

APPENDIX

860 Fed.Appx. 584

Editor's Note: Additions are indicated by **Text** and deletions by **Text** .

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Damon Ramon MARTINEZ, Defendant-Appellant.

No. 19-1389
|
FILED June 23, 2021

Synopsis

Background: Defendant pleaded guilty to being a felon in possession of a firearm and subsequently objected to presentence report's recommendation that condition of supervised release be imposed authorizing probation officer, after getting court approval, to notify third parties of risks presented by defendant or to direct defendant to notify the third parties. The United States District Court for the District of Colorado, No. 1:18-CR-00522-WJM-1, [William J. Martinez, J.](#), denied the objection. Defendant appealed.

[Holding:] The Court of Appeals, [Phillips](#), Circuit Judge, held that defendant's challenge was not ripe for review.

Affirmed in part and dismissed in part.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (1)

[1] **Criminal Law** **Ripeness**

Defendant's challenge of condition of supervised release, which authorized a probation officer, after getting district court's approval, to notify

third parties of risks presented by defendant or to direct defendant to notify the third parties, claiming that a post-sentencing risk notification would be a modification of his supervised-release conditions and, thus, would require the district court to hold a hearing, was not ripe for review; defendant's argument required factual development on several points, including whether defendant's probation officer would determine that defendant presented a risk to a third party and whether the risk would merit notifying the third party, and defendant would suffer no hardship if Court of Appeals declined to decide merits of defendant's challenge. [Fed. R. Crim. P. 32.1\(c\)](#).

(D.C. No. 1:18-CR-00522-WJM-1) (D. Colorado)

Attorneys and Law Firms

[Michael Conrad Johnson](#), Office of the United States Attorney, District of Colorado, Denver, CO, for Plaintiff-Appellee

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Before [PHILLIPS](#), [EBEL](#), and [CARSON](#), Circuit Judges.

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Fed. R. App. P. 32.1](#) and [10th Cir. R. 32.1](#).

[Gregory A. Phillips](#), Circuit Judge

We return to the familiar subject of supervised-release conditions, this time examining ***585** the District of Colorado's post- [Cabral](#) version of Standard Condition 12. Under this condition, a probation officer may, after getting the district court's approval, (1) notify third parties of risks presented by a defendant or (2) direct the defendant to notify

the third parties. Damon Martinez argues that post-sentencing risk notification under Standard Condition 12 would be a modification of his supervised-release conditions and thus require the district court to hold a hearing under [Federal Rule of Criminal Procedure 32.1\(c\)](#) before approving any risk notification. Under the prudential-ripeness doctrine, we decline to reach this argument because it requires factual development. As a secondary issue, Martinez contends that the district court erred in treating two of his earlier felony convictions as crimes of violence, which increased his advisory imprisonment range. He concedes that existing circuit precedent forecloses his argument and raises it now to preserve it for further appellate review. Accordingly, we dismiss Martinez's appeal on the first argument and affirm the district court on the second argument.

I. Background

Damon Martinez violated his state parole arising from his Colorado felony robbery conviction. State correctional officials tracked him to a location and minutes later stopped his car. After finding drugs on him, the officials searched his car and found more drugs and a loaded firearm. A federal grand jury indicted him on a charge of felon in possession of a firearm, and Martinez pleaded guilty. The probation office prepared and revised a presentence report ("PSR"). In the district court, Martinez objected to the PSR's recommendation that the court impose the District of Colorado's Standard Condition of Supervised Release 12. The district court denied the objection, and Martinez now appeals.

II. Discussion

Under the District of Colorado's Standard Condition 12, a probation officer may after getting the district court's approval (1) notify third parties of risks presented by a defendant or (2) direct the defendant to notify the third parties of the risks. But as Martinez points out, this version of Standard Condition 12 doesn't answer whether the later risk notification is a "modification" of supervised-release conditions. If it is, Martinez would have a right to a counseled hearing under [Fed. R. Crim. P. 32.1\(c\)](#)¹ before the district court approved any risk notification. Martinez asks not that we strike down Standard Condition 12 but that we interpret it as being subject to [Rule 32.1\(c\)](#). We conclude that Martinez has failed to satisfy the prudential-ripeness doctrine for this claim and decline to reach its merits.

¹ This Rule reads as follows:

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) Exceptions. A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

A. Prudential-Ripeness Doctrine

"We review the issue of ripeness de novo." *586 *Roe No. 2. v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001). "Even when an appeal satisfies Article III's 'case or controversy' requirement, we may still decline to review it under the prudential ripeness doctrine," which "turns on two factors: (1) 'the fitness of the issue for judicial review,' and (2) 'the hardship to the parties from withholding review.'" *United States v. Cabral*, 926 F.3d 687, 693 (10th Cir. 2019) (quoting *United States v. Bennett*, 823 F.3d 1316, 1326 (10th Cir. 2016)). In addressing prudential ripeness, the parties rely primarily on *United States v. Cabral*. So we review that case before turning to Martinez's claim.

1. *United States v. Cabral*

In *Cabral*, this court examined the District of Colorado's pre-2019 version of Standard Condition 12.² That version read as follows:

If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the

person and confirm that you have notified the person about the risk.

926 F.3d at 691.³ Cabral contested this condition on two grounds: (1) that the risk-notification provision was unconstitutionally vague, and (2) that the “condition improperly delegate[d] judicial power to a probation officer to decide the scope of the ‘risk’ that should trigger the notification requirement, thereby delegating the power to ‘decide the nature or extent of [Mr. Cabral’s] punishment.’” *Id.* at 692–93 (quoting Cabral’s opening brief). This court concluded that the vagueness challenge was unripe for review but that the improper-delegation challenge was ripe for review. *Id.* at 693–94.

2 On July 16, 2019, the District of Colorado amended its version of Standard Condition 12 in response to *Cabral*.

3 This condition is the substantial equivalent of U.S.S.G. § 5B1.3(c)(12) (2018), which reads as follows:

If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

We declined to review Cabral’s vagueness challenge to the District of Colorado’s pre-2019 version of Standard Condition 12 after concluding that the challenge wasn’t fit for review and that Cabral would face little hardship from our withholding review.

In deciding whether an issue is fit for judicial review, “we focus on whether the determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed.” *Id.* at 693 (quoting *United States v. Ford*, 882 F.3d 1279, 1283 (10th Cir. 2018)). In *Cabral*, we held that the vagueness challenge was not fit for judicial review, because “it would be virtually impossible to resolve [it] without factual development.” *Id.* at 694.

In this regard, we noted that “we do not know how (or even whether) the probation officer would choose to enforce the risk-notification condition.” *Id.* And “[e]ven if we could resolve this pre-enforcement challenge, as a pure question of law, our precedent strongly disfavors challenges to supervised-release conditions that might never be applied.” *Id.* Thus, Cabral’s vagueness challenge wasn’t fit for review “[b]ecause the scenarios Mr. Cabral alludes to may not occur as anticipated, or indeed may not occur at all, depending on *587 the probation officer’s future decisions[.]” *Id.* (internal quotation marks and citations omitted).

In support, we relied on two cases in which the uncertainty of future events led us to rule that arguments were unfit for review. *Id.* at 695. In the first, *United States v. Ford*, 882 F.3d 1279 (10th Cir. 2018), we held that a supervised-release challenge regarding polygraph examination was unripe because it was “contingent on the decision of a different actor.” *Id.* (quoting *Ford*, 882 F.3d at 1286). And in the second, *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016), we held that a supervised-release challenge to a plethysmograph-testing condition was unripe “where a ‘treatment provider must evaluate [the defendant] and find that testing is appropriate’ before the testing could be imposed.” *Id.* (quoting *Bennett*, 823 F.3d at 1327).

In assessing whether Cabral would suffer hardship from our withholding review, we considered whether he would “‘face a direct and immediate dilemma’ arising from the supervised-release condition he is challenging.” *Cabral*, 926 F.3d at 693 (quoting *Bennett*, 823 F.3d at 1328). We concluded that “Mr. Cabral will face little hardship if we decline to review [his vagueness challenge] now.” *Id.* at 694. Indeed, we noted that Cabral’s dilemma—whether to comply with a risk-notification directive—would arise “only if his probation officer directs him to notify someone.” *Id.* at 695. Though we acknowledged that, by later ordering Cabral to notify third parties of risk, a probation officer could exercise “broad power to infringe on Mr. Cabral’s rights,” we agreed with the government that those scenarios had not occurred and may never occur. *Id.* Echoing *Ford*, we declared that “[w]hen a condition of supervised release is, by its own terms, contingent on the decision of a different actor” “that condition is not ripe for immediate review.” *Id.* (quoting

 *Ford*, 882 F.3d at 1286). We stated that “[t]his holds true even if the *potential* hardship is significant, and even if the challenge could theoretically be analyzed without waiting for its application.”  *Id.* (citing  *Ford*, 882 F.3d at 1286–87).

In his second challenge, Cabral argued that the District of Colorado's pre-2019 version of Standard Condition 12 improperly delegated to the probation officer the power to define terms such as “risk” and thus to “determine what conduct the condition proscribes and when it will be enforced.”  *Id.* at 697. We held that this challenge was ripe for review.  *Id.* In support, we noted that this issue “presents ‘a legal [question] that can be easily resolved’ without additional factual development.”  *Id.* at 696 (quoting  *Ford*, 882 F.3d at 1284). Unlike with the potential polygraph testing in  *Ford*, we observed that “Mr. Cabral is challenging the already-realized delegation of judicial power to a probation officer, not merely some hypothetical future violation that delegation might allow.”  *Id.* In other words, the improper delegation was complete when the court imposed Standard Condition 12: “The district court's delegation to the probation officer occurred at the moment the district court tasked the probation officer with assessing Mr. Cabral's risk and did so without meaningful direction.”  *Id.* The propriety of the delegation did not “depend on how (or even whether) the probation officer might later choose to wield the delegated power.”  *Id.* Thus, we ruled that “the question whether the risk notification condition improperly delegated judicial power is presently fit for judicial review.”  *Id.*

In view of this, we concluded that “[t]he burden Mr. Cabral would face if we do not consider his challenge now weighs at least slightly in favor of review.”  *Id.* Though ***588** recognizing that Cabral would suffer no hardship unless the probation officer invoked the risk-notification condition, we noted that Cabral could challenge the condition after that “only without the benefit of appointed counsel or ‘risk re-incarceration’ by violating the condition.”  *Id.* at 696–97 (quoting  *Ford*, 882 F.3d at 1284). We distinguished  *Ford* on grounds that Cabral had presented a “pure improper-delegation challenge.” In this circumstance, which did not require factual development, we found sufficient

hardship from the possibility that Cabral would later have to hire counsel or proceed pro se to challenge the condition.

 *Id.* at 697.

2. Martinez's Case

Martinez fails to satisfy either of the two prongs on which our prudential-ripeness inquiry turns.

Martinez argues that his [Rule 32.1\(c\)](#) argument is fit for review like Cabral's improper-delegation argument was. We disagree. In  *Cabral*, as noted, we found it important that the delegation was complete at the instant the district court imposed the District of Colorado's pre-2019 Standard Condition 12. See  926 F.3d at 696. In contrast, Martinez's [Rule 32.1\(c\)](#) argument, like Cabral's vagueness argument, requires factual development on several points: (1) whether the probation officer will determine that Martinez presents a risk to a third party; (2) whether the probation officer will determine that the risk merits notifying the third party of it; (3) whether the probation officer will request that the district court approve the probation officer's ordering Martinez to notify the third party of the risk⁴; (4) whether the district court will agree with the probation officer and approve the probation officer's ordering Martinez to notify the third party of the risks; and (5) whether the district court will give this approval without holding a [Rule 32.1\(c\)](#) hearing.⁵ In short, Martinez's [Rule 32.1\(c\)](#) issue is not fit for review for the same reasons that Cabral's vagueness condition was not yet fit for review. See  926 F.3d at 694–95.

⁴ We agree with the government that any risk notification to third parties by the probation officer wouldn't constitute a condition of Martinez's supervised release. Simply put, it wouldn't compel Martinez to do anything or expose him to revocation of supervised release. In fact, the District of Colorado's pre- *Cabral* version of Standard Condition 12 didn't require the probation officer to get the district court's approval before personally notifying third parties of a defendant's risks. But its post- *Cabral* version does:

If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, *after*

obtaining Court approval, notify the person about the risk or require you to notify that the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

Vol. 1 at 117 (post- *Cabral* language italicized). If it chooses to do so, a district court can require its pre-approval before probation officers themselves notify third parties of a defendant's risks. But nothing in  § 5B1.3(c)(12) or  *Cabral* requires that.

5 Because we resolve this issue on prudential-ripeness grounds, we need not address whether risk-notification approval must comport with Rule 32.1(c).

Second, Martinez argues that he will suffer hardship if we decline to decide the merits of his argument now. But Martinez's hardship argument fails for the same reason that Cabral's did on his vagueness argument. In  *Cabral*, we concluded that the vagueness challenge didn't present sufficient hardship, even though Cabral would later "suffer a burden from the lack of appointed counsel to challenge the condition."  926 F.3d at 696. So too here.

*589 B. U.S.S.G. § 4B1.2 Crimes of Violence

Martinez contends that Application Note 1 to  U.S.S.G. § 4B1.2 runs counter to the guideline text by defining "crime of violence" as including attempts and conspiracies to commit those offenses. Martinez seeks to preserve the issue of whether his felony convictions for attempted robbery and conspiracy to commit menacing with a deadly weapon qualify as crimes of violence, but he acknowledges that we cannot now accept such an argument. Absent a contrary Supreme Court ruling or en banc ruling from our court, we must abide our earlier decision that Application Note 1 is a permissible interpretation of  § 4B1.2(a). See  *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010).

CONCLUSION

We dismiss Martinez's challenge to Standard Condition 12 as prudentially unripe and affirm the district court's crime-of-violence findings and sentence.

All Citations

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1 plea documents, whether it's through whatever information
2 they want. Same goes for the probation department.

3 What they have chosen to -- it is their choice to
4 rely on a probable cause statement found in a court file.
5 That's their choice. And they have to live with their
6 choice, which is that the Court shouldn't consider that
7 information. Thank you.

8 THE COURT: All right. This is what I'm going to
9 do, so that we're not here for three or four hours. I'm
10 going to go ahead and talk about the objections that I
11 either am prepared to rule on and/or I want a little bit
12 more oral argument, and/or there is one where I am going to
13 ask in terms of any additional evidentiary support, and that
14 being the reference in paragraph 29 to the possession of a
15 digital scale.

16 And then I'm going to wait until later in the
17 hearing, and as to those factual disputes that I've not had
18 to reference in my rulings on those objections and arguments
19 that go directly to the offense level and the guideline
20 range, then I can address whatever is left there. And most
21 likely what I will do is not rule on those because I haven't
22 had to do that during the course of the hearing in terms of
23 doing the guideline range and offense level. So what's what
24 I'm going to do.

25 So in terms of the first objection that I am

1 prepared to rule on, that would be the objection to
2 paragraph 28 for the four-level offense level increase for
3 the defendant's two prior crime-of-violence convictions.
4 The counsel have briefed this extensively. You both did a
5 very good job. I don't need any additional argument, so I'm
6 prepared to rule.

7 Paragraph 28 of the report concludes that guideline
8 Section 2K2.1(a)(2) requires a four-level increase in the
9 base offense level due to the defendant having been
10 convicted of two prior crimes of violence. The report
11 states that the defendant has actually been convicted of
12 three prior crimes of violence: conspiracy to commit
13 menacing with a deadly weapon, robbery, and attempted
14 robbery. All of those convictions were under Colorado law.

15 The Tenth Circuit held in two 2017 decisions,
16 *United States v. Harris*, 844 F.3d 1260, and *United States v.*
17 *Crump*, 674 F. App'x 802, that robbery in Colorado is
18 categorically a crime of violence and defendant concedes as
19 much.

20 The Tenth Circuit held in a 2010 decision, *United*
21 *States v. Celso Martinez*, 602 F.3d 1166, that attempted
22 crimes of violence are, themselves, crimes of violence. The
23 defendant concedes that this applies to his conviction for
24 attempted robbery, but he argues against it anyway for
25 appellate preservation purposes. He notes that the Federal

1 Public Defender's Office has recently filed a motion asking
2 the Tenth Circuit to reconsider that decision en banc. That
3 motion is pending in Tenth Circuit case No. 19-1100, *United*
4 *States v. Lovelace*.

5 Finally, the defendant argues that the conspiracy
6 to commit menacing with a deadly weapon is not a crime of
7 violence. But if I were to rule on that argument, I would
8 essentially be giving an advisory opinion. It is undisputed
9 under current state -- under the current state of the law as
10 it exists today that the defendant's convictions for robbery
11 and attempted robbery are crimes of violence within the
12 meaning of the relevant guideline provisions and only two
13 crimes of violence are needed to satisfy 2K2.1(a)(2).

14 Accordingly to the extent the defendant objects to
15 paragraphs 28's classification of attempted robbery as a
16 crime of violence, that objection's overruled. And to the
17 extent the defendant objects to paragraph 28's
18 classification of conspiracy to commit menacing as a crime
19 of violence, that objection is overruled as moot.

20 All right. The next objection I'm going to turn
21 to, which is one of those factual disputes that I do need to
22 resolve -- and I have considered and reviewed the file
23 evidence -- and that is objection to paragraph 22 of the
24 report that the firearm found in the vehicle the defendant
25 was driving functioned as designed. I am going to overrule

FILED

**United States Court of Appeals
Tenth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

December 13, 2021

**Jane K. Castro
Chief Deputy Clerk**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAMON RAMON MARTINEZ,

Defendant - Appellant.

No. 19-1389
(D.C. No. 1:18-CR-00522-WJM-1)
(D. Colo.)

ORDER

Before **PHILLIPS, EBEL**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10 .

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

- (3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

- (4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

- (5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. Definition of "Prohibited Person."—For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. Application of Subsection (a)(7).—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. Application of Subsection (b)(1).—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. Application of Subsection (b)(2).—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. Destructive Devices.—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a

firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. Application of Subsection (b)(7).—Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.

13. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

(B) Definitions.—For purposes of this subsection:

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. Application of Subsections (b)(6)(B) and (c)(1).—

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) Firearm Cited in the Offense of Conviction. Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) Firearm Not Cited in the Offense of Conviction. Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See

§1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).— In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629-631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense

under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.
3. Applicability of §4A1.2.—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. Upward Departure for Burglary Involving Violence.—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).

Appendix E

Colorado Revised Code Provisions

Colorado Revised Statutes § 18-2-101. Criminal attempt

(1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

(2) A person who engages in conduct intending to aid another to commit an offense commits criminal attempt if the conduct would establish his complicity under section 18-1-603 were the offense committed by the other person, even if the other is not guilty of committing or attempting the offense.

(3) It is an affirmative defense to a charge under this section that the defendant abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his criminal intent.

(3.5) Criminal attempt to commit any crime for which a court is required to sentence a defendant for a crime of violence in accordance with section 18-1.3-406 is itself a crime of violence for the purposes of that section.

(4) Criminal attempt to commit a class 1 felony is a class 2 felony; criminal attempt to commit a class 2 felony is a class 3 felony; criminal attempt to commit a class 3 felony is a class 4 felony; criminal attempt to commit a class 4 felony is a class 5 felony; criminal attempt to commit a class 5 or 6 felony is a class 6 felony.

(5) Criminal attempt to commit a felony which is defined by any statute other than one contained in this title and for which no penalty is specifically provided is a class 6 felony.

(6) Criminal attempt to commit a class 1 misdemeanor is a class 2 misdemeanor.

(7) Criminal attempt to commit a misdemeanor other than a class 1 misdemeanor is a class 3 misdemeanor.

(8) Criminal attempt to commit a petty offense is a crime of the same class as the offense itself.

(9) The provisions of subsections (4) to (8) of this section shall not apply to a person who commits criminal attempt to escape. A person who commits criminal attempt to escape shall be punished as provided in section 18-8-208.1.

(10)

(a) Except as otherwise provided by law, criminal attempt to commit a level 1 drug felony is a level 2 drug felony; criminal attempt to commit a level 2 drug felony is a level 3 drug felony; criminal attempt to commit a level 3 drug felony is a level 4 drug felony; and criminal attempt to commit a level 4 drug felony is a level 4 drug felony.

(b) Except as otherwise provided by law, criminal attempt to commit a level 1 drug misdemeanor is a level 2 drug misdemeanor; and criminal attempt to commit a level 2 drug misdemeanor is a level 2 drug misdemeanor.

Colorado Revised Statutes § 18-3-203. Assault in the second degree

(1) A person commits the crime of assault in the second degree if:

(a) Repealed by Laws 1994, H.B.94-1126, § 8, eff. July 1, 1994.

(b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, he or she intentionally causes bodily injury to any person; or

(c.5) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, he or she intentionally causes serious bodily injury to any person; or

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or

(e) For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance, or preparation capable of producing the intended harm; or

(f) While lawfully confined or in custody, he or she knowingly and violently applies physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or, while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child, he or she knowingly and violently applies physical force against a person engaged in the performance of his or her duties while employed by or under contract with a detention facility, as defined in section 18-8-203(3), or while employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series, and the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while

employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender; except that, if the offense is committed against a person employed by the division in the department of human services responsible for youth services, the court may grant probation or a suspended sentence in whole or in part, and the sentence may run concurrently or consecutively with any sentences being served. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203(3), and who is required to report back to the detention facility at a specified time is deemed to be in custody.

(f.5)

(I) While lawfully confined in a detention facility within this state, a person with intent to infect, injure, harm, harass, annoy, threaten, or alarm a person in a detention facility whom the actor knows or reasonably should know to be an employee of a detention facility, causes such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including but not limited to throwing, tossing, or expelling such fluid or material.

(II) Repealed by Laws 2015, Ch. 109, § 1, eff. July 1, 2015.

(III)

(A) As used in this paragraph (f.5), “detention facility” means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

(B) As used in this paragraph (f.5), “employee of a detention facility” includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility. “Employee of a detention facility” does not include a person lawfully confined in a detention facility.

(g) With intent to cause bodily injury to another person, he or she causes serious bodily injury to that person or another; or

(h) With intent to infect, injure, or harm another person whom the actor knows or reasonably should know to be engaged in the performance of his or her duties as a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider, he or she causes such person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including by throwing, tossing, or expelling such fluid or material; or

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

(2)

(a) If assault in the second degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 6 felony.

(b) If assault in the second degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 4 felony.

(b.5) Assault in the second degree by any person under subsection (1) of this section without the circumstances provided in paragraph (a) of this subsection (2) is a class 3 felony if the person who is assaulted, other than a participant in the crime, suffered serious bodily injury during the commission or attempted commission of or flight from the commission or attempted commission of murder, robbery, arson, burglary, escape, kidnapping in the first degree, sexual assault, sexual assault in the first or second degree as such offenses existed prior to July 1, 2000, or class 3 felony sexual assault on a child.

(c)

(I) If a defendant is convicted of assault in the second degree pursuant to paragraph (c.5) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, the court

shall sentence the defendant in accordance with the provisions of section 18-1.3-406. A defendant convicted of assault in the second degree pursuant to paragraph (b.5) of this subsection (2) with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, shall be sentenced in accordance with section 18-1.3-401(8)(e) or (8)(e.5).

(II) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section, the court shall sentence the offender in accordance with section 18-1.3-406; except that, notwithstanding the provisions of section 18-1.3-406, the court is not required to sentence the defendant to the department of corrections for a mandatory term of incarceration.

(d) For purposes of determining sudden heat of passion pursuant to subsection (2)(a) of this section, a defendant's act does not constitute an act performed upon a sudden heat of passion if it results solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

(3) Repealed by Laws 2016, Ch. 304, § 4, eff. July 1, 2016.