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To: Members of the Long-Term Fiscal Stability Commission

From: Christie Donner, Executive Director, 7-29-09

***Re: Prisons and spending in Colorado***

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### **National and state perspective on incarceration rates**

The United States incarcerates more people per capita than any other nation in the world. Colorado's incarceration rate<sup>1</sup> of 506 per 100,000 is much greater than the 50-state average (462) and the average of the Western states (458.) In comparison, countries around the world have adult incarceration rates that are far lower: South Africa (344), Israel (209), Mexico (191), England/Wales (145), Australia (120), China (118), Canada (116), Germany (97), France (88), Sweden (81) and Japan (60).<sup>2</sup>

In 2008, the Pew Center on the States released a national report that one in 100 adults in the United States are behind bars either in jail or prison.<sup>3</sup> In a 2009 update to that report, Pew reported an even more startling statistic: one in 31 adults in the United States is currently under some form of criminal justice control either on probation, parole, or incarcerated in jail or prison.<sup>4</sup> Colorado's state profile indicates that one in 29 adults is under some form of criminal justice control.<sup>5</sup>

According to Pew, "*The explosive prison growth of the past 30 years didn't happen by accident, and it wasn't driven primarily by crime rates or broad social and economic forces beyond the reach of state governments. It was the direct result of sentencing, release and other correctional practices that determine who goes to prison and how long they stay.*"<sup>6</sup>

Recently, Senator Jim Webb (D, Va) appealed broadly to the American public in an article he wrote for PARADE magazine in which he stated, "[e]ither we are the most evil people on earth or we are doing something very wrong."<sup>7</sup> Senator Webb introduced federal legislation this March that will create a national commission to look at every aspect of the criminal justice system with an eye toward reshaping the process from top to bottom.<sup>8</sup>

Supreme Court Justice Anthony Kennedy commented on the extraordinary rate of incarceration in this country in a speech before the American Bar Association in which he said, "[o]ur resources are misspent, our punishments too severe, our sentences too long."<sup>9</sup>

Almost every state is straining financially from its growing prison population and budget. Many states are implementing strategies to reducing the prison population.<sup>10</sup>

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<sup>1</sup> The incarceration rate is a calculation of the number of adults in prison per 100,000 adult state residents.

<sup>2</sup> Annual Report, Colorado Commission on Criminal and Juvenile Justice (Dec. 2008) citing the Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs/pubalp2.htm#prisoners>)

<sup>3</sup> *One in 100: Behind Bars in America in 2008*, Pew Center on the States (February 2008) available at [http://www.pewcenteronthestates.org/initiatives\\_detail.aspx?initiativeID=31336](http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=31336)

<sup>4</sup> *One in 31: The Long Reach of American Corrections*, Pew Center on the States (March 2009); also available at [http://www.pewcenteronthestates.org/initiatives\\_detail.aspx?initiativeID=31336](http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=31336)

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *What's Wrong with Our Prisons?*, Senator Jim Webb (D-VA), PARADE magazine, March 29, 2009.

<sup>8</sup> National Criminal Justice Commission Act of 2009, S.714. The bill has twenty-nine cosponsors in the Senate, including Senator Mark Udall (D-CO), and the endorsements of dozens of organizations and associations, representing a broad range of organizations. For a full list visit; <http://webb.senate.gov/pdf/Endorsers.pdf>

<sup>9</sup> Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting (Aug.9, 2003), reported in 16 FED.SENT'G.REP. 126, 127 as quoted in *Evidence Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, The Honorable Michael A. Wolff, New York University Law Review, Volume 83, Number 5 (November 2008) at 1392.

## **Understanding the primary drivers behind growth in the prison population in Colorado**

Understanding the drivers behind growth in the prison population in Colorado is complex. However, in CCJRC's analysis, there are four primary drivers:

1. Increasing sentence lengths: the passage of the Mielke bill in 1985 (HB 85-1320) doubled the maximum presumptive sentence for all felony convictions. The prison population doubled within five years of its passage.<sup>11</sup>

2. The "war on drugs": drug offenses now constitute the largest single crime category of people admitted to prison, 24% of total prison admissions in 2008,<sup>12</sup> up from 6% of total admissions to prison in 1982.<sup>13</sup> Between 1989 and 1998, the number of people sent to prison for a drug offense increased 476%.<sup>14</sup> Meanwhile, Colorado has the fifth highest rate of drug dependence and abuse of the fifty states and the District of Columbia and the sixth worst treatment gap (i.e., number of people in need of but not receiving treatment).<sup>15</sup>

3. High failure rates on parole: 97% of people in prison will be released and most of them will be under parole supervision. The Department of Corrections defines recidivism as a return to prison within three years of release. Of those released on mandatory parole in 2005, 64% were returned to prison within three years; of those released on discretionary parole in 2005, 48% were returned to prison. In 2008, technical parole violators comprised 30% of total prison admissions, up from 18% in 1988.<sup>16</sup> Of those revoked from parole and re-incarcerated, 75% were revoked for a technical violation of a condition of parole and 25% had been convicted of a new offense.<sup>17</sup>

4. Declining use of discretionary parole: In 1993, the legislature passed a bill requiring all people sentenced to prison to serve a mandatory period of time on parole from one to five years, depending on the felony class of conviction. However, the legislature did not abolish the pre-existing discretionary parole model whereby the parole board had the authority to release people prior to the completion of their sentence. Since the creation of mandatory parole, releases from prison on discretionary parole have declined significantly. Like our sentencing laws, our parole laws have undergone numerous changes over the years and were not reconciled with one another. Consequently, we now have a very confusing parole structure that needs to be clarified with regard to intent and role of the parole board.

### **Positive trends:**

- Colorado is experiencing a very promising trend whereby there has been a dramatic reduction in the growth in the prison population, from 109 people a month at the end of FY 2006 to 16 people a month at the end of FY 2008.<sup>18</sup>
- The work of the Commission on Criminal & Juvenile Justice, created by the legislature in 2007, is focusing on evidence-based research to effectively reduce recidivism and is now moving into sentencing reform.

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<sup>10</sup> *To Cut Costs, States Relax Prison Policies*, Jennifer Steinhauer, New York Times, March 25, 2009.

<sup>11</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008) at pg 5.

<sup>12</sup> Colorado Department of Corrections, *Statistical Report: Fiscal Year 2008* (June 2009) at page 15, table 10

<sup>13</sup> Colorado Department of Corrections, *Statistical Report 1983-1987* (January 1988) at page 22.

<sup>14</sup> Legislative Council, *An Overview of the Adult Criminal Justice System*, Research Publication 452 (1998) pg 9-10

<sup>15</sup> U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *State Estimates of Substance Abuse from the 2000 National Household Survey on Drug Abuse*, v. 1 (October 2002), 134-35; ---, ---, *National and State Estimates of the Drug Abuse Treatment Gap: 2000 National Household Survey on Drug Abuse* (July 2002), 20.

<sup>16</sup> See page 7 of this memo for a graph of this trend.

<sup>17</sup> Colorado Department of Corrections, *Statistical Report: Fiscal Year 2008* (June 2009) at pg 51, table 40 and page 12, Table 7.

<sup>18</sup> Colorado Department of Corrections, *Monthly Population and Capacity Report* (June 2009); available at [https://exdoc.state.co.us/secure/combo2.0.0/userfiles/folder\\_15/Current.pdf](https://exdoc.state.co.us/secure/combo2.0.0/userfiles/folder_15/Current.pdf), pg 4.

- The conversation around criminal justice has changed recently. Rather than being driven by rhetoric about being “tough” or “soft” on crime, the policy debate and framework is more about how to reduce recidivism, which is actually an outcome that can be measured.

### **Negative trends:**

- *Importing prisoners from other states to be housed in private prisons in Colorado.* Recently, the state of Arizona contracted with Corrections Corporation of America to house 750 Arizona prisoners at the Huerfano County Correctional Facility in Walsenburg, Colorado. There is nothing in Colorado state law that prevents this importation or requires Colorado legislative approval or oversight in order to allow importation. Since the prison population is not growing as rapidly as projected, there are over 1,000 empty private prison beds in Colorado<sup>19</sup>; another 750 bed private facility is under construction in Hudson with a completion date of the spring of 2010. This excess capacity and lack of any requirement of legislative approval or oversight makes Colorado very vulnerable to becoming a “dumping ground” for other states.

*Using certificates of participation to finance construction of Colorado State Penitentiary II:* In 2003, the legislature passed HB 1256 which authorized the use of certificates of participation to construct a 948 bed prison known as the Colorado State Penitentiary II.<sup>20</sup> This is the first time the state has used certificates of participation to finance the construction costs of a prison. This facility is scheduled to be opened in the spring of 2010, but it is questionable whether the state will have the funds to staff and open the new facility. Regardless, the state is obligated to pay the terms of the certificate of participation or risk a significant credit rating downgrade. The legislation originally capped the total value of the certificates of participation at \$102.8 million but the construction of CSP II has required state funding of \$141.7 million to date. In addition, the State is obligated to pay \$18.6 million of capital interest that has accrued to date. In total, the COPs will cost the State \$167.3 million.<sup>21</sup>

- *Collateral consequence of a felony record:* More and more employers and landlords are doing criminal background checks as a matter of routine, and many have adopted a “felon need not apply” hiring or rental practice. In 2008, 10,565 people were released from prison<sup>22</sup> and tried to re-establish themselves in the community, a process known as re-entry. Research is conclusive that “stable and meaningful employment is critical to recidivism reduction”<sup>23</sup> and that “one of the most important conditions that leads to less offending is a strong tie to meaningful employment.”<sup>24</sup> However, most people face almost insurmountable barriers to gaining employment and housing. These barriers can last a lifetime.

- *The needs of children are largely overlooked or ignored in the design of criminal justice policy:*<sup>25</sup> CCJRC estimates that approximately 17,000 children in Colorado currently have a parent in prison. Understanding how children are impacted when a parent is incarcerated is very important for parents,

<sup>19</sup> Colorado Department of Corrections, *Monthly Population and Capacity Report* (June 2009)

<sup>20</sup> In October 2003, CCJRC and five individual taxpayers filed a lawsuit claiming that the financing scheme required voter approval and that HB 1256 violated the single subject restriction. Both claims were rejected by the Colorado Court of Appeals and the Colorado Supreme Court denied certiorari in October 2005, ending the litigation. CSP II is an administrative segregation facility where inmates are locked down 23 hours a day in solitary confinement. According to the Department of Corrections, upwards of 30% of the inmates at CSP have a serious mental illness. CCJRC is extremely concerned about the incarceration of the seriously mentally ill in long-term solitary confinement and hope this issue will be explored with the Department before funding any opening of CSP II.

<sup>21</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008) at pg 28.

<sup>22</sup> Colorado Department of Corrections, *Statistical Report: Fiscal Year 2008*, (June 2009) at pg 21.

<sup>23</sup> Colorado Commission on Criminal and Juvenile Justice 2008 Annual Report (December 2008), at pg 49. Available online at <http://cdpsweb.state.co.us/cccj/2008recommendations.html>.

<sup>24</sup> Przybylski, Roger. What Works: Effective Recidivism Reduction and Risk-Focused Prevention Programs. Prepared for the Colorado Division of Criminal Justice (February 2008) at page 38. Available online at [http://cdpsweb.state.co.us/cccj/PDF/WW08\\_022808.pdf](http://cdpsweb.state.co.us/cccj/PDF/WW08_022808.pdf).

<sup>25</sup> Bosley, B., Donner, C., McLean, C., and Toomey-Hale, E, (Eds.)(2004) *Parenting from Prison: A Resource Guide for Parents Incarcerated in Colorado*, Colorado Criminal Justice Reform Coalition at page 6.

caregivers, and policymakers. Studies have shown that children with an incarcerated parent are much more likely to have difficulties in school, both academically and behaviorally. Also, children with a parent in prison are more likely to engage in substance abuse and delinquency than their peers who don't have a parent in prison. The needs of children should be considered in sentencing decisions and in the design of criminal justice policies.

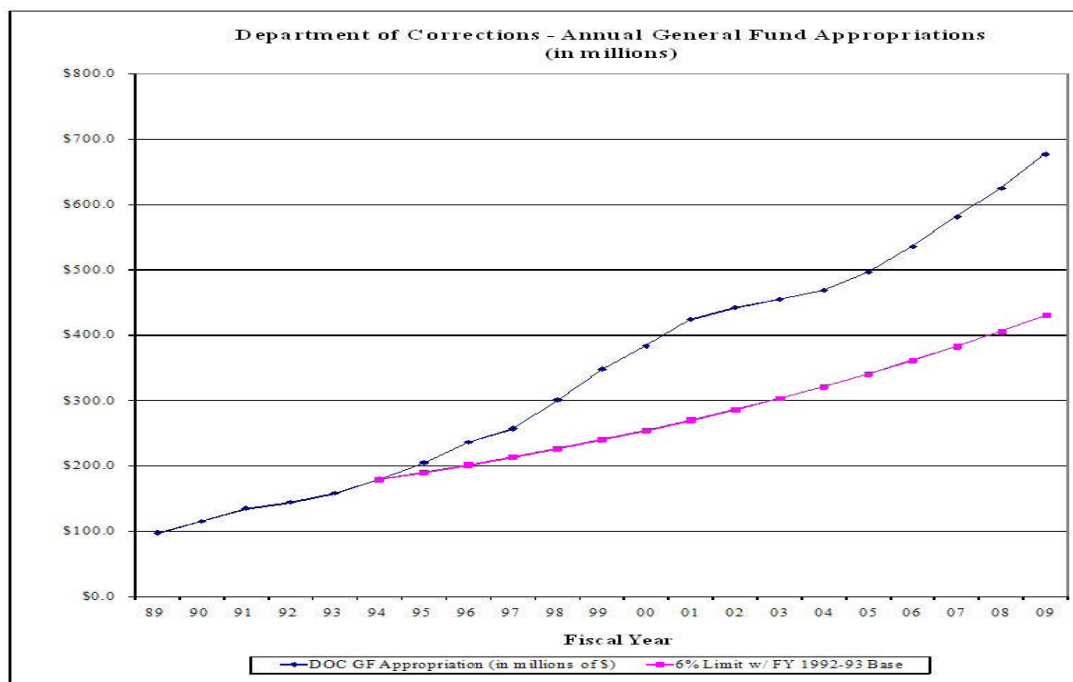
### Understanding prison population and budget growth

In order to provide a historical perspective on the growth in the prison and parole population and the growth in the prison budget, the following section quotes verbatim from the Joint Budget Committee budget briefing on corrections from December 2008.<sup>26</sup>

#### **Significant Growth in Appropriations to the Department of Corrections<sup>27</sup>**

The Department of Corrections (DOC) has grown significantly in the past 20 years. From FY 1988-89 through FY 2008-09, the General Fund appropriation to the Department grew from \$97.0 million to \$676.8 million, an increase of \$579.8 million. This growth rate represents a compound annual growth rate of 10.2 percent over the 20-year period. During the 16 years since the 6.0 percent limit on General Fund appropriations was established, General Fund appropriations to the Department have grown at a compound annual rate of 9.5 percent.

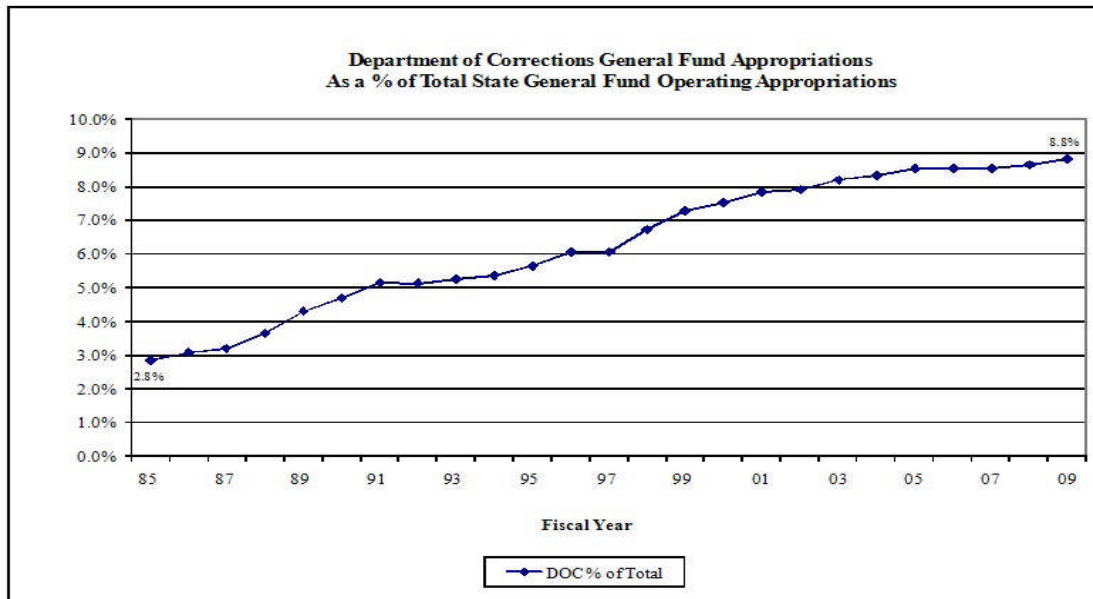
The following graph depicts the annual General Fund appropriations to the Department of Corrections for the past 20 years. From FY 1992-93, the graph also contains a hypothetical line that demonstrates the growth that would have occurred had General Fund appropriations to the Department of Corrections been limited to an annual growth rate of 6.0 percent. The FY 2008-09 General Fund appropriation is 57.4 percent higher (\$246.9 million) than it would have been had appropriations to the Department of Corrections been limited to 6.0 percent annual compound growth during this time period. This difference is illustrated by the difference between the two lines on the graph.



<sup>26</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008)

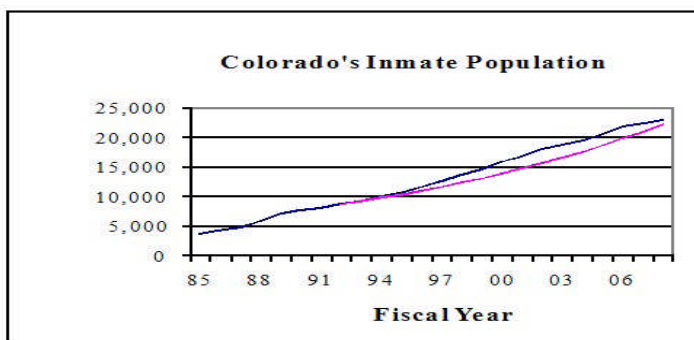
<sup>27</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008) at pg 3-4.

**Department of Corrections Becoming Larger Share of State Operating Budget<sup>28</sup>.** The Department of Corrections comprises a larger share of the state budget than in prior years. This has occurred because of the significant growth in General Fund appropriations to the Department of Corrections relative to limitations on available funds and statutory limitations on appropriations. In FY 1984-85, General Fund appropriations to the Department of Corrections comprised 2.8 percent of the state operating budget. By FY 2008-09, DOC General Fund appropriations have increased to 8.8 percent of the state operating budget.



**Inmate Population – Primary Factor Driving DOC's Budget<sup>29</sup>**

The growth in the inmate population is the primary factor driving the Department of Corrections' budget. The inmate population includes inmates sentenced to DOC including those who are in a transition community corrections placement. As shown in the following graph, the inmate population growth has exceeded the 6.0 percent limit.<sup>30</sup>

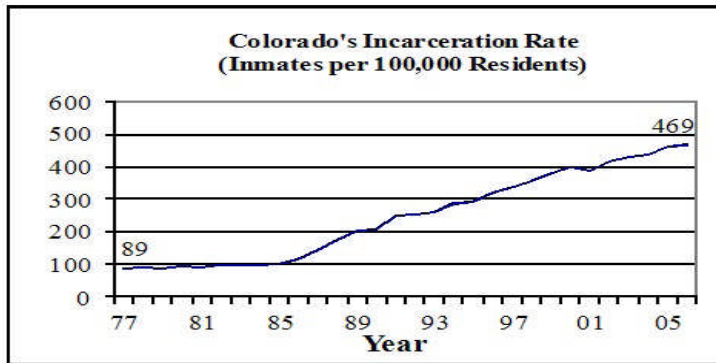


The increase in the prison population and budget cannot be explained entirely by the growth in the Colorado population. Over the past 20 years, the incarceration rate has increased steadily. As such, a higher percent of Colorado's residents are incarcerated than in prior years.<sup>31</sup>

<sup>28</sup> Ibid. Pg 5.

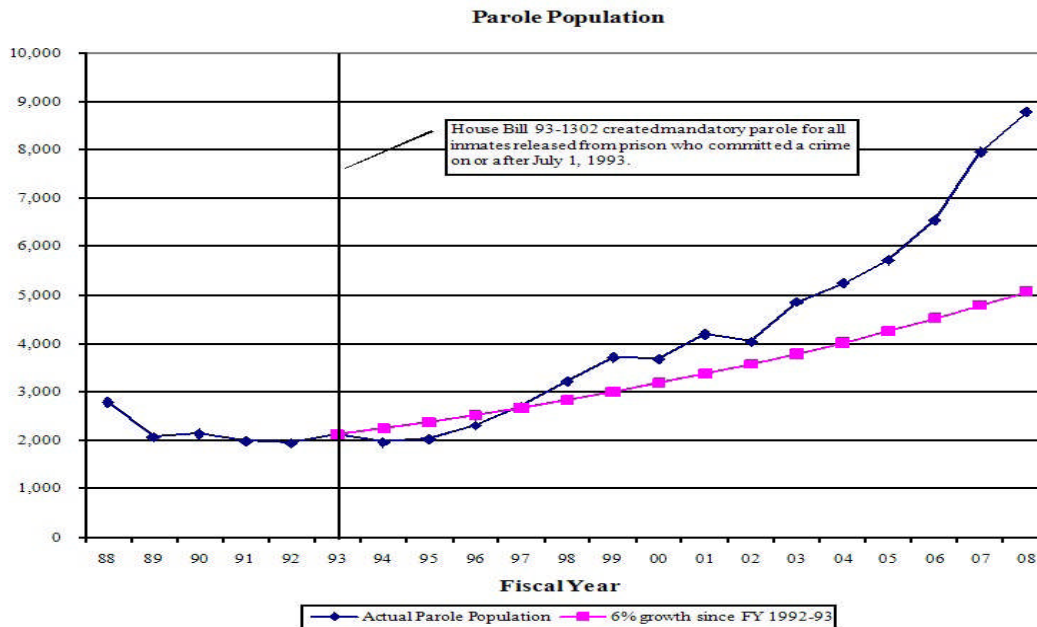
<sup>29</sup> Ibid. Pg 5-6.

<sup>30</sup> This 6% limit refers to the spending limit. There is no 6% limit on inmate growth.



**Parole Population Increase<sup>32</sup>**

The parole population also has an impact on the Department of Corrections' budget. Since FY 1993-94, the parole population has grown at a compound annual rate of 10.0 percent.



**Population Increase - Impact on Capital Construction<sup>33</sup>**

Since 2002, no state-owned and operated facilities have come on line. In 2002, 1,000 male beds became available (500 in Ft. Lyon and 500 in Trinidad).<sup>34</sup>

**Population Increase - Private Contracts<sup>35</sup>**

In the early 1990s, the DOC began contracting with private prison operators in order to reduce the number of inmates in the jail backlog while state facilities were being constructed. As of June 30, 2008, the DOC had 5,224 inmates in contract facilities.<sup>36</sup> Combined with the number of inmates held

<sup>31</sup> Ibid. Pg 6. (citing Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs/pubalp2.htm#Prisoners>)).

<sup>32</sup> ibid at pg 7.

<sup>33</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008) at pg 7, 28)

<sup>34</sup> However, several private prisons have expanded and a 948 bed state prison (CSP II) is under construction.

<sup>35</sup> Colorado General Assembly, Joint Budget Committee, *FY 09-10 Staff Budget Briefing, Department of Corrections*, (December 23, 2008) at pg 8-9

in the jail backlog, this represented approximately 23.0 percent of the existing population.

In 2002, the legislature approved payments to the private prison operators in the total amount of \$45 million with a daily per diem rate of \$54.66. In 2008, payments to private prisons exceeded \$91 million at a daily per diem rate of \$52.69.

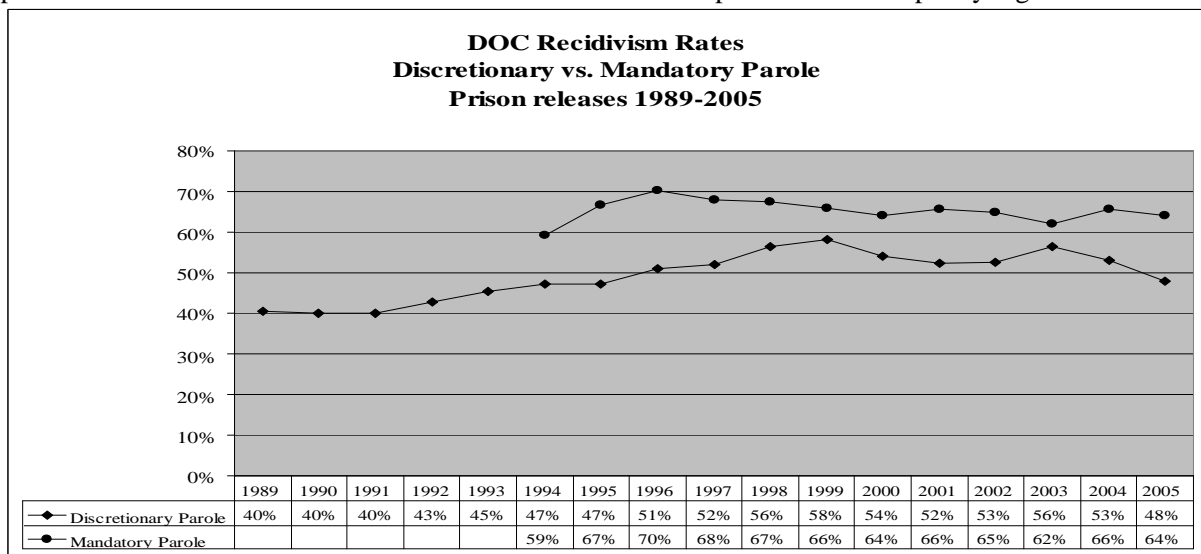
Also in FY 2004-2005, the Department of Corrections transferred approximately 125 Colorado inmates to a private contract facility in Mississippi, at a cost of \$51.00 per inmate per day (total cost \$2,298,162.) In addition, in FY 2006-07, the Department of Corrections transferred approximately 240 inmates to a private contract facility in Oklahoma, at a cost of \$54.00 per inmate per day (total cost \$4,699,470.) Currently, Colorado does not have any inmates out of state.

### Conclusion

CCJRC is very confident that Colorado can safely reduce growth in the prison population and budget. It is not a choice between public safety and financial stability. CCJRC is preparing a separate memo that details a number of strategies that could reduce the prison population and budget but we wanted to highlight two specific and essential areas of focus.

1. CCJRC strongly advocates that Colorado redesign drug policy to provide much greater access to treatment and other support services, including employment, in the local community. We also believe that sentencing reform is a critical component of more effective drug policy and support the creation of a misdemeanor for people convicted of drug use or possession. We don't believe that it makes sense to use scarce prison resources to house people convicted of low level drug offenses.

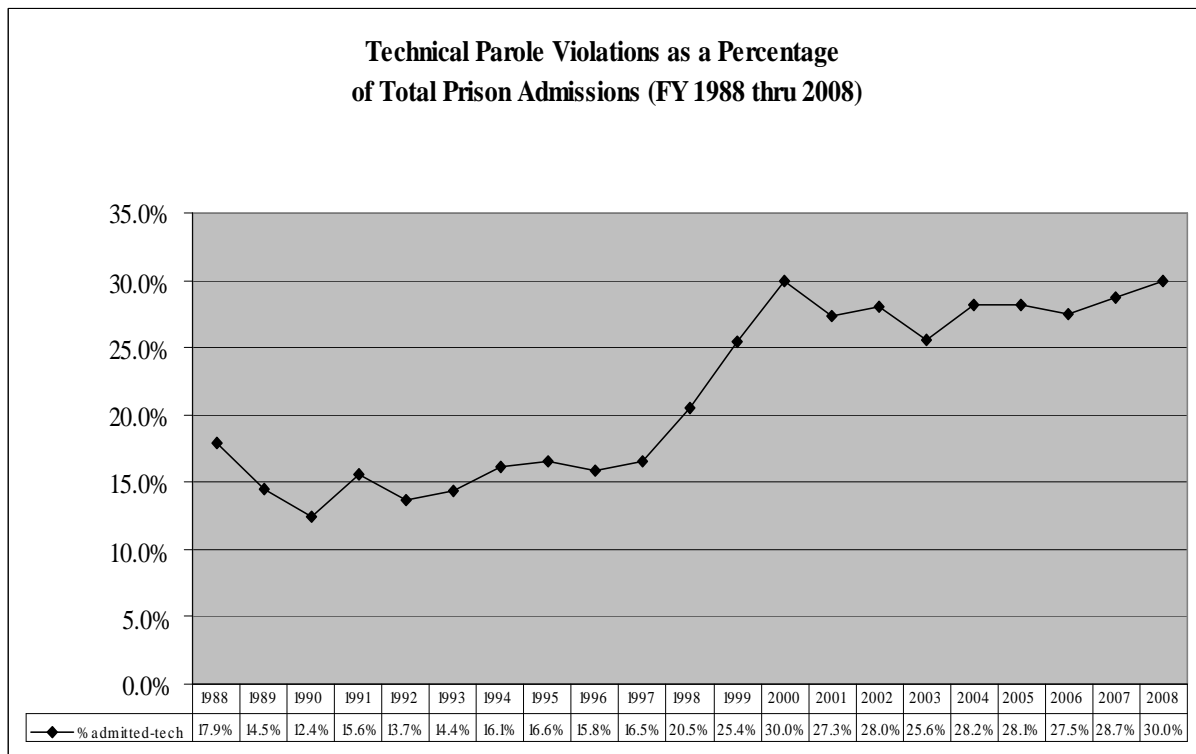
2. CCJRC also strongly advocates that policymakers look very closely at the increasing rate of revocation for people on parole, particularly for a technical violation of supervision. The following graph depicts a comparison of recidivism rates by release type, either discretionary or mandatory release to parole from 1989 thru 2005.<sup>37</sup> The Department of Corrections defines recidivism as a return to prison within three years of release, which includes both technical violations of parole as well as parole revocations as a result of a new criminal conviction. The reality is that the majority of people will not be successful on parole and will be re-incarcerated. Our current failure rates on parole are unacceptably high.



<sup>36</sup> At the end of June 2009, there were 5,309 people in private prisons in Colorado. Colorado Department of Corrections, *Monthly Population and Capacity Report* (June 2009).

<sup>37</sup> Colorado Department of Corrections, annual *Statistical Report* for years 1991-2008 as compiled by CCJRC.

Of those that fail on parole, overwhelmingly they are revoked and re-incarcerated for committing a technical violation of parole, not for committing a new crime. In 2008, 75% of parole failures were returned to prison for a technical violation of parole. This subgroup of technical parole violators is a growing percentage of total prison admissions.<sup>38</sup> As demonstrated by the graph below, in 2008, 30% (or over 3,300 people) were re-incarcerated for a technical parole violation. The cost of re-incarcerating technical parole violators is enormous.



Colorado needs to develop alternative strategies and sanctions because the period of parole is intended to be a period of transition back into the community, not punishment. The prison sentence has been served.

Many people in prison are not adequately prepared prior to release, and there are inadequate support services to assist them after release. Transition may be very difficult as people face such barriers as homelessness, unemployment, mental illness, extreme poverty, and substance abuse.

CCJRC recommends that policymakers focus efforts on limiting the use of incarceration for technical parole violations and improving pre-release planning and support services for people following release from prison. These approaches can be successful in reducing recidivism, promoting public safety, and effectively using scarce state resources.

<sup>38</sup> Colorado Department of Corrections, annual *Statistical Report* for the years FY 1994 (pg 24), FY 1995 (pg 24), FY 1996 (pg 26), FY 2000 (pg 31), FY 2002 (pg 31), FY 2004 (pg 31), FY 2006 (pg 31), FY 2007 (pg 32), FY 2008 (pg 12) as compiled by CCJRC.