DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. **Defendant: HOMAIDAN AL-TURKI**	▲ COURT USE ONLY ▲ Case Number: 2005CR1571 Div.: 202
ORDER REGARDING DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE	

This order addresses the motion of defendant Homaidan Al-Turki ("Defendant") for reduction of sentence pursuant to Crim. P. 35(b) filed June 24, 2011, and supplemented on February 8, October 23, and October 30, 2013.

The Court conducted a hearing on the motion commencing October 24, 2013, and concluding on October 31, 2013.

The Court has reviewed the motion, the supplements, the People's responses, the briefs, and the exhibits admitted into evidence. The Court has also considered the testimony of the witnesses and the arguments of counsel.

The Court will first address the evidence submitted in support of, and in opposition to, this motion. Then, the Court will address the law applicable to this motion.

I.

A.

On June 2, 2005, Defendant was charged with first degree kidnapping, conspiracy to commit first degree kidnapping, aggravated sexual assault (12 counts), criminal extortion, and false imprisonment. Subsequently, a count of felony theft was added.

At the conclusion of a jury trial, on June 30, 2006, Defendant was acquitted on each of the 12 sexual assault counts and on each of the kidnapping counts. But he was convicted of lesser included offenses, 12 counts of unlawful sexual contact with force. The jury found that Defendant subjected the victim to separate acts of unlawful sexual contact during each of the months set out in counts three through fourteen.

Defendant was also convicted of theft, $15,000 or more, for having obtained the domestic services of the victim by threat or deception with the intent to deprive the victim permanently of her wages. In addition, Defendant was convicted of criminal extortion for requiring the victim to perform domestic services under the threat that she would be reported to immigration authorities if she were to refuse to perform those services and insisted on being paid the wages earned for her services. Finally, Defendant was convicted of false imprisonment and conspiracy to commit false imprisonment for having confined the victim in the family home between September 2000 and November 2004.

The Court conducted a sentencing hearing on August 31, 2006. On the 12 class four felony unlawful sexual contact counts, the Court imposed concurrent sentences of 20 years to life (counts 3-14). On the extortion count (count 15) and on the theft count (count 18), the Court imposed sentences of six years and eight years respectively. These latter two sentences were ordered to be served concurrently, but consecutive to the indeterminate 20-years to life sentences imposed on counts 3-14. Finally, the Court imposed sentences of twelve months and six months on the misdemeanor false imprisonment counts (counts 1 and 2), which were ordered to be served concurrently with the sentences on counts 15 and 18, but to run consecutive to the 20-years to life terms imposed on counts 3-14. Defendant was also ordered to complete a sex offender evaluation prior to release on parole.

Defendant's conviction was affirmed by the Colorado Court of Appeals in a decision announced January 22, 2009. The Colorado Supreme Court denied Defendant's petition for writ of certiorari on September 14, 2009. The United States Supreme Court denied review on April 5, 2010, and the mandate was issued by the Colorado Court of Appeals on March 4, 2010.

B.

On June 11, 2010, Defendant filed a motion to correct illegal sentence pursuant to Crim. P. 35(a) and motion for reduction of sentence pursuant to Crim. P. 35(b).

In his motion to correct illegal sentence, Defendant argued that his sentence of 20 years to life on his convictions for unlawful sexual contact with force were illegal. In *Vensor v. People*, 151 P.3d 1274, 1279 (Colo. 2007), the Colorado Supreme Court held that the Colorado Sex Offender Lifetime Supervision Act of 1998 requires sentencing to an upper term of the sex offender's natural life and "a lower term of a definite number of years, not less than the minimum nor more than the maximum of the presumptive range authorized for the class of felony of which the defendant stands convicted." Defendant's unlawful sexual contact with force convictions are class four felonies. The maximum sentence in the presumptive range for a class four felony is six years imprisonment. §18-1.3-401(1)(a)(V)(A), C.R.S. Defendant's minimum sentence of 20 years on each of the unlawful sexual contact counts was greater than twice the six-year presumptive maximum sentence for a class four felony. Thus, Defendant argued that his sentences on the unlawful sexual contact counts were illegal, and that the legally appropriate minimum sentence on counts 3 to 14 was within the range of from four to twelve years.

In his motion for reduction of sentence, Defendant described the reasons supporting reduction of his sentences. He stated that he was almost 42 years of age, that he was married

with five children ranging in age from 11 to 21, and that his wife and children, who reside in Saudi Arabia, had not seen him since his incarceration.

Defendant explained that he was educated in Saudi Arabia and was awarded a Bachelor of Arts degree in linguistics and English literature. He moved to the United States in 1992 to pursue his education, and received a Master of Arts degree in linguistics from the University of Colorado in 1995. He was enrolled in a Ph.D. program in linguistics at the University of Colorado at the time of his conviction. App. C. He had no prior criminal record.

In further support of his motion for reduction of sentence, Defendant submitted letters showing that he was an important member of his community. Those who knew him well believed that he was not a danger to the community. App. A. Defendant also submitted letters urging the Court to grant leniency. App. B. Mohamed Hashmi gave several examples of Defendant's generosity and his work with charities. Amma Maraheel related that Defendant was involved in starting a scholarship program for families who could not afford to pay full tuition at the Crescent View Academy.

Defendant stated that his institutional performance had been exemplary. He mentioned that he had not been convicted of any violations of the code of penal discipline and that he had demonstrated "positive behavior and willingness to work with Staff & other Inmates." App. F. He stated that he was working in the pre-release program at the Limon Correctional Facility as a para-professional preparing inmates for release on parole. App. G.

Defendant explained that he had experienced significant medical issues while incarcerated. In 2008 he passed several painful kidney stones. He suffered an injury to his ulnar nerve caused by repeated motion in his work in the prison kitchen. He also suffered a complete tear of the anterior cruciate ligament in his left knee. App. H. Defendant also has diabetes, which is difficult for him to control in prison.

Defendant requested that the Court reduce his sentences on counts 3-14 to four years to life so that he would become immediately eligible for sex offender treatment within the Department of Corrections ("DOC"). He stated that if the Court were to grant relief as requested, he would be placed near the head of the line for sex offender treatment. He stated that before he would have any chance at parole, he would have to complete sex offender treatment. He also noted that, if paroled, he would not be released in this country, but would be placed in the custody of U.S. Immigration and Customs Enforcement ("ICE") for deportation to Saudi Arabia.

In their response to Defendant's Crim. P. 35(a) motion, the People agreed that the minimum for Defendant's indeterminate sentence on each count of unlawful sexual contact must be between four and twelve years in the DOC. However, the People urged the Court to impose an aggregate sentence of twenty years to life by allocating the years between counts and running some counts consecutively. The People also argued that the Court should defer ruling on Defendant's motion for sentence reduction until after imposition of a corrected, legal sentence.

C.

The Court conducted a resentencing hearing on February 25, 2011. In further support of his motion, Defendant submitted a letter from Aristedes Zavares, former executive director of the DOC. Mr. Zavares stated that Defendant had had "a significant impact on preparing inmates for release and life outside the walls of a correctional institution." Mr. Zavares also stated that Defendant had begun participation in a nine-week "7 Habits on the Inside" program. App. L.

Defendant also submitted a copy of his recent progress assessment summary dated January 20, 2011. App. M. His case manager noted that his "positive behavior was a very big factor in his acceptance into the incentive living unit newly developed at [the Limon Correctional Facility]." However, under the category of sexual violence, the case manager stated: "Has

severe treatment needs in this area, will address these needs when he meets the time frame criteria for treatment."

In addition, Defendant furnished the affidavit of William Woodward, a faculty member at the University of Colorado at Boulder's Center for the Study and Prevention of Violence and former director of the Colorado Division of Criminal Justice. He reviewed Defendant's records from the DOC, including a risk assessment and Defendant's institutional performance. App. N. Mr. Woodward expressed the opinion that Defendant is a low risk for violence and a low risk for reoffending sexually. He also mentioned that sex offenders without treatment offend at higher rates than sex offenders with treatment and that "sex offender treatment in the DOC is among the best in the nation."

Finally, Defendant submitted a letter from the Ambassador from the Kingdom of Saudi Arabia to the United States, Adel bin Ahmed Al-Jubeir. App. O. Ambassador Al-Jubeir urged leniency for Defendant and noted Defendant's good conduct while incarcerated, his ongoing health issues, and his long separation from his wife, children, and other family members.

After considering all of the evidence submitted in support of sentence reconsideration, the Court entered an order substantially reducing Defendant's sentences. On each of the unlawful sexual contact counts, the Court imposed concurrent sentences of six years to life, plus an indeterminate period of parole of ten years to life. On the extortion count and the theft count, the Court imposed sentences of six years and eight years respectively. These latter two sentences were ordered to be served concurrently with the sentences on the unlawful sexual contact counts.

D.

The People then filed a motion to correct illegal sentence arguing that Defendant's convictions of unlawful sexual contact with force must be served consecutively to the sentences

on the other counts. The Court denied this motion in an order entered June 1, 2011. That order was affirmed on appeal and the mandate issued on October 5, 2012.

In the meantime, on June 24, 2011, Defendant filed another motion for reduction of sentence requesting that the Court impose a sentence of probation to allow his immediate deportation to Saudi Arabia. The request was made under section 18-1.3-406(1)(a), C.R.S., which authorizes sentences for crimes of violence below the mandatory minimum, including a probationary sentence, after a defendant has served 120 days in the DOC, is otherwise eligible for probation, and his case is exceptional and involves "unusual and extenuating circumstances." *Id.*

Defendant argued that he was eligible for probation because he had been incarcerated for almost five years and had served over 120 days in the DOC subsequent to his resentencing; having no other criminal record, he was otherwise eligible for probation; he had an exemplary institutional record; and if he were granted a probationary sentence, he would be placed in the custody of ICE and deported to Saudi Arabia.

On February 8, 2013, Defendant submitted a supplement to his motion for reduction of sentence. The supplement included a psychosexual evaluation, dated June 6, 2011, prepared by Sex Offender Management Board ("SOMB") approved treatment provider Paul M. Isenstadt, LCSW. App. U. He concluded that Defendant is "an individual who overall is at a very low risk level" and who "presents minimal risk to sexually re-offend." However, in conducting his evaluation, Mr. Isenstadt did not administer the Abel screen, a sexual interest assessment, or the Affinity screen, which also measures sexual interest. Mr. Isenstadt also noted that Defendant is in categorical denial regarding any inappropriate sexual behavior with the victim.

Defendant also submitted a psychological assessment prepared by Dr. Spencer Friedman, a licensed psychologist. Dr. Friedman conducted seven individual diagnostic interviews and

psychological testing of Defendant between January 2012 and January 2013. Ex. V. He concluded that Defendant presents a low risk to reoffend sexually. He also noted that there is evidence to suggest that treated sex offenders generally present as a lower risk to engage in sexually offending behavior in the future, but that denial is not a significant risk factor.

Along with the psychosexual evaluation and the psychological assessment, Defendant submitted his most recent DOC progress assessment summary dated December 4, 2012. Ex. W. Under the category of sexual violence, his case manager noted that he has severe treatment needs. He was afforded multiple opportunities to be screened for participation in sex offender specific treatment, but declined to participate. His case manager noted that he is free to contact mental health staff to arrange another screening, and based on his parole eligibility date would be high on the priority list.

Defendant also advised the Court in the supplement to his motion that he appeared before the parole board in August 2011, but was denied parole.

E.

In 2012, Defendant filed an application for a transfer to serve the remainder of his sentence in Saudi Arabia, pursuant to the American Convention on Serving Criminal Sentences Abroad (the "treaty"). § 24-60-2301, C.R.S; DOC Admin. Reg. 550-05. Ex. Z; Ex. 8.

Defendant's case manager found that he met "the criteria for consideration for transfer of custody to his home country." Ex. AA. Angel Medina, the warden of the Limon Correctional Facility where Defendant was housed, recommended the transfer. Ex. BB. The office of offender services reviewed the application and concluded that Defendant "meets eligibility criteria for application review." Ex. CC. Ambassador Al-Jubeir wrote a letter to Governor Hickenlooper and Tom Clements, the executive director of the department of corrections, requesting approval of the transfer application. Ex. EE.

Margaret Heil, the chief of behavioral health, provided information to Mr. Clements concerning Defendant's sentence and treatment options. Ex. 13, p. 26/3248. She stated that offenders sentenced under the Sex Offender Lifetime Supervision Act are generally screened for treatment amenability when they are within four years of their parole eligibility date. They must meet certain participation requirements before they are placed on a treatment waiting list. They must:

a. Have eight years or less until their parole eligibility date;
b. Admit to sexually abusive behavior and be willing to discuss the details of their behavior;
c. Be willing to admit to problems related to sexually abusive behavior and work on them in treatment;
d. Demonstrate a willingness to participate in group treatment at the level recommended by the program; and
e. Sign and comply with the conditions of all Sex Offender Treatment and Monitoring Program ("SOTMP") treatment contracts.

Ex. 13, p. 26/3249.

Ms. Heil noted that Defendant is within the general time period when offenders are screened for SOTMP participation, but that he has declined to be screened until his legal issues are resolved. She advised Mr. Clements that participants in the SOTMP come from a variety of religious backgrounds, including the Islamic faith. She stated that:

> [i]f a participant feels a treatment activity or requirement is contrary to their religious belief, SOTMP staff work with the DOC volunteer coordinator to contact religious leaders for advice to resolve the concern. This has not been an obstacle in the past. During the past three years, there have been 10 offenders who practiced the Islamic religion during their incarceration who have successfully progressed in SOTMP.

Ex. 13, p. 26/3250.

In January 2013, executive director Clements prepared a letter addressed to the United States Department of Justice forwarding Defendant's application for transfer of his sentence to Saudi Arabia. Ex. LL. The letter requested that Defendant be required to complete offense

specific treatment prior to his release from incarceration. However, the letter was not sent to the Department of Justice.

Subsequently, in a letter to Defendant dated March 11, 2013, Mr. Clements denied the transfer stating:

> After a thorough review and careful consideration of all information provided to me in this matter, I have decided not to support your request for transfer to Saudi Arabia at this time.
>
> I would encourage you to reconsider your position regarding participation in required treatment. Should you change your mind, you should contact your case manager about initiating the process to be screened for the treatment program. Your successful participation in the Sex Offender Treatment and Monitoring Program would reflect positive progression and, although there can be no guarantees of future determinations, could result in your eventual parole or transfer to a Saudi Arabian prison.

Ex. OO.

F.

Defendant had a second parole hearing on May 28, 2013. He prepared a parole package, which was emailed to his case manager at the Limon Correctional Facility in advance of the hearing, but the DOC refused to transmit the parole package because the "parole board only would like two (2) pages scanned and sent to them." Ex. QQ. Defendant's attorneys and a representative of the embassy of Saudi Arabia were not allowed to attend the hearing or to present the parole package. On the other hand, Ann Tomsic, a chief deputy district attorney for the 18th Judicial District, was allowed to appear at the hearing and argue against Defendant's parole. Ex. SS. She also expressed the victim's belief that Defendant should try to better himself through participation in sex offender treatment. After the hearing concluded, the parole board deferred Defendant's application until May 2015 and directed that he complete sex offender treatment. Ex. UU. The parole board stated that the reasons for the deferral were risk related and readiness related.

G.

In his second supplement to his motion for reduction of sentence, Defendant advised the Court that he had completed "The 7 Habits on the Inside Program." Ex. VV. He also submitted his most recent progress assessment summary dated June 10, 2013. Ex. WW. In that evaluation, his case manager stated:

> He has been report free during his incarceration and has displayed acceptable institutional behavior. He is not considered a management problem or security risk to staff. He has maintained his acceptance to the LCF Incentive Unit Program based on his acceptable institutional behavior and program compliance. As an Incentive Unit offender, he has assisted the facility during lockdowns by providing services outside the scope of his normal job duties. He deserves credit for assisting the facility as needed.

His case manager also noted in the category of sexual violence that Defendant "[h]as severe treatment needs and is recommended for offense specific treatment." Ex. WW.

The second supplement also describes Defendant's transfer on September 6, 2013, to the Englewood Federal Correctional Institution, and his subsequent transfer to the United States Penitentiary in Tucson, Arizona, where he is currently housed.

Defendant states that Colorado's Sex Offender Monitoring and Treatment Program ("SOTMP") as currently administered in the DOC violates his religious and cultural beliefs and practices. He submitted a report prepared by Dr. Birgit Fisher, a certified SOMB treatment provider, wherein she states that SOTMP within the DOC requires, *inter alia*:

- group therapy ideally co-facilitated by a male and a female therapist;
- disclosure of deviant sexual thoughts and fantasies;
- discussion of the offender's sexual offense.

Ex. CCC.

Defendant also submitted a letter from Seth Ward, Ph. D., a specialist in Near Eastern language, literature, and religion. The letter states, *inter alia*:

- the Abel screen, which displays photographs of men, women, and children in undergarments or swimsuits, contravenes Islamic rules about modesty of dress;

- Islam prohibits discussion about intimate matters outside of marriage;
- A group of men and women discussing licit and illicit sexuality is antithetical to Islamic and Saudi norms, particularly if the leader of the group is a woman.

Ex. DDD.

Defendant further states that he cannot discuss the facts of his case due to the pendency of a number of current and future legal proceedings. He has advised the Court that he will be filing a petition for postconviction relief under Crim. P. 35(c).

He also states that it is impossible for him to complete Colorado sex offender treatment because he is housed in a federal prison. However, the Federal Bureau of Prisons provides sex offender treatment services. Ex. 32.

Defendant submitted a list of Arapahoe County sex offense cases from the last ten years in which probation was granted. Ex. GGG. He also submitted examples of cases where judges have granted probation after finding "unusual and extenuating circumstances" which justified modification of sentence under section 18-1.3-406(1)(a), C.R.S.

In one of these cases, the defendant in June 1996 received a 10-year sentence on a sex offense. Ex. KKK. The defendant had no other criminal history, his behavior and attitude in the DOC had been exceptional, and the probation department had advised that the defendant could be safely managed on probation. Based on these circumstances, the court granted a probationary sentence in 1996. However, the sentencing in this case pre-dated the adoption of the Colorado Sex Offender Lifetime Suspension Act, which applies to any person who commits a sex offense on or after November 1, 1998. § 18-1.3-1012, C.R.S.

The Ministry of Interior administers prison sentences and prisoner treatment and rehabilitation in Saudi Arabia. Dr. Addullah F. Ansary, the director general of legal affairs and international cooperation and the director of the prisoner transfer committee has described how Defendant would be evaluated, treated, and supervised if granted probation and returned to Saudi

Arabia. Ex. OOO. Dr. Ansary has advised the Court that the Ministry of Interior would honor and administer any period of probation, including ten years to life, that the Court might impose. Ex. CCCCC.

H.

Defendant argues that his case is exceptional, warranting a probationary sentence. He cites the following extraordinary and unusual circumstances:

- He has no prior criminal record;
- He was convicted of unlawful sexual contact with force, but he was acquitted of all sexual assault charges;
- He has served more than his minimum sentence and has been incarcerated over eight years;
- He has paid all restitution;
- He has significant health issues;
- The costs of incarceration, treatment, and supervision in Saudi Arabia would be zero to the taxpayers of Colorado;
- When first asked about a reduction in sentence several years ago, the victim stated that it was "okay with her";
- Defendant's institutional record is exemplary, and he has completed all self-improvement programs available to him;
- Despite his institutional record, he was transferred to a federal maximum security facility;
- His meritorious application for treaty transfer was denied;
- He has twice been denied for parole;
- He has been falsely accused in the press of involvement in the death of Mr. Clements and repeatedly placed in administrative segregation;
- Colorado sex offender treatment, which is incompatible with his faith and culture, is no longer available to him due to his transfer to a federal prison;
- He is a low risk for reoffending;
- He is subject to an ICE detainer and order of remand; upon a grant of probation, he would be deported to Saudi Arabia and would never be able to return to the United States due to his felony conviction;
- If returned to Saudi Arabia, he would be treated and supervised;
- A comparison of Defendant's case with others in which courts have granted a probationary sentence after conviction of a crime of violence supports a probationary sentence for Defendant.

II.

At the hearing commencing on October 24, 2013, Defendant called three witnesses. Fahed Al-Rawaf, a consular official at the Saudi Arabian embassy in Washington, D.C., stated

that if Defendant were granted probation, the Kingdom of Saudi Arabia would honor and administer the terms and conditions of probation imposed by the Court.

Dr. Ahmad Al-Turki, Defendant's brother, also addressed the Court. He stated that he has provided most of the financial support for Defendant's family during the last eight years. He mentioned that Defendant was unable to attend his father's funeral and that Defendant's mother is in poor health. He stated that Defendant's family would benefit if he were granted probation and allowed to return to Saudi Arabia.

Dr. Spencer Friedman, a licensed psychologist, expressed the opinion that Defendant presents a low risk to engage in future sexual acting-out behavior and a very low risk of recidivism. He also expressed the opinion that the treatment program in Saudi Arabia would provide Defendant with the opportunity to receive treatment in a manner that is consistent with his value system and religious beliefs. On cross-examination he acknowledged that an Abel screen had not been administered to gauge Defendant's sexual interest or sexual deviance. He also admitted that in conducting his risk assessment he did not review the risk assessment factors provided by the Colorado Sex Offender Management Board in Appendix A of the Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders.

The People called four witnesses. The first was Doug Carpenter, who is an experienced certified SOMB evaluator and treatment provider. He testified that the DOC provides individual therapy for inmates in phase 2 of sex offender treatment, and that SOMB guidelines require that sex offenders be treated in a culturally sensitive manner. They can participate even though they are asserting their 5th Amendment privilege against self-incrimination. He also commented on the psychosexual evaluation of Defendant provided by Paul Isenstadt. He stated that the evaluation does not comply with SOMB guidelines because Mr. Isenstadt did not conduct any

arousal or sexual interest testing. He also noted that Mr. Isenstadt did not express an opinion concerning Defendant's amenability to treatment.

Mr. Carpenter testified that Defendant's amenability to treatment is poor because he has repeatedly refused to discuss his offenses, has repeatedly refused treatment, and does not appear to have any motivation to obtain treatment. He admitted, however, that based on the testing instruments administered by Mr. Isenstadt, Defendant presents as a low risk to engage in future unlawful sexual behavior.

The People's next witness was Aristedes Zavaras, former director of the DOC. He had signed a letter in 2010 concerning Defendant's institutional performance and conduct while in custody. He testified that he received information about Defendant from his attorney, Henry Solano. He verified this information by contacting Angel Medina, the warden of the Limon Correctional Facility where Defendant was housed. When he furnished the letter, he had not seen the incident reports concerning Defendant nor a memorandum dated October 11, 2007, concerning an alleged order from Defendant that an inmate be killed. Ex. 17; Ex. 19. Mr. Zavaras indicated that if he had received this information, he would have included it in his letter to the Court. He also testified that the medical services provided by the DOC are excellent.

The People's next witness was Angel Medina, the assistant director of prison operations for the DOC. Previously, he was warden of the Limon Correctional Facility from September 2009 through September 2012. He was questioned about his letter dated July 31, 2012, to Mr. Clements recommending consideration of Defendant's treaty transfer request. Ex. BB. He was also asked about Defendant's most recent progress assessment summary. Ex. WW. Mr. Medina did not consider Defendant to be disruptive.

Finally, the People called Paul Hollenbeck, associate director for offender services for the DOC. He described the process that ultimately resulted in the denial of Defendant's treaty transfer application.

III.

The People argue that Defendant is not eligible for probation under the provisions of section 18-1.3-406(1)(a), C.R.S., and that a modification of Defendant's sentence to probation would be an illegal sentence. Defendant argues to the contrary. Therefore, the Court must determine whether it has authority under section 18-1.3-406(1)(a) to modify Defendant's sentences to probation.

A.

Defendant was convicted of 12 counts of unlawful sexual contact. § 18-3-404(1)(a), C.R.S. This offense is a class four felony if the actor compels the victim to submit through the actual application of physical force or physical violence. §18-3-404(2)(b), C.R.S. Here the jury found Defendant guilty of 12 counts of unlawful sexual contact with force.

The unlawful sexual contact statute further provides that if a defendant is convicted of a class four felony as described in section 18-3-404(2)(b), "the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406." § 18-3-404(3), C.R.S. Section 18-1.3-406 prescribes mandatory sentences for crimes of violence.

When the statute defining an offense prescribes crime of violence sentencing for the offense by reference to section 18-1.3-406, the offense is called a per se crime of violence. *See People v. Banks*, 9 P.3d 1125, 1130 (Colo. 2000). "Crime of violence sentencing applies equally when (1) the defendant is convicted of a per se crime of violence, or (2) the prosecution pleads and proves the elements of a crime of violence as enumerated in section 18-1.3-406(2), C.R.S. 2012." *People v. Hunsaker*, 2013WL174475 at ¶42 (Colo. App. 2013).

Here section 18-3-404(3) expressly states that a defendant convicted of unlawful sexual contact with force shall be sentenced "in accordance with the provisions of section 18-1.3-406." Thus, this crime is a per se crime of violence. *See People in Interest of A.B.-B.*, 215 P.3d 1205, 1208-09 (Colo. App. 2009); *People v. Banks*, 9 P.3d 1125, 1130 (Colo. 2000) (sentencing language found in section 18-3-405.3(4) creates a per se crime of violence).

A per se crime of violence is an offense to which the sentencing provisions of the crime of violence statute apply regardless of whether the offense meets the definition of a crime of violence in section 18-1.3-406(2)(a) or (2)(b) or whether the prosecution satisfies the pleading and proof requirements of that statute. *See Banks*, 9 P. 3d at 1130; *People v. Brown*, 70 P.3d 489, 494-95 (Colo. App. 2002) (sexual assault on a child as part of a pattern of abuse is a per se crime of violence even though its elements do not overlap the elements contained in the crime of violence statute); *Terry v. People*, 977 P.2d 145, 147 n. 5, 149 (Colo. 1999); *People v. Terry*, 791 P.2d 374, 377-78 (Colo. 1990).

The crime of violence statute, section 18-1.3-406, provides in relevant part as follows:

> (1)(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, 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.
>
> . . .
>
> (b)Notwithstanding the provisions of paragraph (a) of this subsection (1), 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) up to a maximum of the person's natural life, as provided in section 18-1.3-1004(1).

Thus, subsection (1)(a) and (1)(b) differentiate between crimes of violence that involve sexual offenses and those that do not. *People v. Tillery*, 231 P.3d 36, 51 (Colo. App. 2009).

Felony unlawful sexual contact is a sex offense as defined in section 18-1.3-1003(5). § 18-1.3-1003(5)(a)(III)(A), C.R.S. (2013). The presumptive range of sentencing for a class four felony is two to six years in the department of corrections. § 18-1.3-401(1)(a)(V)(A), C.R.S.

Thus, as to a class four felony sex offense to which the crime of violence sentencing provisions apply, including a per se crime of violence, a court must impose an indeterminate sentence to the department of corrections with a minimum term of at least four years and a maximum term of the defendant's natural life. *See People v. Hunsaker*, 2013WL174475, ¶ 39 (Colo. App. 2013).

B.

Defendant argues that he can be sentenced to probation pursuant to the provisions of section 18-1.3-406(1)(a), C.R.S. That subsection provides that a person convicted of a crime of violence shall be sentenced 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, as modified for an extraordinary risk crime, without suspension. However, in an exceptional case involving unusual and extraordinary circumstances, a court may modify the sentence. Such modification may include probation if the person is otherwise eligible for probation. Here, Defendant argues that his case is exceptional and involves unusual and extenuating circumstances.

However, subsection (1)(b) of the crime of violence statute, § 18-1.3-406, provides that

> Notwithstanding the provisions of paragraph (a) of this subsection (1), 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) up to a maximum of the person's natural life, as provided in section 18-1.3-1004(1).

The term "notwithstanding" means "excluding, in opposition to, or in spite of other statutes." *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97, 102 (Colo. 2008); *see also Zamarripa v. Q&T Food Stores, Inc.*, 929 P.2d 1332, 1339 n. 9 (Colo. 1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 126-27 (Thomson/West 2012) (a dependent phrase that begins with notwithstanding indicates that the main clause that it introduces derogates from the provision to which it refers; the provision to which it accords priority prevails.)

Thus, the phrase "[n]otwithstanding the provisions of paragraph (a) of this subsection (1)," indicates that paragraph (b) governs the sentencing of persons who have been convicted of sex offenses that constitute a crime of violence. Paragraph (b) requires that a person who has been convicted of a sex offense constituting a crime of violence be sentenced to the department of corrections. There is no exception for modification of the sentence to probation in exceptional cases involving unusual and extenuating circumstances.

C.

Defendant also maintains that section 18-1.3-1004(1)(b), C.R.S. (2013) supports his argument that he may be sentenced to probation. That provision states:

> If the sex offender committed a sex offense that constitutes a crime of violence, as defined in section 18-1.3-406, the district court shall sentence the sex offender to the custody of the department [of corrections] for an indeterminate term of at least the midpoint in the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(emphasis added). Another subsection of that same section states that a court may sentence a sex offender to probation unless the sex offender committed a crime of violence "as defined in section 18-1.3-406." § 18-1.3-1004(2)(a), C.R.S.

Section 18-1.3-406(2)(a)(I) defines "crime of violence" as follows:

> (2)(a)(I) "Crime of violence" means any of the crimes specified in subparagraph (II) of this paragraph (a) 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.
>
> (II) Subparagraph (I) of this paragraph (a) applies to the following crimes:
> (A) Any crime against an at-risk adult or at-risk juvenile;
> (B) Murder;
> (C) First or second degree assault;
> (D) Kidnapping;
> (E) A sexual offense pursuant to part 4 of article 3 of this title;
> (F) Aggravated robbery;
> (G) First degree arson;
> (H) First degree burglary;
> (I) Escape;
> (J) Criminal extortion; or
> (K) First or second degree unlawful termination of pregnancy.

Section 18-1.3-406(2)(b)(I) defines "crime of violence" to also mean:

> any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (I), "unlawful sexual offense" shall have the same meaning as set forth in section 18-3-411(1), and "bodily injury" shall have the same meaning as set forth in section 18-1-901(3)(c).

Section 18-3-411(1) defines "unlawful sexual offense" to include unlawful sexual contact when the victim at the time of the commission of the act was a child less than fifteen years of age.

Defendant argues that the offense of which he was convicted, unlawful sexual contact with force, is not a crime of violence because it did not involve a deadly weapon or cause serious bodily injury or death. Also, Defendant's offense was not an unlawful sexual offense involving bodily injury to the victim or the use of threat, intimidation, or force against a victim who was less than fifteen years of age.

Thus, Defendant was not convicted of a sex offense that constitutes "a crime of violence, as defined in section 18-1.3-406." However, the statute defining Defendant's offense and

providing the sentence, section 18-3-404(2)(b) and(3), C.R.S., mandates that he be sentenced in accordance with the crime of violence statute, specifically section 18-1.3-406(1)(b). Felony unlawful sexual contact is a per se crime of violence to which section 18-1.3-406(1)(b) applies regardless of whether the offense satisfies the definitions found in the crime of violence statute.

D.

1.

Defendant maintains that language in *Vensor v. People*, 151 P.3d 1274 (Colo. 2007) supports his argument that he can be sentenced to probation under section 18-1.3-406(1)(a). In *Vensor*, the Colorado Supreme Court interpreted section 18-1.3-1004(a) of the Lifetime Supervision of Sex Offenders Act (the "Act"), which provides that the court "shall sentence a sex offender to the custody of the department for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the sex offender's natural life." The Supreme Court held that the lower end of a sex offender's sentence must be "a definite number of years, not less than the minimum nor more than twice the maximum of the presumptive range authorized for the class of felony of which the defendant stands convicted." *Id.* at 1279.

In its analysis, the court noted that the Act's declaration of purpose "makes clear the legislature's intent to provide for treatment and extended supervision, rather than to punish sex offenders with terms of incarceration longer than those of other felons of the same class." *Id.* at 1278. The court also observed that during a committee hearing, the Act's sponsor "emphasized three separate times that the Act was not intended to change the sentencing guidelines already in place under Colorado law. *Id.* at 1279.

The *Vensor* court, however, did not address the issue of whether a defendant convicted of a sex offense that is a per se crime of violence can be sentenced to probation under section 18-1.3-406(1)(a).

2.

Defendant also argues that *People v. Hunsaker*, 2013WL174475 (Colo. App. 2013) supports his argument that the legislature intended section 18-1.3-406(1)(b) "to add lifetime supervision to sex offender sentencing without changing the underlying sentencing scheme." Memo. Brief filed 10/23/13, p. 4. In *Hunsaker*, the Court of Appeals held that the lower end of an indeterminate sentence for a sex offense that is a crime of violence is intended to be imposed within the same parameters as a determinate sentence prescribed for any crime of violence, that is, between the midpoint in, and twice the maximum of, the presumptive range for the applicable felony class. *Id.* at ¶ 39. Thus, the prosecution need not establish aggravating circumstances to support sentencing above the maximum of the presumptive range for a sex offense that is a crime of violence. *Id.* at ¶ 40.

Here, Defendant's sentence is within the presumptive range for a class four felony, and nothing in *Hunsaker* suggests that a defendant who has been convicted of a sex offense that is a per se crime of violence is eligible for probation under section 18-1.3-406(1)(a).

E.

Finally, the Colorado Court of Appeals in a published decision has addressed the issue of whether a defendant convicted of unlawful sexual contact with force can be granted probation.

In *People v. Holwuttle*, 155 P.3d 447 (Colo. App. 2006) the Court of Appeals held that, because felony unlawful sexual contact is a per se crime of violence, the crime of violence

sentencing provisions applied and precluded a sentence to probation. *Id.* at 451 (construing former section 16-11-309(1)(c), which is now codified at section 18-1.3-406(1)(b)).

In *Holwuttle*, the defendant was convicted of unlawful sexual contact with force. The trial court imposed a sentence of four years to life, plus ten years to life of mandatory parole. On appeal, the defendant argued that the trial court erred in determining that he was not eligible for probation.

In its analysis, the Court of Appeals observed that when the defendant committed his crime, the applicable version of section 18-3-404(3) provided: "If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to subsection (1.5) or (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 16-11-309, C.R.S." *Id.* at 451. Section 16-11-309(1)(c) (now codified at section 18-1.3-406(1)(b)), provided that any person convicted of a sex offense that constituted a crime of violence was to be sentenced to an indeterminate term of incarceration of at least the midpoint in the presumptive range, up to a maximum of the person's natural life. *Id.* The Court of Appeals defined incarceration to mean "imprisonment, confinement in a jail or penitentiary" and "shall" to mean that such a sentence is mandatory. *Id.*

The court concluded its analysis stating that

> persons who committed unlawful sexual contact with force, a class four felony, must be sentenced in accordance with the former § 16-11-309. Under that statute, the trial court was required to sentence defendant to a minimum of the midpoint in the presumptive range and to a maximum of his natural life. The presumptive range for a class four felony is two to six years. [citation omitted] Thus, the trial court properly sentenced defendant to four years to life in the custody of the DOC.

Id.

The opinion of the Court of Appeals in *Holwuttle* was designated for official publication and must be followed as precedent by the trial judges of the state of Colorado. C.A.R. 35(f).

F.

Defendant was convicted of sex offenses that are per se crimes of violence, and he must be sentenced in accordance with the provisions of section 18-1.3-406 for sex offenses. Under section 18-1.3-406(1)(b) he must be sentenced to the department of corrections for an indeterminate term of incarceration of at least the midpoint in the presumptive range for a class four felony up to a maximum of his natural life.

On each of the twelve counts of unlawful sexual contact with force of which Defendant was convicted, he has been sentenced to an indeterminate term of incarceration of six years to life, plus an indeterminate period of parole of ten years to life. These sentences are to be served concurrently. He is not eligible for probation under the provisions of section 18-1.3-406(1)(a) for exceptional circumstances. Rather, he must be sentenced to incarceration pursuant to the provisions of section 18-1.3-406(1)(b) for sex offenses that constitute crimes of violence.

IV.

For the reasons explained above, this Court does not have the authority to modify Defendant's sentence to a probationary sentence. Therefore, Defendant's motion filed June 24, 2011, for reduction of his sentence to a probationary sentence, is denied.

IT IS SO ORDERED.

Dated and signed this 2nd day of January, 2014.

BY THE COURT:

J. Mark Hannen
District Court Judge