SUMMARY
January 24, 2019

2019COA9

No. 17CA1955, *People v. Terry* — Constitutional Law — Eighth Amendment — Cruel and Unusual Punishment; Criminal Procedure — Postconviction Remedies

Addressing an issue of first impression, a division of the court of appeals contemplates whether attempted extreme indifference murder constitutes a per se "grave and serious" crime for purposes of an abbreviated proportionality review. The division concludes that it does. It reasons that, because the class 2 felony involves elements of intent and violence, attempted extreme indifference murder poses an extreme danger to the victim and the public, which justifies classifying it as per se "grave and serious."

The division also determines that, under Crim. P. 35(c)(3)(V), the district court may rule on a supplemental petition for postconviction relief, in part, and order the prosecutor to respond and defense counsel to reply to the remaining allegation. Further,

without a showing of prejudice by the defendant, the division concludes that any error in the trial court's interpretation of Crim. P. 35(c)(3)(V) was harmless.

The division also rejects the defendant's claims of ineffective assistance of counsel.

Accordingly, the division affirms the order.

COLORADO COURT OF APPEALS **2019COA9**

Court of Appeals No. 17CA1955
Adams County District Court Nos. 10CR3742 & 11CR247
Honorable Thomas R. Ensor, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Andrew Joseph Terry,

Defendant-Appellant.

ORDER AFFIRMED

Division I
Opinion by JUDGE TAUBMAN
Bernard, C.J., and Fox, J., concur

Announced January 24, 2019

Philip J. Weiser, Attorney General, Jillian J. Price, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Antony Noble, Alternate Defense Counsel, Matthew Fredrickson, Alternate Defense Counsel, Lakewood, Colorado, for Defendant-Appellant

¶ 1 Defendant, Andrew Joseph Terry, appeals the district court's denial of his Crim. P. 35(c) motion for postconviction relief. He alleges that the court procedurally erred in denying five of his six claims for relief before ordering the prosecution to respond to the only remaining claim. He further contends that he sufficiently pleaded ineffective assistance of counsel; thus, the district court erred in denying his postconviction motion. We affirm.

I. Background

¶ 2 Terry was charged in two cases with multiple offenses arising from two separate incidents; the cases were joined for trial. In the first case, law enforcement officers in an unmarked patrol car were monitoring a parking lot due to a high volume of recent thefts. Officers observed a man looking in various car windows and acting suspiciously before joining Terry in a truck and driving away. As Terry drove away, officers noticed a broken window in one of the vehicles into which the man had peered, so officers followed the truck and eventually instructed an officer in a marked patrol car to pull it over. As the officer attempted to stop Terry, he rammed his truck into the patrol car; the attending officer reported that he "was

afraid for his safety." Officers uncovered stolen items in the truck and arrested Terry.

¶ 3 During Terry's arraignment, he fled from the courtroom, purportedly panicking because of his surprise at being charged with attempted murder of a police officer. A week and a half later, officers responded to a report of an intoxicated man — later identified as Terry — driving his truck around a Walmart parking lot. As the officer approached Terry, he got in his truck, slammed the officer's hand in the door, and ran over the officer's foot as he sped away. A high-speed chase ensued and, when officers cornered him, he accelerated toward an officer who had drawn his gun. As Terry drove away, the officer fired his gun, shooting him in the back. Once officers surrounded him with patrol cars, Terry attempted to escape again by ramming the patrol cars. This incident formed the basis for the second case.

¶ 4 At trial, the district court joined Terry's cases, and he entered a plea of not guilty by reason of insanity (NGRI). He withdrew his plea on the second day of trial after a court-ordered mental health evaluation established his legal competence to proceed at trial and his sanity during the commission of the crimes. The jury found him

guilty of attempted extreme indifference murder, second degree assault on a peace officer, two counts of first degree criminal trespass, third degree assault on a peace officer, two counts of criminal mischief, two counts of vehicular eluding, and four habitual criminal counts. After the court adjudicated Terry a habitual criminal in a separate trial, it sentenced him to an aggregate total of 204 years in the custody of the Department of Corrections.

¶ 5 On direct appeal, a division of our court affirmed the convictions, but it vacated the sentence for attempted extreme indifference murder and remanded to the district court for resentencing on that count. *See People v. Terry*, (Colo. App. No. 13CA0443, Dec. 31, 2015) (not published pursuant to C.A.R. 35(f)). At the instruction of the division, the district court reduced Terry's sentence for attempted extreme indifference murder to 96 years rather than the original 196 years.

¶ 6 Terry then filed a pro se motion for postconviction relief with a request for counsel. The district court denied three of the four claims and appointed counsel to address only the one claim on which it had not already ruled. It simultaneously ordered that a

copy of the motion be served on the Office of the Public Defender and the prosecution and instructed the prosecutor to respond to the pro se motion and any supplemental motion within thirty days of its filing.

¶ 7 After the Public Defender's Office determined that it had a conflict of interest, alternative defense counsel (ADC) was appointed and filed a supplemental motion on Terry's behalf. The motion raised the following six claims of ineffective assistance of counsel — (1) failure to investigate and present evidence in support of Terry's NGRI plea; (2) failure to investigate and present evidence to prove his level of intoxication at the time of the offenses; (3) failure to investigate and present evidence in support of lesser nonincluded offenses and failing to request instruction on those offenses; (4) failure to file a motion to suppress his arrest; (5) failure to convey the prosecution's plea offer; and (6) failure to request a proportionality review. The district court concluded that five of the six claims did not entitle Terry to relief and ordered the prosecution to respond to the solitary claim that remained — trial counsel's failure to convey a plea offer to him. However, Terry voluntarily withdrew that claim.

¶ 8 Terry appeals the district court's dismissal of his five claims of ineffective assistance of counsel without first ordering a response from the prosecution.

II. Postconviction Court Procedure

¶ 9 Terry contends that the district court erred in denying his petition for postconviction relief because Crim. P. 35(c)(3)(V) requires, in the circumstances presented here, that the prosecution respond and the defendant be allowed an opportunity to reply to that response. We disagree.

A. Standard of Review

¶ 10 We review de novo a district court's denial of a Crim. P. 35(c) motion and its construction of a rule of criminal procedure. *People v. Davis*, 2012 COA 14, ¶ 6, 272 P.3d 1167, 1169.

B. Applicable Law

¶ 11 Crim. P. 35(c)(3) prescribes particular procedures regarding pro se petitions for postconviction relief. Crim. P. 35(c)(3)(IV). The court may only deny a pro se defendant's petition for postconviction relief if the motion, files, and record clearly demonstrate "that the defendant is not entitled to relief." *Id.*; *Ardolino v. People*, 69 P.3d 73, 77 (2003). However, if the court does not deny the motion, it

must order service of the motion on the prosecutor and appoint counsel if the defendant so requests. Crim. P. 35(c)(3)(V).

¶ 12 The public defender or ADC[1] must respond, stating his or her intention to enter an appearance on behalf of the defendant, identifying any conflict, requesting any needed time extension, and setting forth additional claims counsel intends to pursue. *Id.* Once the district court receives appointed counsel's response, it must order the prosecutor to respond to the claims and direct defense counsel to reply to that response. *Id.* The rule notes that the prosecutor need not respond until so directed by the court. *Id.* "Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law." *Id.*

¶ 13 Though the rule appears to outline a detailed approach to handling pro se motions for postconviction relief, we observe gaps in the scheme that require the court to fill in, as necessary. First, the

[1] Though the rule designates the Public Defender's Office when discussing the procedures of appointed counsel, we interpret this to include ADC.

rule makes no mention of ADC and only refers to the Public Defender's Office. Thus, when the defendant requires ADC, it remains unclear what amount of time the court may allow for an entry of appearance by counsel.

¶ 14 When ADC must act as appointed counsel, Crim. P. 35(c)(3)(V) also presumes the postconviction court will order the prosecution to respond to ADC's supplemental motion. Moreover, the language stating that the court shall direct the prosecution to respond to the defendant's claims is ambiguous. Whether it requires the prosecution to respond to both the pro se motion and the supplemental motion or just the supplemental motion is unclear. Crim. P. 35(c)(3)(V). Finally, the rule leaves open the question of whether the court may order the prosecution to respond to only a portion of the claims alleged in the Crim. P. 35(c) motion(s) while dismissing other claims.

C. Analysis

¶ 15 We conclude that, where the text of Crim. P. 35(c)(3)(V) is ambiguous, the district court appropriately filled in gaps in the rule. First, it determined that — based on the motion, files, and record — three out of the four claims in Terry's pro se motion lacked merit.

The court then properly served both the Public Defender's Office and the prosecution with the motion, instructing appointed defense counsel to address only issues on which it had not ruled.

¶ 16 While disposing of three out of four claims, the court also ordered the prosecutor to respond to Terry's claims once appointed counsel filed a supplemental motion. After the court received Terry's supplemental motion, it concluded that, based on the pleadings, it was appropriate to enter a ruling containing written findings of fact and conclusions of law on five out of six of Terry's contentions before ordering the prosecutor to respond — and, presumably, allowing a reply to that response — to the sole remaining allegation. Terry contends that the district court erred in ruling on the five claims in his supplemental motion before the prosecutor responded.

¶ 17 We conclude that the procedure employed by the district court fell within the bounds of the prescribed procedure. Crim. P. 35(c)(3)(V)'s requirement that "the court shall direct the prosecution to respond to the defendant's claims," read in combination with the rule's language stating "[t]he prosecution has no duty to respond until so directed by the court," does not prevent the court from

ordering the prosecution to respond to only that portion of a postconviction motion that the court considers to have arguable merit. Therefore, the district court's initial order on the pro se motion advised the prosecution of its duty to eventually respond, and its order on the supplemental motion limited that duty to respond to the one claim that the court believed had arguable merit.

¶ 18 Terry urges us to draw parallels between the present case and *Davis*; however, the two are distinguishable. In *Davis*, ¶ 13, 272 P.3d at 1170, a division of our court held that the postconviction court committed reversible error when it ordered the State to respond to the defendant's pro se petition without first serving a copy on appointed counsel, and without allowing appointed counsel to file supplemental briefing. After the postconviction court received the State's response, it considered a newly prepared affidavit attached to the response and ruled on the petition without granting the public defender an opportunity to respond. *Id.* The *Davis* division reasoned that Crim. P. 35(c)(3)(V) procedures "inure to the defendant's benefit . . . [therefore,] the court's failure to comply may have prejudiced [the defendant]," specifically because the court considered an affidavit outside of the original record without

allowing the defendant to respond. *Id.* at ¶¶ 10-14, 272 P.3d at 1169-70.

¶ 19 Here, the court did not deviate from the rules of Crim. P. 35(c)(3)(V) to deprive Terry of his right to appointed counsel. Instead, it ruled on Terry's pro se and supplemental petitions based on the motions, record, and facts and ordered the prosecution to respond to the one claim it deemed potentially meritorious. Unlike the defendant in *Davis*, Terry benefitted from the assistance of appointed counsel, and the postconviction court did not rely on information provided outside of the original record on appeal to render its decision.

¶ 20 Terry also relies on *People v. Higgins*; but, that case is also distinguishable. 2017 COA 57, 413 P.3d 298. There, the division concluded that the district court committed reversible error by ordering the prosecution to respond to the defendant's pro se motion and, after receipt of that response, denying the motion without first serving the Public Defender's Office with the motion and permitting an opportunity to respond. *Id.* at ¶¶ 16-17, 413 P.3d at 301. Here, appointed counsel received the petition and filed

a supplemental brief, and the court ruled after considering Terry's allegations and the People's response.

¶ 21 Accordingly, we conclude that the district court did not err in ruling on a portion of the petition and ordering the prosecution to respond to the remaining portion. However, even if the district court erred, any error was harmless because Terry has not shown that he was prejudiced by the procedure used by the district court. Moreover, the court was within its authority to deny the motion without a hearing because it properly determined, as discussed below, that Terry's claims did not warrant an evidentiary hearing.

III. Ineffective Assistance of Counsel

¶ 22 Terry contends that we should vacate the district court's denial of his postconviction petition and instruct the postconviction court to order the prosecutor to respond to his motion because Terry sufficiently pleaded ineffective assistance of counsel. He asserts five allegations of ineffective assistance of counsel. We disagree. We first address Terry's arguments that counsel failed to file a motion to suppress his arrest before we separately address his argument that counsel failed to request a proportionality review.

A. Standard of Review

¶ 23 The determination of ineffectiveness of counsel presents mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). "When reviewing a postconviction court's findings on a mixed question of [fact] and [law], we defer to the court's findings of fact if they are supported by the record but review legal conclusions de novo." *Dunlap v. People*, 173 P.3d 1054, 1063 (Colo. 2007), *as modified on denial of reh'g* (July 2, 2007).

B. Applicable Law

¶ 24 We analyze a claim of ineffective assistance of counsel under the two-prong standard announced in *Strickland*, 466 U.S. at 687. A defendant must establish deficiency in counsel's performance and that the deficient performance prejudiced the defense. *Id.* This requires a showing that the gravity of the error essentially deprived the defendant of his or her Sixth Amendment right to counsel and deprived him or her of a fair trial with a reliable result. *Id.*

¶ 25 In reviewing any potential deficiency in counsel's performance, we must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at

the time." *Dunlap*, 173 P.3d at 1062-63 (quoting *Strickland*, 466 U.S. at 689). The defendant must show that counsel's representation was objectively unreasonable; in doing so, he or she must overcome the "strong presumption" that counsel rendered effective assistance. *Id.* (quoting *Strickland*, 466 U.S. at 689).

¶ 26 Our determination of the prejudice prong rests on whether we discern a reasonable probability that any errors by counsel caused an unfavorable result for the defendant at trial. *Id.* If such errors exist, we must then determine whether these errors undermine our confidence in the outcome of the proceedings. *See id.*

C. Analysis

¶ 27 First, trial counsel's decision not to pursue an NGRI defense after initially advising Terry to so plead was not deficient. The district court recognized at pretrial hearings that Terry's mental health evaluation found that he was competent to proceed at trial and that he was sane during the commission of the offenses. Considering the mental health evaluation and the fact that Terry does not identify expert testimony that would rebut the court-ordered evaluation results, we conclude that trial counsel's decision not to pursue the NGRI plea was objectively reasonable. Likewise,

his claim that trial counsel failed to advance another mental health defense fails for the same reasons.

¶ 28 Terry next asserts that trial counsel performed deficiently in failing to pursue a voluntary intoxication defense. We conclude the district court properly determined that trial counsel's decisions were strategically sound. It concluded that, in light of the following facts, trial counsel was not unreasonable in declining to pursue the defense: (1) In his Crim. P. 35(c) petition, Terry failed to allege the qualifications of the expert he declared would testify to his blood alcohol level six hours before his blood alcohol level was measured; (2) even if an expert testified that his blood alcohol level was .170 to .190 at the time of the offenses (as he alleges), a jury still may not have been convinced that this affected his culpability because Terry's ability to operate his truck during the high-speed chase suggests his capability to form the requisite mens rea; (3) his only recorded blood alcohol level was .047, which may or may not suggest impairment; (4) the district court acknowledged in its order that voluntary intoxication defenses are, generally, not well received by juries; and (5) the voluntary intoxication defense applies only to specific intent crimes, and not all of Terry's charged offenses

required specific intent. Thus, we conclude that this decision fell within the broad realm of strategic decision-making allowed to trial counsel, and Terry's claim did not require an evidentiary hearing.

¶ 29 Terry's averment that trial counsel acted deficiently in not pursuing lesser nonincluded offenses is unconvincing. We agree with the district court's conclusion that

> as a matter of law, the fact that lesser non-included offenses were not submitted for the jury's consideration has no effect whatsoever regarding the verdicts which were submitted to the jury, and determined by them to have been proven beyond a reasonable doubt. When a lesser non-included offense is submitted to the jury, the defendant can be found guilty of BOTH the original offense as well as the lesser non-included offense.

The district court's decision tracks the conclusion in *People v. Skinner* that a defendant's request for a lesser nonincluded offense is purely strategic. 825 P.2d 1045, 1047 (Colo. App. 1991). Theoretically, counsel should only request a lesser nonincluded offense instruction when he or she believes that a jury would acquit the defendant of the charged offense and find him or her guilty of the lesser nonincluded offense. *Id.* Thus, if trial counsel does not

believe that the jury would likely acquit the defendant of the charged offense, counsel could perceive the strategy as too risky.

¶ 30 Here, trial counsel argued in closing that Terry was guilty of the less severe offenses of criminal mischief, eluding, and trespassing, but not guilty of assault or attempted murder. The jury was instructed on — and rejected — the lesser *included* offenses involving the injured officer. Therefore, it is conceivable that trial counsel did not want to "risk[] conviction on [the lesser nonincluded] offense. . . . , instructing the jury on a lesser nonincluded offense carries an additional risk, not present in the lesser included offense context: that a defendant will be convicted of both the charged offense and the lesser nonincluded offense." *People v. Newmiller*, 2014 COA 84, ¶ 34, 338 P.3d 459, 466.

¶ 31 Terry also alleges that counsel failed to move to suppress his stop and arrest by an officer, contending that the officer did not have reasonable suspicion for a traffic stop or probable cause for an arrest. A challenge to trial counsel's decision not to move for suppression requires that the defendant prove the merit of the claim. *People v. Vincente-Sontay*, 2014 COA 175, ¶ 23, 361 P.3d 1046, 1051.

¶ 32 In a *Terry* stop, officers may temporarily detain an individual with less than probable cause. *Outlaw v. People*, 17 P.3d 150, 156 (Colo. 2001), *as modified on denial of reh'g* (Feb. 5, 2001). "It is now long established that a limited seizure of a person, designated an investigatory stop, is permitted by the Fourth Amendment upon reasonable articulable suspicion, not rising to the level of probable cause, that the person is committing, has committed, or is about to commit a crime." *People v. Ball*, 2017 CO 108, ¶ 9, 407 P.3d 580, 583. This reasonable articulable suspicion must accompany a reasonable objective for intrusion and a connection between that objective and the scope and character of the intrusion. *People v. Reyes-Valenzuela*, 2017 CO 31, ¶ 11, 392 P.3d 520, 522. When a person is detained, the court determines the reasonableness of that detention under the circumstances. *Outlaw*, 17 P.3d at 156.

¶ 33 Here, officers received reports of an intoxicated driver; they confirmed it was Terry's truck; and the officers had reason to stop him because they had an interest in preventing drunk driving. Therefore, we perceive multiple reasons for counsel to decide not to move to suppress.

¶ 34 Terry asserts that the officers lacked reasonable suspicion, probable cause, and a warrant, but aside from claiming that the officers needed additional corroborating evidence of a crime or potential crime, he failed to allege in his motion facts sufficient to suggest that a motion to suppress would have succeeded. To the contrary, the trial court properly concluded that the police officers had reasonable suspicion to stop him, and later, probable cause to arrest him. Accordingly, because counsel's decision not to file a suppression motion did not prejudice Terry, and because we observe no deficiency in counsel's performance, we determine that counsel was not ineffective in this regard.[2]

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[2] Terry urges us to apply the standard the Supreme Court established in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). This requires us to consider an element in addition to the *Strickland* analysis.

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

IV. Proportionality Review

¶ 35 Finally, Terry argues that he was entitled to a proportionality review by the district court and that counsel's failure to request one constituted ineffective assistance. An abbreviated proportionality review presents a question of law; therefore, an appellate court can conduct a review without remanding the case to the district court. *See People v. Deroulet*, 48 P.3d 520, 524 (Colo. 2002) (stating that, when an extended proportionality review is unnecessary, an appellate court may conduct an abbreviated proportionality review without a remand); *see also People v. Buckner*, 228 P.3d 245, 252 (Colo. App. 2009) (asserting that we review de novo whether a sentence yields an inference of gross disproportionality). Based on our abbreviated proportionality review, we conclude there was no ineffective assistance of counsel.

A. Standard of Review

¶ 36 We review de novo the legal question of a sentence's constitutional proportionality. *People v. Strock*, 252 P.3d 1148, 1157 (Colo. App. 2010).

Id. However, we need not address *Kimmelman* because we conclude that counsel's performance was not deficient.

B. Applicable Law

¶ 37 The Eighth Amendment's prohibition against cruel and unusual punishment does not require strict proportionality between the crime committed and the sentence imposed. It forbids only sentences that are "grossly disproportionate" to the crime committed. *Deroulet*, 48 P.3d at 524 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *Close v. People*, 48 P.3d 528, 536 (Colo. 2002).

¶ 38 Our examination on appeal requires only an abbreviated proportionality review in which we compare the gravity and seriousness of the offense to the severity of the punishment. *Deroulet*, 48 P.3d at 524. Gravity and severity are determined by "the harm caused or threatened to the victim or to society and the culpability of the offender." *Id.* If, in conducting our abbreviated review, we conclude that an inference of gross disproportionality arises, we must engage in an extended proportionality review. *Id.* The extended review requires "a comparison of the sentences imposed on other criminals who commit the same crime in the same jurisdiction and a comparison of the sentences imposed for

commission of the same crime in other jurisdictions." *Id.* However, an abbreviated proportionality review of a noncapital case generally results in the conclusion that the district court imposed a constitutionally proportionate sentence. *Id.* at 526; *see also Rutter v. People*, 2015 CO 71, ¶ 15, 363 P.3d 183, 188.

¶ 39 We classify certain crimes — such as aggravated robbery, robbery, burglary, attempted burglary, accessory to first degree murder, and drug-related crimes — "grave and serious" per se due to the clear potential for harm to society. *Strock*, 252 P.3d at 1157; *see People v. Gaskins*, 825 P.2d 30, 37 (Colo. 1992). If the crime under review is grave and serious per se, the "court need not consider the harm caused or threatened to the victim or to society and the culpability of the defendant. The court may simply consider the harshness of the penalty." *Strock*, 252 P.3d at 1158.

¶ 40 The list of per se grave and serious crimes grows with our appellate jurisprudence. Consequently, the *Strock* division concluded that vehicular homicide while driving under the influence is grave and serious per se because of the grave harm inflicted and the culpability of the conduct. *Id.* In addition, even if a crime is not

classified as grave and serious per se, we may consider factors such as

> whether the crime involves violence, the absolute magnitude of the crime and the defendant's motive. *Gaskins*, 825 P.2d at 36-37. However, this list is not exhaustive, but merely illustrative of "generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes."

People v. Mershon, 874 P.2d 1025, 1032 (Colo. 1994) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)).

¶ 41 We need not classify each sentenced crime as grave and serious to conclude that, in combination, they were sufficiently grave and serious to determine that the sentence was not grossly disproportionate. *See People v. Loris*, 2018 COA 101, ¶ 11, ___ P.3d ___, ___.

C. Analysis

¶ 42 The jury convicted Terry of multiple felonies involving violence, including second degree assault, vehicular eluding, and attempted extreme indifference murder. A division of our court recognized vehicular eluding as a grave and serious offense due to the risk to society. *See People v. Allen*, 111 P.3d 518, 520 (Colo. App. 2004).

Another division classified first degree assault as grave and serious. *People v. Oldright*, 2017 COA 91, ¶ 6, ___ P.3d ___, ___. Further, attempted extreme indifference murder entails components of intention and violence, not unlike felony menacing, first degree assault, and robbery, which our state appellate courts have already recognized as grave and serious per se. *See Oldright*, ¶ 6, ___ P.3d at ___; *see also People v. Cisneros*, 855 P.2d 822, 830 (Colo. 1993) (concluding that, because the offenses underlying the defendant's conviction as a habitual offender involve crimes of violence or potential violence by their very nature, the combination of the offenses met "the requisite requirement of gravity or seriousness to support a sentence of life imprisonment"); *Gaskins*, 825 P.2d at 36 (recognizing that an appellate court is well-positioned to conduct an abbreviated proportionality review when the defendant was convicted of serious crimes that present grave societal harm). Crimes classified as per se grave and serious, including aggravated robbery (a class 3 felony) and attempted burglary (a class 5 felony), raise no greater concerns of violence and risk to society than a class 2 felony characterized by "an attitude of universal malice manifesting extreme indifference to the value of human life

generally . . . which creates a grave risk of death . . .” § 18-3-102(1)(d), C.R.S. 2018 (defining extreme indifference murder); *see* § 18-2-101, C.R.S. 2018 (classifying criminal attempt to commit a class 1 felony as a class 2 felony). Thus, although Terry’s crime of attempted extreme indifference murder is not yet classified as grave and serious per se, we conclude that it is grave and serious when compared with other crimes already classified as grave and serious.

¶ 43 Terry’s offenses presented danger to society — the chase, second degree assault of a peace officer, and attempted extreme indifference murder all posed extreme danger to the public as well as to the officers who attempted to stop Terry.

¶ 44 Finally, in conducting an abbreviated proportionality review under the habitual criminal statute, as we do here, we “must consider the gravity or seriousness of the underlying crimes together with the triggering crime . . . .” *Deroulet*, 48 P.3d at 525 n.6. When considering all offenses together with the triggering offenses, including attempted extreme indifference murder, we conclude that Terry’s offenses were grave and serious, and the ninety-six-year sentence is not grossly disproportionate.

Accordingly, we need not engage in an extended proportionality review.

¶ 45 Because we do not deem his sentence to be grossly disproportionate, we conclude that Terry cannot establish that counsel's failure to request a proportionality review prejudiced him.

V. Conclusion

¶ 46 Accordingly, the order is affirmed.

CHIEF JUDGE BERNARD and JUDGE FOX concur.