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**Specialty Law Columns**  
**Criminal Law Newsletter**  
*1997 Criminal Legislation*  
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This article is a summary of 1997 Colorado legislation in the criminal arena. Unless otherwise indicated, all legislation was effective July 1, 1997. Highlights of this year's enactments include a new death penalty post-conviction procedure and reduction of "special offender" penalties.

## **Driving Privileges**

### ***H.B. 97-1035***

The previous statutory scheme required loss of a driver's license for many drug offenses. There was a possible conflict in the statutes, with one statute requiring that the offender submit his or her license to the court and another requiring the Department of Motor Vehicles ("Department") to revoke the license for the same conduct. This act takes the court out of the loop by deleting the requirement in CRS § 42-2-131 that the license be surrendered to the judge. The mandatory revocation now begins when the Department gives notice of the revocation pursuant to CRS §§ 42-2-125(1)(m) and 42-2-119(2).

The practitioner might want to consider whether this change enhances a double jeopardy challenge to the revocation. The previous scheme was less susceptible to attack because, arguably, the revocation occurred in the same proceeding in which the criminal penalty was imposed. Now the action clearly occurs in two different forums. There remains, of course, the

question of whether the Department's revocation of an individual's driver's license for a drug offense is a "penalty" as that term is used in double jeopardy analysis.

H.B. 97-1035 applies to cases in which a plea of guilty, no contest, or a finding of guilt by verdict was entered on or after May 21, 1997.

### ***S.B. 97-36***

This year's General Assembly provided some statutory guidance for the robot systems that have recently been used around the state to detect traffic offenders. This act allows the use of such systems, but it bans point assessment for any such violation. The act also provides for a mechanism of service of process under the Colorado Municipal Court Rules and Procedures. The act was effective June 5, 1997.

### ***H.B. 97-1125***

This act provides a mechanism for revoking a driver's license for a person convicted of defacing property in violation of CRS § 18-4-509(2) or any municipal ordinance counterpart. The revocation is for six months. The court is required to report the conviction. This act applies to offenses committed on or after July 1, 1997.

### ***H.B. 97-1301***

This act makes it unlawful for an individual under twenty-one years of age to drive a motor vehicle with a blood or breath alcohol level of .02 or higher. The crime is a 4-point offense, and the license must be administratively revoked for driving with such a blood or breath alcohol level.

## **Death Penalty**

### ***H.B. 97-1225***

Post-conviction litigation in death penalty cases will take place in parallel with any direct appellate litigation. This act is an attempt to bring Colorado within the provisions of the Federal Anti-terrorism Act of 1996, thereby expediting federal *habeas* review. The specific procedures are to be provided by Supreme Court rule, but they must require completion of all appellate briefing within two years after the sentence of death is imposed. No extensions of any kind are allowed. The Supreme Court has promulgated draft rules and will be considering public comment on them this fall [see "Court Business," 26 *The Colorado Lawyer* 125 (Aug. 1997) for hearing details]. The rules are to be promulgated no later than January 1, 1998.

***S.B. 97-34***

This act amends CRS §§ 24-4.1-302.5 and 16-11-103 to provide that matters relating to the personal characteristics of the victim and the impact of the crime on the victim's family may be presented at the penalty phase of a death case. The act applies to sentencing hearings conducted on or after March 21, 1997.

**Grand Jury*****H.B. 97-1009***

This act creates a mechanism for grand jury reports to be made public when there is no indictment. If the court is satisfied that the report meets certain statutory criteria and is in the public interest, the report can be released to the public. There is a mechanism for persons discussed in the report to file comments. To be "in the public interest," the report must make allegations of public malfeasance or commission of Class 1, 2, or 3 felony. This act is effective for reports submitted by grand juries on or after October 1, 1997.

**Juvenile*****H.B. 97-1126***

This act broadens the range of individuals who may be committed to the Department of Human Services for up to two years to include any felony or misdemeanor defendant. This is accomplished by amending CRS §§ 19-2-909(1)(a) and 19-2-921(3)(c). The effective date was May 27, 1997.

**New and Improved Crimes*****H.B. 97-1079***

This act redefines the crime of harboring a minor, CRS § 18-6-601. The principal change makes the crime one of specific intent. The previous crime (defined as harboring a runaway child) required only knowing conduct. The offense remains a Class 2 misdemeanor. The act applies to crimes on or after May 22, 1997.

***H.B. 97-1077***

This act broadens the definition of complicity by including "encouraging" another person to plan or commit an offense within the definition.

H.B. 97-1077 amends CRS § 12-47-903 regarding contributing to the delinquency of a minor. It appears to overrule *People v. O'Donnell*,<sup>1</sup> which held that if the delinquent conduct was underage drinking, the defendant

could be convicted only of a misdemeanor liquor code violation.

### ***H.B. 97-1186***

This act adds a new subsection to the crime of second-degree assault, CRS § 18-3-203. The new offense is one committed by an individual confined in a facility who causes an employee of the facility to come into contact with certain bodily fluids. The conduct has to be done with the intent to infect, injure, harm, harass, annoy, threaten, or alarm the recipient.

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## **Parole**

### ***H.B. 97-1046***

H.B. 97-1046, which went into effect March 20, 1997, calls for a study by the legislative counsel of the parole board's operation.

### ***H.B. 97-1077***

This act amends, retroactive to July 1, 1993, CRS § 17-22.5-405(5)(b) to allow offenders convicted of theft earned time credits while on parole. Since this provision is retroactive, the Department of Corrections ("DOC") has made an effort to review its records to identify offenders whose sentences need to be recalculated. They have asked any attorney who is aware of such an offender to bring that person to the attention of Donna Thurlow at the DOC headquarters in Colorado Springs, (719) 579-9580.

## **Procedural Changes**

### ***H.B. 97-1145***

H.B. 97-1145 does the following:

- 1) adds deferred judgments to the list of restitution orders that can be reduced to judgment pursuant to CRS § 16-11-101.5(1);
- 2) allows the district attorney to reveal the contents of a probation report to a crime victim, CRS § 24-72-304(5);
- 3) broadens the category of new offenses that would trigger a modification of a prior bond to include all felony offenses, CRS § 16-4-103(2);
- 4) amends CRS § 16-11.7-102(2) to insure that individuals who

receive deferred judgments for sex offenses are deemed "convicted" for purposes of treatment requirements; and

5) makes certain changes in conditional release revocations for individuals found not guilty by reason of insanity, CRS § 16-8-115.5.

### ***H.B. 97-1241***

This act denies personal recognizance bonds to individuals whose rap sheets show that they have failed to appear in a case involving a Class 1 misdemeanor or felony in the preceding five years, unless the district attorney consents, CRS § 16-4-105 (n.5). The act was effective ninety days after final adjournment of the General Assembly, or August 6, 1997.

## **Sentencing**

### ***H.B. 97-1046***

This act amends CRS § 17-27-105(2)(b). The former statute required a community corrections referral for prison inmates not serving a sentence imposed pursuant to CRS § 16-11-309 at least sixteen months before parole eligibility. The amended statute requires such a referral for inmates not serving a sentence for an offense referred to in CRS § 16-11-309 (a somewhat broader definition). In any event, the violent offender remains eligible for referral to community corrections 180 days prior to parole eligibility.

H.B. 97-1046 also repeals Colorado's pre-parole program, CRS § 17-2-401 *et seq.* It went into effect March 20, 1997.

### ***H.B. 97-1077***

H.B. 97-1077 reduces the minimum sentence for a "special offender" in the drug statute, CRS § 18-18-407(1), from 24 years to 8 years.

Colorado, through H.B. 97-1077, has now adopted a penalty scheme for drug offenses related to the quantity of the most common drugs. If the item involved is at least 25 grams but less than 450 grams of any material containing a Schedule I or Schedule II controlled substance, the defendant must receive at least a minimum term of incarceration in the presumptive range to the DOC. If the quantity is 450 grams but less than 1 kilogram, the sentence to the DOC must be for a term of at least the mid-point in the presumptive range but not more than twice the presumptive range maximum. If the weight of the item is 1 kilogram or more, the sentencing range must be greater than the maximum presumptive range but not more than twice the maximum.

It is unclear whether these statutes prevent the court from imposing any

sentence other than to the DOC. The literal wording seems to indicate that a prison sentence is mandatory; however, there is no discussion of whether the sentence can be suspended, as some other mandatory sentence statutes contain. Note that simple possession of a Class 1 or Class 2 controlled substance is included in these definitions. It is likely that possession of at least 25 grams of a Schedule I or Schedule II controlled substance requires a mandatory prison term.

H.B. 97-1077 adds an additional aggravator to the list of circumstances requiring a sentence to at least the mid-point in the presumptive range under CRS § 18-1-105(9)(a). The new aggravator applies when the offender is on juvenile probation when he or she commits the adult felony. A similar statute amends CRS § 18-1-105(9.5) to provide that the aggravators listed therein apply to individuals who are sentenced as adults but are under the age of eighteen.

The threshold for felony theft has been raised by H.B. 97-1077 from \$400 to \$500. Unfortunately, similar amendments to other theft-related crimes, such as theft by receiving, theft of rental property, and criminal mischief, were not made, so those thresholds remain at \$400.

H.B. 97-1077 also amends the deferred judgment statute, CRS § 16-7-403(2) by requiring that an individual convicted of any crime for which the underlying factual basis includes an act of domestic violence must stipulate to the treatment conditions contained in CRS § 16-11-204(2)(b).

## **Sex Offenders**

### ***S.B. 97-84***

This act creates the status of "sexually violent predator." An individual meets this definition if he or she:

- 1) has been convicted on or after January 1, 1999, of any one of a number of sex offenses, including first- or second-degree sexual assault, some forms of third-degree sexual assault, and sexual assault on a child (and by one in a position of trust);
- 2) is a person "whose victim was [either] a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization"; and
- 3) qualifies under a risk assessment screening instrument to be developed by the Division of Criminal Justice as an individual likely to again commit one or more of the previously enumerated offenses.

The court must determine, prior to sentencing, whether the individual is a sexually violent predator if the district attorney or the probation

department so requests. The only apparent effect of the label at this point is that the individual must register as a sexually violent predator pursuant to CRS § 18-3-412.5(3.5).

### ***H.B. 97-1077***

This act amends CRS § 18-6.5-103 to raise the penalties for sexual assaults against at-risk individuals.

## **Victim's Rights**

### ***S.B. 97-84***

This act broadens the victim's assistance statutes to add careless driving (CRS § 42-4-1402) and hit-and-run (CRS § 42-4-1601) to the list of compensable crimes contained in CRS § 24-4.1-102(4)(a), when such action causes the death of an individual. The definition of "victim" also is expanded to include an individual killed or injured by an act of international terrorism as defined by federal law. Harassment by stalking and ethic intimidation are also added to the list of crimes contained in CRS § 24-4.1-302(1).

These are crimes to which the victim's rights legislation, CRS § 24-4.1-301 *et seq.*, applies. The definition of "critical stages" at which the victims have rights, CRS § 24-4.1-302(2), has been expanded to add the filing of some probation revocation complaints, a request to change probation supervision to another jurisdiction, and the request to terminate probation early.

## **Wiretapping and Eavesdropping**

### ***H.B. 97-1060***

H.B. 97-1060 adds cellular phones to the type of communications covered under telecommunications crimes, CRS § 18-9-309. "Telecommunications crimes" is then added to the list of predicate offenses under Colorado's organized crime statute, CRS § 18-17-101 *et seq.*

### ***H.B. 97-1268***

This act broadens the wiretapping statute, CRS § 16-15-101 *et seq.*, by including communication from the radio portion of a cordless telephone to the base unit. The act was effective ninety days after final adjournment of the General Assembly, August 6, 1997.

## **NOTE**

1. 926 P.2d 114 (Colo.App. 1996).

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*This newsletter is prepared by the CBA Criminal Law Section. This month's article was written by Phil Cherner, Denver.*

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