

**DOLLARS, SENTENCES  
& LONG-TERM PUBLIC SAFETY**

**Managing A Fiscal Crisis With A Goal  
Of Long\_Term Public Safety**

**Prepared by  
Middle Ground Prison Reform  
September 2003**

## INTRODUCTION

Since 1983, Middle Ground Prison Reform has been the sole watchdog agency that consistently has scrutinized the criminal justice system in Arizona — particularly with respect to the operation of jails and prisons. We also are a grass\_roots public education and prisoner/family advocacy organization working to protect and define the rights, privileges and responsibilities of prisoners and their supporters, in addition to advocating for improvement in the effectiveness of the correctional system.

Historically, our proposals have taken into account the vital importance of protecting public safety. We are selective in the issues we pursue and we do not take lightly the responsibility to provide timely and accurate information to official decision\_makers in our state.

In September 1989, we distributed a report to all legislators entitled, Prison Overcrowding – Manufactured Crisis?, in which we outlined our concern that the Arizona Department of Corrections was not doing all it truly could to free bed space for newly\_sentenced prisoners. The report contained dozens of proposals, discussions and suggestions for consideration by lawmakers — all of which incorporated consideration of the need to protect the public while effectively and fully utilizing beds throughout the prison system. For example, we pointed out the inherent shortcomings of the Department’s practice of operating halfway houses as “baby” prisons rather than as true re\_entry preparation programs for released offenders; current and future problems with the ADOC classification system; and the department’s failure to timely process released offenders from the prison itself into the community, thus needlessly wasting needed beds.

How the state views the prison beds presently authorized, what goals the state wants those beds to serve, what goals the state desires for the larger society, whether the state accomplishes those goals or succumbs to the inertia of a resistant bureaucracy and its resistant brethren in the courts, the probation departments, and the county prosecutor offices, all are dependent upon the precise utilization of beds for a blend of multiple purposes simultaneously. Appropriate and effective prison bed utilization is a necessary — but not sufficient — condition for success.

In this report, Middle Ground makes specific suggestions for the Legislature and for the Department of Corrections, including but not limited to the department’s bed utilization. We hope these suggestions are accepted in the spirit in which they are offered. A tension exists because Middle Ground speaks from the perspective of *those who go* (to jail, to prison, to a difficult future), and not from the perspective of *those who keep* or *those who send* or *those who watch* — and we make no apologies for doing so.

Middle Ground’s executive director, Donna Leone Hamm, is a former judge in the lower court system, has been qualified in the courts as an expert witness on prison and executive clemency matters, is a former director of a residential treatment agency and outpatient counseling program for delinquent and dependent youth, a former executive director of a defense bar organization, and the spouse of a former prisoner from the Arizona prison system. She serves as a consultant on prison and executive clemency issues, as well as performing mitigation work in the courts for private attorneys. Middle Ground’s director of advocacy services, James J. Hamm, is the former prisoner, who earned a bachelor’s degree attending a corrections\_focused curriculum within the Sociology Department of Northern Arizona University (1983) while attending class with prisoners and guards inside the prison at Florence, Arizona; obtained a commutation of his sentence (1989), and was granted a parole to the community (1992); earned a Juris Doctor degree from Arizona State University’s College of Law (1997); delivered public and professional talks, presentations, and lectures on re\_inventing rehabilitation (1999–2003); was fully discharged from

his sentence (2001); and has functioned for years as a consultant on criminal justice issues, especially prison\_related issues.

The relationship between Middle Ground and the administration of the Department of Corrections historically has not been one of congeniality, and that relationship might not change in the future; if change is to come, it must be preceded by a new approach within the Department. Nonetheless, the ideas in this report merit serious consideration, and the more each suggestion is understood, the easier it is to recognize their multi\_level interactive effects and how those effects will tend to resolve issues that otherwise would work at cross\_purposes (and thus frustrate otherwise well\_meaning attempts to take constructive steps in a fiscally\_exhausted environment). Agency survival is not a substitute for agency purpose (once again, it is a necessary, but not sufficient, condition). This report presents ideas that move toward a shared purpose and away from a fundamentally stagnated design.

Middle Ground's 1989 report to the Legislature outlined several concerns in addition to identifying problems arising out of the Department of Corrections. We addressed serious concerns with respect to (1) prosecutorial power vs. judicial decision\_making; (2) objections to and predictions for the failure of "shock incarceration" along with cogent reasons why the program would not succeed in its purported goal; (3) the justice system's failure to use community corrections as an alternative\_to\_prison punishment; (4) the justice system's lack of community service sentences and lack of authentic victim restitution; (5) a pervasive lack of other viable punishment options for lower level offenders as opposed to secure prison confinement; and (6) a myriad of additional issues.

Since Middle Ground's 1989 report was issued, changes in Arizona law have provided for a somewhat less inequitable justice system, addressing a few of the concerns we identified (examples include the elimination of "Hannah Priors" as a means of enhancing a criminal punishment<sup>1</sup>; and the reinstatement of a statutory provision that a prison inmate serving consecutive sentences may move to the next sentence upon reaching the ERC date<sup>2</sup> on the sentence currently being served). We recognize that our group was not the only organization to express concern over such issues, but we also are aware that because of our insight into the actual operation of the prison and correctional system, we are able to identify and discuss certain operational problems and issues which would not be known to a casual or even academic observer.

In 1989, the Arizona Legislative Council issued a Request for Proposal (RFP) which asked bidders to study a variety of criminal justice issues, including evaluating the operation of the Arizona Department of Corrections, evaluating risk assessment methods used by the Parole Board (now called the Board of Executive Clemency), and evaluating the impact that a sentencing

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<sup>1</sup>"Hannah priors" are convictions that occur at the same time but that were used as prior convictions to enhance the remaining sentences. For example, if a person was convicted of three burglaries by a single jury, the first sentence would be a first conviction; the second sentence would be enhanced with one prior; and the third sentence would be enhanced with two priors. The legislature now has banned the use of Hannah priors and permits only the use of "historical priors," which are prior convictions obtained previously rather than contemporaneously. There are serious problems associated with the current definition and use of historical priors, and those problems also are discussed in this report.

<sup>2</sup>"ERC" date stands for Earned Release Credit date, now partially subsumed by the Community Supervision Release date. Few understand precisely how the Earned Release Credit date and the Community Supervision Release date differ, except that the ERC is a creature of the pre\_1994 criminal code and the CSR is a creature of the 1994 criminal code. For purposes of addressing the current crisis in the criminal justice system, one need only know that the amount of "good time" (by any name or label) is extremely limited at present and there are fundamentally sound reasons why it should be increased. A more in\_depth discussion is provided in the body of this document at a later point.

guidelines commission might have on various aspects of the criminal justice process. A contract was awarded to the Institute for Rational Public Policy, Inc. The completed study, issued on June 30, 1991, and sometimes referred to as the “Knapp Report,” covered a wide range of issues related to crime and corrections in Arizona.

Middle Ground thoroughly reviewed the 1991 Knapp Report and, in general, we supported its findings, with a few qualifications. We felt that the Knapp Report was far too conciliatory in some areas and on some important topics, where we believed that a more direct approach would have been more beneficial in the long run. In other areas, we disagreed with some Knapp Report recommendations and/or the rationale for them. In October 1991, we submitted to all legislators a document entitled, Reclaiming the Vision: A Report Prepared for the Joint Legislative Study Committee on the Criminal Code Revision Study. This document was a good faith attempt to make positive, constructive suggestions for making needed change in an ordered fashion. In our 1991 Reclaiming the Vision report, we stated:

*“The problem of crime control is one of enormous proportions with great complexity, and one that poses stark fiscal implications for the citizens of Arizona.”*

Now, after more than a decade of so-called “tough on crime” proposals and politically expedient but fiscally imprudent and socially ineffective stances, it is clear that the statement was true when made and has become even more important and more urgent today.

As we noted in our 1991 Reclaiming The Vision report, many people — including members of the media, our own prisoner family members, the general public, and other groups — seemed to be confused about the work of the Joint Legislative Study Committee on the Criminal Code Revision Study. In fact, as we noted in 1991, many people referred to that committee as the “mandatory sentencing committee.” We expressed our opinion then and restate it now that mandatory sentencing is but one issue out of many which richly deserve ardent attention.

Middle Ground strongly urged the Committee in 1991 to consider far more than Title 13 (the Criminal Code) in seeking ways to solve or address the problems of corrections. Reclaiming the Vision urged consideration of changes to Titles 31 and Title 41 as well as Title 13, with the goal of enhancing public safety, deterring crime, enhancing the quality of justice, addressing prison overcrowding and all the fiscal realities attendant upon operating the gargantuan prison system we have in Arizona<sup>3</sup>. Some of the statutes in those titles directly and/or indirectly have a significant impact upon the cost and the operation of our entire punishment system in Arizona. We also urged then, and reassert now, changes in the operation of the prison system or in the justice system which do not always require legislative action, but which do have an effect on recidivism and the effective reintegration of criminal offenders into the community upon release from prison.

The “vision” we embraced in Reclaiming the Vision was captured — PRECISELY, in our opinion — in our cover letter to the Committee when we distributed our report to each of ninety (90) legislators:

*As you prepare to begin the enormous task of review [of the criminal code] we hope that you will also be mindful of the need for fundamental fairness to victims and offenders alike, as well as to the notion that if our criminal justice process continues at its present pace it will burn up our*

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<sup>3</sup>Arizona’s prison population has grown more than six fold since 1980 — from 4,360 to more than 30,000 prisoners. According to the Bureau of Justice Statistics, by the end of 2001, Arizona ranked highest among thirteen Western states in per capita incarceration (492 per 100,000 residents), and we were the 10<sup>th</sup> highest in the nation.

*resources, our integrity, our self\_respect, our notions of decency, our principles and our futures.*

Now, in 2003, Arizona faces a hemorrhage in the correctional system that cannot be ignored or merely bandaged. The correctional crisis is fueled by an even larger crisis in the criminal justice system itself. Continuous tinkering with the criminal codes (both the 1978 code and the 1994 code) has produced a plethora of statutory provisions which apply to one group of prisoners, but not to others, and often the two groups are serving sentences for the same type of crimes. Sentencing computations are confusing and can be complex — even with the advent of the so-called “truth in sentencing” criminal code<sup>4</sup>. Computations can be especially complex for those with consecutive sentences, old code/new code combination offenses, combinations of mandatory flat sentences with TIS or 85% sentences, etc. In short, the almost constant tinkering with the criminal code has resulted in inequities, unintended consequences, and a reduction in the fairness of the criminal justice process (an inevitable result when, under one criminal code, an offender is sentenced to one range of sentences while under another criminal code or even during a different year in the same criminal code, a different sentence applies to the same crime and felony classification).

Over the past several decades in Arizona, many studies, reports, inquiries, and official commission/committee recommendations have advanced ideas to address serious problems within our justice system. Thousands of taxpayer dollars have paid for such studies and reports. Very few of the professional recommendations have actually been implemented. Ignoring many of those recommendations has resulted in the crisis with which the state now is confronted.

Arizona must squarely face the bleakness of the future for our children and our children’s children if we continue along the present course of the criminal justice system, for the problem lies not merely with the Department of Corrections nor even with corrections itself. We must examine the courts at all levels, the defense and prosecution bar, county probation departments, community supervision and parole supervision agencies, as well as private agencies who purport to serve the needs of released offenders. Victims of crime must be given sensitive and fair treatment which will assist them in effectively coming to grips with the losses they have suffered, and the assistance must be provided in ways that are meaningful to them in their own terms and that effectively address their own needs. Far too often we hear from crime victims who did not want to prosecute as harshly as the county attorney wants them to — particularly in death penalty cases — and these victims are treated very differently from and very negative in comparison to those victims who accede to the county attorney’s preferences.

Disproportionate numbers of Latino and African\_American citizens are sentenced to prison.<sup>5</sup> Cultural, health\_related, transportation, and educational budgets adversely have been affected (and continue to be affected) in order for the state to obtain the funds to support our

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<sup>4</sup>The Truth In Sentencing code (TIS code) is the 1994 criminal code. It also is referred to by some as the “85% law” criminal code.

<sup>5</sup>Arizona incarcerates Latinos at a rate of 1,281 per 100,000 adults — we are 6<sup>th</sup> highest in the nation. By comparison, the average for the three other border states was 929 per 100,000 adults incarcerated — almost 1/3 lower than our rate. African\_American adults are seven times more likely to be incarcerated than non\_Hispanic whites. Source: The National Center for Institutions and Alternatives, “Masking the Divide: How Officially Reported Prison Statistics Distort the Racial and Ethnic Realities of Prison Growth,” Holman, Barry. (Note: The National Center for Institutions and Alternatives uses a different method for determining rates of incarceration than that used by the U.S. Bureau of Justice Studies. NCIA reports the number of persons incarcerated per 100,000 adults, rather than per 100,000 residents. Since African-American and Latino populations include a higher percentage of youth who are not incarcerated in adult institutions, as well as a large number of youth who are tried as adults but may not be counted as adults by adult prison statistical reporters, the NCIA’s method of reporting allows a more accurate comparison of incarceration rates for whites, Latinos and African-Americans.)

massive investment in policies of punishment\_by\_prison. Vested interests struggle to maintain their stranglehold on the gargantuan prison system. City governments challenge census data if it fails to incorporate state prisoners who may be housed within their boundaries (because of the financial advantage to counting such persons in receipt of federal monies). Entire communities are now known as “prison towns” because of the private, state, federal, and other incarceration facilities in their communities.

The purpose of this document is to outline practical solutions to some of the problems confronting our correctional/criminal justice system. They are not all new ideas; some were presented in the past in various forms and forums by Middle Ground and are based upon more than two decades of experience in advocating for change in the operation of our criminal justice system. Some of the suggestions have been suggested or supported by other agencies or groups or individuals.

Arizona has been here before (*i.e.*, in crisis). Middle Ground accurately predicted the arrival of the current state of affairs. Now is the time to comprehensively examine the options open to the state. Some changes suggested in this report do not require statutory change or enactment; rather, they require adequate oversight of the operation of the agency involved. Some suggestions require executive endorsement by the Governor or by state leaders in various positions of trust. All are important if a comprehensive review is to take place.

As a final note before discussing numerous specific suggestions about addressing the current crisis, it is critical to grasp the notion that the state must do more with every dollar spent, because the state genuinely has fewer dollars to spend, and, at the same time, the state is confronted with an expanding set of needs that must be addressed. Around the country, states are discovering what we have been saying all along: a more effective prison and corrections policy will cost less as well as produce better results. . . results that have an impact on long-term public safety.

Reorienting the criminal justice system — *i.e.*, to accomplish more than just “locking people up” — will require policy changes within departments. The direction of those policy changes is critical to the successful resolution of this crisis. Accordingly, after addressing some of the more direct and hands\_on suggestions, this report also addresses needed changes in agency policy and management. Middle Ground respectfully suggests that overall policy changes are no less important than quick\_fix suggestions which can provide short\_term, immediate relief.

#### **COURT AND SENTENCING RELATED SUGGESTIONS THAT SIMULTANEOUSLY ADDRESS THE STATE’S FISCAL CRISIS, THE PRISON OVERCROWDING CRISIS, AND FUNDAMENTAL IMPROVEMENT IN THE CRIMINAL JUSTICE SYSTEM:**

The following suggestions are not merely aimed at slowing the rate of inflow of prisoners into the system, at increasing the outflow of prisoners back into the community, and at correcting certain inequities that have arisen over the years from changes in the law. Rather, these suggestions also are directed toward making the system function more effectively as a correctional system and as a criminal justice system.

1. **Legislative Change In The Process For Transferring Juveniles To Adult Court.** The authority to decide which juveniles may be transferred to adult court must be vested in judges, not in prosecutors.

Currently, Arizona law grants exclusively to county prosecutors the power to determine which juveniles will be tried as adults. There is no due process hearing, no objective evaluation of the situation, no opportunity to contest the decision. Differing policies of individual county attorney’s treat similarly\_situated juvenile offenders differently,

without respect to fundamental principles of fairness, consistency, or objective assessment of individualized circumstances, resulting in inequitable decisions too easily influenced by political ambitions, budgets, public pressure and a variety of other factors.

Although no case as yet has reached the United States Supreme Court on this issue, there is a very high probability that the Arizona statute is unconstitutional on its face (the statute which effectively eliminates all opportunity for a hearing and for input before decision). The two fundamentals of due process are notice and a hearing (at a meaningful time and place). Under Arizona law, the juvenile transfer decision is made behind closed doors, with no hearing and no opportunity for input. Neither the public nor even the specific juvenile who is the subject of the decision can know how the decision was made, precisely who made it, or why the transfer was elected. Even worse, there is no appeal of the decision. If the legislature does not change this process, Middle Ground believes that it eventually will be struck down by the federal courts.

There can be no way to know in advance if judges vested with the power to make such decisions would refer fewer or more youth to adult courts, but we strongly believe that the proper place where such decisions are made should be in a court, and not behind the closed doors of a county prosecutor's office.

2. Authorization of Home Arrest With Electronic Monitoring As A True Additional Alternative To Incarceration For Selected Offenses. Legislation is needed to allow Electronic Monitoring to be used as a true alternative to incarceration, applicable to mid\_level felony classifications which otherwise would result in incarceration, at the discretion of the sentencing court.

Superior Court Judges should be given authority to impose electronic monitoring in lieu of an actual prison sentence, with conditions more restrictive than mere probation. It is true that county probation departments and the ADOC community supervision division currently can impose electronic monitoring as a special condition of supervision for individual offenders, but these uses of electronic monitoring are not true alternatives to prison. In the case of ordinary probation, the sentencing court already determined that prison was not needed and that probation was warranted. In the case of ADOC community supervision at the end of a prison term, the person will be in the community regardless of whether electronic monitoring is used.

Home Arrest with electronic monitoring, as a true alternative available to a sentencing court, would provide a true alternative to incarceration and would impose greater restrictions, especially for mid\_level felony classifications and in light of recent technology which provides greater levels of scrutiny for monitored offenders.

This suggestion requires legislative change granting discretion to judges to impose Home Arrest With Electronic Monitoring rather than prison. If this alternative is authorized, every person who is placed on Home Arrest With Electronic Monitoring<sup>6</sup> will contribute to easing the inflow pressure on the ADOC, which already has been casting about for private prisons to house the influx of newly arriving prisoners.

3. Re Examination Of Class 6 Felonies. The entire group of Class 6 felonies (the lowest

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<sup>6</sup>This suggestion immediately implicates re\_evaluation of the tension that exists between a prosecutor's power to draft a plea agreement which mandates a prison term and a judge's discretion to utilize Home Arrest. The resolution of this tension in this particular instance (each instance requires its own solution, in order to avoid restructuring the entire criminal justice system) is for the Legislature, as part of the new statutory Home Arrest language, to designate those offenses for which Home Arrest is to be available in lieu of a prison term.

category of felonies) should be examined to see which of those offenses might more appropriately be classified as Class 1 misdemeanors (the highest category of misdemeanors). This is particularly important in light of the direct and collateral consequence of conviction for any felony (see later discussion of collateral consequences of felony conviction).

It is important to note that Middle Ground does NOT advocate the elimination of all Class 6 felonies, thereby leaving only Class 1 through Class 5 felonies. Middle Ground concurs with those who have suggested that it is important for the legislature to retain either Endangerment or Disorderly Conduct as Class 6 felonies for plea bargain purposes, if not for any other reason. Retaining these offenses as felonies will allow, for example, for those instances where a gang member has fired at people but the victims are too intimidated to testify that the gun ever was pointed at them (thus precluding successful prosecution for higher class felony charges). As another example, Endangerment by discharging a firearm within a residential area is a Class 6 felony that still allows for obtaining a conviction that invokes the prohibited possessor statute for that person. A Class 6 undesignated offense plea bargain can provide an opportunity to have the charge reduced to a misdemeanor upon successful completion of probation, in appropriate circumstances — that is, where the actual offense matches the definition of a Class 6 felony.

Any change that the legislature makes by shifting an offense from a Class 6 felony to a Class 1 misdemeanor also will have a progressively ameliorating effect upon the excessive number of new arrivals entering the prison system, because prior misdemeanors do not subsequently subject a person to excessively enhanced sentences.<sup>7</sup> In addition, the serious and life-long collateral consequences of a felony conviction which attach to locating jobs, housing, voting rights, etc. (discussed later in this report) do not attach to those convicted of misdemeanor offenses.

4. Legislatively Increased Discretion In Consecutive vs. Concurrent Sentencing. The legislature should reverse the current presumption (found in A.R.S. § 13\_708 and in Rule 26.13, Arizona Rules of Criminal Procedure<sup>8</sup>). This is a presumption that separate sentences of imprisonment for two or more independent offenses are to run consecutively unless the judge expressly directs otherwise (see also State v. Rhodes, 104 Ariz. 451, 454 P.2d 993 (1969), cert. denied 396 U.S. 945). The presumption of consecutive sentences creates a public policy for the state of Arizona, and judges are not inclined in run\_of\_the\_mill cases to overrule a public policy, even where the individual judge might believe that consecutive sentences are not really called for. We suggest that Arizona judges should be given discretion to impose sentences either concurrently or consecutively, and should place their reasons for doing so on the record in both cases. There should be no presumption in favor of consecutive sentences, nor in favor of concurrent sentences. Instead, the facts of each case and the circumstances under which the offense occurred should be factored into the decision in each instance whether to impose concurrent or consecutive sentences.

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<sup>7</sup>Changing a Class 6 felony to a Class 1 Misdemeanor will result in a reduction in the flow of prisoners into the prison system even when the former Class 6 felony allowed for probation, because a subsequent offense with a prior felony mandates prison and significantly increases the sentence under the provisions of A.R.S. § 13\_604 that deal with repetitive offenses, whereas prior misdemeanors do not subsequently subject a person to highly enhanced sentences.

<sup>8</sup>The exclusive constitutional authority of the courts to enact procedural rules governing the processing of cases is not implicated in this instance, in that the court rule merely repeats the statutory mandate. Because the mandate is substantive rather than procedural, the legislature has primary authority over the issue, and can change the mandate as a matter of law.



5. **Increasing the Amount of Release Credits Prisoners May Earn During Incarceration.**<sup>9</sup> Release credits in Arizona do not reduce the sentence, but do allow for possible release on community supervision status prior to expiration of the sentence. One means of providing immediate relief from the prison overcrowding/budget crisis situation is to advance the release date for prisoners who already reside within the prison system. One means of accomplishing this goal is for the Legislature to authorize the Department of Corrections to increase release credits.

The current release credit system is designed to conform to what has been called the Truth In Sentencing criminal code (the 1994 criminal code), under which prisoners must serve at least 85% of the sentence imposed by the court. Under previous criminal codes, prisoners could earn a greater number of release credits. Under the 1978 criminal code, non\_violent and non\_repetitive prisoners could earn up to one\_third of the sentence and some violent or repetitive offenders could earn up to one\_fourth of the sentence. Under the criminal code prior to 1978, prisoners could earn one day of credit for every day actually served (informally called the "two\_for\_one" system). Currently, prisoners sentenced under the 1994 criminal code may earn up to but not more than 15% of their sentences (*i.e.*, one day of credit for every six days actually served<sup>10</sup>). Immediately below is a chart showing Middle Ground's suggestions for authorization of additional release credits for prisoners sentenced under the 1978 and 1994 criminal codes. With respect to the 1994 criminal code, the result of newly\_authorized release credits will not alter the period of time on community supervision (it will remain at 15%, as imposed by the sentencing court), but will change the point at which the person begins the community supervision portion of his sentence (it would begin before reaching 85% of the sentence).

Middle Ground suggests that the legislature provide for the recalculation of sentences in the following ways.

TYPE OF OFFENSE	APPLICABLE RELEASE CREDIT %	MINIMUM TIME THAT MUST BE SERVED	TIME SERVED IF GOOD CONDUCT	MAXIMUM TIME SERVED IF BAD CONDUCT
(1) All Offenses Formally Designated as <u>Both Non_Violent and Non_Repetitive</u>	35%	65%	Not Less Than 65%	Up To 100%

<sup>9</sup>Many of the suggestions in this report previously have been made by Middle Ground; additionally, one version of this particular suggestion was made by Mr. Howard R. Wine of the Pima County Legal Defender's Office to the Legislature's Alternatives To Sentencing Work Group.

<sup>10</sup>It is important to note that the release credit system is not designed solely as an overcrowding relief valve. The ability to earn release credits is linked with good conduct within the prison system. Bad conduct days are served "flat" (*i.e.*, without earning additional credit while serving those days). Consequently, the greater the opportunity to earn release credits, the greater the incentive to conform one's conduct to the rules and regulations of the Department of Corrections. The dramatic rise in gang problems within the ADOC is attributable to the sharp reduction in incentive for good conduct. Resisting gangs can be risky business for individual prisoners; when there is no formal incentive or reward for doing so, fewer prisoners will put themselves at risk. Increasing release credits is a useful management tool for the prison system, and will have far greater positive effect than the costly construction of super\_max facilities intended to house gang members under conditions of extreme isolation.

(2) Some Offenses Formally Designated as Non_Violent but Repetitive	15%	85%	Not Less Than 85%	Up To 100%
(3) Some Offenses Formally Designated as Violent but Non_ Repetitive	15%	85%	Not Less Than 85%	Up To 100%
(4) All Offenses Formally Designated as <u>Both</u> Violent <u>and</u> Repetitive	NONE	100%	100%	100%

**Discussion of chart:**

(1) Sentences for prisoners serving time for offenses formally designated as non\_violent and non\_repetitive could be recalculated to provide for up to approximately 35% of the sentence imposed (*i.e.*, earning five days of release credits for every fourteen days actually served<sup>11</sup>).

(2) Sentences for prisoners serving time for offenses formally designated as non\_violent but repetitive could be recalculated to provide for up to approximately 15% of the sentence imposed (*i.e.*, still requiring them to serve at least 85% of the sentence, and, if their conduct within the ADOC is not appropriate, they would serve 100% of the sentence imposed.<sup>12</sup>

(3) Sentences for prisoners serving time for offenses formally designated as violent but not repetitive could be recalculated to provide for up to approximately 15% of the sentence imposed (*i.e.*, still requiring them to serve at least 85% of the sentence, and, if their conduct within the ADOC is not appropriate, they would serve 100% of the sentence imposed.<sup>13</sup>

(4) Sentences for prisoners serving time for offenses formally designated as both violent and repetitive could be left without change — that is, not earning release credits at all.

**1. The Legislature Should Authorize Judges To Provide Sentencing Credit For Up To One Half The Time Served On Probation For Probation Violators Who Subsequently**

<sup>11</sup>As a technical but nonetheless important matter, Arizona law provides that release credits are not pro\_rated. That is, the release credits do not accrue until service of the actual time. Thus, the five days of credit would not be earned until service of fourteen actual days in prison; at the end of the thirteenth day, the prisoner has earned zero credits; at the end of the fourteenth day, the prisoner has earned five days. This is important for purposes of simplifying the recalculation of release credits and ascertaining actual release dates for prisoners. This matter has long been settled by case law within Arizona. See Jones v. State ex rel. Eyman 19 Ariz. App. 153 (1973), 505 P. 2d 1044; and Fragosa v. Eyman 3 Ariz App 308, 414 P 2d 157 (1966).

<sup>12</sup>The reason for providing a possible 15% release credit option for some non\_violent but repetitive offenses and for some violent but non\_repetitive offenses is two\_fold. One the one hand, a distinction needs to be made between those offenders whose offenses are both violent and repetitive and those whose offenses are one or the other but not both. Flat time should be reserved for persons who have committed a violent and repetitive offense. Some offenses that are violent but non\_repetitive involve offenses where one person possessed a weapon and all participants are convicted of the crime. It is reasonable to make a distinction between the participants, and to make an impression on the offender, that the justice system genuinely attempts to recognize differences in culpability and in opportunity to correct oneself and return to the community.

<sup>13</sup>See discussion in immediately preceding footnote.

**Are Sent To Prison.** Many probationers are not able to comply with conditions of probation and subsequently are sent to prison. Sometimes, persons fail on probation, but not due to any inherent criminal intent, but simply because they are unable to overcome addiction or to conform their conduct to the strict conditions required of them. Where the probationer has served several months or even a few years on probation, it is appropriate to recognize the effort that went into the probation time period.

Middle Ground suggests that the legislature could allow the sentencing judge to make a determination about how much of the probation period should be credited toward the prison sentence, with a statutory upper cap of one\_half of the total time on probation and an additional statutory condition that the probation credit cannot reduce the remaining prison sentence to less than four months on a Class 4, 5, or 6 felony or to less than one year on a Class 2 or 3 felony.

County probation departments keep records of days on probation prior to issuance of a warrant for re\_arrest, and the sentencing court can designate the portion of that period that is to be credited toward the prison term.

2. **The Legislature May Authorize The Department Of Corrections To Award Time Credit For One Quarter Of The Time Served On Probation For Current Prisoners Who Were Sent To Prison As Probation Violators.** This suggestion is an extension of the suggestion immediately above, but applies to former probationers who now already are serving prison sentences after revocation of their probation.<sup>14</sup> In order to avoid all the problems associated with formal re\_senencing, the ADOC could be authorized to award a credit of one\_quarter of the probation period, with a statutory condition that the probation credit awarded cannot reduce the remaining prison sentence to less than four months on a Class 4, 5, or 6 felony or to less than one year on a class 2 or 3 felony.<sup>15</sup>
3. **The Legislature Should Alter The Statutes Governing Enhancement Of Sentences Based On Prior Convictions.**<sup>16</sup> In the past, enhancement of sentence for a prior conviction applied to persons who previously had been convicted of an offense and who had served time in prison and **THEN** had committed a new criminal offense. The intent was to penalize a person who continued in criminal ways after having been completely through the system before, including having been sent to prison. Arizona, however, now treats convictions for separate crimes as prior convictions, so long as they were not "spree" offenses, thus giving prosecutors excessive power.

#### EXPLANATION OF SENTENCE AGGRAVATION VERSUS SENTENCE ENHANCEMENT

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<sup>14</sup>Many of the suggestions made in this report have been made by Middle Ground previously. Some of these ideas have been suggested to the Legislature's Alternatives To Sentencing Work Group in one or another recent presentation prior to Middle Ground's presentation. One version of this particular suggestion was made by Mr. Howard R. Wine of the Pima County Legal Defender's Office.

<sup>15</sup>The Department of Corrections can notify each county's probation department of the names and birth dates of prisoners sentenced from that county; the county probation department can forward to the ADOC a list of those current prisoners who served time on probation prior to revocation and sentencing to prison and a record of days served on probation prior to issuance of a warrant for re\_arrest. The ADOC then can re\_calculate the sentences of those prisoners and credit them with one\_quarter of the probation time they served.

<sup>16</sup>Many of the suggestions made in this report have been made by Middle Ground previously. Some of these ideas have been suggested to the Legislature's Alternatives To Sentencing Work Group in one or another recent presentation prior to Middle Ground's presentation. One version of this particular suggestion was made by Mr. Howard R. Wine of the Pima County Legal Defender's Office.

Aggravation of Sentence	Sentencing ranges in Arizona provide for a mitigated term, a presumptive term, and an aggravated term. Aggravating a sentence results in increasing punishment within the statutory sentencing range for that offense; aggravating a sentence results in a sentence greater than the presumptive sentence, potentially increasing the sentence all the way to the maximum sentence permitted.
Enhancement of Sentence	Sentence enhancement shifts sentencing from the standard sentencing range for that offense to one of two higher sentencing ranges. The first enhanced range is for offenses committed with one prior felony conviction. The second enhanced range is for offenses committed with two or more prior felony convictions.

**SUGGESTED APPLICATION OF SENTENCE ENHANCEMENT STATUTES**

Extremely serious Offenses (firearm offenses, aggravated robbery, sexual assault, etc.)	Retain current language of enhancement statutes.
Less Serious Offenses	Insert language expressly indicating that enhancement applies only for prior convictions that resulted in incarceration in prison (not mere prior convictions, not for serving jail time, not for prior probation time, etc.).
Crimes committed while on pre-trial release, on probation, or on parole	Enhancement for prior conviction would be subject to same rule as for crimes committed while not on any form of conditional release; fact that crime was committed while on conditional release may be considered for aggravation purposes; make separate add-on sentencing discretionary with sentencing judge rather than mandatory if alleged by prosecutor

There are three changes that should be undertaken by the legislature regarding enhancement of sentence for prior convictions:

**SUGGESTED CHANGES TO EXPIRATION DATES FOR PRIOR OFFENSES FOR SENTENCE ENHANCEMENT PURPOSES**

Dangerous Priors*	Expire ten years after completion of sentence.
DUI's and Class 2 & 3 Priors*	Expire five years after completion of sentence.
Class 4, 5, & 6 Priors*	Expire three years after completion of sentence. Insert language expressly indicating that enhancement applies only for prior convictions that resulted in incarceration in prison (not mere prior convictions, not for serving jail time, not for prior probation time, etc.).

\* Except for extremely serious prior offenses (see preceding chart), prior offenses refer only to prior convictions that resulted in serving prison term and that have not expired during the intervening period between completion of the prior sentence and the commission of the new (current) sentence. ALL prior convictions may be considered for purposes of aggravating a sentence within a sentencing range, but may not shift sentencing to a higher range.

1. **Changes To The "Excessive Sentence Commutation" Statute.** A.R.S. § 13\_603(L) permits a sentencing judge to authorize a defendant to apply for a commutation of sentence within 90 days of sentencing, where the court believes that a legislatively\_required

sentence is “clearly excessive” (given the particular circumstances and the particular defendant).

Currently, a sentencing court’s special order permitting a defendant to apply for a commutation within ninety (90) days of sentencing frequently means only that the ultimate decision will be based upon political motivations and considerations, rather than fairness and integrity. The statute should be changed to provide that the judge’s alternative sentencing recommendation is to be put in writing, and that there is a presumption that the alternative recommendation will be granted, in the absence of compelling reasons for denying or altering the recommendation (and that such compelling reasons must be placed in writing where the presumptive recommendation is denied or altered). If, after this legislative change, the percentage of denials remains above 50%, then the legislature may need to consider using a completely different means of preserving the integrity of the justice system. Some effective process for dealing with sentencing exceptions in cases of mandatory sentences that are excessive in given cases is needed to serve as a relief valve for a system that sometimes produces an inherently unjust result. The current operation of Arizona’s manifest injustice exception (to preserve the integrity and fairness of the criminal justice system by means of a process for handling individual cases where a sentencing exception is appropriate) is not working as intended or as needed (see chart below, showing actual results).

Analysis of A.R.S. § 13\_603(L) Excessive Sentence Commutations

Calendar Year:	2001	2002	2003**
Number of 13_603(L) commutation applications received:	12	13	5
Applications Denied at Phase I (i.e., at the first hearing):	5	5	3
Applications Recommended to Governor (after Phase II hearing):	7	8	2
Denied by Governor:	4	5	1
Granted by Governor:	3	3	1

\*\*Thus far (i.e., January 1 – September 22, 2003)

Clearly, among the many thousands of felony criminal sentences imposed upon defendants throughout the entire state of Arizona each year, it is virtually inconceivable that only a dozen or so per year are considered to be “clearly excessive” by judges. Either there needs to be targeted education of judges and the defense bar on this issue,<sup>17</sup> or the entire system for responding to a court’s determination of excessive sentencing needs to be addressed by means of a different method. Confidence in the justice system is severely undermined when the system itself is woefully incapable of acknowledging and/or rectifying inappropriate sentences.

1. Changes To Arizona’s Felony Murder Statute. Arizona’s felony murder statute needs to

<sup>17</sup>It is quite possible that many defense attorneys are not even aware of the excessive sentence commutation provisions of A.R.S. § 13\_603(L) and, therefore, do not ask the sentencing judge to consider its application to their cases. One way of ensuring that judges have considered the applicability of 13-603(L) to a particular sentence or defendant is to alter on a statewide basis the printed version of plea agreements to include a box for judges to check as an indication of their "acceptance" or "rejection" of this statutory consideration. For those convicted at trial, the same provision could be incorporated into the regular script used by judges at sentencing hearings.

be modified so as to provide for a lesser sentence in some cases where there was no intent to cause death. One of the ways of doing this would be to allow some felony murder defendants to be charged with second degree murder or manslaughter rather than first degree murder, based upon the facts of the case.

Obviously, some cases of felony murder would be appropriately charged as first degree murder, but the current statute does not allow for those cases where the circumstances warrant a lesser homicide sentence, such as second degree murder or manslaughter. If this statutory change is undertaken, it will need to be carefully phrased, so as to apply a firm set of principles to the decision whether to charge the defendant with the greater or lesser of the homicide options— otherwise, the unfettered discretion of the prosecutor inevitably will continue to result in decisions not grounded entirely in fairness and justice. As an additional check and balance provision, the legislature should authorize the jury, which determines the facts of the case, also to determine the level of felony murder which applies to the defendant, by mandating the use of special verdict forms in felony murder cases.

2. Statutory Enactment of Probationer Review For Consideration For Early Termination of Probation, Every Two Years For Ordinary Cases and Every Ten Years For Lifetime Probation. Middle Ground recognizes the balance that is needed to manage the risks and rewards associated with probation versus prison. No one desires to have additional victims as a result of choosing community punishment rather than prison for offenders.

The Maricopa County Adult Probation Department asserts that it aggressively looks for probationers who can be terminated from supervision early, and then supports an application for early termination before the courts in those cases. The Probation Department's definition of who is deserving of early termination, however, is a matter of dispute. While the probation department denies that it seeks revocation of probation (and therefore incarceration in the prison system) for probationers who commit only status offenses (technical violations of probation conditions that are not in themselves illegal), status offenses often do "disqualify" probationers from advocacy for early termination.

Two Year Review For Ordinary Probation Cases (i.e., Not Lifetime Probation Cases). While we do not argue that some offenders may require supervision and surveillance to the very end of their sentence, we also believe that the law should provide for an automatic review of ordinary probation cases every two (2) years. This will establish a system of checks and balances, enabling the sentencing judge to have an opportunity to review the person's progress on probation within the context of the offense, and independently determine whether further supervision is needed and whether a shorter period of probation is warranted. Even for a probationer who may have a few technical violations on his record of supervision, it may be appropriate for the sentencing judge to independently determine that supervised probation is no longer necessary.

Ten Year Review For Lifetime Probation For Sex Offenders. Middle Ground recognizes the serious threat to the community that is posed by violent or untreatable sex offenders. No one wants to have children or any other innocent person preyed upon by a person who violates such a sacred trust. Current Arizona law, however, treats all sex offenders in almost the same manner, with lifetime probation being the rule of thumb. While we do not argue that some sex offenders may require lifetime supervision and surveillance, we do believe that the law should provide for a statutory review of lifetime probation every ten (10) years. Currently, a sex offender on lifetime probation may submit at any time a Motion to Modify the Conditions of Supervision (and/or to Terminate Supervision). Placing into law an automatic review every ten (10) years would send a

strong message to sex offenders of the minimum amount of time that would be required before a probation sentence would be considered for termination, while simultaneously providing a formal update to the sentencing court of the progress of a particular offender while in the community.

**Benefits Arising From Probation Review Statistics.** There is a need to reduce the negative consequences of the traditional I\_support\_my\_staff attitudes that pervade virtually all governmental bureaucracies. A statutory review of ordinary probationers every two (2) years for early termination or modification of conditions is a reasonable mechanism for doing so, especially if statistics are kept for those who are terminated early with only technical violations on the probation record. Keeping such statistics will have an additional positive effect, in that it then will be easy to track which probation staff have histories of technical violations by their probationers which have no effect whatsoever on future success of the probationer. Whether the probation department would act responsibly on the information available in terms of selections for staff advancements or promotions is an unknown, but such information could be quite valuable for the purpose of increasing the professionalism of a department and establishing "best practice" guidelines for the profession.

3. **Fiscal Truth In Sentencing.** Middle Ground believes that the legislature should enact legislation that would require judges, at the time of sentencing, to express in writing on the sentencing documents not only the amount of time imposed as the prison sentence (as currently already is required), but also the approximate cost to the taxpayer for the full sentence. The Arizona Department of Corrections (secure confinement and community supervision), the county probation departments and other criminal justice agencies currently calculate on an annual basis the cost\_of\_incarceration or cost-to-supervise figures that could be used to calculate the total cost to the State or County for the entire sentence imposed, whether on probation, in prison, in jail, or with a combination of penalties thereof. We believe this statistic would be reported by the media and would serve as a reminder and an educational tool to the public of the costs associated with imprisonment vs. restorative justice alternatives in the community.
4. **Fiscal Penalties For Counties Exceeding Quotas For State Prisoners.** Middle Ground suggests that it would be useful for Arizona to study other states where the counties are (in effect) penalized for sending too many people to prison from their particular county. Various measuring sticks can be used to determine what is the appropriate or usual rate of incarceration (for example, by county population), and if significantly more defendants are sentenced to prison during a particular time frame, that county would be required to pay the state for the cost of incarceration. In Arizona, county attorneys are free to adopt internal office policies — such as refusing to offer plea agreements that include probation whenever any type of weapon is displayed or used in a crime — which results in increasing the number of defendants from a particular county who are sent to prison. Such all\_or\_nothing policies include first\_time offenders and also ignores differences in circumstances. Arizona's sentencing policies should not create inequities for both victims and offenders alike just because a county attorney wishes to, for example, advance a political career or make a name for him/herself.

Even if the legislature chooses not to impose fiscal penalties on counties for sending disproportionate numbers of defendants to prison, the legislature should study the disparity in county attorney offices in handling similar offenses through the charging process and through the plea bargain process throughout Arizona in order to identify and evaluate noticeable disparities.

**ADDRESSING THE FISCAL CRISIS AND THE OVERCROWDING CRISIS  
FROM WITHIN THE DEPARTMENT OF CORRECTIONS:**

1. **International Treaty Transfers Of Foreign Nationals.** Statutes (See ARS 41-105) and treaties already are in place with respect to Treaty Transfers of foreign nationals which provide for them to be returned to their respective home countries. Arizona underutilizes the treaty, which results in keeping prisoners here at our expense when they reasonably might be transferred to prison authorities in their own country. Current ADOC policy — as dictated by the DOC Director and not by statute (Director's Order 1004.03, entitled "Inmate Transfer System," effective June 21, 2002) — prohibits certain offenders from consideration for transfer and provides for eligibility criteria that exceed the basic criteria contained in all federal treaties providing for transfer of prisoners. This policy needs review. In fact, the large number of Mexican Nationals<sup>18</sup> within the prison system has resulted in the rise of new gangs, including the Border Brothers (undocumented Mexican Nationals) and the Paisanos (documented Mexican Nationals), in addition to the major Mexican gangs already in place, La EME (the Mexican Mafia) and the New EME (New Mexican Mafia). The situation within the prison became so difficult to manage that the former director, Terry Stewart, proposed construction of a separate prison for Mexican Nationals (fortunately, the Legislature did not fund the extremely problematic proposal).

As a means of realizing genuine savings by means of international treaty transfers, the Arizona Governor and the ADOC Director could request that the President of Mexico enter into an agreement with the State of Arizona providing that any prisoner transferred to Mexico from Arizona (pursuant to the official Prisoner Transfer Treaty between the United States of America and the United States of Mexico) would be required to serve a minimum of 70% of the sentence imposed by Arizona. Such transfers could save millions of dollars for Arizona.<sup>19</sup> The incentive for prisoners to participate in this program is the prospect of being closer to families in their own country, to live in a country where their native language is spoken, and where programs and services are provided in their native language.

2. **Authorization For Emergency Release When Prison Overcrowding Occurs; Identifying Categories of Offenders For Possible Emergency Release; Process For Evaluating Risk For Emergency Early Release.** Previous criminal codes, which permitted parole, authorized the ADOC Director to accelerate by six months the parole eligibility date for certain classes of offenders (not for all parole eligible prisoners, but only for some), when the prison population reached or exceeded 95% of the ADOC's permanent bed capacity. The ADOC Director did not make the actual release decisions; rather, there was an independent consideration of formally identified and technically qualified candidates (those encompassed within the classes of offenders legislatively authorized for such consideration) by the then Parole Board (now, Board of Executive Clemency).

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<sup>18</sup>As of June 30, 2003, the Department of Corrections (Arizona), "Who Is In Prison," listed 10.8% of the prison population as Mexican Nationals — 3,268 males and 61 females, for a total of 3,329 persons.

<sup>19</sup>In the immediately preceding footnote, we noted that 10.8% of Arizona's prisoners are Mexican Nationals — 3,268 males and 61 females, for a total of 3,329 persons. At a conservative estimate of \$55/day we are spending \$66,829,675/year to house these prisoners, many of whom readily could be returned to their own country for imprisonment, pursuant to current Treaty Transfer provisions (and possibly conditioned upon an additional Mexico\_President\_to\_Arizona\_Governor agreement as to the percentage of the sentence to be served prior to release eligibility in the other country).



That previous legislation now is ineffective, because the prisoners who would be affected by accelerating their parole eligibility dates already have passed out of the system and have been replaced by prisoners sentenced under the 1994 criminal code, which virtually eliminated parole.

Under the current criminal code, the legislature could authorize conditional emergency release. This suggestion is totally separate from prior suggestions within this report which discussed details of accelerating Earned Release Credits for prisoners under the current criminal code (the 1994 criminal code).

As a means of identifying groups or categories of prisoners who potentially could be granted some type of emergency early release without compromising public safety, we believe that offenders classified by the ADOC Classification System as “*minimal or no risk to the community*” would be the most appropriate place to begin. As of December 31, 2002, the DOC housed exactly 1,922 such offenders.<sup>20</sup> These are adult male and female inmates whose classification scores are in the Level 1 category for both “public risk” and “institutional risk.” While not every single individual who is classified in these categories would be appropriate for early release, the DOC could qualify them by name and ADOC number, forward the information to the Board of Executive Clemency, and a hearing could be held by the Board to determine each individual’s appropriateness for early release. This “check and balance” process would weed out the higher risks and increase confidence in the process.<sup>21</sup>

It also is possible that some of the emergency early releases could include some inmates currently classified by ADOC as Level 2 inmates. Under the DOC’s classification system, Level 2 inmates (those with a public risk score of 2) are identified as those who pose a “*low or minimal risk to the community*.” These individuals, if released early, could be supervised on intensive supervision status, by electronic monitoring, etc.

Statutory provisions would be required to enable this procedure. Such legislation should be passed as an emergency measure, to take effect immediately and start the process of identification and review, which will take some time.

In this scenario, Level 1 and Level 2 offenders (as determined by the ADOC’s classification system) could be eligible for emergency release after having served a given percentage of their sentences (for example, 50% of the imposed sentence), without compromise to public safety. This legislation would be tailored to the special circumstances of the ADOC reaching or exceeding its permanent bed capacity, and

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<sup>20</sup>As of July 31, 2003, the population of the Arizona Department of Corrections prison system consisted of 1,543 males and 289 females classified at the lowest possible security level—Level 1/1. On the same date, the prison system held 197 males and 19 females who were classified as Level 1 (Public Risk Score)/Level 2 (Institutional Risk Score). These individuals are clearly a category of offender posing minimal or no risk to public safety if supervised in the community.

<sup>21</sup>The ADOC has not been receptive to this idea in the past. The previous administration’s blanket rejection of the idea strongly suggested that the agency was operating according to its own latent agenda (the loss of a category of prisoners means a decrease in the size and growth of the agency, with concomitant consequences on future budgets). The rejection also reflected a fundamental insecurity with the agency’s classification system (the agency would be subject to public disapprobation if a released offender committed a series of serious crimes after being rated as “no risk to the community”). This is a primary reason for utilizing a check and balance system for selecting individuals for accelerated release (final approval through the Board of Executive Clemency), so that public safety is not wholly dependent upon the ADOC’s current classification system.

would be triggered by the ADOC director formally designating the system as overcrowded. At any point, the director could rescind the formal designation, thus halting the acceleration of emergency release dates.

It costs nearly \$40 million per year to house 1,922 inmates in secure confinement (if calculated at approximately \$55/day).<sup>22</sup> By comparison, the cost for home arrest, electronic monitoring (with or without GPS tracking) and regular community supervision is between \$9 and \$22/day (between \$6.5 million and \$16 million per year). Each offender on community supervision generally is required to pay supervision fees of about \$30/month, which offsets a portion of the supervision costs (approximately \$717,000 per year).

Middle Ground believes that these individuals should be transferred out of the prison system altogether and sent home for supervision from their homes (similar to home arrest, intensive probation, parole or regular probation) and NOT transferred to yet another ADOC facility such as a halfway house, old warehouse building or other temporary structure set up by the ADOC. So long as the ADOC is housing, feeding, providing medical care and other necessities of life to a prisoner, that prisoner is utilizing taxpayer monies.

- 3. Restrictions On Forfeiture Of Earned Release Credits.** The current disciplinary system within the ADOC should be audited on many levels, but — for budget purposes — should be reviewed to examine how many days of earned release credit (ERC) are excessively or arbitrarily forfeited by the DOC each year. Forfeiture of one ERC day has the net result of delaying the release date by one day. The Knapp Report of 1991 urged that prisoners be permitted to “vest” earned release credits after a certain period of time. We concur. We believe that the DOC should be permitted to impose restrictions upon inmates for earning future release credits if the behavior warrants such action, but that ERC’s should become vested after a specific period of time. In addition, the DOC disciplinary scheme permits the Director or his/her designee to forfeit “any and all” ERC days which have been earned. This results in widely disparate application of a disciplinary sanction. For precisely the same behavior, one inmate who has been in prison for a long period of time might forfeit hundreds of days of ERC, while another who engages in the same conduct might forfeit only a few. This inequity undermines the credibility of the disciplinary system and demonstrates the DOC’s lack of concern for fair or just punishment for infractions.

While a procedure does exist within ADOC for restoration of forfeited ERC’s, it is the forfeiture of inequitable amounts of ERC days in the first place which creates the lack of respect among the inmate population for the disciplinary system itself. Contributing to this problem is the fact that inmates are no longer eligible for early release until at least 85% of the sentence has been served. This means that there is little incentive embedded in the release credit system for good behavior, and this situation is made worse when all earned credits may be forfeited for a single disciplinary infraction. If not released early (on ERC’s), and therefore required to serve 100% of the prison sentence imposed by the court, an inmate still is required to serve the equivalent of 15% of the imposed sentence on community supervision following release.

Specifically, Middle Ground suggests that credits become vested (*i.e.*, made permanent) one year after they have been earned. This would mean that ADOC disciplinary sanctions could forfeit up to 100% of the release credits earned in the year preceding the forfeiture action, but could not affect credits earned more than one year prior to the date of the disciplinary infraction.

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<sup>22</sup>1,922 inmates at \$55 per day for 365 days = \$ 39, 989, 400.00.

## ADDRESSING THE CRISIS THROUGH THE BOARD OF EXECUTIVE CLEMENCY:

1. **No Sunset For Board Of Executive Clemency.** The Board of Executive Clemency is scheduled for sunset in 2004. For practical and pragmatic reasons, the Board cannot be terminated, because there are inmates who are serving vast amounts of prison time on consecutive sentences from old codes which provided for parole eligibility and there must be an agency with the power to review and grant paroles. Further, there always will be prisoners who will require reprieve and other executive clemency hearings. Even further, most sentences provide for the possibility of a commutation of sentence, which requires a recommendation to the Governor by the Board. Although very few commutations are actually granted, a prisoner whose sentencing code permits application for commutation of sentence has a due process right to have available to him an administrative agency which is lawfully empowered to hear such applications and, if applicable, make recommendations to the state executive.
2. **Maintenance of Board As Independent Agency; Maintenance Of Board As Paid State Employees Rather Than As Volunteers.** It is critical that the Board of Executive Clemency remain an agency fully independent of the Department of Corrections. It is imperative that the agency have the authority to act in its “sole discretion,” as is presently codified in law. A volunteer board, as has been suggested in the past, would not serve the best interests of the state of Arizona. Board members have limited but not full immunity from decisions that are made. There is no reason to believe that community volunteers would accept the grave responsibility for critical decision\_making, including for death sentences, when they can be held partially liable for decisions. Overall, Middle Ground believes the Board possesses a reasonable record with respect to its historical decision\_making. A study should be conducted to compare the rate of return to prison by persons who have been released via decisions of the Board versus administrative decisions of the ADOC or by mandatory releases.
3. **Term Limits For Board Members; Lengthen Term To Eight Years.** There are five members of the Board of Executive Clemency. Board members serve staggered terms, to prevent the terms of all members ending simultaneously. Some Board members have had inappropriate political ties or connections to the Governor’s office and have allowed themselves to be influenced by the Governor’s staff and by their hopes for re\_appointment to another term (Board members serve staggered five\_year terms<sup>23</sup>). Middle Ground believes that the statute should be changed so that it provides for term\_limitations (one term only) for board members, but that the term be increased to eight years. If limited to just one term, board members would be far less likely to be influenced by the Governor’s office (on death penalty cases or other highly controversial decisions).
4. **Enact Legislation Authorizing Sentencing Parity Commutations.** The Legislature should authorize sentencing parity commutations for the purpose of achieving sentencing parity in the interests of fundamental justice. This would apply to offenders whose sentences were unnecessarily harsh when compared to sentences for the same or similar offenses under subsequent changes in Arizona’s criminal code.
5. **Statutory Authorization For Partial Forfeiture Of Time In Community And For Establishment Of Date For Rehearing Or Re\_Release.** The Board currently hears

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<sup>23</sup> A.R.S. § 31\_401 (A, D).

revocation cases for parole and community supervision and the inmate, if violated, will return to secure confinement for the remainder of his/her prison sentence. If serving a 1994 TIS criminal code sentence, the offender is then released into the community with absolutely no supervision. An Old code offender is released in the same fashion — *i.e.*, with no supervision if they previously were released and then the release was revoked and the prisoner served the remainder of the sentence in confinement. Community safety negatively is impacted when released offenders have no supervision at all during the transition into the community. New statutes need to be developed which provide the Board of Executive Clemency the power to partially forfeit “street time,” community supervision, and other forms of conditional release; and simultaneously consider the offender for a future supervised release into the community. The board should have the option of setting a future date for re\_release or setting a future date for a new hearing for release consideration. This would have the dual effect of reducing the amount of time that status offenders spend in secure confinement (thus saving a tremendous amount of money) and also would provide public safety controls on the still\_supervised offender.

6. Legislatively Authorize Contracts For Residential Parole Facilities. Three important purposes would be achieved by authorizing the Board to enter into contractual agreements for residential parole facilities. First, it would provide a means of serving long periods of time in the community for prisoners who function quite well within a controlled and supervised environment and who do not require the expensive, 24\_hour\_per\_day prison setting, thus making available additional beds in the prison system.<sup>24</sup> Second, it would provide a cost\_effective means of handling a category of

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<sup>24</sup>This goal has synergistic effects on other components of the correctional system. The beds that would be made available within the prison system are beds that otherwise would be occupied for many years, thus allowing the ADOC to house many prisoners over the same time period. This is a genuine and significant benefit to the state and to the prison system. The persons on parole will be able to defray the cost of supervision to a far greater extent than ordinary prisoners or parolees, and, in fact, the aggregate of the housing payments will enable the state to purchase and convert

persons subject to revocation proceedings who are awaiting a hearing to determine if they will be returned to prison.<sup>25</sup> Third, without jeopardizing public safety, such facilities could house categories of prisoners who otherwise would not achieve parole or who cannot succeed on general parole.<sup>26</sup>

1. Funding A Web Site For The Board of Executive Clemency. The board is one of only a few state government agencies which do not have a web site. If provided the funding to do so, the board could post monthly hearing calendars, answer frequently asked questions, provide the ability for applicant/families to download applications for pardon, commutation of sentence, etc., post their adopted rules and regulations, post hearing results and annual or monthly statistical reports, and provide much useful and timely information to victims of crime and others who are interested in the board's monthly

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additional facilities for use by the corrections system without burdening the State General Fund. Incidentally, there will be a contribution toward additional facilities beyond merely the aggregate housing payments, because some prisoners paroled to the residential facility will provide a source of labor for the conversion process.

<sup>25</sup>A significant percentage of persons awaiting revocation proceedings are reinstated on supervision in the community rather than returned to prison for the remainder of their sentences. For those persons who have good jobs in the community, this option will allow them to continue to work while awaiting the board's revocation/reinstatement decision. For those who constructively respond to the shock of pending re-imprisonment, it will provide an opportunity to demonstrate that they are serious about meeting their obligations and commitments prior to the revocation hearing. For those who have family emergencies or other extremely serious situations that need to be handled or cleared up prior to a return to prison, it provides a means of allowing the system to be more responsive to the realities of community life without impairing public safety. For those who previously have failed on general parole, it provides the possibility of being transferred from general parole to residential parole, an intermediate level of custody and supervision short of re-imprisonment.

<sup>26</sup>For some people, prison becomes the employer of last resort, in the sense that they simply fail to appropriately cope with unfettered community life, but flourish in a more controlled environment. They need supervision and do not possess the self-control that would enable them to remain in the community without recourse to crime. For that category of offender, prison is more like retirement on the installment plan. A residential parole facility provides a cost-effective means of effectively absorbing and socially integrating this population in a far more constructive manner.

functions. Considering the importance of the decisions that this agency makes with respect to impacting public safety in our state, there is no justifiable reason for not providing the agency the funding and staff support for developing a viable web site.

2. Transfer All State Employee Community Supervision Personnel To Board Of Executive Clemency From Department Of Corrections. The current system of having the Board of Executive Clemency make decisions on who will be paroled (for those statutorily eligible for parole pursuant to the laws in effect on the date of the offense), who will be revoked on community supervision, and who will be supervised and under what conditions makes it all the more reasonable that the Board itself should hire, train, fire, and supervise Parole/Community Supervision officers. The Board has more of a stake in seeing that its own releasees are successful, and there would be no additional cost to the state for this change to take place. The statutory authority for parole/community supervision would need to be transferred to the Board of Executive Clemency, and the present budget, infrastructure of field offices, staff, etc. would transfer to the authority of the Board.

This consolidation of all community supervision personnel would not affect the probation departments, which are staffed by county employees rather than state employees.

## PRACTICAL VICTIM RESPONSE / RESTORATION SUGGESTIONS

1. Victim Impact Programs; Victim–Offender Reconciliation Programs. ADOC rapidly should move toward institution of victim\_offender reconciliation programs within the prison system. Middle Ground Prison Reform in conjunction with We The People, a Tucson\_based victim’s rights group, made such a proposal to DOC Director Sam Lewis several years ago. We proposed two types of programs: (1) Volunteers from victim’s rights groups would conduct victim impact programs inside the prison whereby inmates who wished to attend would hear from victims about the harm that was caused as a result of the criminal act against them. The victims on these panels or presentations would not be directly associated with the crimes for which the prisoners attending such presentations were involved in; (2) On a voluntary basis for both the victim and for the offender, actual meetings between the two would be carefully arranged so that the victim could express the hurt, pain, loss, fear, and harm caused by the offender’s criminal act. If the offender agreed to participate and was judged by prison psychological staff to be serious and appropriate, he/she would then be permitted to express shame, sorrow, understanding, or nothing at all. Our research on similar programs which exists in other prisons — again, with all parties as volunteers — indicates that there is a tremendous positive impact arising from such interaction. From the victim’s perspective, a tremendous psychological weight can be lifted, in that most of the time this encounter is the first time they have been given opportunity to address their real feelings to the person who profoundly harmed them or their family. From the offender’s perspective, it is the first time that he/she is given the opportunity to be able to express understanding, empathy, to apologize, etc. to his/her victim.

## SPECIAL–CATEGORY–OFFENDER ISSUES

1. Eliminating Mandatory Consecutive Sentences For Viewing Pictures Over The Internet That Violate Child Sexual Offense Statutes. Under Arizona law, a person can be given a sentence that requires far more prison time for viewing child pornography pictures over the Internet than for brutally raping an adult woman. No one claims that the sexual

assault statutes are too lenient; which leads to the conclusion that the penalties for viewing pictures certainly is. No one disputes the claim that there is a logical link between exploiting children by taking pictures of their abuse and the images displayed on Internet web sites. Providing for punishment is appropriately within the bounds of state government; but the severity of the punishment is supposed to bear a reasonable relationship to the culpability of the individual; otherwise, we exclude essential information that directly bears simultaneously upon the individual and the crime. It provides the justice system with information necessary to accomplish the goal of fitting the punishment to the crime. Without that information, disparities emerge, just as has occurred in Arizona, where viewing pictures is punished far more harshly than physical sexual assault. Mandatory consecutive sentences (presumptive ten\_year terms for each picture, see A.R.S. § 13\_604.01(I,K)), and the resultant excessive composite sentence imposed, creates an injustice.

Not only should we alter the statute— A.R.S. § 13\_604.01 — we should provide relief for those we have unfairly treated. They should be eligible for re\_senencing pursuant to the provisions of the new statute. Re-senencing can be accomplished through either of two mechanisms First, by legislatively granting substantively vested and irrevocable good time credits calculated at a specific rate for the entire class. This "re-senencing" could be completed by providing statutory authority to the Department of Corrections to recalculate the sentence, taking into account the newly authorized earned release credits. A second option is to authorize the Board of Executive Clemency to consider persons from the class for purposes of a parity review commutation. In the past, however, parity review commutations have not been effective in providing actual relief, because they ultimately involve an often politically\_charged decision by the Governor.

The express provisions of the sentencing statute under which current prisoners are sentenced preclude pardon, parole, commutation of sentence, etc., until service of the entire sentence. This does not limit the current legislature's power to alter substantive law and impose it retroactively, so long as the law is not an *ex post facto* law. Since the proposed change would benefit those affected by it, it cannot work to their detriment by removing a prior right or imposing an increased penalty. Thus, the power of the legislature to alter the existing law as they see fit is the most fundamental of all the constitutional rights assigned to the Legislative Branch. Where two laws conflict, the Legislature may decide which prevails. The limitations on legislative action that arise out of the initiative process or directly from the language of the state constitution are not applicable here. The legislature would merely alter the wording of the statute and expressly declare its application to those sentenced under the prior versions of that particular offense.

If the parity review option is chosen, the Board of Executive Clemency could hear the cases, make general or specific recommendations to the Governor's office, and the Governor could grant or deny the commutations.

## **STATUTORY CHANGES FACILITATING RESTORATION OF AND IMPROVEMENT IN THE PERCEPTION OF INTEGRITY WITHIN THE CRIMINAL JUSTICE SYSTEM:**

Middle Ground understands that most of those who work within the criminal justice system are loathe to view it as being perceived as needing its integrity restored, because that implies that its integrity has been impaired. The suggestions presented in this section arise from the fact that it is essential for the consumers of the criminal justice system to begin once again to believe in the system if truly positive and constructive as well as cost\_effective outcomes are to be achieved. Most people would acknowledge that there are widely disparate views and perceptions of the

justice system, and the suggestions below do not assume that either extreme wholly is correct. If these changes are adopted, however, there will be a unification of purpose and an improvement in perception in terms of how the justice system is viewed by those directly affected by its operation. Commensurately, that will produce far greater success in outcomes and continue to reduce costs over time.

1. **Utilization of Court's Power to Issue Finding of Rehabilitation.** Case law as recent as 1990<sup>27</sup> has recognized a court's inherent power to issue a formal finding of rehabilitation under appropriate circumstances. The recognition of rehabilitation would assist in combating the significant effects of stigma and would facilitate job and school placement. In addition, such recognition by the court would provide "closure" for the offender and is a strong message that society accepts his/her presence as a fully integrated member of the community.

Middle Ground suggests that the legislature enact a statute which expressly authorizes a sentencing court to issue a Certificate of Rehabilitation upon application two years after the complete termination of the sentence. Whether to grant such a certificate would be at the discretion of the sentencing court.

2. **Information On Restoration Of Rights, Including The Right to Vote.** Thirty (30) days prior to the release of every prisoner from prison, jail or probation/community supervision, the supervising agency should be required to provide certain basic information in writing to the offender. Evidence of receipt of the information should be required to be placed in the court file of the offender. This information would include basic instruction in the method and qualification for restoration of one's right to vote, how to obtain a driver's license or state identification card, how to obtain a duplicate social security card, how to obtain one's birth certificate, etc. We have heard various officials of the ADOC claim that this service is already performed by parole officers when a person is supervised by their office upon release. However, our practical experience in dealing with offenders is that they do not receive such information at all. Some offenders serving time under the pre\_1994 criminal code are released directly to the community with no supervision, and that is an additional reason the prison system itself should be responsible for dissemination of such information. In the case of probation supervision, the individual probation officer could readily disseminate such information and the supervised offender would sign a form acknowledging receipt. Costs for printing and updating such information should be borne by the Arizona Supreme Court. The encouragement to offenders to fully expire their sentences and regain their civil rights — especially the right to vote in public elections — is a strong psychological message to offenders that upon completion of their punishment, they are welcome to rejoin the community to start anew.

3. **Public Service Announcements. Ex Offenders Registering To Vote:** "*Disenfranchisement is one of the great exclusions of civic life in the U.S.*"<sup>28</sup> As noted earlier, registering to vote and actually voting in public elections is a time honored way to feel truly a part of one's own government. For ex\_offenders, it is one important way to "buy into" the political system. We would like to see public service announcements by the Secretary of State, the Governor, the ADOC Director, and other prominent public officials, placing emphasis on restoration of civil rights and registering to vote. This does not require any partisan displays of loyalty. Considering the numbers of Arizonans who

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<sup>27</sup>See *State v. Buonafede*, 165 Ariz. 181 (App. 1990), 797 P. 2d 720.

<sup>28</sup>Testimony at new Jersey Assembly Supporting Assembly Bill 584 by Ludwic Blain, Director/Democracy Program/Démos, January 16, 2003.



have lost their civil rights<sup>29</sup> as a result of a felony conviction, restoration of civil rights should become a part of the public dialogue, including the process which must be completed for those who have more than one felony conviction.<sup>30</sup> “Justice for all” means that we have to open our hearts and minds to those who have made mistakes and sincerely are trying to put their lives back together.

4. Creation Of A One Stop Referral Office For Released Ex Offenders. A one stop referral office for released ex\_offenders should be established in each major city within the state. Full funding for such offices could come from the proceeds of the collect telephone system and from proceeds of the inmate commissaries and visitation\_area vending machines. This office would supplement the information for items mentioned above. Many prisoners are released into the community with nothing but the clothes they are wearing and one or two "banker boxes" of personal property. At the proposed office, blank forms could be provided for restoration of civil rights, notification of what an absolute discharge is, information and referral to various social services agencies, listings of known apartments and employers who are open to ex\_offenders. Bus tokens and limited phone cards should be provided. Job openings at various sites could be displayed. Coupons for showers at homeless shelters could be provided, as well as coupons for free meals at shelters. A prisoner without transportation, with a “gate money” check (but no cash) in his pocket, and an awkward cardboard banker box containing his worldly possessions is in no position to transport him/herself around the city to obtain such information or seek such services. If the office space in each city (minimum: Phoenix, Tucson, Flagstaff) were donated by the State, the offices could be staffed by volunteers or by members of inmate advocacy groups. In no case should the office be staffed by employees of the ADOC or any probation agency. This needs to be an office that is not connected with any component of the criminal justice system. In the early 1970's, DES offered some ex\_offender services; this could be a starting point for this idea.
5. Require Notice Of Collateral Consequences For Plea Bargains And Trials. The Arizona Supreme Court, in cooperation with the Arizona Legislature and the Governor's Office, should develop a statute and a court rule which would require notice to criminal defendants of at least some broad categories of the collateral consequences of a felony conviction.

If convicted at trial, a criminal defendant should be notified in writing of the collateral consequences of a felony conviction. If sentenced pursuant to a plea agreement, the plea bargain paperwork should include information about the collateral consequences of a felony conviction. Current law requires notification in writing of the right to seek review by direct appeal and/ or by post conviction relief. Current law also requires the court to inform a pleading defendant of whether a sentence must be served day for day or whether release credits are possible. Current law does not require notification of collateral consequences. The American Bar Association's Criminal Justice Section, chaired by a former Justice Department official, recently adopted new guidelines and

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<sup>29</sup> This number is extremely difficult to determine, but we know that approximately 14,000 felony offenders are released each year from prison; that more than 179,000 Arizonans have been sentenced to prison (overall) since prisoner numbers have been issued. In addition, at any given time, there are about 40,000 citizens convicted of felonies who are under probation supervision (both general and intensive supervision). Many of these persons represent duplicates in the numbers above. Most would agree, however, that based upon our rate/capita of incarceration, the number is large, and that it disproportionately affects ethnic and racial minority groups.

<sup>30</sup>Restoration of civil rights is automatic under Arizona law for first offenders. Restoration of civil rights does not include the right to possess a weapon, which requires a totally separate process and is applicable in only the rarest of cases.

urged that all the punishments should be codified in one place and made part of sentencing so that defendants, their lawyers and judges fully understand what is happening.

There are many collateral consequences of criminal convictions that are not spelled out at sentencing. Many such consequences do not begin or become apparent until the person is released from confinement. Most of the sanctions are imposed as a result of acts of the U.S. Congress, but they apply to all states. In 2003, as record numbers of men and women who filled prisons in the last decade are being released, the consequences of such penalties are being felt.

Such collateral consequences of felony conviction include, but are not limited to, the following:

- a. Lifetime ban on receiving welfare or food stamps for those convicted of drug felonies.<sup>31</sup>
- b. Prohibitions against getting certain jobs in education, health care and other fields. In the state of New York, there are more than 100 prohibited job categories for ex\_offenders, including plumbing, real estate, barbering, private security, etc. Arizona's ban is less severe, but does include working in security jobs, the health care field, teaching, working with children, etc.
- c. Felons with drug convictions are barred from obtaining student loans.
- d. Some incarcerated parents who do not have close relatives who will care for a child or children are forced by the courts to sever their parental relationship.
- e. Many apartment complexes will refuse to allow an ex\_felon to move into the complex, even when a spouse or family member has lawfully lived in the same complex for years prior to the ex\_offender returning home.
- f. Voting rights in some states are permanently revoked for a felony conviction. Arizona's statute (A.R.S. § 2\_904 *et seq.*) suspends voting rights upon conviction of a felony, but they are restored along with other rights (automatically for a first conviction and upon application after two years for subsequent convictions).
- g. Deportation is common after a felony conviction for aliens, even when they have children and close family ties in this country.
- h. Public housing is denied to those with a felony conviction, even when married to a spouse who lives in public housing. In Chicago, the public housing eviction law has created a group of (mostly) males who are essential nomadic because of their felony convictions. They simply have nowhere to go.
- i. If a felon has a place to live other than public housing, he cannot visit family who may live in public housing without violating criminal trespass laws.

These hidden penalties directly result from a felony conviction. Arizona defendants should be notified prior to entering a guilty plea to a felony charge of the collateral consequences of conviction for a felony, at least those collateral consequences which apply in Arizona. The cost of notifying defendants of collateral consequences would be negligible, and would provide for more fully informed decisions by defendants. Notification would merely require each county to incorporate new statutory language into the sentencing/plea bargaining scripts used by judges and into the plea agreement forms which are utilized by county attorney offices.

1. **Review And Reduce State Imposed Collateral Consequences.** In addition to the notice requirement regarding collateral consequences of a felony conviction, it is time to re\_think such penalties. The American Bar Association's Criminal Justice Section

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<sup>31</sup> Arizona has opted out of this lifetime ban.

recently adopted new guidelines suggesting that such laws need to be re\_examined. Even some conservatives have asked whether these penalties have gone too far. Anne Piehl, an associate professor of public policy at the John F. Kennedy School of Government at Harvard, said, *“These laws tend to get passed independently without considering all the consequences, so the cumulative effect is greater than what was intended.”*

Millions of Americans (and thousands of Arizonans) are affected by such collateral consequences. Thirteen million felons who are in prison or have served time live in the United States, according to an estimate by Christopher Uggen, a sociologist at the University of Minnesota. That is almost seven (7) percent of the adult population of the United States of America. In short, the law should make some allowance for demonstrated rehabilitation. In states such as Florida, where it is estimated that more than 600,000 people are permanently disenfranchised (permanently barred from voting in local, state, and national elections) due to felony convictions, the collateral consequence affects nearly one\_quarter of the state’s African\_American population.<sup>32</sup>

The Legislature should appoint a committee to study each and every law in Arizona that restricts an ex\_offender from an employment opportunity or license. While it may be perfectly obvious that a sex offender should not be permitted to work with children or be accepted into the teaching profession at all, it is not so obvious why a person convicted of, for example, a non\_violent property offense should be forever barred from teaching in an elementary or secondary school. It is possible that some statutes are outdated and others are over\_reaching. After a specified period of time following absolute discharge from a criminal conviction, it is reasonable to lift the prohibition against ex\_offenders entering certain professions or obtaining certification to engage in certain licensed professions.

The law in Arizona makes provision for “absolute discharge” from the criminal sentence. This should mean something more than merely eliminating criminal justice supervision of the offender. Punishing people forever is not in the best interests of the state. A thorough examination of the collateral consequences of a felony conviction should be undertaken by a legislative committee.

2. Modifications To "Gate Money;" Allowing Interest On Prisoner’s Mandatory Dedicated Discharge Account. Under current Arizona law, inmates are released with \$50 “gate money” from the prisoner’s “dedicated discharge account.”<sup>33</sup> The money is released in the form of a check which is difficult to cash. The money derives from a percentage of a prisoner’s wages which are steadily deducted until his “dedicated discharge account”<sup>34</sup> reaches \$50. At the time the account reaches \$50, the account is frozen. No interest is earned on the money by the prisoner, no matter how long it sits in his account. This is an absurd public policy and a blueprint for failure.<sup>35</sup> If Arizona is going to continue to incarcerate its citizens at the rate we do, it needs to accept responsibility for its part in a reasonable plan for reintegration.

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<sup>32</sup> All of the information contained in this paragraph was taken from “Freed From Prison, But Still Paying a Penalty,” The New York Times, December 29, 2002, by Fox Butterfield, page unknown.

<sup>33</sup> A.R.S. § 31\_237(A).

<sup>34</sup> A.R.S. § 31\_237(A,B).

<sup>35</sup> No one reasonably can be expected to succeed on \$50 in today’s world if one is being released to the community with no home, no job, no clothing, no food, and no prospects for the future. In California, inmates are provided \$250 in “gate money,” which at least provides a night or two in a motel and some meals.

All inmates should be permitted to earn modest interest on the monies in the dedicated discharge accounts, as well as on money held in their spendable account or retention fund.<sup>36</sup> Those serving natural life or death sentences and/or consecutive mandatory sentences in excess of 50 calendar years should be exempt from deductions from prison wages for a dedicated discharge account. This proposal would not cost the state any money since the method of achieving the additional gate money has not been changed, just the total amount before deductions are stopped. With respect to paying interest on prisoner's deposited monies and wages held in spendable or retention fund accounts, prisoners who wished to earn interest could be charged a reasonable annual or monthly fee for maintenance of such records, just as banks and savings account businesses do in the community. Middle Ground would only support an increase in the amount to be withheld for gate money if prisoners were able to earn interest on the money deposited. For prisoners who do not work or are unable to work while in prison, the gate money could come from the State's general fund, the ADOC budget, the proceeds of the inmate collect telephone system, or the proceeds from inmate stores and visitation vending machines.

3. **Release Transition Medications.** Basic needs for released offenders must include an adequate supply of prescribed transition medications. Transition to AHCCCS should occur during the final weeks of a prison sentence, especially for those taking psychotropic medications or for those who suffer from chronic disease for which medication is prescribed. Correctional Officers should be required to insure that a person assigned to their caseload has all the necessary paperwork, information, medication, property, legal releases, etc. before the person is released. CO's on vacation or sick leave must have a backup staff person who can effectively fill in, since a prisoner who reaches his release date cannot be held beyond that date without serious liability to the state and to the Department. There needs to be sufficient back pressure on the ADOC to insure that they will take care of this seemingly insignificant, but dramatically important issue. A mental health patient begins to decompensate— sometimes to serious levels — if suddenly withdrawn from powerful medication. Prisoners with chronic medical conditions such as high blood pressure, diabetes, etc., must also be assured of transition medication. Current ADOC policy provides for this transition, but in reality it is rarely accomplished.
4. **Formation Of Ex Offender Support Groups.** The community supervision or parole condition that prohibits ex\_offenders on supervision from associating with any other person under criminal justice supervision should be amended (including on all official forms) to incorporate the possibility that an ex\_offender could organize, attend, or participate in a support group composed solely of and by ex\_offenders who are struggling to “make it” upon release. Currently, ex\_offenders associate with one another at homeless shelters, at “group” therapy sessions mandated by their supervising agency, and in the performance of mandated community service projects. These same ex\_offenders are prohibited, however, from seeing or associating with each other in their own support group.

There are many volunteers in the community — including long standing successful ex\_offenders who no longer are on criminal justice supervision — who would be willing to supervise/staff such support groups and who would provide tremendous credibility for the group participants.

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<sup>36</sup> See Director's Order 905 for explanation of inmate spendable account and inmate retention funds.

5. **Establishment Of A Corrections Advisory Board Composed Of Successful Ex Offenders.** By Executive Order, the Governor's Office should establish an advisory board composed of successful ex\_offenders (selected from among those who have been discharged from a sentence for five years or more) who can serve as a volunteer advisory board with respect to "what works" (best practice) in the area of rehabilitation. In addition, the ADOC Director should utilize the same group of individuals — both males and females — to conduct panel discussions and programs inside the prisons in much the same way that victim impact panels would operate.

This corps of successfully rehabilitated ex\_offenders could discuss at schools and civic groups what really happens to a person convicted of a felony offense and what happens in the recovery/rehabilitation process. They could discuss the obstacles encountered in finding housing, jobs, etc. This would not be the failed "scared straight" programs which are often presented by angry, stereotypical, scar\_faced prisoners who are transported to schools from within a prison system. Instead, these volunteers would focus on the long\_term, life\_changing effects of even a single felony conviction on a person, and would be presented only by persons who have succeeded in the community after a term of prison. There would be no cost to the state for this program or for public service announcements or for other free advertising methods that could be utilized to disseminate the information.

6. **Creation Of A University-To-State-Agency Corp.** Legislation should be introduced which would allow graduates of sociology, social work, public administration, psychology, and criminal justice programs to have two years of student loans forgiven in exchange for two years of work in the Department of Corrections at the line staff level. This would have at least two major benefits. The ADOC would be "infiltrated" with the ideas, values, attitudes, knowledge, skills, and other benefits of recent graduates in fields which actually have a bearing on "corrections," and the graduate would benefit from forgiveness of some educational costs at the same time he/she is gaining valuable real\_world experience in a work environment directly utilizing the skills and knowledge acquired in their major fields of study. Obviously, this program would also address the serious crisis which exists within the ADOC in staff shortages. Rather than a Peace Corps, this group of individuals would be a "Corrections Corp". The idea could be expanded to provide the same educational cost\_forgiveness for students going to work for DES as well.
7. **Public Service Announcements.** The theme: "*We all win when someone succeeds in our community after prison*" should be adopted as the state government's attitude. Various public officials, beginning with the Governor, could record public service announcements that confirm the state's commitment to long\_term public safety and the cost savings associated with a significant reduction in recidivism. The messages also could encourage employers to utilize the job tax credit and the federal bonding program, in addition to giving an ex\_offender a chance. *We do* all win when an ex\_offender succeeds and does not return to criminal activity or to prison.
8. **Enact Legislation Providing For Release Of Geriatric and Seriously Ill Prisoners.** Release of geriatric and seriously ill prisoners will contribute in a disproportionate manner to cost savings, because of the combination of few numbers of prisoners affected and the cost of care that must be provided. As prisoners age, health care problems multiply, as does the demand on the limited resources of the prison health care system. By making provision for the release of these prisoners, (including conditional release<sup>37</sup>),

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<sup>37</sup>We do not suggest going to such extremes as Texas recently did when it proposed to parole offenders in a coma. Several states operate release programs for elderly or ill inmates. Arizona

the institutional health care budget dollars go farther, the risk to the community is quite reduced, and the total number of inmates affected is very small.

9. **Re-establish Halfway Houses To Facilitate Transition From Prison To The Community.** In the past, the Department operated halfway houses, but elected to close them down when mandatory sentencing for DUI offenders was passed into law. Since that time, Arizona has adopted an untransitioned release policy, whereby some prisoners are released directly into the community, sometimes in a homeless condition, and without essential transition services. These practices, like so many others of the Department, increase the risk of recidivism, which then adds to corrections costs. In fact, increases in recidivism are perhaps the single greatest factor in the states' fiscal corrections crises, as larger and larger proportions of the prison population are composed of former prisoners who have returned to prison for new offenses, in large part due to the disastrous consequences of the punishment-not-rehabilitation focus of prison systems.

## **POLICY AND MANAGEMENT CHANGES WITHIN THE DEPARTMENT OF CORRECTIONS**

When ADOC Director Dora Shriro addressed the Arizona Legislature's Alternatives To Sentencing Work Group, she emphasized her vision of a "parallel universe" within the Department, and supported it by pointing out that every aspect of corrections has to work together to accomplish positive and meaningful outcomes. She recognizes many aspects of the big picture, including the interrelationships between staff attitudes, work programs, inmate morale, incentives for good behavior, the need for effective transition programming, the deleterious effects of overcrowding, counterproductive consequences of excessively punitive and unprofessional staff conduct, etc.

The specifics of how to accomplish her goals within the Arizona prison system, however, were left uncharted. The number of times she repeated how pleased she was with what she found during her intensive schedule of visiting every institution in the ADOC suggests either that she does not recognize the disparity between her vision and the actual operational realities of ADOC institutions or that she sees the disparities but does not yet have a plan for addressing them.

This report, therefore, clusters together a number of policy and management suggestions involving the Department of Corrections in a separate section, placed after all the suggestions that deal with courts and other agencies. Some of those suggestions also require legislative action, but it is legislative action directed toward long-term reduction in the costs of corrections, rather than those which promise more rapid savings. It is hoped that those suggestions will not be given lesser consideration, because they proffer the best opportunity for truly addressing expanding costs in a world of shrinking resources.

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easily could adopt such a program. As of June 30, 2003, the Department held 715 inmates who were over the age of 60 (695 males; 20 females).

1. **Reduction In Wasteful Cost Of Excessive Re Incarceration Of Status Offenders.** During the year 2000, for example, about 1,500 offenders were returned to prison after failing on community supervision. Only 121 of those persons committed new felony crimes.<sup>38</sup> The remainder were “status offenders” who violated a rule imposed upon them due to their status as a supervised offender, but they were not charged with new crimes. These offenses would include such things as failing to report on time to a parole officer’s office, failure to timely notify a parole officer of an address change, drinking alcohol, etc. At approximately \$25,000 /year for each person in secure confinement, it seems fiscally prudent to examine how we might keep these 1,350-1,400 people from returning to expensive, secure confinement when they have not committed a new crime.
2. **Reinstatement Of Prisoner Performed Work That Does Not Compromise Security.** During previous professional prison administrations (notably, that of former Director Ellis MacDougall) many jobs inside the prison were safely and cost effectively performed by prisoners — at prisoner wages ranging from 10\_50/cents/hour. Under subsequent prison administrations (*i.e.*, that of Sam Lewis and Terry Stewart), a very large number of prisoner positions were eliminated and new state employees were hired to perform the work, at a tremendous increase in cost to the state. Because much of this work was needed on a daily and weekly basis, those employees are not available to perform other tasks. Inmates work at low cost and constitute a readily available source of labor inside the prison system. Additionally, there is far too much idleness and far too many meaningless “make work” positions. Prisoners appropriately should be utilized for many jobs which do not compromise prison safety, internal security, or confidentiality. A study should be undertaken to determine which jobs previously held by prisoners are now held by prison staff, and which of those jobs could be re\_delegated to the prisoner labor force.
3. **Expanded Use Of State Wide Trustee Work.** The use of prisoner labor (“trustees”) for unskilled labor jobs in all areas of state government should be expanded. The savings in salary and benefits alone are quite obvious. With appropriate supervision, it is possible that some jobs of a more skilled nature also could be performed by prison labor — all for the cost of approximately 50 cents/hour.
4. **Specialized Audit of Policies Of Department of Corrections.** An audit of the Department of Corrections (as well as of other applicable state agencies) should be performed to determine what cost savings would be achieved by examining the policies and practices of a particular agency as those policies relate to colorable legal claims which have succeeded in the past, but which have not resulted in corresponding system\_wide alteration of the policy or practice. For example, the ADOC leaves itself open and vulnerable to costly litigation when it could easily be avoided by strict adherence to already written, established policy.

One example occurred in Summitt v. Cenzano, et al., where a prisoner was deliberately denied food for 21 days as punishment for objecting to harassment and intimidation by prison guards. The ADOC Central Office policy was violated which prohibits using food as a reward or as a punishment for prisoners. The DOC has a written, established policy which requires that certain medical and observational procedures are to be put into place if a prisoner — for any reason or for no articulated reason at all — refuses food or

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<sup>38</sup> The Corrections Yearbook, 2001, published by the Criminal Justice Institute, Inc., Middletown, Connecticut. During 2001, there were 2,905 technical violations compared to 353 violations for new felony offenses. For 2002, the numbers were 2,764 technical violations and 335 new felonies. The figures in this footnote for 2001 and 2002 were obtained from the Arizona Department of Corrections.

does not eat for a period of 72 consecutive hours. In 1996, inmate Brent Summitt was sexually harassed by a DOC staff member as he attempted to retrieve his food tray from the cell door food trap. As a result, he refused to obey the rule which required him to sit on his bunk in order to obtain a meal. Guards refused to bring his meal tray altogether, or brought it to the door and then refused to serve it. In direct violation of written and established policy directives signed by the Director, the guards not only refused to feed Summitt for a period of about 21 days, but they did not follow the procedure which required them to place Summitt in a medical/observation cell after 72 hours, did not produce written "Incident Reports" as required by policy, and — essentially — determined on their own to punish the inmate by refusing him meals. In addition, they taunted him with inappropriate, cruel, and disgusting remarks. Summitt filed a lawsuit which, originally, was dismissed. He filed an appeal to the 9<sup>th</sup> Circuit Court of Appeals and the case was remanded to the District Court. Ultimately, he settled out of court for a reasonable sum of money considering the case. The litigation costs (for the state's attorneys, to pay the Plaintiff's attorney costs, to pay the settlement itself) could all have been avoided had the staff simply followed established policy. It is important to note that it is not so much the cost of the final settlement that should be taken into consideration, but the cost of the litigation (for attorneys on both sides) itself.

In another, even more egregious, case, Inmate Brian Stallings was forced to walk barefoot across hot blacktop pavement for a distance of many, many, yards at the Lewis Prison Complex, because he verbally challenged an out\_of\_control corrections staff member while he (Stallings) was lying on his face on the floor during a cell search. The inmate sustained second\_ and third\_ degree burns on the bottoms of both feet and permanent nerve damage. The settlement in this case was an undisclosed but quite substantial amount of money, plus the cost of defending the case up to the point of settlement.

During more than 20 years of experience dealing with questions of whether the ADOC has violated its own policies, it has become painfully clear that many DOC administrators believe that they can engage in acts which will ultimately cost the state, but which will not redound in consequences to the offending agency since they have "free lawyers" at their disposal to defend them no matter what they do. An audit should be conducted to determine which state agencies are unnecessarily creating liability for state government. At the very least, a public report should be made so that taxpayers can readily see which state agencies are the most egregious violators of rules, regulations and rights, and for what reasons.<sup>39</sup>

5. Treatment And Pre Release Programming. About 14,000 people are released from prison in Arizona each year<sup>40</sup>, and very little appropriate pre\_release planning is performed. This is especially critical and dangerous for offenders who are being released from bizarre "close\_custody" settings such as Arizona's super\_maximum facilities. It is not sufficient to provide sporadic "programming" in how to balance a checkbook or fill out a job application, especially for a person who has been confined for a long period of time. These are forward\_thinking activities which have nothing to do with addressing criminal behavior, poor attitudes, counterproductive values, or personal/social deficiencies which caused the criminal behavior in the first place. Hence, true rehabilitation must begin to be addressed when the prisoner demonstrates that

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<sup>39</sup>It should be noted that an audit will reveal the scope of fiscal irresponsibility arising from blatant violation of rights, but will not solve the problem. There must be some form of "back pressure" put on the agency, which will provide the Director of each agency with a legitimate basis for discipline of employees whose actions subject the agency to legislative sanctions or the risk of legislative sanctions. We have suggestions in this regard, as well.

<sup>40</sup>Annual Report, Arizona Department of Corrections, FY 2002.



he/she is interested and is willing to respond to authentic reintegration efforts which will maximize success. It is wasteful and counterproductive to incarcerate a person for years or decades, and then allocate the final 90 days of a sentence (or less) to “pre\_release programming.”

For those prisoners willing to participate, pre\_release preparation should begin almost from the time the prisoner commences his/her jail or prison sentence. This is consistent with the new direction asserted by Dora Shriro in her address to the legislative working group. It also is consistent with what some other states are doing in the process of addressing their own fiscal crisis and burgeoning prison systems, which have recognized that the budget crisis essentially forces states to “do better with what we’ve got.”<sup>41</sup>

6. **Removal Of Restrictions On Participation In Educational Programming.** The statute which prohibits inmates housed in SMU I or SMU II or on death row from participating in agency\_offered education programming should be repealed.<sup>42</sup> In the absence of specific disciplinary violations directly related to an abuse of the education programming opportunity, no one should be punished by restricting the right to learn and improve oneself. Preparation for successful re\_entry to the community necessarily involves improvement of ones’ skills (basic literacy, math, etc.) and improvement of one’s attitudes and outlook on society and its rules. Education is one key to this improvement. In Arizona, the individuals who perhaps need education *more than anyone else* are the very ones denied the opportunity for education. As long as a prisoner has purchased his own television, he should be permitted to access any available closed-circuit educational programming, including personal follow\_up by individual teachers/instructors. We have recently learned that the provisions of ARS 31-240 are being applied even to those prisoners at SMU I and II who have the financial means to purchase correspondence course work and educational materials from outside the prison, such as from distance-learning institutions.
7. **Classification System; Inappropriate and Detrimental Housing Assignments.** The ADOC should be required to report monthly to the legislature the number of inmates who are assigned to the super\_maximum facilities (SMU I and SMU II) for other than disciplinary reasons (example: due to lack of bed space in the appropriate location or classification level) and the number of days or months that such prisoners spend in these super-max/total lockdown facilities. The courts have held that isolation in such high security facilities is psychologically detrimental. This cannot even remotely be justified for those whose behavior did not warrant classification to such a facility in the first place.

For information about the psychological effects of SMU II example, see Comer v. Stewart, 215 F.3d 910 (9<sup>th</sup> Cir.2000), wherein a death row inmate was declared to be incapable of making an informed decision about whether to waive all appeals because, in part, of the psychological deprivations and consequences of sustained periods of time at SMU II (“...[W]e and other courts have recognized that prison conditions remarkably similar to Mr. Comer’s descriptions of his current confinement can adversely affect a person’s mental health” — Comer, at p. 916, citing other cases involving deprivation of virtually all fresh air and light, combined with continuous control by guards of lighting and involving other conditions of confinement).

See also Koch v. Lewis, U.S. District Court, Arizona Case No. CIV 90\_1872\_PHX\_ROS (JBM), wherein a non\_active, well\_behaved gang member successfully argued that his

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<sup>41</sup>Louisiana Senator Donald Cravins, quoted in the Vera Institute of Justice’s July 2003 booklet, Dollars and Sentences: Legislator’s Views on Prisons, Punishment, and the Budget Crisis, at page 5.

<sup>42</sup>A.R.S § 31\_240(B).

life\_time assignment to SMU could not be justified, absent active, disruptive gang activity (He was validated by the DOC process as a gang member, but his behavior was exemplary and he was not active in gang activity). He was ordered removed from the severe confinement at SMU II, transferred to Winslow, and now is on successful parole supervision in the community. Forty to sixty inmates in similar situations to Koch are presently litigating their placement at SMU II.

8. Reduction Of High Staff Turnover Rate. The ADOC continuously struggles with a high staff turnover rate. Even after all these years and even after the advent of a new director, the ADOC continues to assert that the primary staff turnover problem is the low wage for its line-staff employees, and the ADOC submits charts and graphs showing that correctional officers earn less than "other law enforcement officers." While increasing wages for correctional officers might result in a small reduction in the staff turnover rate,<sup>43</sup> other important factors have been concealed because they do not conform to the perceptions the ADOC seeks to convey. Exit interviews for departing employees are not conducted in such a manner as to obtain accurate and truthful information about the reasons for leaving and about the employee's actual feelings about his/her experience with the department. It has been reported to Middle Ground that in some cases, the departing employee is presented with a blank interview sheet to be signed. The employee has no idea what information was placed into the so-called "record." Exit interviews should not be conducted by any person from the ADOC or by anyone who gives the impression that retirement or other benefits could be affected by the content of the interview. In short, we believe that job conditions and supervisor attitudes play a much more significant role in the employee turnover rate than the ADOC has been willing to acknowledge to date.

#### SUGGESTIONS FOR OTHER COMPONENTS OF THE CRIMINAL JUSTICE SYSTEM:

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<sup>43</sup>Wages for correctional officers represent only one portion of the job benefits that accompany state employment. In a down turned economy, the number of workers seeking employment far exceed the available jobs. The fact is that the reputation of correctional officers (most commonly referred to as Oguards O) and the general perception of the conditions of employment work to disadvantage the Department in the recruitment process.

1. **The Legislature Must Take Steps to Ensure The Integrity of the State's Criminal History Records System.** By statute, the DPS is mandated to serve as the central repository of criminal history records and related criminal justice information for the state. The Bureau of Justice Statistics reports that Arizona is one of twelve others nationwide that contains final disposition information for less than one half of the arrests in its records.<sup>44</sup> The DPS must meet a reasonable mandated date for virtually full compliance; if not, then the repository should move to another agency.

Persons with a previous criminal record who desire to work in health care, for example, need to clear a special category fingerprint check. If the information contained in the DPS records are incorrect, for any reason, it can cause serious problems. Incomplete information simply stalls the process. Incorrect information can lead to the necessity of expending thousands of dollars to address an issue that did not exist in the first place. We are aware of a case, for example, where a defendant was charged with an open-ended felony which, upon successful completion of a period of probation, was to be dismissed. This information was contained in the written plea bargain. However, DPS only recorded the felony charge and the plea of "guilty." The court did not follow-up with final disposition of the dismissed charge, DPS has not secured the information from the court, and the record on this individual still reflects a felony conviction. The charge was made in 1996; as of 2003, the record still reflects a felony. In fact, the individual should have no felony record at all and the final disposition should show that the charge was "dismissed."<sup>45</sup>

2. The DPS needs to expedite and improve the background checks it performs. DPS background checks are used to determine if an individual should work in certain areas, for example, working with children or handling money. Many employers allow individuals to work, pending the outcome of the background check. Currently, the DPS check can take several weeks to complete. To be fair, some of the delay is at the FBI and not under the control of DPS. Nonetheless, several weeks is too long a time for a background check.
3. Over 839,000, or 46%, of individual arrest charges in Arizona's Computerized Criminal History (ACCH) database, between 1995 and 1999, lack disposition. However, DPS does not know which criminal justice agency failed to submit each disposition. Many arrest charges dating prior to 1995, as well as more recent arrests, also lack disposition. DPS does not consider a record incomplete until arrest charges are two or more years old to allow time for the charges to be resolved. In addition, over 20,000 dispositions were rejected by ACCH during fiscal year 2001 because information provided by criminal justice agencies did not meet system (computer) requirements. For example, if sentencing information for a guilty verdict is missing or a statutory violation codes does not match the violation's description, ACCH rejects the disposition altogether. To resolve these rejected dispositions, DPS needs corrected or additional information from over 300 criminal justice agencies including sheriff's offices, county attorneys, and Superior Courts.<sup>46</sup>

## **THE LARGER PICTURE**

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<sup>44</sup>See Performance Audit, Department of Public Safety, October 2001, Report No. 01-28, conducted by Arizona Auditor General's Department, p. ii.

<sup>45</sup>To protect this individual's identity, we have not recorded the details of the case number in this report. We do have the information available for verification, if necessary.

<sup>46</sup>Office of the Auditor General, Report No. 01-28, October 2001, Performance Audit, Department of Public Safety, p. 14

By now, it should be painfully clear that this document is a challenge to legislative leaders, correctional staff, as well as the citizens of Arizona to “reinvent” our correctional system as it relates to authentic rehabilitation of criminal offenders. We have challenged many conventional stereotypes and perceptions upon which most current “correctional” practice is based. There is and will be more than a little resistance to such challenge. We firmly believe that criminal offenders must fully accept personal responsibility for their own actions. However, we also believe that the agents of government who purport to be corrections experts must also live up to their responsibilities – to the public, to the victims of crime, to the offenders and their families and supporters, and – most importantly – to the future of our state.

An authentic and effective correctional system is not rocket science. It is very much grounded in common sense. What makes some of Middle Ground’s ideas seem somewhat radical is the fact that the traditional prison system has been operating for so long that it has become reified – that is, it has taken on a life of its own – and current correctional practices and social policies are accepted without questioning their validity.

In our view, there are four (4) core features of a traditional prison system: (1) the presence of three highly problematic social-psychological processes which are endemic to the prison environment which act to impede successful outcomes. These processes are institutionalization (becoming swallowed up in the routines of life as a prisoner), prisonization (losing the ability to function in a self-regulated and responsible fashion in the world beyond prison), and criminalization (becoming inducted into the criminalistic value system of the underworld of prisons); (2) the absence of a true correctional process; (3) adoption of an extremely limited agency mission; and (4) utterly inadequate handling of unmotivated offenders.

Additional features of Arizona’s prison system include: (1) an inability to handle prison gangs and institutional violence; (2) prisons located in extremely remote rural locations; (3) unprofessional management practices that drive away many qualified employees; and (4) prison policies and practices that undermine the rehabilitative activities and potential of visitors.

One of the most important aspects of an authentic correctional system necessarily involves a classification system or function which is grounded in tracking an inmate’s decision-making and actual behavior. Inmates whose desired outcomes are similar should be clustered together temporarily. Inmates who are working hard to solve their own problems (achieving their own rehabilitative goals) should be clustered together. An effective tracking system for staff decision-making and for inmate behavior is essential. The current classification system is a numbers game calculated to fill certain pre-determined and constructed bed spaces for specified periods of time, with no correlation to the achievement of collectively agreed upon goals. It is a shell game that actually undermines correctional success.

An authentic classification system must make such primary distinctions as the following:

- Is the inmate indifferent to the vicissitudes of his/her life?
- Is the inmate committed to a life of crime, or willing to work very hard to achieve agreed\_upon correctional goals?
- Is the inmate caught up in a subcultural identity and value system (such as a gang or “convict” mentality), or is he willing to make sacrifices and to accept responsibility for his/her own actions?
- Is the inmate temporarily overwhelmed and unable to participate in such fundamental decision\_making, or is he/she ready and willing to accept punishment?

It is just as important for staff to be held accountable for their level of participation and

success in correctional activity. We propose the development of a tracking system for staff decisions which would affect future individual promotion, provide information for a general corrections equation, and facilitate system management, future planning and agency projections. Inmate behavioral tracking would have implications for offender classification, and provide information for a specific, individualized, corrections equation for each offender.

One of the key aspects to developing a true correctional system is a shift from compelling prisoners to focus upon and to prioritize the needs of the institution to a focus upon responsibly solving or meeting their genuine correctional needs (this is the core of an individual corrections equation). The past and current road to the failure of so-called rehabilitational programs arises from delivering rehabilitation programs devised by self-constituted authority figures who define what the offender supposedly "needs" to work on.<sup>47</sup> Clearly, this management policy, disguised as a "program" is a means for short-staffed prison units to control yard movement and limit the activity of inmates. It has nothing whatever to do with corrections or rehabilitation. In a "parallel universe," as touted by the new DOC director, self-regulating individuals do not walk around with hall passes, as we all did when in high school., paying people to deliver these externally defined programs, funding the program by purchasing the resources that the authority figure defines as essential to successful delivery of the program. This is a fiscal failure, especially, because one could pour the equivalent of the national debt into such an approach and the end result would be much the same as what we already have.

It is not the purpose of this report to re-define the institution of corrections, but it certainly is appropriate to inform the legislature that new, creative, sound, safe, and effective ideas are available to anyone interested enough to consult with Middle Ground about options that go beyond the current superficial and ineffective programs of the past.

External to the prison system, it is obvious that problems need to be caught early and dealt with effectively and constructively. Hence, we strongly support efforts to re-vamp the social service/welfare and child advocacy systems in Arizona. As everyone presumably agrees, diverting

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<sup>47</sup>The Department of Corrections Annual Report, FY 2002, at page 16, provides a precise example of the claim we are making. In a program called "Inmate Program Plan (IPP)," – touted by the Department as "the most comprehensive inmate management strategy anywhere in this nation," the program evaluation demonstrates "maximized use of the Department's available resources," "enhancing the safety of staff," "reducing the number of major inmate disciplinary violations," and "increasing inmate accountability," as the program's major success points. Under the guidelines of the IPP, an inmate is assigned a Correctional Officer III within three days of his/her arrival in prison. It should be noted that this early time of entry into the prison system for all but the most hardened convicts is known as the "screaming entries," and is not generally accepted as a time when rational thought or reasonable decision-making – especially for the long term – can be expected to be made by an inmate. The CO III and the inmate "discuss the inmate's file and compose a plan for the inmate's time while incarcerated."

It is ironic to Middle Ground that at the same time a newly-arrived inmate is being administered psychological tests to determine his mental health status, he is at the same time assisting to "compose" a plan with his assigned CPO III for his use of time while in prison.

The Annual Report further states, "A committee of prison officials who determine (emphasis added) the inmate's educational, vocational, substance treatment and work programming needs then assesses the plan. The committee matches the needs of inmates to the best suitable classes, jobs and programs that are available within the prison." Computerized passes are then issued to an inmate for all of his/her movements throughout the day.

There is no discussion of the rehabilitational effects of having someone pre-determine the inmate's 24-hour/day schedule. Logic would tell us that the Department is fooling itself into believing that it can control the thought processes of an inmate, the behavioral patterns, and control his sleep or even his use of private cell time – which amounts to a significant number of hours in closed custody units.

cases from the criminal justice system altogether, via appropriate and effective interventions before the problems become crimes, is an ideal situation.

To that end, we must identify many of the ways in which our formal institutions function at odds with each other, thus neutralizing the effects we hoped to achieve and, in the process, consuming massive amounts of resources without producing any pragmatic results. We then must re-examine those activities and redirect the resources that are counterproductively expended, even where such redirection causes temporary disruption and dislocation. It will not be long before the results arising from the redirected resources will far outweigh the difficulties associated with the re-allocation. Such redirection must be thoughtful, for what seems at first to be obvious ways of proceeding are the very ways that brought us to where we are today, faced with an impasse in every direction, and not having extra resources to expend to solve our problems. In short, it is money wisely and more effectively spent to invest in genuinely adequate child care resources, appropriate parenting skills training and assistance for those in crisis, after-school programs and effective interventions targeted to at-risk youth. These are, realistically, crime prevention activities.

Getting tough might have worked as a temporary measure, but its end result has been a dramatic rise in recidivism rates, and in prison populations in general, that threatens the very foundations of our economy, robbing vital education and social services in order to fill the prison-budget coffers. We are submitting to you a report which contains dozens of suggestions for ameliorating the current crisis and producing a less inequitable criminal justice system. However, without fully addressing the underlying causes of the problems you are dealing with, what it will do is buy time.

On the other hand, sensible, reasonable, productive ways that take into account all of the various perspectives and resolve the conflicts with an eye toward the goal of long term public safety will demonstrate a level of commitment and leadership befitting the positions of trust you hold as legislators. In our view, the vested interests of the current conglomeration we refer to as the criminal justice system will resist changes in their turf boundaries, their budgets, their allegiances, and their ability to talk and act  tough on crime.

Better than almost anyone, prisoners and their families know that there are individuals who are truly violent, scary people, dangerous to those close to them and more dangerous to those more socially distant. Targeting serious, dangerous and repetitive offenders remains a legitimate goal. But even during the most conservative political times we still have a system which permits many of even these offenders to eventually be released from prison. At the prison gate, we overtly deliver the message that society has turned away from them, we alienate them from community values, harden them by their experiences, producing resentment toward an uncaring and unreasonable system that treats nearly all people who commit crimes as though they are vicious criminals dedicated to the overall destruction of our society as a whole.

That simply is not true. Many of the people in prisons today can be successfully "corrected" and returned to society without a high probability of recidivism, but not by the current programs, methods and policies of the Department of Corrections. If they could do it, they's have done it by now. They can't, and everyone needs to recognize this truth, because only then will a light develop out of events by which Arizona can move toward and into a more effective and responsible correctional system.

The reality that Arizona now begins to face is one more version of the same reality that is spreading across the nation. The economy is sinking and the so-called "signs of recovery" are more wishful thinking than accurate analysis. Along with worsening economies come rising crime rates. Sociology may not tell us many things that truly help us come to grips with the big picture, but one of the things it does tell us is that there is a genuine link between the state of the economy

**and the rate of crime. The better the economy, the lower the crime rate, and the longer the economy stays good, the lower the crime rate. Unfortunately for everyone, the opposite is also true.**

**We cannot continue with the way we've approached crime control in the past, because it wasn't effective then and now we are faced with the truly daunting fact that it's going to get worse – much worse – and get worse much faster than we are prepared for.**

**The prison system is also in the same fix. Arizona's new prison director will not say so, but the underlying reality is that prison officials have lost control of the prison system. They have the position, the power, the numbers, the money, and the coercive mechanisms, but with every day that passes, the situation deepens. Arizona's prison system is now characterized by a truly pervasive us-versus-them attitude that worsens every inherent problem. When prisoners are viewed as the enemy by the people who supposedly control the prison system, and when prisoners view the controllers as their enemy, then we are at war with ourselves.**

**More and more energy is required to hold the opposing forces in a state of equilibrium, and that is what consumes budgets and resources without producing any positive outcome. More prisons, more beds, more staff, more expense put into internal prison systems (mail, property, classification, discipline, grievances, meals, clothing, activities, maintenance, and on and on). The system's resources are consumed by activities which are undertaken for the purpose of preventing the emergence of what is seen as even worse outcomes. The end result is a sterile environment where lip service is paid to goals which no one really believes can be achieved, and the longer this goes on, the more dangerous the whole becomes. It is a bomb with an unstable equilibrium and an unpredictable set of triggers.**

**The current system tends to create and sustain an ever-growing population that is not committed to common goals and that actually threatens the stability, security, and tranquility of the larger community. Unfortunately, recognition alone is insufficient to provide a realistic and pragmatic solution. We need to break the cycle of alienation that shifts larger and larger numbers of citizens from core values of civilization toward values characterized by individual gain at the expense of others, but bemoaning a problem does not produce a solution.**

**It is difficult to say in just a few final words, but what we must do is insure that every dollar we spend in all the components of the criminal justice system have to work in a highly-interactive way, all directed toward the achievement of a single goal. The goal? The fostering and development of a self-regulating individual who will join or live in society and function in a way that is compatible with common societal goals.**

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## **SYNOPSIS OF SUGGESTIONS CONTAINED IN REPORT**

### **COURT AND SENTENCING-RELATED SUGGESTIONS THAT SIMULTANEOUSLY ADDRESS THE STATE'S FISCAL CRISIS, THE PRISON OVERCROWDING CRISIS, AND FUNDAMENTAL IMPROVEMENT IN THE CRIMINAL JUSTICE SYSTEM**

- 1. adult Make legislative change in the process for referring juveniles to court (page 5).**
- 2. Authorize the use of home arrest with electronic monitoring as a true alternative to incarceration (page 6).**
- 3. Re-examine all Class 6 felonies to determine which might be appropriate for designation as Class 1 misdemeanors (page 6).**
- 4. Give more discretion to Judges in determining consecutive vs. concurrent sentences (page 7).**
- 5. Increase the amount of earned release credits prisoners may earn during incarceration; no relief for violent and repetitive offenders (page 7).**
- 6. Authorize Judges to provide sentencing credit for up to one-half the amount of time spent on probation for offenders who are violated and sent to prison (page 9).**
- 7. Authorize the ADOC to award sentencing time credit for up to one quarter of the time served on probation prior to being violated and resentenced to prison, for those currently in prison on probation violations (page 10).**
- 8. Alter the statutes governing enhancement of sentences based on prior convictions (page 10).**
- 9. Make changes in the statute governing "excessive sentence" relief (which provides for referral for commutation of sentence) (page 11).**
- 10. Make changes to Arizona's felony murder statute (page 12).**
- 11. Make statutory provision to provide for review every two-years of those on probation supervision (for ordinary cases) and review every ten-years for those on lifetime probation (page 13).**
- 12. Enact legislation to provide for fiscal truth-in-sentencing (page 14).**
- 13. Enact legislation providing penalties to counties who exceed**

established quotas for referral of offenders to state prison (page 14).

#### **ADDRESSING THE FISCAL CRISIS AND THE OVERCROWDING CRISIS FROM WITHIN THE DEPARTMENT OF CORRECTIONS**

14. **Expand the use of International Treaty Transfer of Foreign National prisoners to their home countries to relieve overcrowding (page 14).**
15. **Re-authorize emergency release statutes in place during 1978 criminal code, which are utilized when prison capacity reaches 95% (page 15).**
16. **Impose limitations on the Department of Corrections' ability to forfeit earned released credits of a prisoner who commits a disciplinary infraction (page 16).**

#### **ADDRESSING THE FISCAL CRISIS THROUGH THE BOARD OF EXECUTIVE CLEMENCY**

17. **Maintain the Board of Executive Clemency as an independent agency with sole discretion for decision-making; keep board members as state workers, not volunteers (page 17).**
18. **Limit Board members to one eight-year term (page 18).**
19. **Enact legislation authorizing sentencing parity commutations (page 18).**
20. **Provide to the Board of Executive Clemency the statutory power to partially forfeit community supervision or parole and to establish dates for rehearing offenders who are revoked (page 18).**
21. **Legislatively authorize ability to contract for residential parole facilities (page 18).**
22. **Transfer supervision of all parole and community supervision functions from the Department of Corrections to the Board of Executive Clemency (page 19).**

#### **PRACTICAL VICTIM RESPONSE/RESTORATION SUGGESTIONS**

23. **Mandate by statute that victim impact and victim-reconciliation programs must be offered and facilitated within the Department of Corrections (page 19).**

#### **SPECIAL-CATEGORY OFFENDER ISSUES**

24. **Eliminate mandatory consecutive sentences for viewing pictures over the Internet that violate child sexual offense statutes – punishment for this crime is more harsh than actual physical abuse of a child (page 20).**

**STATUTORY CHANGES FACILITATING  
RESTORATION OF AND IMPROVEMENT IN  
THE PERCEPTION OF INTEGRITY WITHIN  
THE CRIMINAL JUSTICE SYSTEM**

25. **Utilize the sentencing court’s power to issue a finding of rehabilitation two years after an offender fully completes all terms of a sentence (page 21).**
26. **Mandate that the ADOC provide information to released offenders regarding restoration of civil rights, including the right to vote (page 21).**
27. **Authorize a one-stop referral office in each major city (Tucson, Flagstaff and Phoenix) for released offenders to facilitate re-entry into the community (page 22).**
28. **Require the courts to notify defendants of possible collateral consequences of a plea bargain entry of guilt, or require courts to notify defendants of collateral consequences of a conviction after trial (page 23).**
29. **Review statutory collateral consequences of felony convictions which prohibit ex-offender employment opportunities and licensing (page 24).**
30. **Modify statute governing "gate money" which provides for \$50 from a dedicated discharge account to be given to a released prisoner (page 24).**
31. **Examine the ADOC’s track record with respect to providing transition medications – especially mental health medications – to released offenders (page 25).**
32. **Require the ADOC to allow released offenders to organize and/or participate in ex-offender support groups, facilitated by volunteers in the community who are successful ex-offenders (page 25).**
33. **Establish a Corrections Advisory Board consisting of successful ex\_offenders (those who have been fully discharged from a sentence for five years or more who have been fully rehabilitated (page 26).**
34. **In order to deal with ADOC staff shortages, legislatively authorize forgiveness of student loans (for up to two years) for recent college graduates in the fields of sociology, social work, public administration, criminal justice and psychology who will work for two years in the prison system (page 26).**

35. **Enact legislation which provides for release of geriatric and seriously ill prisoners (page 26).**
  36. **Re-establish state operated halfway houses to facilitate transition from prison to community (page 27).**
- POLICY AND MANAGEMENT CHANGES WITHIN  
THE DEPARTMENT OF CORRECTIONS**
37. **Reinstate prisoner job opportunities that do not compromise security or confidentiality which are currently held by much higher paid state employees (page 28).**
  38. **Expand the use of state-wide trustee work by prisoners (page 28).**
  39. **Perform specialized audit of ADOC (and other applicable state agencies) to see how much money is spent to defend and pay settlements on lawsuits that could have been avoided (page 28).**
  40. **Expand pre-release programming, and mandate it for those confined in and about-to-be-released from supermax facilities (page 29).**
  41. **Remove the statutory restrictions on prisoners housed at supermax facilities from participating in educational programming (page 29).**
  42. **Require reports from the ADOC regarding housing assignments within ADOC compared to classification levels (page 30).**
  43. **Examine the ADOC's method of conducting exit interviews for departing staff to insure accuracy of comments on reasons for leaving the agency; prohibit implication that retirement benefits are tied to 'correct' answers (page 31).**

**SUGGESTIONS FOR OTHER COMPONENTS OF  
THE CRIMINAL JUSTICE SYSTEM**

44. **Provide resources to DPS to deal with the thousands of cases where criminal history records/dispositions are not complete (page 31).**