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Colorado Felony Sentencing: Law and Practice

by Philip A. Cherner, © 1995

Since the last article on this subject was published in 1989,[1] there have been significant changes in the area of victims' rights, sentence categorization and length, and collateral consequences. The overall sentencing scheme has become 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, 1995.

BACKGROUND

A felony is defined by the Colorado Constitution as any offense for which an offender can be sentenced to the penitentiary.[2] The court's authority to sentence is statutory. Prior to *Burns v. District Court*, cases had held there was inherent authority to suspend a sentence; 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 to imprisonment, including a mandatory period of parole; (2) a sentence to the Youth Offender System; (3) a fine; (4) probation, including intensive supervision, confinement in the county jail, home detention and restitution; (5) community corrections; or (6) 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.[5] 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,[6] 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.

Since 1979, the most dramatic changes were the 1985 doubling of the presumptive ranges[7] and the removal of the mandatory parole provision.[8] In 1991, the General Assembly formally recognized the cost of financing the prison system by passing CRS § 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 "revenue neutral."

Nominally, there are now six classes of felonies, but in reality 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.[9]

Colorado D.O.C.'s Prison Population

In June 1995, the D.O.C.'s population was 10,802 inmates.[10] This figure includes those actually in prison, as well as the 200 or so who are backlogged in county jails awaiting bed space in the D.O.C. It also includes 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. It costs approximately $21,000 annually to house an inmate and $70,000 to build a prison cell. Current projections show a D.O.C. population of 14,543 inmates by January 1, 2000, an increase of 35.7 percent from the current numbers.

The D.O.C. operates 21 facilities throughout the state. These range from residential/minimum restrictive security level facilities up through the maximum security facility, the Colorado State Penitentiary in Canon City.[11] By the D.O.C.'s estimate, only 31 percent of the inmates are serving sentences for violent crimes. By far the most prevalent convictions are for burglaries (11.6 percent) and drug abuse (11.2 percent). More than one-third of the inmates are serving sentences for class four felonies and 18 percent for class five felonies.

Colorado's prison population reflects the racial discrimination prevalent in the society at large. Colorado is approximately 4 percent black and 13 percent Hispanic, yet the D.O.C. population is 25 percent black and 26 percent Hispanic. The D.O.C.'s most restrictive facility, the Colorado State Penitentiary, has the lowest percentage of Anglo inmates (36.9 percent) of any D.O.C. facility.

The Sentencing Scheme

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

Sentencing Ranges for Colorado Felonies Committed on or after July 1, 1995 (in years).

			Extraordinary Risk Crimes*		All Felonies**	
Felony Class	Presumptive Range	Extraordinary Range	Presumptive Range	Extraordinary Range	Fine Range	Mandatory Parole Period
1	Life or Death		n/a	n/a	n/a	n/a
2	8-24	4-48	n/a	n/a	$5K-1M	5 years
3	4-12	2-24	4-16	2-32	$3K-$750K	5 years
4	2-6	1-12	2-8	1-24	$2K-$500K	3 years
5	1-3	1/2-6	1-4	1/2-8	$1K-$100K	2 years
6	1-1 1/2	1/2-3	1-2	1/2-4	$1K-$100K	1 year

* Extraordinary Risk Crimes are enumerated in CRS § 18-1-105(9.7)(b) and note 15, infra.

**Notwithstanding the figures shown, CRS § 18-1-105(1)(a)(V)(C) requires a five year parole period for felony sentences imposed for crimes enumerated in CRS § 18-3-401 *et. seq.* and § 18-6-301 *et. seq.* (sex offenses and crimes against children).

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 24 years.

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 a 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.12 Thus, the inmate really receives two sentences from the court: one to prison and one to parole.

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).13 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.14 Felonies that are exempted from this scheme are sex offenses, crimes of violence and drug distribution.15 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.16 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.17

Over the years, the legislature has amended, added to and deleted items from this category. In 1990, several aggravators were deleted and placed in another section of CRS § 18-1-105, where they now mandate a sentence in the ordinary range or greater only if a prison sentence is imposed.18

Today, five remaining factors require an aggravated range sentence.19 The defendant: (1) was convicted of a crime of violence under CRS § 16-11-309; (2) was on parole for another felony at the time of commission of the felony;20 (3) was on probation for another felony at the time of the commission of the felony;21 (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;22 or (5) at the time of commission of the felony, was on appeal bond following conviction for a previous felony.

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.23 The exception is a conviction for a crime of violence. CRS § 16-11-309(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.24 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.25

Prior to the Gorsuch bill, the statute required that the court impose a minimum period of incarceration to the D.O.C. for enumerated violent offenses. Pursuant to CRS 16-11-309, this remains the case. In addition, an offender sentenced under this statute 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 only on appropriate findings reconsiders the sentence at a later time.26

The interplay between this mandatory sentencing statute and the substantive crime definitions can be confusing. Pursuant to CRS § 16-11-309, separate counts must allege the commission of a crime of violence, and the allegations must be tried by the factfinder (the jury).

Litigation in the 1980s cast doubt over the constitutionality of CRS § 6-11-309.27 The General Assembly responded by passing legislation which effectively deleted the need for the separate counts for nine specified offenses.28 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*29 provided some certainty by finding the language requiring a separate charging document and a separate conviction under the crime of violence statute in CRS § 16-11-309 does 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 § 16-11-309 is charged in a separate count. 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."30 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.31 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*,32 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 have found justification for an aggravated range sentence in the defendant's criminal history.33 Consequently, today a court may impose an aggravated range sentence in any case where the facts so warrant.

Habitual Criminal

First enacted following World War II,34 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.35 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.36 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.37 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.38 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.39 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.40 The habitual criminal sentence supplants the routine sentence for the substantive crime.41

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 CRS § 16-11-309(2)] 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.42 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 commiting a class two sexual assault with two prior violent offenses within ten years must receive a sentence of 72 years.43 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 54 years before parole eligibility, let alone release.

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 where the prosecution must prove the prior convictions and the identity of the perpetrator beyond a reasonable doubt.44

The Sex Offender Act

The Colorado Sex Offender Act of 1968 45 provides for a sentence of from one day to life. The Act must be specifically invoked by the court or either party. The one day to life sentence is imposed if the sex offender is found to be a threat to the public.46 A release date is then determined by the parole board.47 However, since such offenders receive no special treatment under the Sex Offenders Act and the ultimate release date is uncertain, this act is seldom utilized.48 Therefore, most sex offenders are sentenced under the routine provisions of CRS § 18-1-105.

Concurrent versus Consecutive Sentences

Unless constrained by statute, the court has inherent authority to impose concurrent or consecutive sentences.49 At least six statutes directly address the court's authority to sentence consecutively or concurrently in specific situations. The compulsory joinder statute50 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.51 However, where there are multiple victims, the court has the discretion to impose consecutive sentences.

Where a defendant is convicted of two or more separate crimes of violence arising out of the same incident, the sentences must be consecutive.52 In addition, anyone convicted of a class two sexual assault must receive a sentence consecutive to any other crime of violence sentence.53

CRS § 16-11-309(8)(a) 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.54

CRS § 18-8-209 requires a sentence for escape or attempted escape to be consecutive to the sentence from which the offender escaped, and CRS § 18-8-213(3) requires a consecutive sentence for bond jumping.

Boot Camp

Pursuant to CRS § 17-27.7-102(1)(a), 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).55 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.56

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.57

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.58 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*,59 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

CRS § 16-11-306, which eliminated this unequal treatment.[60] 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. 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.[61] 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,[62] but not for time spent in the same facility under the same rules if placed there as a condition of probation.[63] 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).[64]

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.[65] It appears that the court retains discretion to award credit for less restrictive custodial time, but there is no entitlement.[66] 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.[67]

At the opposite end of the spectrum, an offender is not entitled to credit for time spent on routine noncustodial probation.[68] Similarly, the nonresidential portion of the community sentence need not be credited against a subsequently imposed sentence after revocation.[69] 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.[70]

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 § 16-11-306 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.[71]

Focusing on the purpose of CRS § 16-11-306 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."72 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.73 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 P.E.D. is currently much less than 50 percent of the imposed sentence.

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 ten days per month earned time for each month of the sentence actually served.

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 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. 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. CRS §§ 17-22.5-303(3) and 403 (2) provide that an offender convicted of second degree murder, first degree assault, first degree kidnapping (except class one kidnapping), 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 § 16-11-309, 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 CRS § 16-11-309, 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.74

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.75 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.76 No such rule applies when the sentences are consecutive.77

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.78 Prison crowding has resulted in many inmates waiting months to get into the diagnostic unit. The unit's purpose is to classify and program incoming inmates.79 Inmates are interviewed and tested to determine their optimum placement, pursuant to the authority vested in the executive director.80 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.81 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 no more than three consecutive terms.82

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 CRS § 17-22.5-404(2), which lists

a mind-boggling 38 factors to be considered.[83] 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.[84] Although the violent offender deferral provision was added in 1993, the parole board applies it retroactively. The constitutionality of a similar California policy recently has been upheld.[85]

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.[86]

Parole is imposed by the judge at sentencing, and the length is fixed by statute.[87] The length of time is shown in the chart on page 2670. The parole board retains the authority to terminate parole early.[88]

Parole Revocation

Offenders in violation of parole may have their parole revoked. The case of *Morrissey v. Brewer*[89] 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.[90] 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.[91] If the revocation is triggered by something other than commission of an 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.[92]

If revocation is appropriate, 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.[93]

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.[94] 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.[95] 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.96

SENTENCES OTHER THAN TO PRISON

Community Corrections

Community corrections was first created pursuant to statute in 1976, and the statute was repealed and re-enacted in 1993.97 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.98

Every community corrections placement requires approval by the referring agency, be it the D.O.C., parole board or court; a community board in each judicial district;99 and the individual community program.100 Currently, 24 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.101

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.102

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 current statute acknowledges that a community board may contract with other boards or state governmental agencies to treat offenders brought from another jurisdiction.103 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.

The perceived unavailability of cross-jurisdictional placement has slowed the development of specialized facilities, but at least three are now functioning: PEER I in Denver and the Residential Treatment Center in Greeley (both of which take inmates from outside of their home counties to provide programs dedicated to substance abuse difficulties) and Community Corrections in Colorado Springs (which operates a specialized facility for sex offenders).

D.O.C. inmates must be referred for community corrections review and possible acceptance at least sixteen months before their P.E.D. If they are serving a sentence pursuant to CRS § 16-11-309, however, the mandatory referral date is 180 days prior to parole eligibility.104

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.105 Previously, 120 days after imposition, there appeared to be no way to modify a community sentence.106 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.107

For some time, the courts have wrestled over a mechanism to deal with offenders who allegedly violate 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.108

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*109 held that there was no constitutional right to a hearing. The 1993 reenactment states that the court is not required to hold such a hearing,110 but if there is no hearing, the sentence length cannot exceed that originally imposed.111 In practice, this cap on the length of the sentence seems to be imposed whether or not there is a hearing.112

A recent Court of Appeals case holds there is a right to counsel when the court considers a change of placement.113

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.114 The legislation contains a declaration that the routine incarceration of non-violent offenders "punishes taxpayers."115

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.116 An offender is eligible for the program if not convicted for an offense of violence as described in CRS § 16-11-309 or a felony offense against a child.117 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.

No such facilities are currently operated in Colorado because of lack of funding.

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.118 Offenders otherwise ineligible for probation may be fined in lieu of incarceration and are eligible for community placement.119

In its simplest form, probation is an order to behave. A court imposing probation may require any of the conditions set forth in CRS § 16-11-204, 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.120 The court may impose, in addition, any condition reasonably related to the offender's rehabilitation and the purposes of probation. 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.121 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.122

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.123

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.124 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 the stipulation.125 Offender may then receive any sentence authorized by law, including probation.126

The controlled substances statute provides for what amounts to a deferred judgment, except that the consent of the prosecution is not required.127 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. The purpose of restitution is to make the victim whole.128 In Colorado, restitution is to be made a condition of every probation and parole.129 The amount of restitution is based on the "actual pecuniary damages" sustained by the victim, the ability of the defendant to pay and the defendant's obligation to support his or her dependents and to meet other family obligations.130

Restitution is appropriate only for the victim named in the count of conviction, unless the defendant agrees otherwise,131 but can encompass additional incidents outside the count of conviction for the same victim where the facts warrant such an order.132

The term "victim" includes those parties actually aggrieved by the conduct of the defendant, as well as those who suffer losses because of a contractual relationship with the victim, such as insurance companies.133 A governmental entity also can be a victim.134

"Actual pecuniary damages" can include out-of-pocket losses, as well as investigative and attorney fees incurred by a corporate victim.135 Therapeutic needs of a victim also may be compensated in a restitution award, if the facts so warrant.136

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.137

Although not strictly restitution, another statute requires that a crime stopper reward be reimbursed as restitution.138

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 been 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.139 These programs are operated by private entities that contract with Colorado's Department of Public Safety. Offenders 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.

The technology behind home detention provides a glimmer of the future of corrections. The systems are changing fast, becoming more and more sophisticated. Today, 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. Home detention programs contemplate some authorized absences, such as therapy visits and work.

JUVENILES PROSECUTED AS ADULTS

Direct Filings 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 filings, the sentencing court may impose an adult sentence, a sentence to the youthful offender system (where allowed) or a juvenile sentence.[140] This latter option is available only 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 § 16-11-309. The option to sentence as a juvenile also is available if the offender is fourteen years old or older and is a habitual juvenile offender.[141] 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.[142]

Transfer hearings are governed by CRS § 19-2-806. 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.[143]

Youth Offender System

In a September 1993 special session, the General Assembly created the Youth Offender System ("Y.O.S.").[144] 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.

A Y.O.S. sentence may be imposed if the offender is charged as an adult under CRS § 19-2-805 (direct filed), is fourteen years of age or older and is: (1) convicted of a felony crime of violence as defined in CRS § 16-11-309, 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 and 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.[145]

CRS § 19-2-805(1)(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.[146]

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.[147] 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.[148] 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.149

COLLATERAL CONSEQUENCES

There are a number of collateral consequences that flow from the conviction of a felony. Persons serving prison sentences may not vote.150 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.151 Members of many professions may have their licenses suspended or revoked on conviction of a felony.152

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 § 42-2-125(1)(k) provides for revocation 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.153 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.154

CRS §§ 16-11-501 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. In no event is the amount of reimbursement to the governmental entity to be in excess of the actual per capita cost incurred.155

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 Treatment 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 is in the process of promulgating standards for treatment. These standards are to take effect January 1, 1996.

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.156

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.157

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.158

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.159 Most offenders also are subject to random drug testing.160

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.161 The presentence report also includes enough financial information about the offender to allow the court to make an intelligent decision regarding cost of care.162 A psychiatric report on the defendant is optional. The report must be provided to the court and parties at least 72 hours prior to the sentencing hearing.163 Even if the presentence report is waived by the parties, the victim impact statement still must be provided at least 72 hours prior to sentencing.164

The Sentencing Hearing

The traditional model of the sentencing hearing assumes that there are two parties going before the decision maker, the prosecution and the defendant. However, the probation department is becoming an increasingly 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,165 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 hearings166 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 the dismissed counts, if any, resulting from a plea bargain against the defendant.167 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.168

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.169 The defendant also has the right to allocution at sentencing,170 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,171 such as the concepts of deterrence, punishment, equality and rehabilitation.172 If the court is considering a grant of probation, additional factors must be considered.173 To insure meaningful appellate review of any sentence, the court must place findings on the record regarding the pertinent factors.174 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 by amending CRS § 16-11-101.175 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.176

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, rehabilatative potential, victim impact and ability to pay restitution.177

This new alternative sentencing statute raises a significant question: May a judge sentence a non-violent offender to something other than a mandatory sentence if a mandatory sentence is required by another statute? For example, drug offenses are included in the definition of "non-violent offender," but some drug offenses carry mandatory sentences.178

The alternative sentence statute was enacted as part of the same act that authorized millions of dollars in new prison construction.179 It appears to be an attempt to divert some offenders

VICTIMS' RIGHTS

In 1992, the voters approved Art. II, § 16A of the Colorado Constitution, entitled "Rights of Crime Victims."180 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."181

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.182 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.183

CRS § 24-4.1-302.5(1)(d) and (g) provides 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.184 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.185 An administrative and civil enforcement mechanism also is provided.186 Another statute provides that, prior to a sentence of home detention, the court must make "every reasonable effort" to notify the victims involved.187

Victims' rights legislation is perhaps more significant for what it represents than what it actually requires. Other than notification and an obligation to listen, where appropriate, to the victims' comments, the statute poses little additional burden on the sentencing phase of the criminal justice process. However, the statute represents a substantial swing of the pendulum away from protection of the defendant's rights toward those of the victim (or alleged victim, depending on the stage of the case). For example, in some trial courts, defendants housed in Texas and Minnesota have not been present on motions to reconsider, motions to set an appeal bond and other post-conviction proceedings. On the other hand, the victims' rights statute specifically provides that a victim has a right to be present.188

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.189 However, CRS § 18-1-409(2) requires that an appeal be commenced within 45 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. The appellate court must grant the motions as a matter of course or judge the merits of the motion to reconsider before the trial court does the same thing. 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.190 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.191 Motions to reconsider are the defendant's last chance in the courts: the exercise of the court's discretion is not appealable.192

Sentence Appeals

Appeals of sentences by defendants are handled routinely with or without an appeal of the verdict.193 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."194 The standard of review is one of abuse of discretion.195 The reviewing court may affirm the sentence, impose any sentence the trial court could lawfully have imposed or remand for resentencing.196 The last published case which reversed a sentence for excessive length was in 1986.197

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.198 At the new hearing, a longer sentence is not barred by double jeopardy principles.199

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.200 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.201

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, this author 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.

NOTES:

1. The earlier articles by this author are "Colorado Felony Sentencing," 11 The Colorado Lawyer 1479 (June 1982); "Colorado Felony Sentencing: An Update," 14 The Colorado Lawyer 2163 (Dec. 1985), and "Felony Sentencing in Colorado," The Colorado Lawyer 1689 (Sept. 1989).

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 § 16-11-101.

5. 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).

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

7. L. 85 Ch. 145, § 7.

8. L. 85 Ch. 142, § 4.

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

10. The figures in this section come from Colorado D.O.C. annual reports, prison population growth projections published by the Legislative Council and the Colorado Division of Criminal Justice, and the U.S. Census Bureau.

11. CRS § 17-1-104.3.

12. CRS § 18-1-105(1)(a)(V)(D).

13. CRS § 18-1-105.

14. H.B. 93-1302, L.93, Ch. 322, § 7.

15. Specifically, the "extraordinary risk crimes" are defined in CRS § 18-1-105(9.7)(b) as: first degree sexual assault, CRS § 18-3-402; second degree sexual assault, CRS § 18-3-403; third degree sexual assault, CRS § 18-3-404; sexual assault on a child, CRS § 18-3-405; sexual assault on a child by one in a position of trust, CRS § 18-3-405.3; sexual assault on a client by a psychotherapist, CRS § 18-3-405.5; incest, CRS § 18-6-301; aggravated incest, CRS § 18-6-302; aggravated robbery, CRS § 18-4-302; child abuse, CRS § 18-6-401; drug distribution, manufacturing (but not possession) and any offense defined as a "crime of violence" by CRS § 16-11-309.

16. H.B. 79-1589, L.79, Ch. 157, § 16.

17. L. 81, Ch. 211, § 1.

18. At the time of commission of the felony, the defendant: (1) was charged with or was on bond for a previous felony, for which the defendant was subsequently convicted; (2) was under a deferred judgment and sentence for another felony; (3) was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult; and (4) was on bond for having pled guilty to a lesser offense when the original offense charged was a felony.

19. CRS § 18-1-105(9)(a).

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

21. 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).

22. 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.

23. CRS § 18-1-105(9).

24. The crimes are any crime against an at-risk adult or at-risk juvenile, murder, first or second degree assault, kidnapping, 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."

25. CRS § 16-11-309(2)(a)(I).

26. CRS §§ 16-11-309(1)(a) and 18-1-105(10).

27. 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).

28. 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.

29. 791 P.2d 374 (Colo. 1990).

30. See Multz, supra, note 5.

31. L. 81, Ch. 210, § 1.

32. 769 P.2d 1064 (Colo. 1989). See also CRS § 18-1-105(9)(c) and (f).

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

34. L. 45, Ch. 114.

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

36. 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).

37. H.B. 93-1302, L. 93, Ch. 322, § 1, amending CRS § 16-13-101.

38. CRS § 16-13-101(2).

39. CRS § 16-13-101(1.5).

40. CRS § 16-13-101(2.5).

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

42. CRS § 16-13-101(1).

43. The presumptive maximum for a class-two felony is 24 years, multiplied by three, equaling 72 years.

44. CRS § 16-13-103.

45. CRS § 16-13-201 et seq.

46. CRS §§ 16-13-203 and 211.

47. CRS § 16-13-216(4).

48. The D.O.C. puts all sex offenders, however sentenced, in its Sex Offender Treatment Program.

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

50. CRS § 18-1-408.

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

52. CRS § 16-11-309(1)(a).

53. CRS § 18-3-402(4).

54. 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 § 16-11-309(8).

55. CRS § 17-27.7-104(2)(a).

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

57. Colorado Regimented Inmate Training Program: A Legislative Report (Dept. of Corr., 1993).

58. CRS § 17-27.5-101.

59. 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.

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

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

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

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

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

65. *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).

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

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

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

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

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

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

72. Id. at 794.

73. Id. at 795.

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

75. CRS § 17-22.5-104.

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

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

78. CRS § 16-11-308(2).

79. CRS § 17-40-101 et seq.

80. CRS § 16-11-308(5).

81. CRS § 17-2-201(4)(a).

82. CRS § 17-2-201(1).

83. CRS § 17-22.5-404.

84. The criteria are incarceration for a crime which is a class one or class two crime of violence

as defined in CRS § 16-11-309 or any class three sex offense contained in CRS

§ 18-3-401 et seq., any habitual criminal offense enumerated in CRS § 16-13-101(2.5), or anyone sentenced under the Sex Offender Act of 1968, CRS § 16-13-201 et seq. CRS

§ 17-2-201(4)(a).

85. *California v. Morales*, 115 S.Ct. 1597 (1995). 86. CRS § 17-2-201.

87. CRS § 18-1-105.

88. Id.

89. 92 S.Ct. 2593 (1972).

90. CRS § 17-2-103.

91. CRS § 17-2-103(11).

92. Id.

93. CRS § 17-22.5-402(8).

94. The definition of "non-violent offender" for these purposes is found in CRS § 17-22.5-405(5)(b).

95. CRS § 17-22.5-405(5)(a).

96. CRS §§ 17-22.5-303(7) and 403(6).

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

98. CRS § 17-27-105.

99. CRS § 17-27-103(5), (7).

100. CRS § 17-27-104(3), (5).

101. CRS § 17-27-108.

102. CRS §§ 17-27-106 and 18-8-208.

103. CRS § 17-27-103(3); see also CRS § 17-27-105(1)(g).

104. CRS § 17-27-105 (2)(b). The wording of the statute, as amended in 1995, overrules *McKinney v. Kautzky*, 801 P.2d 508 (Colo. 1990).

105. CRS § 17-27-105(1)(h).

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

107. CRS § 17-27-105(1)(h). CRS § 16-11-204(4) provides for notice and a hearing prior to modification of a probationary, and hence a community corrections, sentence.

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

109. 817 P.2d 1017 (Colo. 1991).

110. CRS § 17-27-105(1)(g).

111. CRS § 17-27-105(1)(d).

112. *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986).

113. *People v. Lippolt*, 24 Colo.Law. 864 (April 1995)(App. No. 93CA1156, annc'd 2/9/95, cert. granted).

114. CRS § 17-27.9-101 et seq.

115. CRS § 17-27.9-101(2).

116. CRS § 17-27.9-102(2).

117. CRS § 17-27.9-103(1)(a).

118. CRS § 16-11-201(2).

119. *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).

120. CRS § 16-11-204.

121. CRS § 16-11-212.

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

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

124. CRS § 16-7-403. A six-month extension also is allowed to facilitate the collection of restitution.

125. 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 must be proven beyond a reasonable doubt. *People v. Van Deusen*, 677 P.2d 402 (Colo.App. 1983). Otherwise, the standard is one of a preponderance of the evidence. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

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

127. CRS § 18-18-404.

128. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

129. See CRS §§ 16-11-204.5 (1) and 17-2-201 (5)(c)(I).

130. CRS § 16-11-204.5 (1). In computing the amount of restitution, the court is not bound by the strict rules of damages as in civil cases and may proceed whether or not a civil case is pending. *People v. Johnson*, supra, note 128; *People v. Smith*, 754 P.2d 1168 (Colo. 1988). But see *People v. Hoisington*, 24 Colo.Law. 908 (Apr. 1995)(App. No. 94CA0461, annc'd 2/23/95)(claim for unpaid wages offset against restitution award). Restitution need only be proven by a preponderance of the evidence. *People v. Carpenter*, 885 P.2d 334 (Colo. App. 1994).

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

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

133. CRS § 16-11-204.5; *Phillips*, supra, note 128.

134. *People v. Cera*, 673 P.2d 807 (Colo. App. 1983)(front money provided by Drug Enforcement Administration appropriate subject for restitution).

135. *Phillips*, supra, note 128.

136. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

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

138. CRS § 16-11-204.6. CRS § 16-11-101.7 also provides that a crime stopper reward can be taxed as costs.

139. CRS § 17-27.8-101.

140. CRS § 19-2-805(2).

141. A "Habitual Juvenile Offender" is a juvenile who has previously been twice adjudicated a juvenile delinquent for separate delinquent acts, arising out of separate and distinct criminal episodes that constitute felonies. CRS § 19-2-805(1)(a)(V).

142. A "mandatory sentence offender," as defined in CRS § 18-2-801(1), has either been twice adjudicated a delinquent child or has been adjudicated a delinquent child and placed on probation and has had probation revoked for a delinquent act. A repeat juvenile offender, as defined in CRS § 19-2-802 (1), has been previously adjudicated a juvenile delinquent and is adjudicated a juvenile delinquent for a delinquent act, 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 § 19-2-803(1) must be thirteen years of age or older at the time the offense was committed and adjudicated for an act which constitutes a crime of violence as defined in CRS § 16-11-309(2). An "aggravated juvenile offender," as defined by CRS § 19-2-804(1) is (1) either twelve years of age or older, is adjudicated a juvenile delinquent for a delinquent act that constitutes a class one or class two felony and has had probation revoked for a delinquent act that would constitute a class one or class two felony; or (2) is sixteen years of age or older, 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 § 16-11-309(2), or has had probation revoked for a similarly defined crime of violence.

143. CRS § 19-2-806(1)(d).

144. CRS §§ 16-11-101(1)(i) and 16-11-311.

145. CRS §§ 16-11-311(2)(a)(I) and 19-2-805.

146. CRS § 19-2-805(2)(b)(I).

147. CRS § 18-11-311(2).

148. CRS § 16-11-311(2)(a)(II)(5).

149. CRS § 16-11-311(2)(b) and (2)(a)(II).

150. Colo. Const., Art. VII, § 10.

151. CRS § 18-1-105(3).

152. 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)].

153. CRS § 17-10-101 et seq.

154. CRS § 16-11-501.

155. CRS §§ 16-11-501(4) and 17-20-103(3).

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

157. CRS § 17-2-201(5)(g).

158. CRS § 18-3-415.

159. CRS § 16-11.4-104.

160. CRS §§ 16-11-102.5 and 16-11.5-101 et seq.

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

162. CRS § 16-11-102(1.7).

163. CRS § 16-11-102(1)(a).

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

165. CRS § 24-4.1-301 et seq.

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

167. *People v. Lowery*, 642 P.2d 515 (Colo. 1982).

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

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

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

171. See, e.g., *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

172. CRS § 18-1-102.5.

173. CRS § 16-11-203.

174. *People v. Walker*, 724 P.2d 666 (Colo. 1986).

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

176. CRS § 16-11-101(1)(b.5)(II)(B). A "non-violent offender" is defined as "a person convicted of a felony other than a crime of violence" [CRS § 16-11-309(2)], one of the felonies set forth in CRS § 18-3-104 (manslaughter), CRS § 18-4-203 (1 degree burglary), CRS § 18-4-301 (robbery) or CRS § 18-4-401(2)(c), (2)(d) or (5) (some forms of theft) or a felony offense committed against a child as set forth in CRS Articles 3, 6 and 7 or Title 18 and who is not subject to the provisions of CRS § 16-13-101 (habitual criminal).

177. CRS § 16-11-101(2)(a).

178. See, e.g., "dangerous special offender," CRS § 18-18-407.

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

180. CRS § 24-4.1-301 et seq.

181. *People v. Herron*, 874 P.2d 435 (Colo. App. 1993).

182. CRS § 24-4.1-302.5(5).

183. CRS § 24-4.1-302(2).

184. CRS § 24-4.1-303(4).

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

186. CRS § 24-4.1-303(17).

187. CRS § 17-27.8-103(1)(c).

188. CRS § 24-4.1-301 et seq.

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

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

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

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

193. CRS § 18-1-409(1); C.A.R. 4(c).

194. CRS § 18-1-409(1).

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

196. CRS § 18-1-409(3).

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

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

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

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

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

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