to state imprisonment, which is represented by the *italicized numbers*. In accordance with state law, the minimum of the range is 15 percent lower, and maximum is 20 percent higher, than the fixed duration, but the minimum sentence cannot be less than one year and one day and the maximum sentence is not more than the statutory maximum.

¹⁵The statutory maximum for financial exploitation of a vulnerable adult is 240 months; the standard range of 20 percent higher than the fixed duration applies at CHS 6 or more. (The range is 62-86).

¹⁶One year and one day.

**Appendix C
Oregon Standard Sentencing Guideline Grid**

Severity Level	Criminal History Categories									Probation term	Max Depart	PPS
	A	B	C	D	E	F	G	H	I			
11	225-269	196-224	178-194	164-177	149-163	135-148	129-134	122-128	120-121	5 years		3 years
10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60			
9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36			
8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18	3 years	18 months	
7	31-36	25-30	21-24	19-20	16-18	180-90	180-90	180-90	180-90			
6	25-30	19-24	15-18	13-14	10-12	180-90	180-90	180-90	180-90			
5	15-16	13-14	11-12	9-10	6-8	180-90	120-60	120-60	120-60	2 years	12 months	2 years
4	10-11	8-9	120-60	120-60	120-60	120-60	120-60	120-60	120-60			
3	120-60	120-60	120-60	120-60	120-60	120-60	90-30	90-30	90-30	18 months	6 months	1 year
2	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30			
1	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30			

Notes: The presumptive grid block for any felony conviction is the intersection where the crime seriousness ranking and the criminal history classification meet. Grid blocks in the non-shaded area represent the range of presumptive imprisonment and post-prison supervision (PPS). Shaded grid blocks are presumptive sentences of probation (Prob.Term) with local custodial sanctions in days (upper number) and maximum jail days without a departure (lower number).

In grid blocks 4-C and 4-D, for offenders sentenced under Or. Rev. Stat. §§ 813.011 or 813.012, relating to driving while under the influence of intoxicants, the upper number of sanction units is 180, and the lower number of sanction units is 90. Offenders sentenced under those provisions are required to serve a mandatory minimum term of incarceration of 90 days without reduction for any reason.

The upward dispositional departure maximum sentence (Max Depart) for a presumptive probation sentence is:

- up to six months for offenses classified in Crime Categories 1 and 2, or grid blocks 3-G, 3-H, and 3-I;
- up to 12 months for offenses classified in grid blocks 3-A through 3-F, 4-C through 4-I, and 5-G through 5-I; and
- up to 18 months for offenses classified in grid blocks 5-F, 6-F through 6-I, and 7-F through 7-I.

Under certain conditions a probation sentence may be imposed in grid blocks 8-G, 8-H, and 8-I without a departure.