

**SENTENCING REFORM TASK FORCE**  
FINAL RECOMMENDATION PRESENTED TO THE  
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE  
March 10, 2023

**FY23-SR #04. Change Felony Crime Classifications and Sentence Enhancement Provisions of the Criminal Code [Statutory]**

**Recommendation FY23-SR #04**

Amends and appends multiple provisions of statute related to felony crimes, including revisions of post-conviction review and sentence reconsideration. This recommendation comprises three elements that each include a Description, a Discussion and Proposed Statutory Language for the following:

- **ELEMENT 4.1. Mandatory Consecutive Sentencing and Post-Conviction Review** [p. 1-4]  
Includes revisions and/or amendments to:
  - §18-1.3-406. Mandatory sentences for violent crimes.
  - §24-4.1-302. Definitions and/or §24-4.1-302.5. Rights afforded to victims.
- **ELEMENT 4.2. Habitual Sentences** [p. 4-6]  
Includes revisions and/or amendments to:
  - §18-1.3-801. Punishment for habitual criminals.
  - §24-4.1-302. Definitions and/or §24-4.1-302.5. Rights afforded to victims.
- **ELEMENT 4.3. Extraordinary Risk** [p. 6-7]  
Includes revisions and/or amendments to:
  - §18-1.3-401. Felonies classified - presumptive penalties.

**ELEMENT 4.1. MANDATORY CONSECUTIVE SENTENCING AND POST-CONVICTION REVIEW**

**4.1. Description**

This Element 4.1 creates a “safety valve” at sentencing and a post-conviction review when mandatory consecutive sentences are imposed for crime of violence offenses arising out of the same incident. Provisions of the “safety valve” and reconsideration include the following:

- 1) Create a “safety valve” at sentencing to allow the court an additional option other than imposing consecutive sentences when the defendant has been convicted in a single criminal episode of multiple offenses if the parties agree to waive ineligibility or the following factors are proven by a preponderance of the evidence by the defendant at a sentencing hearing:
  - Defendant has no prior VRA felony convictions, and
  - Defendant did not use or possess a firearm or explosive in the commission of the offense or threaten the use of a firearm or explosive during the commission of the offense, and
  - The defendant’s action did not result in serious bodily injury.
- 2) Amend Post-conviction review statutes to allow for additional time/additional factors for an 18-1.3-406 sentence modification review when mandatory consecutive sentences are imposed as required by 18-1.3-406(1) (a) (i.e., COV offenses “arising out of the same incident”). This expanded review is only for COV sentences imposed as mandatory consecutive. Excluding mandatory consecutive sentences, the current time frame (120 days) and factors (unusual and extenuating circumstances) regarding reconsideration allowable for all COV mandatory would remain the same. The related review criteria include:
  - Defendant may file for a modification of the sentence after 2 calendar years up to 5 calendar years after the judgment of conviction is final.
  - Defendant may only file once.
  - Defendant is entitled to court-appointed counsel and an evidentiary hearing.
  - Mandatory victim notification and opportunity to be heard at hearing.

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Standard of review. The court may modify a sentence when the case involves substantial mitigating factors and the defendant has demonstrated actions toward rehabilitation evidenced by positive programming and engagement at the CDOC that justify a modification of sentence. When there are significant changes in the law, the defendant may also request that the court consider such changes that are relevant to the defendant's sentence.

3) This element may only be applied prospectively and therefore cannot be applied retrospectively.

#### 4.1. Discussion

This recommendation is in response to the Governor's 2022 Biennial Letter<sup>1</sup> that specifically requests the CCJJ to address mandatory consecutive sentencing. This is consistent with the request in 2020 to study sentencing enhancements and long sentences to CDOC.

Significant philosophical disagreement surrounds any discussion of mandatory sentencing. Certain stakeholders support the General Assembly determine when mandatory sentences are necessary in order to define appropriate punishment and increase public safety. Other stakeholders believe legislatively required mandatory sentences interfere with judicial discretion and serve as an instrument for the government to leverage plea bargains. In many ways, this disagreement has no middle ground. The Sentence Structure Working Group of the Sentencing Reform Task Force recognized this disagreement and attempted to approach the issue by combining three recognized concepts in the adjudication of criminal cases. One is well recognized in federal law (i.e., the "safety valve") which allows the court to impose a sentence not mandated by the statute when certain defined mitigating factors are present. This recommendation element adopts language substantially similar to the deferral language. The next concept added was that of "waiver," Colorado law allows for a waiver of certain statutory mandates by agreement of the parties (e.g. waiver of the "ineligible" for probation rule due to prior criminal history). The recommendation element specifically allows for a waiver when agreed to by the prosecution. The final concept was the expansion of the **modification** of sentence language included in 18-1.3.406(1) (a). This section allows for the modification of a mandatory COV sentence, including modification to any legally allowable sentence including for probationary sentences when the facts and circumstances supported such a sentence. However, current case law holds that the statute does not allow the court to modify the consecutive nature of any sentence (*People v. Beyer 793 P2d 644 (Colo. App. 1990)*).

After review of the judicial report describing the limited number of sentence modifications under 18-1.3.406(1) (a) since 1977 (with an average 4 to 5 per year), and the time frames and issues that courts found valuable in determining a modification, this recommendation was drafted which allows for a 2 to 5 year time frame (prospectively) for a person to petition **once** for a sentence modification for both sentence term of years and the concurrent/consecutive nature of the sentence. This "second look" will happen after a period of incarceration and after the judgment of conviction is final. This sentence

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<sup>1</sup> The "Biennial Letter" is pursuant to House Bill 2018 - 1287 (see also, §16-11.3-103(7), C.R.S.). Statute requires that in even-numbered years the Commission request a letter from the Governor regarding topics of study. The Governor is encouraged to consult with the Chief Justice of the Colorado Supreme Court and the Majority and Minority Leaders of the Colorado House of Representatives and the Senate. The first of these letters was received June 24, 2020 and encouraged the Commission to study, discuss, and return recommendations to the Governor on a variety of sentencing-related topics. The second Biennial Letter was received September 15, 2022, which included additional sentencing issues along with other criminal justice concerns that require analysis and action.

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modification will allow consideration of both the mitigating factors in the case and the behavior of the person in CDOC.

**4.1. Proposed Statutory Language**

**§18-1.3-406. Mandatory sentences for violent crimes.**

Amend subsection (1) as described above regarding the provisions related to the “safety valve” and sentence reconsideration. Add this reconsideration provision as a “critical stage” in the Victim Rights section of statute (§24-4.1-302 and §24-4.1-302.5).

Statutory language:

**18-1.3-406(1) (a) (b) (c) (d)**

(a) Any person convicted of a crime of violence shall be sentenced pursuant to the provisions of section 18-1.3-401 (8) to the department of corrections for a term of incarceration of at least the midpoint in, but not more than twice the maximum of, the presumptive range provided for such offense in section 18-1.3-401 (1)(a), as modified for an extraordinary risk crime pursuant to section 18-1.3-401 (10), without suspension; except that, within ninety-one days after he or she has been placed in the custody of the department of corrections, **UPON THE REQUEST OF EITHER THE DEFENDANT, PROSECUTION OR THE COURT**, the department shall transmit to the sentencing court a report on the evaluation and diagnosis of the violent offender, and the court, in a case which it considers to be exceptional and to involve unusual and extenuating circumstances, may thereupon modify the sentence, effective not earlier than one hundred nineteen days after his or her placement in the custody of the department. Such modification may include probation if the person is otherwise eligible therefor. Whenever a court finds that modification of a sentence is justified, the judge shall notify the state court administrator of his or her decision and shall advise said administrator of the unusual and extenuating circumstances that justified such modification. The state court administrator shall maintain a record, which shall be open to the public, summarizing all modifications of sentences and the grounds therefor for each judge of each district court in the state. ~~Except as described in paragraph (c) of this subsection (1), a court shall sentence a person convicted of two or more separate crimes of violence arising out of the same incident so that his or her sentences are served consecutively rather than concurrently.~~

(b) **EXCEPT AS DESCRIBED IN PARAGRAPH (d) OF THIS SUBSECTION (1), A COURT SHALL SENTENCE A PERSON CONVICTED OF TWO OR MORE SEPARATE CRIMES OF VIOLENCE ARISING OUT OF THE SAME INCIDENT SO THAT HIS OR HER SENTENCES ARE SERVED CONSECUTIVELY RATHER THAN CONCURRENTLY; EXCEPT THAT, EFFECTIVE [insert effective date], AFTER 2 CALENDAR YEARS and UP TO FIVE YEARS AFTER THE FINAL JUDGMENT OF CONVICTION/SENTENCE IS ENTERED [discuss with the drafter how to word this and whether using the language form Rule 35(b) regarding finality is best] THE DEFENDER MAY PETITION THE COURT FOR A MODIFICATION OF THE CONSECUTIVE SENTENCES IMPOSED, WHICH MAY INCLUDE THE IMPOSITION OF CONCURRENT SENTENCES, AND THE LENGTH OF THE SENTENCES TO INCARCERATION IF THE DEFENDANT HAS NOT PREVIOUSLY REQUESTED A REVIEW OF THE TERM OF YEARS OF THE MANDATORY SENTENCES PURSUANT TO PARAGRAPH (1)(A). THE DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS OR HER REQUEST FOR MODIFICATION OF SENTENCE AND SHALL BE APPOINTED COUNSEL FOR THE HEARING. THE COURT MAY MODIFY THE TERMS OF THE SENTENCE IF THE COURT FINDS SUBSTANTIAL MITIGATING FACTORS SURROUNDING THE CASE AND THAT THE DEFENDANT HAS DEMONSTRATED SUBSTANTIAL ACTIONS TOWARD REHABILITATION AS EVIDENCED BY ENGAGEMENT IN POSITIVE PROGRAMMING; WORK; TREATMENT, WHEN AVAILABLE; AND BEHAVIOR THAT IS COMPLIANT WITH ALL RULES OF THE FACILITY OR FACILITIES WHERE THE DEFENDANT IS OR WAS PLACED.**

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(c) ~~(b)~~ Notwithstanding the provisions of subsection (1)(a) of this section, any person convicted of a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, that constitutes a crime of violence shall be sentenced to the department of corrections for an indeterminate term of incarceration of at least the midpoint in the presumptive range specified in section 18-1.3-401 (1)(a)(V)(A) or 18-1.3-401 (1)(a)(V)(A.1) up to a maximum of the person's natural life, as provided in section 18-1.3-1004 (1).

(d) ~~(e)~~ The court may require a defendant to serve his or her sentences concurrently rather than consecutively if the defendant is convicted of two or more separate crimes of violence arising out of the same incident and one of such crimes is:

(I) Aggravated robbery, as described in section 18-4-302;

(II) Assault in the second degree, as described in section 18-3-203;

(III) Escape, as described in section 18-8-208, **OR**

(IV) **THE PARTIES AGREED TO WAIVE INELIGIBILITY FOR CONCURRENT SENTENCES OR THE FOLLOWING FACTORS ARE PROVEN BY A PREPONDERANCE OF THE EVIDENCE BY THE DEFENDANT OR STIPULATED TO BY THE PARTIES AT THE SENTENCING HEARING:**

- **DEFENDANT HAS NO PRIOR FELONY CONVICTIONS FOR A VICTIM RIGHTS OFFENSE PURSUANT TO 24 -4.1-302 AND**
- **DEFENDANT DID NOT USE OR POSSESS A FIREARM OR EXPLOSIVE IN THE COMMISSION OF THE OFFENSE OR THREATEN THE USE OF A FIREARM OR EXPLOSIVE DURING THE COMMISSION OF THE OFFENSE AND**
- **THE DEFENDANT'S ACTION DID NOT RESULT IN SERIOUS BODILY INJURY OR DEATH.**

**§24-4.1-302. Definitions.**

**§24-4.1-302.5. Rights afforded to victims.**

As necessary in 24-4.1-302 and 24-4.1-302.5 (related to the Victim Rights Act) add that this reconsideration (described above) is a "critical stage" of the criminal justice process. Also, add language that the court shall advise victim(s) of right to be notified and to participate, but that one can opt out and that they should notify the court of any change of address.

Statutory language:

**24-4.1-302 (c) and 24-4.1-302.5.**

Insert proper revisions as necessary in victim rights statutes, for example, in the "critical stages" section 24-4.1-302 (c) and 24-4.1-302.5.

**ELEMENT 4.2. HABITUAL SENTENCES**

**4.2. Description**

This Element 4.2 amends the reconsideration provisions for Habitual sentences. The current sentencing scheme is maintained with the following changes:

- After serving 10 calendar years in the Department of Corrections, the defendant may request a reconsideration if the sentence imposed is greater than 24 years.
- Defendant may only file once.
- Defendant is entitled to court-appointed counsel and an evidentiary hearing.
- Mandatory victim notification and opportunity to be heard at the evidentiary hearing. This would include all victims of any offenses that served as convictions for the purpose of imposing a habitual sentence.

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Standard for review. The court may modify a sentence when the case involves mitigating factors and the defendant has demonstrated actions toward rehabilitation evidenced by positive programming and engagement at the CDOC that justify a modification of sentence.

The re-sentencing range is the mid-point of the aggravated range to the top end of the current sentence imposed (e.g., the 3 times the maximum of the presumptive range<sup>2</sup> or the 4 times the maximum of the presumptive).<sup>3</sup> A sentence cannot be increased at the hearing.

The application of this element shall be prospective, not retroactive.

#### **4.2. Discussion**

This recommendation element is in response to the governor’s request in 2020 to examine the habitual sentencing statutes “so we are enhancing sentences for those individuals who are truly public safety risks.”

This recommendation element is a result of extensive discussions of how best to make the decision about whether a person is “truly a public safety risk.” Given the many individual and societal factors that may cause a person to offend multiple times and become eligible for an habitual filing coupled with the data indicating that application of the habitual enhancement is often a filing decision driven but the policies and practices of individual judicial districts, it was determined that the best way to address habitual sentences was to combine a **significant CDOC stay** (at least 10 calendar years) with a “post-conviction second look” so that all persons and their sentences can be evaluated in terms of the severity of the particular crimes involved plus a review of the choices made by the person in CDOC to illustrate their change and commitment to positive and “safe” living. These concepts, in concert, will meet the sentencing goals of punishment along with a pathway for change. It allows for persons to demonstrate they are not public safety risks.

There is a national movement toward “second look” statutory provisions which were considered in the discussion regarding long sentences. The recommended changes will be prospective and not retroactive so that all persons, including victims, can be made aware of this opportunity prior to sentencing.

#### **4.2. Proposed Statutory Language**

##### **§18-1.3-801. Punishment for habitual criminals.**

Add the following language to the habitual criminal statute in subsection (6) regarding “second look” provisions. Add this “second look” provision as a “critical stage” in the Victim Rights section of statute (§24-4.1-302 and §24-4.1-302.5).

*Note: The drafter will identify all necessary conforming language and clarification due to convoluted criminal code in §18-1.3 401, etc. But the core changes are drafted above. An effective date is also needed (“...for crimes committed after...”).*

Statutory language:

##### **18-1.3-801 (6)**

**(6) ANY PERSON CONVICTED AND SENTENCED AS AN HABITUAL OFFENDER PURSUANT TO THE PROVISIONS OF THIS SECTION WHO HAS BEEN SENTENCED TO AT LEAST 24 YEARS OR MORE IN**

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<sup>2</sup> This is the increased sentence for the “little habitual.”

<sup>3</sup> This is the increase sentence for the “big habitual.”

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THE DEPARTMENT OF CORRECTIONS AND HAS SERVED AT LEAST 10 CALENDAR YEARS OF ANY FELONY OFFENSE FOR WHICH THE PERSON WAS SENTENCED AS A HABITUAL CRIMINAL, SHALL BE ELIGIBLE TO PETITION THE COURT FOR A MODIFICATION OF THAT SENTENCE AND ANY OTHER HABITUAL SENTENCE FOR WHICH THE PERSON IS IMPRISONED IN THE DEPARTMENT OF CORRECTIONS. THE PERSON SHALL BE APPOINTED COUNSEL FROM THE OFFICE OF THE PUBLIC DEFENDER OR THE OFFICE OF ALTERNATE DEFENSE COUNSEL, WHEN NECESSARY, TO PROPERLY REPRESENT HIM OR HER AT ANY MODIFICATION HEARING AND AN EVIDENTIARY HEARING SHALL BE GRANTED BY THE COURT IF THE PERSON MEETS THE STATUTORY CRITERIA FOR MODIFICATION AS SET FORTH IN THIS SECTION.

THE PERSON SHALL HAVE THE BURDEN OF DEMONSTRATING, BY A PREPONDERANCE OF THE EVIDENCE, THAT THERE ARE SUBSTANTIAL MITIGATING FACTORS REGARDING THE CIRCUMSTANCES OF THE OFFENSE OR OFFENSES OR MITIGATING FACTORS REGARDING THE CIRCUMSTANCES OF PERSON AT THE TIME OF CONVICTION, THAT THE PERSON HAS DEMONSTRATED POSITIVE, ENGAGED AND PRODUCTIVE BEHAVIOR IN THE DEPARTMENT OF CORRECTIONS AND THE PERSON DOES NOT CURRENTLY PRESENT AS A RISK TO THE COMMUNITY AT LARGE. IF THE COURT DETERMINES THAT A MODIFICATION OF SENTENCE IS JUSTIFIED, THE COURT MAY RE-SENTENCE THE PERSON TO A TERM OF AT LEAST THE MIDPOINT IN THE AGGRAVATED RAGE FOR THE CLASS OF FELONY WHICH THE PERSON IS CONVICTED UP TO A TIME LESS THAN THE CURRENT SENTENCE.

**§24-4.1-302. Definitions.**

**§24-4.1-302.5. Rights afforded to victims.**

As necessary in 24-4.1-302 and 24-4.1-302.5 (related to the Victim Rights Act) add that this “second look” provision (described above) is a “critical stage” of the criminal justice process. Victim shall be notified at the sentencing hearing that the defendant might petition for modification and shall be advised of the process by which they can notify the court of any change of address or of their decision to opt out of any notification process.

Statutory language:

**24-4.1-302 (c)** and **24-4.1-302.5.**

Insert proper revisions as necessary in victim rights statutes, for example, in the “critical stages” section 24-4.1-302 (c) and 24-4.1-302.5.

**ELEMENT 4.3. EXTRAORDINARY RISK**

**4.3. Description**

This Element 4.3 eliminates provisions of Colorado criminal statutes related to Extraordinary Risk for class 5 and 6 felonies.

**4.3. Discussion**

In an attempt to simplify parts of the criminal code, the extraordinary risk classification was eliminated for almost all misdemeanor offenses in Senate Bill 2021-271. In discussions around felony offenses, it was determined that the extraordinary risk ranges have value for more serious offenses. The discussion recognized that the elevated range for Class 5 and 6 felonies are unnecessary.

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**4.3. Proposed Statutory Language**

**§18-1.3-401. Felonies classified - presumptive penalties.**

Eliminate extraordinary risk range for class 5 and class 6 felonies.

*Note: The drafter will identify all necessary conforming language and clarifications.*

Statutory language:

**18-1.3-401 (10) (a)**

(10)(a) The general assembly hereby finds that certain crimes that are listed in subsection (10)(b) of this section present an extraordinary risk of harm to society and therefore, in the interest of public safety, for such crimes that constitute class 3 felonies, the maximum sentence in the presumptive range is increased by four years; for such crimes that constitute class 4 felonies, the maximum sentence in the presumptive range is increased by two years; ~~for such crimes that constitute class 5 felonies, the maximum sentence in the presumptive range is increased by one year; for such crimes that constitute class 6 felonies, the maximum sentence in the presumptive range is increased by six months.~~