

18-1.3-1004. Indeterminate sentence.

(1) (a) Except as otherwise provided in this subsection (1) and in subsection (2) of this section, the district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term of at least the minimum of the presumptive range specified in section [18-1.3-401](#) for the level of offense committed and a maximum of the sex offender's natural life.

(b) If the sex offender committed a sex offense that constitutes a crime of violence, as defined in section [18-1.3-406](#), the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least the midpoint in the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(c) If the sex offender committed a sex offense that makes him or her eligible for sentencing as an habitual sex offender against children pursuant to section [18-3-412](#), the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(d) If the sex offender committed a sex offense that constitutes a sexual offense, as defined in section [18-3-415.5](#), and the sex offender, prior to committing the offense, had notice that he or she had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(2) (a) The district court having jurisdiction, based on consideration of the evaluation conducted pursuant to section [16-11.7-104](#), C.R.S., and the factors specified in section [18-1.3-203](#), may sentence a sex offender to probation for an indeterminate period of at least ten years for a class 4 felony or twenty years for a class 2 or 3 felony and a maximum of the sex offender's natural life; except that, if the sex offender committed a sex offense that constitutes a crime of violence, as defined in section [18-1.3-406](#), or committed a sex offense that makes him or her eligible for sentencing as a habitual sex offender against children pursuant to section [18-3-412](#), the court shall sentence the sex offender to the department of corrections as provided in subsection (1) of this section. For any sex offender sentenced to probation pursuant to this subsection (2), the court shall order that the sex offender, as a condition of probation, participate in an intensive supervision probation program established pursuant to section [18-1.3-1007](#), until further order of the court.

(b) The court, as a condition of probation, may sentence a sex offender to a residential community corrections program pursuant to section [18-1.3-301](#) for a minimum period specified by the court. Following completion of the minimum period, the sex offender may be released to intensive supervision probation as provided in section [18-1.3-1008](#) (1.5).

(3) Each sex offender sentenced pursuant to this section shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to section [16-11.7-105](#), C.R.S.

(4) (a) The court may sentence any person pursuant to the provisions of this section if:

(I) The person is convicted of or pleads guilty or nolo contendere to a crime specified in paragraph (b) of this subsection (4); and

(II) An assessment of the person pursuant to section [16-11.7-104](#), C.R.S., determines that the person is likely to commit one or more of the offenses specified in section [18-3-414.5](#) (1) (a) (II), under the circumstances described in section [18-3-414.5](#) (1) (a) (III).

(b) The provisions of this subsection (4) shall apply to any person who is convicted of or pleads guilty or nolo contendere to any of the following offenses or criminal attempt, conspiracy, or solicitation to commit any of the following offenses:

(I) Trafficking in children, as described in section [18-3-502](#);

(II) Sexual exploitation of children, as described in section [18-6-403](#);

(III) Procurement of a child for sexual exploitation, as described in section [18-6-404](#);

(IV) Soliciting for child prostitution, as described in section [18-7-402](#);

(V) Pandering of a child, as described in section [18-7-403](#);

(VI) Procurement of a child, as described in section [18-7-403.5](#);

(VII) Keeping a place of child prostitution, as described in section [18-7-404](#);

(VIII) Pimping of a child, as described in section [18-7-405](#);

(IX) Inducement of child prostitution, as described in section [18-7-405.5](#).

(c) Any person sentenced as a sex offender pursuant to this subsection (4) shall be subject to the provisions of this part 10.

(5) (a) Any sex offender sentenced pursuant to subsection (1) or (4) of this section and convicted of one or more additional crimes arising out of the same incident as the sex offense shall be sentenced for the sex offense and such other crimes so that the sentences are served consecutively rather than concurrently.

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), if a sex offender sentenced pursuant to this part 10 is convicted of a subsequent crime prior to being discharged from parole pursuant to section [18-1.3-1006](#) or discharged from probation pursuant to section [18-1.3-1008](#), any sentence imposed for the second crime shall not supersede the sex offender's sentence pursuant to the provisions of this part 10. If the sex offender commits the subsequent crime while he or she is on parole or probation and the sex offender receives a sentence to the department of corrections for the subsequent crime, the sex offender's parole or probation shall be deemed revoked pursuant to section [18-1.3-1010](#), and the sex offender shall continue to be subject to the provisions of this part 10.

(II) The provisions of subparagraph (I) of this paragraph (b) shall not apply if the sex offender commits a subsequent crime that is a class 1 felony.

Source: **L. 2002:** Entire article added with relocations, p. 1435, § 2, effective October 1. **L. 2006:** (4)(b)(II) amended, p. 2044, § 3, effective July 1. **L. 2010:** (4)(b)(I) amended, ([SB 10-140](#)), ch. 156, p. 538, § 8, effective April 21.

Editor's note: This section is similar to former § 16-13-804 as it existed prior to 2002.

RECENT ANNOTATIONS

Collateral attack on district court's jurisdiction to order a deferred judgment and sentence barred under statute of limitations set forth in § [16-5-402](#). The statutory language expressly limits the court's jurisdiction only in those cases where it actually enters a sentence, and a deferred judgment is technically not a sentence but rather a continuance with probation-like supervision conditions. *People v. Loveall*, 231 P.3d 408 (Colo. 2010).

ANNOTATION

Annotator's note. Since § [18-1.3-1004](#) is similar to § 16-13-804 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

Indeterminate sentencing portion of the lifetime supervision of sex offenders act is constitutional. Indeterminate sentencing does not violate procedural due process. A defendant is given an opportunity to be heard at sentencing, and, since the statute does not require any further findings by a court to impose indeterminate sentencing, the defendant is not entitled to any further opportunity to be heard. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing for sex offenders does not violate procedural due process. The opportunities in § [18-1.3-1006](#) (1) satisfy continuing due process requirements by providing an adequate continuing opportunity to be heard on the issue of release after a sentence has been imposed. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Substantive due process is not infringed by indeterminate sentencing. Indeterminate sentencing does implicate a fundamental right; therefore, it is subject to the rational basis test. The sentencing scheme is rationally related to the government's legitimate interest in shielding the public from untreated sex offenders and rehabilitating and treating those offenders. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing does not violate equal protection. The threshold question in any equal protection challenge is whether the person allegedly subject to the disparate treatment is in fact similarly situated. In this case, the defendant is similarly situated with other offenders convicted of the same or similar crimes and subject to the same law, so there is no disparate treatment. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing does not violate separation of powers. In this sentencing scheme, each branch carries out a different function, the legislative branch determined the particular punishment, the judicial branch imposed the particular sentence, and the executive branch carried out the sentence. Vesting the parole board with the decision to grant parole or release does not violate separation of powers. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Trial court properly reviewed constitutionality of this section under the rational basis test. An adult offender has no fundamental liberty interest in freedom from incarceration. Because no fundamental right is implicated, the section is evaluated under the rational basis test. *People v. Streaun*, 74 P.3d 387 (Colo. App. 2002);

People v. Dash, 104 P.3d 286 (Colo. App. 2004).

This section bears a reasonable relationship to the legitimate state interests of safety, flexibility in rehabilitation and treatment, and minimizing unacceptably high costs of lifetime incarceration. People v. Streaun, 74 P.3d 387 (Colo. App. 2002); People v. Dash, 104 P.3d 286 (Colo. App. 2004).

Indeterminate sentencing for sex offenders does not constitute cruel and unusual punishment. Sex offenses are considered particularly heinous crimes. People v. Dash, 104 P.3d 286 (Colo. App. 2004).

Prisoner has a liberty interest in participation in a statutorily mandated sex offender treatment program. Beebe v. Heil, 333 F. Supp. 2d 1011 (D. Colo. 2004).

In evaluating prisoner's substantive due process claim, the court must consider whether prison officials were deliberately indifferent to a liberty interest and deprived prisoner of that interest in such a way that the behavior of the governmental officers was so egregious, so outrageous that it may fairly be said to shock the contemporary conscience. The deliberate indifference standard is sensibly employed when actual deliberation is practical. Beebe v. Heil, 333 F. Supp. 2d 1011 (D. Colo. 2004).

Due process must be provided to a convicted sex offender before he can be excluded from such a program. Beebe v. Heil, 333 F. Supp. 2d 1011 (D. Colo. 2004).

The court must consider first, whether prisoner's exclusion from the treatment program itself constitutes an atypical and significant hardship and, second, whether the failure of the prison officials to provide prisoner with due process before terminating him from sex offender treatment constitutes an atypical and significant hardship. To evaluate whether a prisoner's freedom has been restrained in a manner that imposes atypical and significant hardship, the court must carefully examine the conditions of the prisoner's confinement, including the duration and degree of prisoner's restrictions as compared with other inmates. Beebe v. Heil, 333 F. Supp. 2d 1011 (D. Colo. 2004).

This part 10 grants the court discretion to impose an indeterminate sentence with a minimum term that exceeds the maximum of the presumptive range set forth in § [18-1.3-401](#). This part 10 creates specific sentencing provisions for a specific type of felony, whereas the general sentencing provisions in § [18-1.3-401](#) create presumptive ranges that apply to general classes of felonies. These sentencing provisions, therefore, supplant the presumptive ranges in § [18-1.3-401](#). People v. Larson, 97 P.3d 246 (Colo. App. 2004).

If a convicted sex offender is subject to both subsection (1)(a) and the provisions of the habitual criminal statute, both statutes must be reconciled. In such case, the trial court must impose a prison sentence for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life. People v. Apodaca, 58 P.3d 1126 (Colo. App. 2002).

This section requires the court to give the offender an indeterminate sentence. The phrase "at least" in paragraph (a) of subsection (1) by its plain meaning provides the court with the options to impose either the minimum of the presumptive range or an increased minimum sentence as the minimum period of the indeterminate sentence. People v. Smith, 29 P.3d 347 (Colo. App. 2001); People v. Becker, 55 P.3d 246 (Colo. App. 2002).

Indeterminate sentencing is mandatory for the types of inchoate or completed offenses enumerated in § [18-1.3-1003](#) (5). People v. Harrison, 165 P.3d 859 (Colo. App. 2007).

Indeterminate sentencing is discretionary and appropriate but only under certain circumstances, including the need for a sexually violent predator assessment, for the offenses specified in subsection (4). People v. Harrison, 165 P.3d 859 (Colo. App. 2007).

This section gives notice of the possible sentencing range and allows the court to exercise its discretion in considering rehabilitative potential. People v. Smith, 29 P.3d 347 (Colo. App. 2001).

Phrase "at least" in § 16-13-804 (1) does not require the court to set the minimum length of the indeterminate sentence at the midpoint of the presumptive range. The court may impose a minimum length to the indeterminate sentence that is greater than the midpoint of the presumptive range. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

When the court sentenced the defendant to consecutive sentences after finding that the two counts arose out of the same incident, the sentencing did not violate Apprendi principles. In this case, the court's fact finding did not increase the defendant's sentence beyond the maximum allowed by statute. *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Sections [16-11-309 \(1\)\(c\)](#) and [18-1-105 \(9\)\(e.5\)](#) conflict irreconcilably with § 16-13-804 (1)(b). The phrase "up to the defendant's natural life" in §§ [16-11-309 \(1\)\(c\)](#) and [18-1-105 \(9\)\(e.5\)](#) conflicts with the phrase "a maximum of the sex offender's natural life" in § 16-13-804 (1)(b). Statutory construction calls for § 16-13-804 (1)(b) to prevail, requiring the court to set the maximum length of the indeterminate sentence at the defendant's natural life. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

The court has discretion to designate a minimum term that is greater than the maximum presumptive penalty. To conclude otherwise would be to read a provision into the act that does not exist. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

The Colorado Sex Offender Lifetime Supervision Act requires an indeterminate sentence for the class 2, 3, and 4 felony sex offenses to which it applies, consisting of an upper term of the sex offender's natural life and a lower term of a definite number of years, not less than the minimum nor more than twice the maximum of the presumptive range authorized for the class of felony of which the defendant stands convicted. *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).

Although the Colorado Sex Offender Lifetime Supervision Act expressly forbids a sentence with a lower term that is less than the minimum of the presumptive range, it does not preclude the lower term of the defendant's indeterminate sentence from exceeding the presumptive range as the result of extraordinary aggravating circumstances. Subject to the express prohibition of subsection (1)(a) against a sentencing below the presumptive range, the lower term of a sex offender's indeterminate sentence must be fixed according to the provisions of the determinate sentencing scheme of § [18-1.3-401](#). *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).

This section applies to first degree sexual assault on an at-risk adult. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

This section applies to an attempt to commit a sex offense if the attempt constitutes a class 2, 3, or 4 felony. *People v. King*, 151 P.3d 594 (Colo. App. 2006).

Before a defendant convicted of soliciting for child prostitution can be sentenced to an indeterminate sentence, an assessment must be made that it is likely that the defendant will commit an enumerated sexually violent predator crime under certain specific circumstances. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

When the sentence imposed by the court is supported by the record there is no abuse of discretion. *People v. Ogleshorpe*, 87 P.3d 129 (Colo. App. 2003).

Where defendant was sentenced under subsection (1)(a) of this section and not § [18-1.3-401 \(7\)](#), the court was not required to make specific findings to identify extraordinary circumstances and reasons for varying from the presumptive sentencing range. *People v. Vensor*, 116 P.3d 1240 (Colo. App. 2005), rev'd on other grounds, 151 P.3d 1274 (Colo. 2007).

Applied in *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004).

