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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 10CA2454	
Petitioner THE PEOPLE OF THE STATE OF COLORADO v. Respondent CURTIS G. ADAMS	
Douglas K. Wilson, Colorado State Public Defender CORY D. RIDDLE 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #37719	Case Number: 14SC94
ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

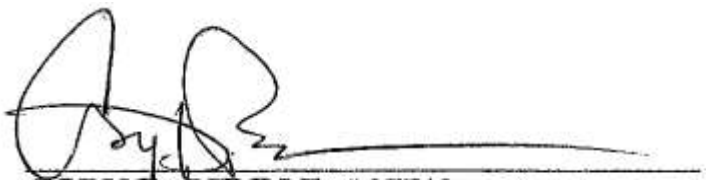
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 3,148 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

> In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



CORY D. RIDDLE, # 37719

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ISSUE GRANTED BY THE COURT

Whether the mandatory sentencing aggravator in section 18-1.3-401(8)(a)(IV), CRS (2014) applies to the crime of second degree assault as defined in section 18-3-203(1)(f), CRS (2014).

STATEMENT OF THE CASE

A jury convicted Mr. Adams of one count second degree assault in violation of § 18-3-203(1)(f) CRS (F4), and one count interference with governmental operations in violation of § 18-8-102 CRS (M3). (v1,pp4-5). The court sentenced Mr. Adams to an aggravated controlling term of 12 years consecutive to any sentence Mr. Adams was "now serving or yet to serve" by applying the mandatory sentencing aggravator in § 18-1.3-401(8)(a)(IV) CRS to the second degree assault conviction. (v1,p64;v13,pp10,14)

The Court of Appeals affirmed the judgment but found the general sentencing aggravator in § 18-1.3-401(8)(a)(IV), CRS did not apply to the crime of second degree assault as defined in § 18-3-203(1)(f), CRS, vacated the sentence, and remanded the case with instructions to reconsider Adams' sentence. The court noted that the sentence may be aggravated pursuant to another statutory provision. *People v. Adams* at 8, (Colo. App. No. 10CA2454, January 9, 2014) (not published pursuant to C.A.R. 35(f)). This Court granted the Attorney General's Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

On March 6, 2008, Curtis Gordon Adams was incarcerated at Colorado State Penitentiary after being convicted of a felony. (v12,pp4-7) A correctional officer testified that when he tried to take control of Mr. Adams, Mr. Adams assaulted him. (v11,pp213-224,233-250; State's Exhibits Nos. 1-7) This case followed.

SUMMARY OF THE ARGUMENT

The sentencing aggravator in § 18-1.3-401(8)(a)(IV), CRS does not apply to the crime of second degree assault as defined in § 18-3-203(1)(f), CRS because § 18-3-203(1)(f) has its own specific sentencing aggravator. The Court of Appeals correctly followed *People v. Andrews*, 871 P.2d 1199, 1200 (Colo. 1994), and *People v. Willcoxon*, 80 P.3d 817, 822 (Colo. App. 2002), in reaching its determination in this case.

ARGUMENTS

I. The General Sentencing Aggravator In Section 18-1.3-401(8)(A)(IV), CRS (2014) Does Not Apply To The Crime Of Second Degree Assault As Defined In Section 18-3-203(1)(F), CRS (2014) Because Section 18-3-203(1)(F) Has Its Own Specific Sentencing Aggravator.

A. Standard of Review

This case presents an issue of statutory interpretation. This Court reviews de novo questions of statutory interpretation. *Dubois v. People,* 211 P.3d 41, 43 (Colo. 2009).

B. Applicable Rules of Statutory Construction

In determining the meaning of a statute, the Court's central task is to ascertain and give effect to the intent of the legislature. *People v. Dist. Ct.,* 713 P.2d 918, 921 (Colo. 1986). The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme. *See id.* at 921; *Bynum v. Kautzky,* 784 P.2d 735, 736 (Colo. 1989). Thus, the Court's interpretation should give consistent, harmonious, and sensible effect to all parts of a statute. *Dist. Ct.,* 713 P.2d at 921. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Colorado's rules of statutory construction are that a special statute preempts a general statute and that a later statute is given effect over an earlier statute. *Jones v. Cox*, 828 P.2d 218, 222 (Colo. 1992)

C. Statutory Provisions

In relevant part:

§ 18-3-203(1)(f), CRS (2014): second degree assault statute provides:
While lawfully confined or in custody, he or she knowingly and violently applies physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, . . . while lawfully confined or in custody as a result of being charged with or convicted of a crime

. . .

A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender.

> **§ 18-1.3-401(8)(a), CRS (2013) provides**: The presence of any one or more of the following extraordinary aggravating circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony
>
> . . .
>
> (IV) The defendant was under confinement, in prison, or in any correctional institution as a convicted felon[.]

D. Law and Analysis

The general sentencing aggravator in § 18-1.3-401(8)(a)(IV), CRS does not apply to the crime of second degree assault as defined in § 18-3-203(1)(f), CRS because § 18-3-203(1)(f) has its own specific sentencing aggravator.

In *People v. Andrews*, 871 P.2d 1199, 1200 (Colo. 1994), Andrews pleaded guilty to two counts of class five felony attempted escape while in custody or confinement. The trial court, utilizing a prior sentence enhancement provision (section 18-1-105(9)(a)(V), 8B C.R.S. (1986 and 1992 Supp.)[1]), sentenced him to a controlling term of three and one half years to run consecutive to Andrews' prior sentences. The court of appeals found that the aggravated sentence was improper, vacated the sentence, and remanded the case for re-sentencing.

This Court concluded that the sentence enhancer found in § 18-1.3-401(8)(a)(IV) was inapplicable to the crime of class 3 felony escape. First, this Court

[1] Now located at § 18-1.3-401(8)(a)(IV).

looked at the overall statutory scheme and concluded that application of the sentence enhancer would require a defendant convicted of the class 3 felony to be sentenced as a class 2 felony, and would "effectively render meaningless the classification of the felony as class 3, since in each and every case an enhanced sentence would be imposed upon the defendant." 871 P.2d at 1202.

The principal reason, however, that this Court held the legislature did not intend to punish escape and attempted escape through application of the enhancement provision at issue was because the language of the escape and attempted escape statutes provide for a specific sentence and additionally provide that punishment imposed pursuant to conviction of such crimes shall run consecutive to the punishment for the underlying felony. *Andrews*, 871 P.2d at 1203.

The General Assembly twice amended the general aggravator statute after the *Andrews* decision. Colo. Sess. Laws 1996, ch. 155, § 18-1-105(9)(a)(III) at 736; Colo. Sess. Laws 1997, ch. 264, § 18-1-105(9)(a)(X) at 1546. And the entire statute was repealed and reenacted in 2002 without substantive change to this general aggravator provision. Because the legislature is presumed to be aware of judicial decisions when it enacts or amends legislation, *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997), its failure otherwise to amend the statute indicates approval of the *Andrews* court's

interpretation. *See People v. Swain*, 959 P.2d 426, 430–31 (Colo. 1998); *People v. Willcoxon*, 80 P.3d 817, 822 (Colo. App. 2002)

In *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002), a jury convicted Mr. Willcoxon of two counts second degree assault under § 18-3-203(1)(f). The trial court sentenced Willcoxon to six years in the Department of Corrections for each count, to be served concurrently[2]. This sentence was ordered to be served consecutively to any sentence or sentences defendant was serving or had yet to serve. *Willcoxon*, 80 P.3d 817, 819. The Court of Appeals found that *Andrews*, 871 P.2d 1199, governs its analysis of Willcoxon's aggravated sentence, and it relied on this Court's second reason in *Andrews* to conclude that the sentence aggravator in § 18-1.3-401(8)(a)(IV) did not apply to the crime of second degree assault as defined in § 18-3-203(1)(f) because § 18-3-203(1)(f) has its own specific aggravator. Although *Willcoxon* did not rely upon the first reason in *Andrews* for its decision, § 18-1.3-401(8)(a)(IV) will arguably apply to every person convicted under § 18-3-203(1)(f) just like the aggravator in *Andrews*, 871 P.2d 1199, 1200.

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[2] Defendant's sentence of six years imprisonment for each count falls within both the presumptive sentencing range and the aggravated sentencing range.
Because the record is unclear as to whether the trial court employed the aggravated range in imposing the sentence, the case was remanded for the trial court to reconsider the sentence and determine if it was an aggravated sentence. *Willcoxon*, 80 P.3d at 822.

Section 18-1.3-401(8)(a)(IV) is written in the disjunctive: expressing an alternative or opposition between the meanings of the words connected. And the modifier "as a convicted felon" only modifies "correctional institution."

"The defendant was under confinement, in prison, or in any correctional institution as a convicted felon," will arguably apply to all defendants under confinement (with or without a felony conviction), in prison (presumably with a felony conviction), and those convicted of a felony that are in any correctional institution. As a result, "under confinement" will include all those convicted under § 18-3-203(1)(f), including those defendants who are not convicted felons. Thus, § 18-1.3-401(8)(a)(IV) will automatically apply to every conviction under § 18-3-203(1)(f), thereby rendering the classification of § 18-3-203(1)(f), as a class level 4 felony (2-6 years) meaningless because all defendants convicted under § 18-3-203(1)(f) will be subject to a class level 3 felony (4-12 years) under § 18-1.3-401(8)(a)(IV).

As stated above, the General Assembly is presumed to be aware of the judicial interpretation of a statute that it amends, and it is also presumed that a legislative amendment does not change the existing law further than is expressly declared or necessarily implied. *Karlin v. Conard*, 876 P.2d 64 (Colo. App. 1993); *Dover Elevator Co. v. Indus. Claim Appeals Office of State of Colo.*, 961 P.2d 1141, 1143 (Colo. App. 1998). *Willcoxon* was decided in 2002, and the legislature has not amended the second degree

assault statute § 18-3-203(1)(f), CRS (2014), in response to *Willcoxon* to include the general enhancement provision of § 18-1.3-401(8)(a)(IV) along with the consecutive sentence mandate of § 18-3-203(1)(f). Nor has § 18-1.3-401(8)(a)(IV) been amended to specifically include § 18-3-203 as subject to this general enhancement.

Thus, this Court should presume the General Assembly approves of the *Willcoxon* decision that the general aggravator statute does not apply to the offense of second degree assault as defined in § 18-3-203(1)(f) because the statute contains a specific sentence enhancer. To apply both the specific and the general enhancements would be inconsistent with legislative intent. *Andrews*, 871 P.2d at 1203; *Willcoxon*, 80 P.3d at 822.

As further support for the legislature's approval of the *Andrews* and *Willcoxon* decisions, the Court of Appeals has issued numerous opinions citing to *Willcoxon* and *Andrews* without any further legislative action by the General Assembly concerning § 18-3-203(1)(f) or § 18-1.3-401(8)(a)(IV).

For example, in *People v. Nitz*, 104 P.3d 240, 242 (Colo. App. 2004), the court held that because § 18-1.3-401(8)(a)(IV) does not automatically apply to all persons convicted under § 18-18-406.5 and because § 18-18-406.5 does not provide specifically for an aggravated sentence, § 18-1.3-401(8)(a)(IV) applies to defendant's

sentence. Thus, the trial court was required to impose an aggravated sentence *People v. Nitz*, 104 P.3d 240, 242 (Colo. App. 2004)

In *Nitz*, the court thus specifically found that unlike the statutes at issue in *Andrews* or *Willcoxon*, § 18-18-406.5 does not provide for a specific aggravated punishment.

And in *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010), a jury convicted Mr. Wylie of four counts second degree assault with bodily fluids while lawfully confined in a detention facility under § 18-3-203(1)(f.5) CRS 2009. The trial court sentenced him to four consecutive ten-year terms to be served consecutively to the sentence he was serving at the time of the assaults. 260 P.3d at 58. The Court of Appeals affirmed the convictions and sentence noting that the sentence enhancement provisions of section 18-1.3-401(8)(a)(IV) would not have an effect, contrary to the legislative intent, of raising the class of felony for which Wylie was convicted, § 18-3-203(1)(f.5) did not have the specific sentence enhancers like in *Wilcoxon* and *Andrews* that would supersede the provisions of the sentencing statute: § 18-1.3-401(8)(a)(IV).

Unlike § 18-3-203(1)(f.5) of which Wylie was convicted, § 18-3-203(1)(f), under which Adams was convicted, has a specific sentence enhancer that would supersede the provisions of the aggravated sentencing statute: § 18-1.3-401(8)(a)(IV). *See Willcoxon, supra*. Moreover, nowhere does the second degree assault statute mandate

aggravated sentencing under § 18-1.3-401(8)(a)(IV). Had the legislature intended to require aggravated sentencing, pursuant to § 18-1.3-401(8)(a)(IV), for a crime committed pursuant to paragraph (f), it would have expressed such an intent. *See Jones v. Cox*, 828 P.2d 218, 221 (Colo. 1992); *Woodsmall v. Regional Transportation District*, 800 P.2d 63, 67 (Colo. 1990) (the court's primary task is to determine the legislative intent from the language of the statute).

The AG erroneously focuses on *Andrews* and this Court's observation in *Andrews* that the application of the general sentence aggravating provision would have the effect of raising the class of the felony from a 4 to a 3 in contravention to legislative intent. That is, the Court observed that, "[t]his construction would effectively render meaningless the classification of the felony as class 3, since in each and every case an enhanced sentence would be imposed upon the defendant. Such a construction is contrary to the presumption that an entire statute, giving force and effect to all its parts, is intended to be effective." *Andrews*, 871 P.2d at 1202. Here, the AG asserts that such would not be the effect for offenders under the second degree assault provision at issue. The AG offers distinctions it contends would not require aggravated sentencing under the general provision in each instance. On this basis, the AG seeks to distinguish Mr. Adams' case from *Andrews*. And this is also why the AG asserts *Willcoxon* was wrongly decided. (OB at 5-6, 10-11)

The AG's focus on this part of *Andrews*, however, is misplaced. As indicated, this Court did not focus on this observation in support of its conclusion. Rather, the first explicit reason this Court held the general sentencing provision did not apply was because "the language of the escape and attempted escape statutes provides for a specific sentence and additionally provides that punishment imposed pursuant to conviction of such crimes shall run consecutive to the punishment for the underlying felony." *Andrews*, 871 P.2d at 1203. This sound reason, underscored by applicable rules of statutory construction, applies with equal force to Mr. Adams' case as more fully explained above. In sum, the second degree assault statute, CRS § 18-3-203(1)(f), requires, similar to the specific sentencing provision in Andrews, that when imposing sentence that every defendant, (1) under confinement; (2) must be sentenced to the Department of Corrections; and (3) the sentence must be consecutive to any sentence being served by the defendant. As in *Andrews*, the specific sentencing provision requiring an enhanced and specific sentence for the second degree assault controls over the general sentencing provision. *See id.*

The second explicit reason the Court held the general sentencing provision inapplicable was because "the General Assembly has not amended the enhancement provision to make it specifically applicable to crimes of escape." *Id.* The Court held critical the fact the legislature had been aware of the Court's decisions in this area

holding that the specific provision controlled over the general and that the legislature had not amended the general sentencing provision or otherwise indicated disapproval of the Court's consistent interpretation in this area.

Similarly here, the legislature, aware of this Court's decision in *Andrews* for more than 25 years and aware that the Court of Appeals has for many, many years in several different cases relied upon the principle that a specific aggravating provision applies over a general sentencing provision, *see* e.g. *Willcoxon*, *Nitz, Wylie,* has not amended the general provision to make it apply to the second degree assault at issue.

In sum, the AG's attempt to undermine the reasoning and rationale of *Willcoxon* and of the Court of Appeals' decision in Mr. Adams's case on the basis of this Court's observation concerning the classification effect of the statues at issue is misplaced and unpersuasive.

Finally, the AG's assertion that the general aggravator would not apply in every case as the defendant must be a convicted felon is erroneous. (OB at pp6,11) Reasonably read, § 18-1.3-401(8)(a)(IV) will apply to every defendant convicted under § 18-3-203(1)(f). Section 18-1.3-401(8)(a)(IV) is written in the disjunctive: expressing an alternative or opposition between the meanings of the words connected. And, the modifier "as a convicted felon" only modifies "correctional institution." "The defendant was under confinement, in prison, or in any correctional institution as a

convicted felon," will arguably apply to all defendants under confinement (with or without a felony conviction), in prison (presumably with a felony conviction), and those convicted of a felony that are in any correctional institution.

It would be redundant for "as a convicted felon" to apply to those defendants in prison because all defendants in prison are presumably convicted of a felony. (interpretations that render statutory provisions redundant and superfluous should be avoided. *See People v. San Emerterio*, 839 P.2d 1161, 1165 (Colo. 1992); *Colorado Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1163 (Colo. 2000). Moreover, the general rule of statutory construction is that relative and qualifying words and phrases, where no contrary intention appears, are construed to refer solely to the last antecedent with which they are closely connected. *Moschetti v. Liquor Licensing Authority of the City of Boulder*, 176 Colo. 281, 490 P.2d 299 (1971); *Wheeler v. Rudolph*, 162 Colo. 410, 426 P.2d 762 (1967).

As a result, "under confinement" will arguably include all those convicted under § 18-3-203(1)(f), including those defendants who are not convicted of a felony. Thus § 18-1.3-401(8)(a)(IV) will automatically apply to every conviction under § 18-3-203(1)(f), thereby rendering the classification of § 18-3-203(1)(f), as a class level 4 felony (2-6 years) meaningless because all defendants convicted under § 18-3-203(1)(f) will be subject to a class level 3 felony (4-12 years) under § 18-1.3-401(8)(a)(IV).

Thus, even under *Andrews* rationale and contrary to the *Nitz* opinion regarding § 18-1.3-401(8)(a)(IV), the sentence enhancement provisions of § 18-1.3-401(8)(a)(IV) would arguably have an effect, contrary to the legislative intent, of raising the class of felony for which Adams was convicted from a class 4 to a class 3.

Also, while it may be true that not every person convicted of misdemeanor possession under § 18-18-406.5 and "confined in a detention facility" is a convicted felon; § 18-1.3-401(8)(a)(IV) would still arguably apply to every person lawfully "confined" in a detention facility. Section 18-1.3-401(8)(a)(IV) applies where "the defendant was under confinement. . ." without any reference to a felony conviction. As a result, to the extent *Nitz* relied upon § 18-1.3-401(8)(a)(IV) not automatically applying to all persons convicted under § 18-18-406.5, it was arguably wrongly decided.

CONCLUSION

Because the legislature did not intend to apply a statutory aggravated range under § 18-1.3-401(8)(a)(IV) to second degree assaults committed under § 18-3-203(1)(f), Mr. Adams requests this Court affirm the Court of Appeals and remand this case to sentence Mr. Adams within the appropriate sentencing range.

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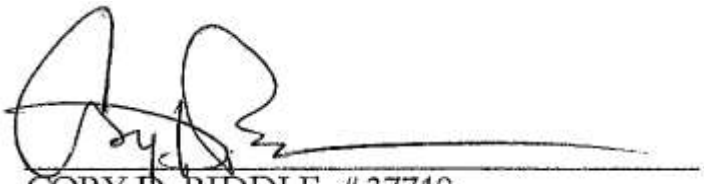

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CERTIFICATE OF SERVICE

I certify that, on January 19, 2016, a copy of this Opening Brief was electronically served through ICCES on William G. Kozeliski of the Attorney General's Office.