Colorado Felony Sentencing Today

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INTRODUCTION

Since the last article on this subject was published in 1995,[1] there have been significant changes in the area of sex offender sentencing and collateral consequences. The overall sentencing scheme remains quite complex. This article covers the various sentencing alternatives for Colorado felons, collateral consequences and the sentencing process. The article does not cover the death penalty. Unless otherwise indicated, this article describes the law applying to offenses committed on or after July 1, 2005.

This is a work in progress. Ideas and corrections are always welcome and should be sent to the authors.

BACKGROUND

A felony is defined by the Colorado Constitution as any offense for which an offender can be sentenced to the penitentiary.[2] A court's authority to sentence is statutory. Prior to *Burns v. District Court*, cases had held there was inherent authority to suspend a sentence; but it is now clear that only the General Assembly can authorize the suspension of sentences.[3]

On conviction of a felony, the court has the following alternatives in imposing sentence:[4] (1) a sentence of death; (2) a sentence to imprisonment, including a mandatory period of parole;[5] (3) a sentence for persons convicted of a sex offense pursuant to C.R.S. §18-1.3-1004; (4) a sentence to the Youth Offender System; (5) a fine; (6) probation, including intensive supervision, confinement in the county jail, home detention and restitution; (7) community corrections; or (8) a suspended sentence.

A BRIEF HISTORY

A brief history of the felony sentencing process may be helpful in understanding the current framework. Prior to 1979, Colorado had five classes of felonies The sentence for a given crime was determined by the class to which the crime belonged. The sentence included a top and bottom number of years to be served. These numbers bracketed the parole board's authority. The bottom number determined the date before which the parole board could not act. The top number determined the maximum date beyond which the offender could not be held, regardless of the parole board's action. The bottom number is the parole eligibility date ("P.E.D."), and the top number is the discharge date.

In an effort to add some certainty and uniformity to felony sentencing, in 1979 the legislature passed what is known as the Gorsuch Law.[6] The Gorsuch scheme retained the five classes of felonies, but dramatically narrowed the available ranges. Using a class two felony as an example, the new range was from eight to twelve years, although the statute authorized a 50 percent downward and 100 percent upward departure for extraordinary cases. The narrow range

came to be known as the presumptive range and the extreme ranges, above and below that, the extraordinary range.

The Gorsuch scheme also changed the function of the parole board. With the exception of a narrow class of cases,[7] the statute mandated parole after completion of the sentence, less earned time. Phrased another way, the parole board had no discretion to refuse to release on parole an inmate who had accumulated appropriate credits. Thus, the judge became, in most cases, the true sentencing authority. An inmate sentenced to twelve years under the Gorsuch scheme who behaved well could expect to be paroled a few weeks short of six years.

In 1985 the legislature doubled the presumptive ranges[8] and removed the mandatory parole provision.[9] In 1991, the General Assembly formally recognized the cost of financing the prison system by passing C.R.S. § 2-2-703. This statute provides that no legislative enactment that will increase the overall length of stay for inmates in the Department of Corrections ("D.O.C.") may be passed unless the additional needed beds are funded for the first five years following passage of the bill. In practice, this has meant that an act that increases a sentence range for a given crime often contains a reduction of sentence for some other crime in an attempt to be "expenditure neutral."

While there are now six classes of felonies, there are special sentencing rules for a multitude of crimes. Penalties and definitions are amended annually, so the reader is cautioned that the applicable statute is invariably the one that was in effect on the date of the offense.[10]

Colorado D.O.C.'s Prison Population

In 1995, the average daily D.O.C.'s population was 10,564 inmates.[11] This figure included those actually in prison, as well as the 200 or so who were backlogged in county jails awaiting bed space in the D.O.C. It also included the more than 1,000 inmates serving D.O.C. sentences in facilities in Minnesota and Texas. In 1979, there were only 2,556 D.O.C. inmates. In 2004-05, it cost an average of $26, 813 annually to house an inmate. The average construction cost for a new prison bed is $86, 360. For a special needs and high level custody beds the average cost is $125,000. The approximate cost for a low security bed is $65,000. In 1995 projections showed a D.O.C. population of 14,543 inmates by January 1, 2000, an increase of 35.7 percent from the current numbers. In fact, the projection was underestimated by just under 1000 inmates. By 2000 the average daily inmate population was 15, 441. In December 2005, the D.O.C.'s total inmate population was 20,228. By 2011 the D.O.C. estimates the inmate population will be 29,314.

The D.O.C. operates twenty-three facilities throughout the state, including the Youthful Offender System facility. These range from residential/minimum restrictive security level facilities up through the maximum security facility, the Colorado State Penitentiary in Canon City.[12] Additionally, there are seven privately operated facilities under contract wth the D.O.C. housing inmates in medium security prisons and below.[13] By the D.O.C.'s count, 43.9 percent of the inmates are serving sentences for violent crimes. By far the most prevalent convictions are for

drug abuse (20.3 percent), while the percentage of incarceration for other non-violent crimes has remained consistent or steadily decreased. For example, in 1995 the percent of those incarcerated for burglary was 11.6 percent, and in 2004 it was 7.4 percent, while those serving time for theft remained consistent (7.5 percent in 1995 and 2004).

Colorado's prison population reflects the racial discrimination prevalent in the society at large. Colorado is approximately 4 percent black and 17 percent Hispanic, yet the D.O.C. population is 21 percent black and 29 percent Hispanic. The D.O.C.'s most restrictive facilities, the Colorado State Penitentiary, and Centennial Correctional Facility have the lowest percentage of Anglo inmates (36.4 percent and 35.6 percent respectively) of any D.O.C. facility.[14]

The Sentencing Scheme

Colorado's felony sentencing scheme, containing six classes of felonies, is shown with the applicable ranges in years in the following chart:

FELONIES COMMITTED ON OR AFER JULY 1, 1993					
PRESUMPTIVE RANGE			EXCEPTIONAL CIRCUMSTANCES		
CLASS	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM	MANDATORY PAROLE
1	Life Imprisonment	Death	Life Imprisonment	Death	
2	8 years $5000 fine	24 years $1,000,000 fine	4 years	48 years	5 years
3	4 years $3000 fine	12 years $750,000 fine	2 years	24 years	5 years
Extraordinary Risk Crime	4 years $3000 fine	16 years $750,000	2 years	32 years	5 years
4	2 years $2000 fine	6 years $500,000	1 year	12 years	3 years
Extraordinary Risk Crime	2 years $2000 fine	8 years $500,000	1 year	16 years	3 years
5	1 year $1000 fine	3 years $100,000	6 months	6 years	2 years
Extraordinary Risk Crime	1 year $1000 fine	4 years $100,000	6 months	8 years	2 years

6	1 year $1000 fine	18 months $100,000	6 months	3 years	1 year
Extraordinary Risk Crime	1 year $1000 fine	2 years $100,000	6 months	4 years	1 year

Crimes that present an extraordinary risk of harm to society shall include the following: 1) Aggravated robbery, CRS § 18-4-302; 2) Child Abuse, CRS § 18-6-401; 3) CRS § 18-18-405 (controlled substances, but not simple possession); 4) CRS § 18-1.3-406 (crimes of violence); 5) Stalking, CRS § 18-9-111(4); 6) Sale of materials to manufacture controlled substances, CRS § 18-18-412.7.[15]

The chart shows presumptive and extraordinary ranges for sentences. By definition, the extraordinary aggravated range is the range from the midpoint of the presumptive range to twice the presumptive maximum. The extraordinary mitigated range is from half the bottom of the presumptive range to the bottom. For example, second degree burglary of a dwelling is a class three felony. The presumptive range sentence is from four to twelve years. An extraordinarily mitigated sentence would be anywhere from two to four years. A sentence imposed in the extraordinary aggravated range would be from eight years to twenty-four years.[16]

Every inmate must serve a period of parole. The current scheme requires no early release and, in fact, there is no entitlement to early release. An inmate may be required to serve the full sentence imposed by the court, and then a period of parole. This latter period is in addition to, not in lieu of, the sentence. Under the current sentencing scheme (differentiated from that in effect for crimes committed from 1979 to 1993), the inmate's release to a period of parole terminates the prison sentence.[17] Thus, the inmate really receives two sentences from the court: one to prison and one to parole.[18]

SENTENCES TO IMPRISONMENT

Extraordinary Risk Crimes

In addition to the six classes of felonies, the legislature has prescribed a plethora of specific sentencing penalties related to individual or groups of crimes. The most prevalent of these is for "extraordinary risk" crimes.

Prior to 1993, an inmate could refuse parole, serve his or her entire sentence in the D.O.C. and eventually reach a discharge date and be returned to society without any supervision.

To insure that all inmates are placed on a period of parole after their release from D.O.C., the General Assembly amended the statute to require a period of parole for every sentence (see the section on parole below).[19] To compensate for the additional period of supervision, the legislature shortened the sentence ranges for some class 3-6 felonies by an average of 25 percent.[20] Felonies that are exempted from this scheme are sex offenses, crimes of violence and

drug distribution.[21] Thus, the extraordinary risk crimes retain their pre-1993 sentencing ranges.

Mandatory Sentence Aggravators

Another large exception carved out of the general sentencing scheme is that of the mandatory sentence aggravators. Under the original Gorsuch scheme, the court had the authority to impose a sentence in excess of the ordinary maximum on a written finding of extraordinary circumstances.[22] However, the statute did not further define extraordinary.

In 1981, the General Assembly established a list of factors, any one of which would mandate a sentence in the extraordinary range. These were largely tied to the offender's status, such as being (1) on parole at the time of the offense, (2) on probation for another offense at the time of the offense, (3) on bond for another offense, or (4) on a deferred judgment for a previous felony offense.[23]

Today, six factors require an aggravated range sentence. The defendant: (1) was convicted of a crime of violence under C.R.S. § 18-1.3-406; (2) was on parole for another felony at the time of commission of the felony;[24] (3) was on probation or was on bond while awaiting sentencing following revocation of probation for another felony at the time of the commission of the felony;[25] (4) was under confinement, in prison or a correctional institution as a convicted felon, or was an escapee from any correctional institution for another felony at the time of the commission of a felony;[26] or (5) at the time of commission of the felony, was on appeal bond following conviction for a previous felony; (6) the defendant was on probation for or on bond while awaiting sentencing following revocation of probation for a delinquent act that would have constituted a felony if committed by an adult.[27]

Mandatory Sentences for Crimes of Violence

With one exception, the preceding statutory aggravating factors do *not* mandate a prison term. They only require that *if a prison term is imposed*, it must be at least the midpoint of the presumptive range, but no more than the maximum in the extraordinary range.[28] The exception is a conviction for a crime of violence. C.R.S. § 18-1.3-406(2)(a)(I) defines a "crime of violence" as any of certain enumerated crimes in which a person used, or possessed and threatened the use of, a deadly weapon, or caused serious bodily injury or death to any other person except another participant.[29] A crime of violence also covers any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation or force against the victim, or committed a sexual offense against a child as defined in C.R.S. § 18-3-411 (1).[30]

Pursuant to C.R.S. § 18-1.3-406, an offender sentenced for a" crime of violence" must be sentenced to a term of imprisonment no less than the midpoint of the presumptive range and no greater than twice the ordinary maximum (i.e., the top of the aggravated range). The court must impose such a sentence, but upon appropriate findings may reconsiders the sentence at a later time.[31]

The interplay between this mandatory sentencing statute and the substantive crime definitions can be confusing. The statute, C.R.S. §18-1.3-406, provides separate counts must allege the commission of a crime of violence, and the allegations must be tried by the factfinder (the jury), but this is no longer the law.

Litigation in the 1980s cast doubt over the constitutionality of CRS §16-11-309 (the then mandatory sentencing for violent crimes statute).[32] The General Assembly responded by passing legislation which effectively deleted the need for the separate counts for nine specified offenses.[33] The mechanism used was less than clear (the phrase, "the court shall sentence the defendant in accordance with the provisions of section 16-11-309, C.R.S." was inserted into each of the nine offenses). The court in *People v. Terry*[34] provided some certainty by finding the language requiring a separate charging document and a separate conviction under the crime of violence statute in C.R.S. §16-11-309 did not apply to the specified offenses.

Since the 1986 *Terry* case, the General Assembly has broadened the number of offenses that come within its ambit. Thus, today, a number of crimes carry a mandatory minimum sentence of no less than half of the midpoint in the presumptive range, whether or not a specific violation of CRS § 18-1.3-406 is charged in a separate count.[35] Practitioners must be keenly aware of the risks of a conviction for the "*Terry*" crimes. Such a sentence is not only mandatory, but lengthy.

Permissive Sentence Aggravation

The Gorsuch drafters, hoping to reduce the disparity in sentences around the state, prescribed narrow ranges, believing that very few offenses would mandate a lengthier sentence. These cases were considered to be "extraordinary."[36] Over the years, the concept that only a few offenders each year would be sentenced in the extraordinary range has been steadily eroded and no longer exists.

The erosion began in 1981 with the repeal of the requirements that the court make written findings to justify a sentence in the extraordinary aggravated range, and that only such sentences be subject to an automatic (and non-adversary) appeal.[37] For a time, a line of cases held that a fact which proved an element of the offense could not, in and of itself, also support an extraordinary range sentence, but in *People v. Sanchez*,[38] the court found no double jeopardy or equal protection bar to such a sentence.

The *Sanchez* opinion upheld maximum consecutive sentences for vehicular assault where the trial court had found that the defendant's blood alcohol level, speed, nature of the injuries inflicted and the fact that the defendant was driving in the wrong lane justified a sentence in the aggravated range. Other opinions found justification for an aggravated range sentence in the defendant's criminal history.[39] Consequently, a court could impose an aggravated range sentence in any case where the facts so warrant.[40] The procedure by which such a sentence must be imposed has, however, changed recently.

In 2000 the U.S. Supreme Court decided *Apprendi v. New Jersey*.[41] *Apprendi* held that, except for the fact of a prior conviction, facts supporting an increase in a sentence beyond the statutory maximum must be charged, tried to a jury and proven beyond a reasonable doubt.[42] However, the case seemed to have little if any effect on the imposition of sentences on Colorado defendants. In *People v. Allen,*[43] the court of appeals broadly rejected an *Apprendi* challenge to Colorado's felony sentencing scheme.

Then in 2004, the U.S. Supreme Court applied the rule of *Apprendi* to Washington state's sentencing scheme in *Blakely v.Washington*.[44] The *Blakely* Court focused on the definition of a "statutory maximum" sentence to which a defendant is exposed by a jury verdict or guilty plea; and (2) the distinction between elements of an offense, which must be tried to a jury, and sentencing factors, which need not be. The Court stated that "our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[45]

The Colorado Supreme Court has recently applied the *Apprendi/Blakely* rule in *Lopez v. People,*[46] The defendant in *Lopez* pled guilty to possession of a controlled substance, a class four felony, and was placed on deferred judgment. At the original sentencing hearing the factual basis for the plea agreement was the probable cause affidavit and the presentence report. Neither of the documents were in the record nor did the record indicate that the defendant admitted to the facts contained in the documents.

Lopez was subsequently charged with vehicular homicide, DUI, and Reckless Driving. He was found guilty of the charges by a jury. The prosecution then filed a motion to revoke the deferred judgment based on the guilty verdict in the vehicular homicide case. At the sentencing hearing the judge aggravated Lopez' sentence on the vehicular homicide and aggravated the sentence for the possession charge. Lopez appealed the twelve year possession sentence.[47] The Court of Appeals found that the sentencing court had authority to aggravate Lopez' sentence pursuant to C.R.S. § 18-1.3-401(6), and had made adequate findings on the record to support the sentence. The Court of Appeals dismissed Lopez' argument that any facts used to increase his sentence must be admitted or tried to a jury under *Apprendi.*

Although C.R.S. §18-1.3-401(6) does not specify particular facts that permit imposition of a sentence above the presumptive range, it imposes an express condition on departure from that range. Paragraph (6) states:

> In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better

> serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

The Colorado Supreme Court found in *Lopez* that C.R.S. § 18-1.3-401(6) is constitutional if properly applied. Under *Lopez* a defendant's sentence can be aggravated if the facts are *Blakely*-exempt, or *Blakely*-compliant. *Blakely*-exempt factors are those facts are prior conviction facts. *Blakely*-compliant facts that a sentencing court may rely upon when considering whether to extend a sentence beyond the presumptive range: (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant;[48] (3) facts found by a judge after the defendant stipulates to judicial factfinding for sentencing purposes; and, (4) facts regarding prior convictions.[49]

In *People v. Isaacks*, __ P.3d __, announced 4/24/06, 05SC87, the court held that, absent a constitutionally sufficient waiver of the right to a jury trial, the defendant's failure at sentencing to correct statements in the probation report is not, for *Blakely* purposes, an admission of those facts which go beyond the elements of the offense. "[T]he right to have a jury determine the facts that form the basis for aggravated sentencing under section 18-1.3-401(6)is a fundamental right that can only be waived knowingly, voluntarily and intelligently." Id., slip op. p. 13.

In *Lopez*, the Court further stated that the holding would only apply to those cases that were pending on direct appeal on the date *Lopez* was decided. The Court further suggested that the legislature could take legislative action in response to *Apprendi* and *Blakely,* judges, and prosecutors could insist that defendants admit to facts in order to aggravate the sentence,[50] and juries could be asked by interrogatory to determine facts potentially needed for aggravated sentencing.

Habitual Criminal

First enacted following World War II,[51] Colorado's habitual criminal statute at times has been as draconian as any in the country. For example, Colorado at one time required a sentence of life without parole if there were three prior felony convictions.[52] The habitual criminal penalties were so severe that, in the 1980s, the courts began to question whether the statute violated an individual's right to be free from cruel and unusual punishment under the Eighth Amendment.[53] The statute mandated a harsh penalty regardless of the severity of the underlying offense.

In 1993, the General Assembly responded to these concerns by substantially revising the penalty structure.[54] To be eligible for sentencing under what is known as the "big" habitual criminal statute, an individual must have three prior felonies separately brought and tried and arising from separate and distinct episodes in this state or elsewhere. The sentence is four times

the presumptive maximum for the instant crime.[55] The "little" habitual criminal statute provides a sentence of three times the presumptive maximum if the instant felony is a class one through class five felony, and if the offender has two prior felonies within ten years.[56] Thus, the penalty is scaled to the severity of the instant offense. Life (with forty-year parole eligibility) is required for a second habitual criminal adjudication.[57] The habitual criminal sentence supplants the routine sentence for the substantive crime.[58]

In 1994, Colorado, as many other states, enacted a "three strikes" provision. Any offender convicted of a class one or class two felony (or a class three felony that is defined as a crime of violence under C.R.S. §18-1.3-801(1)) and who has two previous convictions of these same types of crimes must be sentenced to life. An offender so sentenced is eligible for parole after no less than forty years.[59] This appears to be a case of overkill because the existing little habitual criminal law, even after the 1993 changes, provides, for example, that an offender committing a class two sexual assault with two prior violent offenses within ten years must receive a sentence of seventy-two years.[60] The current parole statute, because of the offender's prior record and violent instant offense, would invoke the "75 percent rule" (see the section on time computation below); the offender would have to serve fifty-four years before parole eligibility, let alone release.

A Defendant convicted of first degree burglary, first degree burglary of a controlled substance, or second degree burglary of a dwelling who, within ten years of the date of the current offense, has been previously convicted of any of those offenses shall be sentenced to a term of imprisonment greater than the maximum in the presumptive range, but not more than twice he maximum term, provided for such offense in CRS § 18-1.3-401. Any offender twice previously convicted is subject to the provisions of CRS § 18-1.3-801.[61] 18-1.3-804

If an offender is prosecuted under the habitual criminal provisions, the prosecution must allege each of the prior convictions. At the conclusion of the trial, a second or penalty phase proceeding is held before the court. The prosecution must prove the prior convictions and the identity of the perpetrator beyond a reasonable doubt.[62]

The Colorado Sex Offender Lifetime Supervision Act of 1998[63]

Prior to November 1, 1998, sex offenders were most frequently sentenced under the general felony sentencing statute and, in rare cases, under the Colorado Sex Offenders Act of 1968[64](“1968 Act”). The 1990s, saw the evolution of treatment programs for sex offenders on probation and in prison. The Colorado Sex Offender Lifetime Supervision Act of 1998 (“Act”),[65] radically changed the philosophy of Colorado sex offender sentencing. The Act can be seen as a culmination of this trend. The Act wholly abrogated the 1968 Act and imposes lifetime supervision for the more serious sex offenders, whether the offender has been sentenced to probation or to prison.

Generally, if a sex offense is covered by the Act, the court must impose a life prison sentence or lifetime probation. Persons who commit sex offenses not covered by the Act are

sentenced to a determinant sentence of years, rather than a range, in the same manner as for other felonies.[66]

The Colorado Court of Appeals has rejected all constitutional challenges to the Act. Due process, equal protection, separation of powers, cruel and unusual punishment, and Fifth Amendment attacks were denied in *People v. Ogelthorpe*,[67] among other cases.

A court that imposes a life prison sentence is commanded to sentence the offender to "at least" the minimum in the presumptive range, to life. The presumptive range for the offense is defined in the general felony sentencing statute.[68] For a class 4 felony, for example, the minimum in the presumptive range is two years. Thus, the sentence for the sex offense has to be at least two years to life. The phrase "at least" was interpreted literally in *People v. Smith*[69] Under this case there is apparently no upper limit to the minimum. For this example, therefore, the sentence could be two years to life, fifty years to life, or ninety-nine years to life. The "top" end of the indeterminate sentence must, as required by the Act, be natural life, meaning the offender will be imprisoned forever unless paroled.[70]

Unlike all other felons, a defendant sentenced to prison under the Act must serve 100 percent of the minimum sentence, less any earned time deductions, before the parole board may give initial consideration to releasing the offender to parole.[71] Earned time cannot exceed 25 percent of the sentence.[72]

When an offender is parole-eligible, the parole board must consider releasing the defendant to parole, but it may reject the application. The parole board has considered 182 Lifetime Supervision offenders for release. Two were granted parole in September, 2005. The DOC does not anticipate any parole discharge hearings for the next few years because offenders convicted of a class four offense must serve ten years on parole and those convicted of class one or class two offenses must serve twenty years on parole.[73]

Concurrent v. Consecutive Sentences

Unless constrained by statute, the court has inherent authority to impose concurrent or consecutive sentences.[74] At least six statutes directly address the court's authority to sentence consecutively or concurrently in specific situations. (1)The compulsory joinder statute[75] mandates concurrent sentences where multiple counts arise from the same transaction, the prosecution was aware of the charges at the time of filing, and the charges arise from the same episode and are supported by the same evidence.[76] However, where there are multiple victims, the court has the discretion to impose consecutive sentences. (2) Where a defendant is convicted of two or more separate crimes of violence arising out of the same incident, the sentences must be consecutive.[77] (3) Anyone convicted of a class two sexual assault must receive a sentence consecutive to any other crime of violence sentence.[78] (4) CRS § 18-1.3-406(7) mandates an additional five-year consecutive sentence for an individual convicted of using a dangerous or semi-automatic assault weapon in the course of certain crimes.[79] (5) CRS § 18-8-209 requires a sentence for escape and

offense relating to custody[80] to be consecutive to the sentence for which the offender was serving at the time of the offense, and (6) CRS § 18-8-212(3) requires a consecutive sentence for bond jumping.

In the absence of an order that a sentence is consecutive, it is concurrent by operation of law.

Boot Camp

Pursuant to CRS § 17-27.7-103, Colorado has the "Regimented Inmate Discipline and Treatment Program," commonly known as boot camp. The program is designed for youthful non-violent offenders, and is best described as a military-style intensive physical training and discipline program. Offenders are expected to serve ninety days in the program, and when successfully completed, the court is notified. An offender who successfully completes the program may apply to the court for reconsideration under Crim.P. 35(b).[81] Placement in the program may be recommended by the court, but the final decision is up to the executive director of the D.O.C.[82]

At least one audit of the boot camp program has determined that inmates leaving the program are more likely to re-offend than those who have not been through the program.[83]

Intensive Supervision

Colorado D.O.C. inmates who are within 180 days of their P.E.D. may be placed in an intensive supervision program, which is akin to probation.[84] CRS § 17-27.5-102(2) requires certain minimum levels of supervision, including restrictions on weekly face-to-face contact between inmate and staff, daily telephone contact, monitored curfew, employment visitation, home visitation, drug and alcohol screening, treatment referrals, the monitoring of the payment of restitution and performance of community service. Since the statute requires the offender be placed through community corrections (see the section on community corrections below), the offender must be approved by the community board. The offender is supervised by a parole officer.

Presentence Confinement

Often, offenders sentenced to the D.O.C. spend time in custody prior to sentencing. These individuals are entitled to credit from the time spent in custody against their sentence. In Colorado, there is no constitutional right to presentence credit. In the case of *Godbold v. District Court*,[85] the defendant unsuccessfully argued that to deny presentence credit to the indigent violated equal protection. It was his claim that a poor inmate would spend time in custody prior to sentencing because of his inability to make bail, while a wealthier inmate who made bail would serve only the sentence imposed with no presentence time. If the poor inmate is denied presentence credit, he ends up serving more time in toto than the wealthy inmate.

Godbold lost his battle, but he may have won the war. In 1979, the General Assembly enacted C.R.S. §16-11-306, which eliminated this unequal treatment.[86] The statute is now located at C.R.S. §18-1.3-405. The statute requires an award of presentence confinement time. At sentencing, the trial court must determine whatever facts are necessary to compute the time in question and endorse the amount of time to be credited on the mittimus. The D.O.C. then deducts the time from the sentence. If the defendant is serving a sentence or is on parole for a previous offense when he or she commits a new offense, the credit goes toward the previous offense.

While the principle seems simple enough, its application in practice has generated numerous appellate decisions.

What is Confinement?

An offender jailed locally prior to sentencing is entitled to credit for that length of time against his or her sentence. Offenders housed in another state awaiting extradition on the sentence that is eventually imposed are likewise entitled to credit.[87] However, offenders resentenced after revocation of some status, such as probation or community corrections, present a more complex picture. An offender is entitled to credit for time spent in residential community corrections, assuming he or she was sentenced,[88] but not for time spent in the same facility under the same rules if placed there as a condition of probation.[89] Moreover, the defendant is not entitled to credit for time spent in a drug treatment facility that is not a community corrections facility when enrollment in that program is a condition of a suspended sentence (see the section on community corrections below).[90]

The principle emerging from the case law is that the individual's legal status is more significant than the type of facility in which he or she is a resident. The doctrine seems to be that no time spent in custody as a condition of probation must be credited against the sentence unless that time was spent in jail or prison.[91] It appears that the court retains discretion to award credit for less restrictive custodial time, but there is no entitlement.[92] This is contrasted with periods of confinement a person might spend while on direct sentence to community corrections that are appropriately credited to his or her sentence.[93]

At the opposite end of the spectrum, an offender is not entitled to credit for time spent on routine noncustodial probation.[94] Similarly, the nonresidential portion of the community sentence need not be credited against a subsequently imposed sentence after revocation.[95] The period of supervision in question is not considered to be "custodial."

By definition, an inmate serving a life sentence is not entitled to presentence credit.[96] Another restriction on presentence credit is contained in C.R.S. §18-1.3-405:

> If a defendant is serving a sentence or is on parole for a previous offense when he or she commits a new offense and he or she continues to serve the sentence for the previous offense while charges on the new offense are pending, the credit given

for presentence confinement under this section shall be granted against the sentence the defendant is currently serving for the previous offense and shall not be granted against the sentence for the new offense.

Multiple Sentences

Offenders sometimes are prosecuted for more than one offense at a time. In addition to multiple counts in one prosecution, it is not unusual for offenders to be prosecuted simultaneously in several jurisdictions. To avail themselves of the benefits of CRS § 18-1.3-405 and receive an award of presentence time, offenders who are confined for a number of different reasons in a facility must show a "substantial nexus" between their confinement and the charge for which the sentence is ultimately imposed.[97]

Focusing on the purpose of credit for presentence confinement to eliminate financial inequities, the court in *Schubert v. People* held that the defendant had a statutory entitlement to presentence credit for either "the time served as the result of the charge for which the sentence is imposed or, what will undoubtedly be the longer period in most cases, time served as a result of the conduct in which such charge is based."[98] Thus, an offender sentenced on a charge unrelated to his or her confinement prior to sentencing is not entitled to credit.

Schubert also held that a defendant charged with multiple counts arising out of the same transactions is entitled to credit against each sentence, especially if the sentences are imposed concurrently.[99] On the other hand, if the sentences are consecutive, credit against only one of them is necessary to give the defendant full benefit of his or her presentence confinement.

Time Computation

A person sentenced to a four-year sentence does not necessarily serve four years. Even the most restrictive sentencing schemes have allowed substantial discounts for earned time, good time, trustee time and meritorious time. In fact, the earliest parole eligibility date ("P.E.D.") is currently much less than 50 percent of the imposed sentence. The reader is cautioned, however, that parole eligibility is not the same as release.

For crimes committed on or after July 1, 1993, the following formula generally describes how the parole eligibility date is computed: (1) subtract 50 percent from the imposed sentence; (2) subtract any presentence credit from the remainder; and (3) deduct any earned time awarded (up to ten days per month for each month of the sentence actually served but not to exceed 25% of the sentence). For example, an inmate sentenced to four years with thirty days presentence credit is eligible to meet the parole board in one year, eleven months, less up to ten days per month earned time for each month actually served. Since the earned time is not awarded prospectively, the P.E.D. is accelerated by ten days for every month the inmate serves if the earned time is earned. After this inmate had served a year, his P.E.D. would advance from one year, eleven months to one year, seven months from the date sentence was imposed, assuming good behavior. Taking this computation to its conclusion, the inmate would be parole eligible

about seventeen months after sentencing, for a total period of incarceration of about eighteen months. Keep in mind that the P.E.D. does not mandate release. If no earned time is awarded and the parole board does not act favorably, the inmate would serve the entire four years.

There are some exceptions to this computation. Any person convicted of a class two or three felony, second degree murder, first degree assault, first degree kidnaping, first degree arson, first degree burglary, or aggravated robbery, committed on or after July 1, 2004, must serve 75% of the sentence before parole eligibility, less earned time. If the person has been convicted of a class 4 or 5 felony, this rule applies only if the person has a prior conviction for a crime of violence as defined in section 18-1.3-406.

Another exception if found in C.R.S. §§ 17-22.5-403(3). It provides that an offender convicted of second degree murder, first degree assault, first degree kidnaping (except class one kidnaping), first or second degree sexual assault, first degree arson, first degree burglary or aggravated robbery, who has previously been convicted of an offense which would have been a crime of violence under CRS § 18-1.3-406, must serve 75 percent of the sentence, less earned time, prior to parole eligibility. If the offender has two prior violent offenses as defined in C.R.S. § 18-1.3-406, he or she must serve 75 percent of the sentence with no earned time deduction before parole eligibility. Even without this statutory mandate, the parole board would be unlikely to parole these offenders before they had served most, perhaps all, of their sentences.[100]

Individuals sentenced under the Lifetime Sex Offender scheme must serve 100% of their minimum sentence, less earned time, before they are parole eligible.

The time computation formula is also different for people serving life sentences. For such sentences, the sentence is either life with a forty-year parole eligibility or no parole eligibility.[101] Another exception to the computation rule is that CRS § 17-22.5-403 (1) provides that the D.O.C.'s executive director may extend the parole eligibility date for an offender's "misconduct during incarceration." This statute provides the basis for D.O.C.'s administrative disciplinary policy (Code of Penal Discipline) and any punishment that results.

Some inmates are serving concurrent sentences for crimes committed on different dates under different sentencing schemes. In this situation, the time computation rules of the longest sentence govern.[102] No such rule applies when the sentences are consecutive.[103]

The Diagnostic Process

After sentencing, the offender is sent to the county jail for transportation to the diagnostic unit of the D.O.C. in Denver.[104] Prison crowding has resulted in some inmates waiting months to get into the diagnostic unit. The unit's purpose is to classify and program incoming inmates.[105] Inmates are interviewed and tested to determine their optimum placement, pursuant to the authority vested in the executive director.[106] Facilities include maximum, close, medium and minimum security facilities, honor camps and halfway houses. The results of the diagnostic

process are placed in a report and made available to the courts and counsel. The report is often helpful to the court in deciding a motion to reconsider.

Parole

The term "parole" can be misleading because it has two definitions. "Parole" is often used to describe the process of early release. Therefore, an inmate is said to be paroled when he or she is released before the expiration of the sentence. The decision whether or not to authorize early release is made by Colorado's parole board.[107] The effective release date for most inmates is determined not by the judge but by the parole board. "Parole" is also used to describe the status of someone under supervision after being released from the D.O.C. An offender who is on parole is akin to one who is on probation.

This dual definition of the word "parole" can lead to some confusion. The parole board, while empowered to decide whether or not to release an inmate, has no supervisory authority over parole officers. The board is composed of individuals appointed by the governor and is quasi-judicial; parole officers (those who supervise parolees after their release) work for the D.O.C. Indeed, in parole revocation hearings, parole officers often act as prosecutors, and parole board members preside as if they are judges.

Inmates who have accumulated sufficient time credits to become parole eligible apply to the parole board for consideration. The board consists of seven members appointed by the governor and confirmed by the senate. They serve a term of three years, and may serve consecutive terms.[108]

When inmates apply for parole, they are interviewed by the board (in practice, often by a single board member). The board then applies the criteria set forth in C.R.S. §17-22.5-404(2), which lists a mind-boggling thirty-seven factors to be considered.[109] Many of these are the same factors the court considers at sentencing; those that are not are similar, but relate to the inmate's conduct after such sentencing.

After reviewing an inmate's file and interviewing the inmate, the board may grant or deny parole. If parole is denied, the inmate's case must be reviewed within the next year, except that inmates who meet certain violent offender criteria may be deferred for up to three years.[110] Although the violent offender deferral provision was added in 1993, the parole board applies it retroactively. The constitutionality of a similar California policy has been upheld.[111]

The parole statutes enumerate a number of restrictive conditions that may be placed on the parolee. The most novel of these is that the parolee must pay child support if obligated. Also, sex offenders, as defined, must submit to chemical testing (blood and saliva) to determine genetic markers and secretor status. Every parolee is required to submit random urine samples for drug and alcohol testing.[112]

Parole is imposed by the judge at sentencing, and the length is fixed by statute.[113] The length of time is shown in the chart on page 6. The parole board retains the authority to terminate parole early.[114]

Parole Revocation

Offenders in violation of parole may have their parole revoked. The case of *Morrissey v. Brewer*[115] held that the parolee has a "liberty interest" that may be terminated only with due process. Colorado's parole revocation statute tracks *Morrissey* and provides for written notice of the alleged violation, an opportunity to be heard and present evidence, a limited right to confront and cross-examine witnesses and a hearing before a neutral decision maker.[116] If the board finds that the parolee has violated a condition of parole, it may either revoke parole, continue parole or modify the conditions of parole.[117] If the revocation is triggered by something other than commission of a new offense, and depending on the character of the original offense, the parolee may be placed in community corrections (see the section on community corrections below) for up to 180 days or placed in the county jail for ninety days in lieu of placing the offender back in the D.O.C.[118]

If returned to prison, the offender is placed in the D.O.C. for a period of time remaining on the mandatory period of parole originally imposed by the court. At its discretion, the parole board may require the inmate to serve the remainder of his or her original parole period in the D.O.C. or may parole the inmate at any time.[119]

The amount of time to be served by an offender who is reincarcerated for a parole violation requires a determination of non-violent offender status.[120] For an offense committed on or after July 1, 1993, offenders who fit this definition are eligible to receive earned time while on parole, but not for the period of reincarceration imposed.[121] Offenders who are not "non-violent" receive no earned time for the period they are on parole. For "non-violent offenders" sentenced for crimes committed on or after July 1, 1979, time spent on parole counts against the sentence after revocation. Violent offenders do not receive the benefit of these time credits.[122]

SENTENCES OTHER THAN TO PRISON

Community Corrections

Community corrections was first created pursuant to statute in 1976, and the statute was repealed and reenacted in 1993.[123] Community corrections is designed to provide an alternative sentence between prison and probation, as well as a transitional setting for inmates being released from the D.O.C. Its admission mechanism promotes community involvement.

The six routes to a community corrections placement are: (1) a direct sentence by the court; (2) as a condition of probation; (3) by order of the D.O.C.'s executive director; (4) as a condition of a deferred judgment; (5) as a condition of parole; and (6) as a means of pretrial supervision in lieu of incarceration.[124]

Every community corrections placement requires approval by the referring agency (be it the D.O.C., parole board or court); approval by a community board in the judicial district where the facility is located;[125] and approval by the individual community program.[126] Currently, thirty-six community facilities are operating around the state and none is owned or operated by the D.O.C. The facilities are contracted for by the Colorado Division of Criminal Justice.[127]

CRS § 17-27-102 (3) states the objectives of the community correction facilities. Each facility monitors the activities of offenders, oversees restitution and community service, assists offenders in obtaining employment and/or education, provides vocational training or engages in other rehabilitative endeavors. The inmates generally are allowed to leave during the day to participate in their various programs, but must reside in the facility when not engaged in them. Failure to stay within the extended rules of confinement is an escape punishable as a class three felony.[128]

The usual course of conduct for an inmate is to proceed through the various levels of the given facility. Progress is directly related to the inmate's favorable behavior. Eventually, the inmate is moved from residential to nonresidential status (akin to probation).

It is often assumed that courts in a given jurisdiction can only sentence inmates to community corrections facilities within that jurisdiction. That is not the case. In fact, the statute acknowledges that a community board may contract with other boards or state governmental agencies to treat offenders brought from another jurisdiction.[129] Placement of an offender by one jurisdiction in another raises funding issues that are not uniformly addressed across the state. Some community boards are more willing to fund such placements than others.

Cross-jurisdictional placement has allowed the development of specialized facilities. For example PEER I in Denver and the Residential Treatment Center in Greeley (both of which take inmates from outside of their home counties provide programs dedicated to substance abuse difficulties) and Community Corrections in Colorado Springs (which operates a specialized facility for sex offenders)[130].

D.O.C. inmates convicted of nonviolent offenses, who are nineteen (19) months from their P.E.D., and inmates who are convicted of violent offenders who are nine (9) months from their P.E.D. may be referred to a residential community corrections centers.[131] D.O.C. inmates must be referred for community corrections review and possible acceptance if the successfully complete a regimented inmate discipline program within twenty-eight months prior to the offender's P.E.D., or at least sixteen months before their P.E.D.

An important change effected by the 1993 rewrite of the community corrections statute is that the community placement may be modified by the court in the same manner as a probationary sentence.[132] Previously, 120 days after imposition, there appeared to be no way to modify a community sentence.[133] This left some inmates on non-residential status for years, often unnecessarily. Now a community sentence can be modified as needed on request of the prosecution, probation department or defendant.[134]

For some time, the courts wrestled over a mechanism to deal with offenders who allegedly violated the terms of their community placement. In 1987, the law was interpreted to require a hearing prior to revocation of the inmate's placement and transfer into the D.O.C.[135] In 1989, CRS § 17-27-114 (2) was amended to disallow such a hearing. That left the question as to whether a hearing was required as a matter of constitutional due process. The court in *People v. Wilhite*[136] held that there was no constitutional right to a hearing. The 1993 reenactment stated that the court was not required to hold such a hearing,[137] but if there is no hearing, the sentence length cannot exceed that originally imposed.[138] The length of the sentence does not include the mandatory period of parole.[139]

In *People v. Lippoldt*[140] the Court of Appeals case held that there is a right to counsel when the court grants a hearing. However, there is no right to counsel with respect to resentencing if there is no evidentiary hearing.[141]

Specialized Restitution and Community Service Programs

Specialized restitution and community service programs were designed to create an intermediate sanction that would minimize taxpayer cost and, at the same time, compensate victims in society for the damage offenders have caused.[142] The legislation contains a declaration that the routine incarceration of non-violent offenders "punishes taxpayers."[143]

The program is designed to operate in three phases: intensive residential, residential treatment in conjunction with gradual re-entry into the community and non-residential. The first and second phases may take up to nine months and the third phase, up to twelve months.[144] An offender is eligible for the program if not convicted for an offense of violence as described in CRS § 18-1.3-406 or a felony offense against a child.[145] Parole violators may also be placed in the program.[146] In addition, to avoid net-widening, the court is required to make a determination that the offender would be incarcerated if not placed in the program. Applicants must be accepted before the community board prior to placement in the facility.

Thought authorized by statute, the authors are unaware that any programs exist.

Probation

Offenders are ineligible for probation if they have two prior felony convictions, or one prior felony conviction within the last ten years and the instant conviction is for a class one, two or three felony, unless the court and prosecutor agree otherwise.[147] Offenders otherwise ineligible for probation may be fined in lieu of incarceration and are eligible for community placement.[148]

In its simplest form, probation is an order to behave. A court imposing probation may require any of the conditions set forth in CRS § 18-1.3-204, which include: faithful pursuit of employment or education, freedom from alcohol and drug abuse, substance abuse therapy, appropriate contact with the probation officer, maintaining a stable residence, restitution, and

refraining from committing new offenses. The court may impose, in addition, any condition reasonably related to the offender's rehabilitation and the purposes of probation.[149] Placement in a community corrections program also may be required. Probation may include up to ninety days in the county jail or up to two years' confinement if work or education release is authorized.[150] There is no statute governing the maximum length of probation, but it may be at least as long as the maximum extraordinary prison sentence authorized for the offense.[151]

Probation may be punitive. Courts can use the probation power to fashion sentences closely tailored to the offender and the offense. For example, the court could impose a probation sentence of two months in the county jail, several hundred hours of community service, restitution and even a court-ordered charitable contribution.[152]

Deferred Judgment

By statute and on stipulation of the parties, the court may accept a guilty plea and defer the entry of judgment on the plea for up to four years.[153] During this period, offenders are placed under the supervision of the probation department.

If the offenders comply with the conditions of the deferral, they may withdraw a guilty plea and the case will be dismissed. If it is alleged that the offenders have not complied, they are entitled to a hearing, after which the court may enter judgment (if the violation is proven) and sentence them as if the guilty plea had been taken without stipulation.[154] Offenders then may receive any sentence authorized by law, including probation.[155]

The controlled substances statute provides for what amounts to a deferred judgment, except that the consent of the prosecution is not required.[156] If the court finds a user of controlled substances is in need of treatment, it can suspend the proceedings and order such rehabilitation as it deems necessary. After completion of treatment, the court may, in its discretion, dismiss the case.

Restitution

The General Assembly and the courts have expressed a strong preference for the payment of restitution, declaring that restitution is both rehabilitative and a deterrent to future criminality.[157] Restitution is intended to make the victim whole.[158] In Colorado, restitution must be made a condition of every probation and parole.[159] "'Restitution' means any pecuniary loss suffered by a victim and includes but is not limited to all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses, rewards paid by victims, money advanced by law enforcement agencies, money advanced by a governmental agency for a service animal, adjustment expenses, and other losses . . .that can be reasonably calculated and recompensed in money."[160] Pre-judgment interest, as well as post-judgment interest is authorized.[161] A court is not required to make factual findings regarding a defendant's ability to pay prior to ordering restitution.[162] Restitution is appropriate only for the victim named in the count of conviction, unless the defendant agrees otherwise,[163] but can encompass additional incidents outside the count of conviction for the same victim where the facts warrant such an order.[164]

The term "victim" in not restricted to those parties actually aggrieved by the conduct of the defendant, but also includes those who have suffered a loss because of a contractual relationship with the victim, including insurers and any victim compensation board that has paid a victim compensation claim.[165] Restitution can include costs incurred by a governmental entity, and include the overtime wages for governmental employees, operating expenses for equipment, and the cost of property designed for one-time use.[166]

When a defendant is sentenced to the D.O.C., the court must fix the amount of restitution on the *mittimus*. Restitution must then be ordered by the parole board as a condition of parole.[167]

Although not strictly restitution, another statute requires that a crime stopper reward be reimbursed as restitution.[168]

Home Detention

Home detention (also known as the "bracelet") is a form of electronic monitoring used to insure the presence of an offender at a given location at a given time. By statute, any offender who has not bee convicted of a "class one or violent felony" or who has been placed on a deferred judgment may be put on home detention as a sentence or as a condition of probation.[169] These programs are operated by private entities that contract with the Colorado Department of Public Safety. Offender convicted of domestic violence as defined in CRS § 18-6-800.3(1) are not eligible for home detention in the home of the victim.

A bracelet is attached to the inmate's ankle, and a device is connected to the inmate's telephone that electronically contacts the bracelet. If the device is unable to make contact with the bracelet (because the bracelet is more than a prescribed distance from the device), the device activates a telephone link to the authorities. This process lets the authorities know when the individual has left home. Alternatively, a GPS unit may be used. This configuration offers greater awareness of the offender's location.

Home detention programs contemplate some authorized absences, such as therapy visits and work.

JUVENILES PROSECUTED AS ADULTS

Direct Filing and Transfers

Colorado law allows the prosecution to charge a juvenile as an adult in two situations. First, in certain circumstances, charges can be filed directly despite the fact the offender is less than eighteen years of age. "Direct file" means adult charges may be filed directly in the district court. Second, in certain other situations, charges may be filed in juvenile court but are then transferred to the district court where the offender is treated as an adult. Each of these routes leads to different sentencing options should the offender be convicted.

Regarding direct filing, the sentencing court may impose an adult sentence, a sentence to the youthful offender system (where allowed) or a juvenile sentence.[170] The last option is only available if the offender is less than sixteen years of age and is not convicted of a class one or class two felony or a crime of violence pursuant to CRS § 18-1.3-406. If the juvenile offender is sentenced as a juvenile by the adult court, the mandatory, repeat, violent and aggravated juvenile offender statutes all govern the court's sentencing authority.[171]

Transfer hearings are governed by CRS § 19-2-518. If a case has been transferred to adult court by the juvenile judge, the adult court may impose any sentence that the juvenile court could have imposed had the matter been handled by the juvenile court system, can remand the matter to juvenile court for sentencing, or may impose an adult sentence. However, if the juvenile is convicted of a class one felony or has been previously adjudicated a mandatory sentence offender, violent juvenile offender or aggravated juvenile offender, he or she must be sentenced as an adult.

Youth Offender System

In a September 1993 special session, the General Assembly created the Youth Offender System ("Y.O.S.").[172] Y.O.S. is intended to be an intermediate sentencing option for those youths who are not adults under the law (fourteen through seventeen years of age), but who need more intensive intervention than the juvenile court system can deliver.

In order to sentence a juvenile to the youthful offender system, the court shall first impose upon such person a sentence to the department of corrections in accordance with CRS § 18-1.3-401. The D.O.C. sentence is then suspended conditioned upon the youth's successful completion of a Y.O.S. sentence.[173] A Y.O.S. sentence may be imposed if the offender is charged as an adult under CRS § 19-2-517, is fourteen years of age or older and is: (1) convicted of a felony crime of violence as defined in CRS § 18-1.3-406, excluding class 1 felonies and class 2 crimes of violence; (2) convicted of a felony gun offense enumerated in CRS § 18-12-101 *et seq.*, except possession of a handgun; (3) used, or possessed an threatened the use of, a deadly weapon during the commission of a felony against a person enumerated in CRS § 18-3-101 *et seq.*; or (4) has two or more prior adjudications for offenses that would be felonies if committed by an adult.[174]

CRS § 19-2-517(1)(a)(V)(b) states that attempts, conspiracies, solicitations and complicity to commit the predicate offenses also are punishable with a Y.O.S. sentence.

The previous list notwithstanding, offenders convicted of a sex offense enumerated in CRS § 18-3-401 *et seq.* or who have previously been sentenced to the Y.O.S. program or the D.O.C. may not be given a Y.O.S. sentence.[175]

A Y.O.S. sentence is imposed for a determinate period of between two and six years, plus a period of community supervision. As an incentive for performance, a D.O.C. sentence also is imposed but suspended.[176] If the D.O.C.'s executive director determines an offender cannot

successfully complete the Y.O.S. sentence, the court can, on request, impose the suspended D.O.C. sentence.[177] In this case, the time spent in the Y.O.S. program is counted in computing the prison sentence. The suspended sentence is deemed satisfied if the Y.O.S. sentence is successfully completed.[178]

COLLATERAL CONSEQUENCES

There are a number of collateral consequences that flow from the conviction of a felony. Persons serving prison sentences may not vote.[179] Persons convicted of a felony are disqualified from holding public office and from the practice of law during their period of confinement and while on probation.[180] Members of many professions may have their licenses suspended or revoked on conviction of a felony.[181]

A drug conviction has two collateral consequences that are sometimes overlooked. A substantial surcharge attaches for a conviction or a deferred judgment for any offense or attempt to commit any offense under CRS § 18-18-101 et seq. Also, CRS § 42-2-127.3 provides for suspension of the driver's license of a person convicted of or given a deferred judgment for a drug offense.

Cost of Care

A significant collateral consequence of a criminal adjudication is the growing requirement to pay for the "cost of care." The Colorado General Assembly has made it state policy to attempt to recover reimbursement for the cost of probation, parole, incarceration and home detention.[182] In addition, the statute governing payment of costs in criminal cases has been steadily expanded to include items heretofore not commonly associated with the term.[183]

CRS §§ 18-1.3-701 and 17-10-103 require the court to order payments for the cost of care or to allow the agency providing services (such as the D.O.C. or judicial department) to bring an action for reimbursement of costs. A restitution order takes priority over a governmental need for reimbursement. However, the circumstances of the offender and the offender's ability to earn income also are considered. CRS § 16-11-101.6 allows for additional twenty-five dollar time payment fee if the defendant does not pay all amounts assessed at the time an order for payment is entered and late penalty fees for fees not paid on time.[184] Additionally, the court may order a defendant to repay any crime stopper reward.[185]

Sex Offenders

A number of collateral rules apply to sex offenders:

1. CRS § 24-72-308, which governs the sealing of criminal justice records, contains an exception [subsection (3)(c)] that prevents the sealing of criminal justice records if a defendant has a deferred judgment, deferred prosecution or a conviction for any sex offense. For purposes of this statute, sex offenses are those enumerated in CRS § 18-3-401 *et seq*.

2. An individual who receives a deferred judgment or conviction for a sex offense must pay a sex offender surcharge. The fees are scaled in CRS § 18-21-103 for the severity of the offense. The definition of a sex offense, for surcharge purposes, is contained in CRS § 16-11.7-102 (3), which lists a number of offenses.

3. CRS § 16-11.7-101 et seq. creates the Colorado Sex Offender Trreatment Program. For purposes of this statute, sex offenses are defined in CRS § 16-11.7-103. It includes a number of sex crimes, as well as attempt, conspiracy and solicitation to commit such crimes. There is also a catch-all: the statute applies to an offender who has "any history of sex offenses." Apparently, this goes beyond convictions. CRS § 16-11.7-104 requires an evaluation as part of the probation report, and CRS § 16-11.7-105 requires treatment, both at the expense of the defendant. The sex offender statute also creates a treatment board, which has promulgated standards for treatment.

4. For "offenses involving unlawful sexual behavior," CRS § 18-3-412.5 requires the sex offender to register with local law enforcement at least annually. Also, the Colorado Bureau of Investigation ("CBI") may establish a central registry of such offenders.[186]

5. For offenses "for which the factual basis involved a sexual assault as defined in part four of article three of the title 18, C.R.S.," parolees must submit blood and saliva samples for CBI analysis.[187]

6. Finally, a finding of probable cause or a conviction for "any sexual offense involving sexual penetration," as defined in CRS § 18-3-401(6) requires a blood test for human immunodeficiency virus and disclosure of the results to the victim.[188]

THE SENTENCING PROCESS

The Presentence Report

On conviction, either by plea of guilty or a finding of guilt by trial, the first step in the sentencing process is the preparation of the presentence report, which is drafted by the probation department for the court. The report should give the court an objective briefing on the defendant's character and background, as well as the circumstances of the offense, the amount of restitution (if any) and the impact on the victim. The probation department also makes a sentencing recommendation. For sex offenders, the probation report is required to contain a treatment evaluation.[189] Most offenders also are subject to random drug testing.[190]

The presentence report includes information on the defendant's family background, educational history, employment record and past criminal history, as well as sentencing alternatives. A victim impact statement must be prepared by the Department of Human Services and forwarded to the probation department for inclusion in the report.[191] The presentence report also includes enough financial information about the offender to allow the court to make an intelligent decision regarding cost of care.[192] A psychiatric report on the defendant is optional.

The report must be provided to the court and parties at least seventy-two hours prior to the sentencing hearing.[193] Even if the presentence report is waived by the parties, the victim impact statement still must be provided at least seventy-two hours prior to sentencing.[194]

The Sentencing Hearing

The traditional model of the sentencing hearing assumes that there are two parties going before the decisionmaker, the prosecution and the defendant. However, the probation department is also an important third party because its report continues to cover more and more ground, and the court has a growing number of sentencing options. Then there is the increased role of victims at the sentencing hearing. Under current victim's rights legislation,[195] victims may appear in court even if the prosecution chooses not to call them to testify (see the section on victims' rights below). Therefore, up to four independent parties provide information and make recommendations to the court regarding the appropriate sentence.

The probation department generally gets the information about the crime from the district attorney's file. Often this is a verbatim summary of a police report. Therefore, defense counsel who have information that is contrary to or supplements the police material must provide it to the probation department well in advance of the sentencing. Incorporation of this information in the report can lead to both better understanding by the court of mitigating factors and a more favorable recommendation from the probation department. Favorable evidence in other forms, such as videotaped interviews, should be made available to the probation officer as well.

The hearing is wide open, since the rules of evidence do not apply at sentencing hearings[196] and the court must consider every facet of the case and the circumstances of the offender. The courts have even held that the judge can consider conduct for which the defendant was never charged, the dismissed counts, if any, resulting from a plea bargain against the defendant, or even, in some circumstances, conduct for which the defendant was acquitted.[197] The court must give the defense adequate advance notice if the court is considering a sentence in the extraordinary aggravated range. The aggravating circumstance must be proven by a preponderance of the evidence.[198]

Most felony cases result in a sentencing hearing and, therefore, the attorneys should begin sentencing preparation when they first become involved in the case. Defense counsel, in particular, should begin accumulating relevant background material on the client at this point. If the client signs a release of information for all medical and psychological information, as well as previous probation report and diagnostic reports generated by the D.O.C., defense counsel can obtain them early in the proceedings so they may be used if and when appropriate.

The defendant has the right to counsel at the sentencing hearing.[199] The defendant also has the right to allocution at sentencing,[200] so defense counsel and the defendant need to consider what the defendant would like to say. If the case has been tried, and it appears that comments by the defendant could be used at any retrial, the defendant might want to remain silent. On the

other hand, following a plea bargain, the defendant should be prepared to make appropriate comments, such as apologizing for his or her conduct.

Case law and a number of statutes direct the court to consider many factors at sentencing,[201] such as the concepts of deterrence, punishment, equality and rehabilitation.[202] If the court is considering a grant of probation, additional factors must be considered.[203] To insure meaningful appellate review of any sentence, the court must place findings on the record regarding the pertinent factors.[204] The factors to be considered are nothing less than the defendant's entire life history, circumstances of the offense, and the impact of the offense on the victim and society. The offender's prior criminal history and the level of violence associated with the crime are the two most significant factors.

Alternative Sentences

In 1995, the General Assembly created an alternative sentencing scheme, now located at CRS § 18-1.3-104.[205] A non-violent offender may be sentenced "alternatively" if the court finds that both probation and D.O.C. sentences are inappropriate. Having made such a finding, the defendant can then be sentenced to community corrections, home detention or a specialized restitution and community service program (see discussion of these alternatives above). A non-violent offender is defined by statute.[206]

In making its decision to sentence non-violent offenders, the court must consider the nature of the offense, as well as the offender's character, criminal history, employment history, rehabilitative potential, victim impact and ability to pay restitution.[207]

The alternative sentence statute was enacted as part of the same act that authorized millions of dollars in new prison construction.[208]

VICTIMS' RIGHTS

In 1992, the voters approved Art. II, §16A of the Colorado Constitution, entitled "Rights of Crime Victims."[209] The amendment provides that victims or their designees shall have the right to be heard when relevant, to be informed and to be present at all critical stages of the criminal justice process. The amendment leaves to the General Assembly the authority to determine terminology, including the phrase "critical stages."[210]

The statute impacts the sentencing process in a number of respects. A victim is defined as a someone who is incapacitated or deceased, or his or her spouse, sibling, child, grandparent, significant other or other lawful representative.[211] The General Assembly has broadly defined the phrase "critical stages" to include arraignment, "disposition," sentencing hearing, subsequent sentence modification, probation revocation hearing, post-conviction proceeding, parole application and application hearing, release from parole, discharge from prison, transfer to a non-secured facility (such as community corrections), transfer to a state hospital and appeal.[212]

CRS § 24-4.1-302.5(1)(d) and (g) provide for the right to be heard at the acceptance of a negotiated plea and at sentencing. The statute also requires that the victim be informed of the rights to pursue a civil judgment against the defendant and that the court determine restitution. Pursuant to subsection (q), the victim must be advised if the defendant is placed in or transferred to a less secure correctional facility or program.

Victims' rights legislation places substantial obligations on the prosecution to consult with the victim. Before the sentence may be reduced or plea negotiated, the district attorney must consult "where practicable" with the victim.[213] The statute also requires the prosecution to advise the victim of the date, time and place of all critical stages of the proceeding, including the time and day of the sentencing, motions to reconsider, modification of the sentence and the course of the appellate process.[214] An administrative and civil enforcement mechanism also is provided.[215] Another statute provides that, prior to a sentence of home detention, the court must make "every reasonable effort" to notify the victims involved.[216]

POSTCONVICTION REMEDIES

Motions to Reconsider

Pursuant to Crim.P. 35(b), the defendant may petition the court for reconsideration of sentence no later than 120 days after imposition of sentence, provided the case is not on appeal. In the event of an appeal, the 120 days commence after the mandate of the appellate court has issued.

Case law holds that the trial court is deprived of jurisdiction to hear the Crim.P. 35(b) motion while the case is on appeal.[217] However, CRS § 18-1-409(2) requires that an appeal be commenced within forty-five days of judgment. Therefore, offenders are presented with three possible options: they can forego the appeal, forego the motion to reconsider, or appeal and seek a limited remand from the appellate court for the purpose of allowing the trial court to rule on the reconsideration motion. The last alternative is the most likely, but requires the appellate court to rule on the remand. A rule change removing the need for this cumbersome procedure would be welcome.

Prison crowding has lead to the following scenario: an inmate coming up on his 120-day deadline for filing his motion has yet to be placed in the D.O.C.'s diagnostic unit. His diagnostic testing and report are therefore unavailable. In this situation, counsel may file a motion and ask the court to defer ruling. The 120-day limitation is designed to effect separation between the court's authority to sentence and the D.O.C. executive's authority to commute. If the defendant urges excessive delay, his or her motion is no longer within the court's jurisdiction and is deemed abandoned.[218] However, some lesser period of delay is acceptable, especially if it is not due to the conduct of the defendant. In ruling on the motion, the court can consider the defendant's conduct while in the D.O.C.[219] Motions to reconsider are the defendant's last chance in the courts: the exercise of the court's discretion is not appealable.[220]

Sentence Appeals

Appeals of sentences by defendants are handled routinely with or without an appeal of the verdict.[221] The reviewing court considers "the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based."[222] The standard of review is one of abuse of discretion.[223] The reviewing court may affirm the sentence, impose any sentence the trial court could lawfully have imposed or remand for resentencing.[224] The last published case which reversed a sentence for excessive length was in 1986.[225]

The prosecution may appeal questions of law regarding sentencing pursuant to CRS § 16-12-102 and may appeal an "illegal" sentence and seek a new sentencing hearing.[226] At the new hearing, a longer sentence is not barred by double jeopardy principles.[227]

COMMUTATION/PARDONS

The power of the governor to commute a sentence or pardon an offender is found in Article 4, § 7 of the Colorado Constitution. Once a conviction becomes final, the courts no longer have authority to alter it; that authority rests only with the executive branch, e.g., the governor.[228] Finality for these purposes is the expiration of the court's authority to act under Crim.P. 35(b) (motions to reconsider). Based on the doctrine of separation of powers, once the governor has acted to commute a sentence, the court no longer has authority to alter the sentence in any fashion.[229]

The legislature has prescribed a procedure for pardons and commutations, embodied in CRS § 16-17-102. Before the governor acts he or she must solicit comments from the prosecutor and the judge who handled the matter at trial. The governor has the sole authority to evaluate these comments and other factors and then make appropriate decisions.

CONCLUSION

The felony sentencing statutes suffer from "definition overload." For example, there are multiple definitions for sex offenses and violent offenses. Also, two sentencing authorities and (at least) two sentencing proceedings are required for every D.O.C. sentence. The judge considers the case and the parole board replicates this hearing at a later time. The court's sentence serves only to bracket the length of the true period of incarceration.

At a time when public confidence in sentencing is at a low, one of the authors believes the legislature should abolish the parole board's authority and require inmates to serve the court's sentence with no deductions. To accomplish this goal, the sentencing ranges could be adjusted to reflect the sentences actually being served today.

The legislature should reconsider the concept of allowing community boards to reject offenders, even when the D.O.C. or the court has placed them. Community boards often reject the more heinous offenders. These individuals are later released directly into the community without the benefit of transitional placement. In practice, offenders with the greatest need for support as they reintegrate into the community have the least chance of getting such help.

The Colorado felony sentencing process has evolved from simple to extremely complex. The significant changes in the areas of sentence categorization, length and collateral consequences make it essential that counsel carefully examine every new wrinkle in the sentencing scheme.

1. The earlier articles by Phil Cherner are "Colorado Felony Sentencing," 11 The Colorado Lawyer 1479 (June 1982); "Colorado Felony Sentencing: An Update," 14 The Colorado Lawyer 2163 (Dec. 1985), "Felony Sentencing in Colorado," The Colorado Lawyer 1689 (Sept. 1989); "Colorado Felony Sentencing: Law and Practice", 24 The Colorado Lawyer 2669 (Dec. 1995); "Felony Sex Offender Sentencing" The Colorado Lawyer, December, 2004.

2. Colo. Const. Art. XVIII, § 4; *Smalley v. People*, 304 P.2d 902 (Colo. 1956).

3. 673 P.2d 991 (Colo. 1983); *see also People v. Flenniken,* 749 P.2d 395 (Colo. 1988).

4. CRS § 18-1.3-104.

5. *People v. Rockwell*, 125 P.3d 410 (Colo. 2005); *Martin v. People,* 27 P.3d 846 (Colo. 2001); *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

6. For a history of the Gorsuch Law, see *Thiret v. Kautzky*, 792 P.2d 801 (Colo.1990); and Multz, "Presumptive Sentencing: Colorado's New Sentencing Act," 8 The Colorado Lawyer 2349 (Dec. 1979).

7. Persons serving life sentences, sex offenders and habitual criminals. CRS § 17-2-201(5)(a). See *Thiret*, supra, note 5.

8. L. 85 Ch. 145, § 7.

9. L. 85 Ch. 142, § 4.

10. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

11. The figures in this section come from Colorado D.O.C reports available at www.doc.state.co.us, prison population growth projections published by the Legislative Council, the Colorado Division of Criminal Justice, and the U.S. Census Bureau.

12. CRS § 17-1-104.3

13. CRS § 17-1-104.9

14. *Colorado Dept. Of Corrections, Statistical Report Fiscal Year 2004,* Table 60, Offender Profile by Facility Ethnicity and Admission Type as of June 30, 2004.

15. C.R.S. §18-1.3-401(10)(b).

16. C.R.S. §18-1.3-401(6).

17. C.R.S. § 18-1.3-401.

18. This scheme nevertheless does not offend double jeopardy guarantees. *People v. Mayes*, 981 P.2d 1106 (Colo. App.,1999).

19. CRS § 18-1.3-401.

20. H.B. 93-1302, L.93, Ch. 322, § 7.

21. Specifically, the "extraordinary risk crimes" are defined in CRS §

22. H.B. 79-1589, L.79, Ch. 157, § 16

23. L. 81, Ch. 211, § 1.

24. *People v. Glover*, 781 P.2d 134 (Colo. App. 1989).

25. Where the predicate crime was a felony in Oregon, it was irrelevant that it was a misdemeanor in Colorado. *People v. Sellers*, 762 P.2d 749 (Colo.App. 1988). Probation as a result of conviction under New York's youth offender act is not an aggravator under this subsection. *People v. Pellien*, 701 P.2d 1244 (Colo. App. 1985).

26. But see *People v. Andrews*, 871 P.2d 1199 (Colo. 1994), holding a sentence for the crime of escape is not automatically aggravated by this provision.

27. CRS § 18-1.3-401(8).

28. CRS § 18-1.3-401(8).

29. The crimes are any crime against an at-risk adult or at-risk juvenile, murder, first or second degree assault, kidnaping, sexual assault, aggravated robbery, first degree arson, first degree burglary, escape or criminal extortion. A "deadly weapon" is defined by CRS § 18-1-901(3)(e) as "any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether loaded or unloaded; (II) A knife; (III) A bludgeon; (IV) Any other weapon, device, instrument material, or substance, whether animate or inanimate." "Serious bodily injury" is defined by CRS § 18-1-901(3)(p) as "bodily injury which involves, either at the time of the actual injury or at a later time, a substantial risk of

death, a substantial risk of serious permanent disfigurement, or a substantial risk of protracted loss or impairment of a function of any part or organ of the body, or breaks, fractures or burns of the second or third degree." "Bodily injury" is defined by CRS § 18-1-901(3)(c) as "physical pain, illness, or any impairment of physical or mental condition."

30. C.R.S. § 18-1.3-406(2)(b)(I).

31. C.R.S. §18-1.3-406(1)(a); Crim .P. 35(b). Cf. *People v. Watkins*, 126 P.3d 309 (Colo. App., 2005).

32. The apple cart was upset in *People v. Montoya*, 709 P.2d 58 (Colo.App. 1985) where the court held it was unconstitutional to punish defendant for first degree assault and again for possessing and using the gun. This doctrine was later cast aside in *People v. Haymaker*, 716 P.2d 110 (Colo. 1986) and specifically overruled in *People v. Montoya*, 736 P.2d 1208 (Colo. 1987).

33. H.B. 86-1008, L.86, ch. 138. The nine offenses are second degree murder, some forms of first degree and second degree assault, assault on the elderly or handicapped, second degree kidnaping, sexual assault in the third degree, sexual assault on a child, first degree arson and aggravated robbery.

34. 791 P.2d 374 (Colo. 1990).

35. These crimes have come to be called crimes of violence *per se.* See, e.g., *People v. Hogan* 114 P.3d 42 (Colo. App., 2004 0.

36. See Multz, supra, note 5.

37. L. 81, Ch. 210, § 1.

38. 769 P.2d 1064 (Colo. 1989).

39. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo.App. 1994).

40. CRS § 18-1.3-401 (6).

41. 530 U.S. 466 (2000).

42. *Id.* At 490.

43. 78 P.3d 751 (Colo. App., 2001).

44. 124 S.Ct. 2531 (2004).

45. *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

46. 113 P.2d 713 (Colo. 2005). *Lopez* overturned *People v. Allen*, 78 P.3d 751 (Colo. App. 2001). Soon after the Colorado Supreme Court granted certiorari on a number of cases for reconsideration in light of *Lopez* and *Blakely*. See, *People v. Moon*, 04SC800 (Oct. 11, 2005); *People v. Barton*, 05SC149 (Oct. 11, 2005); *People v. Solis-Martinez*, 05SC37 (Oct. 11, 2005); *People v. Starkweather*, 05SC150 (Oct. 11, 2005); *People v. Sinclair*, 05SC200 (Oct. 11, 2005); *People v. Pham*, 05SC249 (Oct. 11, 2005); *People v. Misenhelter*, 05SC272 (Oct. 11, 2005); *People v. Schulze*, 05SC345 (Oct. 11, 2005); *People v. Armenta*, 05SC350 (Oct. 11, 2005); *People v. Hopkins*, 05SC351 (Oct. 11, 2005); *People v. Johnson*, 05SC408 (Oct. 11, 2005);

47. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

48. *People v. Fogle*, 116 P.3d 1227 (Colo. App. 2004) (Statements of fact, made without objection by the defendant are treated as an admission for Sixth Amendment purposes.); *People v. Scott*, __ P.3d __, (Colo. App. 2005), 2005 WL 2877851 (Colo. App. 2005) (A fact admitted by a defendant is a Blakely-compliant factor, sufficient to support an aggravated sentence.).

49. In *People v. Huber,* __ P.3d __, 05SC40, announced 4/24/06, the court found the prior conviction exception applied to misdemeanor as well as felony convictions, and that the phrase "facts regarding prior convictions" as used in *Blakely*, includes a probationary status reflected in judicial records.

50. *Lopez*, 97 P.3d at 716.

51. L. 45, Ch. 114.

52. This provision was repealed retroactively, so no inmates actually served life sentences. CRS § 17-22.5-104(2).

53. See, e.g., *People v. Gaskins*, 825 P.2d 30 (Colo. 1992); Brown, "Challenging the Constitutionality of Sentences Through Proportionality Hearings," 23 The Colorado Lawyer 43 (Jan. 1994).

54. H.B. 93-1302, L. 93, Ch. 322, § 1, amending CRS § 16-13-101 (relocated to CRS § 18-1.3-801 *et seq.*).

55. CRS § 18-1.3-801(2).

56. CRS § 18-1.3-801(1.5).

57. CRS § 18-1.3-801(2.5).

58. *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986).

59. CRS § 18-1.3-801(1)(c).

60. The presumptive maximum for a class two felony is twenty-four years, multiplied by three, equaling seventy-two years.

61. CRS § 18-1.3-804.

62. CRS § 18-1.3-803.

63. See also, Cherner, "Felony Sex Offender Sentencing" Colorado Lawyer, December, 2004.

64. CRS § 18-1.3-904.

65. H.B. 98-1156, L. 98, Ch. 303, codified in CRS §§ 16-13-801 *et seq*. and now in CRS §§ 18-1.3-1001 *et seq.*

66. CRS § 18-1.3-401.

67. *Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *see also People v. Strean,* 74 P.3d 387 (Colo.App. 2002), *People v. Dash,* 104 P.3d 286 (Colo. App. 2004).

68. CRS § 18-1.3-401(1)(a)(V)(A).

69. *Smith*, 29 P.3d 347 (Colo. App. 2001) *See also People v. Larson*, 97 P.3d 246 (Colo. App. 2004) (fifty year minimum upheld).

70. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002), This is so despite the conflicting wording in the crime of violence statute, CRS § 18-1.3406(1)(b).

71. CRS § 18-1.3-1006(1)(a). "On completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited to the sex offender pursuant to § 17–22.5-405, CRS, the parole board shall schedule a hearing to determine whether the sex offender may be released on parole."

72. CRS § 17-22.5-405(4).

73. *Lifetime Supervision of Sex Offenders, Annual Report* (Nov. 1, 2005) at 12, prepared pursuant to CRS § 18-1.3-1011(a), by the Colorado Dept. Of Public Safety, and State Judicial Department. The report is available at http://dcj.state.co.us/ovdsom/Sex_Offender/SO_Pdfs/AnnualReport.pdf.

74. *People v. Montgomery*, 669 P.2d 1387 (Colo. 1983); *People v. Wilson*, 819 P.2d 510 (Colo.App. 1991).

75. CRS § 18-1-408.

76. CRS § 18-1-408 (3); see generally *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

77. CRS § 18-1.3-406(1)(a).

78. CRS § 18-3-402(5).

79. An assault weapon is a semiautomatic firearm with a detachable magazine capable of holding twenty or more rounds. The five-year sentence is in addition to the mandatory sentence imposed for a crime of violence and may not be suspended. CRS § 18-1.3-406(7).

80. CRS §§ 18-8-201 to 18-8-208 and CRS § 18-8-211.

81. CRS § 17-27.7-104(3).

82. CRS § 17-27.7-103(1); *People v. Young*, 894 P.2d 19 (Colo.App. 1994).

83. Colorado Regimented Inmate Training Program: A Legislative Report (Dept. of Corr., 1993). See also, collected studies at the Center for the Study and Prevention of Violence web site, http://www.colorado.edu/cspv/.

84. CRS § 17-27.5-101.

85. 623 P.2d 862 (Colo. 1981), but see *Godbold v. Wilson*, 518 F.Supp. 1265 (D.Colo. 1981), implying there is a federal constitutional right to presentence credit. This is dicta, however, because the court found Godbold had failed to prove he was indigent, mooting the constitutional issue.

86. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

87. *People v. Hardman*, 653 P.2d 763 (Colo. App. 1982).

88. *People v. Washington*, 709 P.2d 100 (Colo.App. 1985).

89. *People v. Radar*, 652 P.2d 1085 (Colo. App. 1982).

90. *Beecroft v. People*, 874 P.2d 1041 (Colo. 1994).

91. *People v. Murray*, 805 P.2d 1175 (Colo. App. 1990); *Massey v. People*, 736 P.2d 19 (Colo. 1987); *People v. Lee*, 678 P.2d 1030 (Colo. App. 1983) (municipal jail).

92. *Beecroft*, supra, note 64; *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982).

93. *People v. Kastning*, 738 P.2d 807 (Colo. App. 1987).

94. *Gehl. v. People*, 423 P.2d 332 (Colo. 1967).

95. *People v. Hoecher*, 822 P.2d 8 (Colo. 1991).

96. *People v. Corbett*, 713 P.2d 1340 (Colo. App. 1985).

97. *Schubert*, supra, note 60 at 795.

98. Id. at 794.

99. Id. at 795.

100. D.O.C. personnel have informally told the author that no inmate who has met the 75 percent criteria has ever reached parole eligibility.

101. CRS § 17-22.5-104(d)(I).

102. *Price v. Mills*, 728 P.2d 715 (Colo. 1986); *Thiret*, supra, note 5; *Vaughn v. Gunter*, 820 P.2d 659 (Colo. 1991).

103. *Spoto v. Colorado D.O.C.*, 883 P.2d 11 (Colo. 1994).

104. CRS § 16-11-308(2).

105. CRS § 17-40-101 et seq.

106. CRS § 16-11-308(5).

107. CRS § 17-2-201(4)(a).

108. CRS § 17-2-201(1).

109. CRS § 17-22.5-404.

110. The criteria are incarceration for a crime which is a class one or class two crime of violence as defined in CRS § 18-1.3-406 or any class three sex offense contained in CRS § 18-3-401 et seq., any habitual criminal offense enumerated in CRS § 18-13-801, or anyone sentenced under the Sex Offender Act of 1968, CRS § 18-1.3-901 et seq. CRS § 17-2-201(4)(a).

111. *California v. Morales*, 115 S.Ct. 1597 (1995).

112. CRS § 17-2-201.

113. CRS § 18-1.3-401.

114. Id.

115. 92 S.Ct. 2593 (1972).

116. CRS § 17-2-103.

117. CRS § 17-2-103(11).

118. Id.

119. CRS § 17-22.5-403(8).

120. The definition of "non-violent offender" for these purposes is found in CRS § 17-22.5-405(5)(b). It is a felony offense other than a crime of violence as defined in CRS §§18-1.3-406, 18-3-104, 18-4-203, 18-4-301, 18-4-401(2)(c), (2)(d) and (5), or any felony committed against a child under articles 3, 6 and 7 of title 18.

121. CRS § 17-22.5-405(5)(a).

122. CRS §§ 17-22.5-303(7) and 403(6).

123. L. 93, Ch. 187; CRS § 17-27-101 *et seq*.

124. CRS §§ 17-27-103, 17-27-104 and 18-1.3-301.

125. CRS § 17-27-103(5), (7).

126. CRS § 17-27-104(3), (5).

127. CRS § 17-27-108.

128. CRS §§ 17-27-106 and 18-8-208.

129. CRS § 17-27-103(3); see also CRS § 17-27-105.5(3)(f).

130. As of November, 2005, five lifetime sex offenders have been placed in transition community corrections, and two in community corrections. *Lifetime Supervision of Sex Offenders, Annual Report* (Nov. 1, 2005) at 12, prepared pursuant to CRS § 18-1.3-1011(a), by the Colorado Dept. Of Public Safety, and State Judicial Department. The report is available at http://dcj.state.co.us/ovdsom/Sex_Offender/SO_Pdfs/AnnualReport.pdf.

131. Colorado Department of Corrections, Division of Adult Parole, Community Corrections, and YOS, www.doc.state.co.us/commcorr/community transition.asp

132. CRS § 18-1.3-301(1)(h).

133. Crim.P. 35(b) imposed the 120-day limit.

134. CRS § 18-1.3-301(1)(d). CRS § 18-1.3-204(4) provides for notice and a hearing prior to modification of a probationary, and hence a community corrections, sentence.

135. *Wilson v. People*, 747 P.2d 638 (Colo. 1987).

136. 817 P.2d 1017 (Colo. 1991).

137. CRS § 18-1.3-405(1)(g).

138. CRS § 18-1.3-301(1)(e); *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986); *Downing v. People*, 895 P.2d 1046 (Colo. 1995). See also *Benz v. People*, 5 P.3d 311 (Colo. 2000) (trial court has jurisdiction to re-sentence an offender rejected after acceptance from a community corrections program).

139. *People v. Johnson*, 13 P.3d 309 (Colo. 2000).

140. 902 P.2d 852 (Colo. App. 1995).

141. *People v. James*, 940 P.2d 1092 (Colo. App. 1996).

142. CRS § 18-1.3-402 (1)(a).

143. CRS § 18-1.3-402 (1)(b).

144. CRS § 17-27.9-102(2).

145. CRS § 18-1.3-302(2)(a).

146. CRS § 18-1.3-302(5).

147. CRS § 18-1.3-201 (2)(a).

148. *People v. Thompson*, 897 P.2d 857 (Colo.App. 1994) (fines); *People ex rel. Van Meveren v. District Court*, 572 P.2d 483 (Colo. 1977) (community placement).

149. *People v. Brockelman*, 933 P.2d 1315 (Colo.,1997)(geographic restriction upheld).

150. CRS § 18-1.3-202.

151. *Flenniken*, supra, note 3; *People v. Martinez*, 844 P.2d 1203 (Colo.App. 1992).

152. A required charitable contribution was approved in *People v. Burleigh*, 727 P.2d 873 (Colo.App. 1986).

153. CRS § 18-1.3-102. A 180 day extension is allowed to facilitate the collection of restitution.

154. The court must revoke the deferred judgment if the violation is proven. *People v. Wilder,* 687 P.2d 451 Colo. 1984). If the violation alleged is a criminal offense, the violation alleged is a criminal offense, the violation must be proven beyond a reasonable doubt. *People v. Van Deusen,* 667 P.2d 402 (Colo. App. 1983). Otherwise, the standard is one of preponderance of the evidence. *People v. Adair,* 620 P.2d 46 (1980), aff'd in pat and rev'd in part on other grounds,

651 P.2d 389 (Colo. 1982).

155. *People v. Turner,* 644 P.2d 951 (Colo. 1982).

156. CRS § 18-18-404(3).

157. CRS § 18-1.3-601.

158. *People v. Engel*, 746 P.2d 60 (Colo. App.1987).

159. CRS § 18-1.3-603(1) and 17-2-201(5)(c)(I).

160. CRS § 18-1.3-602(3)(a); See also *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005) (court must consider if the defendant's conduct is the proximate cause of expenses incurred ; travel expenses to memorial services incurred by parents of victim was proximately caused by defendant)

161. *People v. Roberts,* --- P.3d ----, 2006 WL 321168, Colo., Feb 13, 2006.

162. *People v. Quinonez*, 735 P.2d 159 (Colo. 1987).

163. *Id*.

164. *People v. Borquez*, 814 P.2d 382 (Colo. 1991).

165. CRS § 18-1.3-602(4)(a).

166. *Id.*

167. CRS §§ 17-2-201(5)(c)(I) and 16-11-102(4).

168. CRS § 18-1.3-206. CRS § 16-11-101.7 also provides that a crime stopper reward can be taxed as costs.

169. CRS § 18-1.3.104.

170. CRS § 19-2-517(2).

171. A "mandatory sentence offender," as defined in CRS § 19-2-516, has either been twice adjudicated as a delinquent child and placed on probation and has had probation revoked for a delinquent act. A repeat juvenile offender, as defined in CRS §, has been previously adjudicated a juvenile delinquent and is adjudicated a juvenile delinquent for a, which constitutes a felony, or the juvenile's probation has been revoked for a delinquent act which constitutes a felony. A "violent juvenile offender," as defined in CRS § 19-2-516(3),is a violent juvenile offender if he or she is adjudicated a juvenile deliquent for a delinquent act that constitutes a crime of violence as defined in CRS § 18-1.3-406. An "aggravated juvenile offender," as defined by CRS § 19-2-

516 is (1) is adjudicated a juvenile delinquent for a delinquent act that constitutes a class one or class two felony and has had probation revoked for and act that constitutes a class one or class two felony; or (2) is adjudicated a delinquent for a delinquent act that constitutes a felony and is subsequently adjudicated a juvenile delinquent for a delinquent act that would constitute a "crime of violence," as defined in CRS §18-1.3-406 or has had probation revoked for a similarly defined crime of violence; or, (3) adjudicated a juvenile delinquent or if his or her probation is revoked for a delinquent act that constitutes felonious unlawful sexual behavior under Part 4 of article 3 of title 18, CRS, or aggravated incest under CRS § 18-6-302.

172. CRS § 18-1.3-407.

173. CRS § 18-1.3-407(2).

174. CRS § 18-1.3-407(2)(a)(I).

175. CRS § 19-2-518(1)(d)(II).

176. CRS § 18-1.3-407(5)(c).

177. CRS § 18-1.3-407(2)(II).

178. CRS § 18-1.3-407.

179. Colo. Const., Art. VII, § 10.

180. CRS § 18-1.3-401(3).

181. E.g., accountants [CRS § 12-2-123 (1)(e)]; architects [CRS § 12-4-11(2)(h)]; motor vehicle dealers [CRS § 12-6-118(3)(d)]; bail bonding agents [CRS § 12-7-106(1)(I)]; dentists [CRS § 12-35-118(1)(b)]; nurses [CRS § 12-28-117(1)(b)] (for nurses, a deferred judgment as well as a conviction can trigger a revocation]; lawyers [CRS § 18-1-105(3) and C.R.C.P. 241.6(5)].

182. CRS § 17-10-101 *et seq.*

183. CRS § 18-1.3-701

184. CRS § 16-11-101.6

185. CRS § 16-11-101.7

186. Offenses "involving unlawful sexual behavior" are those listed in CRS §§ 18-3-401 et seq. and 18-3-305.

187. CRS § 17-2-201(5)(g).

188. CRS § 18-3-415.

189. CRS §§ 16-11-102 and 16-11.7-104.

190. CRS §§ 18-1.3-212 and 16-11.5-101 et seq.

191. The contents of the victim impact statement is delineated in CRS § 16-11-102(1.5).

192. CRS § 16-11-102(1.7).

193. CRS § 16-11-102(1)(a).

194. See *People v. Johnson*; 780 P.2d 504 (Colo. 1989).

195. CRS § 24-4.1-301 *et seq.*

196. C.R.E. 1101(d)(3).

197. *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Newman*, 91 P.3d 369 (Colo. 2004).

198. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Simmons*, 723 P.2d 1350 (Colo. 1986).

199. *Mepha v. Rhay*, 88 S.Ct. 254 (1967).

200. *People v. Doyle*, 565 P.2d 944 (Colo. 1977).

201. See, e.g., *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *Lopez v. People*, 113 P.3d 713, 731 (Colo. 2005).

202. CRS § 18-1-102.5.

203. CRS § 18-1.3-203.

204. *People v. Walker*, 724 P.2d 666 (Colo. 1986); People v. Leske, 957 P.2d 1030 (Colo. 1998).

205. Formerly CRS § 16-11-101; L.95, Ch. 243, § 17, effective June 5, 1995, adding CRS § 16-11-101(b.5).

206. CRS § 18-1.3-104(1)(II)(B) "non-violent offender" means a person convicted of a felony other than a crime of violence as CRS §18-1.3-406(2), one of the felonies set forth in §§ 18-3-104, 18-4-203, 18-4-301, 18-4-401(2)(c), (2)(d) or (5), or a felony offense committed against a child as set forth in articles 3, 6 and 7 of title 18, and who is not subject to the provisions of § 18-1.3-801.

207. CRS § 18-1.3-104(2)(a).

208. HB 95-1352, L. 95, Ch. 243.

209. CRS § 24-4.1-301 et seq.

210. *People v. Herron*, 874 P.2d 435 (Colo. App. 1993); *Gansz v.People*, 888 P.2d 256 (Colo. 1995).

211. CRS § 24-4.1-302(5).

212. CRS § 24-4.1-302(2).

213. CRS § 24-4.1-303(4).

214. CRS §§ 24-4.1-303(11)(d) and (13).

215. CRS § 24-4.1-303(17).

216. CRS § 18-1.3-105(c).

217. *People v. District Court*, 638 P.2d 65 (Colo. 1981).

218. *Mamula v. People*, 847 P.2d 1135 (Colo. 1993).

219. *Ghrist v. People*, 897 P.2d 809 (Colo. 1995).

220. *People v. Malacara*, 606 P.2d 1300 (Colo. 1980).

221. CRS § 18-1-409(1); C.A.R. 4(c).

222. CRS § 18-1-409(1).

223. *People v. Bruebaker*, 539 P.2d 1277 (Colo. 1975).

224. CRS § 18-1-409(3).

225. *People v. Garciadealba*, 736 P.2d 1240 (Colo.App. 1986).

226. See, e.g., *People v. Leonard*, 755 P.2d 447 (Colo. 1988).

227. *Burns*, supra, note 3. See Cherner, "*Burns v. District Court*: Sentencing Enters a New Era," 13 The Colorado Lawyer 443 (March 1984).

228. *People v. Herrera*, 516 P.2d 626 (Colo. 1973); *People v. Lyons*, 618 P.2d 673 (Colo. App. 1980).

229. *People v. Simms*, 528 P.2d 228 (Colo. 1974).