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# **Getting Smart on Crime:** *Time to Reform Colorado's Drug Offense Sentencing Policies*

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## **Executive Summary**

Colorado is in the midst of a prison population crisis. Overburdened state prisons and a demand for yet more new prison beds are in conflict with a state budget dilemma. The legislature can begin to address the prison problem by rethinking Colorado's sentencing structure as it relates to drug offenses, which are a major cause of prison population growth. Two fundamental reforms are needed:

- Creating a separate set of felony sentencing guidelines and halving the presumptive sentencing ranges for non-violent drug offenses.
- Downgrading simple use and possession of controlled substances from felony crimes to misdemeanors.

Why these reforms are needed:

- Colorado's adult prisoner population has increased more than 400% over the last 20 years.
- In just the last decade, the Colorado Department of Corrections' operating budget has more than doubled to \$469.7 million, easily outpacing overall state spending increases.
- While prison population projections require more prison beds, Colorado cannot afford to build more prisons out of the general fund, resulting in an often undesirable reliance on private prisons.
- Since 1985, the percentage of prisoners incarcerated for drug offenses has quadrupled; non-violent drug offenders now make up more than 20% of Colorado prisoners.
- Most drug sales are consensual, albeit criminal, transactions between consenting adults. It is irrational and counter-productive to have non-violent drug offenses in the same felony classification and sentencing scheme as violent and property crimes.
- A felony conviction follows people for life, negatively impacting the ability to obtain credit, housing or employment. Simple use and possession does not rise to the level of lifelong punishment.

## Introduction

The first and most basic duty of any criminal justice system is to protect the innocent from force and fraud. And as a government service, the roughly \$28,000<sup>1</sup> Colorado taxpayers spend annually per state prisoner is a good bargain for the separation of violent and predatory criminals from the public.

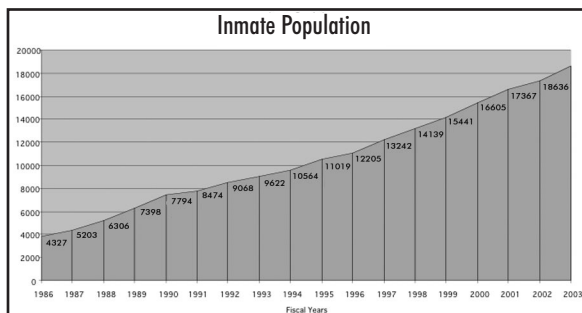
Unfortunately, over the last several decades, Colorado and the rest of the United States has embarked on a massive incarceration campaign. The

result has been a move away from a public safety model of incapacitating violent criminals, to a personal behavior model which also harshly punishes unpopular, and even self-destructive, but consensual behavior.

In 2002, the U.S. inmate population reached the 2 million mark. Remarkably, it took nearly 200 years to get to the first million, but a scant decade, from 1990-2000, to add the second million.<sup>2</sup>

In 1984, Colorado's adult inmate population was less than 4,000 prisoners.<sup>3</sup> As of October 2004, the inmate population—including prisoners transitioning from prison through community corrections but excluding county jails,

parole and probation—was over 19,800,<sup>4</sup> a more than 400% increase in the last 20 years.



Source: Colo. Dept. of Corrections, *Statistical Report, FY 1989 through FY 2003*.

This population growth has necessarily meant a large increase in corrections spending.

In fiscal year 1994-95 the Colorado Department of Correction's (DOC) operating budget—from the state's general fund, but not including new construction and repair/maintenance—was just under \$208.5 million. For fiscal year 2003-04 the operating budget had grown to over \$469.7 million,<sup>5</sup> outpacing overall general fund appropriations by more than 125%.<sup>6</sup>

In 1991, the Colorado legislature passed the "Arveschoug-Bird"<sup>7</sup> general fund appropriations limit, which statutorily holds state budget growth to six percent.

If corrections spending had been held within the six percent growth limit since passage of "Arveschoug-Bird", the fiscal year 2003-04 DOC budget would have been \$299 million.<sup>8</sup>

Since 1994, in addition to more than doubling the DOC budget, the legislature has appropriated roughly half a billion dollars for prison expansion and new prison construction,<sup>9</sup> yet this is still not enough.

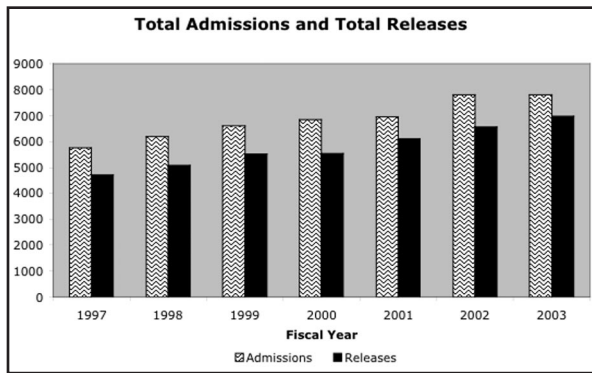
In 2003, Colorado's on-grounds (state facilities) prisoner population versus prison design capacity was 109.8%.<sup>10</sup> This does not count the more than 3,000 Colorado inmates in contract (private) prisons.<sup>11</sup>

According to the Department of Corrections, "Eight hundred twenty-eight additional beds were needed in 2003 to cover the difference between admissions and releases." The number of beds needed per year has averaged 1,067 over this six-year period (1997-2003).<sup>12</sup>

There simply are not enough existing beds to handle the current prisoner population, let alone the expected future population.<sup>13</sup>

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Both the Division of Criminal Justice Research Office and the Legislative Council Staff have prepared prison population projections.<sup>14</sup> The two projections merge in 2009 with an estimate of nearly 25,500 inmates.

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Statutory and constitutional state revenue and spending limitations have meant that the heavy spending on prisons has necessarily come at the expense of other state government services. Colorado is in an ongoing budget crunch, facing a roughly \$263 million budget deficit going into the 2005 legislative session.

As the Denver Post has described, “Without a budget solution, the deficit will mandate drastic cuts in pro-

grams next fiscal year, beyond those made in the last three years.”<sup>15</sup>

Decisions about correctional spending are only going to get harder.

In 2003, House Bill (HB) 1256 was enacted, authorizing the Colorado Department of Corrections to finance a new 948-bed prison (Colorado State Penitentiary II) through the issuance of “certificates of participation” or COPs.

COPs are structured and marketed like government

bonds, a clear form of debt-financing. Investors purchase the COPs, and the state government makes annual “lease payments” to service the outstanding debt. When the COPs are paid off, the state will own the facilities.

Shortly after HB 03-1256 was enacted, the Colorado Criminal Justice Reform Coalition filed a lawsuit against the state claiming that the COPs prison financing scheme violates both TABOR and Colorado’s “single subject” constitutional requirement for full disclosure in legislation.<sup>16</sup>

*However the courts may ultimately rule, Colorado cannot afford to build new prisons directly from the general fund.*

There is little question that many legislators—who otherwise strive to honor Colorado’s spending and revenue limitations—voted for COPs out of frustration over how to deal with the prison population dilemma.

However the courts may ultimately rule, Colorado cannot afford to build new prisons directly from the general fund.

Turning to further dependence on contract (private) prisons ignores the underlying problem. The primary mission of private prisons, like any other business, is profitability. The mission of the state prison system is more complex, including punishment through incarceration (the primary mission), marginal deterrence, rehabilitation and re-entry back into society. So while more inmates with longer sentences are good for the private prison business, it is not necessarily good for either the criminal justice system or taxpayers.

### **Drug Offenses Are Driving the Problem**

Putting certain classes of criminals in prison for longer periods often does reduce crime. The Colorado Bureau of Investigation’s per capita crime index (reported crimes per 100,000 residents) shows an overall 8.1% drop in criminal homicide, rape, robbery, burglary and auto theft between 1997 and 2003.<sup>17</sup>

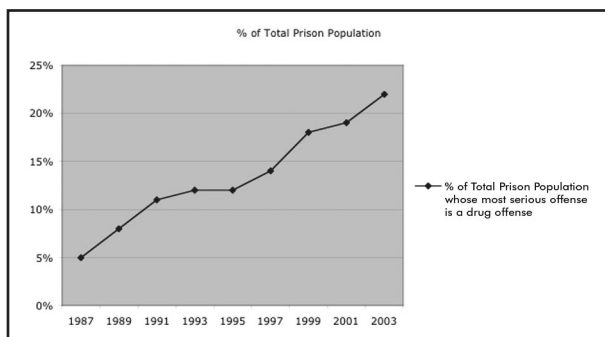
Yet the large-scale expansion of Colorado’s prison population has not resulted in an equal-sized decrease in either violent or property crime. If doubling the prison population resulted in even a corresponding halving of these crimes, the prison population and correctional spending would be justifiable.

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In 2003, drug offenders made up 22% of new adult court commitments to Colorado’s prisons, more than 1,200 inmates and by far the single largest category of offenders.<sup>18</sup> Even if Colorado State Penitentiary II were to be built, just the 2003 drug offenders could immediately fill it beyond capacity.

Since 1985, the percentage of Colorado’s prisoners locked up for a non-violent drug offense has nearly quadrupled.<sup>19</sup> Drug offenders now make up more than 20% of Colorado’s total adult prison population.



Source: Colo. Dept. of Corrections, *Statistical Reports, FY 1985 through FY 2003*.

Putting non-violent drug felonies in the same category as violent and property crimes eats up the criminal justice system’s most valuable tool: prison beds, distracting prisons from their primary mission of incapacitating violent and predatory criminals.

The Colorado Dept. of Corrections lists drug offenses as “non-violent.” One rationale for the harsh sentences for drug offenses is that drug sales or use are inherently violent and constitute a threat to public safety. Almost all drug offenses in Colorado are labeled as “extraordinary risk of harm to society” crimes, which automatically add additional jail time to the presumptive sentencing range.

Actually, the violence related to illegal drug use and sales is due mostly to the drug laws themselves. Violence from disputes between dealers (turf wars) is engendered by prohibition, just as alcohol prohibition caused violence in another era. Robberies by drug users to support a habit are caused by the “risk premium” charged by drug dealers as part of their risk of going to prison.<sup>20</sup>

Trying to incarcerate drug use and sales out of existence simply has not worked, because it cannot work.

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In November 2004, Denver police arrested a suspect known as the “Raspy Robber,” believed responsible for a long string of robberies. The suspect has a long criminal record, and if found guilty and sentenced to a long prison term, police, prosecutors and the courts will have done more than solve a string of crimes and punish the offender; they will have also prevented untold numbers of future robberies.

It is an old debate as to whether prison either deters crime or rehabilitates prisoners. But no one questions that prison incapacitates criminals. Imprison one “Raspy Robber” and there is one less robber on the street. There is not some other potential robber simply waiting to take over the robbery territory left open by the capture of a current robber. The same holds true for pedophiles, serial rapists, burglars and other predatory criminals.

The same does not hold true for drug crimes. The imprisonment of one drug dealer (or even an entire network) only temporarily disrupts the flow of ille-

gal drugs. As soon as one supplier is gone, another quickly moves in to take his place.

Basic economic law of supply and demand says that as long as there is a demand for a product, a market will make that product available. Drug laws only artificially affect the price of drugs, not the availability. The availability of drugs can only be halted by imprisoning every drug user and addict (who are the majority of small time dealers) and everyone willing to break the law in return for large financial rewards (the upper levels of the drug world). Having doubled in a decade, Colorado's prison population could double again without significantly affecting the availability of illicit drugs.

What has been lost is the ability to differentiate between a criminal felon who is also a drug user and turning drug users into felons.

### **Colorado is not Alone**

Kentucky's prison population has increased by nearly 600% since 1970. Projections show another 25% growth in Kentucky prisoners by 2010, requiring one new prison every two years and threatening to bankrupt the state. A study by University of Kentucky Law Professor Robert Lawson cites, among other things, harsh drug sentences, including a law which elevates a second drug offense to a full felony level, as driving Kentucky's crisis.<sup>21</sup>

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- In 1993, Florida, where America's drug war really began, repealed 23 mandatory sentences<sup>22</sup>. This actually allowed the state to increase sentences for violent crimes. Among those changes was removal of persons repeatedly arrested for small-scale drug offenses from the "habitual offender" classification.

- From 1986 to 1996, Louisiana went from incarcerating four drug offenders per 100,000 residents to 107 drug offenders per 100,000 residents, an increase of more than 2800%.<sup>23</sup> By 2001, nearly a third of the prison population was drug offenders. In response, Louisiana legislators repealed mandatory minimum sentences for simple possession and halved the minimum sentences for many drug trafficking offenses.<sup>24</sup>

- In 2002, Michigan, with more than 49,000 inmates, eliminated mandatory minimum sentences for drug crimes. While still retaining quite high maximum sentences, Michigan has returned some flexibility to judges in determining appropriate sentences for drug offenses.<sup>25</sup>

- In 2004, the Republican-controlled legislature in Pennsylvania passed sweeping prison reforms, which divert most non-violent drug (and alcohol) offenders from prison and into treatment.<sup>26</sup> Pennsylvania's prison problem parallels Colorado's in many ways. Since 1993, the prison population has nearly doubled while correctional spending has nearly tripled. Non-violent, or "Part 2" offenders, the majority of which are drug offenders, has grown 80% in the last seven years.

- In 2004, the Oklahoma Sentencing Commission found that: "The top reason felony offenders are imprisoned in Oklahoma is drug possession." Drug possession accounted for 19% of the more than 7,800 offenders sentenced to Oklahoma prisons in 2002. The Commission recommended: "Mandatory minimum sentences for drug possession should be eliminated in order to make better use of prison beds. Offenders charged only with drug possession should be presumptively sentenced to Drug Court, Community Sentencing or Probation."<sup>27</sup>

- In New York State, some 2,000 prisoners are serving life sentences and another 13,000 are serving long mandatory minimum sentences under that state's "Rockefeller" drug laws. In



December 2004, New York lawmakers drastically reduced the 15 years to life sentencing range, which was often applied to low-level and first time drug offenders.<sup>28</sup> It is estimated that some 400 current non-violent inmates serving time for drug offenses will be able to apply for early release, a significant step in relieving New York's own prison population crisis.

*One can advocate that illegal drugs remain illegal, but still not advocate filling prisons with small time drug criminals.*

One can advocate that illegal drugs remain illegal, but still not advocate filling prisons with small time drug criminals. More than a decade ago, Ray Enright, a former assistant to the director of the Drug Enforcement Administration and past chair of the Colorado Parole Board, stated: "It's been my experience that we're seeing too many people, too many low-level traffickers and abusers whose sen-

tences, in my opinion, are not commensurate with their crime."<sup>29</sup>

### **Use and Possession as a Misdemeanor**

In 2003 the General Assembly passed Senate Bill (SB) 318, amending Colorado controlled substance statutes 18-18-404 and 18-18-405 by lowering the felony classification for use of a Schedule I or II controlled substance and for simple possession of one gram or less of any scheduled substance (with the exception of marijuana) to a Class 6 felony, carrying a presumptive sentencing range of between one and 1 1/2 years and a mandatory one year of probation.<sup>30</sup>

SB 318 was a good first step, but it did not go far enough. Lowering the felony classification for simple use and possession may result in shorter sentences but does nothing to address the number of new drug offenders entering prison.

More importantly, SB 318 fails to address the question of why simple use and possession is a felony crime to begin with.

In a 2001 public opinion survey on drug abuse and drug policy in Colorado, 60% of participants (registered Colorado voters) agreed that incarcerating people convicted of drug possession is ineffective in reducing drug use and drug related crime.<sup>31</sup>

Further, 73% either strongly or somewhat favored decreasing criminal penalties for possession of small amounts of drugs from a felony to a misdemeanor.<sup>32</sup>

In a 2004 survey of 300 Chiefs of Police throughout the U.S.,<sup>33</sup> more than a third (37%) thought drug policy needs a major overhaul, and 47% said major changes were in order. Moreover, a majority of the Chiefs thought mandatory minimum sentences for drug possession were either only somewhat effective or not effective at all.

According to the conclusions of a Western Governors' Association drug policy summit report, while alternatives to incarceration are important, "Citizens must be held accountable for their actions."<sup>34</sup>

True enough, but lawmakers must also be accountable to taxpayers for the results of over-filling state prisons with non-violent offenders. Accountability does not necessarily mean "felony sentence."

Carrying a felony conviction, or as some refer to it, "wearing an F on your chest" extracts a heavy toll long after a prison sentence has ended, drastically reducing one's ability to pursue a productive life, obtain credit, or seek housing and employment.

The University of Kentucky's Robert Lawson explains that lawmakers, having lost sight of the importance of distinguishing between dangerous... and non-dangerous offenders, "have laid a foundation for a new citizen underclass made up of parolees, ex-convicts and their families."<sup>35</sup>

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For instance, Wal-Mart, an excellent source of entry into the job market, has recently changed its policy on background checks for criminal history from more sensitive positions, such as loss prevention and pharmacy workers, to background checks on all U.S. applicants.<sup>36</sup>

Technology has made background checks cheaper and easier, and for Wal-Mart and many other employers, the difference between a misdemeanor and felony conviction can mean the difference between being employable or not.

After realizing many drug offenders could not get even menial work because of their felony records, the Illinois legislature in 2004 passed legislation allowing those convicted of class four felonies, including non-violent drug offenses (in Illinois, as little as five dollars worth of cocaine constitutes a class four

felony), to request their records be sealed to make it easier to obtain post-prison employment. Police would still have access to the records, as would employers filling sensitive positions, such as working with children. It is estimated that this legislation will positively affect 25% of Illinois' convicts.<sup>37</sup>

By destroying job opportunities for drug users, the state helps to ensure these people never have the chance to be accountable to anyone other than to the state.

Another problem with making possession and use a felony crime is that it often leads to unjust and questionable practices by both police and prosecutors. Unlike other types of crime, drug possession has no victim and therefore no complainant. The only evidence is often just some drugs and police testimony.

According to Joseph McNamara, an ex-New York City Police Officer and ex-Kansas City Police Chief: “[M]illions of times a year in the name of the war against drugs, police officers do illegally search people and, when they discover drugs, perjure them-

selves so that the evidence is admissible.” According to McNamara, this practice has even become part of police jargon; in New York, it is “testilying” and in Los Angeles it is “joining the liars club.”<sup>38</sup>

Drug possession can also be used as a tool by prosecutors to imprison someone on a relatively easy conviction when they cannot prove another, more serious crime—such as one with a victim—but believe that person indeed committed the crime and deserves to be in prison for something. The integrity of our criminal justice system demands—regardless of intentions—that people only be convicted of crimes they actually committed and which can be proven.

- **18-18-404(1)(a)(I) Drug use as a felony. Amend this subsection.**

This subsection makes unlawful use of any schedule I or II controlled substance a class-6 felony, carrying a sentence of between one and one-and-one-half years. This subsection should be amended to reduce use of Schedule I and II substances to a class-2 misdemeanor, as described in 18-1.3-501(1).

- **18-18-404(1)(a)(II) Drug use as a class-1 misdemeanor. Amend this subsection.**

This subsection makes unlawful use of any schedule III, IV or V controlled substance a class-1 misdemeanor. This subsection should be amended to reduce use of these substances to a class-3 misdemeanor, as described in 18-1.3-501(1).

- **18-18-404(1)(b) Repeal this subsection.**

This subsection repeals the SB 318 reforms on the first fiscal year after 2007 if appropriation of \$2,200,000 for treatment versus incarceration is not made, reverting to the harsher pre-SB 318 sentences for drug use. Colorado should be seeking to slow the growth of the prison population by making the punishment more accurately fit the crime. A return to the model which has helped along the prison problem is counter-productive and unnecessary, repeal this subsection.

*By destroying job opportunities for drug users, the state helps to ensure these people never have the chance to be accountable to anyone other than to the state.*



- **18-18-405(2.3)(a)(I) Possession as a felony. Amend this subsection.**

This subsection makes simple possession of one gram or less of any schedule I through IV controlled substance a class-6 felony. This subsection should be amended to reduce the possession of these substances to a class-2 misdemeanor as described in 18-1.3-501(1).

- **18-18-405(2.3)(a)(II) Second possession offense as a felony. Amend this subsection.**

This subsection makes a second simple possession offense a class-4 felony. Prison beds should not be wasted on drug users. Amend this subsection to make a second possession offense a class-1 misdemeanor as described in 18-1.3-501(1).

- **18-18-405(2.3)(b) Repeal this subsection.**

This repeals subsection 2.3 if appropriations for treatment versus incarceration (part of SB 318) are not made after FY 2007. Reverting back to previous, harsher drug possession sentences is a step backward and makes no sense.

## **Drug Offenses Need a Different Sentencing Scheme**

In 1985, the Colorado legislature enacted House Bill (HB) 1320, doubling the maximum penalty of the presumptive sentencing range for felony crimes. The Department of Corrections describes the result: “The average length of stay projected for new commitments (to DOC) nearly tripled as a result, from 20 months in 1980, to a high of 57 months in 1989.” The prison population more than doubled in the five years following HB 1320.<sup>39</sup>

*Incarceration does not affect the use or availability of drugs outside of prison.*

Longer sentences for certain classes of crime are fine as a tool of incarceration and separation. But placing non-violent drug offenses, including sale and manufacture, in the same sentencing scheme as violent and property crimes is counter-productive. Incarceration does

not affect the use or availability of drugs outside of prison.

Don Boudreaux, Professor of Economics at George Mason University, uses New York as an example of how overly harsh consensual drug crime sentences can actually contradict using prison sentences as a deterrent: “In New York, the minimum sentence for second-degree murder is 15 years. For first-degree murder it’s 20 years. If the minimum mandatory sentence for the sale of more than two ounces of heroin or cocaine remains at 15 years, the additional punishment suffered by drug dealers who commit second-degree murder during drug sales gone bad is now as low as nothing. For first-degree murder the additional penalty is as low as five years.”<sup>40</sup>

Colorado’s drug laws (Uniform Controlled Substances Act of 1992) contain a variety of parameters affecting the class of felony and the sentencing range. A better sentencing scheme for drug offenses would amend and repeal certain statutes and alter the presumptive sentencing range guidelines:

- **18-18-405(3.5) Drug offenses as “Extraordinary Risk” crimes. Repeal this section.**

According to this statute, “The felony offense of unlawfully manufacturing, dispensing, selling, distributing, or possessing with intent to unlawfully manufacture, dispense, sell or distribute a controlled substance is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401(10).” For instance, the normal presumptive sentencing range for a class-4 felony is two to six years. The “extraordinary risk” classification increases the range to between two and eight years. “Extraordinary risk” puts nearly all drug offenses in the same category as sex assault, sex assault on a child, aggravated robbery and aggravated incest. Consensual drug crimes simply do not rise to this level of deserved punishment and only serve to weaken the serious nature of the “extraordinary risk” classification.

• **18-18-422 Imitation Controlled Substances (fake drugs). Repeal this section**

1. Subsection (1)(b)(I) of this statute makes manufacturing, possessing or distributing imitation controlled substances a class-5 felony. Selling someone a bag of powdered sugar and claiming it is really cocaine can land one in prison for between one and three years.
2. Subsection (1)(b)(II) makes a second “fake drug” conviction a class-4 felony. Being twice caught selling vitamins in the guise of an illegal stimulant (speed) is in the same sentencing range as both burglary and assault.
3. In legal drug transactions, such as prescription or over-the-counter drugs, selling fake drugs falls under fraud. But a drug deal involving legal substances under the guise of illicit drugs should fall under the category of stupidity on the part of the buyer, but should not be a felony crime. Repeal the “fake drugs” statute.

• **18-18-407 Special drug offender enhancements. Amend this statute.**

1. Under this statute, certain “extraordinary aggravating circumstances” demand a drug offender be sentenced to between the minimum and twice the maximum range of the class-2 felony range, anywhere from eight to 48 years. For FY 1997-98 to FY 1998-99, the average sentence for special drug offenders was 29.5 years. At the same time, the average sentence for a class-2 felony child abuse conviction (knowingly or recklessly resulting in death) was 30.7 years. A class-2 felony organized crime conviction was 21.5 years.<sup>41</sup> There are several of these drug offender enhancements that clearly do not belong in the special offender category.
2. Under subsection (1)(d) a drug offender becomes a special offender if he, “unlawfully

introduced, distributed or imported into the state of Colorado any schedule I or II controlled substance.” In other words, driving or flying into Colorado from another state with enough cocaine for a small group of friends carries more time in prison than mob extortion. Possession and possession with intent to distribute are already covered by other statutes; repeal this subsection.

3. Subsection (1)(e) makes a drug crime involving more than 100 pounds of marijuana a special offender crime. Enhancements for weight of drugs involved are already covered by other statutes, but more importantly, this makes simply smuggling a trunk full of marijuana into the sentencing equivalent of beating a child to death; repeal this subsection.

• **18-18-412.7 Sales or distribution of materials to manufacture controlled substances, amend this section.**

Someone who legally sells chemicals, supplies or equipment violates subsection (1) of this statute if he “knows or reasonably should know or believes” that someone intends to use the products they sell to illegally manufacture controlled substances. This is much like demanding gun dealers should know if their customers intend to commit a gun crime. The result is to turn legitimate businessmen into unwilling drug agents and all of their customers into potential drug suspects. The “reasonably should know” should be stricken from the statute.

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• **18-18-405(2)(a) Unlawful distribution, manufacturing, dispensing, sale or possession, lower these felony classifications.**

1. Subsection (I)(A) of this statute makes all schedule I and most schedule II drug crimes class-3 felonies, carrying a four to 12-year

sentence. In 2003, drug offense commitments in this sentencing range (387) outnumbered first and second-degree burglary, sex assault on a child, aggravated robbery and first-degree assault combined. Non-violent class-3 drug offenses are lumped in with other, very serious and often-brutal crimes such as attempted second-degree murder, aggravated robbery and vehicular homicide. Lower this subsection to a class-4 felony.

2. Subsection (I)(B) of this statute makes a second schedule I or II offense a class-2 felony. This places drug offenses in the same category as second-degree murder and kidnapping, with a sentencing range of eight to 24 years. Even having a tractor-trailer full of marijuana or a trunk full of cocaine, let alone a second low-level offense such as dealing drugs within one's social circle, should not be lumped in with the illegal taking of life or kidnapping. Lower this subsection to a class-3 felony.
3. Subsection (II)(A) of this statute makes schedule III controlled substance drug crimes class-4 felonies. The number of new class-4 drug offense commitments in 2003 was nearly 800. The next closest was theft with less than 370. In any rational assessment of criminal justice priorities, there should be twice as many thieves in prison as drug offenders. Lower this subsection to a class-5 felony.
4. Subsection (II)(B) makes second schedule III offenses into class-3 felonies. So even a second offense of selling some of your prescription secobarbital suppositories (a sleeping aid) to friends is the sentencing equivalent to first-degree assault (also a class-3 felony). Lower this subsection to a class-4 felony.
5. Subsection (III)(A) makes schedule IV drug crimes into class-5 felonies. Abuse of schedule IV controlled substances, according to the statute, might lead to "limited physical dependence or limited psychological depen-

dence." This could also be describing television or caffeine. At the very least, lower this subsection to a class-6 felony.

6. Subsection (III)(B) makes a second schedule IV drug offense a class-4 felony. For the same reasons as a first offense, lower this subsection to a class-5 felony.
7. Subsection (IV)(A) makes schedule V controlled substance offenses class-I misdemeanors. Schedule V substances have a low potential for abuse relative to schedule IV substances—in other words, quite low. All schedule V offenses should be treated much like simple possession and use. This subsection should be lowered to a class-3 misdemeanor.
8. Subsection (IV)(B) makes a second schedule V offense a class-5 felony. Just as no drug user should be taking up a prison bed better occupied by a violent criminal, neither should a second Schedule V offender. Lower this subsection to a class-1 misdemeanor.

*Schedule V substances have a low potential for abuse relative to schedule IV substances—in other words, quite low.*

Other drug laws take into account the weight of drugs involved to decide the length of a sentence within the presumptive range:

• **18-18-405(3)(a)**

1. In subsection (I) of this statute, drug crimes involving between 25 and 450 grams of a schedule I or II substance requires a sentence of "at least the minimum term" in the presumptive range.
2. In subsection (II), drug crimes involving between 450 and 1,000 grams of schedule I or II substances requires a sentence "of at least the midpoint of the presumptive range but not more than twice the maximum range..."

- 3. In subsection (III), more than 1,000 grams demands “a term greater than the maximum presumptive range but not more than twice the maximum presumptive range...”

The presumptive sentencing range is the common basis for all sentencing parameters in the Controlled Substances Act. In addition to amending and repealing of certain statutes, the legislature should create a special presumptive sentencing range to differentiate non-violent drug crimes from other crimes.

- **18-1.3-401 Felonies classified, presumptive penalties. Amend this statute to include a separate drug offense presumptive sentencing range.**<sup>42</sup>

What the current presumptive sentencing range looks like:

<b>Presumptive Sentencing Range 1993 - Present</b>			
Felony Class	Min.	Max.	Mandatory Parole Period
1	Life	Death	N /A
2	8 Years	24 Years	5 Years
3**	4 Years	16 Years	5 Years
3	4 Years	12 Years	5 Years
4**	2 Years	8 Years	3 Years
4	2 Years	6 Years	3 Years
5**	1 Year	4 Years	2 Years
5	1 Year	3 Years	2 Years
6**	1 Year	2 Years	1 Years
6	1 Year	1.5 Years	1 Years

\*\* Denotes Extraordinary Risk Crimes

New drug offender sentencing range:

<b>Controlled substance Sentencing Range</b>			
Felony Class	Min.	Max.	Mandatory Parole Period
2	4 Years	12 Years	1 Year
3	2 Years	6 Years	1 Year
4	1 Year	3 Years	1 Year
5	1 Year	2 Years	1 Year
6	1 Year	1.5 Years	N / A

Adopting drug offense sentencing changes does not equate to being soft on crime but would recognize that punishment for non-violent drug offenses has over the years become “dumb” rather than “tough.” Colorado would retain the means to punish drug offenders, but in a way that makes the necessary distinction between consensual crimes and crimes against people and property. At the same time, the proposed measures represent a good start towards slowing the growth of Colorado’s prison population and closing the gap between admissions and releases.

Adoption of these policies would rather represent a “smart on sentencing” philosophy and help Colorado get back to the criminal justice idea of prison as a public safety rather than personal behavior tool.

*Adopting drug offense sentencing changes does not equate to being soft on crime but would recognize that punishment for non-violent drug offenses has over the years become “dumb” rather than “tough.”*

## Endnotes

- <sup>1</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, 23. <http://www.doc.state.co.us/Statistics/pdfs/OPARReports/STATReports/2003Complete.pdf>
- <sup>2</sup> Timothy Lynch, "Population Bomb Behind Bars," *Cato Institute*, Feb. 23, 2000. <https://www.cato.org/dailys/02-23-00.html>
- <sup>3</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, Table 2.
- <sup>4</sup> Colorado Dept. of Corrections, *General Statistics, Adult Inmate Population* (as of Sept. 30, 2004) <http://www.doc.state.co.us/Statistics/7GeneralStatistics.htm>
- <sup>5</sup> Colorado Criminal Justice Reform Coalition, *Prison Fact Sheets, State Funds Allocated for Colorado Prisons 1988-2004*, Feb. 2004. <http://www.ccjrc.org/pdf/costofincarceration.pdf>
- <sup>6</sup> Colorado Criminal Justice Reform Coalition, *Incarceration and Correctional Spending in Colorado: A Legislator's Handbook on Criminal Justice Policy*, 2003, Feb. 2003, 6. From 1981 to 2003, DOC General Fund appropriations grew by an accumulative 307%, while total General Fund appropriations grew by 182%. [http://www.ccjrc.org/CCJRC\\_Leg\\_Handbook.html](http://www.ccjrc.org/CCJRC_Leg_Handbook.html)
- <sup>7</sup> CRS 24-75-201 (1)
- <sup>8</sup> Colorado Criminal Justice Reform Coalition, *Prison Fact Sheets, Cost of Incarceration*, Feb. 2004. <http://www.ccjrc.org/pdf/costofincarceration.pdf>
- <sup>9</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, Table 6.
- <sup>10</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, Table 19.
- <sup>11</sup> Joint Budget Committee, *Fiscal Year 2004-05 Appropriations Report*, 37. [http://www.state.co.us/gov\\_dir/leg\\_dir/jbc/FY04-05AppropRpt.pdf](http://www.state.co.us/gov_dir/leg_dir/jbc/FY04-05AppropRpt.pdf)
- <sup>12</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, 30.
- <sup>13</sup> Overcrowding in prisons is not a public safety issue—the inmates are still locked away. However, prison overcrowding increases the chances of Correctional Officers and prison staff being assaulted or even killed and increases the likelihood of prison rioting, yet another danger to personnel.
- <sup>14</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, Table 7.
- <sup>15</sup> "Creative Thinking on State Budget Dilemma," *Denver Post*, Nov. 11, 2004.
- <sup>16</sup> "Not With Our Money: Activists aim to block new prison by suing state over controversial funding scheme," *Boulder Weekly*, Dec. 25, 2003.
- <sup>17</sup> Office of State Planning and Budgeting, *Fact Sheet: Crime Rates*, July 2004. [http://www.state.co.us/gov\\_dir/govnr\\_dir/ospb/budget/factsheets/corrections/doc-jul2004-crimerates.pdf](http://www.state.co.us/gov_dir/govnr_dir/ospb/budget/factsheets/corrections/doc-jul2004-crimerates.pdf)
- <sup>18</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, Table 29.
- <sup>19</sup> Colorado Dept. of Corrections, *Statistical Reports, FY 1989 to FY 2001*. <http://www.doc.state.co.us/Statistics/3StatisticalReports.htm>
- <sup>20</sup> Illicit drugs cost more than they otherwise would because of a) the high cost of illegal smuggling and b) some amount of drugs are going to be seized by police, requiring a higher profit on the drugs which make it to market. Drug dealers also charge customers a "risk premium" based on the chance they might be caught and go to prison. Risk premiums for cocaine and heroin can cause these drugs' prices to be much as 20 to 40 times what they otherwise would cost.
- <sup>21</sup> Robert G. Lawson, "Difficult Times in Kentucky Corrections—Aftershock of a 'Tough on Crime' Philosophy", 93 *Kentucky Law Journal* (forthcoming in 2005), 98. [http://www.uky.edu/Law/current\\_students/ky\\_law\\_journal.html](http://www.uky.edu/Law/current_students/ky_law_journal.html)
- <sup>22</sup> Don J. De Benedictus, "How Long is Too Long?" *American Bar Association Journal*, October 1993.

- <sup>23</sup> "Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States," Justice Policy Institute, July 2000, 9. <http://www.justicepolicy.org/article.php?list=type&type=49>
- <sup>24</sup> "Texas Tough: 3 Years Later," Justice Policy Institute, April 2003. <http://www.justicepolicy.org/article.php?list=type&type=45>
- <sup>25</sup> "Engler Eliminates Mandatory Minimums," *Holland Sentinel*, Dec. 28, 2002. [http://www.thehollandsentinel.net/stories/122802/new\\_122802021.shtml](http://www.thehollandsentinel.net/stories/122802/new_122802021.shtml)
- <sup>26</sup> "State breaking free from costs tied to sentencing law," *Washington Observer-Reporter*, Nov. 27, 2004.
- <sup>27</sup> Oklahoma Sentencing Commission, *Recommendations to the Legislature about Felony Sentencing*, Feb. 2004. <http://www.ocjrc.net/pubFiles/LegisRecom/OSCrecom04.pdf>
- <sup>28</sup> "New York State Votes to Reduce Drug Sentences," *New York Times*, Dec. 7, 2004.
- <sup>29</sup> "Cutting Drug Sentences by Half Proposed," *Rocky Mountain News*, Dec. 1, 1992.
- <sup>30</sup> In Colorado, low-level marijuana possession has a different, less harsh sentencing system than that for other illicit drugs.
- <sup>31</sup> Ridder/Braden, Inc., "Survey on Drug Abuse and Drug Policy: Summary of Results," Sep. 2001. Full report available at [www.ccjrc.org](http://www.ccjrc.org)
- <sup>32</sup> Forty-three percent of voters strongly agreed, while 30% somewhat agreed.
- <sup>33</sup> Peter D. Hart Associates, Inc., "Drugs and Crime Across America: Police Chiefs Speak Out," December 2004. Thirty-eight percent of chiefs thought mandatory minimums were somewhat effective, while 29% thought they were not the answer to drug abuse. <http://www.policefoundation.org/pdf/PolicePollFinal.pdf>
- <sup>34</sup> Western Governors' Association, Drug Policy Working Group, "Drug Strategies in the West," May 25, 2000, 9. <http://www.westgov.org/wga/initiatives/drugs/Drugpolicy-white-paper.htm>
- <sup>35</sup> "Report: Kentucky's prison population has skyrocketed since 1970," Associated Press, Nov. 15, 2004.
- <sup>36</sup> "Watch it! Background checks popular," *Denver Post*, Nov. 28, 2004.
- <sup>37</sup> "Group hopes law can help build neighborhood", *Chicago Tribune*, Nov. 12, 2004. <http://www.chicagotribune.com/news/columnists/chi-0411120208nov12,0,4485094.column>
- <sup>38</sup> Joseph McNamara, "Gangster Cops in the Drug War," *The New Prohibition: Voices of Dissent Challenge the Drug War* (Accurate Press, 2004), 21.
- <sup>39</sup> Colorado Dept. of Corrections, *Statistical Report, Fiscal Year 2003*, 4.
- <sup>40</sup> Donald J. Boudreaux, *Letters to the Editor*, *New York Post*, Dec. 13, 2004.
- <sup>41</sup> Colorado Legislative Council, *An Overview of the Colorado Adult Criminal Justice System, Research Publication No. 487*, January 2001, Table 5.3. [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/research/01CriminalCorrections.htm](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/research/01CriminalCorrections.htm)
- <sup>42</sup> There are no drug offenses in the class-1 felony sentencing range, which carries a sentence of either life or death, and is not included in the drug offender sentencing structure.

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