



THE CASE FOR FURTHER SENTENCING REFORM IN COLORADO

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IP-1-2011
January 2011

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“We have acted under a belief that no price is too high to pay for protecting the public from crime and have generated incarceration costs that now consume huge proportions of corrections budgets, all to the detriment of programs that corrections professionals know to be crucial to any hope of converting offenders into law-abiding citizens.”

Robert G. Lawson, University of Kentucky Professor of Law, “Difficult Times in Kentucky Corrections—Aftershocks Of A ‘Tough On Crime’ Philosophy”

“It is a far better policy to provide for a marginally earlier release for select offenders than it is to perpetuate a business-as-usual system that simply is not sustainable.”

Ari Zavaras, Executive Director, Colorado Department of Corrections, and

Pete Weir, Executive Director, Colorado Department of Public Safety, Denver Post, August 30, 2009

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And as a government service, the roughly \$32,000 (average cost)¹ taxpayers spend annually per state prisoner is a good bargain for the separation of violent and predatory criminals from the public.

But over the last several decades Colorado has embarked on a massive incarceration campaign. This campaign has in turn required an extreme and unprecedented state spending spree that has pushed corrections spending in

Colorado from less than 3 percent to almost 9 percent of Colorado’s General Fund appropriation, with an often less-than-clear public safety benefit.

While this extreme prison spending spree has been bipartisan in nature, the participation over the years of lawmakers who consider themselves “fiscal conservatives” is particularly troubling. As such a dramatic increase in the questionable use of incarceration as a crime control strategy, and the attendant runaway prison spending violates many of the principles generally associated with a

“fiscally conservative” political philosophy. These principles have traditionally included:

- A commitment to limited and constitutional government;
- A desire to reduce the influence of government in people’s lives;
- Keeping the burden of taxation as low as possible;
- A healthy skepticism towards the creation of new state agencies, laws and programs, and the expansion of existing state agencies and programs;
- A critical view towards tax dollars and public policy as a tool of social engineering; and
- A fiscally conservative general attitude towards state government spending.

State spending does not drive the prison population. Rather, just like an entitlement, the prison population drives state spending. The legislature’s ability to affect the prison caseload, and thus the corrections budget, rests in its prerogative to write, and when necessary, re-write the state’s criminal sentencing and parole laws and policies.

On May 25, 2010, Governor Bill Ritter signed into law a significant package of sentencing and other criminal justice-related reform bills.² Many of these bills were generated from the work of the Colorado Commission on Criminal and Juvenile Justice (CCJJ).³ As the Governor, a former prosecutor, correctly noted at the signing, “There is no easier place to get it wrong” than when it comes to issues of crime and punishment.

With that in mind, our purpose here is not to make any specific sentencing, criminal law or parole reform recommendations, but rather to make the case for legislators to support ongoing examination of Colorado’s criminal justice system. We also support evidence-based recommendations, specifically in the areas of drug policy and recidivism, in an effort to avoid any further prison capacity expansion in Colorado and to maximize the best use of the state’s existing prison capacity and criminal justice resources.

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PRISON SPENDING IN COLORADO: ANATOMY OF A FISCAL TRAIN WRECK

In 1985 the Colorado General Assembly passed House Bill 1320, the "Mielke-Arnold" bill. The legislation not only increased the minimum sentences for crimes of violence, but also doubled the maximum penalties for all levels of felony crimes, regardless of the nature of the crime, in Colorado's presumptive sentencing range. Within three years, the average length of prison sentences in Colorado increased by two-thirds, and the average

length of stay increased by 40 percent.⁴ Colorado's inmate population more than doubled in the next five years. Since 1990 it has more than doubled again to around 23,000 inmates.⁵ In comparison, Colorado's overall population has increased by roughly 65 percent over the last 20 years.

To keep pace with the capacity demands of such unprecedented growth in the prison population, successive legislatures and governors have pushed corrections spending from less than 3 percent in 1990 to more than 9 percent of General Fund appropriations today, or from around \$115 million to \$675 million per year. Prison spending over the two decades from FY 1989-90 to FY 2009-10 grew at a compound annual rate of more than 9 percent.⁶

In a direct tradeoff, a dramatic increase in spending for one item as a percentage of the state's General Fund (prisons) necessarily means that other items have had to decrease.

In 2003, unable to build more prisons out of the General Fund, the General Assembly enacted House Bill 1256. The legislation authorized the Colorado Department of Corrections to finance construction of 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 form of debt financing. Investors purchase the COPs, and the state makes annual "lease payments" to service the outstanding debt. When the COPs are paid off, the state (through taxpayers) will own the facility.

The legislation originally capped the cost of the COPs at \$102.8 million, but according to Joint Budget Committee staff, the COPs actually will cost the state \$167.3 million, including \$18.6 million in capital interest that has accrued to date.⁷

THE DIMINISHING RETURN OF INCREASING PRISON POPULATIONS

From 1985 to 2007, Colorado's total crime rates (violent and property crimes combined) dropped by almost half (48 percent).⁸ Over that same time period, Colorado's incarceration rate increased by more than 230 percent.⁹

To be sure, there is a relationship between incarceration of criminals and crime rates. At its simplest, a criminal removed from general society is incapable of re-offending outside the walls of prison for as long as he is incarcerated. At the same time every convict not sentenced to life without parole (nor those who die in prison) is eventually released. The broader question is whether an offender's time in prison prepares him to continue committing crimes, or prepares him to pursue a lawful post-incarceration existence.

It is widely accepted that putting certain classes of criminals in prison for longer periods of time often does, temporarily, reduce crime. Yet the large-scale expansion of Colorado's prison population has not resulted in a proportional reduction in either violent or property crime. For instance, if doubling the prison population resulted in even a corresponding halving of these crimes, then a dramatic increase in both the prison population and corrections spending would be more easily justified. But no one claims that quadrupling Colorado's prison population over 20 years has by itself cut crime rates in half.

As Roger Przybylski notes in *What Works* (prepared for the Colorado Division of Criminal Justice):

From a policy perspective, it is important to recognize that the increased use of imprisonment eventually results in diminishing returns. The reason

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for this is simple; locking up more and more people eventually leads to the incarceration of less serious offenders. When that happens, costs increase without a commensurate increase in public safety.¹⁰

For instance, both property and violent crime rates in Colorado already were trending down in the years before the 1985 doubling of sentences with Mielke-Arnold.¹¹

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roughly doubled to over 257. Yet over that same time period, violent crime rates (or the number of reported offenses per 100,000 in population) in Colorado also increased, from 467.5 to 567.3, before beginning to trend downward again.

Similarly, after dropping steadily for more than a decade, property crime rates in Colorado increased between 2000 and 2005¹² before dropping off again.

Over that same time period, Colorado's incarceration rate grew from 357 to more than 428 per 100,000 of population.

As Przybylski continues in *What Works*:

Incarceration has a far greater impact and return on investment when it is used for violent and high-rate offenders. Prisons are expensive, but violent and career criminals impose tremendous financial and social costs on society. The empirical evidence is increasingly clear, however, that the increased use of incarceration for low-rate, non-violent offenders prevents and deters fewer crimes.¹³

Przybylski quantifies the cost of expanding the prison population, noting that "increasing the incarceration rate by 10 percent to achieve a 4 percent reduction in the crime rate is far more expensive today than it was years ago. In 1990, increasing Colorado's prison population by 10 percent meant adding about 750 prisoners. Today, it means adding about 2,250."

In a 2005 study by the Sentencing Project, researchers similarly found that:

Expanding the use of imprisonment inevitably results in diminishing return in crime control. This is because high rate and serious offenders or violent offenders

will generally be incarcerated even at modest levels of imprisonment, but as prison systems expand, new admissions will increasingly draw in lower-rate offenders. This growth in lower-rate and lower-level offenders shifts the cost-to-benefit ratio, as an equal amount of resources are spent per offender, but the state receives less return on its investment in terms of declining crime rates.¹⁴

Another Sentencing Project report from 2000 found that during the national decline in crime between 1991 and 1998 (a trend that included Colorado), states with the largest increases in incarceration actually experienced smaller declines in crime than states with smaller increases in incarceration.¹⁵

None of these observations are to say that incarceration does not have an impact on crime; clearly it does. Yet mass incarceration alone has not led to a reduction in crime over the last several decades.

DRUG POLICY: A CASE STUDY IN FAILED POLICY

In 1992 Colorado lawmakers surrendered their prerogative to write the state's criminal law and enacted the Uniform Controlled Substances Act,¹⁶ written by drug war judicial agents in Washington, D.C., and designed to turn state drug laws into copies of federal law (the federal Controlled Substances Act). The Uniform Controlled Substances Act created numerous new drug offenses in Colorado, and sentencing enhancements for those offenses.

In the last 20 years, the percentage of inmates whose most serious offense is a drug offense has quadrupled. Drug offenders now constitute the single largest category of people admitted to prison in Colorado, 23 percent of total admissions in 2009 (more than 1,500 admissions).¹⁷ In 1982, drug offenders made up only 6 percent of total prison admissions in Colorado.¹⁸

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A snapshot of Colorado's adult inmate population as of June 30, 2009, showed roughly 18 percent (more than 4,000 inmates) of Colorado's prison population had a controlled substance offense as their "most serious offense."¹⁹

While there is little available data to parse out the criminal histories of the offenders referenced in this statistic, prosecutors will say that few offenders receive an actual prison sentence for such offenses as a first-time conviction of possessing a controlled substance. It is often the case that incarcerated drug offenders have a significant criminal record and/or have pled guilty to a drug offense and had other offenses dismissed (e.g., possessing a weapon while dealing, assault, burglary, etc.). But it does not change the fact that the conviction leading to their prison sentence was a drug offense. Nor does it change the fact that there are more people convicted of drug offenses in Colorado prisons today than the entire state prison population 25 years ago, when the total inmate population was around 3,500.

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According to the U.S. Drug Enforcement Administration's (DEA) 2008 State Fact Sheet for Colorado, heroin is not only "available in the major metropolitan areas of Colorado," but "various law enforcement and treatment indicators suggest that heroin use and availability may be on the rise in Colorado." As for cocaine, "Enforcement activities reflect a steady supply of cocaine coming into and through Colorado." Crack cocaine is "available in the larger metropolitan areas of Colorado, generally in street level amounts." And marijuana, according to DEA, "is available throughout Colorado."²⁰

One of the main goals driving the interdiction and incarceration drug control strategy, and thus the mass incarceration of drug offenders in Colorado, has simply failed.

The problem is not that the Colorado legislature failed

to try hard enough; indeed, the legislature and the Department of Corrections undertook one of the most costly and ambitious expansions in state history. The core problem is that putting non-violent drug felonies in the same presumptive sentencing categories as violent and property crimes is irrational. It consumes the criminal justice system's most valuable tool: prison beds, distracting prisons from their primary mission of incapacitating violent and predatory criminals. One rationale for the mass incarceration of drug offenders is that drug sales or use are inherently violent and constitute a threat to public safety—despite the fact that the Colorado Department of Corrections lists drug offenses as "non-violent". Many drug offenses in Colorado are labeled as "extraordinary risk of harm to society" crimes, which automatically increase sentences in Colorado's presumptive sentencing range.

Much of 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 and other crimes committed by drug users to support a drug habit are caused in part by the "risk premium" charged by drug dealers as part of their risk of going to prison.²¹

Trying to incarcerate away drug use and sales simply has not worked. The imprisonment of one drug dealer (or even an entire network of dealers) only temporarily disrupts the flow of illegal drugs. As soon as one supplier is gone, another quickly moves in to take his place. As long as there is a demand for a product, a market will make that product available.

Using incarceration to try to halt the availability of drugs can only be achieved by imprisoning every illicit drug user and addict, who constitute the majority of the small-time dealers, and everyone willing to break the law in return for potential financial rewards (i.e., dealers in the upper levels of the drug world). A far more cost-effective policy for dealing with illegal drug use, and the criminal activity committed by drug-addicted offenders, is coerced treatment instead of incarceration.

A RAND Corp. national study, "Controlling Cocaine:

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Supply Versus Demand Programs,”²² concludes each dollar spent on treatment reduces the cost of crime and lost productivity by \$7.46. By contrast, domestic enforcement (arrest, seizure and incarceration) returns just 52 cents. In the American Enterprise Institute book, *An Analytical Assessment of U.S. Drug Policy*, authors David Boyum and Peter Reuter note that even if the RAND study is off by a wide margin, the conclusion is unchanged: “Treatment of heavy users is a far more cost-effective policy at the margin than any kind of enforcement.”²³

Focusing resources and the coercive power of the state on hard-core drug addicts who also commit other crimes makes more economic sense than simply punishing all drug offenders since, as the AEI authors note, “most who start using illicit drugs desist of their own volition, without treatment or incarceration, within five years of initiation.”

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In May 2010, Governor Ritter signed into law House Bill 1352, which was generated out of recommendations from the CCJJ, and which passed out of the

legislature with broad bipartisan support. (The House vote was 58-5 and the Senate vote was 30-5.) The bill was sponsored in the Senate by Democrat Pat Steadman and Republican Shawn Mitchell, and in the House by Mark Waller, a Republican and a voting member of the CCJJ. HB 1352 makes modest but much-needed changes to drug offenses contained in the Uniform Controlled Substances Act.²⁵ The changes it brings, among others, include:

- Creates a separate statute for the crime of possession of drugs, thereby separating it from the crime of manufacturing, dispensing, selling, distributing or possessing with the intent to manufacture, sell or distribute;
- Reduces the crime of drug use from a class 6 felony to a class 2 misdemeanor;
- Redefines the quantity of drugs that is considered “simple possession” from one gram or less to four grams or less of a schedule I or II drug and two grams or less of methamphetamine (“simple possession” would be a class 6 felony);
- Standardizes crimes so that possession for personal

use of amounts greater than “simple possession” quantities is a class 4 felony;

- Reduces possession of schedule III-V drugs (i.e., prescription drugs) to a misdemeanor;
- Reduces the penalty for fraud and deceit in connection with controlled substances from a class 5 to a class 6 felony; and
- Requires cost savings from the bill to be evaluated annually by the Division of Criminal Justice and reported to the legislature, and requires that some of the cost savings will be allocated to expand and enhance substance abuse treatment.

While HB 1352 lowered penalties for certain drug offenses, the bill also increased penalties for crimes such as selling illicit drugs to minors and clarified provisions of Colorado’s Special Offender statute.

The Fiscal Note for HB 1352 estimates *more than \$56 million in prison bed cost-savings over five years to state taxpayers.*²⁶ These cost savings may be partially offset by increased jail costs at the county level.²⁷

The broad bipartisan support of HB 1352 should put to rest any fear that taking up sentencing reform, and specifically drug law reform, is a career killer for politicians. A careful and thorough vetting process and working with groups such as CCJJ provides an excellent opportunity for the General Assembly to further pursue drug offense sentencing reforms. Long-term corrections cost savings are available through the expansion of mandatory treatment options over incarceration for drug offenders. Community savings arise from reducing the number of crimes through which drug-addicted offenders fund their habits.

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PAROLE REVOCATION: FISCAL CONSERVATIVES SHOULD WANT PAROLEES TO SUCCEED

In Colorado, recidivism is defined as a return to prison “for either new criminal activity or a technical violation of parole, probation or non-departmental community placement within 3 years of release.”²⁸ Colorado’s recidivism rate is fairly high compared to other states, at around 53 percent.²⁹

To be sure, when offenders released to parole then re-offend (commit crimes), a revocation of parole (or a new prosecution) and a return to prison is a necessary part of the price we pay in order to separate criminals from the public. But with technical parole revocation (where there is not a new crime, but rather some violation of the terms of parole) the frequent resort to re-incarceration is an available area for lawmakers to seek out reforms for cost savings and more efficient use of existing criminal justice resources.

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According to the Joint Budget Committee (JBC) staff, “Technical parole revocations (without a new crime) account for almost 30 percent of admission to Department of Corrections.” These admissions cost the state at least \$42.1 million during FY 2008-09. JBC Staff continues, “Although the cost associated with these technical parole violators is high, there are few guidelines provided to parole officers to

determining when an individual's parole should be revoked for a technical violation.”³⁰

“In addition, staff was unable to find any administrative regulations that attempted to limit the use of prison for technical parole violations,” concludes JBC staff.³¹ In other words, members of the parole board and individual parole officers have significant, and mostly unchecked, power to drive costs and expenditure of state funds.

In 2010 the General Assembly passed House Bill 1360, which is intended to reduce revocations for technical violations of parole. According to an analysis of HB 1360:

In lieu of revocation for a technical violation, the parole board may modify the conditions of parole and require the parolee to participate in a residential or outpatient treatment program. If parolee is revoked for a technical violation, the maximum time of re-incarceration in prison is 90 days if the parolee was assessed as a lower than high risk and the parolees underlying conviction was not for a crime of violence, menacing or stalking. A parolee can be re-incarcerated up to 180 days if s/he is assessed as high risk or is revoked to a community return to custody facility or community corrections facility and the underlying conviction was not for a crime of violence, menacing or stalking.³²

The 2010 legislature also unanimously passed House Bill 1023, an attempt to start removing barriers to parolees and those with criminal backgrounds to obtain and keep employment as key elements both to successful completion of parole, and to avoiding re-incarceration for technical revocations due to unemployment. This law includes limits on the admissibility of evidence of an employee's criminal history in a civil action against an employer where “the criminal history did not have a direct relationship to the underlying cause of action in the civil case.”³³

With HB 1360 and HB 1023, Colorado lawmakers made very careful steps towards both slowing admissions to prison for technical revocations and lowering barriers to employment for parolees. The legislature also allowed broader authority to use coerced treatment instead of incarceration when appropriate in an effort to avoid using valuable and scarce prison beds unnecessarily.

The legislature should take advantage of these steps, and again take advantage of the expertise and vetting process of the CCJJ, to continue pursuing reforms designed to both increase the ability of parolees to get and keep employment, and to decrease technical parole revocations to prison.

CONCLUSION

No rational person should expect the legislature to try to balance the Colorado state budget on the back of public safety. Cost savings generated out of sentencing reform are partially dependent on the individual decisions and actions of offenders and parolees—forces outside the control of either the legislature, or the criminal justice system. But for several decades in Colorado, fiscal conservatives have been willing participants in one of the most extreme spending sprees in state history.

The lesson that should be taken away from the successful, mostly bipartisan, passage of numerous criminal justice reform related bills in 2010 is that prison spending, and the sentencing laws and policies that drive that spending, can and should be placed under the same kind of regular scrutiny as any other state spending item.

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ACKNOWLEDGEMENTS

Christie Donner graciously reviewed the material presented in this paper for accuracy and factual interpretation and offered substantive amendments. Ms. Donner is the Executive Director of the Colorado Criminal Justice Reform Commission, a state-wide, 15 year old public policy organization. Ms. Donner is also the co-author of *Parenting from Prison: A Resource Guide for Incarcerated Parents in Colorado* and *Getting On After Getting Out, A Re-Entry Guide for Colorado*. She holds a degree in political science from the University of Colorado at Boulder.

Peter Weir gave generously of his time to review this material for public policy content and for factual interpretation. He currently is the Senior Chief Deputy District Attorney for the First Judicial District (Jefferson & Gilpin Counties). Until July 2010, Mr. Weir was the Executive Director of the Colorado Department of Public Safety, a cabinet officer position working directly with the Governor. He served previously as a District Judge, deputy District Attorney and worked in private law practice. Mr. Weir earned his law degree from the University of Denver.

ENDNOTES

- ¹ Colorado Department of Corrections, "Statistical Report: Fiscal Year 2009," pg. 9.
- ² For an excellent analysis of these bills, see the 2010 legislative summary produced by the Colorado Criminal Justice Reform Coalition, available at: http://www.ccjrc.org/pdf/2010_Legislative_Summary_CCJRC.pdf.
- ³ In 2007, the General Assembly passed House Bill 1358, which created the 26-member cross-agency, multi-discipline, bi-partisan Commission on Criminal and Juvenile Justice (CCJJ).
- ⁴ Colorado Legislative Council Staff, "An Overview of the Adult Criminal Justice System," Research Publication no. 487, January, 2001. pgs. 32, 62-63.
- ⁵ Colorado Department of Corrections, Office of Planning and Analysis, "Monthly Population and Capacity Report, July 2010," http://www.doc.state.co.us/sites/default/files/opa/MnthPOP_Jul.pdf.
- ⁶ Colorado General Assembly Joint budget Committee, "FY 2010-11 Staff budget Briefing, Corrections," pg. 3.
- ⁷ *Op. cit.*, note 4, pg. 26.
- ⁸ Colorado Division of Criminal Justice, "Offense Rates vs. Incarceration Rates, 1980-2007." In 1985, the total crime rate in Colorado was 6,919 per 100,000 population. In 2007, the total crime rate was 3,353.9 per 100,000 population.
- ⁹ *Op. cit.*, note 11. In 1985, Colorado's incarceration rate was 106.1. In 2007, Colorado's incarceration rate was 456.9.
- ¹⁰ Roger Przybylski, *What Works: Effective Recidivism Reduction and Risk-focused Prevention Programs*, prepared for the Colorado

Division of Criminal Justice, February, 2008, pg. 27

¹¹ Colorado Division of Criminal Justice, "Offense Rates vs Incarceration Rates, 1980-2007," http://dcj.state.co.us/ors/pdf/stats/Violent_vs_Incarceration/2007-total%20offense%20vs%20incarceration%20rates.pdf.

¹² In 2000, Colorado's property crime rate was 3648.6 per 100,000 of population. In 2005, the property crime rate was 4041.0 per 100,000 of population.

¹³ *Op. cit.*, note 11.

¹⁴ The Sentencing Project, "Incarceration and Crime: A Complex Relationship," 2005, pg. 6. http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

¹⁵ The Sentencing Project, "Diminishing Returns: Crime and Incarceration in the 1990s," September 2000.

¹⁶ Colorado Revised Statutes, Title 18, Article 18.

¹⁷ Colorado Department of Corrections, "Statistical Report, Fiscal Year 2009," pg. 17, table 13.

¹⁸ Colorado Department of Corrections, "Statistical Report, 1983-1987," (January 1988), pg. 22.

¹⁹ Colorado Department of Corrections, "Statistical Report, Fiscal Year 2009," pg. 36, table 29.

²⁰ U.S. Drug Enforcement Administration, "Fact Sheets, Colorado, 2008." http://www.usdoj.gov/dea/pubs/state_factsheets/colorado.html.

²¹ 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.

²² C. Peter Rydell and Susan S. Everingham, *Controlling Cocaine, Supply Versus Demand Programs*, Rand Corporation, 1994.

²³ David Boyum and Peter Rueter, *An analytical Assessment of U.S. Drug Policy*, American Enterprise Institute, 2005, pg. 87.

²⁴ *Op. cit.*, note 19, pg. 22.

²⁵ Colorado Revised Statutes, Title 18, Article 18.

²⁶ Colorado Legislative Council Fiscal Note, "State and Local Fiscal Impact, HB10-1352," Table 4, March 18, 2010, http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/F0B440D0C733A91C872576B40000FF89?Open&file=HB1352_00.pdf.

²⁷ According to the Fiscal Note for HB 1352, some 217 felony convictions each year will be reduced to misdemeanors, impacting county jails.

²⁸ *Op. cit.*, note 13, pg. 54.

²⁹ Office of Governor Bill Ritter, Press Release, "FY 09-10 Recidivism Reduction Package," Oct. 30, 2008. <http://www.colorado.gov/cs/Satellite?c=Page&cid=1225363961950&pagina me=GovRitter%2FGOVRLAYOUT>.

³⁰ Colorado General Assembly Joint Budget Committee, "FY 2009-10 Joint budget Committee Staff Budget Briefing," Department of Corrections, pg. 37, http://www.state.co.us/gov_dir/leg_dir/jbc/corbrf.pdf.

³¹ *Op. cit.*, note 8, pg. 38.

³² Christie Donner, Colorado Criminal Justice Reform Coalition, "2010 Legislative Summary," July 15, 2010, pg. 10, http://www.ccjrc.org/pdf/2010_Legislative_Summary_CCJRC.pdf.

³³ *Op. cit.*, note 26, pg. 9.