Colorado Felony Sentencing---An Update

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Please note- This article is decades old--- do not rely on it for current law.

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In 1979 the General Assembly adopted what is known as the "Gorsuch bill,"(fn1) which radically changed felony sentencing in Colorado. Wide sentencing ranges with indeterminate periods of confinement were replaced with narrow ranges and certain release dates. The role of the Parole Board was minimized by fixing parole of one year for all inmates and mandating parole after completion of a fixed percentage of the actual sentence.

In the six years that followed the Gorsuch bill, public clamor for longer sentences forced a continuing reappraisal of the theories it embodied. This culminated in a massive change in the felony sentencing scheme for offenses committed on or after July 1, 1985.(fn2) This article summarizes the current state of the law and traces the evolution of the 1985 amendments. Major trends noted are the increasing number of statutes referencing special circumstances of the offender or the victim, longer authorized sentences for all felonies and renewed authority of the Parole Board to determine release dates.

The sentencing judge continues to have three major sentencing alternatives: the Department of Corrections, community corrections and probation.(fn3) In addition, the 1985 amendments have authorized a fourth alternative---the imposition of fines.(fn4)

THE BASIC SENTENCING SCHEME

In Colorado, felony offenses are divided into five classes for sentencing purposes. In theory, this eliminates the need to legislate a specific penalty for each offense; each statute defining a felony references the class of crime, and the class indicates the penalty.

The classifications are presented in Table 1:

TABLE 1

Class ofPresumptive Sentence

Felony	*(Before 7/1/85)*	*(After 7/1/85)*(fn5)
1	life or death	no change(fn6)
2	8-12 years	8-24 years
3	4-8 years	4-16 years
4	2-4 years	2-8 years
5	1-2 years	1-4 years

By statute, offenders sentenced to the Department of Corrections ("DOC") must be sentenced within these presumptive ranges unless the court finds extraordinary mitigating or aggravating circumstances.(fn7) If these are present, the sentence may be one-half the presumptive bottom or up to twice the presumptive top. For example, the range of sentence for a class two felony, including the extraordinary range, is from four to forty-eight years. As can be seen from Table 1, the new amendments have doubled the presumptive maximum.

Also with the 1985 amendments, a life sentence means there is no parole eligibility for forty years (it had been ten until 1977 when it was changed to twenty).(fn8)

The amendments reinstituted fines for felony offenders.(fn9) The applicable ranges are set forth in Table 2:

TABLE 2

Class of Felony	*Fine*
1	none
2	$5,000 to $1,000,000
3	$3,000 to $750,000
4	$2,000 to $500,000
5	$1,000 to $100,000

In this author's opinion, fines are of questionable value in the criminal arena. Undoubtedly they are needed to punish corporate offenders and there are cases where it is appropriate to fine offenders to deprive them of the fruits of their illegal conduct. However, there are comparatively few corporate offenders, and Colorado now has at least three forfeiture statutes that provide ample authority to deprive criminals of ill-gotten gains.(fn10) Thus, it is hard to ignore the argument that fines represent a means by which the wealthy offender can be punished monetarily, while the poor offender can pay in the currency of years.

Extraordinary Aggravating Factors

There are two kinds of aggravating factors: permissive and mandatory. Permissive aggravating factors are intentionally not defined by statute since they were designed to allow the court to impose an unusually short or unusually long sentence when appropriate in rare situations.(fn11)

The presence of a mandatory "extraordinary aggravating factor" requires the court to impose an aggravated sentence if a sentence to incarceration is imposed at all.

The statutory mandatory aggravators are as follows:(fn12)

1) The offender is on bond or was charged with a felony when the instant offense was committed and subsequently is convicted of the earlier offense.

2) The offender is on felony probation,(fn13) parole or deferred judgment(fn14) at the time of the commission of the offense.

3) The offender is under confinement or in prison as the result of a felony or escape at the time of commission of the offense.(fn15)

4) The offender is convicted (pursuant

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to CRS § 16-11-309) of a "crime of violence."

This last factor mandates a sentence of imprisonment as well as a sentence in the aggravated range. Probation is not permitted. If a fine is imposed, it must be in addition to incarceration.(fn16)

A "crime of violence" has been redefined almost annually by the General Assembly.(fn17) The phrase currently encompasses certain crimes or attempted crimes if the offender used or possessed and threatened the use of a deadly weapon during the commission of the offense or during the immediate flight therefrom, or if the commission of any of the specified offenses results in death or serious bodily injury to the victim.(fn18) The crimes involved are as follows:

Murder

First or second degree assault

Unlawful sexual offenses, except first degree sexual assault(fn19)

Kidnapping

Robbery and aggravated robbery(fn20)

First degree arson

First or second degree burglary

Extortion

Escape

The provisions of the statute also apply to anyone committing a crime against the elderly or the handicapped in which a deadly weapon is used or its use is threatened.

A "crime of violence" must be plead as a separate count, even though its elements are contained within the substantive offense.(fn21)

The terms of CRS § 16-11-309 notwithstanding, its application may have been severely limited by the recent Court of Appeals decision in *People v. Montoya*.(fn22) *Montoya* recognized an inherent problem in the statute: if the substantive offense requires use of a deadly weapon as an element, how can an increased (aggravated) sentence under § 16-11-309 for use of the weapon be mandated? *Montoya* holds that in such a situation, the increased sentence is unconstitutional as a violation of equal protection. Since the statute often has been used in prosecutions in which the use of a deadly weapon was already an element of the substantive offense (*e.g.*, aggravated robbery and first or second degree assault), the statute's efficacy may have been substantially lessened.(fn23)

SPECIAL CIRCUMSTANCES LEGISLATION

Habitual Criminals

From a statutory standpoint, the habitual criminal statute remains unchanged.(fn24) An offender charged with any felony and who is shown to have three prior felonies receives life (the "big" habitual criminal statute). An offender charged with a felony who has two prior felony convictions in the last ten years (the "little" habitual criminal statute) must receive a sentence of between twenty-five and fifty years.(fn25)

Since these sentences were enacted prior to the Gorsuch bill, they have posed some technical problems under the presumptive sentencing laws. It is unclear, for example, whether a 25-to-50-year sentence requires the sentencing judge to impose any sentence within that range (such as 32 years), a range sentence (such as from 30 to 35) or the entire range (from 25 to 50). Case law teaches only that the habitual criminal sentence is imposed in lieu of and not in addition to the usual sentence for the substantive offense.(fn26) The "prior" convictions must predate the instant offense, but do not have to have happened sequentially.(fn27)

The concept of cruel and unusual punishment under the Eighth Amendment has been applied to habitual criminals. In *People v. Hernandez*,(fn28) the Supreme Court applied the analysis used in *Solem v. Helm,* (fn29) which used a proportionality review. In assessing the constitutionality of a sentence, such a review requires the sentencing court to consider (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. With the onset of forty-year life sentences, much litigation is expected in this area. As yet, no Colorado appellate decision has overturned a habitual criminal sentence on cruel and unusual punishment grounds.

Other Special Offenders

In recent years, the General Assembly has repeatedly passed statutes imposing sentencing conditions, in addition to those contained in the five classes of felonies. A prime example is mandatory sentencing for a crime of violence, discussed above. This statute predates the Gorsuch bill and, as originally written, denied an offender any sentence except incarceration. Gorsuch amended the statute to require a presumptive sentence. It was further amended in 1981 to mandate not only a sentence, but an extraordinary one.(fn30)

There are many examples of special circumstances sentencing. In controlled substance prosecutions, distribution of cocaine is treated as an ordinary class three felony unless the amount in question exceeds twenty-four grams, in which case the offender may not be granted probation.(fn31) "Special offenders," as defined in CRS § 18-18-107 and loosely described as pushers or major dealers, must be sentenced in the aggravated range of a class two felony. Habitual sex offenders against children and habitual child abusers must be similarly sentenced.(fn32) Repeat shoplifters are treated as a special category for sentencing purposes.(fn33)

Thus, the General Assembly has within its prerogative the authority to single out certain classes of criminals for different, lengthy sentences. However, this proliferation of special circumstances legislation has created some problems. First, it diminishes the discretion of the sentencing judge to adjust the sentence based upon all the circumstances and unduly highlights just one. Second, it needlessly complicates the charging, trial and plea and sentencing process by imposing so many special rules. Finally, special circumstances legislation lessens the judge's discretion while bolstering the authority and discretion of the prosecutor.

Special circumstances legislation highlights what the General Assembly considers serious. In the long run, this trend reflects society's uncertainty that judges will impose the harsh sentences the public believes are warranted. Since it is often the victim's special circumstance that is the triggering factor, such legislation can also be seen as part of society's heightened concern for the victim's plight.

It should be noted that the Colorado Sex Offenders Act of 1968 remains on the books, although treatment for convicted sex offenders is largely unfunded.(fn34) Its constitutionality has recently been upheld in *People v. White* and *People v. Adrian*.(fn35)

THE SENTENCING PROCEDURE

The Sentencing Hearing

After a finding of guilt based on a plea or verdict, the court sets a sentencing hearing. Prior to the hearing, the Probation Department prepares a probation or presentence report, which details the offense; the circumstances of the victim; the amount of restitution, if any; the offender's social, educational, employment and criminal history; and any pertinent medical or psychological data.(fn36) It is also the responsibility of the Department to compute the amount of presentence time and good time the offender should receive,

subject to an order of the court.(fn37) The defendant is entitled to have a copy of this report a reasonable time prior to the hearing to allow a fair opportunity to rebut its findings and conclusions.(fn38)

The court must allow the defendant the right of allocution at the hearing; failure to do so mandates resentencing.(fn39) In imposing sentence, the court is required to state the reasons for the sentence on the record to facilitate appellate review.(fn40) The victim has a right to present his or her statement to the court. (fn41)

The court is directed to consider four major factors in imposing judgment:(fn42)

1) the appropriateness of the punishment as it relates to the seriousness of the offense;

2) consistency in sentencing by assuring that similarly situated offenders are similarly treated;

3) deterrence of criminal conduct; and

4) the promotion of rehabilitation.

The earliest cases considering sentence length were pre-Gorsuch, but are still helpful today because *People v. Phillips*(fn43) applied their analyses to Gorsuch bill sentences. The imposition of aggravated sentences were largely approved by the appellate courts, although the decisions focused mainly on the procedural requirements mandated by statute.(fn44) For example, in *Flower v. People*,(fn45) it was held that the prior criminal record of the offender alone could justify a lengthy sentence. However, *People v. Hudson*(fn46) may signal the appellate courts' reluctance, absent compelling need, to uphold the authority of the sentencing judge to exceed the ordinary range. *Hudson* rejected an aggravated sentence of twenty-four years for second degree murder (the absolute maximum at the time) because of the offender's youth, relative involvement in the crime compared to the co-defendant and the sentence of the co-defendant.

The *Hudson* case evidences an intent to limit extraordinary sentences to situations where the crime is not only offensive but offensive when compared to other crimes of the same genre---*i.e.*, cases that are "extraordinarily aggravated."

Hudson's crime was heinous, but no more so than other second degree murders. The curtailment of the trial court's sentencing discretion evidenced by *Hudson* is all the more important when one considers the new, broader sentencing ranges.(fn47)

Prior to the passage of the Gorsuch bill, the Parole Board was often the final authority. A sentence of from five to forty years(fn48) gave the Board the discretion to release the offender when appropriate, provided the offender served the statutory minimum. Under the Gorsuch bill, the Parole Board had no authority to deny release (except for inmates serving life and sex offender sentences). The inmate was released based on a mathematical computation of the sentence, less good time and earned time. Thus, the actual period of

confinement was determined by the court and not the Parole Board. With the broader sentencing ranges now permitted by the 1985 amendments, it remains to be seen how the judges will make sentencing decisions.

In the past, many judges postulated a sentence at the middle of the statutory range and adjusted the sentence based on the nature of the offense and the offender's history. However, the maximum sentence now is twice as long. Using the median presumptive sentence as a starting point, then, the actual guideline sentence would be substantially longer. Such deviation from the mean will result in a greater disparity in statewide sentencing practices than under the Gorsuch bill. This disparity, of course, grows exponentially with the seriousness of the crime.

Consecutive and Concurrent Sentences

The trial court's discretion in the area of concurrent and consecutive sentences has been curtailed somewhat. Prior to the 1985 amendments, the only limitation on this authority was contained in CRS § 18-1-408 and applied to a small number of cases.(fn49) The amendments require the court to impose consecutive sentences for conviction of "two separate" crimes of violence arising out of the same incident.(fn50)

The Supreme Court upheld consecutive life sentences against the contention that such sentences infringed on the executive authority of the Parole Board; however, a sentencing court may not make a sentence consecutive to one that has yet to be imposed.(fn51)

Consecutive sentences remain mandatory for some offenses such as escape and bond jumping.(fn52)

OTHER SENTENCING ALTERNATIVES

Probation

Few statutory changes have been made to probation requirements over the last six years. An offender currently is ineligible

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for probation if he has two prior felony convictions or one felony conviction within the last ten years and the instant conviction is for a class one, two or three felony.(fn53) The court has the authority to impose probation for a term not to exceed the maximum permissible length of incarceration.(fn54) The conditions of probation include up to ninety days in the county jail or up to two years with work release.(fn55)

In *Burns v. District Court,* the Colorado Supreme Court overruled the two previous cases that held the trial

court had the inherent authority to suspend sentences.(fn56) Therefore, since there is no statutory authority to do so, the power to suspend sentences is questionable.

Restitution

Restitution has been the subject of both case law and statutory change. *People v. Young* implies that restitution may only be ordered by the court if expressly authorized by statute.(fn57) Moreover, the General Assembly has passed legislation ordering that sex offenders pay for their victim's treatment, in addition to the imposition of sentence.(fn58) Another statute requires the court in all cases in which sentence is imposed to make a finding of the amount of restitution so the Parole Board can order payment upon release of the offender.(fn59) The court no longer has the authority to refuse a restitution award because of the offender's undue hardship.(fn60)

A new statute provides that the definition of "victim" for restitution purposes includes the victim's insurance company,(fn61) overruling *People v. King*.(fn62) Restitution is not to be offset by any amount the victim receives from his or her insuror.(fn63) Finally, restitution is limited to the offense for which the offender is convicted.(fn64)

Deferred Judgment and Deferred Prosecution

By statute and upon stipulation of the parties, the court may accept a guilty plea and defer the entry of judgment on the plea for up to two years.(fn65) During this period, the offender is placed under the supervision of the Probation Department. If the offender complies with the conditions of the deferral, he may withdraw his guilty plea and the case will be dismissed. If it is alleged that the offender has not complied, he is entitled to a hearing, after which the court may enter judgment (if the violation is proven) and sentence him as if his guilty plea had been taken without the stipulation.(fn66) The offender may thus receive any sentence authorized by law, including probation.(fn67)

A deferred prosecution involves a stipulation to place the offender under supervision of the Probation Department for up to two years without the entry of any plea.(fn68) If the stipulation is violated (and such is proven at a hearing), the People can proceed to try the defendant. Unlike a deferred judgment, the offender does not enter a guilty plea and the entire prosecution is deferred. A deferred prosecution is close to no prosecution at all and has fallen into disfavor among prosecutors.

Community Corrections

The final major prong of the sentencing apparatus is community corrections.(fn69) In the last eight years, halfway houses have been established throughout Colorado with little community opposition. An offender who is statutorily ineligible for probation may still be sent to a community corrections facility in lieu of prison, and hundreds are so sentenced each year.(fn70) For example, the Denver Community Corrections Board has over 200 offenders under its jurisdiction at this time.

There are three avenues which lead to placement in community corrections: (1) an offender may be placed in the program as a condition of probation; (2) may be sentenced to the program directly, much like a prison sentence; or (3) may be transferred to the program by the DOC.(fn71) The second category is often used by judges when they believe a prison sentence is inappropriate, but are constrained from ordering probation because of the offender's record.(fn72)

Community corrections, as the name implies, allows offenders to reside in the community. To insure citizen input, the General Assembly mandated that the governing board of each program has veto power over who can be so placed.(fn73) Thus, sentences and placements to community corrections are not final until the board accepts the inmate.

In some counties, judges are reluctant to place offenders in the program until after the board has reviewed the case. In Denver, the judges routinely place the offender there when appropriate, with board review following shortly thereafter. The statute sets forth general eligibility criteria and many boards have issued rules further defining eligibility.(fn74)

Besides the approval of the sentencing court and the local community corrections board, the offender's placement must be approved by the administrator of the halfway house to which he is committed.(fn75) This last of the three tiers of approval is often in private hands since most of the facilities are operated not by the DOC, but by private contractors. Offenders who fail to follow the rules of the facility in which they are housed may be removed by the program personnel. This usually results in incarceration because community placement is seen by the court as the last resort short of prison.

Such a "replacement" is done on an ad hoc basis because the statute is silent on procedure.(fn76) It would seem that offenders are entitled to a hearing as a matter of due process, but no case so holds. Moreover, if at a hearing the offender could show that he was wrongfully accused of an infraction, he will still not be returned to the facility unless the facility approves. Therefore, in most instances, the hearing is a hollow right; the court cannot overrule this decision. Further, the statute does not provide for the burden and quantum of proof. Indeed, the offender can be terminated from the facility at the whim of the staff, although abuses do not appear to be commonplace.

After completing the custodial portion of a community corrections sentence, the offender may be placed on nonresidential status, something akin to intensive supervision, for up to one year.(fn77)

Legal questions concerning community corrections inmates are just starting to appear in the appellate courts. In *People v. Russell,* for example, the court ruled that an inmate who is sentenced to community corrections and leaves is considered to have "escaped" and may be prosecuted pursuant to CRS § 17-27-108. However, the inmate is not "on escape status," so his escape sentence need not be aggravated, pursuant to CRS § 18-1-105(9).(fn78)

POST CONVICTION REMEDIES

Sentence Appeals

The Gorsuch bill was intended to provide the sentencing court with a very narrow range if a term of years

was imposed, although it did have the option of imposing an extraordinary sentence. To insure that extraordinary sentences were only imposed in extraordinary situations, an unusual non-adversary appellate review procedure was established. However, this proved completely unworkable and was repealed in 1982. (fn79) Sentence appeals are now handled much as other appeals.(fn80) As noted above, the appellate courts have begun to scrutinize extreme sentences

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with care. Longer permissible sentences are expected to emphasize the importance of appellate review.

Procedurally, it should be noted that an offender cannot appeal the trial court's refusal to grant probation if the court considered the appropriate legal standard.(fn81) *Burns* and *People v. Bridges* stand for the proposition that not only the defendant, but also the prosecution can appeal a sentence.(fn82) Prosecution appeals have been limited so far to procedural questions.

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 that the case is not on appeal. If on appeal, the 120 days commences after the mandate of the appellate court has issued.

This continues to be an area of difficulty for offenders and their counsel since they must often choose between an appeal or a prompt motion to reconsider. The Colorado Supreme Court has held that no motion to reconsider will lie while the case is on appeal, absent a remand from the appellate court.(fn83)

Commutation

Article II, § 7, of the Colorado Constitution provides that the governor may pardon any offender. Governor Lamm has promulgated rules and regulations limiting his authority, including a rule that the governor will not act so long as the courts are still considering the case. CRS § 16-17-102 also requires the governor to consult with the district attorney and judge who tried the case before he acts.

THE SENTENCE AND THE DEPARTMENT OF CORRECTIONS

The Diagnostic Process

After sentencing, the offender is sent to the county jail for transportation to the Diagnostic Unit at the DOC in Canon City.(fn84) Currently, most inmates wait several weeks to get to the Diagnostic Unit because of overcrowding. The Unit's purpose is primarily one of classification:(fn85) inmates are interviewed and tested to determine their optimum placement within the DOC's various facilities, under the authority of its Executive Director.(fn86) These facilities include maximum, medium and minimum security facilities, honor camps and halfway houses. During this time, a diagnostic summary is prepared, which is a compilation of the inmate's needs and assets. This report often is helpful to the courts when considering whether or not to modify a sentence pursuant to Crim.P. 35(b).

Good Time, Earned Time and Presentence Time

Prior to the 1985 amendments, a sentence was less than it seemed. An inmate was awarded up to 50 percent off for good behavior ("good time") and additional time was discounted for faithful performance of certain institutional tasks ("earned time").(fn87) Good time vested every six months.(fn88) Most inmates received their full allotment of good time; therefore, the average time in confinement was about half the sentence imposed by the trial judge.

The new legislation provides that good time is still awarded in the same proportion, but the accumulation of good time does not mandate release. Instead, good time entitles an offender to make an application for parole, which does not have to be granted.(fn89) In addition, good time no longer vests,(fn90) meaning that many months or even years of good time credits may be withdrawn for institutional infractions. For time computation purposes, the sentence commences on the day it is imposed.(fn91)

An inmate is also entitled to credit for time spent in confinement while awaiting sentencing and, if he follows jail rules, good time credit for that period as well.(fn92) Several recent cases have now discussed how much presentence credit an inmate should receive when confined for more than one offense and/or confined in different facilities prior to sentencing.

The leading case is *Schubert v. People,* which mandates credit for "that period of time spent in custody as a result of the charge for which the sentence is imposed or as the result of the conduct on which such charge is based."(fn93) In making this determination, the court should inquire whether the confinement was actually caused by the charge or conduct for which the offender was sentenced. *Schubert* also provides that there must be a "substantial nexus" between the charge or conduct and the period of confinement. Given the multitude of potential fact patterns, it is not surprising that, in a footnote, the court authorized stipulations as to the appropriate amount of presentence credit.(fn94)

Schubert is already the subject of several opinions from the Court of Appeals which has applied its vague standard to varying case facts.(fn95)

Early Release and Intensive Supervision

In 1984, the legislature initiated a program of early release for certain low-risk inmates.(fn96) Offenders meeting certain criteria are eligible for release from community corrections and placement in intensive nonresidential supervision when they are within 120 days of parole. Absconding from such a release is considered an escape. This program will expire on February 15, 1986.(fn97)

Parole

As noted above, prior to the adoption of the Gorsuch bill, the Parole Board had broad discretion and was often the real sentencing authority. Pre-Gorsuch sentences consisted of a minimum and maximum period of confinement imposed by the court. Using these limits, the Board determined the actual release date. Thus, the Parole Board was in a position to impose statewide sentencing practices.

For example, the range for a class three felony prior to Gorsuch was from five to forty years. If a judge sentenced an offender to, say, seven to twenty years, the Board could either release the offender after about three and one-half years (a substantial good time reduction was allowed) or keep him in custody for up to almost ten. Since virtually all offenders came before the Board for release, the Board became the ultimate Colorado sentencing authority.

With the adoption of the 1985 amendments, the Board is once again in the business of determining release dates, for parole is no longer mandated upon accumulation of good time. Rather, good time merely makes an offender eligible to apply for parole. The Board has a lengthy set of criteria to consider in deciding whether or not to release the inmate. If release is denied, the inmate may reapply for parole in one year. Thus, a five-year sentence means the inmate may be released in two and one-half years, but in fact may not be released for five.(fn98)

Parole revocation proceedings have been streamlined, and the probable cause hearing requirement has been eliminated. Parole revocation hearings are held before a Board member or hearing officer and not a judge. The Board may issue an arrest warrant or a summons upon a showing of probable cause to believe the parolee has violated parole. Parole bonds are no longer authorized. If the parolee is arrested, the revocation hearing must be held within thirty days. If the offender is summoned, the hearing must be held within thirty working days

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after issuance (not service) of the summons. Both time limits may be extended upon a showing of good cause.(fn99)

Upon revocation, the offender no longer needs to be processed through the diagnostic center; he may now be placed in any facility designated by the DOC's Executive Director.(fn100) Effective July 1, 1987, a new four-member board will be appointed for five-year terms and the appointments must have Senate confirmation. (fn101)

Parole hearings are open to the public. The votes of the Board members must be recorded and open to inspection. Victims and their representatives may appear at the hearings, and a notification system has been created.(fn102)

The parole system appears to be redundant. Parole is in the Division of Adult Services in the DOC and is part of the executive branch, while each judicial district, which is part of the judicial branch, has a Probation Department. Virtually every DOC inmate had been evaluated by a Probation Department when the presentence investigation had been prepared, and most have been on probation for some period of time prior to their incarceration. Therefore, it would seem to be more efficient to place parolees under the supervision of the Probation Department in the district from whence they came. Duplicating this effort with a parallel parole structure appears to be a waste of funds. In the author's opinion, this only can be understood as proof of the DOC's political clout in the General Assembly.

CONCLUSION

In a previous article,(fn103) this author indicated that sentencing was moving away from the ideals espoused by the Gorsuch bill and back toward the less uniform sentences of the past. It appears that we now have come full circle. The authorization of lengthy sentences in 1985 has opened the door to a wide disparity of sentences among jurisdictions and even among judges in the same jurisdiction. The standards enunciated by the appellate courts for imposing sentences provide some guidance in the exercise of judical discretion. However, these standards will have little impact on sentences in the ordinary range, leaving the majority of offenders largely unaffected. Much as in the pre-Gorsuch era, the Parole Board has become the final sentencing authority. It remains to be seen how the Board will exercise its discretion in determining release dates.

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Footnotes:

1. H.B. 1589, 1979 Session Laws. The bill was sponsored by then state legislator Ann Gorsuch. *See generally,* Cherner, "Colorado Felony Sentencing," 11 *The Colorado Lawyer,* 1479 (June 1982).

2. The bills having the most impact were H.B. 1320, L. 85, Ch. 145; H.B. 1292, L. 85, Ch. 142; H.B. 1116, L. 85, Ch. 146. Other legislation is cited where appropriate. All references to CRS Titles 16, 17 and 18 are to the 1978 Replacement Volume.

3. CRS §§ 18-1-105, 17-27-101 *et seq*. and 16-11-201, respectively.

4. CRS § 18-1-105(1)(a)(III) (1985 Cum. Supp.).

5. CRS § 18-1-105(1)(a)(II) (1985 Cum. Supp.).

6. The penalty remains life or death, but "life" has been redefined to mean at least 40 (rather than 20) years. CRS §§ 17-22.5-104(2)(b) and 18-1-105(4) (1985 Cum. Supp.).

7. CRS § 18-1-105(6) (1985 Cum. Supp.).

8. L. 77, Ch. 223, § 10. *See,* note 6 *supra*.

9. CRS § 18-1-105(1)(a)(III) (1985 Cum. Supp.). Fines were permissible prior to Gorsuch and for corporate offenders. CRS § 18-1-105(2). With the new amendments, if a

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mandatory sentence pursuant to CRS § 16-11-309 is imposed, the fine may be in addition to but not in lieu of the sentence to incarceration.

10. These statutes all authorize forfeitures: the Colorado Organized Crime Control Act, CRS § 18-17-106; Colorado Contraband Forfeiture Act, CRS § 16-13-501, and nuisance abatement statute, CRS § 16-13-301 *et seq*.

11. *People v. Phillips,* 652 P.2d 575 (Colo. 1982).

12. CRS § 18-1-105(9)(a) (1985 Cum. Supp.).

13. *People v. Pellien,* 14 Colo.Law. 449 (March 1985) (App. No. 83CA1077, *annc'd* 1/31/85) holds that a sentence under New York's juvenile offender statute is not "felony probation" pursuant to CRS § 18-1-105(9)(a)(III).

14. Deferred judgment was added in CRS § 18-1-105(9)(a)(VI) (1985 Cum. Supp.), effective 7/1/85.

15. The crimes of escape, CRS § 18-8-208, and attempted escape, CRS § 18-8-208.1, are not aggravated by this statute. *People v. Russell,* 14 Colo.Law. 606 (April 1985) (App. No. 83CA0960, *annc'd* 2/14/85); *People v. Martinez,* 14 Colo.Law. 604 (April 1985) (App. No. 83CA0798, *annc'd* 2/14/85; *People v. Wells,* 691 P.2d 361 (Colo.App. 1984) holds that fleeing from a private placement facility is not an "escape" for purposes of aggravation.

16. CRS § 18-1-105(1)(b)(III) (1985 Cum. Supp.).

17. L. 77, pp. 865, 888; L. 79, p. 666; L. 81, pp. 944, 971; L. 82, pp. 314, 315; L. 83, p. 682.

18. CRS § 16-11-309.

19. CRS § 18-3-402(4) (1985 Cum. Supp.).

20. *See, People v. Eggers,* 196 Colo. 349, 585 P.2d 284 (1978).

21. *See, People v. Grable,* 43 Colo.App. 518, 611 P.2d 588 (1979).

22. 14 Colo.Law. 1479 (Aug. 1985) (App. No. 84CA0310, *annc'd* 6/27/85). The People's petition for certiorari was granted by the Colorado Supreme Court on 11/18/85.

23. A third area of frequent use of this statute was first degree sexual assault prosecutions, CRS § 18-3-402. However, S.B. 116 makes this unnecessary by amending CRS § 18-3-402 to require an aggravated sentence if the offender uses a weapon. *See,* note 19, *supra*.

24. CRS § 16-13-101 *et seq*.

25. Prior to July 1, 1985, the "little" habitual criminal statute had no application to class five felonies since it only applied to offenses punishable by five years or more in prison. With the new sentences mandated by H.B. 1320, class five felonies now carry up to eight years. *Cf., People v. Quintana,* 634 P.2d 413 (Colo. 1981).

26. *People v. Anderson,* 43 Colo.App. 178, 605 P.2d 60 (1979); *People v. Early,* 692 P.2d 1116 (Colo.App. 1984).

27. *People v. Nees,* 200 Colo. 392, 615 P.2d 690 (1980); *Gimmy v. People,* 645 P.2d 262 (Colo. 1982); *People ex rel. Van Meveren v. District Court,* 643 P.2d 37 (Colo. 1982).

28. 686 P.2d 1325 (Colo. 1984).

29. 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

30. L. 81, Ch. 211, § 2.

31. CRS § 18-18-105(3). A fine between $1,000 and $100,000 is also authorized.

32. CRS §§ 18-3-412 and 18-6-401.2. An aggravated sentence is required.

33. CRS § 18-4-413 (1985 Cum. Supp.). A sentence is mandated. Other examples of special circumstances legislation include habitual burglary, CRS § 18-4-202.1 (1985 Cum. Supp.); robbery of the elderly or handicapped, CRS § 18-4-304 (1985 Cum. Supp.); theft from the elderly or handicapped, CRS § 18-4-401(7) (1985 Cum. Supp.); sexual assault on a child---position of trust. CRS § 18-3-405 (2)(b)(1985 Cum. Supp.); and first degree sexual assault, CRS § 18-3-402 (1985 Cum. Supp.).

34. CRS § 16-13-201 *et seq*.

35. 656 P.2d 690 (Colo. 1983); 14 Colo.Law 1501 (Aug. 1985) (S.Ct. No. 83SA499, *annc'd* 6/10/85).

36. CRS § 16-11-102.

37. *See, People v. Chavez,* 659 P.2d 1381 (Colo. 1983).

38. *See, People v. Wright,* 672 P.2d 518 (Colo. 1983).

39. *See, People v. Doyle,* 193 Colo. 332, 565 P.2d 944 (Colo. 1977).

40. CRS § 18-1-105(7); *People v. Watkins,* 200 Colo. 163, 613 P.2d 633 (1980).

41. CRS § 16-11-601. *See also, People v. Standish,* 14 Colo.Law 596 (April 1985) (App. No. 83CA0622, *annc'd* 2/7/85), where the prosecutor's promise to remain silent at sentencing did not bar his presentation of testimony.

42. CRS § 18-1-102.5. *See, People v. Bustamante,* 14 Colo.Law 260 (Feb. 1985) (App. No. 84CA0044, *annc'd* 12/13/84). For the criteria to be considered in granting probation, *see,* CRS § 16-11-203.

43. *Supra,* note 11. For pre-Gorsuch bill cases, *see,* Cherner, *supra,* note 1 at n.56.

44. *See,* note 79, *infra*.

45. 658 P.2d 266 (Colo. 1983).

46. 14 Colo.Law 1684 (Sept. 1985) (App. No. 84CA0305, *annc'd* 7/18/85).

47. Other cases to overturn presumptive sentences on the merits are: *People v. Jenkins,* 674 P.2d 981 (Colo.App. 1983) and *People v. Manley,* 14 Colo.Law. 1070 (June 1985) (App. No. 84CA0382, *annc'd* 4/25/85). *People v. Piro,* 671 P.2d 1341 (Colo.App. 1983), rejected a presumptive sentence because the record failed to show that the court considered the appropriate factors. *Manley* is also noteworthy in that it held that since "serious bodily injury" was already an element of the offense, the serious nature of the victim's injury did not justify aggravation.

48. The pre-Gorsuch sentencing range for a class three felony.

49. CRS § 18-1-408 requires concurrent sentences "...if the several offenses are known to the district attorney at the time of commencing the prosecution and were committed within his judicial district..." and if they are supported by identical evidence. *See, Jeffrey v. District Court,* 626 P.2d 631 (1981); *People v. Cullen,* 695 P.2d 750 (Colo.App. 1984) (consecutive life sentences allowed where there are two homicide victims and hence the evidence is not identical on each count). *See also, People v. Maestas,* 14 Colo.Law. 430 (March 1985) (App. No. 83CA 1060, *annc'd* 1/10/85).

50. CRS § 16-11-309(1)(a).

51. 669 P.2d 1387 (Colo. 1983); *Flower, supra,* note 45.

52. CRS §§ 18-8-209; 18-8-212.

53. CRS § 16-11-301 (1985 Cum.Supp.).

54. *People v. Knaub,* 624 P.2d 922 (Colo. App. 1980).

55. CRS § 16-11-202, 212.

56. 673 P.2d 991 (Colo. 1983). The two cases overruled in *Burns* are *People v. Ray,* 192 Colo. 391, 560 P.2d 74 (1977) and *People v. Henderson,* 196 Colo. 441, 586 P.2d 229 (1978).

57. 14 Colo.Law. 1459 (Aug. 1985) (App. No. 83CA1048, *annc'd* 6/13/85).

58. CRS § 18-1-105(9)(e)(III) (1985 Cum. Supp.).

59. CRS § 17-2-201(5)(c)(I) (1985 Cum. Supp.).

60. CRS § 16-11-204.5(1) (1985 Cum. Supp.).

61. CRS § 16-11-204.5(4) (1985 Cum. Supp.).

62. 648 P.2d 173 (Colo.App. 1982).

63. *Cumhuriyet v. People,* 200 Colo. 466, 615 P.2d 724 (1980).

64. *People v. Jewett,* 693 P.2d 381 (Colo. App. 1984).

65. CRS § 16-7-403 (1985 Cum. Supp.).

66. The court must revoke the deferred judgment if the violation is proven. *People v. Wilder,* 687 P.2d 451 (Colo. 1984).

67. *See, People v. Turner,* 644 P.2d 951 (Colo. 1982). Note that the controlled substances statute has its own deferred judgment provision, CRS § 18-18-104(3), which allows for a trial as well as a plea prior to the deferral. The deferral need not be by stipulation.

68. CRS § 16-7-401 (1985 Cum. Supp.).

69. CRS § 17-27-101 *et seq*.

70. *People ex rel. Van Meveren v. District Court,* 195 Colo. 34, 575 P.2d 4 (1978).

71. CRS §§ 16-11-204(c), 17-27-105(1)(a) and 17-27-106(4)(a) (1985 Cum. Supp.).

72. *See,* note 70, *supra*.

73. CRS § 17-27-103(3)(1985 Cum. Supp.).

74. *Id*.

75. CRS § 17-27-104(3)(1985 Cum. Supp.).

76. CRS § 17-27-103(3)(1985 Cum. Supp.).

77. CRS § 17-27-105(5)(1985 Cum. Supp.).

78. *Russell,* note 15, supra.

79. L. 82, Ch. 312, § 3. For examples of the problems involved in this procedure, *see, People v. Cole,* 648 P.2d 687 (Colo.App. 1982); *People v. Abeyta,* 677 P.2d 393 (Colo.App. 1983).

80. CRS § 18-1-409; C.A.R. 4(c). The sentence appeal must be taken after the imposition of the original sentence and not after denial of a Crim.P. 35(b) motion to reconsider. *People v. Malacara,* 199 Colo. 243, 606 P.2d 1300 (1980).

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81. *People v. Godwin,* 679 P.2d 1095 (Colo.App. 1983).

82. *Burns, supra,* note 56; *Bridges,* 662 P.2d 161 (Colo. 1983).

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

84. CRS § 16-11-308(2) (1985 Cum. Supp.).

85. CRS § 17-40-101 *et seq*.

86. CRS § 16-11-308(5)(1985 Cum. Supp.).

87. CRS §§ 17-22.5-301 and 302 (1985 Cum. Supp.).

88. CRS § 17-22.5-301(2)(1985 Cum. Supp.).

89. CRS § 17-22.5-303(6)(1985 Cum. Supp.).

90. CRS § 17-22.5-301 (3)(1985 Cum. Supp.).

91. *People v. Mack,* 681 P.2d 949 (Colo. 1984).

92. CRS § 16-11-306, *Chavez, supra,* note 37.

93. 698 P.2d 788 (Colo. 1985) at 795.

94. *Id*. at 796, n. 13.

95. *People v. Myles,* 14 Colo.Law. 1272 (July 1985) (App. No. 84CA0698, *annc'd* 5/16/85); *People v. Freeman,* 14 Colo.Law. 1058 (June 1985) (App. No. 84CA0537, *annc'd* 4/18/85); *People v. Baker,* 14 Colo.Law. 631 (April 1985) (App. No. 84CA0112, *annc'd* 2/28/85); *People v. Nealous,* 14 Colo.Law. 607 (April 1985) (App. No. 83CA1062, *annc'd* 2/14/85); *People v. Middleton,* 14 Colo.Law. 608 (April 1985) (App. No. 83CA1373, *annc'd* 2/14/85).

96. CRS § 17-27.5-101 *et seq*. (1985 Cum. Supp.).

97. CRS §§ 17-27.5-105 and 106 (1985 Cum. Supp.).

98. CRS § 17-22.5-303.5 (1985 Cum. Supp.); *supra*, note 89.

99. CRS § 17-2-103 (1985 Cum. Supp.).

100. CRS § 17-2-103(11)(1985 Cum. Supp.).

101. CRS § 17-2-201(1)(1985 Cum. Supp.).

102. CRS §§ 17-2-214(1), 17-2-215, 17-22.5-106, 24-6-402 (1985 Cum. Supp.).

103. Cherner, *supra*, note 1.

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