Media Alert

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Sentencing in 21st century Colorado

I – Colorado's sentencing laws have a long and tortured history.

Prior to July 1, 1979, Colorado had "indeterminate sentencing." Class 5 felonies were punishable by an indeterminate term not to exceed 5 years. Class 4 felonies: indeterminate to 10 years. Class 3 felonies: not fewer than 5 nor more than 40 years. And class 2 felonies: not fewer than 10 nor more than 50 years. Parole wasn't discussed in a sentencing hearing.

The law has changed several times since then. Attached please find 4 different charts that relate to the Colorado Criminal Code's penalties for the periods July 1, 1979 – June 30, 1985; July 1, 1985 – June 30, 1989; July 1, 1989 – June 30, 1993; and July 1, 1993 – present.

Even as we speak, new sentencing protocols are being considered by the General Assembly and the Governor. This has arisen because of a series of United States Supreme Court cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . .It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Ring v. Arizona, 536 U.S. 584 (2002): "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (This is the case that ended Colorado's 3-judge panel process in death penalty cases.)

Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004). Defendant pled guilty rather than going to trial. (*Apprendi* and *Ring* were jury trial cases.) The judge sentenced Defendant to 90 months in prison, 37 months more than the statutory maximum for the crime to which he pled guilty. "Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with 'deliberate cruelty.' The Framers would not have

thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

As of April 30, 2005, it seems to be axiomatic that a judge cannot sentence a defendant to a term greater than the maximum of the presumptive range (e.g. 6 years for a class 4 felony) unless: (a) that sentence is based on a jury's unanimous, beyond a reasonable doubt determination that an aggravating factor exists

II – Factors which a judge must consider when sentencing. (§18-1-102.5 CRS)

- To punish a convicted offender by assuring that the offender receive a sentence commensurate with the seriousness of the offense. (**Specific deterrence**)
- To assure fair and consistent treatment of all convicted offenders, irrespective of race, gender, socio-economic status, etc. (**Fairness**)
- To prevent crime and promote respect for the law by providing an effective deterrence to others likely to commit similar offenses (**General deterrence**)
- To promote rehabilitation by encouraging correctional programs that elicit voluntary participation of convicted offenders (**Rehabilitation**)

No one factor should be considered to the exclusion of any other.

III – Aids in sentencing

- Presentence Reports (perhaps the most important information available to a judge)
- Pretrial Release Reports (useful when no presentence report is prepared)
- Statements of counsel
- Statements of victims
- Statements of the defendant
- Reports of other agencies, businesses, entities or individuals with whom the defendant has had contact

IV – Alternatives in sentencing:

- Probation (with or without county jail as a condition; jail can include work release and, in some counties, a "weekender program")
- Fine
- Department of Corrections
- Community Corrections

V – Plea bargains are authorized by statute (§§16-7-301, et. seq.; 16-7-401, et. seq.)

Death penalty in Colorado

Colorado's death penalty requires a prosecutor to inform the Court and the defendant that the State will seek capital punishment. This must occur not later than 60 days after arraignment. (Crim. P. 32.1) The death penalty is available only in Class One Felonies (typically First Degree Murder).

Colorado's death penalty statute, involving the use of jurors, has been found to be constitutional by the Colorado Supreme Court. *See, e.g. People v. Dunlap,* 975 P.2d 723 (Colo. 1999). (As noted earlier, the legislature's attempts to require sentencing by a 3

judge panel were struck down because of the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). The Colorado decision is *Woldt v. People*, 64 P.3d 256 (Colo. 2003). Woldt also holds that the statute adequately narrows the group of defendants subject to the death penalty by the use of statutory aggravating factors.

Because the ultimate sanction is being considered, capital litigation is highly stressful for all concerned. A capital case can consume much of a judge's life.

A judge's duties include effective caseflow management; maintaining proper control of the courtroom while permitting counsel and the parties to make a complete record; preparing for the hearings and trials that come before her or him; staying current in the law; and a variety of administrative responsibilities. The Supreme Court has suggested that the rights of the defendant, of the People and of the victims should be honored. Of course, a judge must keep a proper demeanor at all times, whether in the courtroom, in chambers or in public.

These responsibilities are magnified in death penalty litigation. The law is constantly being refined. A complete record is essential for the appellate process. More often than not, counsel become ensnared in the fate of a defendant or the interests of the victim's family. Public scrutiny is very high.

The judge strives to keep the requisite level of control. In this regard, he or she will conduct regular status conferences; require that motions be heard in an orderly and intelligible sequence; and keep to a predictable and regular schedule.

Case law contains references to the requirement that a judge not permit his or her personal views about capital punishment to be a part of the decisional process. "We have recognized that the power to determine the proper punishment for violations of statutes is legislative and not judicial . . . . Whether we individuals who are judges would have voted for the death penalty as voters or legislators is not relevant. In considering the question of whether capital punishment is inconsistent with the contemporary standards of decency, we cannot ignore the fact that throughout the history of this state, capital punishment has been utilized as the penalty for certain crimes. Early decisions of this court upheld the imposition of the death penalty." *People v. Davis*,794 P.2d 159, 171 (Colo. 1990).

Some people express concern about the amount of time required to process a death penalty case from filing to execution. Since the Supreme Court has recognized that "death is different" [*People v. District Court*, 196 Colo. 401, 586 P.2d 31 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978)]. As a result, capital cases require enhanced scrutiny.

In addition, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. §2254.

> A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless available state-court remedies on the federal constitutional claim have been exhausted. 28 U.S.C. § 2254 (b) (1) (citations omitted). The exhaustion requirement is satisfied only if the petitioner can show that he fairly presented the federal claim at each level of the established state-court system for review. (citations omitted) "Fair presentation" of a claim means that the petitioner "must present a federal

> claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." (citations omitted) A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless available state-court remedies on the federal constitutional claim have been exhausted. 28 U.S.C. § 2254(b) (1). *Holloway v. Horn*, 355 F. 3d 707 (3rd Cir. 2004).

Colorado's death penalty statute (§18-1.3-1201 CRS) requires that, upon conviction of a class one felony, the trial jury continues its service. The prosecution then presents evidence as to certain statutory "aggravating factors." Examples include the intentional killing of a police officer, firefighter, judicial officer or elected official; a murder committed while lying in wait, from ambush or by the use of an explosive or incendiary device; the intentional killing of a witness to a criminal offense; the intentional killing of more than one person in more than one criminal episode. Other factors are delineated in the statute and in *People v. Dunlap, supra*.

After the prosecution's presentation, the defense may offer mitigating evidence. Statutory mitigating factors include the age of the defendant at the time of the crime; the presence of unusual duress; the emotional state of the defendant at the time of the crime; and cooperation with law enforcement. In addition, the defendant may present any other evidence that speaks to mitigation. The defendant does not have a burden of proof with respect to mitigation.

The prosecution may present evidence to rebut mitigators. However, the Colorado Supreme Court has fashioned a procedure as to when the jury may consider this evidence.

While the requirements for consideration of these factors is complex, a fair summation is as follows: the prosecution must establish the existence of at least one statutory aggravating factor beyond a reasonable doubt; the jury must consider all mitigating evidence; the jury must determine whether the mitigation is outweighed by the aggravation.

If the jury does not find, beyond a reasonable doubt, that the prosecution has proven the existence of at least one statutory aggravating factor, the deliberations end and a life sentence is imposed. If mitigation is not outweighed by aggravation (or if the jury cannot make such determination beyond a reasonable doubt), deliberations end and a life sentence is imposed.

If the prosecution proves both of these beyond a reasonable doubt, the jury must engage in a profound, moral deliberation as to whether the defendant should be sentenced to death. Only if all 12 jurors conclude, beyond a reasonable doubt, that the death sentence should be imposed, may it return a death verdict.