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Sentencing Dilemmas

by Phil Cherner

Colorado's sentencing scheme has evolved from the simplicity of when it was enacted in 1979 to a bewildering complexity of statutes and court decisions. The danger of misunderstanding the sentence range individuals face can create serious problems in plea negotiation and trial strategy for both the prosecution and defense, as well as for counsel and the court at sentencing hearings.

This article provides background information on Colorado's felony sentencing scheme and describes how it works currently. The article also discusses sentencing for sex offenders and Colorado's parole/community corrections conundrum.

Historical Background

Prior to 1979, the Colorado felony sentencing scheme was based on indeterminate sentencing. The judge would impose a sentence of incarceration by specifying a minimum and maximum number of years. The discretion of the Parole Board to allow parole was governed by these two numbers; the Board could release an inmate no sooner than a percentage of the minimum number of years and hold the inmate for no longer than the maximum number of years, less certain earned time and good time discounts. For example, the permissible range of incarceration for the class 3 felony of aggravated robbery was from 5 to 40 years. Therefore, any sentence of at least 5 years and no more than 40 years was valid. The higher the lower number was, the longer it was before the Board could release the inmate on parole.

In 1979, the Gorsuch Bill[1] established a determinate sentencing system. In an effort to make sentences more uniform statewide, the range of sentences available to the judge was narrowed, and indeterminate sentences were replaced by sentences to a specific term. The Parole Board's discretion in setting the release date was abolished. Release was automatic after service of the sentence, less accumulated earned time and good time credits (which, as a practical matter, meant after service of 50 percent of the sentence, less earned time). A judge could impose a sentence outside the presumptive range only if "extraordinary mitigating or aggravating circumstances" existed.[2] Therefore, for an aggravated-robbery defendant, the law now provided

a presumptive sentencing range of from 4 to 8 years, and an extraordinary range of no less than half the minimum (or 2 years) and no more than double the maximum (or 16 years). The sentence had to be a fixed number (for example, 5 years) within that range. Release on parole was automatic after service of half the sentence (2½ years), less a few weeks earned time.

Two major changes occurred to the Gorsuch scheme in 1985. The General Assembly doubled the top of the presumptive sentencing ranges for most felonies[3] and returned discretion to the Parole Board to release, or refuse to release, an inmate at any time after service of the sentence, less earned time and good time.[4] For example, the sentencing range for an aggravated-robbery defendant became from 4 to 16 years in the presumptive range and from 2 to 32 years in the extraordinary aggravated or mitigated range.

Assuming the defendant received a 5-year sentence, the Board could place the defendant on parole supervision after he or she served 2½ years, less earned time. However, the Board also could refuse to release the defendant up until the inmate had served the full 5-year sentence, less earned time. In the latter case, the inmate would be discharged from the sentence without serving parole because he or she was not released early. The renewed Parole Board discretion turned what had been a determinate number under the original 1979 Gorsuch enactment into a sentence that now looked quite a bit like the old indeterminate sentence.

Another major change occurred in 1993 when the General Assembly mandated that any period of parole be in addition to, and not part of, the term of years the sentencing court imposed. Thus, regardless of whether the hypothetical defendant served 5 years or 10 years, he or she would still have to serve a period of time on parole supervision (which is 5 years for a class 3 felony). This latest scheme has taken on the name "mandatory parole," a phrase that has led to confusion because it is the same label used to refer to the "automatic-release" scheme embodied in the original Gorsuch legislation.

The 1993 amendments also included a reduction in the sentencing range for most offenses.[5] Offenses for which the penalty ranges were not reduced became "extraordinary risk" crimes.[6] Because aggravated robbery is an extraordinary risk offense[7] the authorized presumptive sentence remained a single number between 4 and 16 years, plus an additional 5 years of parole.

In addition to "extraordinary mitigation and aggravation" and "extraordinary risk" crimes, a third category of crimes underwent change. For years prior to Gorsuch, Colorado had a statute mandating a sentence to prison for commission of a "crime of violence." CRS § 16-11-309 contained a detailed definition of "crime of violence." The term generally included certain offenses, such as aggravated robbery, during which a deadly weapon is used. Under Gorsuch, this statute originally required imposition of at least the minimum sentence to prison (that is, it denied probation). For example, the minimum sentence for aggravated robbery was 4 years. The statute was amended to require imposition of at least the minimum sentence in the extraordinary aggravated range, which is one day more than the maximum sentence in the presumptive (or ordinary) range, to a maximum of twice the top of the presumptive range.

Thus, for aggravated robbery, the minimum sentence would be from 16 years and a day to 32

years. Later amendments reduced the minimum sentence for a person convicted of a "crime of violence" to the midpoint of the presumptive range (or an authorized sentence of between 10 and 32 years for aggravated robbery). Over the years, amendments to CRS § 16-11-309 have broadened the definition of "crime of violence;" therefore, the date of an offense is critical in determining the applicability of the statute.

When a Mandatory Sentence is Mandatory

CRS § 16-11-309(4) provides that "in any case in which the accused is charged with a crime of violence, . . . the indictment or information shall so allege in a separate count. . . ." However, in *People v. Alonzo Terry*,[8] the Colorado Supreme Court held that a separate count was not always necessary. The Court held that, regarding the several subsections of the second-degree assault statute[9] that provide that "the court shall sentence the defendant in accordance with provisions of CRS § 16-11-309," no separate count alleging a crime of violence is needed to invoke a mandatory sentence.

Several other statutes, including those for second-degree kidnapping and second-degree murder, and some subsections of the aggravated robbery and first-degree assault statutes have the same "must be sentenced in accordance with §16-11-309" wording. Thus, pursuant to *Alonzo Terry*, these crimes carry mandatory minimum sentences of at least the midpoint of the presumptive range. For example, second-degree murder is a class 2 felony that ordinarily would carry a sentence range of from 8 to 24 years. By virtue of the *Alonzo Terry* case, this is automatically a mandatory sentence offense. Therefore, the correct sentencing range is from 16 years (the midpoint of the presumptive range) to 48 years (twice the presumptive maximum range). Because CRS § 16-11-309 applies, probation is not allowed.

"Second-Degree Murder, Heat of Passion"

An analysis of the appropriate sentence range for heat of passion murder is helpful to understand the interplay between the various aspects of the sentencing scheme. Until 1996, there was a crime called heat of passion manslaughter, which was a class 3 felony. In 1996, this crime was recodified as "second-degree murder, heat of passion."[10] The crime remains a class 3 felony, and its presumptive sentencing range appears to be from 4 to 12 years.[11] However, if the offense presents "an extraordinary risk of harm," the top of the presumptive range is increased to 16 years.[12] In addition, if second-degree murder, heat of passion is a "crime of violence," the sentence must be at least the midpoint of the presumptive range and may be as much as twice the maximum of the presumptive range.[13] Therefore, the theoretical available sentencing ranges for second-degree murder, heat of passion are shown in the chart below.

Sentencing Ranges for Second-degree Murder, Heat of Passion

Extraordinary Risk?	Crime of Violence?	Presumptive Range (in years)	Extraordinary Range (in years)
No	No	4 - 12	12 - 24

Yes	No	4 - 16	16 - 32
No	Yes	N/A	8 - 24 (Mandatory)
Yes	Yes	N/A	10 - 32 (Mandatory)

The determination of whether second-degree murder, heat of passion is an extraordinary risk crime is governed by the list of such offenses in CRS § 18-1-105 (9.7)(b). This list does not include second-degree murder specifically. However, subsection (XII) includes in the definition of extraordinary risk crimes "any crime of violence, as defined in section 16-11-309, C.R.S." Therefore, the defendant should not be subject to sentencing for an extraordinary risk offense unless he or she was convicted of a "crime of violence."

The Applicability of "Crime of Violence"

Determining whether the defendant was convicted of a "crime of violence" affects both the sentence range and whether a sentence to incarceration is mandatory. For example, consider a hypothetical homicide defendant who was not charged with and convicted of a separate count of "crime of violence" pursuant to CRS § 16-11-309. Nevertheless, the defendant would have been subject to the mandatory sentencing provisions of CRS § 16-11-309 if he or she had pled guilty to a different subsection of the second-degree murder statute. CRS § 18-3-103(4) provides that if the defendant is convicted of what is best described as routine second-degree murder (as distinguished from second-degree murder, heat of passion), he or she must be sentenced in accordance with CRS § 16-11-309. This phrase in subsection (4) of the second-degree murder statute mandates sentencing pursuant to the crime of violence statute.[14] Because this defendant pled guilty to a violation of CRS § 18-3-103 (3)(b), he or she is not within the purview of subsection (4)'s sentencing mandate. It follows that second-degree murder, heat of passion is not a "crime of violence."

In *People v. Banks*,[15] the court held that second-degree assault on a peace officer was not an extraordinary risk crime:

> Certainly, if the General Assembly had intended to identify second-degree assault on a peace officer as an extraordinary risk crime, it could easily have included it as a separately designated offense in §18-1-105(9.7)(b). Alternatively, it could have drafted a "catch-all" provision within the statute stating that all crimes containing the provision that offenders were to be sentenced in accordance with the crimes of violence statute also were subject to enhancement as extraordinary risk crimes. It did not do so, and we may not rewrite the statute to add additional terms.[16]

A contrary result was reached in *People v. Farbes*,[17] which considered whether first-degree assault, heat of passion was a "crime of violence." The court found that

> [i]n cases requiring statutory interpretation, our task is to ascertain and give effect to the intent of the General

Assembly. Constructions that defeat the legislative intent are to be avoided. To determine legislative intent, we look first to the statutory language.[18]

Given the reliance on legislative intent in *Farbes* and *Banks*, the legislative history of the 1996 change from heat of passion manslaughter to second-degree murder, heat of passion is relevant. Before 1996, manslaughter was not considered a "crime of violence" because it was not so defined in CRS § 16-11-309(2)(a)(II). *People v. Garcia*[19] noted that the 1996 amendment[20] was designed to clear up confusion among jurors about the process for evaluating claims of heat of passion. The case never suggested that the amendment reclassified the offense.

Debates in the General Assembly also support this conclusion. At no time did a legislator, or a district attorney who wrote and spoke about H.B. 96-1087, opine that the bill altered the penalties. To the contrary, the only comments on the issue were that the defense bar would favor the bill and that no definitional changes would be made. Denver District Attorney Bill Ritter testified before the House Judiciary Committee at the behest of bill sponsor Representative Adkins. He explained that "we are not turning manslaughter into second degree murder,"[21] just clarifying jury instructions. He also opined that "this is something that should be supported by the criminal defense bar"[22] because of the clarifications it brought. In his view, it was "a difference without a distinction."[23] The purpose was to create a mechanism whereby the jury would deliberate on the guilt or innocence of a defendant accused of second-degree murder. If the defendant were found guilty, the jury would answer an interrogatory as to whether the act was performed in the heat of passion.

Sentencing for Sex Offenses

Sentencing for sex offenses is another area of potential confusion. In 1998, the Colorado Sex Offender Lifetime Supervision Act ("Lifetime Act") was enacted.[24] The Act applies an indeterminate sentencing process for a number of sex offenses.[25] For the individuals to whom it applies, the Act provides a sentence to the Department of Corrections for an "indeterminate term of at least the minimum of the presumptive range specified in CRS § 18-1- 105, for the level of offense committed and a maximum of the sex offender's natural life."[26] Similar provisions with greater minimum ranges apply for sex offenses that constitute "crimes of violence,"[27] habitual sex offenses against children,[28] and sex offenses committed by an individual who tests positive for HIV.[29]

These statutes present three distinct questions: (1) Should the sentence be a fixed number within the allowed range? (2) What is the minimum sentence that can be imposed? and (3) What is the maximum sentence that can be imposed?

1. *Should the sentence be a fixed number within the allowed range?* Because the Lifetime Act's requirement of an indeterminate sentence seems similar to that of the former little habitual statute,[30] it could be argued that the Lifetime Act requires a determinate number within the authorized range just like the habitual offender statute.[31] However, the Lifetime

Act amended CRS § 16-11-304 specifically to exempt the Act from the determinate sentence requirement. Therefore, it follows that the Lifetime Act instructs the court to impose an indeterminate (or range) sentence (in other words, a sentence with minimum and maximum periods of confinement).

2. *What is the minimum sentence that can be imposed?* Unlike the Sex Offender Act of 1968[32] and the old habitual criminal statute,[33] the new Lifetime Act applies the phrase "at least" to the minimum sentence to be imposed under the Act. It therefore follows that, while the court can impose the minimum sentence required by the statute for a particular offense, the court also can impose a minimum sentence that is greater than the minimum sentence authorized for that offense. For example, because CRS § 18-1-105 establishes a sentence of from 4 to 16 years as the presumptive range for a class 3 felony, the court could impose a sentence of 4 years *or more* as the lower end of the indeterminate sentence for a class 3 sex offense.

3. *What is the maximum period of confinement?* This is probably the most complex question of the three. No clear answer exists at present. Specifically, must the court impose a maximum period of life in every sentence, regardless of the minimum imposed, or can the court impose a maximum of less than life? The Lifetime Act provides that the court shall sentence the offender to at least a minimum sentence "and a maximum of the sex offender's natural life." Note that the statute does not state "up to" the life maximum—thus, the argument that the maximum sentence must be life in prison and nothing less.

The legislative history on these points is of scant help, but it may support this construction of the statute. The Lifetime Act first was introduced in the House, where it was amended, and then sent to the Senate. A direct colloquy about the meaning of a life sentence took place only in the Senate Judiciary Committee.[34] The Senate sponsor, Senator Wells, responded to a question that Senator Perlmutter asked a lobbyist and opined that the wording does mean that a life sentence is required.[35]

However, a contrary argument is equally valid. Use of the phrase "at least" regarding the lower part of the indeterminate sentence implies an exercise of discretion by the sentencing court. This discretion also may apply to the upper end of the sentence. Additionally, CRS § 16-13-801, the legislative declaration passed with the Lifetime Act, states that the General Assembly finds that keeping all sex offenders in lifetime incarceration poses an unacceptably high cost in both dollars and loss of human potential. The declaration also implies that the goal of the Act, as the title states, is lifetime treatment and supervision, not lifetime incarceration. From this, it may be inferred that the court has the authority to impose something less than a life sentence at the maximum. Absent clear legislative intent, the court should not impose a life sentence.[36]

To sum up, it appears that a court pronouncing sentence under the Lifetime Act should impose an indeterminate (or range) sentence, with a minimum at or beyond the statutory minimum for the crime and a maximum of life or something short of life, subject to future statutory or appellate court guidance.

The Sex Offender and The Fifth Amendment

No evaluation of the sentence a sex offender is facing is complete without an understanding of the conditions that will be imposed on the offender and the dangers of revocation of a sentence to probation. The use of evaluations for sentencing and post-sentencing treatment raises questions regarding the defendant's obligation to participate. A handful of cases have addressed these concerns.

Every "sex offender"[37] who is considered for probation must undergo an "evaluation for treatment, an evaluation for risk, [and] procedures required for monitoring of behavior to protect victims and potential victims. . . ."[38] However, the defendant has a Fifth Amendment right to refuse to provide information that can be used to enhance his or her sentence, and no adverse influence may be drawn from the defendant's exercise of that right during the sentencing process.[39] Thus, a defendant would appear to have the right to refuse to be interviewed as part of the statutory evaluation, at least regarding those questions that potentially could increase his or her punishment. In addition, the sentencing court may not draw any inference from this refusal.[40]

Similarly, even after defendants have been sentenced, they retain a right to silence, which allows them to refrain from incriminating statements regarding other behavior.[41] This right to remain silent after sentencing is important because sex offenders are subjected to a wide range of therapeutic interventions (including interviews and polygraph examinations) as part of the statutorily mandated sex offender treatment programs, both within prisons and under probation and parole supervision.[42] The right to remain silent in the post-conviction stage is not self-executing. The defendant must invoke it. "There is no 5th amendment violation unless the State either expressly, or by implication asserts that invocation of the privilege would lead to revocation or probation."[43] In addition, defendants have no right to remain silent unless the questions would require them to reveal facts for which they still could be placed in jeopardy. If they already have been sentenced for the offense, they have no right to refuse the inquiries of the treatment provider or probation officer regarding that offense.[44]

Recent Cases

Once in a treatment program, the defendant must remain in compliance. *People v. Ickler*[45] and *People v. Colabello*[46] clarify that failure to participate meaningfully in a treatment program, or failure to complete the program, can lead to probation revocation. In *Colabello*, the defendant contended the trial court's probation revocation order was invalid because there was no finding that the failure to complete treatment was willful or unreasonable.[47] The court stated that

> a well intentioned but unsuccessful attempt at completion would not maintain [the] defendant's probationary status because the trial court had very limited options for his treatment, and only through treatment would [the] defendant not be a threat to the community.[48]

Both *Ickler* and *Colabello* involved defendants who were uncooperative in the treatment setting and obvious dangers to the community. Although both cases can be cited for the proposition that failure to complete the program would be sufficient to trigger a probation revocation, even if the failure to complete was no fault of the defendant's, the facts underlying the holdings muddy the waters. It is still unclear whether the defendant's good faith, but unsuccessful participation in a treatment program, would alone mandate revocation. A line of equity still runs through these cases. For example, even if probation is violated, the court has discretion to not revoke probation.[49]

The lessons? Defendants who plead guilty to sex offenses must do so with the knowledge that they will be placed in a highly regimented program. They will be required to admit to (at least) the elements of the offense of which they are convicted, as well as any subordinate offenses. Failure to do so could lead to the revocation of probation. Defense lawyers must advise their clients of these consequences. Therefore, sex offenses require two rational approaches: The defendant can either go to trial or admit to the offenses, both in the courtroom and in subsequent treatment. Defendants who admit only to obtain a plea bargain and then refuse to cooperate in treatment can expect to be sent to prison.

The Parole/Community Corrections Conundrum

CRS § 18-1-105(1)(a)(V)(A) imposes a period of parole on "any person sentenced for a felony." In some parts of the state, it has been assumed that people sentenced to community corrections[50] need not receive a period of parole as part of their sentence. However, recent cases have called this assumption into question. For example, in *People v. Johnson*,[51] the defendant was sentenced to community corrections, but subsequently was terminated from the program after he violated the conditions of his confinement. The court subsequently modified the sentence to a prison term. Although the court did not mention parole, the Department of Corrections determined that the mandatory 3-year period of parole would be imposed. Johnson sought relief under C.R.Crim.P. 35(c).

The Court of Appeals concluded that when the sentence was changed from community corrections to prison, it could not be lengthened, that imposition of a period of parole was considered a "lengthening," and therefore, the prison portion of the sentence had to be reduced to accommodate the length of the period of parole. The court further noted that there was no mandatory period of parole to be served on completion of the community corrections placement.

Several months later, the Colorado Supreme Court decided *Craig v. People*[52] and *Benavidez v. People*[53] and granted *certiorari* on *Johnson*. Given the discussions in *Benavidez* and *Craig* regarding mandatory parole, it is likely that *Johnson* will be reversed by the Supreme Court. That is the supposition of *People v. Snare*.[54] *Snare* squarely disagreed with *Johnson* and held that "the mandatory period of parole is not included in calculating the length of a defendant's term of imprisonment to which he is resentenced, as here, after termination from community corrections."[55] The court in *Snare* went further, however. It found that because a defendant sentenced directly to community corrections remains within the jurisdiction of the judicial (not

the executive) branch, the sentence "does not invoke a mandatory period of parole."[56]

Adding to the confusion is *People v. Sharp*.[57] The trial judge imposed a period of parole on completion of the community corrections sentence and further ordered that parole be supervised by the probation, not the parole, department. The Court of Appeals reviewed the statutory authority for parole and probation and found that because CRS § 17-27-105 provided that the probation department had jurisdiction over offenders sentenced to community corrections, it was logical to extend that authority to the parole period and therefore upheld the trial court's order.

Therefore, the current state of the law is that, pursuant to *Snare*,[58] offenders sentenced to community corrections cannot be placed on parole. However, if they are, they may (pursuant to *Sharp*[59]) be supervised by the probation department. In the event of a revocation from community corrections placement, the defendant can be sent to prison and may, pursuant to *Snare*,[60] be required to serve a mandatory period of parole.

Conclusion

Colorado's sentencing scheme has grown into a confusing mixture of often overlapping and inconsistent provisions. Yearly changes to the scheme exacerbate the confusion. Prosecutors, defense lawyers, and judges alike constantly must review these statutes to ensure that both plea negotiation and sentencing accurately reflect the state of the law.

NOTES

1. H.B. 1589; L.79, Ch. 157.

2. *See generally Thiret v. Kautzky*, 789 P.2d 801 (Colo. 1990).

3. L. 85, Ch. 145, § 7.

4. L. 85, Ch. 142, § 4.

5. L. 93, Ch. 322, § 7.

6. *See* CRS § 18-1-105(9.7)(b) for the current list of extraordinary risk crimes.

7. CRS § 18-1-105(9.7)(b)(XI).

8. 791 P.2d 374 (Colo. 1990).

9. CRS § 18-3-203.

10. CRS § 18-3-103(3)(b).

11. CRS § 18-1-105(1)(a)(v)(A).

12. CRS § 18-1-105(9.7)(a).

13. CRS § 18-1-105(9)(a)(I).

14. *C.f.*, *Alonzo Terry, supra*, note 8 (applying identical language in second-degree assault statute); *John Edward Terry v. People*, 977 P.2d 145 (Colo. 1999) (conspiracy to commit a crime of violence is itself a crime of violence).

15. 983 P.2d 102 (Colo.App. 1999).

16. *Id.* at 107-08. As this article went to press, *Banks* was affirmed (99SC225, *annc'd* 9/18/00).

17. 973 P.2d 704 (Colo.App. 1998).

18. *Id.* at 707.

19. 1 P.3d 214 (Colo.App. 1999), *cert. granted*, May 22, 2000.

20. H.B. 96-1087.

21. Hearings before the House Judiciary Committee on H.B. 96-1087 (Jan. 16, 1996).

22. *Id.*

23. *Id.*

24. CRS §§ 16-13-801 *et seq.*

25. *See* CRS § 16-8-804.

26. CRS § 16-13-804(1)(a).

27. CRS § 16-13-804(1)(b).

28. CRS § 16-13-804(1)(c).

29. CRS § 16-13-804(1)(d).

30. CRS § 16-13-101.

31. *People v. Chambers*, 749 P.2d 984 (Colo. App. 1987) (imposition of thirty-four-year sentence appropriate for conviction of little habitual offender statute pursuant to CRS § 16-11-304).

32. CRS §§ 16-13-201 *et seq.*

33. CRS § 16-13-101.

34. Hearing before the Senate Judiciary Committee on H.B. 98-1156 (date unavailable).

35. *Id.*

36. *People v. District Court*, 713 P.2d 918 (Colo. 1986) (rule of lenity).

37. This term is defined broadly in CRS § 16-11.7-102(2).

38. CRS § 16-11.7-104(1).

39. *Mitchell v. United States*, 526 U.S. 314 (1999).

40. *Id.*

41. *People v. Elsbach*, 934 P.2d 877 (Colo.App. 1997).

42. CRS §§ 16-11.7-101 *et seq.*

43. *Elsbach, supra*, note 41, *quoting Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

44. *Elsbach, supra*, note 41; *People v. Fleming*, 3 P.3d 449 (Colo.App. 1999).

45. 877 P.2d 863 (Colo. 1994).

46. 948 P.2d 77 (Colo.App. 1997).

47. *Id.* at 79.

48. *Id.* at 80.

49. *Ickler, supra*, note 45 at 866.

50. Pursuant to CRS §§ 17-27-101 *et seq.*

51. 987 P.2d 928 (Colo.App. 1999). As this article went to press, *Johnson* was reversed (99SC780, *annc'd* 9/18/00).

52. 986 P.2d 951 (Colo. 1999).

53. 986 P.2d 943 (Colo. 1999).

54. 28 Colo.Law. 197 (Dec. 1999) (Colo.App. No. 97CA2083, *annc'd* Oct. 28, 1999, *cert. denied*, Aug. 21, 2000.

55. *Id.*

56. *Id.*

57. 979 P.2d 33 (Colo.App. 1998), *cert. denied*, July 8, 1999.

58. *Supra*, note 54.

59. *Supra*, note 57.

60. *Supra*, note 54.

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Return to TCL October 2000 Index