

Sentencing Factors that Limit Judicial Discretion and Influence Plea Bargaining

Catherine P. Adkisson
Assistant Solicitor General
Colorado Attorney General's Office

Although all classes of felonies have specific sentencing ranges, § 18-1.3-401, there are many other provisions that limit the trial court's discretion when it is imposing sentence. If the defendant or the offense of which he is convicted fits into one of these categories, the statutes change either the sentencing range that applies, or how sentences for multiple convictions are to be served.

Not surprisingly, these sentence-enhancement statutes are a significant factor in plea bargaining. The defense will assess the risk facing the defendant given the charges and potential penalties, and will try to negotiate the least onerous sentence possible. The prosecution will try to craft a sentence that is fair and reasonable under prevailing standards given the circumstances of the crime and the defendant's prior history.

The following list covers the majority of these variables, but does not purport to be exhaustive. **Sex offenders** are subject to special procedures and will be discussed at a later point this afternoon.

Crimes of violence § 18-1.3-406

The crime of violence sentence enhancer increases the minimum and maximum points of the sentencing range for the defendant's crime.

"Crime of violence" means any of a number of enumerated crimes committed, conspired to be committed, or attempted to be committed by a person during which, or in the immediate flight therefrom, the person:

- (A) Used, or possessed and threatened the use of, a deadly weapon; or
- (B) Caused serious bodily injury or death to any other person except another participant.

The following crimes are considered crimes of violence:

Any crime against an at-risk adult or at-risk juvenile

Murder

First or second degree assault

Kidnapping

Most sexual offenses

Aggravated robbery

First degree arson

First degree burglary

Escape

Criminal extortion.

There are two categories of “crimes of violence.” Some crimes require that the prosecution include in the charging document, and prove beyond a reasonable doubt, that the defendant used a deadly weapon or caused serious injury or death. Other crimes are considered “per se” crimes of violence, and the special crime-of-violence penalty range applies automatically.

If a defendant is convicted of a crime of violence, probation is not an option. The court **MUST** impose a sentence that is at least the midpoint of the presumptive range up to twice the maximum in the presumptive range.

In addition, if a defendant is convicted of a crime of violence that involved the use of a dangerous weapon (a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife) or a semiautomatic assault weapon, the trial court is required to impose an additional, consecutive five-year sentence. § 18-1.3-406(7).

Extraordinary risk offenses § 18-1.3-401(10)

Some offenses are also considered “extraordinary risk offenses,” or crimes “that present an extraordinary risk of harm to society.” These offenses include:

Aggravated robbery

Child abuse

Unlawful distribution, manufacturing, dispensing, sale, or possession of a controlled substance with the intent to sell, distribute, manufacture, or dispense

Any crime of violence (as discussed above)

Stalking

Sale or distribution of materials to manufacture controlled substances

The extraordinary risk statute increases the maximum sentence in the presumptive range for these felonies:

Class 3 – by 4 years

Class 4 – by 2 years

Class 5 – by 1 year

Class 6 – by 6 months

If a defendant is convicted of a crime that is both a crime of violence and an extraordinary risk offense, the extraordinary risk enhancement is applied first, and then the crime of violence enhancer is applied.

Ex: Defendant X is convicted of a class 3 felony that is also an extraordinary risk crime and a crime of violence. The general presumptive range is 4-12 years. The extraordinary risk enhancer increases the top of that range by 4 years, to 4-16 years. Then, the crime of violence statute adjusts both the bottom and the top of the range. The bottom is the midpoint of 4-16 years, or 10 years, and the top is 32 years. The range applicable to X is now 10-32 years.

Extraordinary aggravating factors § 18-1.3-401(8)(a)

There are also a number of factors that are considered “extraordinary aggravating factors” that limit the court’s discretion in sentencing. If the court sentences a defendant to incarceration and any of these factors apply, the trial court **MUST** impose a sentence that is at least the midpoint of the presumptive range up to twice the maximum in the presumptive range. A prison sentence is not mandatory for these situations. The trial court can, if it so chooses, grant probation.

These factors include:

The defendant was on parole for another felony at the time of commission of the felony;

The defendant was on probation or was on bond while awaiting sentencing following revocation of probation for another felony at the time of the commission of the felony;

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;

At the time of the commission of the felony, the defendant was on appeal bond following his or her conviction for a previous felony;

At the time of the commission of a felony, the defendant was on probation for or on bond while awaiting sentencing following revocation of probation for a delinquent act that would have constituted a felony if committed by an adult.

Child abuse

If the defendant is convicted of knowing or reckless child abuse causing serious bodily injury or death, the court is required to sentence the defendant to the department of corrections for a term of at least the midpoint in the presumptive range (16 years) but not more than twice the maximum term authorized in the presumptive range for the punishment of that class felony. Probation is not an option.

Habitual Criminal Statutes

Sentencing for habitual offenders bypasses the presumptive sentencing ranges and requires judges to sentence habitual offenders to a determinate sentence that is significantly higher than the maximum in the felony class presumptive ranges.

There are four habitual offender classes, which depend on the number, time, and nature of the defendant's convictions: the "little habitual," the "big habitual," the "bigger habitual," and the "three strikes, you're out" habitual.

Little habitual – covers offenders who are convicted of a class 1, 2, 3, 4, or 5 felony and, within 10 years of the commission of the offense, were twice convicted of a felony. Mandatory sentence to imprisonment that is 3X the maximum presumptive sentence for the felony at issue.

Big habitual – covers offenders convicted of a fourth felony, regardless of the felony class. Mandatory sentence to imprisonment that is 4X the maximum presumptive sentence for the felony at issue.

Bigger habitual – covers offenders who have been convicted and sentenced under the big habitual statute, and who are then convicted of a crime of violence. Mandatory life imprisonment with parole eligibility after 40 years.

Three strikes – Covers offenders who are convicted of a third class 1, 2, or 3 crime-of-violence felony. Mandatory life imprisonment with parole eligibility after 40 years.

As the preceding chart demonstrates, a defendant who is sentenced as a habitual criminal receives a significantly longer sentence than the maximum in the normal presumptive range.

Circumstances of the crime

In many statutes, the level of the felony changes depending on variables in the circumstances of the crime. For example, these variables can include the amount taken in a theft, whether the theft is part of a series of such thefts; the quantity drugs possessed, and whether the offender has prior similar convictions. In some statutes, such as the special offender drug statute, these variables may require a sentence of at least the minimum in the presumptive range up to twice the maximum in the presumptive range. § 18-18-407.

No probation because of prior felony convictions

Probation is not an option if the defendant has two prior felony convictions, or one felony conviction within the past 10 years and the current offense is a class 1, 2, or 3 felony. (This restriction can be waived by agreement between the prosecutor and the court). § 18-1.3-201(2)(a).

Victim's Pregnancy

For certain offenses (second degree murder, manslaughter, criminally negligent homicide, vehicular assault or homicide, or first or second degree assault), the fact that the victim was pregnant can be an aggravating factor if the defendant knew or reasonably should have known that the victim was pregnant. The trial court must make specific findings to that effect at the time of sentencing. Those findings raise the penalty range to at least the midpoint, but no more than twice the maximum, in the presumptive range for the offense at issue. § 18-1.3-401(13).

Multiple convictions

If a defendant is convicted of multiple offenses based on the same facts, the sentences must be concurrent (unless multiple victims are involved, in which case the court may impose consecutive sentences). § 18-1-408.

But, if a defendant is convicted of multiple crimes of violence arising out of the same incident, the sentences must be consecutive. § 18-1.3-406(1) (a).

Escape

A defendant who is convicted of escape must serve the escape sentence consecutively to any other sentence the offender was serving. § 18-8-209.

No bail

Article II, § 19(2)(a) of the Colorado Constitution limits the situations in which a trial court can grant bail after a conviction:

(2.5)(a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of:

(I) Murder;

(II) Any felony sexual assault involving the use of a deadly weapon;

(III) Any felony sexual assault committed against a child who is under fifteen years of age;

(IV) A crime of violence, as defined by statute enacted by the general assembly; or

(V) Any felony during the commission of which the person used a firearm.