Felony Sentencing In Colorado

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This is the third in a series of articles on felony sentencing in Colorado, exclusive of the death penalty.(fn1) Since 1985 substantial changes in the overall scheme have been enacted and the general trend appears to be one of longer authorized sentences and a diffusion of the rigid classification scheme.

Upon conviction of a felony the court has the following alternatives in imposing sentence: a sentence to imprisonment; fines; probation and other probation-related alternatives (including intensive supervision, confinement in the county jail, home monitoring, deferred judgments and restitution); and community corrections. Following a discussion of these topics, sentencing procedure, time computation, post-conviction remedies and parole policies are surveyed.

SENTENCES TO IMPRISONMENT

Most, but not all, felonies(fn2) are divided into six classes. The sentencing ranges are set forth in the table below.

A prison sentence is formally to the custody of the Executive Director of the Department of Corrections ("DOC"), and is for a fixed term in lieu of a range. For example, a permissible sentence for a class four felony is six years.

Class	Presumptive Range	Extraordinary Range	Fine Range
1	life or death	n/a	none
2	8-24 years	4-48 years	$5k-$1m
3	4-16 years	2-32 years	$3k-$750k
4	2-8 years	1-16 years	$2k-$500k
5	1-4 years	6 mo.-8 years	$1k-$100k
6	1-2 years	6 mo.-4 years	$1k-$100k

Ordinary Range Sentence

If a prison sentence is imposed, CRS § 18-1-105 directs the sentencing court to impose a sentence in the ordinary range unless the court finds the presence of "extraordinary mitigating or aggravating factors." This policy has its genesis in the original Gorsuch bill of 1979,(fn3) in which the ordinary ranges were quite narrow. As enacted, the Gorsuch scheme created five felony classes with the broadest range of ordinary sentences, for class two felonies, only four years apart. In 1985, the General Assembly doubled the ordinary ranges to their present levels.

Extraordinary Range Sentences

In the original Gorsuch bill the court was authorized to impose from half the presumptive minimum to twice the presumptive maximum upon a finding that the offence (including the circumstances of the offender) was "extraordinary," a term that was slowly defined by case law.(fn4) Such sentences came to be known, for lack of a better term, as "permissive" extraordinary range sentences. The court retains authority to impose such sentences.(fn5)

In contrast, a series of factors mandating extraordinary aggravated sentences was created by the General Assembly starting in 1981.(fn6) The presence of any of these, until mid-1988, requires a sentence of at least one day longer than the maximum allowable in the presumptive range. Currently, a sentence of at least the mid-point in the presumptive range is required if a prison sentence is imposed.(fn7) These statutory or mandatory aggravating factors are as follows:(fn8)

[Please see hardcopy for image]

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I. The Defendant is convicted of a crime of violence under section 16-11-309, C.R.S.;

II. The Defendant was on parole for another felony at the time of commission of the felony;(fn9)

III. The Defendant was on probation for another felony at the time of the commission of the felony;(fn10)

IV. The Defendant was charged with or was on bond for a previous felony at the time of the commission of the felony, for which previous felony the Defendant was subsequently convicted;(fn11)

IV.5 At the time of the commission of the felony, the Defendant was on bond for having pled guilty to a lesser offense when the original offense charged was a felony;(fn12)

V. The Defendant was under confinement, in prison, or in any correctional institution as a convicted felon, or an escapee from any correctional institution for another felony at the time of the commission of a felony;

VI. The Defendant was under a deferred judgment and sentence for another felony at the time of the commission of the felony;

VII. At the time of the commission of the felony, the Defendant was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult.

A short line of cases grappled with this problem: If the aggravating factor is already an element of the offense, can the General Assembly constitutionally mandate an increased term of imprisonment, without violating double jeopardy principles? The answer was eventually "yes," but not without some legal meandering. One Colorado appellate case does not require an extraordinary range sentence for escape, since being in custody is already an element of the offense.(fn13) It has, however, been limited severely to its facts. Thus, an aggravated sentence for possession of contraband was upheld even though the defendant's custodial status was an element of the offense.(fn14) A related line of cases has permitted sentences for crimes of violence, even where the use of the weapon was an element of the offense.(fn15)

With one important exception, these statutory aggravating factors do not mandate a prison term. They only require that *if a prison term is imposed* it be in the extraordinary range. The exception is conviction of a "crime of violence,"(fn16) defined by CRS § 16-11-309 as:

"Using, or possessing and threatening the use of, a deadly weapon in the commission or attempted commission of':(fn17)

1) any crime against an elderly(fn18) or handicapped(fn19) person;(fn20)

2) any murder, first or second degree assault, kidnapping, sexual assault, robbery,(fn21) first degree arson, first or second degree burglary, escape or criminal extortion;(fn22)

3) causing death or serious bodily injury(fn23) to someone other than the perpetrators during the commission or attempted commission of the crimes enumerated in 2);(fn24)

4) causing bodily injury(fn25) in the course of an a felony unlawful sexual offense;(fn26) or

5) using force threats or intimidation during the unlawful sexual offense.(fn27)

"Crime of violence" must be pleaded and proven to the trier of fact like any other charge.(fn28)

As noted above, conviction of a crime of violence carries a mandatory prison term of at least the mid-point in the presumptive range for the substantive offense.(fn29) However, there are two loopholes. The lesser is the provision in the crime of violence statute that allows the court to disregard the mandatory sentence provision within ninety days of sentencing in an exceptional situation.(fn30) The greater loophole is apparent from the wording of CRS § 18-1-105(10), which gives the court unlimited authority to suspend *any* sentence. Compare that to the phrase in CRS § 16-11-309 that says the sentence must be imposed "without suspension." Since the authority to suspend was created in 1988, no case has resolved the apparent conflict.

Additional confusion is caused by the fact that many of the statutes defining violent crimes contain a provision that anyone convicted of said crimes "must be sentenced in accordance with the provisions of 16-11-309." This conflicts with the requirement in § 16-11-309(4)-(6) that the charge must be separately pleaded and proven. For example, second degree murder is a class two felony with a presumptive range of 8-24 years and an extraordinary aggravated range of 16-48 years. Obviously, conviction of second degree murder and mandatory sentencing under § 16-11-309 carries a sixteen-year minimum unless the sentence can be suspended under CRS § 18-1-105(10). However, what if the prosecutor, as is not uncommon, agrees to dismiss the mandatory sentence count in exchange for a guilty plea to the substantive crime? Is the court bound by § 16-11-309 anyway? Most courts seem to take the position that they are not, but there is no appellate decision on point.(fn31)

Special Circumstances Legislation

The habitual criminal statute remains unchanged.(fn32) An offender charged with any felony and who is shown to have three or more prior felony convictions arising out of separate criminal episodes receives a life sentence (the "big" habitual statute). An offender convicted of a felony who has two prior felony convictions within ten years of the date of the new offense for crimes arising out of separate criminal episodes must receive a sentence of between 25 and 50 years,(fn33) provided that the new offense carries at least a five-year maximum term (the "little" habitual statute). Thus, offenders charged with class six felonies are ineligible for prosecution under the little habitual criminal statute.(fn34) The prior convictions must predate the instant offense, but need not have happened sequentially.(fn35)

Given the severe punishment inflicted for conviction under the big habitual criminal statute, several cases grapple with a cruel and unusual punishment analysis.(fn36) As yet, no sentence has been set aside, although a life sentence has been defined as a forty-year minimum only since 1985.(fn37)

Another sentence carrying a potential life sentence is the Colorado Sex Offenders Act of 1968.(fn38) The Act provides for a sentence of from one day to life for a sex offender who is found after a hearing to be a threat to the public.(fn39) His release date is then determined by the Parole Board.(fn40) Apparently, because such offenders receive no additional treatment and because of the uncertainty of the ultimate release date, the Act is seldom invoked by either party.

Other Special Offenders

Over the years, the General Assembly has enacted numerous statutes imposing special sentencing conditions for particular offenses or classes of offenses that are outside the six-class classification

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scheme, of which "crime of violence" is only one facet. For example, distribution of cocaine is a class three felony, unless the amount in question is twenty-eight grams or more, in which case the classification is the same but probation is impermissible.(fn41) "Special offenders," loosely defined as pushers or major dealers, must be sentenced in the aggravated range of a class two felony, even though their substantive offense---distribution of a controlled substance---is only a class three felony.(fn42) Several other drug offenses have increased penalties for repeat offenders.(fn43) Habitual sex offenders against children,(fn44) habitual child abusers,(fn45) habitual burglars(fn46) and habitual shoplifters all have their own sentence enhancement schemes to contend with.(fn47) Other examples of special circumstances sentencing include robbery of the elderly or handicapped,(fn48) theft from the elderly or handicapped,(fn49) sexual assault on a child---position of trust,(fn50) some forms of first degree sexual assault,(fn51) and child abuse resulting in death or serious bodily injury.(fn52)

The 1989 General Assembly added a surcharge of five years for the commission of a crime of violence with an assault weapon.(fn53)

In one of the more unusual legislative actions in recent memory, the 1989 General Assembly mandated that offenders convicted of felony controlled-substance offenses under CRS §§ 18-18-104, 105 and 106 lose their driver's licenses for at least three months.(fn54)

Certainly the General Assembly has the authority to prescribe harsher punishments for certain categories of offenders, but there are so many categories that proof and charging problems result. It would be more logical to require courts to take into account these critical parameters when imposing sentence than to overcategorize.(fn55) Where an offender uses a weapon, possesses a large quantity of drugs, or has a history of doing the same or similar crimes, judges have historically imposed stiffer sentences.

The reason for the problem of over-categorization is probably political. The General Assembly has historically approached criminal sentencing piecemeal, giving attention to whichever heinous crime most recently received the most notoriety, rather than the equity or sound functioning of the criminal justice system as a whole. It also can be seen as reflecting the public's lagging confidence in the judiciary, fueled by alleged leniency in sentencing in highly publicized cases.

FINES

In 1979, fines were abolished as penalties for felonies, except for corporations. They were reinstituted in 1985.(fn56) A fine may be imposed in addition to a prison sentence, community corrections sentence or probation. A fine operates as a judgment against the defendant and in favor of the state, and may be collected like any other judgment.(fn57)

In the author's opinion, fines are seldom imposed for felonies because people without money cannot pay and people with money are seldom convicted.

PROBATION AND PROBATION-RELATED ALTERNATIVES

Probation

Recent changes in probation include the creation of intensive supervision and home detention. In its simplest form, probation is an order to behave. An offender is ineligible for probation if he has two prior felony convictions, or if he has one prior felony conviction within the last ten years and the instant conviction is for a class one, two or three felony.(fn58)

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.(fn59) Community corrections, described in more detail below, may also be required.

Probation may include up to ninety days in the county jail as a condition, or up to two years confinement if work or education release is authorized.(fn60)

There is presently no statute governing the maximum length of probation. A recent case holds that it may be at least as long as the maximum extraordinary prison sentence authorized for the offense.(fn61)

Recent technological developments have brought about what the statute calls "home detention"; practitioners call it "the bracelet."(fn62) First authorized for misdemeanants, the bracelet was added to the potential conditions of probation for felonies in 1988.(fn63) An electronic device is worn by the offender and connected by radio to his or her home telephone. If the offender strays from home, the device notifies a computer at the probation department. Thus, the offender can be allowed to leave home to go to work, but otherwise remain confined. There are some offenders who, but for this program, would be confined in a county jail work release facility, and their dependents would suffer accordingly. However, even from a defense perspective, it seems odd. Either the offender merits jail time for a felony or he does not; if he does, it should involve more than being told to "go to your room."

Another innovation in probation is "intensive supervision." In addition to the usual conditions of probation, intensive supervision also requires

> highly restrictive activities, daily contact between the offender and the probation officer, monitored curfew, home visitation and monitoring, drug and alcohol screening, treatment referrals and monitoring, and restitution and community service. . . . (fn64)

Eligibility for intensive supervision requires probation eligibility and a finding that the offender would be sentenced to the DOC but for his placement in the program. For purposes of the escape statutes, an offender who has an obligation to report to a detention facility while on intensive supervision is deemed "in custody."(fn65)

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 four years.(fn66) 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.(fn67) The offender may then receive any sentence authorized by law, including probation.(fn68)

The controlled substances statutes contain a provision for what amounts to a deferred judgment, with the exception that the consent of the prosecution is not required.(fn69) If the court finds a user

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of controlled substances in need of treatment, it can suspend the proceedings and order such rehabilitation as it deems necessary. After completion of treatment, the court, in its discretion, may dismiss the case.

A deferred prosecution is really a formal waiver of speedy trial on the condition that the offender abide by the terms of a stipulation executed by himself and the People and approved by the court.(fn70) During the period of the deferral, he is placed under the supervision of the probation department. This differs from a deferred judgment in that no guilty plea is taken. Compliance with the stipulation results in dismissal of the charges; a violation, if proven, allows the People to proceed with the prosecution. Since a deferred prosecution is tantamount to no prosecution, it is seldom agreed to by prosecutors.

Restitution

Restitution is an order requiring the defendant to compensate the victim. It may be imposed as a condition of probation, of a deferred judgment and of parole. Restitution must be computed and awarded in every case for the "actual pecuniary loss" of the victim.(fn71) However, restitution is not appropriate for offenses which were dismissed as part of a plea bargain.(fn72)

A statute enacted in 1988 makes restitution awards enforceable as judgments, enforceable by the state and the victim.(fn73) Like most judgments, presumably they are assignable.

Although some trial courts have held to the contrary, it appears that restitution may not be awarded as a condition of community corrections because there is no statutory authority to do so.(fn74) It may not be awarded as a part of a prison sentence either, but here the court is instructed to compute the amount so the Parole Board may order restitution as a condition of parole.(fn75)

A restitution award does not appear to be dischargeable in bankruptcy because a recent Colorado statute labels it a debt for "willful and malicious" injury pursuant to the federal Bankruptcy Code.(fn76)

COMMUNITY CORRECTIONS

The final prong of the sentencing apparatus is community corrections.(fn77) This comprises a series of halfway houses, some privately operated and some operated by the government, based in neighborhoods throughout the state. The term "halfway house" is derived from the notion that, while the offender can leave to go to school or work, he must return at scheduled times; he is "halfway" between incarceration and freedom. Historically, the purpose of community corrections is similarly a middle ground. Offenders who are ineligible for probation but who do not warrant a prison sentence are sent to community corrections.(fn78)

There are four ways for an offender to be placed in community corrections: (1) he can be placed there as a condition of probation; (2) sentenced directly to the program; (3) transferred to the program by the DOC, as he would be transferred to any other DOC facility while serving a prison sentence; or (4) placed there as a condition of parole.(fn79)

In addition to requiring the action of the sentencing court or the DOC, placement in community corrections requires two further steps. Each judicial district has a board, comprised of various segments of the community, which must screen the candidates. After board approval the facility staff must also agree on placement.(fn80) Some jurisdictions seek approval of the board prior to the sentencing hearing and others let the court make the initial decision. In either case, approval of all three entities is required. The statute sets forth general eligibility requirements,(fn81) and many boards have promulgated regulations further defining eligibility.

Conviction and sentence in the aggravated range for a "crime of violence," as defined in CRS § 16-11-309, bars community corrections placement. Any other felony offender may be so sentenced by the judge or placed by the Executive Director of the DOC.(fn82)

Offenders who fail to follow the rule of the facility are subject to replacement. This usually means incarceration, since community corrections was the "last chance" prior to prison. However, in districts large enough to have more than one halfway house, the offender will occasionally be transferred.

The right and scope of any hearing to which the offender may be entitled when replacement is sought is still unclear. In *People v. Wilson*,(fn83) the court held that the statutory scheme entitles the offender to a hearing. While expressly declining to address the constitutional due process question presented, the opinion nevertheless contains much language about fairness and the right to a hearing when the inmate's custody level is increased substantially.

In response, the General Assembly amended the community corrections statutes to state clearly that there is no right to an evidentiary hearing.(fn84) Now the courts will have to address the constitutional question. A hearing may appear to be an unnecessary gesture when the violation is an obvious one, such as an escape, but the right to the hearing, rather than the hearing itself, prevents abuse. Any system that allows a private contractor (the house operator) and a community board to make *ex parte* decisions about an inmate's custodial status should welcome a hearing requirement as insurance against accusations of wrongful termination and insulation against liability. Thus, the hearing certainly protects the inmate, but it protects the institution's integrity as well. Even then, the hearing may be a hollow right for the offender since rejection by the facility cannot be overruled by the court. Note also that the offender can be terminated for *any* reason, equitable or otherwise, although abuses do not appear to be common.

After completing the custodial portion of the halfway house sentence, the offender may be placed on nonresidential status for up to one year, whereby he no longer lives in the halfway house but reports periodically.(fn85)

The transition from residential to non-residential status is delegated to the community corrections personnel. That means the offender is sentenced to the facility for a fixed term by the court, but the term "the facility" means the residential and nonresidential components. For example, an offender sentenced to community corrections for six years for burglary would be expected to serve from six to nine months in residential placement and the balance of his sentence on nonresidential status. In fact, the six-to-nine-month period is more or less standard regardless of the offense or the length of sentence imposed by the court.

Leaving the extended range of the inmate's confinement (for example, failing to return to the house after work) is an escape,(fn86) but the sentence for the escape need not be in the extraordinary aggravated range.(fn87)

THE SENTENCING HEARING

There have been few changes in sentencing procedures since 1985. After a finding of guilt based on a plea or verdict, the court sets the sentencing hearing. Prior to the hearing, the probation department prepares a probation or presentence report. This report details the following: the offense; the circumstances of the victim; the amount of restitution, if any; the offender's social, employment, education, health and criminal history; and any other information pertinent to the court's sentencing decision.(fn88) The probation department must also compute presentence time and presentence good time credits for offenders incarcerated prior to sentencing.(fn89) A copy is to be provided to the parties seventy-two hours prior to the hearing.(fn90)

The defendant has the right to allocution at the hearing and the failure to so provide requires resentencing.(fn91) Hearsay is admissible.(fn92) *People v. Lowery* has been cited for the proposition that the sentencing court may consider charges dismissed at the time of the plea, though logic would appear to limit the case to its facts.(fn93) In imposing sentence, the court is required to state the reason for the sentence on the record to facilitate appellate review.(fn94) The victim has the right to address the court at sentencing.(fn95)

CRS § 18-1-105 provides for an extraordinary sentence if the offender is on a certain status, but provides no procedures for proof of the status. In *People v. Lacey*,(fn96) the Supreme Court held that the People had the burden of proving the existence of the aggravating status by a preponderance of the evidence after due notice prior to the sentencing hearing.

In deciding the appropriate sentence, the court is guided by the traditional four criteria, as set forth in CRS § 18-1-102.5: punishment, consistent treatment of similar offenders, deterrence and rehabilitation. The sentencing court has broad discretion in imposing sentence. It must be a rational, balanced selection from available alternatives.(fn97) Undue weight may not be given to any one factor. While a major focus of the hearing is certainly an attempt to weigh the possibility of future unlawful conduct, the *only* acceptable predictor, by statute, is past behavior.(fn98)

The earliest cases considering sentence length were prior to enactment of the Gorsuch bill in 1979, but they are still helpful because *People v. Phillips*(fn99) applied their analyses to Gorsuch bill sentences.(fn100) The fact that a crime is "aggravated," in the generic sense, does not mandate a sentence in the extraordinary aggravated range, but if the aggravation is extraordinary an aggravated range sentence is appropriate.(fn101)

What is excessive of course is always relative. A second degree burglary of a dwelling(fn102) committed in 1980 carried a four-to-eight-year prison sentence.(fn103) There was no mandatory aggravation and parole was required after half the sentence was served.(fn104) The same crime today carries up to sixteen years in the ordinary range and thirty-two in the extraordinary aggravated range, a range that is triggered by a variety of statutory factors.(fn105) Moreover, the offender's release is at the sole discretion of the Parole Board.(fn106) If the mid-point of the ordinary range is taken as a common factor, the 1980 offender serves eighteen months (three years, with parole after no more than half), while today's offender serves up to ten years (ten years minus nothing since parole is not required). Assuming maximum application of the parole and earned time statutes, the most recent inmate still serves over four years. Similar range increases apply to other class felonies, with the length increasing exponentially as the class of felony increases in seriousness. The rapidly increasing DOC population reflects these policy decisions.

The discretion of the trial court to impose consecutive or concurrent sentences had been greatly curtailed by statute. The court must now impose consecutive sentences for two separate crimes of violence arising out of the same criminal episode.(fn107) A sentence may not be made consecutive to a sentence which has yet to be imposed,(fn108) but it may be made consecutive to a pending (but not yet final) parole revocation.(fn109) Consecutive sentences are mandatory for bond jumping,(fn110) escape and possession of contraband.(fn111)

TIME COMPUTATION

"Good time" is that time to be credited against a sentence for good behavior, and equals half the sentence, including half of any presentence time.(fn112) It is almost automatic: the DOC awards good time upon entry of the inmate into the system and only deducts it for improper conduct.

"Earned time" is time credited against a sentence for doing specific tasks.(fn113) Its award is not automatic.

"Presentence time" is the number of days spent in custody prior to sentencing.(fn114) Good time is awarded against this time as well.(fn115) Presentence time is computed by the court at the time sentence is imposed and endorsed upon the mittimus. This figure is then used by the DOC in computing the inmate's parole eligibility date and mandatory release date. The computation is straightforward enough when there is only one case pending and the inmate has been confined only in the county jail. It gets confusing to lawyers and clients alike when there is more than one sentence and/or place of confinement in question.

Although some cases have held to the contrary, the present statute provides that so-called "double credit" is disfavored.(fn116) An inmate who is serving a given sentence and also has pending charges on a new case is not entitled as a matter of right to credit for his presentence confinement on the new case. The reason is that he is already applying his custodial time to the first sentence. This is understandable when the sentences are to be served consecutively, but inequitable when they are made concurrent.

Another problem is the definition of "confinement" in this context. Obviously, the jail/prison setting qualifies, but with the expansion of alternatives, what other types of custodial settings must be included? Is time spent in work release, in community corrections or on probation counted? One case even goes so far as to hold that an inmate, confined in a county jail work release program prior to sentencing, was entitled only to credit for the hours actually spent in jail (the time he was not at work). He was only entitled to two-thirds of the days spent in work release as credit against his sentence.(fn117)

Any sentence is meaningless without an understanding of the length of time actually spent in confinement. Prior to 1985, the Colorado sentencing scheme was very predictable. A quick calculation made at the time of sentencing could predict the release date almost to the day. The inmate received credit for his presentence confinement, if any; received credit for up to sixty days each year for earned time; and an additional 50 percent off for good time, after which parole was mandatory.(fn118) The advantage was that with a predictable release date, the judge could sentence to the term he or she believed was really appropriate: the court wanting to send someone to prison for three real years could impose a seven-year sentence. This practice, however, left the Parole Board emasculated. It was reduced to setting only parole conditions (not release dates) for most offenders.(fn119)

The certainty, uniformity and stability this system provided was washed away in 1985 when the General Assembly once again granted the Parole Board authority to grant or deny release to an inmate who has accumulated the same credits recited above. In other words, the accumulation of presentence, good time and earned time credits gave the Board authority to release the offender, but no longer required it to do so.(fn120) Presently, the Board, by all outward appearances, is granting parole to only one-third of those who come before it for the first time.(fn121)

The Diagnostic Process

After sentencing, the offender is sent to the county jail for transportation to the Diagnostic Unit of the DOC in Canon City.(fn122) Prison crowding has resulted in many inmates waiting months to get into the Diagnostic Unit. The Unit's purpose is to classify incoming inmates.(fn123) Inmates are interviewed and tested to determine their optimum placement within the DOC, pursuant to the authority vested in the Executive Director.(fn124) These 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 in deciding a motion to reconsider.

POST-CONVICTION REMEDIES

Motions to Reconsider

Pursuant to Crim.P. 35(b), the defendant may petition the court for reconsideration of his 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 commences after the mandate of the appellate court has issued.

This continues to be an area of difficulty for offenders and their counsel, since 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.(fn125) CRS § 18-1-409(2) provides the appeal must be commenced within thirty days. Therefore, the offender is presented with three possible options: He can forego the appeal, he can forego the motion to reconsider, or he can seek a limited remand from the appellate court for the purpose of allowing the trial court to consider the reconsideration motion. The last alternative is the most likely approach, but puts the appellate court in the posture of having to rule on the remand. To do so intelligently, the appellate court must either grant the motion 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 is coming up on his 120-day deadline for filing his motion but has yet to be placed in the DOC's Diagnostic Unit. His Diagnostic Testing and report are therefore unavailable. In this situation, many lawyers have filed the motion and asked the court to defer ruling. However, in a recent case, the Colorado Supreme Court held that the defense must make some effort to pursue a decision, even after the filing of the motion, or the motion is deemed abandoned and therefore denied.(fn126)

Motions to reconsider are the defendant's last chance for sentence reduction in the courts: they are not appealable.(fn127)

Sentence Appeals

Defense sentence appeals are handled routinely with or without the appeal of the verdict.(fn128) On appeal, the court is directed to consider

> 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.(fn129)

The standard for review is one of abuse of discretion.(fn130) The reviewing court may affirm the sentence, impose any sentence the trial court could lawfully have imposed or remand for resentencing.(fn131)

The People may also appeal questions of law regarding sentencing pursuant to CRS § 16-12-102.

Commutation

Article II, § 7 of the Colorado Constitution authorizes the governor to pardon any offender. Recent governors have promulgated rules limiting their discretion in this area and creating a "commute board" to screen applications. CRS § 16-17-102 requires the governor to consult with the district attorney and judge who tried the case before he acts.

PAROLE

Parole Eligibility

Perhaps the greatest area of controversy over the last four years in the criminal justice arena has been that of parole. Responding to political pressure, the General Assembly created an entirely new Parole Board, effective July 1, 1987. It consists of four members serving a five-year term each, appointed by the governor and confirmed by the senate.(fn132) The parole statutes are relatively short, but have been amended repeatedly over the last four years, usually with a view toward increasing the length of parole, increasing the Board's authority to deny release and adding tasks for the parolee to perform.

Generally, an inmate may be paroled when he has completed a length of time in custody equal to the length of his sentence, and less presentence time, earned time and good time. For example, an offender who has no presentence credit, is sentenced to four years and receives all good time and earned time credits allowed is eligible for parole one year and eight months after he is sentenced by the court. However, there are some exceptions to the general rule. Inmates

convicted of certain violent offenses(fn133) and who have once previously been convicted of a "crime of violence" must serve at least 75 percent of their sentence prior to parole eligibility; two prior convictions require service of 100 percent of the sentence, each less earned time.(fn134) Of course, it is possible that this statute merely codified the existing practice for paroling violent offenders.

Another exception is that inmates sentenced for class four or five nonviolent offenses(fn135) are eligible for parole after serving the presumptive minimum for the class felony for which they were convicted, less good time and earned time, and if they were sentenced in the presumptive range.(fn136) For example, an inmate who is sentenced to three years for a class five felony with no presentence credit has the same parole eligibility date (one year after sentencing) as an inmate who is sentenced to four years. Earned time would be subtracted as appropriate. While the statute, by its terms, applies only to inmates who endured a trial, parole authorities have apparently applied it to all offenders who otherwise come within its terms. The statute is set to expire on July 1, 1990.(fn137)

Persons sentenced to life are eligible for parole after forty years.(fn138) No good time or earned time credits apply.

The above provisions determine when an offender is eligible to meet the Parole Board; they do not mandate release. In considering a grant of parole, the Board is directed to consider numerous factors which bear on the public welfare and the probability that the offender will not reoffend.(fn139) Once on parole, the maximum length is determined by the date of the offense. For offenders whose crimes occur on or after July 1, 1985, parole may not exceed five years.(fn140)

One of the criteria not expressly listed for the Board to weigh in considering release is the DOC population. For a state with a corrections population bursting at the seams, this is a costly omission. The Parole Board, relative to the trial court, is in a much better position to view the DOC population as a whole when considering the relative merits of each offender's release. Perhaps the statute's direction to consider whether the inmate's "release from institutional custody is compatible with the welfare of society"(fn141) authorizes the Board to factor prison overcrowding into the release decision. It certainly needs to be addressed in some way.

Parole Hearings and Conditions

Parole hearings are open to the public. The votes of individual members are recorded and are open to inspection.(fn142) Victims and their families may appear at the hearings, and a notification system is in place to keep them abreast of an inmate's request for release.(fn143)

As a condition of every parole, the Parole Board is required to order payment of restitution. Other conditions are also required, such as establishing a residence of record, obedience to state and federal laws, periodic reporting, prohibition on possession of firearms, association with known felons without permission, a prohibition on substance abuse and efforts to secure employment or education.(fn144) If the inmate was convicted of a sex offense, the Board must require him to submit to blood testing "to determine genetic markers" and saliva testing "to determine the secretor status."(fn145) Random drug screens, at inmate expense, are also required.(fn146)

The DOC is authorized to establish an intensive supervision program for offenders within ninety days of parole, or within 120 days of parole if the offender is eligible for community placement.(fn147)

While the need for parole, or some form or post-release supervision is apparent, the current system is a wasteful anachronism. Parole is a division of Adult Services in the DOC, part of the executive branch, while each judicial district, part of the judicial branch, has a probation department. Virtually every parolee has previously been examined and reported upon by a probation department; most have been on probation at least once prior to their incarceration. Supervision of parolees by the probation department in the district from which they came would seem to be more logical and efficient than the present system. A bill to accomplish this reform died in the 1989 General Assembly after strong opposition from parole officers.(fn148)

CONCLUSION

Colorado continues to grapple with the tension between the public's desire for harsher punishment and the public's reluctance to fund the cost of incarceration. With the reinstitution of suspended sentences, Colorado now has a broad range of felony sentencing alternatives. However, there are some deficiencies.

There are many separate halfway houses, but no overall community corrections coordination. Halfway houses for offenders who have major psychiatric

difficulties, such as schizophrenia, are needed. Also needed are more halfway houses for women and additional community corrections beds for sex offenders. To institute these reforms on a statewide basis, there should be a mechanism that allows a judge in one judicial district to send an offender to a house in another district.

Treatment (without the provision that they consent to a possible life sentence to get it) for sex offenders should be available in a locked facility. The court should have the authority to sentence an offender directly to such a facility.

It is irrational and wasteful to increase sentences dramatically, as was done in 1985,(fn149) and then enact early release legislation, as was done in 1988(fn150) to accommodate the increased prison population. The creation by the 1989 General Assembly of a Criminal Justice Commission is a step in the right direction. The Commission is charged with developing recommendations for legislation to improve the criminal justice system and deal with the recent capacity problems.(fn151)

NOTES

Footnotes:

1. The earlier articles are "Colorado Felony Sentencing," 11 *The Colorado Lawyer* 1478 (June 1982); and "Colorado Felony Sentencing: An Update," 14 *The Colorado Lawyer* 2163 (Dec. 1985).

2. Unclassified felonies and felonies without penalty are governed by CRS §§ 18-1-108 and 109.

3. L.79, Ch. 157, is the "Gorsuch" bill, named after its chief sponsor, former State Representative Ann Gorsuch.

4. *Infra,* note 101.

5. CRS § 18-1-105(6).

6. L.81, Ch. 211, § 1.

7. CRS § 18-1-105(9)(a).

8. *Id*.

9. *People v. Glover,* 18 Colo. Law. 1565 (Aug. 1989) (App.No. 88CA0327, *annc'd* 6/1/89).

10. 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).

11. The defendant need not have notice or knowledge of the first pending case for the aggravator to apply. *People v. Anderson,* 18 Colo.Law 1559 (Aug. 1989) (App.No. 87CA1398, *annc'd* 6/1/89).

12. This aggravator is peculiar in that by its terms it applies only to the time period between entry of the plea and sentencing; further, it applies only to those who enter pleas to lesser charges, as opposed to those found guilty by a jury of lesser charges.

13. The case is *People v. Russell,* 703 P.2d 620 (Colo.App. 1985). An aggravated sentence, of course, may be imposed for any other valid reason.

14. *People v. Leonard,* 755 P.2d 447 (Colo. 1988). *See also,* CRS §§ 18-1-105(9)(f), which authorizes the court to consider, as aggravation, factors which also are elements of the charged offense.

15. *See, e.g., People v. Haymaker,* 716 P.2d 110 (Colo. 1986); *People v. Collins,* 730 P.2d 293 (Colo. 1986); *People v. Montoya,* 736 P.2d 1208 (Colo. 1987).

16. The 1988 General Assembly enacted the following [now codified as CRS § 18-1-105(10)]:

When it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be best served thereby, the court shall have the power to suspend the imposition or execution of sentence for such period and upon such terms and conditions as it may deem best.

The statute is a legislative response to *People v. District Court,* 673 P.2d 991 (Colo. 1983), and *People v. Flenniken,* 749 P.2d 395 (Colo. 1988), which overruled prior cases and held there was no inherent power to suspend a sentence.

17. 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.

18. An elderly person is at least sixty years old. CRS § 16-11-309(2)(b).

19. A handicapped person "is disabled because of the loss of or permanent loss of use of a hand or foot or because of blindness or the permanent impairment of vision in both eyes to such a degree as to constitute virtual blindness." CRS § 16-11-309(2)(b).

20. CRS § 16-11-309(2)(a)(I).

21. Includes aggravated robbery. *People v. Eggers,* 585 P.2d 284 (Colo. 1978).

22. CRS § 16-11-309(2)(a)(I).

23. "Serious bodily injury" is defined by CRS § 18-1-901(3)(p) as "bodily injury which involves 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."

24. CRS § 16-11-309(2)(a)(I).

25. "Bodily injury" is defined by CRS § 18-1-901(3)(c) as "physical pain, illness, or any impairment of physical or mental condition."

26. CRS § 16-11-309(2)(a)(II). "Unlawful sexual offense" is defined in CRS § 18-3-411(1) and includes virtually all felony sexual assaults and sexual crimes involving children.

27. CRS § 16-11-309(2)(a)(II).

28. CRS § 16-11-309(4).

29. CRS §§ 16-11-309(1)(a); 18-1-105(9) (a)(I).

30. CRS § 16-11-309(1)(a).

31. On March 17, 1986, *People v. Haymaker,* 716 P.2d 110 (Colo. 1986), was announced. The court held neither equal protection nor double jeopardy prohibitions created a ban against using § 16-11-309 to enhance a sentence for use of a deadly weapon where use of the deadly weapon was already an element of the underlying offense, overruling *People v. Montoya,* 709 P.2d 58 (Colo.App. 1985). Part of the court's rationale was that this was clearly the legislative intent, following *Missouri v. Hunter,* 459 U.S. 359, 103 S.Ct. 673 (1983). The Colorado General Assembly then enacted L.86, Ch. 138, which was signed by the Governor on April 19, 1986. This bill amended several violent crime statutes, such as first and second degree assault and second degree murder, to include a provision that anyone convicted of such crimes must be sentenced pursuant to CRS § 16-11-309. Thus, it appears that the wording cited in the text was enacted to "shore up" the *Haymaker* rationale and not to require a sentence in the aggravated range without a separate charge of "crime of violence" under CRS § 16-11-309.

32. CRS § 16-13-101 *et seq*.

33. The sentence is a fixed number, and not a range, like any other sentence. *People v. Chambers,* 749 P.2d 984 (Colo.App. 1987).

34. The maximum penalty for a class six felony, even in the extraordinary aggravated range, is four years. *Cf., People v. Quintana,* 634 P.2d 413 (Colo. 1981).

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

36. The leading U.S. Supreme Court cases are *Rummel v. Estelle,* 445 U.S. 263, 100 S.Ct. 1133 (1980), and *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001 (1983). The most recent Colorado case is *People v. Hernandez,* 686 P.2d 1325 (Colo. 1984). These direct 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. The proof problems inherent in applying this analysis are enormous.

37. CRS § 18-1-105(4).

38. CRS § 16-13-201 *et seq*.

39. CRS §§ 16-13-203, 211.

40. CRS § 16-13-216(4).

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

42. CRS § 18-18-107. As used here, aggravated range means in excess of the maximum in the presumptive range, *i.e.,* from 24 to 48 years. The legislation enacted in 1988 lowering the minimum extraordinary aggravated sentence on a class two (and other classes) felony to the mid-point of the presumptive range (L.88, Ch. 116, § 5) did not amend CRS § 18-18-107. The impact of CRS § 18-1-105(10), which authorizes suspension of sentences and how it is to be interpreted relative to CRS § 18-18-107 remains to be seen.

43. CRS § 18-18-105.

44. CRS § 18-3-412. An aggravated sentence is required.

45. CRS § 18-6-401.2. An aggravated sentence is required.

46. CRS § 18-4-202. 1. A sentence in excess of the presumptive range is required.

47. CRS § 18-4-413. A sentence is mandated.

48. CRS § 18-4-304.

49. CRS § 18-4-401(7).

50. CRS § 18-3-405.

51. CRS §§ 18-3-402 and 18-1-105(9)(e).

52. CRS §§ 18-1-105(9)(d) and 18-6-401 (7)(a)(I) and (III).

53. An assault weapon is a semi-automatic 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), as created by H.B. 1335 (1989 Seas.).

54. H.B. 1166 (1989 Sess.), amending CRS § 42-2-122 and creating CRS § 42-2-123.6.

55. Each time the General Assembly amends the range of sentences for a given class of offenses it must now also amend, to be consistent, each of these special categories. For example, in 1988, CRS § 18-1-105 was amended in several places to reduce the minimum extraordinary range sentence from the top of the presumptive range to the midpoint of the presumptive range. Two specific offenses, child abuse resulting in death or serious bodily injury and most forms of first degree sexual assault, were similarly reduced, presumably since these penalties were also contained in § 18-1-105. However, the sentence for dangerous special drug offenders remains at least the maximum (not the mid-point) of the aggravated range. This sentence is set forth not in the general classification statute, CRS § 18-1-105, but in § 18-18-107. Thus, the child killer and the rapist are treated less harshly than the drug pusher.

56. L.85, Ch. 146, § 1.

57. CRS §§ 16-11-501 and 502; CRS § 18-1-105(1)(a)(III)(A).

58. CRS § 16-11-201(2).

59. CRS § 16-11-204. The court may impose, in addition, any condition reasonably related to the offender's rehabilitation and the purposes of probation.

60. CRS § 16-11-212.

61. *People v. Flenniken,* 749 P.2d 395 (Colo. 1988).

62. CRS §§ 16-11-204(2)(k.5); 17-26-128 (1.1).

63. L.88, Ch. 124.

64. CRS § 16-11-213(3).

65. H.B. 1067 (1989 Sess.), § 3, amending CRS § 18-8-208.1(6).

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

67. 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).

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

69. CRS § 18-18-104(3).

70. CRS § 16-7-401.

71. CRS § 16-11-204.5(1). "Victim" also includes the victim's insurer. CRS § 16-11-204(4).

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

73. CRS § 16-11-101.5.

74. *People v. Young,* 710 P.2d 1140 (Colo.App. 1985). *But see, People v. Martinez,* 734 P.2d 650 (Colo.App. 1986).

75. CRS § 17-2-201(5)(c)(I).

76. H.B. 1091, § 2 (1989 Sess.), adding CRS § 16-11-101.5(4).

77. CRS § 17-27-101 *et seq*.

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

79. CRS §§ 16-11-204(c), 17-27-105(1)(a), 17-27-106(4)(a), 17-27-106.5.

80. CRS §§ 17-27-103(3), 17-27-104(3).

81. CRS § 17-27-103(3).

82. CRS §§ 17-27-102(4), 105 and 106.

83. 747 P.2d 638 (Colo. 1987).

84. H.B. 1335, §§ 7 and 8 (1989 Sess.), amending CRS §§ 17-27-103(3) and 17-27-114(2).

85. CRS § 17-27-105(5).

86. CRS § 17-27-108.

87. *People v. Russell,* 703 P.2d 620 (Colo.App. 1985).

88. CRS § 16-11-102.

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

90. CRS § 16-11-102.

91. *People v. Doyle,* 565 P.2d 944 (Colo. 1977); *People v. Borrego,* 774 P.2d 854 (Colo. 1989).

92. C.R.E. Rule 1101(d)(3).

93. In *Lowery,* 642 P.2d 515 (Colo. 1982), the court approved a procedure whereby the trial court had considered the facts of the dismissed counts when imposing sentence. Thus, the case is sometimes read for the proposition that the charges embodied in the dismissed counts may be considered at sentencing. It is often overlooked, however, that the reason the court considered these facts was that the victim of the dismissed counts testified at the sentencing. In short, the sentencing court was not considering the dismissed *charges;* rather, the facts of the incident were

before the court. This is a far cry from using untried, indeed no longer pending, charges in considering an appropriate sentence. The latter procedure would put the defendant in an untenable position, since he cannot possibly defend against charges which have been dismissed. To so interpret *Lowery* would stand the presumption of innocence on its head.

94. CRS § 18-1-105(7); *People v. Watkins,* 613 P.2d 633 (Colo. 1980); *People v. Walker,* 724 P.2d 666 (Colo. 1986).

95. CRS § 16-11-601. *See also, People v. Standish,* 701 P.2d 633 (Colo.App. 1985), where the prosecutor's promise to remain silent at sentencing did not prevent him from offering testimony.

96. 723 P.2d 111 (Colo. 1986). *See also, People v. Murphy,* 722 P.2d 407 (Colo. 1986).

97. *People v. Watkins, supra,* note 94, contains an excellent discussion of the balancing process required at sentencing. *See also,* CRS § 18-1-105(1)(b)(I): "In imposing sentence within the presumptive range, the court shall consider the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender."

98. CRS § 18-1-105(1)(b)(I); *People v. Garciadealba,* 736 P.2d 1240 (Colo.App. 1986).

99. 652 P.2d 575 (Colo. 1982). The pre-Gorsuch bill cases are collected in "Colorado Felony Sentencing," *supra,* note 1 at 1479, n. 56.

100. Cases upholding aggravated range sentences include *People v. Gonzales,* 613 P.2d 905 (Colo.App. 1980) (prior criminal record alone may be an "extraordinary aggravating factor" under CRS § 18-1-105(6)); *People v. Cantwell,* 636 P.2d 1313 (Colo.App. 1981) (same); *People v. Romero,* 694 P.2d 1256 (Colo. 1985) (same); and *Flower v. People,* 658 P.2d 266 (Colo. 1983). Cases rejecting aggravated range sentences include *People v. Hudson,* 709 P.2d 77 (Colo.App. 1985); *People v. Garciadealba, supra,* note 98; *People v. Jenkins,* 674 P.2d 981 (Colo.App. 1983); *People v. Manley,* 707 P.2d 1021 (Colo.App. 1985).

101. *People v. Maldonado,* 635 P.2d 240 (Colo.App. 1981); *People v. Ward,* 673 P.2d 47 (Colo.App. 1983).

102. CRS § 18-4-203(2)(a).

103. CRS § 18-1-105.

104. L.79, Ch. 157.

105. CRS § 18-1-105(A).

106. CRS § 17-22.5-303(6).

107. CRS §§ 18-1-408(3) and 16-11-309 (1)(a).

108. *People v. Flower,* 644 P.2d 64 (Colo.App. 1981), *aff'd,* 658 P.2d 266 (Colo. 1983).

109. *People v. Lucero,* 772 P.2d 58 (Colo. 1989).

110. CRS § 18-8-212(3).

111. CRS § 18-8-209.

112. CRS § 17-22.5-301.

113. CRS § 17-22.5-302.

114. CRS § 16-11-306. The inmate is entitled to credit even if the presentence confinement was in another state. *People v. Hardman,* 653 P.2d 763 (Colo.App. 1982).

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

116. CRS § 16-11-306. Prior to the 1986 and 1988 amendments to the statute, the courts had held that the offender had the burden of showing a "substantial nexus" between his confinement and the sentences for which he sought presentence credit. *Torand v. People,* 698 P.2d 797 (Colo. 1985); *Schubert v. People,* 698 P.2d 788 (Colo. 1985); *Massey v. People,* 736 P.2d 19 (Colo. 1987).

117. *People v. Lee,* 678 P.2d 1030 (Colo. App. 1983). In *People v. Lachicotte,* 713 P.2d 408 (Colo.App. 1985), the decision to grant or deny presentence credit for halfway house confinement hinged on whether the house was operated by the DOC (credit required) or by another entity (credit not required). A defendant sentenced to community corrections who is later rejected by the facility is entitled to credit against his prison sentence for the time spent in community corrections, *People v. Washington,* 709 P.2d 100 (Colo. App. 1985), but if he was in community corrections as a condition of probation, had his probation revoked and was then sent to the DOC, he is not so entitled. *People v. Radar,* 652 P.2d 1085 (Colo.App. 1982).

118. CRS §§ 17-22.5-301 and 302.

119. The Board still determined release dates for life sentences and offenders sentenced for crimes committed prior to July 1, 1979. CRS § 17-2-201(5)(a).

120. CRS § 17-22.5-303(6).

121. The figure in the text is an estimate based on the author's experience. The Parole Board has not responded to inquiries for firm statistics.

122. CRS § 16-11-308(2). A new diagnostic unit is presently being constructed adjacent to the Denver County Jail.

123. CRS § 17-40-101 *et seq*.

124. CRS § 16-11-308(5).

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

126. *People v. Fuqua,* 764 P.2d 56 (Colo. 1988).

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

128. CRS § 18-1-409(1); CAR 4(c).

129. CRS § 18-1-409(1).

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

131. CRS § 18-1-409(3).

132. CRS § 17-2-201(1).

133. The violent offenses are second degree murder, first degree assault, first degree kidnapping (other than a class one felony first degree kidnapping), first or second degree sexual assault, first degree arson, first degree burglary and aggravated robbery. CRS § 17-22.5-303.3.

134. CRS § 17-22.5-303.3. The definition of "crime of violence" is probably that contained in CRS § 16-1-104(8.5)(a)(I), since both statutes were contained in L.87, p. 657.

135. For purposes of *this* statute, non-violent offenses are those which do not involve the use of a deadly weapon or result in bodily injury. Sex offenders are also excluded. CRS § 17-22.5-104(3)(a).

136. *Id*.

137. CRS § 17-22.5-104(3)(b).

138. CRS § 18-1-105(4).

139. CRS § 17-22.5-303.5.

140. CRS § 17-22.5-303(6).

141. CRS § 17-22.5-303.5(1).

142. CRS § 17-2-103(2)(e).

143. CRS §§ 17-2-214(1), 17-2-215, 17-22.5-106, 24-6-402.

144. CRS § 17-2-201(5).

145. CRS § 17-2-201(g)(I).

146. CRS § 17-2-201(5.5).

147. H.B. 1067 (1989 Sess.), amending CRS § 17-27.5-101 *et seq*.

148. S.B. 212 (1989 Sess.).

149. L.85, Ch. 154, § 7.

150. L.88, Ch. 116, § 4.

151. CRS § 18-1.5-101 *et seq.,* as created by S.B. 246, § 44 (1989 Sess.).

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