APPENDIX

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue, Denver, Colorado 80203

2018 CO 92M

Supreme Court Case No. 16SC653
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA1215

Petitioner:
Christopher Anthony Mountjoy, Jr.,

v.

Respondent:
The People of the State of Colorado.

Judgment Affirmed
en banc
November 19, 2018

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

December 3,2018

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JUSTICE BOATRIGHT delivered the Opinion of the Court.

JUSTICE GABRIEL dissents, and **JUSTICE HART** joins in the dissent.

1. Christopher Mountjoy was convicted of reckless manslaughter, illegal discharge of a firearm, and tampering with physical evidence after he shot and killed V.M. outside of a motorcycle clubhouse. During sentencing, the trial court found that each crime involved extraordinary aggravating circumstances. In doing so, the trial court relied on factual findings that were made by the jury beyond a reasonable doubt on the related charges as aggravating factors for the offense for which he was being sentenced. As a result, the trial court doubled the statutory presumptive maximum of each sentence.

2. Mountjoy appealed his sentences, arguing that aggravating his sentences in this fashion violated his constitutional rights to due process and trial by jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The court of appeals avoided the question of whether *Apprendi* and *Blakely* had been satisfied and concluded that, even assuming they were not satisfied, any error was harmless. We granted certiorari[1] and now affirm

[1] We granted certiorari to review the following issues:

1. Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Gaudin*, 515 U.S.

on other grounds. We hold that the trial court did not deny Mountjoy his rights to due process and trial by jury when it relied on facts found by the jury beyond a reasonable doubt on charges related to the offenses for which the aggravated sentences were imposed. Therefore, we affirm the judgment of the court of appeals on different grounds.

I. Facts and Procedural History

3. This case arises from a shooting outside of a Sin City Disciples motorcycle clubhouse. On the night of the shooting, Mountjoy was working as the club's

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506 (1995), require a jury to make the ultimate determination of "extraordinary aggravating circumstances" under Colorado's residual sentence aggravator, where the requisite finding presents a mixed question of law and fact.

2. Whether a violation of the right to jury trial on a sentence aggravator can be harmless under *Washington v. Recuenco*, 548 U.S. 212 (2006), where the jury probably would have found the historical facts the judge relied on in finding the aggravator was present, but there is substantial doubt the jury would have drawn the ultimate conclusion that the historical facts proved the aggravator.

3. Whether a violation of the right to a jury trial on a sentence aggravator can be harmless under *Washington v. Recuenco*, 548 U.S. 212 (2006), where the prosecution neither charged the aggravator in the information nor gave pre-verdict notice it sought aggravation.

Because we conclude that Mountjoy's aggravated sentences satisfy *Blakely* and *Apprendi*, we do not address issues two and three, which relate to harmless error.

security. The victim of the shooting, V.M., participated in a fight and, as a result, was forced to leave the clubhouse. V.M. drove off with a friend, but they returned to the clubhouse shortly thereafter to reportedly retrieve a wallet he lost during the fight. In returning, the friend parked the car outside the clubhouse with the engine idling. Mountjoy testified that he was concerned that the victim had returned to retaliate. At that point Mountjoy fired eight shots in the direction of the car. As the shots were fired, the car drove away from Mountjoy. One of the fired shots struck and killed V.M. Following the shooting, Mountjoy directed other members of the club to clean up the area, and he deleted text messages from his phone that mentioned the shooting. Subsequently, the People charged Mountjoy with first-degree murder after deliberation, first-degree extreme indifference murder, robbery, illegal discharge of a weapon, and tampering with physical evidence.

4. At trial, Mountjoy was found guilty of (1) reckless manslaughter (the lesser included offense to first-degree murder after deliberation and first-degree extreme indifference murder), (2) illegal discharge of a firearm, and (3) tampering with physical evidence. In sentencing Mountjoy, the trial court determined that there were extraordinary aggravating circumstances that warranted doubling the maximum presumptive range sentence for each of Mountjoy's three convictions under section 18-1.3-401(6), C.R.S. (2018). Specifically, the court found that the reckless manslaughter conviction was extraordinarily aggravated because Mountjoy used a weapon, tampered with evidence, admitted to firing

eight shots, fired into a car with two occupants, and fired while the car was driving away. Furthermore, the court found that the illegal discharge conviction was extraordinarily aggravated because somebody died and Mountjoy tampered with evidence. Finally, the court found that the tampering count was extraordinarily aggravated because somebody died. By aggravating the sentences, the trial court sentenced Mountjoy to twelve years in prison for the reckless manslaughter charge, six years in prison for the illegal discharge of the firearm charge, and three years in prison for the tampering with physical evidence charge, each to be served consecutively, for a total of twenty-one years in prison.

5. Mountjoy appealed the aggravated sentences, arguing, among other things, that his constitutional rights to due process and a jury trial under *Blakely* and *Apprendi* had been violated because the trial court had issued aggravated sentences for each count based on facts that the jury had not specifically found in connection with those particular counts.

6. The court of appeals upheld the enhanced sentences. *People v. Mountjoy*, 2016 COA 86, ¶ 55, __ P.3d __. The majority held that even if the trial court's actions violated *Blakely* and *Apprendi*, the error was harmless because the jury would have found the facts necessary to aggravate each count specifically in connection with each count had it been asked to do so. *Id.* at ¶ 1. In a special concurrence, Judge Jones argued that no *Blakely*/*Apprendi* error had occurred. *Id.* at ¶¶ 57–68. We granted

certiorari and now affirm the court of appeals' judgment on different grounds.

II. Standard of Review

7. We review legal questions and constitutional challenges to sentencing schemes de novo. *Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010); *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005).

III. Analysis

8. We begin by examining Mountjoy's sentencing and Colorado's aggravated sentencing scheme. Next, we discuss the constitutionality of aggravated sentencing schemes under *Blakely* and *Apprendi*, and how Colorado's scheme has been implemented to satisfy constitutional requirements. Finally, we conclude that each of Mountjoy's aggravated sentences are *Blakely*-compliant and therefore did not deny him his rights to due process and trial by jury.

A. Colorado's Aggravating Circumstances Scheme

9. Colorado's felony sentencing statute, section 18-1.3-401, provides sentencing ranges for a trial court, and such ranges are premised on the specific class of felony for which a defendant is convicted. In this case, Mountjoy was convicted of three offenses:

(1) Reckless manslaughter, a class four felony with a presumptive range of two to six years imprisonment;

(2) Illegal discharge of a firearm, a class five felony with a presumptive range of one to three years imprisonment; and

(3) Tampering with physical evidence, a class six felony with a presumptive range of one year to eighteen months imprisonment.

10. A trial court, however, may sentence a defendant in excess of the presumptive range if the court concludes that extraordinary aggravating circumstances are present. In that instance, the trial court can impose a sentence greater than the maximum in the presumptive range; except that in no case shall the term of the sentence exceed twice the maximum authorized in the presumptive range. *See* § 18-1.3-401(6). Thus, the trial court here was authorized under section 18-1.3-401(6) to sentence Mountjoy to twelve years for reckless manslaughter, six years for illegal discharge of a firearm, and three years for tampering with physical evidence. The trial court's implementation of section 18-1.3-401(6), however, must have comported with the Sixth Amendment, which guarantees, among other rights, the right to a trial by an impartial jury.

B. The Constitutionality of Colorado's Aggravating Circumstances Scheme

11. In 2000, the U.S. Supreme Court decided *Apprendi*, which held that the Sixth Amendment right to a jury trial prohibits courts from enhancing criminal sentences beyond the statutory maximum based on facts other than those found by a jury beyond a reasonable doubt. 530 U.S. at 490. The *Apprendi* Court noted a narrow exception to the jury-finding requirement—the fact of a prior conviction. *Id.*

12. Four years later, the Court applied *Apprendi* in the context of an aggravated sentencing guideline

analogous to our section 18-1.3-401(6) in *Blakely*. 542 U.S. at 299, 301. Although the statute in *Blakely* did not specifically use the term "aggravating circumstances," it was functionally equivalent, providing that "[a] judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299 (quoting Wash. Rev. Code § 9.94A.120(2) (2000)). In *Blakely*, the defendant pleaded guilty to the crime charged, and the judge, believing that the crime had been committed with "deliberate cruelty," imposed an exceptional sentence that exceeded the standard range. *Id.* at 298. The U.S. Supreme Court reviewed the constitutionality of that sentence.

13. The *Blakely* Court made two significant holdings regarding aggravated sentencing statutes. First, the Court held that for sentences based solely on the facts reflected in a conviction, the maximum sentence that a trial court may impose is the maximum of the presumptive range, not the aggravated range. *Id.* at 303–04 ("In other words, the relevant 'statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."). Thus, to aggravate a defendant's sentence under a sentence enhancing scheme such as the one in *Blakely* or our section 18-1.3-401(6), the trial court must rely on facts outside of the elements of the crime itself. Second, the *Blakely* Court held that any sentence beyond the presumptive range must comply with *Apprendi*, i.e., any additional fact that a trial court relies on to enhance a sentence—other than the existence of a prior conviction—must have

been admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* at 303.

14. Applying these holdings, the *Blakely* Court found that the exceptional sentence imposed on the defendant violated *Apprendi* because the facts suggesting that deliberate cruelty had occurred were neither admitted by the defendant nor found by a jury. *Id.* Since the defendant in *Blakely* had pleaded guilty to the crime, the Court determined that the only facts admitted by the defendant were those that constituted the elements of the crime. *Id.* at 304. As a result, the Court held that the trial court could not have imposed a sentence outside of the standard range without pointing to an additional fact, and any such additional fact-finding would be subject to the Sixth Amendment jury-trial guarantee. *See Cunningham v. California*, 549 U.S 270, 271 (2007) (discussing *Blakely*). Notably, the Court determined that it was not the sentence enhancing scheme itself that violated *Apprendi*, but rather its implementation. *See Blakely*, 542 U.S. at 308. Hence, a judge may rely on facts outside of the elements of the crime itself that she deems are important to the exercise of her sentencing discretion, so long as a jury found (or the defendant admitted to) those facts. *Id.* at 303, 308–09.

15. We applied *Blakely* and *Apprendi* when we considered the constitutionality of section 18-1.3-401(6) in *Lopez*. We held that section 18-1.3-401(6) is constitutional under *Blakely* so long as an aggravated sentence is based on a fact additional to the elements of the crime that is one of four kinds of facts: (1) facts found by a jury beyond a reasonable doubt, (2) facts admitted by the defendant, (3) facts found by a judge

after the defendant stipulates to judicial fact-finding for sentencing purposes, or (4) the fact of a prior conviction. *Lopez*, 113 P.3d at 719;[2] *see also Blakely*, 542 U.S. at 302–10. Facts fitting into the first three categories are considered *Blakely*-compliant, and facts fitting into the fourth category are considered *Blakely*-exempt. *Lopez*, 113 P.3d at 723. We further held that the trial court determines as a matter of law whether *Blakely*-compliant facts and *Blakely*-exempt facts constitute aggravating circumstances pursuant to section 18-1.3-401(6). *Id.* at 726 n.11.

16. One type of *Blakely*-compliant fact includes facts that constitute an element of a crime of a conviction—either by guilty plea or jury verdict—separate from the charge being aggravated. *See People v. Watts*, 165 P.3d 707, 709–12 (Colo. App. 2006) (holding that the facts inherent to a prior conviction can be *Blakely*-compliant as admissions by the defendant); *People v. Bass*, 155 P.3d 547, 550, 555 (Colo. App. 2006) (holding that aggravating facts can be found based on the element of a concurrent conviction). Accordingly, in order for Mountjoy's aggravated sentences to be constitutional, each sentence must be based on a fact outside of the conviction for which he was being sentenced, and that fact must have been either admitted by Mountjoy or

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[2] Regarding the fourth category, we note that the *Lopez* court defined category four as "facts *regarding* prior convictions." 113 P.3d at 719 (emphasis added). *Blakely* defines category four as "the fact of a prior conviction." 542 U.S. at 302 (emphasis added) (quoting *Apprendi*, 530 U.S. at 490). We adopt the language of *Blakely* and in so doing do not express any opinion regarding the language used in *Lopez*.

found by a jury beyond a reasonable doubt. So, the specific question presented in this case is whether a sentence that is aggravated based on an element of a crime that arises out of the same criminal episode for which there is a separate conviction satisfies *Blakely* and *Apprendi*.

C. Mountjoy's Assertions

17. Mountjoy contends that *Apprendi*, read alongside *United States v. Gaudin*, 515 U.S. 506 (1995), requires a jury to not only find specific facts beyond a reasonable doubt, but to also make the specific determination of whether these same facts actually constitute "extraordinary aggravating circumstances" when sentencing outside of the presumptive range. In *Gaudin*, the defendant was charged with making false statements of material fact on Department of Housing and Urban Development ("HUD") loan documents. *Id.* at 508. At trial, the district court instructed the jury that, although the government had to prove that the alleged false statements were material to HUD's activities and decisions, the issue of materiality was not for the jury to decide; rather the court told the jury that the court itself would determine materiality and that "the statements charged in the indictment are material statements." *Id.* at 508. The jury then found Gaudin guilty. *Id.* at 509.

18. The U.S. Supreme Court held that the trial court's refusal to submit the question of "materiality" to the jury, when materiality was an element of the crime charged, was unconstitutional because the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime charged. *Id.* at 522–23. Mountjoy contends

that the "materiality" element of the crime in *Gaudin* is analogous to deciding whether facts are "aggravating" under section 18-1.3-401(6) here. Thus, Mountjoy asserts that, beyond *Apprendi*'s requirement that aggravating facts be found by a jury, *Gaudin* further requires that the jury must also determine whether those facts are indeed aggravating.

19. We conclude that Mountjoy's reliance on *Gaudin* is misplaced. *Gaudin* is fundamentally different from Mountjoy's case. His case is about sentencing; *Gaudin* is about proof of guilt. The judge in *Gaudin* made the determination of an actual element of the crime charged—materiality—meaning the jury failed to decide each and every element of the offense charged beyond a reasonable doubt. *Id.* at 508, 523. Here, "aggravation" is not an element of any of the crimes charged. Therefore, *Gaudin* is inapposite.[3] In fact, if *Gaudin* were as far-reaching as Mountjoy asserts, the *Blakely* Court would have held that a jury must determine beyond a reasonable doubt not only that facts outside the elements of a conviction exist, but also that those facts themselves warrant an aggravated sentence. But it did not. Instead, *Blakely* held that a judge may aggravate a sentence based on facts outside of the elements of the crime, so long as a jury found (or the defendant admitted to) those facts. *Blakely*, 542 U.S. at 303, 309. Therefore, we conclude

[3] Our conclusion that *Gaudin* is inapplicable here is supported by the fact that the U.S. Supreme Court does not reference *Gaudin* in *Blakely*. That omission is significant because the *Blakely* Court addressed a statute analogous to section 18-1.3-401(6) in light of *Apprendi*.

that *Gaudin* does not impact whether Mountjoy's sentences pass constitutional muster.

20. Next, Mountjoy argues that *Hurst v. Florida*, 136 S. Ct. 616 (2016), has "eroded" *Lopez*, calling into question the constitutionality of section 18-1.3-401(6). We disagree.

21. In *Hurst*, the defendant was convicted of first-degree murder, a capital felony, in Florida state court. *Id.* at 620. In Florida, a conviction for a capital felony, if based on no facts outside of the elements of the conviction, carried a maximum sentence of life in prison. *Id.* (citing Fla. Stat. § 755.082(1) (2010)). A sentence of life in prison, however, could be enhanced to a death sentence following an additional sentencing procedure. In the first phase of this procedure, the trial judge conducted an evidentiary hearing before a jury, and the jury rendered an advisory sentence of either life in prison or death without specifying the factual basis of the recommendation. *Id.* (citing Fla. Stat. § 921.141(1)-(2) (2010)). Notably, the jury would not make any factual determinations. After receiving the advisory sentence from the jury, in the second phase of the procedure, the trial judge would then weigh the aggravating and mitigating circumstances herself and decide whether to issue a death sentence and, if so, set forth in writing the facts she relied on for issuing the death sentence. *Id.* (citing Fla. Stat. § 921.141(3)).

22. In *Hurst*, the jury recommended the death penalty and per Florida's sentencing procedure did not state the facts that formed the basis for that recommendation. In following the Florida statute, the

trial judge made her independent finding that heinous-murder and robbery aggravators existed and, therefore, sentenced Hurst to death. *Id.*

23. In reviewing that decision, the Supreme Court held that Hurst's death sentence violated the Sixth Amendment since the decision to impose a death sentence was made on factual determinations made by the trial judge, not the jury. *See id.* at 622 (explaining that although in Florida the jury recommends a sentence, "it does not make specific factual findings . . . and its recommendation is not binding on the trial judge"). Specifically, the sentencing scheme did "not require the jury to make the critical findings necessary to impose the death penalty. Rather, [the sentencing scheme] require[d] a judge to find these facts." *Id.* Mountjoy now argues that Colorado's aggravating sentencing statute operates like the statute in *Hurst*, and therefore *Hurst* effectively overruled *Lopez*. We conclude that *Hurst* had no effect on *Lopez*.

24. *Hurst* did not modify *Blakely* and *Apprendi.* Instead, it merely applied the bedrock principle of *Blakely* and *Apprendi* that the *facts* relied on to aggravate a sentence must be found by a jury beyond a reasonable doubt, and that a judge may aggravate a sentence based on such facts. *See id.* at 621 ("[A]ny *fact* that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' . . . must be submitted to a jury." (alteration in original) (emphasis added) (quoting *Apprendi*, 530 U.S. at 494)). The issue in *Hurst* was that the jury recommendation failed to contain any factual findings, and the judge made a death sentence determination that

was based on judge-found facts. Contrary to Mountjoy's argument, nowhere in *Hurst* does the Court state that a jury, rather than a judge, must make the legal determination of whether facts found by a jury beyond a reasonable doubt warrant aggravation. If it had, the Court would have had to overrule *Blakely*. It did not. That is significant because, as previously noted, the statute in *Blakely* is functionally equivalent to the sentencing statute in question here. Accordingly, we conclude that since *Hurst* did not modify *Blakely* it does not influence our analysis in this case.

D. Application

25. Each of Mountjoy's aggravated sentences is constitutionally sound because each is based on at least one *Blakely*-compliant fact. As to the conviction for reckless manslaughter, the trial court aggravated Mountjoy's sentence based on two facts: that he used a weapon and that he tampered with evidence. These facts are category one *Blakely*-compliant because the jury necessarily found them beyond a reasonable doubt when it found Mountjoy guilty of the other two offenses. That is, because the jury separately found Mountjoy guilty of illegal discharge of a firearm, the jury found beyond a reasonable doubt each element of that crime, one of which was the discharge of a firearm. Similarly, because the jury separately found Mountjoy guilty of the crime of tampering with evidence, it necessarily found beyond a reasonable doubt that he tampered with evidence.

26. As to the conviction for illegal discharge of a firearm, the trial court aggravated that conviction based on two facts that are category one *Blakely*-com-

pliant. The fact that Mountjoy's firearm discharge resulted in a death is *Blakely*-compliant because the jury found Mountjoy guilty of manslaughter and, therefore, found each element of manslaughter beyond a reasonable doubt, including that he caused the death of another person. Similarly, as previously noted, because the jury found Mountjoy guilty of the crime of tampering with evidence, it found beyond a reasonable doubt that he tampered with evidence.

27. Lastly, the aggravated sentence for the tampering with evidence conviction was based on the fact that the tampering was related to a death. Again, this is category one *Blakely*-compliant. As previously discussed, when the jury returned a guilty verdict for manslaughter, it found beyond a reasonable doubt that Mountjoy caused another's death.

28. Mountjoy points out that the jury did not specifically find these facts in connection with the crimes whose sentences the court ultimately aggravated; e.g., the jury did not find that Mountjoy used a gun as it related to the manslaughter charge. This is immaterial. *Lopez* and *Blakely* only require that aggravating facts be found by a jury beyond a reasonable doubt; they do not require any linkage between the aggravating fact and the crime whose sentence is subsequently aggravated.[4] *See Blakely*, 542 U.S. at 301;

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[4] "The *Blakely* rule is concerned specifically with defendants' constitutional protections in criminal proceedings, particularly the right to a jury determination, beyond a reasonable doubt, that facts exist that expose the defendant to criminal penalties." *Lopez*, 113 P.3d at 726. Therefore, it only matters that a fact was determined by a jury, not that the jury found the fact with regard to a specific conviction, or even that it was the same jury

Lopez, 113 P.3d at 716.

29. Notably, two facts relied on by the trial court to aggravate—that the vehicle had two occupants and that it was driving away—are neither *Blakely*-compliant nor *Blakely*-exempt. This does not influence our analysis, because the presence of one *Blakely*-compliant or *Blakely*-exempt fact renders an aggravated sentence constitutionally sound even if the sentencing judge also considered facts that were not *Blakely*-compliant or *Blakely*-exempt. *Lopez*, 113 P.3d at 731; *see also Bass*, 155 P.3d at 555.

IV. Conclusion

30. For the foregoing reasons, we affirm the judgment of the court of appeals on other grounds.

JUSTICE GABRIEL dissents, and **JUSTICE HART** joins in the dissent.

JUSTICE GABRIEL, dissenting.

31. The majority concludes that the trial court did not deny petitioner Christopher Mountjoy's rights to due process and trial by jury when it aggravated his sentence based on facts that the jury found beyond a reasonable doubt when it convicted him of the underlying charges. *See* maj. op. ¶ 2. Because I believe that the majority's conclusion is inconsistent with the principles set forth in *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Gaudin*, 515 U.S. 506 (1995), and because I cannot say that the trial court's

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who rendered the conviction. *See id.* at 730.

constitutional sentencing error was harmless beyond a reasonable doubt, I respectfully dissent.

I. Factual Background

32. The majority sets forth the pertinent facts and procedural history, and I need not repeat its recitation here. I would add, however, that the People never alleged in their pleadings in this case that the crimes at issue were subject to any sentence enhancers or aggravators. Nor did the People in any way suggest to the jurors that the existence of sentence aggravators was an issue before them. To the contrary, the People first gave notice of their intent to seek aggravated-range sentencing *after* the jury had entered its verdict. In these circumstances, it is difficult for me to see how the aggravated-range sentences that the trial court imposed in this case could have complied with *Blakely* and *Apprendi*, which, as pertinent here, required the jury to find beyond a reasonable doubt the facts supporting the sentence aggravators.

II. Analysis

33. I begin by setting forth the applicable law and conclude that Mountjoy's aggravated-range sentences were imposed in violation of *Blakely*, *Apprendi*, and *Gaudin*. I then address whether this constitutional error was harmless beyond a reasonable doubt and conclude that it was not.

A. Applicable Principles of Aggravated-Range Sentencing

34. The Supreme Court has held that, except for 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," unless the defendant has either stipulated to the relevant facts or consented to judicial fact-finding. *Blakely*, 542 U.S. at 301, 310; *Apprendi*, 530 U.S. at 488, 490. A "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303.

35. For purposes of this analysis, no constitutionally significant difference exists between a fact that is an element of a crime and one that is a sentencing factor. *See S. Union Co. v. United States*, 567 U.S. 343, 358–59 (2012) (noting that the Government's argument "rest[ed] on an assumption that *Apprendi* and its progeny have uniformly rejected: that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor'"); *Washington v. Recuenco*, 548 U.S. 212, 220 (2006) ("[W]e have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt."); *Apprendi*, 530 U.S. at 478, 482–84 (same).

36. Moreover, a factual question is not to be taken away from the jury merely because it requires the jury to apply the applicable law to the facts presented. *See Gaudin*, 515 U.S. at 511–12. Thus, in *Gaudin*, the Supreme Court rejected the Government's assertions that (1) "materiality" for purposes of the charge of making material false statements in

a matter within the jurisdiction of a federal agency is a "legal" question for the court and (2) the requirement that the jury decide all elements of a criminal offense applies only to the factual components of the essential elements. *Id.* at 511.

37. In *Gaudin*, the Government had argued that deciding whether a statement was "material" required the determination of two underlying questions of historical fact, namely, "what statement was made?" and "what decision was the agency trying to make?" *Id.* at 512. The Government had further contended that the ultimate question in the case, i.e., "whether the statement was material to the decision," required the application of the legal standard of materiality to the historical facts. *Id.* The Government asserted that the two underlying questions were to be decided by the jury while the ultimate question was for the court. *Id.*

38. The Supreme Court rejected this argument for two reasons. First, the Court observed that "the application-of-legal-standard-to-fact sort of question . . . , commonly called a 'mixed question of law and fact,' has typically been resolved by juries." *Id.* Second, the Court stated that the Government's position had "absolutely no historical support." *Id.*

39. Turning to the facts of this case, I note that section 18-1.3-401(6), C.R.S. (2018), sets forth the sentencing aggravator here at issue. That provision allows a court to impose a sentence greater than the presumptive range only if the court finds "extraordinary . . . aggravating circumstances." *Id.*

40. In my view, this statute makes clear that the

sentencing enhancer at issue is the existence of "extraordinary . . . aggravating circumstances," not, as the majority states, whether a person died, the defendant used a weapon, or the defendant tampered with evidence. *See* maj. op. ¶¶ 25–28. Accordingly, under the principles set forth in *Blakely*, *Apprendi*, and *Gaudin*, the existence of extraordinary aggravating circumstances was the fact that the jury was required to find, and it is undisputed that it did not do so here.

41. In reaching this conclusion, I am unpersuaded by the People's argument that the trial court properly made the determination regarding the existence of extraordinary aggravating circumstances because the existence of such circumstances presented a legal issue requiring the application of law to facts. As noted above, *Gaudin* expressly rejected such an argument. *See Gaudin*, 515 U.S. at 511–12.

42. Nor am I persuaded by the People's argument, which the majority adopts, maj. op. ¶ 19, that *Gaudin* is distinguishable because it concerned an element of the offense and proof of guilt, whereas here we are dealing with sentencing aggravation. This argument ignores the fact, noted above, that the Supreme Court has long and consistently rejected any distinction between an element of an offense and a sentencing factor. *See*, *e.g.*, *S. Union Co.*, 567 U.S. at 358–59; *Recuenco*, 548 U.S. at 220; *Apprendi*, 530 U.S. at 478, 482–84.

43. Finally, I recognize that, in *Lopez v. People*, 113 P.3d 713,726 n.11 (Colo. 2005), we concluded that the determination of extraordinary aggravating circumstances "is a conclusion of law that remains

within the discretion of the trial court if it is based on *Blakely*-compliant or *Blakely*-exempt facts." We so concluded without ever mentioning *Gaudin*, and, for the reasons set forth above, I believe that this conclusion was directly contrary to *Gaudin* and, therefore, should be overruled.

44. For these reasons, unlike the majority, I would conclude that Mountjoy's aggravated-range sentences were imposed in violation of *Blakely*, *Apprendi*, and *Gaudin* and that the trial court therefore committed constitutional error in imposing those sentences.

B. Harmless Error

45. My foregoing conclusion does not end my analysis because I must next determine whether the constitutional error at issue was harmless.

46. We review preserved constitutional trial errors, like that at issue here, for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. Such errors require reversal unless we can say that the error was harmless beyond a reasonable doubt. *Id.* Accordingly, we will reverse if we conclude that there is a reasonable possibility that the error might have contributed to the judgment. *Id.*

47. Here, the People did not allege in their pleadings in this case that the crimes at issue were subject to any sentence enhancers or aggravators. Nor was the jury given an opportunity to decide whether facts existed to support a sentence enhancement. Instead, the People first gave notice of their intent to seek aggravated-range sentencing *after* the jury had entered its verdict. Thus, what the jury would have done had

it been asked to determine the existence of a sentence aggravator is speculative at best.

48. In addition, although the majority concludes that extraordinary aggravating circumstances were established by the fact that the jury found the elements of the crimes presented to them, *see* maj. op. ¶¶ 25–28, it is not at all clear to me that the jury would have found that mere proof of the elements of the crimes presented would have constituted *extraordinary* aggravating circumstances. To me, by definition, "extraordinary" suggests something beyond proof of the crimes themselves.

49. In perceiving reversible error in this case, I am persuaded by the Washington Supreme Court's analysis in *In re Personal Restraint of Hall*, 181 P.3d 799, 800–03 (Wash. 2008), in which the court considered an aggravated sentencing statute like that at issue here. In *Hall*, the trial court sentenced the defendant to an aggravated-range sentence under a Washington statute allowing for the imposition of an "exceptional sentence" if the trial court found that "substantial and compelling reasons" justified such a sentence. *See id.* at 800, 802 (quoting former Wash. Rev. Code § 9.94A.120(2) (1995), *recodified and amended* as Wash. Rev. Code § 9.94A.535 (2016)). The *Hall* court began by recognizing that the trial court had violated *Blakely* and *Apprendi* when it, rather than a jury, determined that "substantial and compelling reasons" existed for the imposition of an exceptional sentence. *Id.* at 800. The court then proceeded to address whether the error was harmless and concluded that it was not because, under the sentencing statute at issue, "no procedure existed

whereby the jury could have been asked to find aggravating circumstances." *Id.*

50. Here, as in *Hall*, the jury was never given any opportunity to consider whether extraordinary aggravating circumstances existed to justify the imposition of a sentence beyond the statutory maximum. As a result, Mountjoy was denied his constitutional right to have a jury make the finding of extraordinary aggravating circumstances to which he was entitled. Accordingly, I cannot say that the constitutional error here was harmless beyond a reasonable doubt.

III. Conclusion

51. For the foregoing reasons, I believe that the aggravated-range sentences that Mountjoy received, which sentences were imposed without ever having had a jury consider whether extraordinary aggravating circumstances existed in this case, violated the principles set forth in *Blakely*, *Apprendi*, and *Gaudin*. I further believe that this constitutional error was not harmless beyond a reasonable doubt. I therefore would reverse Mountjoy's aggravated-range sentences and remand this case for the imposition of constitutionally valid sentences.

52. Accordingly, I respectfully dissent.

I am authorized to state that **JUSTICE HART** joins in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS 2016COA86

Court of Appeals No. 13CA1215
El Paso County District Court No. 12CR1020
Honorable William B. Bain, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Christopher Anthony Mountjoy, Jr.,

Defendant-Appellant.

SENTENCES AFFIRMED

Division III
Opinion by JUDGE WEBB
Booras, J., concurs
J. Jones, J., specially concurs

Announced June 2, 2016

1. This sentencing appeal presents a novel question in Colorado — if a trial court sentences in the aggravated range based on facts not found by a jury, can the sentence be affirmed based on harmless error, if the record shows beyond a reasonable doubt that a reasonable jury would have found those facts, had the jury been requested to do so by special interrogatory?[1] Many other courts — both federal and state — have

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[1] The parties submitted supplemental briefing on this question.

answered it in the affirmative. We now join them.

2. A jury acquitted Christopher Anthony Mountjoy, Jr., of more serious charges, but convicted him of manslaughter, illegal discharge of a firearm (reckless), and tampering with physical evidence. The trial court imposed a sentence in the aggravated range on each count, to be served consecutively. On appeal, he challenges only the aggravated range sentences, primarily under *Blakely v. Washington*, 542 U.S. 296 (2004). We affirm.

I. Background

3. As the sergeant-at-arms of a motorcycle club, defendant was responsible for security.

4. According to the prosecution's evidence, the victim was involved in a fight on the club's premises. The victim discovered that his wallet was missing shortly after leaving. Then he and a companion drove around the area pondering whether to return and demand the wallet.

5. Defendant saw the car and fired eight shots as it drove away. Two bullets hit the car, one of which killed the victim. After the shooting, defendant directed other club members to "clean up" the area where the shooting occurred, and he deleted text messages related to the shooting from his cell phone.

II. *Blakely* Issues

6. Defendant first contends each of his aggravated range sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely*. But even assuming that they did, how should we deal with the overwhelming evidence of guilt? We conclude that

based on this evidence, a jury would have found the facts on which the trial court relied in imposing aggravated range sentences. And for this reason, we further conclude that *Apprendi/Blakely* error, if any, was harmless beyond a reasonable doubt.

A. Additional Background

7. The trial court enhanced defendant's sentences for each of his three convictions under section 18-1.3-401(6), C.R.S. 2015. This section permits a trial court to impose a sentence above a presumptive range if the court makes specific findings of extraordinary aggravating circumstances. *See generally People v. Kitsmiller*, 74 P.3d 376, 379-80 (Colo. App. 2002) (describing process by which trial court can enhance sentence beyond the presumptive range under section 18-1.3-401(6)).

- The court found that the manslaughter conviction was extraordinarily aggravated because defendant used a weapon, tampered with evidence, admitted firing his weapon eight times, fired into a car with two people inside, and fired while the car was driving away.
- In finding that the illegal discharge conviction was extraordinarily aggravated, the court explained, "[s]omebody died," and, after the discharge, defendant had tampered with evidence.
- Similarly, the court deemed the tampering count extraordinarily aggravated because someone had died.

8. Based on these extraordinary aggravating circumstances, the trial court doubled the maximum

presumptive range sentence for each conviction and imposed sentences of twelve years for manslaughter, six years for illegal discharge of a weapon, and three years for tampering with evidence. Then the court ordered defendant to serve these sentences consecutively.

B. Preservation and Standard of Review

9. The Attorney General concedes that defendant preserved his *Apprendi/Blakely* claim.

10. An appellate court reviews a constitutional challenge to sentencing de novo. *See Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). If the sentencing court committed constitutional error, an appellate court must reverse unless the error is harmless beyond a reasonable doubt. *See Villanueva v. People*, 199 P.3d 1228, 1231 (Colo. 2008).

C. Law

11. "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." *Apprendi*, 530 U.S. at 490. The "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303.

12. Applying *Apprendi* and *Blakely*, our supreme court has identified four types of facts that may constitutionally increase a defendant's sentence beyond the statutory maximum:

> (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; and (4) facts regarding prior convictions.

Lopez, 113 P.3d at 716. The first three types are "*Blakely*-compliant," while a prior conviction is "*Blakely*-exempt." See *id*. at 723.

13. In *Washington v. Recuenco*, 548 U.S. 212, 222 (2006), the Supreme Court applied the constitutional harmless error analysis of *Neder v. United States*, 527 U.S. 1, 15 (1999), to a *Blakely* sentencing error. The Court explained that the sentencing error before it was indistinguishable from the instructional error in *Neder* because "sentencing factors, like elements . . . have to be tried to the jury and proved beyond a reasonable doubt." *Recuenco*, 548 U.S. at 220. Specifically, in both cases, the trial judge, rather than the jury, had found the omitted element or aggravating factors. *See Medina v. People*, 163 P.3d 1136, 1142 n.6 (Colo. 2007). But no Colorado appellate decision has applied harmless error analysis in this context.

14. In cases decided both before and after *Recuenco*, a majority of the federal circuits have held *Apprendi/Blakely* error harmless if the record shows beyond a reasonable doubt that a jury would have found the fact or facts relied on to aggravate, had the jury been asked to do so. *See, e.g., United States v. Mann,* 786 F.3d 1244, 1251-52 (10th Cir. 2015); *United States v. King*, 751 F.3d 1268, 1278-80 (11th Cir. 2014); *United States v. Harakaly*, 734 F.3d 88, 95-

97 (1st Cir. 2013); *United States v. Salazar-Lopez*, 506 F.3d 748, 752-56 (9th Cir. 2007); *United States v. Pittman,* 418 F.3d 704, 710 (7th Cir. 2005) (applying plain error review but also concluding the error "would fall short under harmless error review as well"); *United States v. Matthews*, 312 F.3d 652, 665-67 (5th Cir. 2002); *United States v. Strickland*, 245 F.3d 368, 379-81 (4th Cir. 2001) (applying plain error and concluding, "beyond a reasonable doubt, that had the [drug] quantities been submitted to the jury, the jury's verdict would have been the same").

15. Many state appellate courts have reached the same result. *See, e.g., Campos v. State*, ___ So. 3d ____, No. CR-13-1782, 2015 WL 9264157, at *6 (Ala. Crim. App. Dec. 18, 2015); *Lockuk v. State*, 153 P.3d 1012, 1017 (Alaska Ct. App. 2007); *State v. Hampton*, 140 P.3d 950, 966 (Ariz. 2006); *Galindez v. State*, 955 So. 2d 517, 523¬24 (Fla. 2007); *People v. Nitz*, 848 N.E.2d 982, 995 (Ill. 2006) (applying plain error); *Averitte v. State*, 824 N.E.2d 1283, 1288 (Ind. Ct. App. 2005); *State v. Reyna*, 234 P.3d 761, 773 (Kan. 2010); *State v. Ardoin*, 58 So. 3d 1025, 1044-45 (La. Ct. App. 2011); *People v. Harper*, 739 N.W.2d 523, 547-49 (Mich. 2007); *State v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006); *State v. Payan*, 765 N.W.2d 192, 204-05 (Neb. 2009); *State v. Fichera*, 7 A.3d 1151, 1154 (N.H. 2010); *State v. McDonald*, 99 P.3d 667, 669-71 (N.M. 2004); *State v. Cuevas*, 326 P.3d 1242, 1255-56 (Or. Ct. App. 2014), aff'd, 361 P.3d 581 (Or. 2015); *State v. Duran*, 262 P.3d 468, 473-77 (Utah Ct. App. 2011); *State v. LaCount*, 750 N.W.2d 780, 797-98 (Wis. 2008).

16. Defendant's supplemental brief does not cite contrary authority from any jurisdiction.

D. Application

17. Should we begin by considering whether any of the extraordinary aggravating circumstances the trial court identified in aggravating the sentences is either *Blakely*-compliant or *Blakely*-exempt, as "[o]ne *Blakely*-compliant or *Blakely*-exempt factor is sufficient to support an aggravated sentence"? *Lopez*, 113 P.3d at 731. Defendant invites us to do so and argues that we should answer "no" because, while the jury found some of the facts on which the court relied to impose aggravated range sentences, the court violated *Blakely* and *Apprendi* by using facts found on only one count to aggravate the sentence on a different count. Specifically, the jury's determinations were as follows:

- By finding defendant guilty of manslaughter, the jury concluded that he had recklessly caused the death of another person. But the jury's verdict on this count did not determine that defendant used a weapon, tampered with evidence, fired eight times, fired into a car occupied by two people, or fired while the car was driving away.
- In finding the defendant guilty of illegal discharge of a weapon, the jury did not determine that someone had died or that defendant had tampered with evidence of the illegal discharge.
- And the jury did not determine that someone had died when finding defendant guilty of tampering with evidence.

18. Following this path would eventually require

us to reconcile possibly inconsistent decisions of divisions of this court. *Compare People v. Glasser*, 293 P.3d 68, 79-80 (Colo. App. 2011) (Trial court impermissibly aggravated the defendant's sexual assault sentence based on jury interrogatory answer that the defendant used a weapon to perpetrate a kidnapping, explaining that "the jury did not find that defendant used the deadly weapon during the kidnapping."), *with People v. Bass*, 155 P.3d 547, 554-55 (Colo. App. 2006) (upholding aggravation of "use of a stun gun" offense based on "elderly" element of concurrent conviction for robbery of an at-risk adult).

19. Instead of picking a winner between these cases, neither of which contains significant analysis, we assume, but do not decide, that, for the reason defendant argues, the trial court committed an *Apprendi/Blakely* error. Then we consider whether this assumed error was harmless beyond a reasonable doubt. For the following reasons, we conclude that it was.

20. First, uncontroverted and incontrovertible evidence proved that the victim had died — a fact the trial court relied on when aggravating defendant's sentences for illegal discharge and tampering. Indeed, defendant admitted this fact by pleading self-defense. *See People v. Roadcap*, 78 P.3d 1108, 1113 (Colo. App. 2003) ("Self-defense is an affirmative defense under which a defendant admits doing the act charged, but seeks to justify, excuse, or mitigate his or her conduct."). We conclude beyond a reasonable doubt that had a special interrogatory been submitted as to either the illegal discharge and tampering charges, a reasonable jury would have found — in the

trial court's words at sentencing — that "[s]omebody died."

21. Second, overwhelming evidence showed defendant's use of a handgun — a fact the trial court relied on when aggravating defendant's sentence for manslaughter. Surveillance footage introduced by the prosecution showed someone repeatedly firing at a car as it drove away. During his testimony, defendant acknowledged that he had shot at the car with the victim and another person inside. The medical examiner described the victim's "gunshot entrance wound to his left back." A crime lab technician explained that the bullet removed from the victim was "a .45-caliber projectile or consistent with a .45-caliber projectile," and defendant admitted that he had fired a .45-caliber handgun the night of the shooting. Again, we conclude beyond a reasonable doubt that had a special interrogatory been submitted as to manslaughter, a reasonable jury would have found that defendant fired a weapon.

22. Third, similarly overwhelming evidence showed defendant's guilt of tampering — a fact the trial court relied on when aggravating defendant's sentences for manslaughter and illegal discharge. Defendant testified that after the shooting, he "told people to go outside and clean up because we were closing the club up." And he testified to having deleted text messages from his cell phone:

> Q. Okay. And so you clear your phone because you don't want there to be evidence left behind of what happened, right?

A. Correct.

Thus, we conclude beyond a reasonable doubt that had a special interrogatory been submitted as to either the manslaughter or the illegal discharge charge, a reasonable jury would have found that defendant tampered with evidence.

23. In sum, because the evidence was overwhelming on the three primary [2]facts the trial court used to aggravate defendant's sentences — someone died, defendant used a weapon, and defendant tampered with evidence — we conclude that the assumed *Blakely* error was harmless beyond a reasonable doubt.

III. Extraordinarily Aggravated Finding

24. Although defendant does not dispute the legal basis for this harmless error analysis, he contends that even if the record shows the jury would have found the aggravating *facts* beyond a reasonable doubt, the jury — not the court — must *also* conclude that these facts constitute extraordinary aggravated circumstances. And because the jury did not do so, he continues, the harmless error analysis fails. But defendant cites no supporting authority. Regardless, and even assuming that defendant presented evidence and argument which could have persuaded the

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[2] Recall that one *Blakely*-compliant or *Blakely*-exempt fact is sufficient to aggravate a defendant's sentence. *See Lopez v. People*, 113 P.3d 713, 731 (Colo. 2005). Thus, in assessing harmless error, we need not analyze all of the facts the trial court relied on in concluding that defendant's manslaughter conviction was aggravated.

jury to find these facts were not extraordinarily aggravating,[3] this contention fails because it conflates the roles of judge and jury, and it thwarts the judge's role in sentencing.

A. Standard of Review and Preservation

25. Defendant asserts he preserved this claim, relying on the following statement by counsel at the sentencing hearing: "The jury did not find any of the facts [were] extraordinary aggravating [circumstances]." The Attorney General counters that this statement, taken in context, referred to the *Blakely / Apprendi* claim, not to defendant's claim that the jury must also decide whether facts are extraordinary aggravating circumstances.

26. Because counsel could have been attempting to articulate the argument defendant develops more thoroughly on appeal, whether this claim was preserved is a close question. Hence, we will assume that he preserved his claim. *See, e.g., People v. McMinn,* 2013 COA 94, ¶ 17 ("[W]e view the preservation issue as close, but we will assume without deciding" that defendant preserved the claim.).

27. Based on the above-cited authorities, we review de novo and must reverse unless the error, if any, is harmless beyond a reasonable doubt.

B. Law and Application

28. Our supreme court has rejected defendant's

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[3] For example, defendant suggests that the jury could have concluded that manslaughter committed with a handgun was less aggravated than manslaughter committed with a machete.

argument that the jury must find that allegedly aggravating facts constitute extraordinarily aggravating circumstances. *Lopez*, 113 P.3d at 726 n.11. In *Lopez*, the court explained that "this determination is a conclusion of law that remains within the discretion of the trial court if it is based on *Blakely*-compliant or *Blakely*-exempt facts." Id.; *see also Bass*, 155 P.3d at 555 (explaining *Lopez's* holding "that a jury is not required to find that a fact is an 'extraordinary aggravating circumstance'" (quoting *Lopez*, 113 P.3d at 726 n.11)).

29. Thus, we perceive no error.

IV. Void for Vagueness

30. Defendant next contends section 18-1.3-401(6) is void for vagueness both on its face and as applied to him. We conclude that this issue is not properly before us.

A. Preservation

31. The Attorney General disputes that defendant preserved this challenge and argues that constitutional issues should not be considered for the first time on appeal, even as plain error, citing *People v. Cagle*, 751 P.2d 614, 619 (Colo. 1988).

32. Defendant concedes that he did not preserve his facial challenge, but asks us to review this claim because it is "likely to recur in our trial courts." As for the as-applied challenge, defendant asserts that he preserved this claim by arguing to the trial court that an aggravated range sentence would deprive him of "due process under the United States and Colorado constitutions." As well, he points out that below he

raised "an issue of notice" and argued that an aggravated range sentence could be based on "whatever [the trial court] think[s] is aggravating."

33. These assertions fall short of showing preservation. At sentencing, defendant did not articulate "void for vagueness." Nor did he obtain a ruling on vagueness. *See People v. Douglas*, 2015 COA 155, ¶ 40 (Defendant's counsel "declined to request a ruling on her objection, which amounts either to no objection at all, or, worse still, to an abandonment of the objection and a waiver of any right to assert error on appeal."). And he failed to tell the trial court how the sentencing statute was unconstitutional as applied to him, but not in all of its applications. *See Colo. Ins. Guar. Ass'n v. Sunstate Equip. Co.*, 2016 COA 64, ¶ 26 ("When asserting an as-applied challenge, the party 'contends that the statute would be unconstitutional under the circumstances in which the [party] has acted or proposes to act.'" (quoting *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo. App. 2006))).

34. For these reasons, we cannot allow defendant to dodge his obligation to give the trial court fair notice of — and, thus, an opportunity to make findings on — his specific constitutional objection to the sentencing statute. *See, e.g., People v. Smalley*, 2015 COA 140, ¶ 81 (To preserve an issue for appeal, the trial court must have a "meaningful chance to prevent or correct the error.") (citation omitted). Thus, both defendant's facial and his as-applied challenges are unpreserved.

35. Even so, some cases decided since *Cagle* have held that an appellate court "may, as a matter of dis-

cretion, take up an unpreserved challenge to the constitutionality of a statute, but only where doing so would clearly further judicial economy." *People v. Houser,* 2013 COA 11, ¶ 35; *see also People v. Tillery*, 231 P.3d 36 (Colo. App. 2009) (reviewing an unpreserved double jeopardy claim for plain error), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011). We discern no reason to exercise our discretion and address either the unpreserved as-applied or facial challenges, although the latter requires a more detailed analysis.[4]

B. Unpreserved As-Applied Challenge

36. Our supreme court has rejected an as-applied constitutional challenge because it was not preserved. *Townsend v. People*, 252 P.3d 1108, 1113 (Colo. 2011) ("On appeal, he argued instead that the statute was unconstitutional as applied to him . . . . We will not consider constitutional arguments raised for the first time on appeal.") (citation omitted). So have many divisions of this court. *See People v. Veren*, 140 P.3d 131, 140 (Colo. App. 2005) (declining to review unpreserved as-applied challenge).[5]

37. Inadequacy of the record also disfavors addressing an as-applied challenge for the first time on appeal. *See People v. Allman*, 2012 COA 212, ¶ 15

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[4] Defendant does not seek plain error review of either the as-applied or facial challenges.

[5] Relying on *Veren*, three other divisions have declined to take up an unpreserved as-applied constitutional challenge. *See People v. Torres*, 224 P.3d 268, 273 (Colo. App. 2009); *People v. Cooper*, 205 P.3d 475, 477-78 (Colo. App. 2008); *People v. VanMatre*, 190 P.3d 770, 774 (Colo. App. 2008).

("Just as the absence of a sufficient record is a common basis for refusing to review unpreserved constitutional error, courts that have exercised their discretion to review such error have relied on the presence of a sufficiently developed record as a basis for doing so."). As noted in *Veren*, 140 P.3d at 140, to support an as-applied challenge, "it is imperative that the trial court make some factual record that indicates what causes the statute to be unconstitutional as applied." *See also People v. Torres*, 224 P.3d 268, 273 (Colo. App. 2009) (Trial court did not make findings of fact "concerning his due process and equal protection claims, specifically, concerning the identification of actual or potential victims," which would be relevant to an as-applied challenge.); *cf. People v. Patrick*, 772 P.2d 98, 100 (Colo. 1989) ("[I]t is imperative that there be some factual record made by the trial court which states why the evidence . . . causes the statute to be unconstitutional as applied.").

38. Defendant limits his as-applied argument to asserting that because the prosecution did not identify extraordinary aggravating facts before sentencing, he "could only guess at what a sentencing court might decide were extraordinary aggravating circumstances"; he continues, "it was 'difficult if not impossible' for [him] to 'prepare a defense against' the allegation of extraordinary aggravating circumstances." Had defense counsel raised these concerns before the trial court, it could have structured the proceedings to address them and then made appropriate findings. But because counsel failed to do so, we have no such findings to review.

C. Unpreserved Facial Challenge

39. Whether to exercise discretion and take up defendant's facial challenge requires us to consider judicial economy.

40. True enough, because defendant's constitutional claim only implicates sentencing, the trial would have occurred regardless. This factor favors taking up the unpreserved constitutional claim. *See, e.g., People v. Banks*, 2012 COA 157, ¶ 117 (reviewing the defendant's unpreserved constitutional sentencing challenge in part because "the remedy for the error would be merely vacating the sentence in part and remanding for resentencing, not reversing and ordering a retrial"), *aff'd in part and rev'd in part on other grounds by People v. Tate*, 2015 CO 42.

41. But this view of judicial economy only goes so far. And looking further, defendant's assertion that addressing his claim would further judicial economy by saving the parties and the courts time and resources remains flawed in two ways.

42. First, viewed systemically, whenever appellate review of a constitutional challenge to a statute is foreclosed because it was not raised before the trial court, the challenge remains to be resolved in another case. But surrendering to this view would gut the preference for preservation and effectively require that all such challenges be entertained on appeal. *Cf. Hagos v. People*, 2012 CO 63, ¶ 23 (noting the need "to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time" by raising the issue before the trial court).

43. Second, in criminal cases, the judicial economy inquiry assesses whether the issue is "likely to arise in a later proceeding below." *Houser*, ¶ 36. As the division in *Houser* explained, a likely ineffective assistance of counsel claim is a primary consideration. *Id.* at ¶¶ 37-42 ("[T]he specter of an ineffective assistance claim favors permitting flawed appeals to proceed in the interest of judicial economy."); *see also Estep v. People*, 753 P.2d 1241, 1246 (Colo. 1988).

44. A closer look at defendant's vagueness challenge dispels this specter because we do not see how he could show that his trial counsel was ineffective for failing to have raised vagueness. *See People v. Phillips,* 652 P.2d 575, 580 (Colo. 1982) (holding that a predecessor to section 18-1.3-401(6) was not vague). Thus, by declining to take up defendant's constitutional claim now, we do not create a significant risk of protracting the proceedings with a *meritorious* post-conviction ineffective assistance claim.

45. Lastly, defendant's assertion that a Supreme Court case announced since his trial — *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 2557-60 (2015) — favors addressing his unpreserved constitutional claim is unpersuasive. *Johnson* overturned an increased sentence under the Armed Career Criminal Act because the Act's residual clause was impermissibly vague, rendering its application unpredictable and arbitrary. But a division of this court recently explained that *Johnson* does not alter Colorado's vagueness analysis. *See People v. McCoy*, 2015 COA 76M, ¶¶ 64-66.

46. For these reasons, we decline to exercise our

discretion and address defendant's unpreserved constitutional challenge to section 18-1.3-401(6). *See People v. Whitlock,* 2014 COA 162, ¶¶ 39-41 (declining to review facial and as-applied challenges because they were not raised below); *People v. Fuentes-Espinoza,* 2013 COA 1, ¶ 16 ("[W]e will not consider the unpreserved constitutional attack on the statute."); *Tillery*, 231 P.3d at 52 (declining to address an unpreserved facial challenge to a statute).

V. Consecutive Sentences

47. Finally, defendant contends the trial court abused its discretion in sentencing him consecutively on each conviction. We discern no abuse of discretion.

A. Standard of Review and Preservation

48. Defendant has a right to appeal "the propriety of the sentence[.]" § 18-1-409(1), C.R.S. 2015.

49. An appellate court examines the trial court's decision to impose consecutive sentences for an abuse of discretion. *People v. Fritts*, 2014 COA 103, ¶ 39. "Sentencing is by its very nature a discretionary function, and because the trial court is more familiar with the defendant and the circumstances of the case, it is accorded wide latitude in its decisions on such matters." *People v. Myers*, 45 P.3d 756, 757 (Colo. App. 2001).

B. Law

50. A trial court may impose either concurrent or consecutive sentences where a defendant is convicted of multiple offenses. *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007). And when a trial court imposes consecutive sentences, an appellate court must affirm that

decision "if there is any evidence in the record to support the findings that separate acts support each of the convictions." *Fritts*, ¶ 39. But when two or more offenses are supported by identical evidence, the sentences must run concurrently. § 18-1-408(3), C.R.S. 2015.

C. Application

51. The trial court highlighted that separate acts supported defendant's convictions for manslaughter and illegal discharge of a weapon:

> Here, the evidence was that two bullets entered the car; one in the roof and one into the body of the car that killed [the victim]. So can the evidence support a reasonable inference that the convictions were based on separate evidence? And the answer is, Yes. The jury very well could have decided, We are convicting on illegal discharge of a firearm for the shot into the roof and convicted on the manslaughter for the bullet that went into the car and killed [the victim].

52. And the illegal discharge and manslaughter convictions were further distinct because they did not involve the same victim: both passengers in the car were victims of his illegal discharge conviction, whereas only the deceased was the victim of defendant's manslaughter conviction. Thus, we agree that defendant's convictions for illegal discharge and manslaughter are not supported by identical evidence and are therefore distinct. *See, e.g., People v. O'Dell*, 53

P.3d 655, 657 (Colo. App. 2001) (explaining that when multiple convictions involve multiple victims, the sentencing court has discretion to impose consecutive sentences).

53. As well, the facts supporting the tampering with evidence conviction — defendant's instructions to "clean up" after the shooting and deleting his text messages — did not involve the same acts as either the illegal discharge or manslaughter convictions.

54. Thus, the trial court did not abuse its discretion in imposing consecutive sentences, as the record shows each conviction was supported by distinct evidence. *See, e.g., People v. Hogan*, 114 P.3d 42, 58 (Colo. App. 2004) (Trial court did not abuse its discretion in imposing consecutive sentences when convictions require "proof of different elements," and "were supported by different evidence.").

VI. Conclusion

55. The sentences are affirmed.

JUDGE BOORAS concurs.

JUDGE J. JONES specially concurs

J. JONES, J., specially concurring.

56. I concur in the majority's judgment affirming defendant's sentences. But while I agree with much of the majority's reasoning, I write separately to address two issues the majority declines to address. First, I address whether the district court erred in relying on certain facts to enhance defendant's sentence, and conclude that it did not. Second, I address whether section 18-1.3-401(6), C.R.S. 2015, is, on its face, void for vagueness, and conclude that it is not.

I. *Apprendi/Blakely* Error

57. The district court enhanced the sentences on defendant's three convictions based on its conclusions that various facts of the criminal episode constituted extraordinary aggravating circumstances. *See* § 18-1.3-401(6). As to each conviction, those facts were as follows:

1. Manslaughter.

- Defendant used a weapon.
- Defendant tampered with evidence.
- Defendant admitted firing his weapon eight times.
- Defendant fired into a car with two people inside.
- Defendant fired at the car while it was driving away.

2. Illegal discharge of a firearm.

- Someone died.
- Defendant tampered with evidence.

3. Tampering with evidence.

- Someone died.

58. Defendant argues that because the jury did not find any of these aggravating facts specifically in conjunction with the offenses to which the district court applied them, [1]the court violated his Sixth Amendment right to a trial by jury as expressed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The majority assumes that the district court so erred, but holds that any such error was harmless. I agree with the majority's harmless error analysis, but rather than assuming, as the majority does, that the district court erred, I would conclude that the district court did not err.

59. As the majority points out, "[o]ther 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." *Apprendi*, 530 U.S. at 490. In this context, the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303. In *Lopez v. People*, 113 P.3d 713 (Colo. 2005), the supreme court identified four types of facts that a judge may rely on to enhance a defendant's sentence, consistent with *Apprendi* and *Blakely*:

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[1] For example, in convicting defendant of manslaughter, the jury did not find that he tampered with evidence.

> (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; and (4) facts regarding prior convictions.

Id. at 716. In my view, the district court properly relied on facts falling within both the first and fourth categories.

60. In finding defendant guilty of manslaughter, the jury necessarily found, beyond a reasonable doubt, that someone died. *See* § 18-3-104(1)(a), C.R.S. 2015 (a person commits manslaughter if he "recklessly causes the death of another person"). Just as obviously, in finding defendant guilty of illegal discharge of a firearm and tampering with evidence, the jury necessarily found, beyond a reasonable doubt, that defendant used a weapon and tampered with evidence, respectively. *See* § 18-12-107.5(1), C.R.S. 2015 (a person illegally discharges a firearm if he "knowingly or recklessly discharges a firearm into . . . any motor vehicle occupied by any person"); § 18-8-610(1)(a), C.R.S. 2015 (a person tampers with physical evidence if "believing that an official proceeding is . . . about to be instituted," he "[d]estroys [or] conceals . . . physical evidence with intent to impair its . . . availability in the . . . prospective official proceeding," and does so "without legal right or authority").

61. Thus, in enhancing defendant's sentence for manslaughter based on the facts that defendant used a weapon and tampered with evidence, the district

court relied on facts found by the jury beyond a reasonable doubt. Likewise, in enhancing defendant's sentence for illegal discharge of a firearm based on the facts that someone died and defendant tampered with evidence, the district court relied on facts found by a jury beyond a reasonable doubt. And in enhancing defendant's sentence for tampering with evidence based on the fact that someone died, the district court relied on a fact found by the jury beyond a reasonable doubt. As each enhanced sentence is supported by at least one *Blakely*-compliant fact, none of the sentences runs afoul of the Sixth Amendment. *Lopez*, 113 P.3d at 731.

62. I am not persuaded by defendant's argument that a jury finding doesn't count for *Blakely* purposes unless it was made specifically in conjunction with the offense to which the enhanced sentence is applied. The Sixth Amendment right at issue in this context is the right to a jury determination of facts. *See Blakely*, 542 U.S. at 301-02, 305-07; *Apprendi*, 530 U.S. at 476-77. That right is fully vindicated whenever a jury finds facts beyond a reasonable doubt.

63. The soundness of this position is evidenced by the prior conviction exception itself. As noted, a prior conviction may be used to enhance a sentence in a subsequent case. *Blakely*, 542 U.S. at 301; *Apprendi,* 530 U.S. at 490; *Misenhelter v. People*, 234 P.3d 657, 660-61 (Colo. 2010). This is so even though a different jury made the factual determination of guilt (and of the elements of the offense), and did so considering evidence of a different criminal episode. In such a situation, the prior conviction is *Blakely*-ex-

empt because "the underlying fact in a prior conviction analysis — that the defendant was previously convicted of certain crimes — is one that has passed through the safeguards of the jury right . . . ." *Lopez*, 113 P.3d at 730. So, too, convictions on separate charges by the same jury have passed through the safeguards of the jury right.

64. Courts in other jurisdictions have held that a jury's factual finding in conjunction with one charge may be used to enhance a sentence on another charge in the same case. *E.g., State v. Martinez*, 115 P.3d 618, 625-26 (Ariz. 2005); [2]*People v. Stankewitz*, 24 Cal. Rptr. 3d 418, 422, 424, 426-27 (Cal. Ct. App. 2005); *Robinson v. United States*, 946 A.2d 334, 335-39 (D.C. 2008). Another division of this court approved that practice in *People v. Bass*, 155 P.3d 547, 554-55 (Colo. App. 2006). To the extent the division in *People v. Glasser*, 293 P.3d 68, 79-80 (Colo. App. 2011), held otherwise, I would not follow it. See *People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008) (one division of the court of appeals is not obligated to follow another division's decision).[3]

65. Thus, I conclude that the district court properly aggravated defendant's sentences based on

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[2] Other Arizona cases applying jury verdicts in this manner include *State v. Patron*, No. 1 CA-CR 13-0629, 2015 WL 5167661, at *7-8 (Ariz. Ct. App. 2015) (unpublished decision), and *State v. Moore*, No. 2 CA-CR 2006-0248, 2007 WL 5323085, at *4-5 (Ariz. Ct. App. 2007) (unpublished decision).

[3] Neither *People v. Bass*, 155 P.3d 547 (Colo. App. 2006), nor *People v. Glasser*, 293 P.3d 68 (Colo. App. 2011), analyzed this issue in any depth.

Blakely-compliant facts found by a jury beyond a reasonable doubt.

66. Further, the district court properly enhanced the sentences based on *Blakely*-exempt prior convictions.

67. A conviction is considered a "prior" conviction for *Blakely* purposes if it is entered before sentencing on the different offense. *Misenhelter*, 234 P.3d at 661-62; *Lopez*, 113 P.3d at 730. So even a conviction on one charge entered at the same time as a conviction on another charge is a prior conviction for purposes of sentencing on the other charge. *Misenhelter*, 234 P.3d at 661-62; *see also Lopez*, 113 P.3d at 730 (a conviction on one charge entered after a conviction on another charge is a prior conviction vis-à-vis the other charge if entered before sentencing on the other charge).

68. At sentencing in this case, the district court enhanced the sentences because defendant had used a weapon, someone had died, and defendant had tampered with evidence. The court had previously entered convictions for illegal discharge of a firearm, manslaughter, and tampering with evidence. I view the district court's references at sentencing to be to those (prior) convictions. Thus, for this reason as well, the district court did not violate defendant's Sixth Amendment right to trial by jury.

II. Void For Vagueness

69. Defendant contends that section 18-1.3-401(6) is void for vagueness on its face and as applied to him. I agree with the majority that defendant did not preserve either claim. But I disagree with the majority that we should therefore decline to address the

facial challenge. As I have written in the past, constitutional claims are reviewable on appeal for plain error so long as they do not require further development of a record in the district court. *See People v. Greer*, 262 P.3d 920, 936 (Colo. App. 2011) (J. Jones, J., specially concurring).

70. Defendant's facial challenge to the statute does not require further development of a factual record: he contends that the statutory language provides no discernable limit to what a sentencing court may consider in aggravation. I would therefore review that challenge.[4]

71. In *People v. Phillips*, 652 P.2d 575 (Colo. 1982), the supreme court rejected a void for vagueness challenge to the statute. The statute has not been changed appreciably since that decision, which is binding on this court. *See People v. Allen*, 111 P.3d 518, 520 (Colo. App. 2004) (the court of appeals is bound by decisions of the supreme court); *see also People v. Novotny,* 2014 CO 18, ¶ 26 (The supreme court "alone can overrule [its] prior precedents concerning matters of state law . . . ."). Therefore, I would reject defendant's challenge on the merits.

[4] I agree with the majority, however, that defendant's unpreserved as-applied challenge is not reviewable.

APPENDIX C

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO 270 South Tejon Street Colorado Springs, Colorado 80903	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. CHRISTOPHER MOUNT-JOY, Defendant.	COURT USE ONLY
For the Plaintiff: LAUREL E. HUSTON, Reg #35534 Deputy District Attorney 105 East Vermijo Avenue, Suite 500 Colorado Springs, Colorado 80903 (719)520-6000 For the Defendant: CINDY K. HYATT, Reg. #35655 KAREN C. PARROTT, Reg. #40842 Deputy State Public Defenders	Case No: 12CR1020 Division: 22

19 North Tejon Street, Suite 105 Colorado Springs, Colorado 80903 (719)475-1235	
REPORTER'S TRANSCRIPT	

The above-entitled matter came on for hearing on May 16, 2012, before the HONORABLE WILLIAM BAIN, Judge of the District Court.

[2] P R O C E E D I N G S

(Whereupon, the following proceedings commenced at 11:03 a.m.)

THE COURT: All right. We'll call the Mountjoy matter.

MS. HYATT: Good morning, Your Honor. Mr. Mountjoy appears in custody. And Karen Parrott is with me from the public defender.

THE COURT: Good morning. Laurel Huston is here for the people. Are we expecting Ms. Vellar?

MS. HUSTON: Good Morning, Your Honor. Ms. Vellar had an emergency. She had to leave town this morning. It will just be me. Detective Schiffelbein is here, but he's staying in the gallery.

THE COURT: All right. This comes on for sentencing. Did you have any corrections to the presentence report?

MS. HYATT: We didn't. We were not happy that

Mr. Mountjoy was asked about the events. We specifically asked Mr.-- or asked that probation be ordered not to speak to Mr. Mountjoy about the circumstances given Mr. Mountjoy's appellate rights. Also the last recommendation is that Mr. Mountjoy be assessed a $45 drug and alcohol assessment fee, which -- and maybe I am just forgetting but I don't see where there was any alcohol. Usually those are for drug assessments.

THE COURT: It looks to be a typo.

MS. HYATT: That's what I was thinking. I didn't know if [3] he was referring to something else. But I think those are the only changes or disagreements with the PSIR.

THE COURT: All right. Argument from the People?

MS. HOUSTON: Your Honor, I believe there's a couple of people that would like to speak with you. Would you like to hear the witnesses first?

THE COURT: Sure.

MS. HUSTON: Your Honor, this is Marlon Means, the brother of Virgil Means.

THE COURT: Good morning.

MR. MEANS: As you see, my mom is not here. Nobody else in my family is here because of all of the injustice through all these cases that we face. My mom can't handle it. And I seen my mom raise five kids on $5 by herself. That is a strong woman, and I've never seen my mom ever not be able to handle anything. She lost her son, the backbone of our body,

of our family.

And it's just sad, you know that -- to think that this guy could just walk out of here. 16 years isn't even enough. You have to remember that Virgil Means also served his country. But unlike Mr. Mountjoy here Virgil Means came back from the military and served his community too. And what did he get for that? A good night at a bar and killed by some gangsters. And yet we sit here trying to find a way to be lenient.

And not only that, but I also feel sorry for our justice system, for the cops that risk their life every day to catch men [4] like this and for them to just watch them walk out. You know, as a community we all want the bad guys locked up, but we just let them right back out.

And we're not talking about a theft or a burglary. We're talking about he killed a man, a good man. The kind of man that went to church every Sunday and read out of the bible every day, who just went out to have a drink; while these guys went out to hurt somebody, maybe not my brother in particular but that's what they did. Now I don't have a brother. I'll never get my brother back. And I think we need a little justice. Can we get a little justice? Please? Thank you.

THE COURT: Thank you, Mr. Means.

Good morning. What is your name?

MS. FORDYCE: Good morning. My name is Bonnie Fordyce. F-O-R-D-Y-C-E.

THE COURT: What would you like to say?

MS. FORDYCE: My good friend, Harriet, called me to have me speak on her behalf today, and she's a dear friend. She's a grieving mother. I work with her. I've watched her grieve for her son. She's tired. She's worn. It's been more -- more than a year of grieving for a son whose life was taken tragically. She grieves for the grandchildren she'll never know through him, for the plans he had to help mankind, cut short by this man's choice to fire a weapon to kill him.

I've been through nearly every hour of these trials, and [5] I watched the videos. I heard the evidence. And it is dead clear to me that this is a 1 percent outlaw motorcycle gang that lives by their own rules, their own set of rules, and has a hunger to harm. I've sat through lies, cover-ups, and even intimidation by the shooter to the witnesses on the stand.

Your Honor, this country is built on truth, justice, and freedom. The freedom that Jason had that night to choose to go out to drink where we wanted to and party. But he was put at a distinct disadvantage that night. He was not handed gang rules at the door, and tragically he ended up dead. That's a fact. And most likely it was over a girl who is labeled "property" of those gang members. How tragic.

Your Honor, it was in yesterday and today's news that the Waldo Canyon thieves have received decades of prison terms. I stand before you today to plead with you to give human life much higher value than possessions, that you impose the maximum sentence allowed by law to this dangerous criminal. Justice must prevail in order that these things cease to happen, Your Honor. I thank you for listening.

THE COURT: Thank you.

MS. HUSTON: Your Honor, I have argument.

THE COURT: All right.

MS. HUSTON: Your Honor, for starters I just -- I'd like to make clear that the People believe that there is everything across the board from probation to maximum prison. In this [6] particular instance, the People will be arguing for an aggravated sentence for the manslaughter counts that merge.

THE COURT: So you're asking for more than six years?

MS. HUSTON: Yes. We believe the Court has the discretion to give up to 12 years on the manslaughter counts that merge.

THE COURT: Do you have authority for that?

MS. HUSTON: Sure. I would point the Court to both case law and statute. 18-1.3-401 is, of course, a sentencing statute that the Court relies on. And subsection 401(6) through (8) in particular deal with instances where the Court finds extraordinary aggravating circumstances and the only real -- there are some qualifications to that, Your Honor.

The Court is required to make specific findings on record as to what the circumstances are that you are finding to justify an aggravated sentence. That's under subsection (7). The list -- there is also a list that we're all familiar with under subsection (8) that lists things like parole and crimes of violence.

But the statute is clear that that list is not exhaustive and that the Court can look to other factors.

And the statute even in (8)(f) directs the Court that it may consider circumstances such as the use of a weapon or serious bodily injury to a victim. So that's how the statute lies it out.

Of course, in 2004 with the Blakely decision from the U.S. Supreme Court, we get further guidance and, basically, the [7] Court has to, as required -- to make specific findings to a Blakely compliant or a Blakely exempt fact. The People readily concede there's not any Blakely exempt facts for the Court to consider.

But a Blakely compliant fact can be a fact determined by the jury beyond a reasonable doubt and that can include a fact that was determined as an element of an offense. And it can also include a fact admitted by the defendant or found by you after a defendant stipulates to a judicial fact.

I think important for our particular case is that we have a series of charges here that the Defendant was found guilty for. And some of those charges have elements that are certainly Blakely compliant that you can rely on to aggravate the sentence, the most obvious and serious of which would be the death of Virgil Means.

There are -- Colorado law is full of case law examples where defendants have -- for example, similar to our circumstance -- been charged with very serious crimes including first degree murder, gone to jury trial, and found not guilty and acquitted of the murder charge; but found guilty of lesser charges and the Court gave aggravated sentences to those lesser charges.

The case that I find instructive and helpful is the

-- I believe it's Lee, L-E. People v. Lee, and that is 74 P3d 431. It's a Colorado Court of Appeals case. And I think it's helpful because in this particular case the brief facts were that the defendant was charged with first degree murder along with a whole series of other things; solicitation, conspiracy, burglary, [8] robbery. He went to trial, and he was found guilty of the lesser charge but acquitted of the murder charge. The Court in that case sentenced him in the aggravated range for the lesser crimes.

The case went up on several points of appeal, one of which was whether that sentence was appropriate. And the appellate Court found it was appropriate because the Court had made the specific findings necessary under the statute and under Blakely.

But it also talked about -- it's instructive because it went through the role that the Court played at the sentencing hearing in considering the aggravation, the mitigation; all the facts of the case. And ultimately the Court's determination that in that particular case the defendant's actions led to the death of somebody.

And one of the appellate issues in this particular case was whether the fact that the prosecutor recognized and argued that, even though he was acquitted of first degree murder, whether it was an appropriate sentencing argument and sentencing consideration for the Court; whether somebody who had been acquitted of first degree murder, whether the Court can consider that. And ultimately in Le, the appellate Court notes the Court is allowed to do that.

The Court is instructed to properly evaluate the

overall circumstances of the crimes of which a defendant is convicted and the serious risks that attend those crimes; a risk being, for example, the death of another person or persons.

[9] THE COURT: I have not read this case, but I plan to do that. Would that mean that other than manslaughter there is no such thing as a presumptive range because by definition there is a death?

MS. HUSTON: Your Honor, I think that the Court can definitely find within the presumptive range if the Court so desires. I mean, the presumptive range is there, and it's the baseline instruction for all of us. But I do believe -- and I found no case law to suggest otherwise -- that when you're dealing with manslaughter and dealing with a death, the Court can always find that that is a Blakely compliant fact upon which it wants to consider and rest an aggravated sentence, but you don't have to.

And so I would argue that the Court is allowed to consider that and extend the sentencing range, but obviously doesn't have to and can be guided merely by the presumptive range for a Class 4 felony.

There are other cases that I can cite to the Court that deal with this type of circumstance where a defendant is found guilty of a criminally negligent homicide and things of that nature. I have found no case law that says the Court cannot do that as long as the Court makes findings of at least a single Blakely compliant fact. Because case law is also clear that you can consider other things and rely on other facts that aren't -- that aren't and cannot be considered Blakely compliant facts. But as long as one of the facts meets

the requirement of Blakely, you [10] can get into the aggravated range if the Court feels that that is appropriate.

And in the Trujillo and Allen cases, I think it's important for the Court to note that there's a discussion of subsection (6) of the aggravated -- extraordinary aggravated circumstances language in 18-1.3-401. And the Court points out that what the trial Court -- the sentencing Court is to consider are simply the normal circumstances that a trial Court would always consider in imposing a sentence. And these are circumstances which become extraordinary in the evaluation of the Court because of the their quantity or quality.

In this instance, we're talking about quality. The fact that the extraordinary circumstances lead to a death as opposed to a theft case where there were 27 victims and Court might say, I would sentence in the presumptive range, but because of the quantity, I'll sentence in the aggravated range.

THE COURT: Do you have the cite for Trujillo?

MS. HUSTON: Trujillo is at 75 P3d 1133. Allen is 78 P3d 751.

So the Court doesn't have to look to specified facts or considerations that we would normally fall back and rely upon to increase a penalty or a change of classification of an offense like a full aggravator or a COV aggravator or this is the third time a particular defendant committed a crime, so it bumps him up to a felony. The Court merely has to consider the normal circumstances [11] that it would in imposing a sen-

tence and determine whether in this case, the circumstances of the crimes the defendant has been found guilty of rises to the level of aggravation. It is the People's position that it does.

And I would candidly tell you, Your Honor, probably if I was in front of you in a different case, I would make a similar argument. But I have to say in this particular case I feel like the facts before the Court are particularly supportive of an aggravated sentence, more than just the fact that somebody ultimately died.

The Court is instructed -- and I know the Court is aware there is no set factors or number of factors that you have to consider. And case law is full of different things that Courts have considered. But there is a lot of case law that talks about the Court considering events surrounding the crime and the patterns and the conduct which would indicate to the Court whether the defendant is a serious danger to society. Some of that discussion was in Leske, 957 P2d 1030.

And there is a lot of -- there is obviously many, many cases that come before the Court where the circumstances of the crime alone can justify the imposition of a maximum sentence or an aggravated sentence. The case law is clear about that. But if we just think about the circumstances surrounding this particular crime -- and I'd like to think about it in terms of this language from Leske about pattern of conduct. I know that when we normally [12] talk about pattern of conduct, what comes to my mind is somebody who is a repeat offender and has done this particular crime over and over again.

Here, I would like the Court to consider that the pattern of conduct in this particular case includes Mr. Mountjoy's personal role in an entity, the Sin City Deciples, which a self-avowed 1 percent outlaw motorcycle gang in which Mr. Mountjoy was not just a member or a passive participant at the club, but he was an active leader. He was the enforcer. He was, by his own testimony, involved in the club before it moved to the location at which the murder occurred and at the prior address. And he, in fact, got -- it appears from his own testimony and the testimony of others -- that his promotion and position within the club, was in part because of all his dedicated service in moving that club from one place to another.

The reason that's important is not just because of the activities going on at that club, but the fact that he would have been aware of that. And it came out in trial through testimony that there were a lot -- an alarmingly high number of calls for service for the police at all of the club's locations and prior locations.

The importance of that, Your Honor, is just simply that this is a man who was the club enforcer who dealt with problems and, certainly, who would have been aware of the problems. That goes to his recklessness, the conscious disregard that the jury [13] found that he conducted that resulted in the death of Virgil Means. Even before you get to the acts of that night, he was aware of his circumstances and the type of place he was hanging out.

I think that's important because the Court has received a lot of letters requesting leniency. And they talk about a man who has done a lot of great things for his community and country and sounds like a

great kid when he was growing up. That's different than the man who kept going to a place where the police were called not 10 times, not a dozen times but, you know, dozens of times to each of those locations for assaults, for robberies, for thefts, for gun violence, for disturbances, and ultimately for this homicide.

The Court is also instructed to consider public safety, the public interest in safety of deterrence and the criminal justice goal of protecting society and punishment of deterrence. And I would just point out that I'm not trying to blame everything bad that that club has ever done on Mr. Mountjoy. But Mr. Mountjoy's leadership role in it, I think lends me the ability to at least say the Court should be aware that the crimes continue.

I mean there's been another homicide where another club member is a defendant, a wholly new separate homicide. During his own trial, there was an assault and robbery where somebody was kicked out of the club, beaten up, and had their wallet taken. And that was over the weekend during the Defendant's own trial. During the Defendant's own trial, there was an additional shooting [14] outside.

The trial does become a concern. The public safety does become a concern for the People when there is this repeated pattern of activity and when the person who was the enforcer of the club has been found guilty of a conscious disregard for safety that resulted in the death of somebody. And, of course, the Court is instructed to consider whether it's a crime to persons or property and the likelihood of depreciating the seriousness of the offense with a lesser sentence. And I think here all of that weighs to an aggravated

sentence.

And to be clear, Your Honor, I'm not simply asking the Court for an aggravated sentence. I'm standing before you on behalf of the district attorney's office, the victim's family, the Colorado Springs Police Department, asking that you use your maximum discretion to sentence Mr. Mountjoy to 16 1/2 years; 12 years on the manslaughter charges, which merge; and then the maximum for the other two charges which would be 18 months on the F6 and three years on the F5.

THE COURT: So you're not asking that the other two be aggravated?

MS. HUSTON: I am not.

THE COURT: Okay. Do I have the authority to aggravate them, do you think?

MS. HUSTON: Well, I think, Your Honor, if you can find a Blakely compliant fact, you could and the same fact could be used.

[15] So maybe, perhaps, I should have thought that through more. You don't have to find an element of the offense. In the instance of the manslaughter, the death is an element of the offense.

But you can use the death as a fact that the jury found in Count 1 to aggravate the other count. That is clearly allowed under case law. So the Court could find an aggravated sentence on all of those counts. To be perfectly frank, Your Honor, I hadn't considered that until now. So I'm going to revise my argument and say I would like you to consider aggravation on all them.

THE COURT: All right.

MS. HUSTON: Your Honor, I just want to say a couple more things about the Defendant's role. I know the Court has sat through two very lengthy preliminary hearings, multiple trials and hearings, a couple of sentencing hearings and are well aware of the facts. But I would for the record remind the Court that the testimony that the Defendant gave himself at his trial was that he was essentially leading events that night. If we take the Defendant at his word, he in fact, told the other people not do to anything and ran forward with his gun.

The importance of that is he was directing and leading the actual event that led to Virgil Means' death. Not just as a leader; as the enforcer. But when it actually went down, he is the one we see in the video charge forward with the gun; by his own words, Taking care of it. He was the only out there that we're aware of that had the authority to tell the others to do anything.

[16] And, Your Honor, he has a strong knowledge of firearms, maybe better than most defendants that come before you because of his military service. And he fired a gun. Even if we believe that he was unaware that anybody else was firing or going to fire, he fired a gun; not just at Virgil Means, but at a car with two people in it and the freeway behind (indicated) and all of those businesses (indicated). And the Court has been to the scene. It's not a long distance.

It's a tragedy that Jason Means was killed but, honestly, there could have been even far worse conse-

quences. We heard Mark Nadeau's testimony. Bullets came very close to him. Bullets could have hit people even in the area. And he knows about guns. He knew what he was doing.

Your Honor, just two other brief points. And that is this is not the same as other Class 4 felonies. As both Marlon Means and Bonnie Fordyce mentioned, lots of things are Class 4; theft, criminal mischief, drug charges. This is a wholly different category. Death is different.

And I know that the Court is aware of this, but I think it's important to state on the record that I know you've received letters talking about the Defendant's accident or mistake. There has been a guilty finding in this case. Part of that guilty finding by the jury was this was not an accident, not a mistake. The jury did not find that Christopher Mountjoy was defending himself or others. What they found is that he was reckless and he [17] recklessly killed somebody by consciously disregarding substantial and unjustified risk. That's what the jury found.

And, finally, Your Honor, I guess it goes without saying, but I have to say that Virgil Means' family and friends have been here I think for every single court appearance no matter what it was; for every five-minute setting and every three-day hearing. When Harriet Chess or Marlon Means weren't here themselves, Harriet's co-workers who she works with at a nursing home hospital facility, would come after working all night long and sit in this courtroom having not slept, for hours on end.

And during every serious court proceeding, including Mr. Mountjoy's trial, they have stood in the hall and waited for the proceeding to be over because they can't stand being in the courtroom and hearing the facts of how their loved one died. The family is devastated. And, frankly, Your Honor it's just too difficult for them to be here anymore and to participate in the proceedings. And I know the Court would never hold that against them.

But I think somebody needs to just say they're here in spirit. They're never getting their loved one back, and they're relying on the Court to recognize they've hung in as long as they can.

Your Honor, I ask the Court to please sentence in the aggravated range for these charges, to give the maximum sentence allowed by law and to order that the counts be consecutive. As we [18] all know, we have no control over how long somebody stays at the Department of Corrections. But everybody in this room that deals with the system is aware with a charge like manslaughter that Mr. Mountjoy won't serve nearly the time he is sentenced to.

If the Court sentences him to the maximum rate, he's still going to serve literally a handful, perhaps only 5 fingers, perhaps only 5 years for a 16 1/2 year sentence. That is not fair, but that's something we cannot do anything about. We can, however, sentence him to the maximum sentence allowed by law, and that's what I ask you to do.

THE COURT: Thank you.

Ms. Hyatt?

MS. HYATT: Your Honor, that's all fine argument made by Ms. Huston. All arguments that should have been made to the jury had they wanted to submit aggravated circumstances to the jury. They chose not to do that, Your Honor. They cannot come in here in the sentencing and ask you to do that for them.

THE COURT: Well, they're saying legally I have the power to find in the aggravated range. Do you have authority that is contrary to that?

MS. HYATT: I do, along with Apprendi, along with Blakely. There may be -- the Court may not impose an aggravated sentence based solely on the fact that the elements of the offense were proven. Leske 957 P2d at 1044, note 18. Factors that the Court can consider are facts found by a jury beyond a reasonable [19] doubt that were not submitted to a jury in a case. Could have been, nothing else preventing the Prosecution to do that. But they chose not to.

THE COURT: What Ms. Huston is saying is that the use of a firearm can be used as an aggravating factor. Wasn't there a finding of illegal use of a firearm?

MS. HYATT: I don't know that there was. There was certainly the illegal discharge.

THE COURT: Isn't that a finding of illegal use of a firearm?

MS. HYATT: That is finding of a firearm. And what makes that different from any other manslaughter where there's a gun used? If the legislature wanted to make manslaughter a crime of violence,

they would have done that. There is nothing special about committing manslaughter with a gun versus any other -- any other weapon. There is nothing extraordinary about that.

Further, in terms of facts admitted by the jury and facts found by the Court after judicial fact finding for sentencing and facts regarding prior convictions, Ms. Huston has confessed there are no facts regarding prior convictions.

And I think the other thing that the Court needs to take into consideration is I don't believe that the Court can sentence him consecutively for the illegal discharge. And that's based on 18- -- sorry. That's based on 18-1-408 subsection (3). When two or more offenses are charged as required by subsection (2) of this [20] section and they are supported by identical evidence, the Court upon application may require the State to elect the counts on which the issues will be tried. And I don't think that's relevant language.

But what's relevant is if more than one guilty verdict is returned as to any defendant, the prosecution where multiple counts are tried as defined by subsection (2) of this section, the sentences imposed shall run concurrently, except that where multiple victims are involved the Court may in its discretion impose consecutive sentences. The illegal discharge and the manslaughter are on the same evidence, the absolute same evidence.

THE COURT: How do we know the illegal discharge of a firearm isn't a shot into the roof?

MS. HYATT: We didn't have the jury make that

determination, so we don't. It could be the same. Presumably it is the same because they found him guilty of manslaughter. This is exactly what Apprendi and Blakely were set to address.

We cannot go back after we've released the jury and try to get back into their heads and see exactly what they were trying to figure out. This is what they found. There is a way to do that. We have interrogatories. We have ways of making the jury make those findings beyond a reasonable doubt, which Mr. Mountjoy is entitled to under the United States and Colorado constitutions. Had they wanted to charge those separately, they would have simply put in two charges; illegal discharge, roof; and illegal discharge, [21] Mr. Means. They didn't do that.

The Court cannot go back now and try to parse that out. It's not the role of the Court or the responsibility of the Court to do that. Our position is that Mr. Mountjoy is looking at the presumptive range of 2 to 6 years for manslaughter. The illegal discharge has to merge based on statutes, which is based on double jeopardy principles, being punished twice for the same act.

And as far as the tampering, I think arguably under the same statute, 18-1-408, the offense is a continuing course of conduct and the defendant's course of conduct was uninterrupted until the law provides a specific period of such conduct constitutes separate offenses. And that's subsection (1)(e), which is also -- they're all based on the double jeopardy clauses of the constitution.

THE COURT: Isn't tampering really a separate

act? I mean, that's certainly not identical evidence of the shooting.

MS. HYATT: Not identical evidence, Your Honor, no, but certainly a continuing course of conduct.

THE COURT: Does the statute say if it's a continuing course of conduct, it all has to run concurrent?

MS. HYATT: I think -- frankly, Your Honor, I think the Court has discretion to stack the F6 tampering. I do not believe the Court has discretion to stack the F4 or aggravate the F4 or the manslaughter conviction. That could have been determined by the jury; it wasn't. It could have been determined by the legislature [22] to be a crime of violence because it involved a firearm. That wasn't how -- the jury made no -- absolutely no determination that this was a crime of violence, which they are required to do if it's to be punished as one.

All of those things could have been done and they weren't. And it is inappropriate and not the Court's role now to go back and try to get inside the jury's head as to what exactly they found. And I would also point the Court to Lopez, which is 113 P3d 713. That case was more specifically post-Apprendi and post-Blakely, Colorado case that implemented the rulings and the findings in the United States Supreme Court cases.

As far as -- and in terms of another endangering of Mr. Nadeau, Mr. Mountjoy was never even charged with attempt on Mr. Nadeau. Never charged with attempted murder, never charged with assault, never charged with anything whatsoever having to do with Mr. Nadeau.

The Prosecution could have done that had they wanted an enhanced penalty. They didn't do it, Your Honor. They chose not to do it, and that can't be used now to get the Court to essentially correct the error they made in not submitting them at trial.

I note if the Court wants to look at --

THE COURT: I have it. I've read these cases.

MS. HYATT: And we have one or two witnesses on behalf of Mr. Mountjoy. Did the Court want to hear the witnesses now?

[23] THE COURT: Sure.

MS. HUSTON: And, Your Honor -- I apologize to Ms. Hyatt -- but I failed to look at a note earlier. There is one other family member that wanted to speak on behalf of Mr. Means, so if that would be possible. I assume the Court would like to hear that before all the witnesses for Mr. Mountjoy.

THE COURT: Yes. Why don't I hear from this person and then I'll hear from Mr. Mountjoy's witnesses.

MS. HYATT: Right.

THE COURT: All right. Come on up, ma'am. Good morning. And remind me of your name again.

MS. WHITE: Elizabeth White.

THE COURT: What would you like to say?

MS. WHITE: I would like to say no matter what happens today we all know that my brother can't walk out of the grave. But this man no matter how good he was as a child or how well he does in the military, he

made a decision to pull out his weapon and make those shots. I don't know if he's been to Afghanistan or wherever, but he knew just as well as I would know right now if I was angry and I had a weapon of any sort and came at you or shot at you, the consequences of that.

There is evidence. There's a videotape. There's a videotape. I'm almost going out of my mind on that. It's not like hearsay; he said, she said. There is a videotape showing these young men shooting at the car. I can't say that Mr. Mountjoy's [24] bullet hit my brother. I can't say that the next young man's bullet hit my brother, but they all shot. They all knew what they were doing regardless of stupid or just raging out of their minds. I don't care what they were thinking at that moment, at that hour, at that time.

My brother passed away. He was 31 years old. He passed away because of their decisions. No one told these young men to do so. And I will be damned if I hear one more time that I have -- what is it -- post-traumatic stress disorder. This has given me post-traumatic stress disorder. This has given my mother and my brothers and my sisters post-traumatic stress disorder.

I have a husband who is in the military who is a veteran of Afghanistan and Iraq. I have a brother-in-law who is a veteran. I have -- my brother is a veteran. No one came back from being overseas and just started shooting people because they saw what they saw. They saw awful things. People see awful things but they make a difference in other people's lives. They don't go back and decide to make a decision on someone else's. I can't bring my brother back, and I

understand that. And that is a hard, hard lesson to learn every day when I want to speak to him. That's a hard lesson.

But I know one thing: That these young men made a decision and there's no reason and there's no way for them not to get what's -- 16 years? Is that the max? 16 years? By the time he gets out, his child probably won't even be out of middle school. [25] With good behavior, he will be out by six years at max. I know this because I have friends that have gone to prison from high school. I see them walking around now. How did you get out? Oh, you know, the good time, blah, blah, blah. You have a daughter. You have a wife. They will be back. When you get out of prison they will still be here, God willing. I'm sorry that you made a bad decision, but we make decisions every day.

And one thing I want to tell you, Mr. Mountjoy, from the bottom of my heart is that you know what? This is not the last -- regardless of what you believe, your Buddhism, whatever -- that this is not the last time you will stand in front of a judge. And this time -- this next time that you actually do stand in front of a judge, there won't be hearsay. He's going to ask you, Why did you take my son? And there won't be if this and if that. There won't be lies. There won't be, Oh. Well, God, this and this and this and this. Those things won't stand up to him. And I don't know what lies you told yourself or told your family or told this Court, but those won't stand up.

And I all I can do is pray for your moral soul because without -- without God I feel so bad for your

family. I had to sit down and stop thinking about myself for a minute. And I had to think about the families -- not just my family that you have ripped to shambles, but everybody else that you brought through the wringer. You have a daughter. You should be ashamed of yourself. And that's all I have to say.

[26] THE COURT: Thank you, Ms. White.

Ms. Hyatt?

MS. HYATT: Your Honor, we ask Mr. Mountjoy's mother-in-law to address the Court.

THE COURT: All right. And your name is?

MS. HARP: My name is Delia Harp (phonetic),

Mr. Mountjoy's mother-in-law.

THE COURT: Good morning.

MS. HARP: My daughter is Carol Ann. And it is hard not to talk when I heard things being said that this is the man that Chris is. He came into my daughter's life. He is funny. He will do everything for everybody. He helps everybody. He's a man that -- I don't know how to explain it.

He knows everybody. In Fort Campbell when he lived over there where I live in Tennessee, we would go out in public and people -- Hey, Chris. And hugs and, Hey, man, how are you doing? And I would be like, Oh, is that somebody you know? Oh, no, no, no, no. I met them at the bowling alley or at the gym; something like that. Everybody knew him. He knew everybody's name.

He was there. You need some help? I'll help you.

He was one that when those babies were born -- and not too many men can do this -- he jumped in there for every single one of those three children, two girls and one boy. He cut the umbilical cords. He was there for every push. He was there for every pain. He never backed down.

[27] He always helped anytime he came to my house. Mom, you need fences fixed? I have horses and stuff like that. And he wasn't a cowboy, but he tried and did everything, hauled hay. He did everything. He helped everybody. There was nobody he would ever turn his back on, that he would help.

And I'm getting kind of emotional. I'm sorry. I'm not trying to. But it's hard to hear that people try to call him a murderer, and he's not. There was circumstances that happened as far as I'm concerned. It didn't end up right. You know, I'm not the DA or his defense attorney or anything like that, but I know Chris. He did not go there to harm somebody.

He's the one when they say "the enforcer" -- probably because he's the guy that will listen to both sides. He's not the one that's going to take somebody's side and say, You're nothing. He's the one that will listen to both sides and take things into consideration and -- what they say -- take care of it because he listens. That's why he was a counselor for the Wounded Warrior program. That's why he has a good military reputation because he wasn't and is not a person that just goes after somebody. He's the person there that helps people.

And I probably should stop there because I can ramble, so...

THE COURT: All right. Good morning. And your name is?

MS. MOUNTJOY: Good morning, Your Honor. My name is Kathleen Mountjoy. I'm Chris Mountjoy's mother. I acknowledge [28] this is a travesty and a tragedy. It's affected so many families and so many people.

But I can't help but want to add -- I know you read my letter -- that my son doesn't have a mean bone in his body. He's a good and nurturing son and man. And I think it was proved during the trial that his bullet did not kill the victim. And, in fact, he was protecting because of a perceived -- a perceived danger.

I think that Colorado Springs and law enforcement -- I don't understand why they would allow after-hours clubs to continue. I heard a great deal of comments, remarks regarding the -- the crimes that go on at these type of places. And I think that there's mitigating circumstances in that and mitigating factors in that these clubs are allowed to have after-hours parties. The police are well aware of them.

When I drove here from Denver last night, there were police cars all along the freeway. Where are they when people are drinking illegally after hours in these private clubs where there is -- is a record of violence or crimes? I just don't understand why it can be allowed to go on.

As for my son and his association with the so-called 1 percent club, I was unaware of most of this until this last 14 months. I've done a lot of research. I've been around the block once or twice. I find this club to be somewhat comedic. I don't look at them as

a 1 percent club.

The atmosphere. Mr. Means had been drinking throughout [29] the night with a group of friends, like anybody else would go out and drink. 2:00 in the morning, that's when you go home. These young men went to an after-hours club. They knew the atmosphere in which they were partying. They knew that there is a -- people are allowed to carry guns in this place. They know that they're patted down.

Mr. Means, it was proven that -- or it was proven at trial that he left threatening. He came back several times, three. And then twice, I think, in the car if I remember correctly. He kept coming back. Why would you come back to this type of atmosphere? That in itself is reckless. I feel -- I just feel -- my heart goes out to his family. I'm affected. I know they're affected a hundredfold more. But I really think that Mr. Means set this incident into motion by his own actions.

And I just don't think that it's appropriate for my son to receive a maximum sentence. He's never, ever really been in trouble before. He's very sensitive. He's always been raised to put himself in other people's shoes and to feel how they would feel, to empathize with other people. And that's why he was a peer counselor in school. And yes, he was a good young man -- is a good young man.

His history is good. He's still the same person. Even after his deployments overseas and the horrors that he witnessed, he has a loving and giving heart. He would have been the first person to help Mr.

Means leave safely. Mr. Means took it upon [30] himself to come back again and again, and I just think that was foolhardy. He threatened. Mr. Means threatened people as he was leaving the club. He was intoxicated. I just don't know where law enforcement -- they just ignore this cul-de-sac. That's just beyond my comprehension.

Christopher has support from many, many people; many people who didn't write letters and many people who couldn't be here. Our family couldn't be here. I'm here on behalf of my entire family requesting leniency so Chris can return to his family, become the breadwinner that he was and continue with a good life. He had a good life. This was a mistake.

But I don't think that -- I think it was proven through physics that his -- his gun didn't shoot. He was trying to protect people who were in fear. And he would have done the same thing -- the same thing if Mr. Means was standing next to him. He would have protected him. I went on Mr. Means' Facebook page. He was quite like my son. The two of them were very similar. I -- my son is still alive. I'm thankful for that. He could have easily been killed as well.

I just want you to know that I think to impose a maximum sentence and place him in an institution with hardened criminals is not going to be a positive -- a positive thing. I mean, he's -- he's not a hardened criminal. He is -- he can contribute to society. He has stated to me over and over and over again he will never touch another firearm the rest of his life. He has been [31] severely impacted by this whole incident, as he should be.

I just request that -- that in your discretion that you allow Christopher to return to society, pay his debt back, and to become a productive member of society again and a father and a husband, and be returned to his family. They're suffering. All of us in this courtroom are suffering. Thank you.

THE COURT: Thank you.

MS. HYATT: Obviously, Your Honor the Court received a number of letters. Ms. Mountjoy is here and she wishes to stand on her letter.

THE COURT: All right. Any other argument?

MS. HYATT: Just this, Your Honor. When Mr. Mountjoy came back from deployment, he was looking for this club or some sort of affiliation, some sort of brotherhood, some sort of group that resembled what he had in the military. It's more for that reason and that reason alone that he joined Sin City. Mr. Mountjoy didn't join Sin City because that would be a group enterprise to get together and commit crimes with.

He joined it because they are a very, very tight brotherhood. Their motto is, I am my brother's keeper. That part appealed to Mr. Mountjoy. He was not a career criminal or somebody who was constantly getting into trouble and looking for a group of people who were like-minded so they could all commit crimes together.

He came back and carried a gun. I think you would be [32] hard-pressed to find veterans who have been deployed who don't have guns on them most of the time. Just by virtue of that experience in that particular type of combat and difficulty to readjusting

to living here after being deployed -- and most people like Mr. Mountjoy being deployed more than once.

The other thing I would add, Your Honor, there was no offer in this case. And that's the Prosecution's prerogative. And quite frankly, it gave me a lot less stress. But I say that because this isn't a case where I had a client who refuses to negotiate, refuses to take any responsibility. That was never the case with Mr. Mountjoy. He wasn't given an opportunity through plea negotiations to do so, which was why we ended up going to trial.

Beyond that, Your Honor, I don't have much to add. I think this Court knows a lot about this case through the prelim, the two jury trials. This isn't a case where there's a lot of information out there that the Court doesn't know about. Mr. Mountjoy's medical records, military records were all turned over to the district attorney and to CMHIP. There is nothing out there, nothing hidden that the Court doesn't know about. This is it.

And I don't think that the Court has any ground to aggravate this sentence based on any reason. I think had the Prosecution wanted that, they needed to submit them to the jury and that would have taken care of the issue. We can't go back and try [33] to -- do second-guessing or fact-finding for them at this point. So we would ask the Court to impose a sentence in the presumptive range of manslaughter.

And Mr. Mountjoy just has a brief comment for the Court.

THE COURT: Mr. Mountjoy, what would you like to say?

THE DEFENDANT: Your Honor, thank you for your time and effort in this legal matter and for reading all the letters on behalf of myself and from my family.

I would like to send my deepest apologies and dearest thoughts and prayers to the Means family. I pray that they stay strong as a family and continue to stand proud of who they are.

This is not been easy for either side. I have let a lot of people down, and they are still standing next to me. Numerous people that you bring with this type of sentence -- and I do understand that every crime has a punishment. I ask that if you do see it's fit to not issue that type of punishment, it is not for me, it's for everyone back here in my family. Thank you, Your Honor.

THE COURT: Thank you.

MS. HUSTON: Your Honor, if the Court is going to review the cases, can I give you additional cites for consideration?

THE COURT: Yes.

MS. HUSTON: Okay. I'll give the cites. Watt, 165 P3d 707; Presiado-Flores, 466 P3d 155; Fiske, 194 P3d 495.

With regard to consecutive versus concurrent, there's a [34] number of annotations in the statutes, but the Court could certainly take a look at Wieghard, W-I-E-G-H-A-R-D; 743 P2d 977; Williams, 33 P3d 1187.

And with regard to Blakely compliant facts, just

needing a single Blakely fact in response to some of what Ms. Hyatt said. She gave you the Lopez cite. There's also Huber, which is 139 P3d 628; and De-Herrera, which is 122 P3d 992. She also directed you to towards Leske, and I think that's a good case to look at as well. And I ask the Court to consider case law, perhaps, look at those cases as well.

MS. HYATT: May I approach just while I'm thinking of it?

THE COURT: Yes. Just so the DA knows, this is a motion for appointment of public defender on appeal, a motion to proceed in forma pauperis. I have 10 cases I need to read. There is a lot of people that are here for the sentencing. But you need know that I have read all 10 of these cases. I'll reconvene at 1:00 for the sentence.

(A recess was taken from 12:01 p.m. until 1:02 p.m.)

THE COURT: The Court will recall the Mountjoy case. The attorneys and Mr. Mountjoy are present.

Ms. Hyatt, my clerk tells me you indicated you have more argument.

MS. HYATT: I do, Your Honor. We object to the aggravated sentence -- being sentenced in the aggravated range on two separate grounds. One is due process under the United States [35] and Colorado constitutions. It's an issue of notice. There is no notice in the statute that requires committing -- in committing reckless manslaughter can lead to a sentence beyond the statutory maximum. The law gives a certain

time, and to sentence beyond that is a sentence beyond what the law promises.

The jury did not find any of the facts that Ms. Huston cited as extraordinary aggravating factors.

THE COURT: What about the use of the gun? Isn't that considered an aggravating factor?

MS. HYATT: They didn't find that that was an aggravator; they found it was use of a gun. People vs. Watt, that was a Colorado appeals case where the defendant pled guilty and waived statutory -- waived a jury finding of statutory aggravators or mitigators.

Presiado-Flores was pre-Blakely and Apprendi. Fiske was -- there wasn't any -- the Court couldn't aggravate because of a misdemeanor prior. And even the defendant stipulating to a prior conviction that -- stipulates that a prior conviction -- there was a prior conviction, and that was Blakely exempt and not an admission for the purpose of being sentenced in the extraordinary aggravating range.

Williams was also a pre-Blakely and Apprendi case. It was -- how it -- it affirmed the -- a Court sentencing a client on escape, consecutive. Trujillo was overruled as was Allen. DeHerrera was also a guilty plea. Huber was a sex offender status, [36] which the Court found was the extraordinary aggravating circumstance which required a sentence in the enhanced range.

I would also note for the Court that -- and, of course, jury trial and the right to jury trial, right to jury trial determination of those factors for that enhanced sentence. I would also note in Blakely and

Apprendi that both of those cases involved -- a defendant being convicted of multiple counts. And nowhere in those opinions did the Supreme Court say you can use other counts, other things that you are being convicted of as aggravators of each other. And, certainly, they could have found that.

And I think -- I don't think that it is -- that the Prosecution's argument to the Court; aggravate Mr. Mountjoy on whatever you think, whatever you think is aggravating. As long as you pick one Blakely compliant factor, you will not -- the appellate courts will uphold your ruling.

I think to say that is to essentially say that Colorado Courts allow trial Courts to say, Blakely and Apprendi thought these -- it was unconstitutional to aggravate under these circumstances. They said that. But, Judge, if you go ahead and aggravate for whatever reason you care to, just include one that's Blakely compliant. You'll be all right. I don't think that's honoring the spirit of Blakely and Apprendi, which found that without certain factors being present, it is unconstitutional to sentence someone in the aggravated range. And that's all I have.

THE COURT: All right. Thank you. Mr. Mountjoy, I'll [37] have you stand up at the podium there. Judgment and conviction will enter as to Counts 1 and 4, which are the manslaughter counts. Those were merged into Count 1. They're basically the same conviction, so it's just one conviction for manslaughter. Judgment and conviction will enter for Counts 5 and 6.

I have considered the arguments here today. I've

considered the evidence from the trial that I sat through and the preliminary hearing. I have reviewed all the letters that were sent to me. There were some 40 or 50 letters that were sent on behalf of Mr. Mountjoy.

I'll start with the letters. Setting aside the events from March of 2012 at the Sin City club, just set aside. If I look at you, Mr. Mountjoy, and consider your life prior to that date, you lived really an upstanding life, an honorable life. You were in the military. You served in combat. You were injured in combat. You were married. You had three kids. I've got 40 or 50 letters from people talking about how wonderful a person you are.

I have had defendants who come into court and they're disrespectful to their attorneys. They're disrespectful to me. They're disrespectful to the DAs. And then I get defendants who are the exact opposite. You are that exact opposite. You've always been courteous. You've always been kind. You've always been respectful. So again, setting side the events tied to these crimes, I believe you are as good a person as all of your supporters have been telling me that you are.

[38] Then when I consider the evidence in this case and the events of the night in question, it's hard to understand how a person as good as you have been did these acts. I'm sure it's been mind-boggling to all of your family and your supporters and your friends. It's mind-boggling to me that somebody who has had such a good life and served their country and got injured got involved in this.

But as the argument has been made, you joined a

club that was advertising itself as an outlaw club. You prided yourself on being a 1 percent motorcycle gang. Your mother indicates it's kind of a joke, but it's not. The evidence did show the cops are out there all the time. You were the enforcer. You were a prime leader of this organization. Again, I don't know why -- in light of all the great things about you -- I don't know why you were involved in an organization that repeatedly had the police called out to it.

You have seen the effect that your actions had on -- well, certainly Mr. Means -- but on the entire family. They are crushed and have been crushed for 14, 15 months now and in all likelihood will continue to suffer for years to come.

When I consider your conviction for manslaughter, there's been some suggestion this is Mr. Means' fault, that maybe he shouldn't have been at the club, that bad things were going to happen at the club. People just need to understand that. The message needs to be clear. This is you. You did this. This is in [39] no way the fault of Mr. Means.

The jury flat out rejected the defense of self-defense. The testimony was that it was your bullet more likely than not that actually caused the actual death of Mr. Means. The evidence was pretty uncontested that that bullet just a foot or two above in the roof was fired from your gun. You killed this man. You killed him. In terms of manslaughters, this is far and away as aggravated as a manslaughter gets.

The jury listened to all the evidence. They listened to over 50 witnesses. They reviewed over 400 exhibits. They concluded this was manslaughter.

And the presumptive range for manslaughter is 2 to 6. It can be aggravated up to 12 depending on the legal determinations that I make. And I'll get to that in a second. But I'll just say as a general matter this is as aggravated as manslaughter gets.

As for the legal question of well, what is the sentencing range? I heard argument from both sides, and I've done an hour of research on this highly complicated issue. And I acknowledge that I could be wrong because this is such a complex area of the law. The question is: Can I sentence Mr. Mountjoy above 6 years on Count 1 based on a finding of extraordinary aggravating circumstances?

Again, under 18-1.3-401 (6), I'm going to impose a sentence in the presumptive range, unless I conclude that extraordinary aggravating circumstances are present and support a [40] different sentence which better serves the purposes of this code with respect to sentencing as set forth in 18-1-102.5.

The purposes of the code with respect to sentencing are, A, to punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense.

B, to assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed in establishing fair procedures for the imposition of sentences.

C, to prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses.

D, to promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation of the participation of convicted offenders.

E, to select a sentence length and the level of supervision that addresses the offender's individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence.

And F, to promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims in the community while attempting to reduce recidivism and the cost to society by the use of restored justice practices.

If I find extraordinary aggravating circumstances, I can [41] impose a sentence that is greater than the presumptive range but it can't be more than twice the maximum of the presumptive range. If I impose a sentence in the aggravated range, I must make specific findings on the record of the case detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.

As I say, this is a complicated area. Many of the cases provided by the DA were pre-Blakely and so not entirely clear whether they are even applicable at all. To be compliant with Blakely, the aggravated sentence has to rely on at least one of four kinds of facts: One, facts found by a jury beyond a reasonable doubt; two, facts admitted by the defendant; three, facts found by a judge after the defendant stipulated to judicial fact finding for sentencing purposes; and, four, facts regarding prior convictions.

I do find that there are extraordinary aggravating factors that warrants a sentence beyond the presumptive range. Under category one, are there facts found by a jury beyond a reasonable doubt? Here, I don't think on a manslaughter conviction I can say, Well, somebody is dead and, therefore, we're going to aggravate it. That's an element of the crime.

But I can find based on the jury finding beyond a reasonable doubt that what makes this extraordinarily aggravated is one, that a gun was used. Manslaughter doesn't require that a gun was used. But here, the jury with its determination on illegal [42] discharge of a firearm did make a conclusion beyond a reasonable doubt that you did fire a gun. I find that makes this case extraordinarily aggravated.

Two, the jury found that as part of this incident you tampered with evidence, that you helped get rid of evidence in a case that involved a shooting.

Three, you admitted to firing your gun eight times. Then I think I can find based on recollection of the testimony that you admitted to firing your gun eight times in the direction of I-25 -- Highway I-25. Those are the facts that I'm relying on in sentencing you in the aggravated range.

I do take into account, Mr. Mountjoy, all the positive qualities that you have as a human being. When I consider all of the factors that I'm to consider in sentencing, I'm to consider a deterrent and I'm to consider punishment. My sentence is not for the family of Mr. Means. My sentence is for the community. As a judge, I speak for the community.

This is a case where in a rare circumstance the

crime was caught on videotape. Ms. White makes a good point. This whole crime is on videotape. And the videotape clearly shows Mr. Means and Mr. Nadeau -- in fact, let me stop there and make another finding. Another reason I'm going to the extraordinary aggravated range is the jury made a finding that you fired into a car occupied by two people. The elements that were given to them were that it had to be proven you fired a gun into a car with Virgil Means and [43] Mr. Nadeau. And they found beyond a reasonable that was the case.

So Mr. Nadeau and Mr. Means are in their car. You don't know most likely why they circled around two times and why the car is just sitting there. But we know now that the reason they're sitting there is because they're having a discussion about Mr. Means getting his wallet back. He wants to get his wallet back probably because he had a card in there with several hundred dollars. That's why they were there. You may not have known that, but that's why they were there.

What is particularly aggravated about this case is that the car then drives away. As the car is sitting there, you are the person who sort of directs people to do what they do. You're the one who comes up between the cars. You're the one who, as that car is a driving away after Mr. Means is persuaded by Mr. Nadeau that this is not a good idea, that we just need to get out of here. As they're driving away, you were the guy that didn't fall back and recognize, All right. There is not a threat here. We don't have to worry about you. You were the person who follows up, follows that car, walks ahead, lifts your gun and fires it

eight times towards this car.

This car had been driving away for seven seconds. It's on the video. They had been driving away for seven seconds, and they were almost at the intersection, some 50 to 75 yards away before you start firing your gun.

As I say, the jury rejected your self-defense theory [44] because they clearly recognized how can this be self-defense when that car is driving away. It's 75 yards away, and there's no evidence there are any shots coming out of that car. Again, I do not comprehend why you made the choice that you did. In light of everything that I know about you, I don't comprehend it. But as I say, this is as aggravated as manslaughter gets.

With that, I am going to sentence you to 12 years on Count 1. As to Count 5, the illegal discharge of a firearm, there is a question about whether this has to run consecutive or concurrent. And for this I rely on Juhl v. People, J-U-H-L, 172 P3d 896; which in turn cites the Muckle case, M-U-C-K-L-E, which is 107 P3d 380.

And the Juhl Court says, We have previously held that the mere possibility that identical evidence may support two convictions, is not sufficient to deprive the Court of its discretion to impose consecutive sentencing. A sentencing Court is mandated to impose concurrent sentences only when the evidence supports no other reasonable inference than the convictions were based on identical evidence. In all other instances, the trial Court retains its sentencing discretion and its decision must be upheld unless the

trial Court abuses it's discretion.

Here, the evidence was that two bullets entered the car; one in the roof and one into the body of the car that killed Mr. Means. So can the evidence support a reasonable inference that the convictions were based on separate evidence? And the [45] answer is, Yes. The jury very well could have decided, We are convicting on illegal discharge of a firearm for the shot into the roof and convicted on the manslaughter for the bullet that went into the car and killed Mr. Means.

Illegal discharge of a fireman, this is a Class 5 felony. The presumptive range is one to three. But, again, I find this extraordinarily aggravated. One, because somebody did die during this process of shooting into the car. If you had just fired into the car and nobody was hit, nobody hurt; you would be guilty of illegal discharge of a firearm and looking at one to three.

But, here, the jury decided as part of this incident you killed somebody. And so I find the death of Mr. Means makes this extraordinarily aggravated. And, again, I find it extraordinarily aggravated because you then immediately after are tampering with the evidence in the case.

The maximum sentence in the aggravated range is 6 years. I'm going to impose a 6-year sentence for Count 5. I am not required to run concurrent. I can run consecutive and I am running that consecutive.

On tampering, tampering carries a presumptive range of 1 year to 18 months. But, again, I find it is extraordinarily aggravated for the reasons that I've

stated earlier. Somebody died. You were tampering with evidence following the death of somebody that you were directly tied to. That's really the primary aggravating factor. You weren't just tampering with evidence; you [46] were tampering with evidence of a crime where somebody is dead. And that to me makes it extraordinarily aggravated. So I am imposing a three-year sentence on the tampering count, running consecutive to Counts 1 and 5 that.

That makes this a total of a 21-year sentence. There will be a mandatory 3-year period of parole that follows. I will sign the motion for appointment of public defender on appeal.

MS. HYATT: Your Honor, there are 427 days of presentence confinement credit.

THE COURT: All right. I'll grant you the 427 days of presentence confinement credit. We'll keep this and get this --

MS. HYATT: There are three. If the Court wishes to sign all three, I can just take one or two and the Court can keep one. May I approach?

THE COURT: Yes. You just need how many?

MS. HYATT: One or two.

THE COURT: And I think there was a request for costs or restitution we need to address.

MS. HYATT: I need to look into that a little further. I received a discovery recently on some of those expenses. If the Court wants to allow a time for objection.

THE COURT: Why don't I order -- I'll sign off on

the restitution request and the motion for reimbursement and give you 35 days to file an objection. Will that be sufficient?

MS. HYATT: It will.

[47] THE COURT: All right. Good luck, Mr. Mountjoy.

THE DEFENDANT: Thank you, Your Honor.

(Whereupon, the proceedings concluded at 1:28 p.m.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter for the 4th Judicial District, El Paso County District Court, 270 South Tejon, Colorado Springs, Colorado, at the time and date above set forth.

Dated at Colorado Springs, Colorado, this 1st day of March, 2015. My commission expires October 10, 2016.

/s/ Gerri-Jo Elliott
Gerri-Jo Elliott, RPR
Registered Professional
Reporter
Notary Public
719-452-5331

APPENDIX D

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 3, 2018 CASE NUMBER: 2016SC653
Certiorari to the Court of Appeals, 2013CA1215 District Court, El Paso County, 2012CR1020	
Petitioner: Christopher Anthony Mountjoy, Jr., **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2016SC653
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Opinion Modified and as Modified, said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 3, 2018.

APPENDIX E

Relevant Statutory Provisions

Colo. Rev. Stat. § 18-1.3-401

(1)(a)(I) As to any person sentenced for a felony committed after July 1, 1979, and before July 1, 1984, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years plus one year of parole
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year of parole

(II) As to any person sentenced for a felony committed on or after July 1, 1984, and before July 1, 1985, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years
3	Four to eight years

4	Two to four years
5	One to two years

(III)(A) As to any person sentenced for a felony committed on or after July 1, 1985, except as otherwise provided in sub-subparagraph (E) of this subparagraph (III), in addition to, or in lieu of, any sentence to imprisonment, probation, community corrections, or work release, a fine within the following presumptive ranges may be imposed for the specified classes of felonies:

Class	Minimum Sentence	Maximum Sentence
1	No fine	No fine
2	Five thousand dollars	One million dollars
3	Three thousand dollars	Seven hundred fifty thousand dollars
4	Two thousand dollars	Five hundred thousand dollars
5	One thousand dollars	One hundred thousand dollars
6	One thousand dollars	One hundred thousand dollars

(A.5) Notwithstanding any provision of law to the contrary, any person who attempts to commit, conspires to commit, or commits against an elderly person any felony set forth in part 4 of article 4 of this title, part 1, 2, 3, or 5 of article 5 of this title, article 5.5 of this

title, or section 11-51-603, C.R.S., shall be required to pay a mandatory and substantial fine within the limits permitted by law. However, all moneys collected from the offender shall be applied in the following order: Costs for crime victim compensation fund pursuant to section 24-4.1-119, C.R.S.; surcharges for victims and witnesses assistance and law enforcement fund pursuant to section 24-4.2-104, C.R.S.; restitution; time payment fee; late fees; and any other fines, fees, or surcharges. For purposes of this sub-subparagraph (A.5), an "elderly person" or "elderly victim" means a person sixty years of age or older.

(B) Failure to pay a fine imposed pursuant to this subparagraph (III) is grounds for revocation of probation or revocation of a sentence to community corrections, assuming the defendant's ability to pay. If such a revocation occurs, the court may impose the maximum sentence allowable in the given sentencing ranges.

(C) Each judicial district shall have at least one clerk who shall collect and administer the fines imposed under this subparagraph (III) and under section 18-1.3-501 in accordance with the provisions of sub-subparagraph (D) of this subparagraph (III).

(D) All fines collected pursuant to this subparagraph (III) shall be deposited in the fines collection cash fund, which fund is hereby created. The general assembly shall make annual appropriations out of such fund for administrative and personnel costs incurred in the collection and administration of said fines. All unexpended balances shall revert to the general fund at the end of each fiscal year.

(E) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (III), a person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced shall not be eligible to receive a fine in lieu of any sentence to imprisonment, community corrections, or work release but shall be sentenced to at least the minimum sentence specified in subparagraph (V) of this paragraph (a) and may receive a fine in addition to said sentence.

(IV) As to any person sentenced for a felony committed on or after July 1, 1985, but prior to July 1, 1993, felonies are divided into six classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence
1	Life imprisonment	Death
2	Eight years imprisonment	Twenty-four years imprisonment
3	Four years imprisonment	Sixteen years imprisonment
4	Two years imprisonment	Eight years imprisonment
5	One year imprisonment	Four years imprisonment
6	One year imprisonment	Two years imprisonment

(V)(A) Except as otherwise provided in section 18-1.3-401.5 for offenses contained in article 18 of this title committed on or after October 1, 2013, as to any person sentenced for a felony committed on or after July 1, 1993, felonies are divided into six classes that are distinguished from one another by the following presumptive ranges of penalties that are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence	Mandatory Period of Parole
1	Life imprisonment	Death	None
2	Eight years imprisonment	Twenty-four years imprisonment	Five years
3	Four years imprisonment	Twelve years imprisonment	Five years
4	Two years imprisonment	Six years imprisonment	Three years
5	One year imprisonment	Three years imprisonment	Two years
6	One year imprisonment	Eighteen months imprisonment	One year

(B) Any person who is paroled pursuant to section 17-

22.5-403, C.R.S., or any person who is not paroled and is discharged pursuant to law, shall be subject to the mandatory period of parole established pursuant to sub-subparagraph (A) of this subparagraph (V). Such mandatory period of parole may not be waived by the offender or waived or suspended by the court and shall be subject to the provisions of section 17-22.5-403(6), C.R.S., which permits the state board of parole to discharge the offender at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision.

(C) Notwithstanding sub-subparagraph (A) of this subparagraph (V), the mandatory period of parole for a person convicted of a felony offense committed prior to July 1, 1996, pursuant to part 4 of article 3 of this title, or part 3 of article 6 of this title, shall be five years. Notwithstanding sub-subparagraph (A) of this subparagraph (V), and except as otherwise provided in sub-subparagraph (C.5) of this subparagraph (V), the period of parole for a person convicted of a felony offense committed on or after July 1, 1996, but prior to July 1, 2002, pursuant to part 4 of article 3 of this title, or part 3 of article 6 of this title, shall be set by the state board of parole pursuant to section 17-2-201(5)(a.5), C.R.S., but in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court.

(C.3) Deleted by Laws 2002, Ch. 48, § 1, eff. March 26, 2002.

(C.5) Notwithstanding the provisions of sub-subpara-

graph (A) of this subparagraph (V), any person sentenced for a sex offense, as defined in section 18-1.3-1003(5), committed on or after November 1, 1998, shall be sentenced pursuant to the provisions of part 10 of this article.

(C.7) Any person sentenced for a felony committed on or after July 1, 2002, involving unlawful sexual behavior, as defined in section 16-22-102(9), C.R.S., or for a felony, committed on or after July 1, 2002, the underlying factual basis of which involved unlawful sexual behavior, and who is not subject to the provisions of part 10 of this article, shall be subject to the mandatory period of parole specified in sub-subparagraph (A) of this subparagraph (V).

(D) The mandatory period of parole imposed pursuant to sub-subparagraph (A) of this subparagraph (V) shall commence immediately upon the discharge of an offender from imprisonment in the custody of the department of corrections. If the offender has been granted release to parole supervision by the state board of parole, the offender shall be deemed to have discharged the offender's sentence to imprisonment provided for in sub-subparagraph (A) of this subparagraph (V) in the same manner as if such sentence were discharged pursuant to law; except that the sentence to imprisonment for any person sentenced as a sex offender pursuant to part 10 of this article shall not be deemed discharged on release of said person on parole. When an offender is released by the state board of parole or released because the offender's sentence was discharged pursuant to law, the mandatory period of parole shall be served by such offender. An offender sentenced for nonviolent felony offenses, as

defined in section 17-22.5-405(5), C.R.S., may receive earned time pursuant to section 17-22.5-405, C.R.S., while serving a mandatory parole period in accordance with this section, but not while such offender is reincarcerated after a revocation of the mandatory period of parole. An offender who is sentenced for a felony committed on or after July 1, 1993, and paroled on or after January 1, 2009, shall be eligible to receive any earned time while on parole or after reparole following a parole revocation. The offender shall not be eligible for earned time while the offender is reincarcerated after revocation of the mandatory period of parole pursuant to this subparagraph (V).

(E) If an offender is sentenced consecutively for the commission of two or more felony offenses pursuant to sub-subparagraph (A) of this subparagraph (V), the mandatory period of parole for such offender shall be the mandatory period of parole established for the highest class felony of which such offender has been convicted.

(VI) Any person sentenced for a class 2, 3, 4, or 5 felony, or a class 6 felony that is the offender's second or subsequent felony offense, committed on or after July 1, 1998, regardless of the length of the person's sentence to incarceration and the mandatory period of parole, shall not be deemed to have fully discharged his or her sentence until said person has either completed or been discharged by the state board of parole from the mandatory period of parole imposed pursuant to subparagraph (V) of this paragraph (a).

(b)(I) Except as provided in subsection (6) and subsection (8) of this section and in section 18-1.3-804, a person who has been convicted of a class 2, class 3, class

4, class 5, or class 6 felony shall be punished by the imposition of a definite sentence which is within the presumptive ranges set forth in paragraph (a) of this subsection (1). In imposing the sentence within the presumptive range, the court shall consider the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender. The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct, shall not be considered in determining the length of sentence to be imposed.

(II) As to any person sentenced for a felony committed on or after July 1, 1985, a person may be sentenced to imprisonment as described in subparagraph (I) of this paragraph (b) or to pay a fine that is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of this subsection (1) or to both such fine and imprisonment; except that any person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced shall not be eligible to receive a fine in lieu of any sentence to imprisonment as described in subparagraph (I) of this paragraph (b) but shall be sentenced to at least the minimum sentence specified in subparagraph (V) of paragraph (a) of this subsection (1) and may receive a fine in addition to said sentence.

(II.5) Notwithstanding anything in this section to the contrary, any person sentenced for a sex offense, as defined in section 18-1.3-1003(5), committed on or after November 1, 1998, may be sentenced to pay a fine

in addition to, but not instead of, a sentence for imprisonment or probation pursuant to section 18-1.3-1004.

(III) Notwithstanding anything in this section to the contrary, as to any person sentenced for a crime of violence, as defined in section 18-1.3-406, committed on or after July 1, 1985, a person may be sentenced to pay a fine in addition to, but not instead of, a sentence for imprisonment.

(IV) If a person is convicted of assault in the first degree pursuant to section 18-3-202 or assault in the second degree pursuant to section 18-3-203(1)(c.5), and the victim is a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, as defined in section 18-1.3-501(1.5)(b), notwithstanding the provisions of subparagraph (III) of paragraph (a) of this subsection (1) and subparagraph (II) of this paragraph (b), the court shall sentence the person to the department of corrections. In addition to a term of imprisonment, the court may impose a fine on the person pursuant to subparagraph (III) of paragraph (a) of this subsection (1).

(c) Except as otherwise provided by statute, felonies are punishable by imprisonment in any correctional facility under the supervision of the executive director of the department of corrections. Nothing in this section shall limit the authority granted in part 8 of this article to increase sentences for habitual criminals. Nothing in this section shall limit the authority granted in parts 9 and 10 of this article to sentence sex offenders to the department of corrections or to

sentence sex offenders to probation for an indeterminate term. Nothing in this section shall limit the authority granted in section 18-1.3-804 for increased sentences for habitual burglary offenders.

(2)(a) A corporation which has been found guilty of a class 2 or class 3 felony shall be subject to imposition of a fine of not less than five thousand dollars nor more than fifty thousand dollars. A corporation which has been found guilty of a class 4, class 5, or class 6 felony shall be subject to imposition of a fine of not less than one thousand dollars nor more than thirty thousand dollars.

(b) A corporation which has been found guilty of a class 2, class 3, class 4, class 5, or class 6 felony, for an act committed on or after July 1, 1985, shall be subject to imposition of a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of subsection (1) of this section.

(3) Every person convicted of a felony, whether defined as such within or outside this code, shall be disqualified from holding any office of honor, trust, or profit under the laws of this state or from practicing as an attorney in any of the courts of this state during the actual time of confinement or commitment to imprisonment or release from actual confinement on conditions of probation. Upon his or her discharge after completion of service of his or her sentence or after service under probation, the right to hold any office of honor, trust, or profit shall be restored, except as provided in section 4 of article XII of the state constitution .

(4)(a) A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections unless a proceeding held to determine sentence according to the procedure set forth in section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, results in a verdict that requires imposition of the death penalty, in which event such person shall be sentenced to death. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, and before July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

(b)(I) Notwithstanding the provisions of sub-subparagraph (A) of subparagraph (V) of paragraph (a) of subsection (1) of this section and notwithstanding the provisions of paragraph (a) of this subsection (4), as to a person who is convicted as an adult of a class 1 felony following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., the district court judge shall sentence the person to a term of life imprisonment with the possibility of parole after serving a period of forty years, less any earned time granted pursuant to section 17-22.5-405, C.R.S. Regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of the person's life and shall not be discharged.

(II) The provisions of this paragraph (b) shall apply to persons sentenced for offenses committed on or after July 1, 2006.

(c)(I) Notwithstanding the provisions of sub-subparagraph (A) of subparagraph (V) of paragraph (a) of subsection (1) of this section and notwithstanding the provisions of paragraphs (a) and (b) of this subsection (4), as to a person who is convicted as an adult of a class 1 felony following a direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., or pursuant to either of these sections as they existed prior to their repeal and reenactment, with amendments, by House Bill 96-1005, which felony was committed on or after July 1, 1990, and before July 1, 2006, and who received a sentence to life imprisonment without the possibility of parole:

(A) If the felony for which the person was convicted is murder in the first degree, as described in section 18-3-102(1)(b), then the district court, after holding a hearing, may sentence the person to a determinate sentence within the range of thirty to fifty years in prison, less any earned time granted pursuant to section 17-22.5-405, C.R.S., if, after considering the factors described in subparagraph (II) of this paragraph (c), the district court finds extraordinary mitigating circumstances. Alternatively, the court may sentence the person to a term of life imprisonment with the possibility of parole after serving forty years, less any earned time granted pursuant to section 17-22.5-405, C.R.S.

(B) If the felony for which the person was convicted is

not murder in the first degree, as described in section 18-3-102(1)(b), then the district court shall sentence the person to a term of life imprisonment with the possibility of parole after serving forty years, less any earned time granted pursuant to section 17-22.5-405, C.R.S.

(II) In determining whether extraordinary mitigating circumstances exist, the court shall conduct a sentencing hearing, make factual findings to support its decision, and consider relevant evidence presented by either party regarding the following factors:

(A) The diminished culpability and heightened capacity for change associated with youth;

(B) The offender's developmental maturity and chronological age at the time of the offense and the hallmark features of such age, including but not limited to immaturity, impetuosity, and inability to appreciate risks and consequences;

(C) The offender's capacity for change and potential for rehabilitation, including any evidence of the offender's efforts toward, or amenability to, rehabilitation;

(D) The impact of the offense upon any victim or victim's immediate family; and

(E) Any other factors that the court deems relevant to its decision, so long as the court identifies such factors on the record.

(III) If a person is sentenced to a determinate range of thirty to fifty years in prison pursuant to this paragraph (c), the court shall impose a mandatory period of ten years parole.

(IV) If a person is sentenced to a term of life imprisonment with the possibility of parole after serving forty years, less any earned time granted pursuant to section 17-22.5-405, C.R.S., regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of his or her life and shall not be discharged.

(5) In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized

in the presumptive range for the punishment of the offense.

(7) In all cases, except as provided in subsection (8) of this section, in which a sentence which is not within the presumptive range is imposed, the court shall make specific findings on the record of the case, detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.

(8)(a) 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:

(I) The defendant is convicted of a crime of violence under section 18-1.3-406;

(II) The defendant was on parole for another felony at the time of commission of the felony;

(III) The defendant was on probation or was on bond while awaiting sentencing following revocation of probation for another felony at the time of the commission of the felony;

(IV) The defendant was under confinement, in prison, or in any correctional institution as a convicted felon, or an escapee from any correctional institution for another felony at the time of the commission of a felony;

(V) At the time of the commission of the felony, the defendant was on appeal bond following his or her conviction for a previous felony;

(VI) At the time of the commission of a felony, the defendant was on probation for or on bond while awaiting sentencing following revocation of probation for a delinquent act that would have constituted a felony if committed by an adult.

(b) In any case in which one or more of the extraordinary aggravating circumstances provided for in paragraph (a) of this subsection (8) exist, the provisions of subsection (7) of this section shall not apply.

(c) Nothing in this subsection (8) shall preclude the court from considering aggravating circumstances other than those stated in paragraph (a) of this subsection (8) as the basis for sentencing the defendant to a term greater than the presumptive range for the felony.

(d)(I) If the defendant is convicted of the class 2 or the class 3 felony of child abuse under section 18-6-401(7)(a)(I) or (7)(a)(III), the court shall be required to sentence the defendant to the department of corrections for 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 that class felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (d) be eligible for suspension of sentence or for probation or deferred prosecution.

(e)(I) If the defendant is convicted of the class 2 felony of sexual assault in the first degree under section 18-3-402(3), commission of which offense occurs prior to November 1, 1998, the court shall be required 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 that class of felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (e) be eligible for suspension of sentence or probation.

(III) As a condition of parole under section 17-2-201(5)(e), C.R.S., a defendant sentenced pursuant to this paragraph (e) shall be required to participate in a program of mental health counseling or receive appropriate treatment to the extent that the state board of parole deems appropriate to effectuate the successful reintegration of the defendant into the community while recognizing the need for public safety.

(e.5) If the defendant is convicted of the class 2 felony of sexual assault under section 18-3-402(5) or the class 2 felony of sexual assault in the first degree under section 18-3-402(3) as it existed prior to July 1, 2000, commission of which offense occurs on or after November 1, 1998, the court shall be required to sentence the defendant to the department of corrections for an indeterminate sentence of at least the midpoint in the presumptive range for the punishment of that class of felony up to the defendant's natural life.

(f) The court may consider aggravating circumstances such as serious bodily injury caused to the victim or the use of a weapon in the commission of a crime, notwithstanding the fact that such factors constitute elements of the offense.

(g) If the defendant is convicted of class 4 or class 3 felony vehicular homicide under section 18-3-106(1)(a) or (1)(b), and while committing vehicular

homicide the defendant was in immediate flight from the commission of another felony, the court shall be required to sentence the defendant to the department of corrections for 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 the class of felony vehicular homicide of which the defendant is convicted.

(9) The presence of any one or more of the following sentence-enhancing circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term of at least the minimum in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony:

(a) At the time of the commission of the felony, the defendant was charged with or was on bond for a felony in a previous case and the defendant was convicted of any felony in the previous case;

(a.5) At the time of the commission of the felony, the defendant was charged with or was on bond for a delinquent act that would have constituted a felony if committed by an adult;

(b) At the time of the commission of the felony, the defendant was on bond for having pled guilty to a lesser offense when the original offense charged was a felony;

(c) The defendant was under a deferred judgment and sentence for another felony at the time of the commission of the felony;

(c.5) At the time of the commission of the felony, the

defendant was on bond in a juvenile prosecution under title 19, C.R.S., for having pled guilty to a lesser delinquent act when the original delinquent act charged would have constituted a felony if committed by an adult;

(c.7) At the time of the commission of the felony, the defendant was under a deferred judgment and sentence for a delinquent act that would have constituted a felony if committed by an adult;

(d) At the time of the commission of the felony, the defendant was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult.

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

(b) Crimes that present an extraordinary risk of harm to society shall include the following:

(I) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(II) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(III) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(IV) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(V) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(VI) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(VII) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(VIII) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(IX) Aggravated robbery, as defined in section 18-4-302;

(X) Child abuse, as defined in section 18-6-401;

(XI) Unlawful distribution, manufacturing, dispensing, sale, or possession of a controlled substance with the intent to sell, distribute, manufacture, or dispense, as defined in section 18-18-405;

(XII) Any crime of violence, as defined in section 18-1.3-406;

(XIII) Stalking, as described in section 18-9-111(4) , as it existed prior to August 11, 2010, or section 18-3-602;

(XIV) Sale or distribution of materials to manufacture controlled substances, as described in section 18-18-412.7;

(XV) Felony invasion of privacy for sexual gratification, as described in section 18-3-405.6;

(XVI) A class 3 felony offense of human trafficking for involuntary servitude, as described in section 18-3-503;

(XVII) A class 3 felony offense of human trafficking for sexual servitude, as described in section 18-3-504; and

(XVIII) Assault in the second degree, as described in section 18-3-203(1)(i).

(c) Repealed by Laws 2004, Ch. 200, § 1, eff. Aug. 4, 2004.

(11) When it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be best served thereby, the court shall have the power to suspend the imposition or execution of sentence for such period and upon such terms and conditions as it may deem best; except that in no instance shall the court have the power to suspend a sentence to a term of incarceration when the defendant is sentenced pursuant to a sentencing provision that requires incarceration or imprisonment in the department of corrections, community corrections, or jail. In no instance shall a sentence be suspended if the defendant is ineligible for probation pursuant to section 18-1.3-201 , except upon an express waiver being made by the sentencing court regarding a particular defendant upon recommendation of the district attorney and approval of such recommendation by an order of the sentencing court pursuant to section 18-1.3-201(4) .

(12) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

(13)(a) The court, if it sentences a defendant who is convicted of any one or more of the offenses specified in paragraph (b) of this subsection (13) to incarceration, shall sentence the defendant to a term of at least the midpoint, but not more than twice the maximum, of the presumptive range authorized for the punishment of the offense of which the defendant is convicted if the court makes the following findings on the record:

(I) The victim of the offense was pregnant at the time of commission of the offense; and

(II) The defendant knew or reasonably should have known that the victim of the offense was pregnant.

(III) Deleted by Laws 2003, Ch. 340, § 3, eff. July 1, 2003.

(b) The provisions of this subsection (13) shall apply to the following offenses:

(I) Murder in the second degree, as described in section 18-3-103;

(II) Manslaughter, as described in section 18-3-104;

(III) Criminally negligent homicide, as described in section 18-3-105;

(IV) Vehicular homicide, as described in section 18-3-106;

(V) Assault in the first degree, as described in section 18-3-202;

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

(VII) Vehicular assault, as described in section 18-3-205.

(c) Notwithstanding any provision of this subsection (13) to the contrary, for any of the offenses specified in paragraph (b) of this subsection (13) that constitute crimes of violence, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(14) The court may sentence a defendant to the youthful offender system created in section 18-1.3-407 if the defendant is an eligible young adult offender pursuant to section 18-1.3-407.5.