(A) A class 1 misdemeanor; or

(B) A class 5 felony, if the violation is committed subsequent to any prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I), (II), or (III) of this paragraph (a) or this subparagraph (IV) applies or would apply if convicted in this state.

(b) Repealed.

(2.1) Repealed.

(2.3) (a) Any person who commits the offense of possession in violation of the provisions of subsection (1) of this section by possessing any material, compound, mixture, or preparation, weighing one gram or less that contains any quantity of a controlled substance listed in schedules I through IV of part 2 of this article commits:

(I) A class 6 felony; or

(II) A class 4 felony, if the violation is committed subsequent to any prior conviction under subparagraph (I), (II), or (III) of paragraph (a) of subsection (2) of this section or under this subsection (2.3).

(b) Repealed.

(2.5) (a) Notwithstanding the provisions of subparagraph (III) of paragraph (a) of subsection (2) of this section, a person who violates the provisions of subsection (1) of this section with regard to flunitrazepam commits a class 3 felony; except that the person commits a class 2 felony if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation involving flunitrazepam or to which subparagraph (I) of paragraph (a) of subsection (2) of this section applies or would apply if convicted in this state.

(b) Any person convicted of violating the provisions of subsection (1) of this section with regard to flunitrazepam shall be subject to the mandatory sentencing provisions of subsection (3) of this section.

(c) Repealed.

(2.6) Repealed.

(3) (a) Unless a greater sentence is required pursuant to the provisions of another statute, any person convicted pursuant to subparagraph (I) of paragraph (a) of subsection (2) of this section for knowingly manufacturing, dispensing, selling, distributing, possessing, or possessing with intent to manufacture, dispense, sell, or distribute, or inducing, attempting to induce, or conspiring with one or more other persons, to manufacture, dispense, sell, distribute, possess, or possess with intent to manufacture, dispense, sell, or distribute an amount that is or has been represented to be:

(I) At least twenty-five grams or one ounce but less than four hundred fifty grams of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for at least the minimum term of incarceration in the presumptive range provided for such offense in section 18-1.3-401 (1)

(a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for at least the minimum term of incarceration in the presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute;

(II) At least four hundred fifty grams or one pound but less than one thousand grams of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for a term of at least the midpoint of the presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for a term of at least the midpoint of the presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute;

(III) One thousand grams or one kilogram or more of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for a term greater than the maximum presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for a term greater than the maximum presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute.

(b) In addition to any other penalty imposed under this subsection (3), upon conviction, a person who violates this subsection (3) shall be fined not less than one thousand dollars but not more than five hundred thousand dollars. For offenses committed on or after July 1, 1985, the fine shall be in an amount within the presumptive range set out in section 18-1.3-401 (1) (a) (III).

(3.5) The felony offense of unlawfully manufacturing, dispensing, selling, distributing, or possessing with intent to unlawfully manufacture, dispense, sell, or distribute a controlled substance is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(4) Repealed.

(5) When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, or flunitrazepam, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, and the aggregate amount of the schedule I or schedule II controlled substance or flunitrazepam involved equals or exceeds twenty-five grams, the defendant shall be sentenced pursuant to the mandatory sentencing requirements specified in subsection (3) of this section.

(6) Repealed.

Source: L. 92: Entire article R&RE, p. 356, § 1, effective July 1. **L. 93:** (4) amended, p. 972, § 2, effective

July 1. **L. 94:** (2)(a)(I) and (4)(a) amended, p. 1723, § 24, effective July 1. **L. 97:** (2)(a)(I) and (3)(a) amended and (4) repealed, pp. 1542, 1543, §§ 9,10, effective July 1. **L. 98:** (5) amended and (6) added, pp. 1443, 1435, §§ 30, 5, effective July 1. **L. 99:** (2.5) added and (5) amended, pp. 795, 796, §§ 6, 8, effective July 1. **L. 2000:** (6) amended, p. 1360, § 42, effective July 1, 2001. **L. 2002:** (1)(a) amended, p. 1270, § 1, effective July 1; (2)(a)(II), (2)(b)(II), (2)(c)(II), (2)(d)(II), (2.5)(a), and (6) amended, pp. 1579, 1583, §§ 4, 13, effective July 1; (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b) amended, p. 1518, § 212, effective October 1. **L. 2003:** IP(3)(a) amended, p. 1424, § 2, effective April 29; (2), (2.5), and IP(3)(a) amended and (2.1), (2.3), and (2.6) added, p. 2682, § 3, effective July 1. **L. 2004:** (3)(a) amended and (3.5) added, p. 636, § 12, effective August 4. **L. 2007:** (2)(b), (2.1), (2.3)(b), (2.5)(c), and (2.6) repealed, p. 1689, § 10, effective July 1. **L. 2009:** (6) repealed, (HB 09-1266), ch. 347, p. 1815, § 5, effective August 5.

Editor's note: (1) This section is similar to former § 18-18-105 as it existed prior to 1992.

(2) Amendments to the introductory portion to subsection (3)(a) by House Bill 03-1236 and Senate Bill 03-318 were harmonized.

(3) Section 17 of chapter 347, Session Laws of Colorado 2009, provides that the act repealing subsection (6) applies to sentences for convictions entered on or after August 5, 2009. The act was passed without a safety clause and the act, or portions thereof, may not take effect if the people exercise their right to petition under article V, section 1 (3) of the state constitution. For an explanation concerning the effective date, see page ix of this volume.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative intent contained in the 2003 act amending subsections (2) and (2.5) and the introductory portion to subsection (3)(a) and enacting subsections (2.1), (2.3), and (2.6), see section 1 of chapter 424, Session Laws of Colorado 2003.

RECENT ANNOTATIONS

"Knowingly" requirement does not apply to the amount of controlled substance. "Knowingly" appears only in subsection (1)(a) and applies only to the elements of the crime. The amount of controlled substance in subsection (2) operates as a sentence enhancer and does not contain a mens rea. People v. Scheffer, __ P.3d __, 2009 Colo. App. Lexis 507 (Colo. App. 2009).

Evidence sufficient to uphold conviction. The jury could infer that defendant was at the scene to sell drugs based on the evidence that an informant had arranged a drug deal for $300, defendant was one of two people at the location of the drug deal, and there was $300 dollars worth of drugs under defendant's car seat. People v. Robinson, __ P.3d __, 2009 Colo. App. Lexis 818 (Colo. App.), rehearing denied, 2009 Colo. App. Lexis 1700 (Ct. App. 2009).

Conspiracy to distribute a controlled substance is not an extraordinary risk crime. A plain reading of the statute does not include inchoate crimes. People v. Valenzuela, 216 P.3d 588 (Colo. 2009).

ANNOTATION

Am. Jur.2d. See 25 Am. Jur.2d, Drugs and Controlled Substances, §§ 141-149, 162.

C.J.S. See 28 C.J.S. Supp., Drugs and Narcotics, §§ 248, 250-255.

Annotator's note. Since § 18-18-405 is similar to § 18-18-105 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Provision of this section classifying conspiracy to distribute a schedule II controlled substance as a class three felony does not violate equal protection even though distribution of a schedule II controlled substance is itself a class three felony and § 18-2-206 generally classifies any conspiracy to commit a class three felony as a class four felony. The general assembly could reasonably determine that conspiracies to distribute drugs have greater social impact and consequences than other conspiracies and should carry harsher penalties. People v. Thurman, 948 P.2d 69 (Colo. App. 1997).

Defendant's felony conviction under this statute did not violate equal protection when compared with § 12-22-314, which punishes cocaine possession as a misdemeanor, in that practitioners are engaged in an occupation which regularly requires administration, dispensation, and possession of controlled substance. People v. Unruh, 713 P.2d 370 (Colo.), cert. denied, 479 U.S. 1171, 106 S. Ct. 2894, 90 L. Ed.2d 981 (Colo. 1986).

Equal protection is not violated when a defendant is charged for the same conduct under both this section and § 18-18-404(1)(a) because unlawful use and unlawful possession are distinct offenses that each require proof of at least one fact that the other does not. People v. District Ct. of 11th Jud. Dist., 964 P.2d 498 (Colo. 1998).

Prohibiting possession of controlled substances under this section does not violate equal protection when compared with § 18-18-104, which punishes use of the same controlled substances less harshly, because punishing possession more harshly than use is justified to control distribution of controlled substances. People v. Cagle, 751 P.2d 614 (Colo. 1988), appeal dismissed for want of a substantial federal question, 486 U.S. 1028, 108 S. Ct. 2009, 100 L. Ed 2d 597 (1988); People v. Warren, 55 P.3d 809 (Colo. App. 2002); People v. Campbell, 58 P.3d 1080 (Colo. App. 2002), aff'd on other grounds, 73 P.3d 11 (Colo. 2003).

This section and § 18-18-404 do not contain identical elements for purposes of an equal protection analysis. The general assembly's choice to classify possession as a graver offense than use is reasonably related to the general purposes of the criminal legislation. Campbell v. People, 73 P.3d 11 (Colo. 2003).

Conduct proscribed under this statute different than conduct proscribed by more general criminal attempt and conspiracy statutes; therefore, this statute's harsher penalty does not violate equal protection. People v. Roy, 723 P.2d 1345 (Colo. 1986).

Defendant's due process rights not violated when the amount of cocaine was included in the information and jury instructions. The instructions correctly charged the jury to determine the substantive offense: Possession with intent to sell the controlled substance. People v. Martinez, 36 P.3d 201 (Colo. App. 2001) (decided under law in effect prior to 1997 amendment).

The general assembly has chosen to make drug possession a crime requiring only a general intent: if one knowingly possesses the substance, he has violated the statute. People v. Barry, 888 P.2d 327 (Colo. App. 1994).

"Knowing" element. This section requires only that a person know that he or she possesses a controlled substance, and not that he or she know the precise controlled substance possessed. People v. Perea, 126 P.3d 241 (Colo. App. 2005).

To sustain a conviction for possession of a controlled substance, the prosecution must show that defendant had knowledge that he or she was in possession of a narcotic drug and that he or she knowingly intended to possess the drug. This element may be established circumstantially: If the defendant has exclusive possession of the premises in which drugs are found, the jury may infer knowledge from the fact of possession. Similarly, knowledge can be inferred from the fact that defendant was the driver and sole occupant of a vehicle, irrespective of whether he or she was also the vehicle's owner. People v. Baca, 109 P.3d 1005 (Colo. App. 2004).

A conviction for unlawful possession of a controlled substance may be predicated on circumstantial evidence. The controlled substance need not be found on the person of the defendant as long as it is found in a place under his or her dominion and control. Whenever a person is not in exclusive possession of the premises where the drugs are found, such an inference may not be drawn unless there are statements or circumstances tending to buttress the inference of possession. People v. Atencio, 140 P.3d 73 (Colo. App. 2005).

In this case, there are four pieces of circumstantial evidence that buttress the inference: (1) The defendant fled from officers; (2) the baggies were found in the place where defendant's flight was interrupted; (3) the baggies were warmer than the night air; and (4) the baggies had not been in the location of the yard prior to apprehension of the defendant. People v. Atencio, 140 P.3d 73 (Colo. App. 2005).

"Knowingly" element of this section is applied in People v. Romero, 689 P.2d 692 (Colo. App. 1984).

In light of all the indications suggesting a legislative intent to create a single, unitary offense, as well as the absence of evidence to the contrary, the acts enumerated in subsection (1)(a) all represent stages in the commission of one crime. People v. Abiodun, 111 P.3d 462 (Colo. 2005).

The statutory language of the Uniform Controlled Substance Act of 1992 does not convey an intention by the Colorado general assembly to limit its application solely to designer drugs. Thus, the argument that pseudoephedrine is not a designer drug and therefore outside the jurisdiction of this act is invalid. People v. Frantz, 114 P.3d 34 (Colo. App. 2004).

Legislature did not intend to limit representations regarding the amount to those made during the transaction. The statute is intended to target offenders whose level of involvement is that of an "ounce dealer", and all representations made by a defendant regarding the amount are indicative of an offender's level of involvement in a transaction. People v. Abiodun, 87 P.3d 164 (Colo. App. 2003), aff'd on other grounds, 111 P.3d 462 (Colo. 2005).

Quantity not an element. Subsection (3)(a) does not create an additional element of quantity for the underlying substantive offense; rather, it defines circumstances that, if proven beyond a reasonable doubt, may require a sentence greater than the presumptive minimum contained in § 18-1.3-401 (1)(a). Whitaker v. People, 48 P.3d 555 (Colo. 2002); People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 169 P.3d 662 (Colo. 2007).

Nevertheless, quantity still must be proved beyond a reasonable doubt. People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 169 P.3d 662 (Colo. 2007).

Where the quantity of a drug is so minute that it amounts to only a trace, there is no basis, from that fact alone, for any logical or reasonable inference that the defendant had knowledgeable possession. People v. Theel, 505 P.2d 964 (Colo. 1973).

Where the amount of contraband is less than a usable quantity, other evidence may be necessary to establish knowing possession. People v. Theel, 505 P.2d 964 (Colo. 1973); People v. Ceja, 904 P.2d 1308 (Colo. 1995); Richardson v. People, 25 P.3d 54 (Colo. 2001).

The absence of a usable quantity does not constitute evidence that the defendant did not know that he possessed the drug. Rather, evidence of a usable quantity alone is sufficient evidence of knowledge to permit the case to go to a jury. Where there is not evidence of a usable quantity, the People must present other evidence regarding the defendant's knowledge to justify the jury's consideration of the element. Richardson v. People, 25 P.3d 54 (Colo. 2001).

Whether defendant had been previously convicted of possession of a controlled substance was not required to be proven beyond a reasonable doubt since previous conviction related to sentence enhancement statutory provision, properly deemed so by the trial court. People v. Whitley, 998 P.2d 31 (Colo. App. 1999).

When sentence enhancement provision increases punishment based on a defendant's criminal history but requires no statutory burden of proof or hearing procedure applicable to determination of the prior criminal conduct, due process is satisfied as long as the defendant receives reasonable notice of the potential for an increased sentence and the prosecution meets its burden of proving the prior criminal conduct by a preponderance of the evidence. People v. Whitley, 998 P.2d 31 (Colo. App. 1999).

A positive field test result is not a prerequisite for a warrantless arrest of a defendant for a drug-related offense if sufficient other factors are present to support probable cause for such an arrest. People v. Rayford, 725 P.2d 1142 (Colo. 1986).

Presence at defendant's laboratory of phenylacetoacetonitrile, which can be combined with other substances to produce a schedule II controlled substance, was insufficient to support conviction of attempted manufacture and possession of schedule II controlled substance against defendant. People v. Noland, 739 P.2d 906 (Colo. App. 1987).

Taking delivery of a controlled substance by purchase is inevitably incident to the criminal conduct of one who delivers it; therefore, the person who purchases the controlled substance is exempt from liability as a complicitor for the crime of distribution committed by the person delivering the controlled substance. People v. Hart, 787 P.2d 186 (Colo. App. 1989).

Adoption of the rule that "transitory" handling of a drug may not constitute "possession" would provide no defense to defendant since jurisdictions with such rule have held that the rule is inapplicable in a case in which the defendant had flushed an alleged narcotic down the toilet when police raided the residence. People v. Barry, 888 P.2d 327 (Colo. App. 1994).

The prescription exception referenced in subsection (1)(a) of this section and appearing in § 18-18-302 (3)(c) is an affirmative defense, notwithstanding the fact that the general assembly did not label it as such. Thus, the trial court erred by refusing to instruct the jury that it was the prosecution's burden to disprove, beyond a reasonable doubt, evidence that defendant attempted to gain possession of the controlled substance pursuant to a lawful order of a practitioner. People v. Whaley, 159 P.3d 757 (Colo. App. 2006).

While subsection (1)(a) uses both the words "sale" and "distribute" to define methods by which the statute may be violated, those words no longer have distinct legal meaning or effect as they had prior to the enactment of the Colorado Controlled Substances Act. Both are words used to describe an exchange involving the unauthorized delivery of a controlled substance. People v. Farris, 812 P.2d 654 (Colo. 1991).

Where the information charged the defendant with "sale and distribution" of a controlled substance, and although the verdict found that he "sold or distributed" such a substance, thereby charging and sustaining only one offense, the trial court properly instructed the jury as to the elements of the crime of sale or distribution of cocaine and as to the pertinent definition of distribution, its refusal to instruct on the "procuring agent" defense was not error. People v. Farris, 812 P.2d 654 (Colo. 1991).

With the exception of simple possession, the general assembly intended the drug-related crimes proscribed in subsection (1), including possession with intent to distribute, to be punished as class 3 felonies. People v. Pierrie, 30 P.3d 816 (Colo. App. 2001).

Crime of simple possession is lesser included offense of the crime of possession with the intent to distribute. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

While an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it. People v. Villapando, 984 P.2d 51 (Colo. 1999).

A type of possession is a lesser-included offense of the crime of manufacture. It is evident that one who manufactures a controlled substance also possesses the substance in the course of manufacturing it; possession requires immediate and knowing control over the substance. Patton v. People, 35 P.3d 124 (Colo. 2001).

Possession is incidental and necessary to distribution, and convictions for possession must merge with the convictions for distribution. People v. Abiodun, 87 P.3d 164 (Colo. App. 2003), aff'd on other grounds, 111 P.3d 462 (Colo. 2005).

Manufacturing a controlled substance is a lesser included offense of child abuse based on manufacturing a controlled substance. People v. Laurent, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to § 18-6-401 (1)(c)).

No conflict between this section and § 18-1.3-401. In this section, the general assembly defined the elements of the crime of possession with intent to distribute and incorporated the presumptive range found in § 18-1.3-401 (1)(a). This section does not preclude the finding that an offense is an extraordinary risk crime and does not preclude the application of § 18-1.3-401 (10) to increase the presumptive range found in subsection (1)(a). People v. Hinojos-

Mendoza, 140 P.3d 30 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 169 P.3d 662 (Colo. 2007).

Subsection (3)(a) requires that, when a defendant is convicted pursuant to subsection (3)(a) and another drug offense with a different sentencing regimen, the court shall apply the regimen producing the greater sentence. In this case, defendant was convicted as a special offender under this section and convicted of possession with intent to distribute under § 18-18-407. Under the regimen in § 18-18-407, the sentencing range was eight to 48 years, under the regimen for this section, the court was required to impose a sentence of at least 16 years and one day, so the court correctly sentenced the defendant pursuant to the regimen of this section. People v. Montalvo-Lopez, __ P.3d __ (Colo. App. 2008).

For the sentence enhancer in subsection (3), a finding of the defendant's knowledge of the precise amount possessed is not required whether the person is a principal or a complicitor. Once a determination of guilt has been made, then if the amount is 28 grams or more, the court is required to sentence the defendant to a minimum presumptive sentence. People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999), aff'd, 43 P.3d 611 (Colo. 2001).

Under subsection (3), defendant is not entitled to credit against sentence for time served in a supervised, nonresidential community corrections program rather than in incarceration in the department of corrections. People v. Winters, 789 P.2d 1120 (Colo. App. 1990).

Trial court exceeded its jurisdiction in applying sentencing alternative available under § 18-18-404 (3) to probationer who was convicted under this section. People v. Hutchings, 881 P.2d 466 (Colo. App. 1994).

A reviewing court's decision whether to address a challenge to multiple punishments by first comparing the acts for which punishment was separately imposed, or by first assessing whether the acts constitute separate offenses, is largely a matter of preference, based on the circumstances of each case and the extent to which one or the other analysis is likely to completely resolve the question. People v. Abiodun, 111 P.3d 462 (Colo. 2005).

As long as each legally distinct offense has been charged with sufficient specificity to distinguish it from other offenses and evidence at trial is sufficient to support convictions of each charge, general verdicts of guilt will be adequate to support multiple convictions. People v. Abiodun, 111 P.3d 462 (Colo. 2005).

Convictions for possession of a controlled substance and possession of manufacturing chemicals or supplies were based on factually distinct conduct and do not violate double jeopardy. People v. Crespi, 155 P.3d 570 (Colo. App. 2006).

This section as it existed prior to its amendment in 1987 mandated sentencing defendants convicted of cocaine offenses involving more than 28 grams to the department of corrections and did not permit sentencing of such defendants to community corrections. People v. Winters, 765 P.2d 1010 (Colo. 1988).

To obtain a conviction for possession of cocaine, subsection (1)(a) does not require the prosecution to prove that the defendant knowingly possessed a usable quantity of cocaine. Rather, the prosecution must prove that the defendant knowingly possessed some quantity of a controlled substance. People v. Ceja, 904 P.2d 1308 (Colo. 1995) (decided under former § 18-18-105 (1)(a) as it existed prior to the 1992 repeal and reenactment of the "Uniform Controlled Substances Act of 1992", article 18 of title 18); People v. Richardson, 8 P.3d 562 (Colo. App. 2000), aff'd, 25 P.3d 54 (Colo. 2001).

Subsection (3)(a) was not intended to create a separate offense for possessing more than 25 grams of a schedule I or schedule II controlled substance, but instead was merely intended to be a mandatory sentencing provision. Therefore, defendant's conviction and sentence for possession of 28 grams or more of cocaine must be vacated. People v. Salcedo, 985 P.2d 7 (Colo. App. 1998), rev'd on other grounds, 999 P.2d 833 (Colo. 2000); People v. Tafoya, 985 P.2d 26 (Colo. App. 1999).

The language in the introductory paragraph of subsection (3)(a) stating "[e]xcept as otherwise provided in § 18-18-407 relating to special offenders" gives the court discretion in special offender cases to impose a minimum sentence less than the minimum sentence otherwise required by subsection (3)(a). People v. Coleman, 55 P.3d 817 (Colo. App. 2002).

The definition of "cocaine" in § 18-18-102 (4), by its plain language, includes a mixture that includes any

amount of cocaine. Therefore, the amount of cocaine involved in a transaction is determined by the total amount of the mixture containing the cocaine, not just the amount of cocaine in the mixture. People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999).

Possession of 28 grams or more of cocaine is not a separate offense, but rather triggers a mandatory sentencing provision. People v. Ramirez, 1 P.3d 233 (Colo. App. 1999) (decided under law in effect prior to 1997 amendment).

Possession of more than 25 grams of cocaine is an element that increases the length of sentence, not a separate offense. However, where defendant's sentence reflected the appropriate application of this section to the sentence imposed for his conviction of other charges under this section, his sentence did not need to be changed. Only the mittimus need be changed to reflect two convictions rather than three. People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999).

The general assembly intended to punish as a class 3 felony possession with intent to distribute a schedule II controlled substance when the amount possessed does not trigger the enhanced sentencing provisions of subsection (3). People v. Perry, 68 P.3d 472 (Colo. App. 2002).

Defendant's conviction and sentence for possession with intent to sell greater than 28 grams of a controlled substance must be vacated when defendant's conviction had already been enhanced by § 18-18-407; and may not be applied as a sentence enhancer to either defendant's possession conviction or his conspiracy conviction because the charge of which defendant had notice in the charging document only allowed for the 28 grams or more of a controlled substance to be applied to the possession with intent to sell conviction. People v. Pineda-Eriza, 49 P.3d 329 (Colo. App. 2001).

Sufficient evidence to support crime of possession with intent to distribute. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Repeat offender penalty enhancer does not have to be considered by the jury. The fact of a prior conviction does not have to be proved a jury. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Court required to apply both § 18-1.3-801 and this section. A second violation of this section for unlawful distribution and sale of a schedule II controlled substance increases the offense to a class 2 felony. If defendant has been convicted of three previous felonies, § 18-1.3-801 (2) requires court to sentence defendant to four times the maximum of the presumptive range for a class 2 felony. People v. Cordova, 199 P.3d 1 (Colo. App. 2007).

Applied in People v. Donald, 637 P.2d 392 (Colo. 1981); People v. Nunez, 658 P.2d 879 (Colo. 1983); People v. Clements, 661 P.2d 267 (Colo. 1983); Holmes v. District Court, 668 P.2d 11 (Colo. 1983); People v. Sprow, 718 P.2d 524 (Colo. 1986); People v. Holmberg, 992 P.2d 705 (Colo. App. 1999).