COLORADO CRIMINAL JUSTICE REFORM COALITION

HARM REDUCTION ACTION CENTER

Special Brief
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Fentanyl in Colorado

Overview and recommendations for addressing the overdose crisis

Fentanyl overdose deaths have dramatically increased across the U.S. since 2014, including in Colorado. As state lawmakers work to address the crisis, the public dialogue in the Capitol and the media has revealed a significant level of misunderstanding about fentanyl, the causes of the recent increase in overdose deaths, and how to effectively respond to it. Most concerningly, some have proposed reverting to failed drug policies of the past that had little to no success of preventing overdoses, reducing drug use, disrupting the drug supply, or preventing additional harms. This brief illustrates how Colorado got here and what it can do to address this public health emergency.

What is fentanyl?

Fentanyl is a synthetic opioid 50 times more potent than heroin.[1] It was approved by the Food and Drug Administration in 1968 and is used as pain medication and anesthesia.[2]

According to a report from the U.S. Commission on Combating Synthetic Opioid Trafficking, "The rise in illicit fentanyl and other synthetic opioid misuse and related deaths has its origins in the U.S. Food and Drug Administration's approval of the prescription opioid painkiller OxyContin in 1995. Since then, the number of fatal drug overdoses has steadily climbed. OxyContin and other prescription opioids were falsely marketed as an easy, nonaddictive fix for pain without an appreciation of the patient's other conditions, such as depression, trauma, and anxiety, which could drive the drug's misuse."[3]

In 2008, Colorado enacted legislation to create a prescription drug monitoring program (PDMP) to combat over-prescribing and "doctor shopping" and help reduce the misuse, abuse, and diversion of prescription drugs. In 2014, the state approved legislation requiring every practitioner and pharmacist permitted to prescribe controlled substances to participate in the PDMP.[4] As prescribing habits changed, the opioid dispensing rate in Colorado declined dramatically, from 73.5 (per 100 people) in 2012 to 37.5 in 2020.[5]

People who were unable to continue obtaining prescriptions for opioid drugs often turned to heroin, then to fentanyl as synthetic drugs became more available. Fentanyl potency is extremely unpredictable, with a rapid onset of effect and a quick duration of action, meaning its effects are felt quickly and do not last very long (about 30–60 minutes).[6] As a result, people consume it multiple times a day to stave off withdrawal symptoms.

While some use fentanyl intentionally, many individuals consume it unknowingly because it is intentionally or unintentionally present in other products. Reports of heroin adulterated with fentanyl began increasing in the U.S. around 2014, especially on the East Coast. It is also found in methamphetamine and cocaine or pressed into pill-form and made to resemble prescription drugs, which are often known as the "blues." Fentanyl testing strips can detect the presence of fentanyl in a pill or other substance, but they do not indicate how much fentanyl is present.

Fentanyl was immediately identified as a causal factor in increasing overdose death rates across the nation. Overdose deaths in Colorado have been increasing since 1999 and began to sharply increase in 2016 due to the growing availability of synthetic opioids.[7] The illegal drug market, both in the U.S. and around the world, is moving away from products produced from plant sources, such as heroin and cocaine, and toward products wholly produced within labs, such as fentanyl.[8] Synthetic drugs are cheaper and easier to produce than heroin and therefore much more profitable for manufacturers.[9] Most illicit fentanyl is manufactured in China and India and brought into the U.S. from Mexico, but importation via U.S. mail and private delivery have increased along with direct sales through the internet (specifically the dark web).[10] This shift in the drug supply is not only impacting people who are dependent on or addicted to drugs, but also casual and novice users, who are also at risk of overdose.

Do states that classify drug possession as a misdemeanor have higher rates of overdose deaths than states that classify possession as a felony?

No. There is no correlation between drug overdose deaths and the severity of penalties for simple possession. Overdose death rates have risen throughout the country in recent years, including in states where simple possession is a felony.

In 2019, Colorado enacted HB19-1263, making possession of up to 4 grams of drugs a misdemeanor for the first three convictions. A fourth conviction for simple possession, or any conviction for possession of more than 4 grams, remained a felony, even if there was no indication of intent to distribute. Under Colorado drug laws, the weight of a controlled substance includes any compound or mixture it is combined with. Controlled substances found in Colorado are rarely pure and usually include other substances.

Some politicians and commentators have claimed HB19-1263 created or worsened the overdose crisis in Colorado, but the state's overdose death rate began rising in 1999 and started to spike in 2016, when simple drug possession was still a felony (see Figure 1). HB19-1263 did not go into effect until March 2020.

Figure 1. Colorado Overdose Death Rate by Year, 2000–2020

Age-adjusted rate (per 100,000)

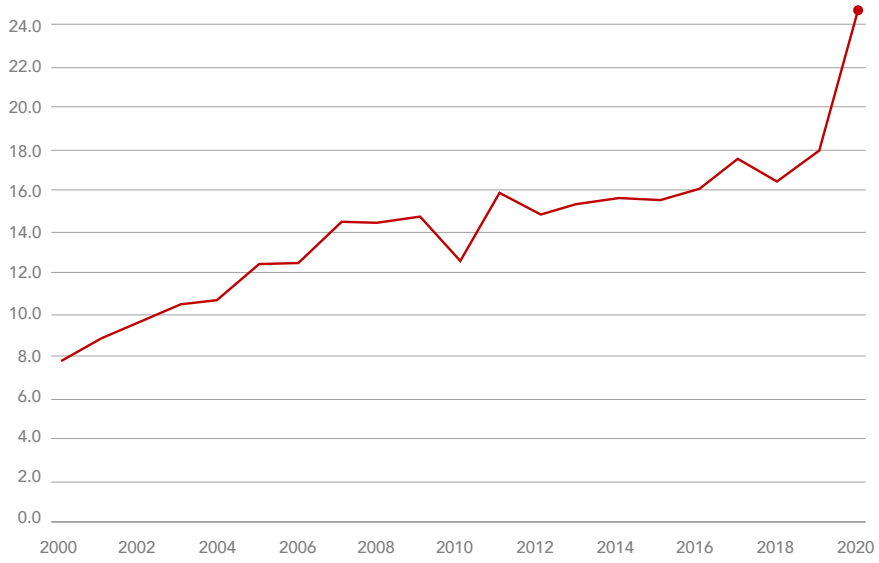

Chart: Colorado Health Institute • Source: Colorado Department of Public Health and Environment

Colorado had the 29th-highest rate of overdose deaths in 2020, according to the Centers for Disease Control and Prevention, and most of the states with higher overdose rates have felony penalties for simple possession (see Table 1).

Table 1. State Drug Possession Penalties and Overdose Death Rates in 2020

Age-adjusted overdose death rates (per 100,000)

F = Felony M = Misdemeanor CV = Civil Violation

Rank	State	Penalty	Rate	Rank	State	Penalty	Rate	Rank	State	Penalty	Rate
1	West Virginia	M	81.4	18	Vermont	M	32.9	35	Utah	M	20.5
2	Kentucky	F	49.2	19	Missouri	F	32.1	36	Oklahoma	M	19.4
3	Delaware	M	47.3	20	New Jersey	F	32.1	37	Arkansas	F	19.1
4	Ohio	F	47.2	21	North Carolina	F	30.9	38	Minnesota	M	19.0
5	Tennessee	M	45.6	22	New Hampshire	F	30.3	39	Oregon	CV	18.7
6	Maryland	M	44.6	23	Michigan	F	28.6	40	Hawaii	F	18.3
7	Louisiana	F	42.7	24	Illinois	F	28.1	41	Georgia	F	18.0
8	Pennsylvania	M	42.4	25	Wisconsin	F	27.7	42	Kansas	F	17.4
9	Maine	M	39.7	26	Virginia	F	26.6	43	Wyoming	M	17.4
10	Connecticut	M	39.1	27	Nevada	F	26.0	44	Idaho	F	15.9
11	New Mexico	F	39.0	28	New York	M	25.4	45	Montana	F	15.6
12	Rhode Island	M	38.2	**29**	**Colorado**	**M**	**24.9**	46	North Dakota	M	15.6
13	Indiana	F	36.7	30	Alabama	F	22.3	47	Iowa	M	14.3
14	Arizona	F	35.8	31	Alaska	M	22.0	48	Texas	F	14.1
15	Florida	F	35.0	32	Washington	M	22.0	49	Nebraska	F	11.3
16	South Carolina	M	34.9	33	California	M	21.8	50	South Dakota	F	10.3
17	Massachusetts	M	33.9	34	Mississippi	M	21.1				

Source: Centers for Disease Control and Prevention

Colorado's increase in overdose deaths stems from the flood of prescription opioids in the 1990s and 2000s, followed by a reduction of opioid prescriptions that pivoted people towards using heroin and other unregulated drugs. Overdose deaths began rising faster in 2016 with the growing availability of powerful synthetic opioids, and the Colorado Health Institute attributes the particularly sharp rise in overdose deaths in 2020 to the COVID-19 pandemic, which resulted in social isolation, a pandemic-induced recession, and changes to care delivery that had an "unprecedented impact on substance use and on treatment and support options."[11] Using drugs alone is one of the biggest risk factors for experiencing a lethal overdose.

Other factors that have contributed to the rise of overdose deaths include poly-drug use (the use of two or more substances at once); significant lack of access to prevention, recovery, and addiction treatment services; and the continued criminalization, stigma and shame associated with drug use.

Will creating a new law for drug induced homicide (DIH) reduce overdose deaths?

No. There is no systematic empirical evidence that DIH prosecutions slow the sale of illegal drugs, according to the Northeastern University School of Law's Health in Justice Action Lab. "DIH prosecutions discourage witnesses to overdoses from calling 9-1-1 for fear that they will be arrested and charged with DIH or other serious crimes." Research also indicates that prosecutions do not typically target major drug traffickers, despite this being the stated purpose of DIH laws. Instead, the majority of DIH cases involve people who are using drugs together or who are selling or trading drugs to support an addiction. As such, they lead to friends and family members who know and love the person who died to be prosecuted and sent to prison for many years.

Will increasing criminal penalties for fentanyl distribution reduce the supply of fentanyl in the community?

No. Incarcerating drug dealers has little or no impact on disrupting drug supplies because the drug market is dynamic. It responds to the demand for drugs by replacing imprisoned sellers with either new recruits or increased drug selling by existing dealers, which is known as the "replacement effect."[12]

There may be other outcomes that justify revising drug distribution laws, including better integration of fentanyl into the drug sentencing grid or holding dealers accountable, but the past 50 years of drug war policies have clearly demonstrated they will not reduce drug supplies.

Increasing criminal penalties is often proposed as a way of getting to major drug dealers. However, the majority of drug arrests and criminal cases filed in Colorado are for simple possession and low-level distribution. From January 2020–January 2022, more than 31,000 drug cases in Colorado were filed against low-income people who were represented by the State Public Defender's Office. Of those case, 75% were for simple drug possession or sharing drugs for personal use. Only 9% were for low-level dealing, 9% for mid-level dealing, and 6% for high-level dealing.[13]

Public health strategies will save lives from overdose

The most effective ways to address the overdose crisis are evidence-based public health and harm reduction strategies that keep people alive and maximize their potential for recovery. Such efforts warrant substantial investment, particularly in underserved communities of color that are experiencing higher rates of overdose deaths. Specifically, we recommend the following:

- Increase access to Naloxone, which reverses opioid overdoses and saves lives.
    - Expand the number and type of entities that are eligible to access standing orders for Naloxone to include high schools, colleges, universities, libraries, and community service organizations.
    - Install Naloxone vending machines where high-risk populations may gather, such as homeless shelters, prison/jail, addiction treatment clinics, schools.
- Strategically focus federal stimulus dollars towards drug prevention, harm reduction, treatment, and recovery services that have been proven to save people's lives, including treatment on demand.
    - Create a grant program for nuanced community-based public education and outreach that targets specific populations and develops community-based responses for increasing awareness and understanding of: (1) synthetic opioids and the risk of overdose; (2) the signs of overdose and the benefits of Naloxone and testing strips; and (3) the Good Samaritan laws.
    - Increase telehealth access for treatment services, including Medication Assisted Treatment (MAT) in rural areas.

    - Increase and incentivize the number of MAT providers who are trained to induct someone who has been using fentanyl.
    - Innovate and tailor new models for medical withdrawal management that are specific to synthetic opioids.
    - Expand and allow treatment providers more options that focus on stabilization of a person rather than abstinence as being the only approach to someone "successfully" completing treatment.
    - Increase statewide availability of Housing First programs that provide or allow MAT inductions to occur on site.
    - Expand MAT in jails and prisons and require jails and prisons to have withdrawal protocols for opioid dependence. People who recently were released from incarceration are over 40 times more likely to die from an opioid overdose.[14]

- Expand the Good Samaritan law to include the crime of "drug sharing."
    - It is important to understand that in most cases the "first responders" in an overdose crisis are not the police or EMTs, but the people with the person who experiencing an overdose. Good Samaritan laws, also known as "Good Sam laws," have been enacted in 48 states and Washington D.C. to encourage people to call 9-1-1 when someone they are with is experiencing an overdose.[15] Colorado's Good Sam law (C.R.S. 18-1-711) was enacted in 2012. It provides a person with immunity from arrest and prosecution for drug use and simple drug possession if the offense arises from the events of the overdose, the person acts in good faith in reporting the overdose to emergency responders, identifies themselves, and remains with the overdosing person until help arrives.
- Increase the number of harm reduction organizations and mobile outreach services with syringe access and engagement with people who use drugs.
- Make fentanyl testing strips and other drug-checking resources easily attainable, so people can test drugs for the presence of fentanyl.
- Support realistic, evidence-based programs to educate teens about drugs and harm reduction.
    - Teach students how to recognize and respond to an overdose, including how to administer Naloxone.
- Honor Colorado's home rule status and local control by allowing overdose prevention sites in communities that want them.
- Support a group of medical and harm reduction experts to develop recommendations for how local communities could enact "safe supply" strategies similar to those that have been successful in other countries.

Endnotes

[1] Centers for Disease Control and Prevention, "Fentanyl Facts," webpage, last reviewed February 2022.

[2] Stanley, Theodore H., "The Fentanyl Story," *The Journal of Pain*, Vol. 15, No. 12, December 2014.

[3] U.S. Commission on Combating Synthetic Opioid Trafficking, *Final Report*, February 8, 2022.

[4] Colorado Office of the State Auditor, *Colorado Prescription Drug Monitoring Program Performance Audit*, March 2021.

[5] Centers for Disease Control and Prevention, "U.S. Opioid Dispensing Rate Maps," webpage, last reviewed February 2022.

[6] United Nations Office on Drugs and Crime. *Recommended methods for the Identification and Analysis of Fentanyl and its Analogues in Biological Specimens*, 2017.

[7] Colorado Department of Public Health and Environment, "Drug Overdose Deaths in Colorado: Final Data for 2010-2020," *HealthWatch*, No. 118, January 2022.

[8] U.S. Commission on Combating Synthetic Opioid Trafficking, *Final Report*, February 8, 2022.

[9] Ibid.

[10] Ibid.

[11] Colorado Health Institute, "A Parallel Epidemic: More Overdose Deaths in 2020, Fentanyl Fatalities Spike," webpage, last reviewed March 2022.

[12] Pryzbiliski, Roger K., *Correctional and Sentencing Reform for Drug Offenders: Research Findings on Selected Key Issues*, prepared for the Colorado Commission on Criminal and Juvenile Justice, September 2009.

[13] Office of the Colorado State Public Defender, data provided February 2022.

[14] Ranapurwala et al., "Opioid Overdose Mortality Among Former North Carolina inmates: 2000-2015," *American Journal of Public Health*, Vol. 108, No. 9, September 1, 2018, retrieved from Prison Policy Initiative webpage, last reviewed February 2022.

[15] U.S. Government Accountability Office, *Drug Misuse: Most States Have Good Samaritan Laws and Research Indicates They May Have Positive Effects*, March 29, 2021.

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