

TITLE 18

CRIMINAL CODE

Editor's note: This title was numbered as chapter 40, C.R.S. 1963. The substantive provisions of this title were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this title prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of this title, see the comparative tables located in the back of the index.

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PART 1

PURPOSE AND SCOPE OF CODE - CLASSIFICATION OF OFFENSES

18-1-101. Citation of title 18.

(1) This title shall be known and may be cited as the "Colorado Criminal Code"; within this title, the "Colorado Criminal Code" is sometimes referred to as "this code".

(2) The portion of any section, subsection, paragraph, or subparagraph contained in this code which precedes a list of examples, requirements, conditions, or other items may be referred to and cited as the "introductory portion" of the section, subsection, paragraph, or subparagraph.

Source: L. 71: R&RE, p. 388, § 1. C.R.S. 1963: § 40-1-101.

ANNOTATION

Caption "criminal code" complies with constitutional requirements concerning titles. The caption "criminal code" is broad enough to embrace every offense against the law that can be classified as a misdemeanor or felony as well as criminal pleading and practice, and fully complies with the constitutional requirements concerning titles to legislation. *Heller v. People*, 2 Colo. App.

459, 31 P. 773 (1892) (decided under G.S. § 1616).

Although a child under the age of 10 cannot be found guilty of a crime, such a child can commit a crime. Therefore, an adult can be found guilty of contributing to the delinquency of a minor where the minor is under the age of 10. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

18-1-102. Purpose of code, statutory construction.

(1) This code shall be construed in such manner as to promote maximum fulfillment of its general purposes, namely:

(a) To define offenses, to define adequately the act and mental state which constitute each offense, to place limitations upon the condemnation of conduct as criminal when it is without fault, and to give fair warning to all persons concerning the nature of the conduct prohibited and the penalties authorized upon conviction;

(b) To forbid the commission of offenses and to prevent their occurrence through the deterrent influence of the sentences authorized; to provide for the rehabilitation of those convicted and their punishment when required in the interests of public protection;

(c) To differentiate on reasonable grounds between serious and minor offenses, and prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities as between individual offenders;

(d) To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses and to identify certain minimum standards for criminal justice which, within the concept of due process of law, have the stature of substantive rights of persons accused of crime;

(e) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.

Source: L. 71: R&RE, p. 388, § 1. **C.R.S. 1963:** § 40-1-102. **L. 2011:** (1)(e) added, (HB 11-1032), ch. 296, p. 1401, § 4, effective August 10.

ANNOTATION

Law reviews. For case note, "Interjurisdictional Merger of Sentences: The Need for an Interstate Compact", see 49 U. Colo. L. Rev. 473 (1978). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Construction. Criminal statutes are to be construed strictly in favor of the accused. *People v. Roybal*, 618 P.2d 1121 (Colo. 1980); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985).

Sentencing court should tailor the sentence to the defendant, keeping in mind past record, potential for rehabilitation, and protection of the public as well. *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975).

Sentencing discretion reposes in court. It is the court, and not the probation department, in whom sentencing discretion is reposed. *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979).

Sentencing involves an exercise in judicial discretion and, accordingly, a sentencing judge has wide latitude in arriving at a final decision. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

The trial court has wide discretion in sentencing and, absent a finding of abuse of discretion, an appellate court will not substitute its judgment for that of the trial judge. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

The trial court has broad discretion in sentencing one convicted of a felony. All relevant factors may be considered to determine which alternative is most appropriate to meet the sentencing goals and policies of deterrence, punishment, rehabilitation, and protection of the public. Absent a finding of an abuse of discretion, an appellate court will not substitute its judgment on appeal. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Record must clearly justify action of sentencing judge where a sentence is imposed for an extended term. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Considerations in appellate review of sentence. In an appellate review of a sentence, a claim of excessiveness generally requires a consideration of the nature of the offense, the character of the offender, and the public interest in safety and deterrence. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

When an offender has committed offenses in a number of different jurisdictions, the sentence imposed should "promote maximum fulfillment" of the legislative directives in the sentencing statutes. *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977).

Applied in *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979); *People v. Martinez*, 628 P.2d 608 (Colo. 1981).

18-1-102.5. Purposes of code with respect to sentencing.

(1) The purposes of this 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, and 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 and participation of convicted offenders;

(e) To select a sentence, a sentence length, and a 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 and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.

Source: **L. 79:** Entire section added, p. 668, § 15, effective July 1. **L. 2011:** (1)(c) and (1)(d) amended and (1)(e) added, (HB 11-1180), ch. 96, p. 282, § 1, effective August 10; (1)(c) and (1)(d) amended and (1)(f) added, (HB 11-1032), ch. 296, p. 1402, § 5, effective August 10.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For comment, "Criminal Sentencing in Colorado: Ripe for Reform", see 65 U. Colo. L. Rev. 685 (1994).

Sentencing is a discretionary decision which requires weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and

society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing, by its very nature, is a discretionary act that is not subject to scientific precision. *Flower v. People*, 658 P.2d 266 (Colo. 1983).

A judge has wide latitude in reaching his decision on a particular sentence. *People v. Martinez*, 628 P.2d 608 (Colo. 1981).

Sentencing is a complex process which requires the exercise of the sound discretion of the sentencing judge. *People v. Beland*, 631 P.2d 1130 (Colo. 1981).

The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Some of the more common factors to be considered in sentencing are: The gravity of the offense in terms of harm to person or property or in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation; and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative chosen. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Reed*, 43 P.3d 644 (Colo. 2001).

Judge's sentencing discretion limited by general assembly. Although a judge has broad discretion in tailoring a sentence to accommodate various factors, the sentence must be consistent with legislatively imposed limits and constraints. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

In order to achieve the purposes of sentencing, the general assembly has required the sentencing court to consider and

weigh, prior to the imposition of the sentence, 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, including those specifically found by the court to be extraordinary. *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985).

Purposes of sentencing are to punish a defendant in relation to the seriousness of the offense, to assure fair and consistent treatment of all convicted offenders, to deter others likely to commit similar offenses, and to promote the defendant's rehabilitation. *People v. Reed*, 43 P.3d 644 (Colo. 2001).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentence must bear some proportionality to severity of offense for which it is imposed, notwithstanding the need for public protection. *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Piro*, 701 P.2d 878 (Colo. App. 1985).

Three considerations of concern to judge when setting sentence are the need to protect society at large and deter potential offenders, to punish the convicted offender, and to rehabilitate him. *People v. Bravo*, 630

P.2d 612 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Defendant's behavior deemed relevant factor. A defendant's behavior during judicial proceedings and while in custody may well become relevant facts for the court to consider as part of the factors it weighs in sentencing. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Judge must consider rehabilitation needs of individual defendant. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

While rehabilitation is a preferred goal, it is only one factor which must be considered in tailoring a sentence to each individual case. *People v. Jordan*, 630 P.2d 613 (Colo. 1981).

Sentence must be supported by reasons in record. Hereafter in felony convictions involving the imposition of a sentence to a correctional facility the sentencing judge must state on the record the basic reasons for the imposition of sentence. The statement need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a

term of confinement to a correctional facility. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Factors in appellate review of extended term of confinement. In evaluating the propriety or intrinsic fairness of an extended term of confinement, an appellate court focuses on the nature of the offense, the character of the offender and the public interest and determines whether the record establishes a clear justification for the sentence imposed. *People v. Scott*, 630 P.2d 615 (Colo. 1981).

No vacation or modification unless abuse of discretion. On review, an appellate court may not vacate or modify a sentence imposed by a trial court unless it appears that the trial judge clearly abused his discretion in imposing the sentence. *People v. Beland*, 631 P.2d 1130 (Colo. 1981).

Although judiciary has exclusive authority to impose sentences, such sentences must be within the limits determined by the general assembly which has the exclusive authority to define crimes and impose punishment. *People v. Schwartz*, 823 P.2d 1386 (Colo. App. 1991).

No abuse of discretion. In light of the facts and the nature of the crimes, the trial

court did not abuse its discretion in imposing consecutive sentences for aggravated robbery and second degree kidnapping. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

Trial court did not abuse its discretion in imposing a sentence of twice the maximum presumptive range. The sentence was appropriate because the defendant had committed an especially vicious attack in violation of a restraining order, and the court gave due consideration to the defendant's rehabilitative potential and employment history. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Because the sentence imposed was within the range required by law and was based on appropriate considerations supported by the record, trial court did not abuse its discretion in imposing an aggravated sentence. *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

The trial court did not abuse its discretion in sentencing a defendant convicted of second degree murder, theft, and attempted theft to imprisonment for 45 years despite the fact the defendant tested positive for the human immunodeficiency virus (HIV). *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Trial court did not abuse its discretion by sentencing a defendant to probation after the defendant's prison-plus-probation sentence was found to be illegal. *People v. Snedeker*, 2023 COA 46, 535 P.3d 128, *aff'd*, 2025 CO 10, 564 P.3d 301.

Applied in *People v. Wylie*, 44 Colo. App. 38, 605 P.2d 494 (1980); *People v. Hostetter*, 44 Colo. App. 44, 606 P.2d 80 (1980); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *Rocha v. People*, 713 P.2d 350 (Colo. 1986).

18-1-103. Scope and application of code.

(1) Except as otherwise expressly provided by sections 18-1.3-402 and 18-1.3-504, or unless the context otherwise requires, the provisions of this code govern the construction of and punishment for any offense defined in any statute of this state, whether in this title or elsewhere, and which is committed on or after July 1, 1972, as well as the construction and application of any defense to a prosecution for such an offense.

(2) Except as otherwise provided by section 18-1-410, the provisions of this code do not apply to or govern the construction of, prosecution for, and punishment for any offense committed prior to July 1, 1972, or the construction and application of any defense to a prosecution for such an offense. Such an offense shall be tried and disposed of according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted. All pending actions shall proceed to final disposition in the same manner as if this code had not been enacted.

(3) The provisions of this code do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action for any conduct which this code makes punishable; and the civil injury is not merged in the offense.

Source: **L. 71:** R&RE, p. 389, § 1. **C.R.S. 1963:** § 40-1-103. **L. 73:** p. 533, § 1. **L. 95:** (3) amended, p. 16, § 8, effective March 9. **L. 2002:** (1) amended, p. 1509, § 176, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

The only purpose of this section was to ensure that the substantive crime definitions and penalty provisions in the repealed chapter 40 of Colorado Revised Statutes 1963, rather than those in this title, would continue in force as to crimes committed prior to July 1, 1972. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294 (1978).

The provisions of this section are not jurisdictional in nature, therefore, the protections of this section may be waived by entry of a voluntary and knowing plea of guilty. *People v. Sandreschi*, 849 P.2d 873 (Colo. App. 1992).

The reference in subsection (2) to "this code" must be read to refer only to the "Colorado Criminal Code" of which it is a part. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294 (1978).

Application of subsection (2). Subsection (2) applies only to the criminal code, and not to the code of criminal

procedure. *People v. Loger*, 188 Colo. 291, 535 P.2d 210 (1975).

1 U.S.C. § 109 nullifies abatement of indictments and prosecutions for acts committed under former code. Because subsection (2) does not obviate prosecutions for illegal activities occurring before July 1, 1972, 1 U.S.C. § 109 operates to nullify any abatement of an indictment and subsequent prosecution for criminal acts committed under the former criminal code. *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973).

Section 18-1-405 not applicable to offense committed prior to July 1, 1972. The speedy trial provision of § 18-1-405 does not apply to an action where the alleged offense was committed prior to July 1, 1972. *People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).

Nor § 18-1-409. Since the offense for which the defendant was sentenced was

committed prior to July 1, 1972, the right of appeal under § 18-1-409 is not available to him. *People v. Knight*, 185 Colo. 364, 525 P.2d 425 (1974).

Preemption of municipal ordinance by code. Where state assault statute was repealed when criminal code took effect on July 1, 1972, and defendant was charged with violation of municipal assault ordinance occurring on July 7, 1972, municipal assault ordinance was not preempted, on July 7, by state assault ordinance; however, it could be argued that municipal assault ordinance was preempted by assault provisions of criminal code. *City*

of Lakewood v. District Court, 181 Colo. 69, 506 P.2d 1228 (1973).

Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense had occurred prior to that time, trial court did not err in refusing such request. *People v. Crawford*, 191 Colo. 504, 553 P.2d 827 (1976).

Body execution statute unconstitutional under fourteenth amendment. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987).

Applied in *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *Barreras v. People*, 636 P.2d 686 (Colo. App. 1981).

18-1-104. "Offense" defined - offenses classified - common-law crimes abolished.

(1) The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed.

(2) Each offense falls into one of nine classes, one of six drug offense levels, or one unclassified category. There are six classes of felonies as described in section 18-1.3-401 and four levels of drug felonies as described in section 18-1.3-401.5, two classes of misdemeanors as described in section 18-1.3-501 and two levels of drug misdemeanors as described in section 18-1.3-501, petty offenses as described in section 18-1.3-503, civil infractions as described in section 18-1.3-503, and the category of drug petty offense as described in section 18-1.3-501 (1)(e).

(3) Common-law crimes are abolished and no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state, but this provision does not affect the power of a court to punish for contempt, or to employ any sanction authorized by law for the enforcement of an order lawfully entered, or a civil judgment or decree; nor does it affect the use of case law as an interpretive aid in the construction of the provisions of this code.

Source: **L. 71:** R&RE, p. 389, § 1. **C.R.S. 1963:** § 40-1-104. **L. 89:** (2) amended, p. 829, § 39, effective July 1. **L. 2002:** (2) amended, p. 1510, § 177, effective October 1. **L. 2014:** (2) amended, (SB 14-163), ch. 391, p. 1969, § 5, effective June 6. **L. 2021:** (2) amended, (SB 21-

271), ch. 462, p. 3166, § 177, effective March 1, 2022. **L. 2022:** (2) amended, (HB 22-1229), ch. 68, p. 343, § 16, effective March 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (2) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 18-1-104 is similar to former § 40-1-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. Colorado has statutorily adopted the common-law rule that a crime consisted of the union of an act and intent. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Courts are not precluded from reliance upon the common law in amplification of sections of the criminal code. *People v. Berry*, 703 P.2d 613 (Colo. App. 1985).

The common law may be used in aid of the meaning to be given statutory language, when such language is not defined in the statute. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Where a statute does not define a crime, but merely gives to it its common-law name or designation, resort must be had to the common law to ascertain what

acts constitute the crime in question. *Thompson v. People*, 181 Colo. 194, 510 P.2d 311 (1973).

When the general assembly defines a crime and sets forth the intent necessary to commit the crime, the courts cannot alter the elements or substitute a different animus or intent. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

The definition of a crime is the same as that of a misdemeanor, each consisting of a violation of a public law. *Hoffman v. People*, 72 Colo. 552, 212 P. 848 (1923).

"Crime" includes all grades of public offenses, which at the common law are often classified as treason, felony, and misdemeanor. *Hoffman v. People*, 72 Colo. 552, 212 P. 848 (1923).

The violation of a municipal ordinance does not come within the definition of this section and is neither a crime nor a misdemeanor. *City of Greeley v. Hamman*, 12 Colo. 94, 20 P. 1 (1888).

Violation of a no-contact order issued by a municipal court pursuant to authority in §§ 14-4-101 to 14-4-105, is a crime under § 18-6-803.5. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998).

Contempt of court. Although the general assembly in 1971 abolished all common law crimes in Colorado, it reserved to the courts the power to punish contempt by enacting this section. *People v. Barron*, 677 P.2d 1370 (Colo. 1984).

The power to define criminal conduct and to establish the legal components of criminal liability is vested with the general assembly. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

In addition to establishing the essential components of criminal liability, it is within the prerogative of the general assembly to establish affirmative defenses based on principles of justification or excuse. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

Within constitutional limitations, the general assembly also may restrict an affirmative defense to a particular crime. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

Applied in *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *City of Greenwood Vill. v. Fleming*, 643 P.2d 511 (Colo. 1982).

18-1-105. Felonies classified - presumptive penalties. (Repealed)

Source: L. 71: R&RE, p. 390, § 1. **C.R.S. 1963:** § 40-1-105. **L. 72:** p. 267, § 4. **L. 73:** p. 531, § 83. **L. 74:** (1) and (2) amended, p. 409, §§ 26, 27, effective April 11; (3) and (4) added, p. 251, § 3, effective January 1, 1975. **L. 76:** (1) amended, p. 548, § 7, effective July 1. **L. 77:** Entire section R&RE, p. 867, § 15, effective July 1, 1979. **L. 79:** (1), (6), and (7) R&RE and (1)(c) amended, pp. 669, 700, §§ 16, 69, effective July 1. **L. 81:** (1)(b), (1)(c), and (7) amended and (8) and (9) added, pp. 969, 970, 972, 986, §§ 1, 1, 1, 2, effective July 1. **L. 82:** (8) repealed, p. 312, § 3, effective July 1. **L. 84:** (1)(a) amended, p. 513, § 5, effective July 1. **L. 85:** (9)(d) added, p. 675, § 4, effective June 7; (1)(a)(II), (2), and (4) amended and (1)(a)(III), (1)(a)(IV), (9)(a)(VI), and (9)(e) added, pp. 622, 652, 655, 667, 675, §§ 5, 7, 1, 3, effective July 1. **L. 86:** (9)(a)(VII), (9)(a)(VIII), and (9)(f) added, p. 769, §§ 1, 2, effective July 1. **L. 87:** (9)(a)(IV.5) added, p. 606, § 9, effective April 16. **L. 88:** (1)(a)(III), IP(9)(a), (9)(d)(I), and (9)(e)(I) amended, (1)(b)(IV), (1)(b)(VI) to (1)(b)(VIII), and (10) added, and (1)(b)(V) added and amended, pp. 680, 681, 716, 711, 1439 §§ 3, 5, 2, 4, 14, 44, effective July 1. **L. 89:** (1)(a)(III)(A), (1)(a)(IV), (1)(b)(I), (2), and (9)(a)(V) amended and (1)(b)(V) to (1)(b)(VIII) repealed, pp. 829, 861, §§ 40, 156, effective July 1. **L. 90:** (11) added, p. 989, § 1, effective April 16; (9)(a)(IV), (9)(a)(IV.5), (9)(a)(VI), and (9)(a)(VII) repealed and (9.5) added, p. 955, §§ 27, 25, effective June 7. **L. 91:** (4) and (10) amended, p. 404, §§ 5, 6, effective June 6. **L. 92:** (11) repealed, p. 393, § 25, effective July 1. **L. 93:** (1)(a)(IV), (1)(c), and (10) amended and (1)(a)(V) and (9.7) added, pp. 1983, 54, 1730, 1981,

§§ 8, 19, 12, 7, 9, effective July 1. **L. 95:** (1)(a)(V)(D) amended, p. 879, § 15, effective May 24; (4) amended, p. 1293, § 3, effective July 1. **L. 96:** (1)(a)(III)(A) and (1)(b)(II) amended and (1)(a)(III)(E) added, p. 1841, § 4, effective July 1; (9)(a)(III) amended, p. 736, § 7, effective July 1. **L. 97:** (9)(a)(IX), (9.5)(a.5), (9.5)(c.5), and (9.5)(c.7) added, p. 1546, §§ 17, 18, effective July 1; (1)(b)(IV) amended, p. 1009, § 11, effective August 6. **L. 98:** (1)(a)(V)(C) amended, p. 399, § 6, effective April 21; (1)(a)(VI) added, p. 1447, § 38, effective July 1; (9)(g) added, p. 1264, § 1, effective July 1; (1)(a)(V)(C), (1)(a)(V)(D), (1)(c), and (9)(e)(I) amended and (1)(a)(V)(C.3), (1)(a)(V)(C.5), (1)(b)(II.5), (9)(e.5), and (9.7)(c) added, pp. 1289, 1290, §§ 4, 5, 6, 7, effective November 1. **L. 99:** (9.5)(a) amended and (9.7)(b)(XIII) added, pp. 800, 794, §§ 22, 3, effective July 1. **L. 2000:** IP(9.7)(b), (9.7)(b)(I), (9.7)(b)(II), and (9.7)(b)(III) amended, p. 702, § 25, effective July 1; (1)(a)(III)(A.5) added, p. 1107, § 3, effective August 2; (12) added, p. 1049, § 12, effective September 1. **L. 2001:** (13) added, p. 1009, § 1, effective July 1. **L. 2002:** (1)(a)(V)(C) and (1)(a)(V)(C.3) amended and (1)(a)(V)(C.7) added, p. 124, § 1, effective March 26; (1)(a)(V)(C.7) amended, p. 1192, § 41, effective July 1; (9)(e.5) amended, p. 758, § 3, effective July 1; (1)(a)(V)(C.7) amended and entire section repealed, pp. 1566, 1463, §§ 387, 3, effective October 1. **L. 2002, 3rd Ex. Sess.:** (4) amended, p. 15, § 7, effective July 12.

Editor's note: This section was relocated to § 18-1.3-401 in 2002.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(a)(V)(C.7) and repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-106. Misdemeanors classified - penalties. (Repealed)

Source: **L. 71:** R&RE, p. 390, § 1. **C.R.S. 1963:** § 40-1-106. **L. 79:** Entire section amended, p. 700, § 70, effective July 1. **L. 87:** Entire section amended, p. 626, § 1, effective April 1. **L. 88:** (1) amended and (1.5) added, p. 717, § 3, effective July 1. **L. 89:** (1.5)(a) amended, p. 1643, § 4, effective June 5. **L. 93:** (1) amended and (3) added, pp. 55, 1984, §§ 20, 10, effective July 1. **L. 97:** (3)(b) amended, p. 1539, § 1, effective July 1; (1.5) amended, p. 1009, § 12, effective August 6. **L. 98:** IP(3)(b) amended and (3)(b)(V) added, p. 1231, § 1, effective July 1. **L. 99:** (3)(b)(I.5) added, p. 347, § 3, effective July 1. **L. 2000:** (3)(b)(I.5) and (3)(b)(II) amended, p. 703, § 26, effective July 1; (4) added, p. 1108, § 4, effective August 2; (5) added, p. 1049, § 13, effective September 1. **L. 2001:** (3)(b)(III) and (3)(b)(V) amended and (3)(b)(VI) added, p. 568, § 3, effective May 29; (6) added, p. 1010, § 2, effective July 1. **L. 2002:** (3)(b)(VI) amended, p. 1186, § 21, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-501 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-107. Petty offenses classified - penalties. (Repealed)

Source: **L. 71:** R&RE, p. 390, § 1. **C.R.S. 1963:** § 40-1-107. **L. 73:** p. 499, § 5. **L. 79:** Entire section amended, p. 700, § 71, effective July 1. **L. 81:** Entire section amended, p. 2025, § 17, July 14. **L. 93:** Entire section amended, p. 55, § 21, effective July 1. **L. 2000:** Entire section amended, p. 1049, § 14, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-503 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-108. Offenses not classified. (Repealed)

Source: **L. 71:** R&RE, p. 391, § 1. **C.R.S. 1963:** § 40-1-108. **L. 76, Ex. Sess.:** 10, § 1. **L. 79:** Entire section amended, p. 671, § 21, effective July 1. **L. 93:** Entire section amended, p. 1985, § 11, effective July 1. **L. 2000:** Entire section amended, p. 1050, § 15, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-504 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-109. Penalty not fixed by statute - punishment. (Repealed)

Source: **L. 72:** p. 268, § 5. **C.R.S. 1963:** § 40-1-109. **L. 79:** Entire section amended, p. 701, § 72, effective July 1. **L. 85:** Entire section amended, p. 657, § 6, effective July 1. **L. 93:** Entire section amended, p. 1985, § 12, effective July 1. **L. 2000:** Entire section amended, p. 1050, § 16, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-505 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-110. Payment and collection of fines for class 1, 2, or 3 misdemeanors and class 1 or 2 petty offenses - release from incarceration. (Repealed)

Source: **L. 89:** Entire section added, p. 886, § 1, effective April 6. **L. 97:** (3) amended, p. 1571, § 5, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-506 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 2

JURISDICTION AND PLACE OF TRIAL

18-1-201. State jurisdiction.

(1) A person is subject to prosecution in this state for an offense which he commits, by his own conduct or that of another for which he is legally accountable, if:

(a) The conduct constitutes an offense and is committed either wholly or partly within the state; or

(b) The conduct outside the state constitutes an attempt, as defined by this code, to commit an offense within the state; or

(c) The conduct outside the state constitutes a conspiracy to commit an offense within the state, and an act in furtherance of the conspiracy occurs in the state; or

(d) The conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited under the laws of this state and such other jurisdiction.

(2) An offense is committed partly within this state if conduct occurs in this state which is an element of an offense or if the result of conduct in this state is such an element. In homicide, the "result" is either the physical contact which causes death or the death itself; and if the body of a criminal homicide victim is found within the state, the death is presumed to have occurred within the state.

(3) Whether an offender is in or outside of the state is immaterial to the commission of an offense based on an omission to perform a duty imposed by the law of this state.

Source: L. 71: R&RE, p. 391, § 1. C.R.S. 1963: § 40-1-201.

ANNOTATION

By this section, Colorado has modified the common-law rule of limited territorial jurisdiction by enlarging its power to prosecute crimes that may originate outside the state. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975); *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Jurisdiction not limited by district. Criminal jurisdiction over felony offenses committed in Colorado extends to all the district courts of Colorado. *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Criminal jurisdiction over felonies committed in Colorado generally extends

to all district courts of the state. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997); *People v. Brown*, 70 P.3d 489 (Colo. App. 2002); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006).

Issue of sovereign jurisdiction a legal question for the trial court. Where determination of jurisdiction depends upon a resolution of disputed facts, the issue must be submitted to the jury with an appropriate instruction, regardless of whether raised by defendant. However, no plain error results from a failure to submit the issue to the jury if the uncontested facts overwhelmingly

support jurisdiction. *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Larceny may be prosecuted at place goods stolen or brought. Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently brought. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Key analysis is not where e-mail threats are written or read, but rather whether the result of sender's conduct, causing a reasonable person to be in fear for his or her safety, occurs, at least in part, in this state. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Evidence sufficient to establish that e-mails, with their implicit and explicit threats, would have caused a reasonable person in recipients' position to fear for their safety and the safety of others in this state. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Conduct of making a credible threat occurred at least partly in this state because sender sent e-mails to addresses associated with individuals sender knew to reside here. Trial court therefore had jurisdiction over felony stalking counts. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Theft committed partly within state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was

"committed partly within this state" as contemplated by subsection (2), and, therefore, in accordance with subsection (1)(a) defendant "is subject to prosecution in this state" for that offense. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Delivery of goods not "conduct" for purposes of subsection (2). *People v. Tinkle*, 714 P.2d 919 (Colo. App. 1985).

Colorado lacked subject matter jurisdiction over a defendant convicted of money laundering when the defendant opened a bank account in Texas, received and disbursed funds in Texas, and never solicited the Colorado victims to wire transfer funds to Texas. *People v. Nevelik*, 2021 COA 30, 491 P.3d 492.

The state lacked subject matter jurisdiction over defendant's prosecution because none of defendant's conduct forming a material element of either unauthorized use of a financial transaction device or identity theft occurred in the state, and the unauthorized use and identity theft statutes do not include a result element. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

Knowledge that the victim lives in the state is a circumstantial element, and is not a conduct or result element of the crime of unauthorized use of a financial transaction device or of identity theft and therefore should not be considered when determining jurisdiction. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

An omission to act in accordance with a custody decree is sufficient to confer jurisdiction on charges of second degree kidnapping. People v. Haynie, 826 P.2d 371 (Colo. App. 1991).

Defendant's alleged expatriation under the Expatriation Act of 1868 does not remove personal jurisdiction from a state court in a criminal prosecution where the offense was committed in that state. People v. Jones, 140 P.3d 325 (Colo. App. 2006).

District court had personal jurisdiction over defendant filing a Crim. P. 32(d) motion because defendant's filing of the motion constituted a waiver of any objection to jurisdiction. By filing the Crim. P. 32(d) motion, defendant subjected himself to the court's authority because the doctrine of

personal jurisdiction exists to protect the individual against the exercise of the court's adjudicatory authority, and any action favorable to defendant taken by the court on defendant's motion would be for his benefit and at his request. People v. Corrales-Castro, 2015 COA 34M, 412 P.3d 701, rev'd on other grounds, 2017 CO 60, 395 P.3d 778.

Officers' testimony that they investigated defendant's conduct "here in Mesa County" makes it clear from the context of the testimony that the officers were referring to Mesa County, Colorado. People v. Torline, 2020 COA 160, 487 P.3d 1284.

Applied in People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Rice, 40 Colo. App. 357, 579 P.2d 647 (1978).

18-1-202. Place of trial - applicability.

(1) Except as otherwise provided by law, criminal actions shall be tried in the county where the offense was committed, or in any other county where an act in furtherance of the offense occurred.

(2) If a person committing an offense upon the person of another is in one county and his victim is in another county at the time of the commission of an act constituting an element of the offense, the offense is committed and trial may be had in either of said counties.

(3) In a case involving the death of a person, the offense is committed and the offender may be tried in any county in which the cause of death is inflicted, or in which death occurs, or in which the body of the deceased or any part of such body is found.

(4) Theft of property is committed and the offender may be tried in any county in which he exercised control over the property.

(5) If the commission of an offense commenced outside the state is consummated within this state, the offense is committed and the offender shall be tried in the county where the offense is consummated.

(6) If an offense is committed in or upon any automobile, trailer, railroad car, aircraft, or other vehicle of transportation passing within or over this state, the offense is deemed to have been committed and the offender may be tried in any county through or over which the vehicle of transportation passed.

(7) (a) When multiple crimes are based upon the same act or series of acts arising from the same criminal episode and are committed in several counties, the offender may be tried in any county in which any one of the individual crimes could have been tried, regardless of whether or not the counties are in the same judicial district.

(b) (I) For purposes of this subsection (7), when a person commits one of the offenses listed in subparagraph (II) of this paragraph (b) on two or more occasions within a six-month period, it may be considered part of the same criminal episode. Nothing in this subsection (7) shall bar prosecution of an offense that could have been joined in another prosecution.

(II) The provisions of subsection (7)(b)(I) of this section apply to the following offenses:

(A) Theft, as defined in section 18-4-401;

(B) and (C) Repealed.

(D) Criminal mischief, as defined in section 18-4-501;

(E) Fraud by check, as defined in section 18-5-205;

(F) Defrauding a secured creditor or debtor, as defined in section 18-5-206;

(G) Failure to pay over assigned accounts, as defined in section 18-5-502;

(H) Concealment or removal of secured property, as defined in section 18-5-504;

(I) Failure to pay over proceeds, as defined in section 18-5-505;

(J) Unauthorized use of a financial transaction device, as defined in section 18-5-702;

(K) Cybercrime, as defined in section 18-5.5-102;

(L) Repealed.

(M) Trafficking in food stamps, as defined in section 26-2-306, C.R.S.;

(N) Unlawful use of a patient personal needs trust fund, as defined in section 25.5-6-206, C.R.S.;

(O) Repealed.

(P) Theft of a license plate, as described in section 42-5-104;

(Q) Theft in connection with assistive technology, as described in section 6-1-409, C.R.S.;

- (R) Theft of farm products, as described in section 35-36-313;
- (S) Fraud in connection with obtaining public assistance, as described in section 26-1-127, C.R.S.;
- (T) Fraud in connection with obtaining food stamps, as described in section 26-2-305, C.R.S.;
- (U) An offense described in part 1 of article 5 of this title;
- (V) Forgery, as defined in sections 18-5-102 and 18-5-104; and
- (W) Identity theft, as defined in section 18-5-902.

(c) (I) For an indictment or information that includes an offense described in article 5 of this title, the offender may be tried in a county where the offense occurred, in a county where an act in furtherance of the offense occurred, or in a county where a bank, savings and loan, credit union, or government agency processed a document or transaction related to the offense.

(II) For the purpose of this section, "processed" means to physically handle a document or to make a written or electronic entry in a permanent or temporary record of the transaction, whether the entry is made manually or through automated means.

(8) An inchoate offense is committed and the offender may be tried in any county in which any act which is an element of the offense, including formation of the agreement in conspiracy, is committed.

(9) When a person in one county solicits, abets, agrees, aids, or attempts to aid another in the planning or commission of an offense in another county, the offense is committed and the offender may be tried for the offense in either county, or in any other county in which the principal offense could be tried.

(10) When an offense is committed on the boundary line between two counties, or so close thereto as to be difficult to readily ascertain in which county the offense occurred, the offense is committed and the offender may be tried for the offense in either county.

(11) Proof of the county in which the offense occurred or which county is the proper place for trial pursuant to this section shall not constitute an element of any offense and need not be proven by the prosecution at trial unless required by the statute defining the offense. Any challenge to the place of trial pursuant to this section shall be made by motion in writing no later than twenty-one days after arraignment, except for good cause shown. The court shall determine any such issue prior to the commencement of the trial and the selection of a jury. If the court finds that trial is not proper in the county in which the charges were filed, the court shall transfer the case to a court of appropriate jurisdiction in the proper county. Failure to challenge the place of trial as provided in this subsection (11) shall constitute a waiver of any objection to the place

of trial. Pursuant to section 16-12-102 (2), C.R.S., the prosecution may file an interlocutory appeal of a decision transferring the case to another county.

(12) If a person commits the offense of failure to register as a sex offender as provided in section 18-3-412.5, the offense is committed and the offender may be tried in the county in which the offender was released from incarceration for commission of the offense requiring registration, in the county in which the offender resides, in the county in which the offender completed his or her last registration, or in the county in which the offender is apprehended.

(13) If a person commits identity theft as described in section 18-5-902, identity theft is committed and the offender may be tried in any county where a prohibited act was committed, in any county where an act in furtherance of the offense was committed, or in any county where the victim resides during all or part of the offense. For purposes of this subsection (13), a business entity resides in any county in which it maintains a physical location.

(14) (a) If a person commits sexual assault on a child as described in section 18-3-405 (1) and commits the offense as part of a pattern of sexual abuse as described in section 18-3-405 (2)(d), or commits sexual assault on a child by one in a position of trust as described in section 18-3-405.3 (1) and commits the offense as part of a pattern of sexual abuse as described in section 18-3-405.3 (2)(b), the offender may be tried for all acts:

(I) In a county where at least one of the acts constituting the offense or the pattern of sexual abuse was committed; or

(II) In a county where an act in furtherance of the offense was committed.

(b) This subsection (14) takes effect on April 4, 2017, and applies to an act constituting a pattern of sexual abuse for which the offense's statute of limitations has not yet run on April 4, 2017.

(c) Nothing in this subsection (14) allows for a defendant to be placed in jeopardy twice for the same incident of sexual conduct involving a child that has been previously alleged as an incident necessary to form a pattern of sexual abuse as defined in section 18-3-401(2.5) in violation of the prohibition against second trials in sections 18-1-301, 18-1-302, and 18-1-303.

Source: L. 71: R&RE, p. 391, § 1. C.R.S. 1963: § 40-1-202. L. 84: (10) added, p. 536, § 4, effective July 1. L. 87: (7) amended, p. 606, § 10, effective April 16. L. 92: (3) amended and (11) added, p. 402, § 12, effective June 3. L. 95: (12) added, p. 469, § 17, effective July 1. L. 98: (7) amended, p. 793, § 2, effective July 1. L. 2002: (12) amended, p. 1181, § 4, effective July 1. L. 2003: (7)(b)(II) amended and (7)(c) added, p. 976, § 15, effective April 17; (7)(b)(II)(S) and (7)(b)(II)(T) amended and (7)(b)(II)(V) added, p. 1019, § 1, effective April 17. L. 2004: (7)(c)(I) amended, p. 1738, § 3, effective July 1. L. 2006: (7)(b)(II)(N) amended, p. 2005, § 60, effective

July 1; (7)(b)(II)(W) and (13) added, p. 1317, §§ 2, 1, effective July 1. **L. 2011:** (12) amended, (SB 11-007), ch. 107, p. 335, § 1, effective August 10; (12) amended, (HB 11-1278), ch. 224, p. 964, § 8, effective August 10. **L. 2012:** (11) amended, (SB 12-175), ch. 208, p. 862, § 101, effective July 1. **L. 2013:** (7)(b)(II)(B) and (7)(b)(II)(C) repealed, (HB 13-1160), ch. 373, p. 2200, § 9, effective June 5. **L. 2017:** (14) added, (HB 17-1109), ch. 97, p. 292, § 1, effective April 4; IP(7)(b)(II) and (7)(b)(II)(L) amended, (HB 17-1245), ch. 240, p. 989, § 2, effective August 9; IP(7)(b)(II) and (7)(b)(II)(R) amended, (SB 17-225), ch. 262, p. 1246, § 5, effective August 9. **L. 2018:** (7)(b)(II)(K) amended, (HB 18-1200), ch. 379, p. 2293, § 5, effective August 8. **L. 2020:** IP(7)(b)(II) and (7)(b)(II)(R) amended, (HB 20-1213), ch. 160, p. 754, § 6, effective June 29. **L. 2021:** (7)(b)(II)(P) amended, (SB 21-271), ch. 462, p. 3166, § 178, effective March 1, 2022; repeal provisions in (7)(b)(II)(L) and (7)(b)(II)(O) added by revision, (SB 21-271), ch. 462, pp. 3166, 3331, §§ 178, 803.

Editor's note: (1) Amendments to subsection (7)(b)(II) by Senate Bill 03-147 and House Bill 03-1020 were harmonized.

(2) Subsection (7)(b)(II)(V) was originally numbered as (7)(b)(II)(U) in House Bill 03-1020 but has been renumbered on revision for ease of location.

(3) Subsection (7)(b)(II)(L) provided for the repeal of subsection (7)(b)(II)(L), effective March 1, 2022. (See L. 2021, pp. 3166, 3331.)

(4) Subsection (7)(b)(II)(O) provided for the repeal of subsection (7)(b)(II)(O), effective March 1, 2022. (See L. 2021, pp. 3166, 3331.)

Cross references: For similar provisions concerning the place of trial, see Crim. P. 18; for change of venue, see part 1 of article 6 of title 16; for the place of trial of an action for violation of a custody order, see § 18-3-304 (4).

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961).

Pursuant to subsection (11), the prosecution is not required to prove venue as an element of the offense and, therefore, the prosecution's burden of proof is not unconstitutionally lowered. The sixth amendment does not require venue to be an element of the crime proven beyond a reasonable doubt. A defendant's right to

proper venue can be vindicated without having to submit the issue to a jury. *People v. Lewis*, 2017 COA 147, 433 P.3d 70.

Venue provisions are solely for the benefit of the defendant and may be waived. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987); *People v. Rice*, 579 P.2d 647 (Colo. App. 1978); *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Entry of plea forecloses objection. Once the accused subjects himself or herself to the authority of the court by offering a guilty plea, any further objection to venue is deemed waived. *Vigil v. People*, 310 P.2d 552 (Colo. 1957); *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

The propriety of venue is a matter of law and fact, not discretion. Therefore, a court must take evidence and make specific findings when it severs counts that are not triable under the court's jurisdiction. *People v. Reed*, 132 P.3d 347 (Colo. 2006).

Authority of district attorney is a technical matter subject to waiver. Just as a defendant may waive objections to venue, he or she may also waive any objection to the authority of the district attorney to bring a criminal charge. *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Larceny may be prosecuted where goods stolen or brought. Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently

brought. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Out-of-state theft. The Colorado courts have jurisdiction over the offense of theft which originated in the state of New Mexico. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Theft committed partly in state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was "committed partly within this state" as contemplated by § 18-1-201(2), and, therefore, in accordance with § 18-1-201(1)(a) defendant "is subject to prosecution in this state" for that offense. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Under subsection (9), drug transaction crime starting in one county and completed in an adjacent county may be tried in either county even though almost all of the transaction occurred in the adjacent county. *People v. Ray*, 109 P.3d 996 (Colo. App. 2004).

Crime committed on highway. Under the provisions of this section where a criminal offense is committed on a public highway between two counties the trial may be had in either county. *Stone v. People*, 71 Colo. 162, 204 P. 897 (1922) (decided under R.S. 08, § 1908).

Where the "cause of death" is administered in one city when a defendant causes a bomb to be placed in the airplane, out of his custody and beyond his control, with the intent and for the purpose of

causing the death of a passenger on the plane, the death is undoubtedly the result of defendant's unlawful act, and this having occurred in the city the venue is there properly laid pursuant to this section, and the trial court there unquestionably has jurisdiction. *Graham v. People*, 134 Colo. 290, 302 P.2d 737 (1956) (decided under §§ 39-9-1 and 40-2-12, CRS 53).

Venue in a kidnapping case may be either in the county in which the offense was committed or in any county through which the person kidnapped was taken or kept while under confinement or restraint. *Claxton v. People*, 164 Colo. 283, 434 P.2d 407 (1967) (decided under § 40-2-47, C.R.S. 1963).

Where an accused is charged with multiple crimes arising from the same criminal episode and which were committed in several counties, charges can be filed in any county in which any of the individual charges could be filed so long as such offenses were committed within the same judicial district since this section does not broaden the authority of the district attorney to file charges based on crimes committed outside the judicial district. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987); *People v. Cortez*, 737 P.2d 810 (Colo. 1987).

This section does not limit the situs of a crime to the county in which the offense is committed but also includes any county where an act in furtherance of the offense occurred. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987); *People v. Bobo*, 897 P.2d 909 (Colo. App. 1995); *People v. Joseph*, 920

P.2d 850 (Colo. App. 1995); *People v. Shackley*, 248 P.3d 1204 (Colo. 2011); *People v. Black*, 2022 COA 127, 524 P.3d 341.

Although some evidence against defendant was seized in a different county, there was a reasonable inference that the seized evidence was used to commit the crimes that were alleged to have been committed in the county where the trial occurred; therefore, venue was proper. *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007).

Filing or preparing tax returns in one county is not an act "in furtherance of the offense" of criminal impersonation. Change of venue to county where work was performed was proper. *People v. Nevarez-Zambrano*, 222 P.3d 329 (Colo. 2010).

Under subsection (11), the prosecution is not required to prove venue as an element of the offense. Therefore, an erroneous allegation of venue does not constitute reversible error. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

Applied in *People v. Gould*, 193 Colo. 176, 563 P.2d 945 (1977); *People v. Donahue*, 41 Colo. App. 70, 578 P.2d 671 (1978); *People v. Rice*, 40 Colo. App. 357, 579 P.2d 647 (1978); *People v. Beck*, 42 Colo. App. 69, 593 P.2d 371 (1979); *People v. Freeman*, 668 P.2d 1371 (Colo. 1983); *People v. Cortez*, 703 P.2d 648 (Colo. App. 1985), *aff'd*, 737 P.2d 810 (Colo. 1987); *People v. Felgar*, 58 P.3d 1122 (Colo. App. 2002).

PART 3

WHEN PROSECUTION BARRED BY FORMER PROCEEDINGS

Cross references: For constitutional provisions concerning double jeopardy, see § 18 of art. II, Colo. Const.

Law reviews: For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to double jeopardy, see 15 Colo. Law. 1572 (1986).

18-1-301. Second trial barred by former prosecution for same offense.

(1) If a prosecution is for a violation of the same provision of law and is based upon the same facts as a former prosecution, it is barred by the former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense even though the conviction is subsequently set aside.

(b) The former prosecution was terminated by a final order or judgment for the defendant that has not been set aside, reversed, or vacated, and that necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction that has not been reversed or vacated, a verdict of guilty that has not been set aside and that is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two instances, failure to enter judgment must be for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as otherwise provided in subsection (2) of this section, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury is sworn if the case is tried by a jury or after the first prosecution witness is sworn if trial is by court following waiver of jury trial.

(2) Termination is not improper under any of the following circumstances:

(a) The defendant consents to the termination or waives his right to object to the termination. The defendant is deemed to have waived all objections to a termination of the trial unless his objections to the order of termination are made of record at the time of the entry thereof.

(b) The trial court finds that:

(I) The termination is necessary because it is physically impossible to proceed with the trial in conformity with the law; or

(II) There is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law; or

(III) Prejudicial conduct has occurred in or outside the courtroom making it unjust either to the defendant or to the state to proceed with the trial; or

(IV) The jury is unable to agree upon a verdict; or

(V) False statements of a juror on voir dire prevent a fair trial.

Source: L. 71: R&RE, p. 396, § 1. C.R.S. 1963: § 40-1-401.

ANNOTATION

Jeopardy does not attach if an information is insufficient in form and substance to sustain a conviction. People v. Garner, 187 Colo. 294, 530 P.2d 496 (1975).

Jeopardy attaches upon guilty plea. Jeopardy attaches to a county court prosecution when the defendant enters a plea of guilty. Corr v. District Court, 661 P.2d 668 (Colo. 1983).

Jeopardy attaches upon court's acceptance of a plea of guilty, and the attachment of jeopardy is what triggers the statutory bar of subsection (2) of § 18-1-408. Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981).

Jeopardy attaches after first prosecution witness is sworn in, so, because no witnesses had yet been sworn in in the habitual criminal proceeding when the trial court dismissed the charges, jeopardy was not considered to have attached. People v. Barnum, 217 P.3d 908 (Colo. App. 2009).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of subsection (2) of § 18-1-408 is broader than both the "same offense" principle of double jeopardy as codified in this section and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in § 18-1-302. Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

Protection from reprosecution where proceedings improperly terminated.

Where defendants had completed a full trial and all charges had been submitted to the jury, and the jury returned a verdict on only one of the numerous charges, dismissal of the jury without further instruction or deliberation on the remaining charges is an improper termination of the proceedings, and the defendants are protected from reprosecution on those charges. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

Where trial judge, despite objections of defense attorney, erroneously declared a mistrial sua sponte because a key staff member resigned, the docket was crowded, and the trial ran longer than was anticipated, second trial was barred by double jeopardy. The court's reasons for declaring a mistrial were not substantial enough to warrant a finding of "manifest necessity". *People v. Berreth*, 13 P.3d 1214 (Colo. 2000).

Double jeopardy principles do not prevent reinstatement of a defendant's habitual criminal counts. The state's double jeopardy law does not apply to noncapital sentencing proceedings, so double jeopardy does not bar trial of a

defendant's habitual counts. *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Where the court gave defendant a choice between a mistrial and a continuance, defendant's response that he did not request either was sufficient to preserve his objection. *Paul v. People*, 105 P.3d 628 (Colo. 2005).

Trial court did in fact declare a mistrial based on jury deadlock. Although the trial court did not expressly declare a mistrial at the time the jury returned the unsigned verdict form, the record showed that the court and the parties understood that a mistrial had been declared. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Trial court did not abuse its discretion in ordering a mistrial when the defense did not disclose to prosecution a defense witness's new alibi evidence and elicited the evidence on cross-examination. *People v. Jackson*, 2018 COA 79, 474 P.3d 60, *aff'd* on other grounds, 2020 CO 75, 472 P.3d 553.

Applied in *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975); *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976).

18-1-302. Second trial barred by former prosecution for different offense.

(1) Although a prosecution is for a violation of a different provision of law than a former prosecution or is based on different facts, it is barred by the former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal or a conviction as defined in section 18-1-301 (1)(a) and (1)(c) and the subsequent prosecution is for:

(I) Any offense of which the defendant could have been convicted under the allegation of the complaint, information, or indictment of the first prosecution; or

(II) The same conduct, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil or the second offense was not consummated when the former trial began.

(b) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction of the second offense.

(c) The former prosecution was improperly terminated, as improper termination is defined in section 18-1-301 (1)(d) and (2), and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

Source: L. 71: R&RE, p. 397, § 1. C.R.S. 1963: § 40-1-402.

ANNOTATION

This section must be read to deal with multiple prosecutions in the same jurisdiction since § 18-1-303 sets out the circumstances in which a second trial in Colorado is barred by a former prosecution in another jurisdiction. Clearly, this section cannot be construed to bar separate prosecutions for different state and federal offenses arising out of the same series of transactions, for such trials could not be held in the same court. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

The test of double jeopardy as to different offenses is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether

separate acts have been committed with the requisite criminal intent and are such as are made punishable. Conviction and sentences for two distinct offenses did not put appellees twice in jeopardy where the Colorado statutes separately define the offenses of burglary and assault with intent to rob. Burglary is a crime against property; it is the unlawful entering of a dwelling house or building with the intent to commit larceny or other felony. Assault with intent to rob is a crime directed against a person; it is an unlawful attempt coupled with a present ability to commit a violent injury on the person, with the specific intent to commit robbery. The offenses were separate and independent and the imposition of two

consecutive sentences were within the law and did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967).

Collateral estoppel is an integral part of the concept of double jeopardy. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Simply stated, collateral estoppel bars relitigation between the same parties of issues actually determined at a previous trial. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Subsection (1)(a)(II) is designed to protect a defendant from having to relitigate an issue of ultimate fact once it has been determined by a valid and final judgment. When a previous judgment was based on a general verdict, a court is required to examine the record, taking into account the pleadings, evidence, charge, and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose. *People v. Matheson*, 671 P.2d 968 (Colo. App. 1983).

This section protects a defendant from having to relitigate a factual issue once it has been determined by a valid and final judgment. The doctrine of collateral estoppel generally precludes a later trial if a rational fact-finder could not have grounded its earlier verdict upon an issue other than that upon which a later conviction would necessarily be based. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Collateral estoppel and invalidity of dual sovereignty in Colorado barred trial.

Where defendant was tried in a municipal court for reckless and careless driving in violation of that municipality's traffic code, he could not later be tried in district court for feloniously inflicting bodily injury while under the influence of intoxicating liquor by operating and driving a motor vehicle in a reckless, negligent, or careless manner, in violation of the state code, because of the doctrine of collateral estoppel, and because dual sovereignty is no longer valid in Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of § 18-1-408 (2) is broader than both the "same offense" principle of double jeopardy as codified in § 18-1-301 and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in this section. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

This statutory prohibition against a later prosecution does not apply if the offense in the later prosecution necessarily requires proof of a fact not required by the former prosecution and the law defining each offense is intended to prevent a substantially different harm or evil. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Effect of acquittal upon lesser included offense. It is the character of the evidence which must control in determining whether

the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Applied in *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

18-1-303. Second trial barred by prosecution in another jurisdiction.

(1) If conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States, or another state, or of a municipality, a prosecution in any other of these jurisdictions is a bar to a subsequent prosecution in this state under either of the following circumstances:

(a) The first prosecution resulted in a conviction or an acquittal as defined in section 18-1-301 (1)(a) and (1)(c), and the subsequent prosecution is based on the same conduct, unless:

(I) The offense for which the defendant was formerly convicted or acquitted requires proof of a fact not required by the offense for which he is subsequently prosecuted and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or

(II) The second offense was not consummated when the former trial began.

(b) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

Source: L. 71: R&RE, p. 397, § 1. C.R.S. 1963: § 40-1-403.

ANNOTATION

Dual sovereignty no longer viable in Colorado. In early cases the courts recognized the concept of dual sovereignty for the purposes of prosecution and punishment of an accused in both a state and municipal court for the same act. The concept of dual sovereignty is no longer viable in Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Subsection (1)(a) specifically defines the capacity of the state to prosecute when there has been a previous prosecution in a municipality. *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977).

Effect of previous prosecution in municipal court. Where defendant was tried in a municipal court for reckless and careless driving in violation of that municipality's traffic code, he could not later

be tried in district court for feloniously inflicting bodily injury while under the influence of intoxicating liquor by operating and driving a motor vehicle in a reckless, negligent, or careless manner, in violation of the state code, because of the doctrine of collateral estoppel, and because dual sovereignty is no longer valid in Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Where defendant struck one man and also allegedly hit another man, and the assault on the first man resulted in the filing of charges for the violation of two municipal ordinances, to which the defendant pleaded guilty, and where the district attorney filed a felony complaint in the Denver county court and charged the defendant with first-degree assault and second-degree burglary, and the felony assault charge predicated on the acts which allegedly caused the injuries to the second man was dismissed by the county court judge, and the district attorney then filed a direct information in the district court, charging the defendant with first-degree assault, this section did not justify dismissal of the felony assault charge against the defendant. *People v. Mendoza*, 190 Colo. 519, 549 P.2d 766 (1976).

Jeopardy does not attach when a charge is dismissed on grounds unrelated to a defendant's criminal liability. Where, prior to the commencement of trial, a federal charge was dismissed on the basis of a finding of incompetency to stand trial, jeopardy did not attach; consequently, state prosecution did not amount to "subsequent prosecution". *Chatfield v. Colo. Court of Appeals*, 775 P.2d 1168 (Colo. 1989).

A complete defense to a subsequent state prosecution is provided by this section; it does not function to deprive a district court of jurisdiction over a defendant or a charged offense. *Chatfield v. Colo. Court of Appeals*, 775 P.2d 1168 (Colo. 1989).

Prosecution by Indian tribal court bars a subsequent Colorado prosecution where the requirements of this section are met. *People v. Morgan*, 785 P.2d 1294 (Colo. 1990).

This section does not apply to prior prosecutions by foreign countries. *People v. Garcia*, 2021 COA 65, 493 P.3d 929, *aff'd*, 2023 CO 41, 530 P.3d 1200.

Exception in this section for previously tried offenses which require proof of different facts than the subsequently tried offense does not include facts required to establish jurisdiction and venue or facts concerning the dates of the conduct. *People v. Morgan*, 785 P.2d 1294 (Colo. 1990).

Colorado's subsequent prosecution barred because it was based on the same conduct for which defendant was convicted in California. Colorado's prosecution for aggravated motor vehicle theft was based on same conduct as California conviction for unlawful taking of a vehicle, and the exception in (1)(a)(I) does not apply because California and Colorado statutes were intended to prevent substantially similar harm. *People v. Giem*, 2015 COA 176, 378 P.3d 809.

While the California offense requires proof of a fact that the Colorado offense does not, the subsection (1)(a)(I) exception to the statutory bar applies only if both prongs of the exception are satisfied. Colorado could not show that the law defining the California offense and the law defining the Colorado offense were intended to prevent a substantially different harm or evil. *People v. Giem*, 2015 COA 176, 378 P.3d 809.

Federal acquittal or conviction based on same conduct is a bar to state prosecution unless federal action requires proof of a fact not required by state offense. *People v. Esch*, 786 P.2d 462 (Colo. App. 1989).

Defendant's federal prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO) and subsequent state conviction for first degree murder for the same incident do not constitute double jeopardy. The RICO conviction required proof of facts not necessary for the state murder conviction, and the two laws seek to prohibit substantially different evils. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

Applied in *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977); *Blum v. County Court*, 631 P.2d 1191 (Colo. App. 1981); *People v. Wentling*, 2015 COA 172, 409 P.3d 411.

18-1-304. Former prosecution not a bar.

(1) A former prosecution is not a bar within the meaning of sections 18-1-301 to 18-1-303, if the former prosecution:

- (a) Was before a court that lacked jurisdiction over the defendant or the offense; or
- (b) Was procured by the defendant without the knowledge of the appropriate prosecuting official and with the intent to avoid the sentence that otherwise might be imposed; or
- (c) Resulted in a judgment of conviction that was set aside, reversed, or vacated upon appeal or in any other subsequent judicial proceeding.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-404.

ANNOTATION

A defendant is not in double jeopardy when a conviction is overturned on appeal and remanded for a retrial. If the first conviction was overturned because the

defendant was convicted through a defective judicial process, the defendant's guilt or innocence has not been adjudicated. Therefore, the new trial on remand does not

violate the state and federal double jeopardy clauses. *People v. Viburg*, 2021 CO 81M, 500 P.3d 1123.

Defendant's arrest in stolen car in California and subsequent California prosecution does not amount to procuring prosecution in California for purposes of the exception. California law enforcement pulled over and arrested defendant for unlawful driving or taking of a vehicle because stolen Colorado vehicle contained

antitheft transmitter. Merely being present in California with a stolen car stops short of procuring a prosecution under this section. The fact that defendant accepted California plea based on lawyer's advice that it would allow him to avoid prosecution in Colorado does not affect analysis because his decision to take the plea occurred after his prosecution began and did not bring about the prosecution. *People v. Giem*, 2015 COA 176, 378 P.3d 809.

PART 4

RIGHTS OF DEFENDANT

18-1-401. Purpose.

It is the intent of this part 4 to confer upon every person accused of an offense the benefits arising from said part 4 as a matter of substantive right, in implementation of minimum standards of criminal justice within the concept of due process of law.

Source: L. 71: R&RE, p. 398, § 1. **C.R.S. 1963: § 40-1-501.**

ANNOTATION

Applied in *People v. Aragon*, 665 P.2d 137 (Colo. App. 1982); *People v. Germany*, 674 P.2d 345 (Colo. 1983).

18-1-402. Presumption of innocence.

Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt.

Source: L. 71: R&RE, p. 398, § 1. **C.R.S. 1963: § 40-1-502.**

ANNOTATION

I. General Consideration.

II. Presumption of Innocence.

III. Proof Beyond Reasonable Doubt.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963).

Annotator's note. Since § 18-1-402 is similar to former § 40-2-20 C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The policy of the government is to punish only those who violate the law and to protect the innocent in all cases. Criminal prosecutions are not to be regarded or conducted as contests between individuals respecting civil rights, wherein advantages not reaching the merits may be gained by one party over another. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Legislature's competence to establish culpability and justification not impaired. Constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the legislature's competence to establish the statutory constituents of criminal culpability for various offenses and to formulate particular rules of justification or excuse for acts that otherwise might be criminally punishable.

People v. Ledman, 622 P.2d 534 (Colo. 1981).

Accused presumed innocent until guilt proved beyond reasonable doubt. The prosecution in a criminal case must establish the guilt of the accused by proof beyond a reasonable doubt, and until the prosecution meets that burden, the accused is presumed to be innocent. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

Section provides foundation of criminal justice system. The presumption of innocence, coupled with proof of each element of the charge beyond a reasonable doubt, provides the foundation for a system of criminal justice. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Component parts of due process of law. Proof beyond a reasonable doubt and presumption of innocence are principles of law applicable to criminal cases which have been so universally accepted and applied as to have become component parts of the term "due process of law". *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

The presumption of innocence has meaning independent of the concept of proof beyond a reasonable doubt which relates to the burden of proof. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Language of the 2022 model jury instruction for the presumption of innocence, burden or proof, and

definition of reasonable doubt does not lower the prosecution's burden of proof.

In making this determination, the court looks at the record as a whole and asks whether there is a reasonable likelihood the jury applied the instructions in an unconstitutional manner. *People v. Berumen*, 2025 COA 93, 583 P.3d 1264.

The 2022 model jury instruction is an accurate statement of the law. The phrase "firmly convinced" correctly connotes a standard of "near certitude", one that is "highly probable" but stops short of absolute certainty. The phrase "real possibility" correctly directs the jury not to acquit the defendant because it can conceive of some fanciful possibility that the defendant is not guilty. *People v. Berumen*, 2025 COA 93, 583 P.3d 1264.

Combining in one instruction the instructions on presumption of innocence, burden of proof, and reasonable doubt did not amount to an abuse of discretion, where no prejudice has been shown. *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973).

II. PRESUMPTION OF INNOCENCE.

Purpose of presumption of innocence. The presumption of innocence was developed for the purpose of guarding against the conviction of an innocent person. It was not developed for the purpose of aiding the guilty to escape punishment. It is nevertheless perfectly plain that the presumption, together with the related rule on the burden of proof, in guarding against the conviction of an innocent person, may in some cases prevent the conviction of a person who is actually guilty. Thus, where

the prosecution is unable to muster evidence sufficient to overcome the presumption, there will be an acquittal, even though the defendant is actually guilty. This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons. The implication that society is just as anxious to convict the guilty as it is to acquit the innocent is false; otherwise there would be no presumption of innocence. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Presumption of guilt raised by implications of defendant's prior criminality held prejudicial error. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely defendant would commit another. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

A presumption of guilt should not be generated against an accused by showing that he committed a crime indicative that he is a depraved person who likely would commit the crime for which he is being tried. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Prosecution's closing argument misstating the presumption of innocence was erroneous. Prosecution's statements in closing argument that defendant "sits here in front of you a guilty man" and that the presumption of innocence "we had when we started this case is gone" were flawed

because a defendant retains a presumption of innocence throughout the trial process. The presumption remains until after a jury returns a guilty verdict. *People v. McBride*, 228 P.3d 216 (Colo. App. 2009).

Prosecutor's closing argument misstated its burden of proof of beyond a reasonable doubt where the prosecutor advised the jury during closing argument that it could acquit defendant only if it disbelieved everything one of the prosecution's witnesses said while testifying. *People v. Cuellar*, 2023 COA 20, 530 P.3d 1236.

Failure to instruct on the presumption of innocence constitutes a denial of due process of law and deprived defendant of his constitutional right to a fair trial. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Failure to instruct the jury as to the presumption of innocence is plain error. *People v. Aragon*, 665 P.2d 137 (Colo. App. 1982).

Instruction on the presumption of innocence is salutary, in that it guarantees that the defendant's liberty will not be lost precipitously and that the state will be put to the proper test in securing a conviction in a criminal case. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Instruction on presumption of innocence held inappropriate. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *Brown v. People*, 177 Colo. 397, 494 P.2d 587 (1972); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Recommended instruction on the presumption of innocence should read: "The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt." *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Instruction was not erroneous. *Zamora v. People*, 175 Colo. 340, 487 P.2d 1116 (1971).

Submitting erroneous instruction requires reversal only if objected to. Submitting to the jury an erroneous instruction on the presumption of innocence would ordinarily require reversal, but only if the defendant objected to the instruction. *People v. Simmons*, 182 Colo. 350, 513 P.2d 193 (1973).

III. PROOF BEYOND REASONABLE DOUBT.

Law reviews. For comment on *Jones v. People* (146 Colo. 40, 360 P.2d 686 (1961)), see 34 *Rocky Mt. L. Rev.* 243 (1962).

The reasonable doubt which authorizes an acquittal is as to the defendant's guilt, not his innocence. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Prosecution bears initial burden of proof. Before the accused can be convicted of murder, or called upon to produce evidence in justification or mitigation of such an offense, the prosecution must make out such a case as will, under the law,

sustain a verdict of guilty. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886).

Burden extends to all essential elements of crime. It is axiomatic that the burden of proof rests upon the prosecution throughout the trial to prove beyond a reasonable doubt the existence of all essential elements necessary to constitute the offense charged. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Prosecutor must establish fair account of transaction. The policy of the law, as evinced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, it devolves upon the defendant to produce in evidence such matters of mitigation, justification or excuse, if any such exist, as may tend to explain his action and show the necessity therefor; otherwise a verdict of guilty must necessarily be returned against him. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

He cannot be compelled to search for and put in evidence all the facts connected with the transaction, or exculpatory facts in the prisoner's favor. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

All matters showing justification or excuse must be considered in favor of accused. When the circumstances surrounding the commission of the homicide are produced in evidence by the state, all matters, if any, which go to justify or excuse the killing must be considered in favor of the defendant; and if sufficient to manifest that

the accused was justified or excused in committing the homicide, he is not bound to prove it by affirmative evidence in his own behalf. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886).

As to all facts in evidence properly constituting part of the *res gestae*, they are to be considered by the jury, in passing upon the question of guilt or innocence, without discrimination as to the rules of evidence, whether introduced by the prosecutor or the defendant. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The rule relating to the *res gestae* applies to all defenses which traverse the averments of the indictment and go to the essence of the guilt charged against the accused. Within this class may be mentioned self-defense, provocation, heat of blood, and, generally, all matters growing out of the *res gestae* which go to justify, extenuate or excuse the crime charged, including the defense of alibi. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The burden is never on the defendant to show that he did not commit the crime. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Defendant's only burden is to raise a reasonable doubt in the minds of the jury as to his guilt from all the evidence of the case. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Burden on accused to raise reasonable doubt of sanity. While up to the point of establishing an unjustifiable homicide the prosecution carries the burden of proof

beyond a reasonable doubt, sanity is presumed. He who relies upon its absence must then produce evidence which will at least raise a reasonable doubt of its existence. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

The killing having been established, the defendant had the burden of proving the effect of his mental condition as a mitigating circumstance in the perpetration of the killing. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961); *Jones v. People*, 155 Colo. 148, 393 P.2d 366 (1964).

Burden of establishing defendant's capacity to form specific criminal intent. Once some evidence from either the prosecution or the defense raises the issue of impaired mental condition, the burden devolves upon the prosecution to establish beyond a reasonable doubt the defendant's capacity to form the specific intent required for the offense as well as the defendant's guilt as to all essential elements of the crime charged against him. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

The accused is not required by this section to prove circumstances of mitigation or excuse beyond a reasonable doubt, or to the extent of satisfactorily establishing his defense. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Nor by a preponderance of evidence. When the killing is proved the burden does not devolve on the accused to show anything to the satisfaction of the jury by a fair preponderance of the evidence. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

In a substantial number of cases insanity is the only defense relied upon and as a practical matter the accused could be deprived of essential and time-honored safeguards and could be required to establish his innocence by a preponderance of the evidence, if provisions requiring proof of sanity by a preponderance of the evidence were upheld. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Defense need only raise reasonable doubt of guilt. The accused is only required to prove excuse or mitigation as any other facts are required to be proved; and if the matters relied on be supported by such proof are such as would produce a reasonable doubt in the minds of the jury as to the guilt of the prisoner, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The accused has the burden of showing circumstances of mitigation or circumstances that justify or excuse the homicide. If the showing be sufficiently strong to create a reasonable doubt of the guilt of the accused as to any grade of offense included in the indictment, the accused is entitled to the benefit thereof. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

It is not incumbent upon the defendant to prove anything to the satisfaction of the jury; rather, it is sufficient if he, by any evidence in the case, succeeds in raising a reasonable doubt in the minds of the jury of

the truth of any essential element of the charge against him. Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962).

Due process of law requires prosecution to establish all essential elements of crime beyond a reasonable doubt. People v. Ledman, 622 P.2d 534 (Colo. 1981).

The test for determining whether a trial court's statements to a jury lowered the prosecution's burden of proof is whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt. Tibbels v. People, 2022 CO 1, 501 P.3d 792; Pettigrew v. People, 2022 CO 2, 501 P.3d 813.

As part of its reasonable doubt instruction, the court should inform the jury that it may consider a lack of evidence in the case. However, omitting "lack of evidence" language did not impermissibly lower the prosecution's burden of proof where there was no basis to believe the jury acted in an unconstitutional way and the absence of an express direction did not amount to a prohibition. People v. Melara, 2025 COA 48, 572 P.3d 619.

Prejudice inevitable when instruction reduces prosecution's obligation of proof.

Prejudice to the defendant is inevitable when the court instructs the jury in such a way as to reduce the prosecution's obligations to prove each element of its case beyond a reasonable doubt. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

During voir dire, the court's description improperly added additional commentary to the reasonable doubt standard that trivialized the prosecution's burden of proof and imparted an incorrect instruction to the jurors. This error was structural and requires reversal of the conviction. Proper jury instruction on reasonable doubt at the close of trial did not cure the court's error. People v. Knobe, 2020 COA 7, 490 P.3d 543.

Instruction on reasonable doubt held fair statement of its legal meaning. People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972).

Instructions held erroneous. Any instruction, whatever its language, which in effect imposes upon the defendant the burden of affirmatively showing that no crime has been committed constitutes reversible error, since it clearly deprives him of the benefit of a reasonable doubt as to his guilt which may arise from all the evidence. Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962).

18-1-403. Legal assistance and supporting services.

All indigent persons who are charged with or held for the commission of a crime are entitled to legal representation and supporting services at state expense, to the extent and in the manner provided for in articles 1 and 2 of title 21, C.R.S.

Source: **L. 71:** R&RE, p. 398, § 1. **C.R.S. 1963:** § 40-1-503. **L. 81:** Entire section amended, p. 928, § 2, September 1. **L. 96:** Entire section amended, p. 1016, § 4, effective May 23. **L. 2014:** Entire section amended, (HB 14-1363), ch. 302, p. 1264, § 11, effective May 31.

Cross references: For other provisions concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and Crim. P. 44.

ANNOTATION

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to the right to counsel, see 15 Colo. Law. 1578 (1986).

Annotator's note. For other annotations concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and Crim. P. 44.

Implementation of ABA standards. The general assembly, in adopting this section, was endeavoring to meet and implement the ABA standards for criminal justice relating to providing defense services. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975).

For the right of defendant to have counsel appointed for appeal, see *In re Griffin*, 152 Colo. 347, 382 P.2d 202 (1963).

Income from members of a defendant's household who contribute monetarily to the household should be excluded from an indigency determination if the income is unavailable to the defendant. *People v. Greer*, 2022 CO 5, 502 P.3d 1012.

Motion within discretion of court. The granting or denial of a motion to provide supporting services to counsel for an indigent defendant in a criminal prosecution is a matter within the sound discretion of the trial court. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975); *People v. Marquiz*, 685 P.2d 242 (Colo. App. 1984), *aff'd*, 726 P.2d 1105 (Colo. 1986); *People v. Tafoya*, 703 P.2d 663 (Colo. App. 1985).

Must demonstrate need for appointment of expert witness. Having failed to demonstrate any particularized and reasonable need for the appointment of investigatory, expert, or other defense services, defendant was not entitled to the appointment of expert witnesses. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975).

Defendant entitled to have his expert take fingerprints from a plastic bag containing cocaine seized from his car, however, he was not entitled to require the state to conduct such fingerprint analysis. *People v. Roy*, 948 P.2d 99 (Colo. App. 1977).

Trial court did not abuse its discretion in failing to provide, at state expense, a private interpreter to translate out-of-court discussions between defendant and his attorney where legal representation was

supplied by a pro bono attorney rather than a public defender. *People v. Cardenas*, 62 P.3d 621 (Colo. 2002).

Applied in *Bd. of County Comm'rs v. Buck*, 168 Colo. 499, 452 P.2d 6 (1969).

18-1-404. Preliminary hearing or waiver - dispositional hearing.

(1) Every person accused of a class 1, 2, or 3 felony or level 1 or level 2 drug felony by direct information or felony complaint has the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406, or is a sexual offense under part 4 of article 3 of this title, shall have the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. The procedure to be followed in asserting the right to a preliminary hearing, and the time within which demand therefor must be made, as well as the time within which the hearing, if demanded, shall be had, shall be as provided by rule of the supreme court of the state of Colorado. A failure to observe and substantially comply with such rule is a waiver of the right to a preliminary hearing.

(2) (a) No person accused of a class 4, 5, or 6 felony or level 3 or level 4 drug felony by direct information or felony complaint, except those which require mandatory sentencing or which are crimes of violence as defined in section 18-1.3-406, or which are sexual offenses under part 4 of article 3 of this title, shall have the right to demand or receive a preliminary hearing; except that such person shall participate in a dispositional hearing for the purposes of case evaluation and potential resolution.

(b) Any defendant accused of a class 4, 5, or 6 felony or level 3 or level 4 drug felony who is not otherwise entitled to a preliminary hearing pursuant to paragraph (a) of this subsection (2), may demand and shall receive a preliminary hearing within a reasonable time pursuant to subsection (1) of this section, if the defendant is in custody; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing.

Source: L. 71: R&RE, p. 398, § 1. **C.R.S. 1963:** § 40-1-504. **L. 98:** Entire section amended, p. 1272, § 2, effective July 1. **L. 2002:** (1) and (2)(a) amended, p. 1510, § 178, effective October 1. **L. 2014:** Entire section amended, (SB 14-163), ch. 391, p. 1970, § 6, effective June 6.

Cross references: (1) For the rule of the supreme court on preliminary hearings, see Crim. P. 5.

(2) For the legislative declaration contained in the 2002 act amending subsections (1) and (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Primary purpose of the preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

The preliminary hearing is held for the limited purpose of determining if probable cause exists to believe that the crime or crimes charged were committed by the defendant. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

The preliminary hearing was created as a screening device to afford the defendant an opportunity to challenge the sufficiency of the prosecution's evidence to establish probable cause before an impartial judge.

People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Prosecution not required to lay out all witnesses and evidence. A preliminary hearing is a screening device and does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Judge must draw all reasonable inferences favorable to the prosecution at a preliminary hearing. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

A trial court commits reversible error when it resolved the inferences arising from conflicting testimony in a preliminary hearing in the defendant's favor. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Standard of review in determining if probable cause had been established requires that the evidence be sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the defendant may have committed the crimes charged. *People*

ex rel. Russel v. Hall, 620 P.2d 34 (Colo. 1980).

The standards for determining probable cause at a preliminary hearing are: (1) Probable cause is established when the evidence is sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged; (2) the evidence presented must be viewed in the light most favorable to the prosecution; (3) if testimony conflicts, the trial court must draw an inference for the prosecution; and (4) the preliminary hearing is a screening device and not a trial. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Hearsay evidence and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Hearsay evidence, which would otherwise be inadmissible at the trial, may be considered for purposes of establishing probable cause. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Admissibility of confessions and evidence not resolved as required at trial. The admissibility of a confession at a preliminary hearing, which is alleged to be involuntary or the admissibility of evidence that may have been seized in violation of amendment 4 of the U.S. Const. need not be resolved on the same basis that would be required when such motion is properly before the trial court or at the time of the

trial. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Waiver admits evidence sufficient to establish probable cause. If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Right to hearing may not be restored once waived. Under the Colorado rules of criminal procedure and the statutes of this state, a district court is not vested with the power to restore a defendant's statutory right to a preliminary hearing once the defendant had waived that right in county court bind-over proceedings. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Defendant entitled to a preliminary hearing on all class 1, 2, or 3 felonies even when the felony classification results from a sentence enhancer. *People v. Simpson*, 2012 COA 156, 292 P.3d 1153.

This section requires a preliminary hearing whenever a defendant who is out of custody is charged with a class 4, 5, or 6 felony that always requires mandatory sentencing, but not if the class 4, 5, or 6 felony charged may require mandatory sentencing. *People v. Hacke*, 2023 CO 6, 524 P.3d 8.

18-1-405. Speedy trial - definition.

(1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(2) If trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six-month period from the date upon which the continuance was granted.

(3.5) If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, the period within which the trial shall be had is extended for an additional six-month period from the date of the defendant's next appearance.

(4) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (1) of this section, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance or unless the defendant without making an appearance before the court in person or by his counsel files a dated written waiver of his rights to a speedy trial pursuant to this section and files an agreement to the continuance signed by the defendant. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(5) To be entitled to a dismissal under subsection (1) of this section, the defendant must move for dismissal prior to the commencement of his trial and prior to any pretrial motions which are set for hearing immediately before the trial or prior to the entry of a plea of guilty to the charge or an included offense. Failure to so move is a waiver of the defendant's rights under this section.

(5.1) If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as being beyond the time within which such trial shall be had pursuant to this section, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provisions of this section.

(6) In computing the time within which a defendant is brought to trial as provided in subsection (1) of this section, the following periods of time are excluded:

(a) Any period during which the defendant is incompetent to stand trial, or is unable to appear by reason of illness or physical disability, or is under observation or examination at any time after the issue of the defendant's mental condition, insanity, incompetency, or impaired mental condition is raised;

(b) The period of delay caused by an interlocutory appeal whether commenced by the defendant or by the prosecution;

(c) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(d) The period of delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial;

(e) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

(f) The period of any delay caused at the instance of the defendant;

(g) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(I) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the later date; or

(II) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court enters specific findings with respect to the justification;

(h) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs (a), (b), (c), (d), and (f) of this subsection (6), not to exceed three months;

(i) The period of delay between the filing of a motion pursuant to section 18-1-202 (11) and any decision by the court regarding such motion, and if such decision by the court transfers the case to another county, the period of delay until the first appearance of all the parties in a court of appropriate jurisdiction in the county to which the case has been transferred, and in such event subsection (7) of this section applies; and

(j) Repealed.

(7) If a trial date has been fixed by the court and the case is subsequently transferred to a court in another county, the period within which trial must be had is extended for an additional three months from the date of the first appearance of all of the parties in a court of appropriate jurisdiction in the county to which the case has been transferred.

(8) Repealed.

Source: **L. 71:** R&RE, p. 398, § 1. **C.R.S. 1963:** § 40-1-505. **L. 79:** (2) amended, p. 725, § 1, effective October 1. **L. 85:** (4) and (5) amended and (5.1) and (6)(h) added, pp. 622, 623, §§ 6, 7, effective July 1. **L. 87:** (3.5) added, p. 606, § 11, effective April 16. **L. 88:** (3.5) amended, p. 664, § 4, effective July 1. **L. 92:** (6) amended and (7) added, p. 402, § 13, effective June 3. **L. 94:** (6)(a) amended, p. 1716, § 4, effective July 1. **L. 99:** (6)(a) amended, p. 404, § 7, effective July 1. **L. 2021:** IP(6) and (6)(i) amended and (6)(j) and (8) added, (HB 21-1309), ch. 277, p. 1600, § 1, effective June 21.

Editor's note: (1) Subsection (6)(j)(VI) provided for the repeal of subsection (6)(j), effective July 1, 2023. (See L. 2021, p. 1600.)

(2) Subsection (8)(d) provided for the repeal of subsection (8), effective July 1, 2023. (See L. 2021, p. 1600.)

ANNOTATION

I. General Consideration.

II. Scope of Right to Speedy Trial.

III. Enforcement of Right.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Right of a Federal Prisoner to a Speedy Trial on a State Charge", see 12 Rocky Mt. L. Rev. 214 (1940). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to speedy trials, see

15 Colo. Law. 1595 and 1617 (1986). For article, "Justice Delayed is Justice Denied", see 21 Colo. Law. 2195 (1992). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado — Part I", see 31 Colo. Law. 115 (July 2002). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado — Part II", see 31 Colo. Law. 59 (Aug. 2002). For article, "At the Intersection: Handling Dependency and Neglect and Juvenile Delinquency Issues in Family Law Cases", see 51 Colo. Law. 28 (Feb. 2022). For article, "COVID-19 Comes to the Colorado

Supreme Court", see 99 Denv. L. Rev. 295 (2022).

Annotator's note. (1) For other annotations concerning speedy trials, see § 16 of art. II, Colo. Const., and Crim. P. 48.

(2) Since § 18-1-405 is similar to former § 39-7-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. It is not the purpose of this section to enable the guilty to escape, but to prevent unnecessary delays on the part of the prosecution. This section was intended to give effect to that provision of our bill of rights which guarantees one accused of a criminal offense a speedy trial. *Henwood v. People*, 57 Colo. 544, 143 P. 373 (1914).

This section is not concerned with the crime, nor with the punishment therefor, but is intended to prevent any unreasonable detention of an accused preliminary to his trial. The accomplishment of this purpose does not require final action on the criminal charge. *People v. Henwood*, 65 Colo. 566, 179 P. 874 (1919).

The fundamental right of an accused to a speedy trial arises from § 16 of art. II, Colo. Const. This section must be regarded as having been enacted for the purpose of rendering the constitutional guaranty effective and providing a method of securing the right declared. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled on other grounds in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

This section is intended to implement the constitutional right to a speedy trial by requiring dismissal of the case whenever the defendant is not tried within the six-month period and the delay does not qualify for one of the express exclusionary categories set out in the statute. *People v. Deason*, 670 P.2d 792 (Colo. 1983); *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

The obvious purpose of both the rule of criminal procedure and this section is to prevent dillydallying on the part of the district attorney or the court in a criminal proceeding. *People v. Bates*, 155 Colo. 277, 394 P.2d 134 (1964).

The right to a speedy trial is not only for the benefit of the accused, but also for the protection of the public. It is essential that an early determination of guilt be made, so that the innocent may be exonerated and the guilty punished. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971); *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Intent of this section is to prevent unnecessary prosecutorial and judicial delays. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

The speedy trial provisions are designed to foster more effective prisoner treatment and rehabilitation by eliminating, as expeditiously as possible, the uncertainties surrounding outstanding criminal charges. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

An accused person's right to a speedy trial is ultimately grounded on the federal and state constitutions, and statutes relating to speedy trial are intended to render these constitutional guarantees more effective. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

The right of an accused to a speedy trial is an important civil right, and when the constitutional mandate is invoked the matter should receive careful consideration by the courts. *Ex parte Russo*, 104 Colo. 91, 88 P.2d 953 (1939).

Section guarantees speedy trial. Under this section and under § 16 of art. II, Colo. Const., a defendant in a criminal action is entitled to a speedy trial, and, generally speaking, he may not be held without trial for a period beyond that fixed by law. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938).

It does not limit the constitutional right of an accused person to have a speedy public trial. *Hicks v. People*, 148 Colo. 26, 364 P.2d 877 (1961).

Trial in violation of defendant's speedy trial rights not permitted. A court would be proceeding without jurisdiction if it was to try a criminal defendant in violation of his rights under the Colorado speedy trial statute and the rules of the Colorado supreme court. *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980).

Court's practice of postponing arraignment until all pretrial matters are concluded thwarts purpose of this section

and *Crim. P. 48(b)*. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Period during which a defendant first was charged counts in assessing a contention by defendant that he was denied his constitutional right to a speedy trial when the state filed charges against him, later sought and obtained dismissal of the charges, and still later refiled the charges. *People v. Nelson*, 2014 COA 165, 360 P.3d 175.

Meaning of subsection (1). The phrase "brought to trial on the issues raised by the . . . information", as used in this section, refers to a trial which resolves the ultimate guilt or innocence of the accused as to the charges filed against him and not a sanity trial, even when the defendant pleads not guilty by reason of insanity. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Subsection (2) is ambiguous because it is silent on the remedy if a new trial does not occur within six months. In order to effectuate the intent of the statute, the dismissal remedy from subsection (1) must be imported into subsection (2). In addition, it is necessary to import the provisions of subsection (6) into subsection (2) in order to avoid an absurd result. *People v. Mosley*, 397 P.3d 1122 (Colo. App. 2011), *aff'd* on other grounds, 2017 CO 20, 392 P.3d 1198.

An accused is "brought to trial" when the court calls the case for trial and the attorneys are ready to proceed. *People v. Peltz*, 697 P.2d 766 (Colo. App. 1984), *aff'd*, 728 P.2d 1271 (Colo. 1986).

Commencement of a sanity trial is not the functional equivalent of a trial on the merits for purposes of satisfying the state's speedy trial obligation. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Section applies in juvenile proceedings. Trial courts are bound by the statutory and constitutional speedy trial requirements in juvenile as well as adult proceedings; fundamental fairness requires no less. *P.V. v. District Court*, 199 Colo. 357, 609 P.2d 110 (1980); *People in Interest of T.F.B.*, 199 Colo. 474, 610 P.2d 501 (1980).

In a juvenile adjudicatory action, a court must consider the factors set forth in subsection (6)(g) when ruling on a prosecutor's request to continue a trial past the speedy trial deadline without the juvenile's consent. *People in Interest of C.M.W.R.*, 2024 COA 4, 546 P.3d 1191.

Burden of compliance with time requirements is on prosecution and trial court. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978); *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

If trial court fails to cause such record to be made, dismissal of charges is required, even after jury has returned verdict of guilty. *People v. Scales*, 745 P.2d 259 (Colo. App. 1987), rev'd on other grounds, 763 P.2d 1045 (Colo. 1988).

It is duty of both prosecutor and trial judge to secure and protect defendant's right to speedy trial. *People v. Chavez*, 779 P.2d 375 (Colo. 1989); *Fisher v. County Court*, 796 P.2d 65 (Colo. App. 1990).

Even where defendant moves for change of venue. Where the defendant successfully moved for a change of venue, and the case was delayed because the trial judge did not designate a new venue and set a date or trial, such delay is attributable to the state since it is the responsibility of the district attorney and the trial court to cause the case to be brought to trial within the prescribed time limits. *People v. Colantonio*, 196 Colo. 242, 583 P.2d 919 (1978).

Burden of compliance with speedy trial statute includes making a record sufficient for an appellate court to determine statutory compliance. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

The constitutional right to a speedy trial derived from the federal and Colorado constitutions, is distinct from the statutory speedy trial right and the determination as to one does not necessarily dispose of the other. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

This statutory language is mandatory and leaves no room for court discretion. Its preface confines exceptions only to those delineated in the statute. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

The language of this section is mandatory and leaves no discretion for a court to fashion exceptions to the six-month rule apart from those delineated in the statute. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

The language of this section is mandatory unless the period of delay fits within or can be inferred from one of its exclusionary

provisions. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

If defendant is not tried within six months of entering plea of not guilty, and defendant has not waived speedy trial rights and no extensions or exclusions are allowable, charges must be dismissed. *Tongish v. Arapahoe County Court*, 775 P.2d 63 (Colo. App. 1989).

If no statutory exception or constitutional right justifies a delay and the defendant has taken no action to either cause or consent to a delay, noncompliance with the speedy trial requirements of this section must result in dismissal of the charges against the defendant. *People v. Arledge*, 938 P.2d 160 (Colo. 1997).

A court may not declare a retroactive mistrial in order to get around mandatory speedy trial deadlines. The people argued that the district court effectively declared a mistrial pursuant to Crim. P. 24(c), allowing an extension to the speedy trial deadline. However, a court cannot "effectively" declare a mistrial, it must explicitly declare one. *People v. Nunez*, 2021 CO 31, 486 P.3d 1149.

This section and Crim. P. 48(b) clarify and simplify the parameters of the constitutional right to a speedy trial. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975); *People v. Cisneros*, 193 Colo. 141, 563 P.2d 355 (1977); *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

This section and Crim. P. 48(b) were designed to render the federal and state

constitutional rights to a speedy trial more effective. *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982).

Crim. P. 48(b) was designed to substantially conform to this section. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

Since Crim. P. 48(b) is the procedural counterpart to the speedy trial statute and is virtually identical to this section, the resolution of a speedy trial issue is the same whether the analysis proceeds from the statute or the rule. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Effect of Crim. P. 48(b). Trial within the time period prescribed by Crim. P. 48(b) does not preclude raising the defendant's right to a speedy public trial as embodied in § 16 of art. II, Colo. Const. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966).

For the applicability of Crim. P. 48(b), see *Rhodus v. People*, 160 Colo. 407, 418 P.2d 42 (1966); *Ferguson v. People*, 160 Colo. 389, 417 P.2d 768 (1966); *Lucero v. People*, 161 Colo. 568, 423 P.2d 577 (1967); *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969); *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

Right to a speedy trial has been formulated to force the prosecution to try a defendant promptly in compliance with the statutes, rules, and constitutional requirements of each case. *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975).

Right to speedy trial attaches with filing of a formal charge. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Where determination that delays in bringing defendant to trial involved resolutions of fact questions, the district attorney could not appeal such determinations. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Section parallels C.M.C.R. 248(b). This section, also enacted as Crim. P. 48(b), is the parallel rule to C.M.C.R. 248(b). *Bachicha v. Mun. Court*, 41 Colo. App. 198, 581 P.2d 746 (1978).

Subsection (5.1) does not apply to acts committed before July 1, 1985, but which continue thereafter. *People v. Newton*, 764 P.2d 1182 (Colo. 1988).

This section, and not the Uniform Mandatory Disposition of Detainers Act (UMDDA), §§ 16-14-101 to 16-14-108, applies to the retrial of charges on convictions overturned on appeal. The UMDDA applies only to untried charges, and the charges against this defendant, while still pending, were not untried. *People v. Campbell*, 885 P.2d 327 (Colo. App. 1994).

Applied in *People v. Flowers*, 190 Colo. 453, 548 P.2d 918 (1976); *People v. Reliford*, 39 Colo. App. 474, 568 P.2d 496 (1977); *People v. Trujillo*, 41 Colo. App. 223, 586 P.2d 235 (1978); *People v. Gonzales*, 198 Colo. 546, 603 P.2d 139 (1979); *People v. Peek*, 199 Colo. 3, 604 P.2d 23 (1979); *People v. Boos*, 199 Colo. 15, 604 P.2d 272 (1979); *People ex rel. Freed v. County Court*, 42 Colo. App. 272,

592 P.2d 1355 (1979); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People in Interest of D.M.*, 650 P.2d 1350 (Colo. App. 1982); *People v. Olds*, 656 P.2d 705 (Colo. 1983); *People v. Ashton*, 661 P.2d 291 (Colo. App. 1982); *People v. Harding*, 671 P.2d 975 (Colo. App. 1983); *People v. Jones*, 677 P.2d 383 (Colo. App. 1983); *Snyder v. Moss*, 703 P.2d 1311 (Colo. App. 1985); *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985); *People v. Goodpaster*, 742 P.2d 965 (Colo. App. 1987).

II. SCOPE OF RIGHT TO SPEEDY TRIAL.

Incarceration of defendant outside state did not make him unavailable for purposes of speedy trial considerations, unless the prosecution can show that despite diligent efforts defendant's presence could not be secured. *Watson v. People*, 700 P.2d 544 (Colo. 1985); *People v. Byrne*, 762 P.2d 674 (Colo. 1988).

Diligent efforts found lacking. See *People v. Byrne*, 762 P.2d 674 (Colo. 1988).

Trial within required period not preclusion of assertion of right. A defendant is not precluded from asserting his constitutional right to a speedy trial simply because the trial was held within the required statutory period; the defendant, however, has the burden of proving that his constitutional speedy trial right has been denied. *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

A defendant is entitled to be tried within six months of the entry of a plea of not guilty. People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975).

Speedy trial is calculated separately for each criminal complaint. When charges in a complaint are properly dismissed within the speedy trial period without prejudice, they are a nullity. If defendant is arraigned under new charges, even if they are identical to the dismissed charges, the speedy trial period begins anew. Huang v. County Court of Douglas County, 98 P.3d 924 (Colo. App. 2003).

When charges are dismissed without prejudice within the speedy trial period and defendant is later charged with the same or similar counts, the speedy trial clock begins anew unless the district attorney dismissed the charges and refiled them to avoid a speedy trial violation. People v. Walker, 252 P.3d 551 (Colo. App. 2011); People v. Nelson, 2014 COA 165, 360 P.3d 175.

When the court dismissed the original charges against defendant when victim did not show up for trial within the speedy trial period against the wishes of the prosecution and defendant did not object, there is no basis to claim district attorney sought dismissal of the original charges to avoid a speedy trial violation. People v. Walker, 252 P.3d 551 (Colo. App. 2011).

Court and prosecutor's joint responsibility to avoid useless delays. It is the joint responsibility of the district attorney and the trial court to assiduously avoid any occasion for a useless and

unnecessary delay in the trial of a criminal case. People v. Murphy, 183 Colo. 106, 515 P.2d 107 (1973).

Ad hoc balancing test used to determine whether right to speedy trial has been denied. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973); People v. Chavez, 779 P.2d 375 (Colo. 1989).

The test includes four factors: The length of the delay, the reason for the delay, the defendant's assertion or demand for a speedy trial, and the prejudice to the defendant. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973); People v. Chavez, 779 P.2d 375 (Colo. 1989); People v. Fears, 962 P.2d 272 (Colo. App. 1997).

Statutory speedy trial period held to exclude period of time reasonably necessary to reset the case for trial after issuance of remittitur following appeal of case on constitutional grounds. People in Interest of N.P., 768 P.2d 707 (Colo. 1989) (decided under law in effect prior to 1985 amendment).

Speedy trial statute tolled with regard to all counts of the charging document when the people file an original proceeding seeking reinstatement of one or more counts of a multi-count charging document. People v. Beyette, 711 P.2d 1263 (Colo. 1986).

Absent the defendant's consent, a trial court may grant the prosecution a continuance with a tolling of the speedy trial period for up to six months if the prosecution establishes that, (1) as a result of a public health crisis, evidence material to its case is unavailable; (2) it has exercised

due diligence to obtain that evidence; and (3) there are reasonable grounds to believe that the unavailable evidence will be available on the new trial date. *People v. Lucy*, 2020 CO 68, 467 P.3d 332.

Time taken to complete appeal is excluded from six-month speedy trial period, but only the time of defendant's absence and a reasonable time to reschedule the hearing may be excluded. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997).

The six-month speedy trial period for commencing a new trial after initial conviction was reversed on appeal was tolled while defendant's C.A.R. 21 proceeding was being considered by the supreme court; therefore, the period of delay caused by the C.A.R. 21 proceeding is excluded from the six-month speedy trial period. *People v. Powell*, 917 P.2d 298 (Colo. App. 1995).

Appeal of trial court's ruling that death penalty statute was unconstitutional, although not technically "interlocutory," was not improperly filed and ultimately was accepted and decided by the Colorado supreme court pursuant to C.A.R. 21. Therefore, speedy trial period was tolled during the pendency of the appeal. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

The speedy trial exclusions in subsection (6) apply to a subsection (2) retrial. The basic right to a speedy trial is established in subsection (1) and the rest of the subsections implement or clarify that right. Subsection (2) does not establish the right to a speedy trial in a retrial: It merely

identifies the triggering event that starts the six-month clock. The exclusions in subsection (6) apply to both a new trial and retrial. *Mosley v. People*, 2017 CO 20, 392 P.3d 1198; *Delacruz v. People*, 2017 CO 21, 393 P.3d 480.

Stay of proceedings pending appeal is one means, but not the exclusive means, for tolling of the speedy trial period to occur. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Right guaranteed although defendant is out on bail or parole. Under former provision, the lapse of the prescribed time after the issuance of a capias and arrest of the defendant without an application to postpone or delay the trial entitles him to his discharge, notwithstanding the fact that he has been out on bail. *Van Buren v. People*, 7 Colo. App. 136, 42 P. 599 (1895).

The fact that the accused during almost the whole time of the delay was at large upon bail does not divest him of his right to the speedy trial guaranteed by the constitution and the provisions of this section. *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919).

The parole status of a federal prisoner is without effect on the conduct of officials charged with the prosecution of an indictment against the prisoner for the violation of a state law. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

The fact that defendant was at large under bond manifestly does not divest him of the

right to that speedy trial which is guaranteed by § 16 of art. II, Colo. Const. Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961).

The right to a speedy trial is not dissipated by the fact that the defendant is granted bail. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Section cannot be invoked where defendant has not been apprehended. One charged with a criminal offense may not invoke the provisions of this section concerning speedy trials where he has not been apprehended, and committed for trial. Ex parte Russo, 104 Colo. 91, 88 P.2d 953 (1939).

Or where delay caused by defendant. One charged with a criminal offense may not successfully invoke his right to a speedy trial where the delay of which he complains was occasioned by his avoidance of arrest, it appearing that the prosecution proceeded reasonably as to time after defendant was apprehended. Ex parte Russo, 104 Colo. 91, 88 P.2d 953 (1939).

A person is not entitled to be discharged if he requested a postponement of his trial or otherwise caused the delay. People v. Bates, 155 Colo. 277, 394 P.2d 134 (1964).

The record does not disclose that defendant was in anywise denied the speedy public trial guaranteed him by the constitution where at least certain delays in getting to trial were of his own making. Lucero v. People, 161 Colo. 568, 423 P.2d 577 (1967).

Both § 18-1-405 and Crim. P. 48 exclude delay which is caused by, agreed to, or

created at the instance of the defendant. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975).

Because sufficient time for trial preparation is a necessary requirement for the effective assistance of counsel, and the substitution of counsel was made at the instance of defendant, continuing the trial date outside the speedy trial deadline was not a violation of his statutory right to a speedy trial. People v. Brewster, 240 P.3d 291 (Colo. App. 2009).

In the absence of a showing of bad faith on the part of the prosecutor in endorsing a witness on the day of the trial, the delay resulting from the defendant's tactical decision to seek a continuance as a result of the late endorsement is chargeable to her. People v. Steele, 193 Colo. 187, 563 P.2d 6 (1977).

Both competency examinations requested by defense counsel for the benefit of the defendant and scheduling delays to accommodate defense counsel are attributable to the defendant. Jones v. People, 711 P.2d 1270 (Colo. 1986).

Where defendant held in another jurisdiction pending extradition to a foreign state makes no effort to disclose his whereabouts to prosecuting authorities in a county in which charges are pending against him, and where such authorities are unaware of the pending extradition proceedings, the period of delay until the defendant returns to the state is attributable to the defendant and must be excluded from the applicable six-month speedy trial period. People v. Moye, 635 P.2d 194 (Colo. 1981).

When a defendant fails to make a scheduled bond appearance before the trial court, the six-month speedy trial period is tolled until he makes himself available to the court, even where some of the time he is unavailable due to being incarcerated in another jurisdiction. *People v. Moye*, 635 P.2d 194 (Colo. 1981).

The provisions of this section cannot be used to the advantage of a defendant who violates his bond, fails to appear at the trial, and absconds from the state. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Six-month period was tolled during period of time that defendant was being processed in federal system, at which time defendant was unable to appear on scheduled trial date in state trial; defendant's failure to appear for trial on the state charges could only be attributed to defendant and, therefore, constituted a waiver of his right to speedy trial. *People v. Marquez*, 739 P.2d 917 (Colo. App. 1987).

Defendant's speedy trial time was tolled by his voluntary request for speedy disposition of detainer filed against him by authorities in another state, and by his subsequent removal to that state, where defendant's actions precluded Colorado authorities from objecting to his removal. *People v. Yellen*, 739 P.2d 1384 (Colo. 1987).

Subsection (6) includes any delays agreed to by defendant or requested by his attorney. Scheduling delays to accommodate defense counsel are attributable to the defendant. *People v. Hamer*, 689 P.2d 1147 (Colo. App.

1984); *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Defendant's speedy trial rights were not violated when, in response to the testimony of defendant's mental health expert during a suppression hearing that defendant's statements were involuntary because of a mental disorder, prosecution requested, and was granted, three month continuance in order to arrange for expert testimony and analyze the alleged mental disorder. *People v. Whalin*, 885 P.2d 293 (Colo. App. 1994).

The time necessary to determine the people's appeal after the trial court granted the defendant's motion to dismiss certain charges was chargeable to the defendant and therefore excluded from the speedy trial computations. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

Court may not extend a defendant's speedy trial deadline under subsection (3.5) when defendant fails to appear at a pretrial readiness conference conducted the day before trial because the date of a pretrial hearing is not the "trial date". *People v. Taylor*, 2020 COA 79, 467 P.3d 1272.

A motion by the defendant's attorney for a continuance, made in open court with the consent of the defendant, is a request for a continuance, governed by subsection (3), rather than a mere delay, governed by subsection (6). In the absence of a showing of bad faith on the part of the prosecution in the late disclosure of evidence bearing on the credibility of one of its prospective witnesses, the legal consequence of defense counsel's request for a continuance was to extend the period

within which the trial could be commenced for an additional six months from the date of the continuance. *People v. Duncan*, 31 P.3d 874 (Colo. 2001).

Delay caused by briefing and determining defendant's motion to dismiss properly charged to defendant. *Williamson v. People*, 735 P.2d 176 (Colo. 1987).

Delay due to substitution of counsel. Continuances made necessary because of the substitution of counsel may, depending upon the particular circumstances of the case, be chargeable to the defendant. *People v. Scales*, 763 P.2d 1045 (Colo. 1988).

Substitution was appropriate when caused by defendant's refusal to cooperate with defense attorney and continuance resulting therefrom was properly charged to the defendant. *People v. Scales*, 763 P.2d 1045 (Colo. 1988).

Trial court's ruling, which disqualified defendant's former attorneys for ethical conflict and which caused need for continuance so that new attorney could prepare, did not deprive defendant of speedy trial rights, where defendant agreed to continuance. *People v. Lewis*, 739 P.2d 861 (Colo. App. 1987); *People v. Monroe*, 907 P.2d 690 (Colo. App. 1995).

Determination that delay was caused by substitution of counsel not supported by record and not properly chargeable to defendant. Defendant's actions did not require a substitution of counsel, he was not counseled by the court on a need for a continuance and he expressed no

understanding of such a need, and the court did not attempt to find other counsel who could meet the deadline. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997).

Substitution may cause defendant to be tried after speedy trial date. Delay may be charged to defendant if court finds the defendant will not receive effective assistance of counsel without a postponement. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997); *People v. Roberts*, 2013 COA 50, 321 P.3d 581.

Continuance to allow third attorney to prepare for trial was properly chargeable to defendant where defendant had engaged in a pattern of noncooperation with his attorneys and failure to continue the trial date would have given the defendant a claim of ineffective assistance of counsel. The fact that the trial court delayed in appointing the third attorney due to a competency evaluation of the defendant in another case did not change this result. *People v. Rocha*, 872 P.2d 1285 (Colo. App. 1993).

Where defendant requested a continuance because of the unavailability of his fingerprint expert, the delay was attributable to the defendant and it does not make the granting of an earlier continuance an abuse of discretion. *People v. Madsen*, 743 P.2d 437 (Colo. App. 1987).

Charges not dismissed where defendant's expressed understanding of computation of time period differs from statute. Where defendant's expressed understanding was that the six-month period

of the speedy trial statute would commence to run at the end of defendant's continuance, the failure to try defendant within six months of the granting of the continuance does not entitle him to dismissal of charges. *Baca v. District Court*, 198 Colo. 486, 603 P.2d 940 (1979).

Delays analyzed to ascertain what part due to defendant. In computing the time chargeable to a defendant in connection with speedy trial determinations, any prolonged lapse of time which causes a trial date to be extended should be carefully analyzed by the trial court to ascertain what part, if any, was due to delays at the request of or for the benefit of the defendant, and the time involved in such delays is properly chargeable to a defendant. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Period of delay was excluded from the speedy trial period under the provisions of subsection (6)(c). The trial court did not abuse its discretion in refusing to grant a severance, therefore the continuance granted to the codefendant was chargeable to the defendant, and the defendant was not denied his right to a speedy trial. *People v. Backus*, 952 P.2d 846 (Colo. App. 1998); *People v. Reynolds*, 159 P.3d 684 (Colo. App. 2006); *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Defendants' delay in asserting their right to a speedy trial is entitled to strong evidentiary weight in determining whether the defendants were denied their constitutional right to a speedy trial. *People*

v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973).

Delay caused by extradition attributable to prosecution. Delay initiated by the issuance of the governor's arrest warrant and subsequent extradition to another state is attributable to the people. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Delay caused by defendant's waiver of extradition not attributable to defendant. Delay in bringing defendant to trial which is caused by defendant's waiver of extradition to another state is not attributable to the defendant within the meaning of this section. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Motion for continuance of arraignment date containing waiver. Where petitioner moved to continue his arraignment date and his written motion contained a statement to the effect that "the Defendant waives his right to a speedy trial", this statement was intended only as a waiver of the right to challenge any speedy trial violation caused by the request for a continuance of the arraignment date and was not effective with respect to any subsequently occurring statutory speedy trial violation. *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980).

Section not invoked where grant of new trial extends original limitation. Where defendant's first trial was completed before the expiration of the period fixed by statute, and a new trial was thereafter granted, the new trial may be set beyond such period. *Ferguson v. People*, 160 Colo. 389, 417 P.2d 768 (1966).

Or where defendant moves for separate trial. Where a trial is not had as required by this section, but practically every continuance is made with the express consent of a defendant's counsel, and where a defendant moves for a separate trial, such motion being filed, heard and denied after the expiration of such period, the defendant cannot avail himself of the benefits of the statute. *Gallegos v. People*, 139 Colo. 166, 337 P.2d 961 (1959), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Or where delay caused by detention by another sovereign power. The constitutional right of one charged with the commission of a crime to a speedy trial is not violated by failure of the state to put him on trial while he is in the custody of the United States serving a sentence for violation of federal laws, and in such circumstances there is no obligation imposed upon the prosecuting authorities of the state to apply to the federal government for a return of such prisoner to the state for trial on the state charge. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

But not where defendant is incarcerated by same sovereign. A sovereign may not deny an accused person a speedy trial in a court also of that sovereign by reason of the circumstance that the accused is incarcerated in a penal institution of that sovereign under a prior conviction and sentence of that sovereign. *Rader v. People*, 138 Colo. 397, 334 P.2d 437 (1959).

Prosecutor had duty to obtain defendant's presence. Where the district attorney was aware that the defendant was being held in custody in another county concerning a different charge, the district attorney had the burden of obtaining the presence of the defendant and delay due to defendant's absence is not chargeable to defendant for purposes of computing speedy trial requirements. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Chronic trial congestion does not excuse the respondents' failure to bring petitioners to trial within the six-month time limit imposed by this section. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

Docket congestion merely factor to consider. Although it is clear that docket congestion would not warrant a retrial later than the three-month maximum period for delay caused by a mistrial, it is a factor in determining the reasonableness of the delay within the statutory and procedural time periods of subsection (6)(e) and Crim. P. 48(b)(6)(V). *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Delay due to congested docket not caused by defendant. Neither the trial court's decision to conduct a hearing, nor the court's congested docket when the hearing date arrived, produce delays that were "caused at the instance of the defendant." *People v. Bell*, 669 P.2d 1381 (Colo. 1983).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's

scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. *Hills v. Westminster Mun. Court*, 245 P.3d 947 (Colo. 2011).

When the defendant pleads "not guilty by reason of insanity" and is thus entitled to a separate trial on the sanity issue, he must be brought to trial on that issue within six months from the date of entry of the plea or defendant's last continuance under subsection (3). *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Once the sanity trial is ended and the defendant is found to be sane, he must then be brought to trial on the other issues of the crime charged within the statutory six months from the judgment in the sanity trial. *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Period from time of commitment until filing of final psychiatric report excludable. When a defendant pleads not guilty by reason of insanity, the period from the time of commitment until the filing of the final psychiatric report, if filed within a reasonable time, is excludable for purposes of the six-month period. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Commitment to institution not necessary for exclusion of time for psychiatric reports. The defendant need not be committed to an institution for examination before a reasonable time can be excluded from the speedy trial computation

for filing of psychiatric reports. *People v. Brown*, 44 Colo. App. 397, 622 P.2d 573 (1980).

Defendant confined to mental institution. When a defendant is confined to a mental institution or hospital for observation or examination prior to a determination of mental competency, he cannot complain of a denial of his constitutional right to a speedy trial because of the delay occasioned by that confinement. *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), *aff'd in part, rev'd in part on other grounds*, 711 P.2d 1270 (Colo. 1986).

For an example of the computation of six-month period where defendant pleads not guilty by reason of insanity, see *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Exclusions from six-month period. Subsection (6)(a) excludes from the six-month term in which a trial must commence only that period of delay required for the sanity examination and the filing of a timely report with the court. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

The period excluded from speedy trial computation under subsection (6) does not end upon the filing of a report that a defendant is competent to proceed, but rather when the court makes a determination that the defendant is restored to competency. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

This section mandates exclusion from a defendant's speedy trial computation of any period during which he or she was

actually being examined for competency, without regard for the necessity or propriety of the court's order requiring such an examination. *Nagi v. People*, 2017 CO 12, 389 P.3d 875.

Defendants not denied right. Where the record reflects that the defendants made no demand for a speedy trial until 14 months expired and showed no prejudice as a result of the delay and that the delay occurred to permit the defendants to obtain expert testimony and prepare for trial, and moreover, the defendants were free on bond at all times prior to trial, the defendants were not denied their constitutional right to a speedy trial. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973).

Because criminal proceedings are suspended during the entire time a defendant is incompetent and may not resume until a judicial determination is made that the defendant has been restored to competency, there is no basis upon which to find that the period in which a defendant is "incompetent" under subsection (6) ends in any manner other than in accord with the procedures of the former §16-8-113. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

Court retains jurisdiction to correct erroneous judgment. In a criminal proceeding where the trial court has jurisdiction of the person of the defendant and of the subject matter and has entered an erroneous judgment, such court retains jurisdiction to correct, modify, or alter such erroneous judgment notwithstanding expiration of the term of court at which the erroneous judgment was pronounced. Under

former provision, the fact that there had been a considerable lapse of time and that many terms of court had intervened was held to be immaterial. *Villalon v. People*, 145 Colo. 327, 358 P.2d 1018 (1961).

For the effect of refiling of information as result of change in circumstances, see *Schiffner v. People*, 173 Colo. 123, 476 P.2d 756 (1970).

Delay chargeable to defendant. In computing the time within which a defendant must be brought to trial, in order for the delay to be charged to the defendant, it must be attributable to affirmative action on defendant's part, or to defendant's express consent to the delay, or to other affirmative conduct evidencing such consent. *Tasset v. Yeager*, 195 Colo. 190, 576 P.2d 558 (1978).

Any delays resulting from a defendant's attempt to meet the conditions of a plea bargain, such as the time allocable to defendant's efforts to qualify for a deferred judgment, should be charged to the defendant. *People v. Luevano*, 670 P.2d 1 (Colo. 1983).

Defendant's attempt to effect plea bargain by applying for probation attributable to defendant and tolls running of speedy trial period under subsection (6)(f). *People v. Madsen*, 707 P.2d 344 (Colo. 1985).

Delay not attributable to defendant where a continuance is granted to prosecution as a sanction against the defense for his failure to disclose any defenses other than his not guilty plea, and for his failure to identify his intent to cross-examine the

prosecution's witnesses. *People v. Castro*, 835 P.2d 561 (Colo. App. 1992).

Or where trial judge instituted reconsideration of a recusal motion, previously denied, and judge recused himself three days prior to trial. At this point, the judge could not require the defendant to waive speedy trial and no part of the subsequent delay was chargeable to the defendant. *People v. Arledge*, 938 P.2d 160 (Colo. 1997).

Key to interpreting subsection (6)(f) is to determine whether the defendant caused the delay. If the delay is caused by, agreed to, or created at the instance of the defendant, it will be excluded from the speedy-trial calculation made by the court. *People v. Bell*, 669 P.2d 1381 (Colo. 1983).

"Material evidence" for purposes of subsection (6)(g)(I) means evidence that has a logical connection with consequential facts. The prosecution has the burden of proving the evidence is material. In order to satisfy that burden, the prosecution must provide the court with enough specificity and information on the record to show that the unavailable evidence is material to the prosecution's case. The court had sufficient information to exercise its independent judgment to determine that the evidence was material. *People v. Roberts*, 146 P.3d 589 (Colo. 2006).

Prosecutor did not establish and court did not find evidence material to the prosecutor's case was unavailable in juvenile adjudicatory action. Prosecutor seeking continuance beyond speedy trial deadline did not reveal the identity of

unavailable witnesses, provide a proffer of their anticipated testimony, or explain why that testimony was material. *People in Interest of C.M.W.R.*, 2024 COA 4, 546 P.3d 1191.

No evidence of a lack of due diligence under subsection (6)(g)(I) where prosecution had prior knowledge of the victim's pregnancy and did not obtain a subpoena. The prosecution asserted to the trial court that, when the trial was originally scheduled, it was anticipated that the victim would have delivered her baby and been available for trial. The trial court did not abuse its discretion in finding that the extension of the victim's pregnancy beyond her original expected due date was the cause of her nonappearance. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Appeal tolls speedy trial period. The period of time necessary to go through the appellate process, where the appeal stems from a dismissal upon the defendant's motion, tolls the statutory speedy trial period. *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979); *People v. Daley*, 97 P.3d 295 (Colo. App. 2004); *People v. Mangum*, 2022 COA 114, 522 P.3d 721.

When a postconviction court grants a new trial pursuant to Crim. P. 35(c), speedy trial period commences on date that court grants the new trial. The speedy trial period is tolled while the postconviction court's decision is appealed, but the period resumes when the appellate court mandates the case to the postconviction court. *People v. Mangum*, 2022 COA 114, 522 P.3d 721.

Delay caused by interlocutory appeal excluded. This section and Crim. P. 48 exclude from the computation of the time in which a defendant shall be brought to trial the period of delay caused by an interlocutory appeal. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

"Interlocutory appeal" construed. An original proceeding initiated in good faith by either the defense or the prosecution constitutes an "interlocutory appeal" for purposes of the speedy trial statute. *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *People v. Beyette*, 711 P.2d 1263 (Colo. 1986).

Prosecution's appeal from a new trial order must be characterized as interlocutory in nature, so as to toll the speedy trial period under subsection (6)(b), so long as the appeal is taken in good faith, is filed before the defendant is convicted, and is necessarily disruptive of the course of proceeding to a final resolution. *People v. Gallegos*, 946 P.2d 946 (Colo. 1997); *People v. Curren*, 2014 COA 59M, 348 P.3d 467.

Prosecution's appeal of a trial court's partial dismissal at a preliminary hearing of a multi-count information is an interlocutory appeal that tolls the running of the speedy trial period. *People v. Gallegos*, 946 P.2d 946 (Colo. 1997).

Prosecution's appeal of an order granting defendant a new trial was interlocutory in nature for purposes of tolling the speedy trial period under subsection (6)(b) even though it was also final in the sense contemplated under § 16-12-102, and the speedy trial period was tolled during the

prosecution's appeal. *People v. Curren*, 2014 COA 59M, 348 P.3d 467.

Appeal of disqualification of district attorney did not have a substantial effect on prosecution's case where special prosecutor was appointed. As such, appeal of the disqualification was not an interlocutory appeal. *People v. Witty*, 36 P.3d 69 (Colo. App. 2000).

Even a second interlocutory appeal, if initiated in good faith, tolls the statute regardless of the fact that it is later dismissed. *People v. Morgan*, 681 P.2d 970, (Colo. App. 1984).

New trial order pursuant to motion treated as reversal on appeal. A new trial order pursuant to a new trial motion is similar to a reversal on appeal for purposes of the speedy trial provisions. *People v. Jamerson*, 196 Colo. 63, 580 P.2d 805 (1978); *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979).

Measurement of six-month period upon filing of amended complaint. When the prosecution files an amended complaint charging new material after the defendant's initial guilty plea, the period of time for dismissal under the speedy trial provisions is measured from the second guilty plea unless the prosecution has shown bad faith in amending the complaint. If the amended complaint does not charge new material, the time period is measured from the original guilty plea. *Amon v. People*, 198 Colo. 172, 597 P.2d 569 (1979).

Period of delay caused by mistrial not includable. The computation of the six-

month period allowed for in this section and Crim. P. 48(b)(1) shall not include any period of delay caused by a mistrial, and the extension provided following a mistrial is part of the period of delay caused thereby. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Three-month exclusion from period following mistrial. Subsection (6)(e) and Crim. P. 48(b)(6)(V) grant the prosecution a three-month exclusion in which to retry a case after a mistrial, provided that the delays are reasonable. *People v. Pipkin*, 655 P.2d 1360 (Colo. 1982); *Mason v. People*, 932 P.2d 1377 (Colo. 1997).

The general assembly intended to grant no more than three months as an exclusion from the speedy trial period, which is one-half of the statutory speedy trial period, following a mistrial. *People v. Pipkin*, 655 P.2d 1360 (Colo. 1982).

When a court orders a mistrial under Crim. P. 24(c)(4) due to a public health crisis, the mistrial triggers a tolling, not an extension, of the speedy trial period. *People v. Sherwood*, 2021 CO 61, 489 P.3d 1233.

When a court orders a mistrial, subsection (6)(e) requires only reasonable delays attributable to the mistrial, not to exceed three months, to be excluded from the time computation of when the trial must occur. *People v. Sherwood*, 2021 CO 61, 489 P.3d 1233.

Mistrials due to prosecutor's actions not treated differently. Neither Crim. P. 48(b)(6)(V) nor subsection (6)(e) treats

mistrials due to the prosecutor's actions differently than mistrials due to other reasons. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

Prosecutor must request additional time upon change of venue. When a change of venue is granted after arraignment, it is incumbent upon the prosecuting attorney to make a motion to obtain additional time to bring the defendant to trial because of the exceptional circumstances of the case. *People v. Colantonio*, 196 Colo. 242, 583 P.2d 919 (1978).

District attorney's motion for continuance insufficient basis for justifying delay. Where the record indicated that the respondent court granted the district attorney's motion to continue the July 30, 1979, trial date solely on the basis of the district attorney's written motion which contained only the unsupported allegation that a material witness would be unavailable for trial on July 30, 1979, and there was no showing of due diligence or that the witness would be available at a later trial date, the delay between July 30, 1979, and November 1, 1979, was not properly excludable from the statutory speedy trial period under subsection (6)(g)(I), and where defendant had plead not guilty on April 20, 1979, the petitioner was entitled to a dismissal of the charges against him under subsection (1). *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980).

There was sufficient evidence of a reasonable possibility that witness would be available to testify to justify granting

the prosecution's request for a continuance to secure the witness's testimony. *People v. Jompp*, 2018 COA 128, 440 P.3d 1166.

Habitual criminal charges not subject to statutory speedy trial deadline. Habitual charges are not offenses, but rather are sentence enhancers, and thus the statutory speedy trial six-month time limit does not apply. Section 18-1.3-803 (1) specifically requires the court to conduct a hearing on habitual charges as soon as practicable after the trial of the substantive offense, so the specific requirements of that statute control over the general speedy trial statute. *People v. Green*, 2012 COA 68M, 296 P.3d 260.

Forfeiture action under Colorado public nuisance statute is civil in nature and therefore is not subject to constitutional or statutory speedy trial provisions applicable to criminal prosecutions. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Where defendant is present when trial date is set and does not object to the setting of a trial date beyond the time required by statute, an extension of the statutory deadline to the date actually set for trial results. *People v. Velarde*, 790 P.2d 903 (Colo. App. 1989).

Defendant was not denied right to speedy trial where he was counseled at length by trial court and appeared to have understood the need for a continuance caused by substitution of counsel and where neither the prosecution nor the judiciary was responsible for the delay. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993).

III. ENFORCEMENT OF RIGHT.

Defendant must enter a plea before he may take advantage of the restriction of this section and Crim. P. 48(b)(1). *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Six-month limitation runs from date plea entered. The six-month limitation of both this section and Crim. P. 48(b)(1) runs from the date that defendant's plea is entered. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

A defendant must be brought to trial within six months from the date of the entry of a plea of not guilty, except as otherwise provided by subsection (6)(a). *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Rule that defendant must be brought to trial within six months from the date of the entry of a plea of not guilty equally applies where a defendant pleads not guilty by reason of insanity. *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Computation of six-month time provision found in *People v. Hampton*, 696 P.2d 765 (Colo. 1985).

The special time limitations of § 24-60-501 prevail, when conflicts arise, over the more general criminal procedure provisions of this section and Crim. P. 48. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

UMDDA controls over general speedy trial provisions. The UMDDA is a special statute designed to foster more effective

prisoner treatment and rehabilitation; thus, when there is a conflict with the general speedy trial provisions, § 16-14-101 et seq., this section, § 24-60-501 et seq., and Crim. P. 48, the provisions of the uniform act control. *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072 (1980).

Policies of this section same as §§ 16-14-101 to 16-14-108. The policies underlying this section and Crim. P. 48 are the same as those relative to the UMDDA, §§ 16-14-101 to 16-14-108. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

The six-month period commences upon the arraignment for the last information. *People v. Dunhill*, 40 Colo. App. 137, 570 P.2d 1097 (1977); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

It is the shared responsibility of the trial court and the prosecution to schedule the suppression hearing for a date within the six-month speedy trial period so that, if the motion were granted, a new trial could commence within the six-month period. *People v. Zedack*, 93 P.3d 629 (Colo. App. 2004).

The length of delay "caused by any mistrial" must be calculated to include the days on which the aborted trial or trials were in progress. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

The entire period of delay caused by a mistrial is to be "excluded" from the computation of the time within which a

defendant must be tried. *People v. Thimmes*, 643 P.2d 778 (Colo. App. 1981).

Delay excluded may be longer than period of absence. The excludable period of delay resulting from defendant's absence, may, in some cases, be longer than merely the period of defendant's absence. *People v. Alward*, 654 P.2d 327 (Colo. App. 1982).

Factors authorized a continuance and thereby extended the speedy trial time where a period of delay was attributable to the inability of the prosecution, despite its exercise of due diligence, to obtain the victim's presence for trial and prosecution demonstrated the victim would be available to testify at a later date. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Speedy trial right violated and defendant's case dismissed with prejudice when neither the prosecution nor the district court sought to commence trial within six months of the issuance of the appellate court mandate, and the delay was not properly attributable to the defendant. *People v. DeGreat*, 2020 CO 25, 461 P.3d 11.

Defendant's right to speedy trial not violated where defendant asked for a continuance to review evidence produced by the prosecution concerning the credibility of a prospective witness and there was no indication of bad faith by the prosecution in producing the evidence just prior to trial. The legal consequence of the defendant's request for a continuance was to extend the period within which trial could be commenced for an additional six months from the date of the continuance, as provided in subsection (3). *People v.*

Duncan, 31 P.3d 874 (Colo. 2001); People v. Conlon, 2025 COA 79M, 580 P.3d 603.

Speedy trial right not violated where trial court did not abuse its discretion in finding prosecutors had acted with due diligence in seeking to obtain presence of out-of-state witnesses for trial and a continuance was warranted. People v. Wolfe, 9 P.3d 1137 (Colo. App. 1999).

The speedy trial statute is not violated in a case where there is no evidence a sheriff acted in bad faith in violating a segregation order that resulted in a delay of the defendant's criminal proceedings and a defendant's waiver of a statutory speedy trial right. People v. McMurtry, 101 P.3d 1098 (Colo. App. 2003), rev'd on other grounds, 122 P.3d 237 (Colo. 2005).

The intent of the general assembly was to exclude a reasonable time period from the speedy trial period following the absence or unavailability of the defendant when the delays are such that might reasonably result from the defendant's absence. People v. Martin, 732 P.2d 1210 (Colo. 1987).

Six-month period includes a reasonable period of time in which to reschedule and prepare for trial a case that has been postponed from its original trial date due to the voluntary absence of the defendant. People v. Martin, 732 P.2d 1210 (Colo. 1987).

Factors to be considered in determining whether the trial delay is reasonable include the difficulty in locating witnesses, the problem of overcrowded dockets, and the potential abuse of the speedy trial period by

defendants who attempt to run time off the speedy trial period before absconding from the state. People v. Martin, 732 P.2d 1210 (Colo. 1987).

Defendant's motion for severance shortly before trial constitutes an exceptional circumstance allowing consideration of docket congestion in determining the reasonable period of delay that tolls statute. People v. Runningbear, 753 P.2d 764 (Colo. 1988).

In order to determine if the defendant was entitled to have the charges against him dismissed for violating his rights to a speedy trial, the court must determine whether there was a delay that should be attributable to the defendant's absence and whether the trial delay caused by such absence was reasonable. People v. Martin, 732 P.2d 1210 (Colo. 1987).

Whether jeopardy has attached is irrelevant. If the court is forced to dismiss the jurors or prospective jurors and reschedule the trial, whether jeopardy has yet attached is irrelevant in computing the length of delay excluded due to mistrial. People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

Effect of escape on running of six-month rule. The defendant was not denied a speedy trial under this section, as his escape stopped the running of the six-month rule, and that the time did not again commence to run until the district attorney had actual knowledge of his return to custody. People v. Gillings, 39 Colo. App. 387, 568 P.2d 92 (1977).

Exclusion of period fairly attributable to defendant's voluntary unavailability.

Subsection (6)(d) contemplates an exclusion from the speedy trial period not only for the time of the defendant's actual absence or unavailability but also for any additional period of delay that may be fairly attributable to the defendant as a result of his voluntary unavailability. *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

In determining what delay can be attributable to the absence or unavailability of the defendant, each case must be viewed individually, and the determination is dependent upon the facts of the specific case. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Such delay may include the time required to reschedule the defendant's trial. *People v. Gray*, 710 P.2d 1149 (Colo. App. 1985).

Defendant has burden to prove he has been denied speedy trial. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Accused must move for dismissal or discharge. To properly raise the question the accused may apply for his discharge or for dismissal for lack of a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

In accordance with the express language of subsection (5), defendant waived his right to a speedy trial by failing to move for dismissal of charges prior to entering a guilty plea. This did not, however, automatically waive the defendant's

constitutional right to a speedy trial. *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

The objection that the defendant has not had a speedy trial must itself be speedily raised when the case is moved for trial. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Failure to move for dismissal prior to beginning of trial is a waiver of the statutory right to speedy trial. *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

A juvenile's failure to request dismissal on speedy trial grounds before the beginning of the adjudicatory trial will result in the waiver of the juvenile's speedy trial rights under this section. *People ex rel. J.M.N.*, 39 P.3d 1261 (Colo. App. 2001).

Defendant's attorney did not object to the trial date on speedy trial grounds until the date of trial. The defendant waived his ability to claim that his right to a speedy trial had been violated. *People of City of Aurora v. Allen*, 885 P.2d 207 (Colo. 1994).

Subsection (5) does not require the defendant to demand his right at the earliest possible time. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Subsection (5) merely requires that the defendant make such a demand prior to the commencement of his trial, which, in most cases, would certainly be after the trial setting. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Defendant's failure to demand dismissal prior to trial pursuant to alleged denial of speedy trial rights normally waives

any speedy trial objection after conviction. *People v. Marquez*, 739 P.2d 917 (Colo. App. 1987).

Effect of the failure of the prosecution and the trial court to comply with the speedy trial statute requires the dismissal of the charges against the defendant with prejudice. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Upon refusal of discharge, accused may apply for habeas corpus. Where a person is entitled to discharge under this section, but such discharge is denied him in the district court, he may at once apply for the writ of habeas corpus. *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919).

A defendant is entitled to a dismissal of charges against him or her for violation of his or her statutory right to a speedy trial if he or she timely files a motion to dismiss even if it is filed on the day of trial, as long as it is filed prior to any hearing on any pretrial motion that is set for hearing on that date. A defendant should not have to assert a violation of his or her speedy trial right weeks before trial when a violation of such right might not occur until days before, or even on the day of, trial. *People v. Desantiago*, 2014 COA 66M, 409 P.3d 389.

Right to speedy trial may be waived. The right to a speedy trial, both under this section and § 16 of art. II, Colo. Const., may certainly be waived. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Defendant can waive his constitutional and statutory right to a speedy trial by his failure to make a timely objection. *People v.*

O'Donnell, 184 Colo. 104, 518 P.2d 945 (1974).

Defendant's failure to object to the date set for pre-trial motions hearing constituted his consent to the trial schedule that was offered, subject only to the condition that the actual trial commence within a reasonable time thereafter. A defendant cannot stand mute and allow a trial schedule to be adopted without registering his complaint that such schedule violates his speedy trial rights. *People v. Atkins*, 885 P.2d 243 (Colo. App. 1994); *People v. Franco*, 74 P.3d 357 (Colo. App. 2002).

Failure to object before trial is waiver. A defendant who has gone to trial without objection cannot by motion obtain his discharge on the ground that he was not tried within the time prescribed by this section. *Heller v. People*, 2 Colo. App. 459, 31 P. 773 (1892).

Failure to object in the trial court to the first trial being held and the subsequent request for a continuance by the defendant constitutes a waiver of the statutory and constitutional right to a discharge. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Statutory right to a speedy trial can be waived, and it is waived by failure to make objection at the trial. *Valdez v. People*, 174 Colo. 268, 483 P.2d 1333 (1971).

Counsel's sending waiver form to defendant not waiver. An agreement by defense counsel to send a waiver form to the defendant cannot be interpreted as a waiver of defendant's right to a speedy trial. *People v. Bell*, 669 P.2d 1381 (Colo. 1983).

Written waiver not essential. The fact that the defendant did not execute a written waiver of her right to a speedy trial as required in the deferred prosecution statute and as she agreed to do in open court does not inure to her benefit. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

But affirmative conduct is. An express consent to the delay or other affirmative conduct evidencing such consent must be shown. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1976); *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978); *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

An express waiver or other affirmative conduct evidencing such a waiver must be shown. *People v. Gallegos*, 192 Colo. 450, 560 P.2d 93 (1977); *Rance v. County Court*, 193 Colo. 220, 564 P.2d 422 (1977).

Defendant did not waive his right to a speedy trial when defendant did not appear at a pretrial conference because the pretrial readiness conference is not defendant's trial date. *People v. Taylor*, 2020 COA 79, 467 P.3d 1272.

Mere silence by a defense counsel at a trial setting shall not be construed as a waiver of the defendant's statutory right to a speedy trial. *Harrington v. District Court*, 38 Colo. 360, 559 P.2d 225 (1977); *Rance v. County Court*, 193 Colo. 220, 564 P.2d 422 (1977); *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

This section does not state that defendant's failure to object to a trial setting beyond the six-month period should be

viewed as a delay attributable to the defendant. In fact, subsection (5) mandates that the only affirmative action required on the part of the defendant be that he move for a dismissal prior to trial. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Failure of each defendant to interpose any objection to a trial setting in county court beyond the six-month speedy trial period did not waive his right to a speedy trial. *Rance v. County Court*, 193 Colo. 220, 564 P.2d 422 (1977).

Request for a pretrial conference in criminal case, without more, does not constitute waiver of speedy trial right nor a delay caused at defendant's instance to be excluded from speedy trial calculations. *Rodman v. County Court*, 694 P.2d 871 (Colo. App. 1984).

Waiver by defense attorney's setting trial date. Where a trial date is set at the request of the defendant's attorney to accommodate his schedule, the defendant waives any speedy trial claims as to this trial date. *People v. Fetty*, 650 P.2d 541 (Colo. 1982).

When defense counsel insists he could not try the case prior to expiration of the six-month speedy trial period, this is tantamount to a request for a continuance. *People v. Chavez*, 650 P.2d 1310 (Colo. App. 1982).

When a defendant's attorney participates in a trial date setting which is within six months of the plea entered on that day, regardless of an earlier plea, the defendant thereby acquiesces to subsection (6)(f) and

the prosecution thus meets its burden of demonstrating compliance with the speedy trial statute. *People v. Rogers*, 706 P.2d 1288 (Colo. App. 1985).

To establish a waiver the record must demonstrate that defense counsel had notice of the trial date and had adequate opportunity to object. *People v. Franco*, 74 P.3d 357 (Colo. App. 2002).

Nothing in subsection (5.1) precludes an off-the-record trial setting, nor does the subsection specify that the defendant or defense counsel must be present. *People v. Franco*, 74 P.3d 357 (Colo. App. 2002).

No provision in this section for revocation once a waiver is in place. *People v. Jefferson*, 981 P.3d 613 (Colo. App. 1998).

A guilty plea waives a defendant's right to claim the improper denial of his or her statutory right to a speedy trial. *People v. McMurtry*, 122 P.3d 237 (Colo. 2005).

By entering an unconditional, voluntary guilty plea, a defendant waives the right to assert, either on appeal or by collateral attack, a violation of the statutory right to speedy trial. *People v. Owen*, 122 P.3d 1006 (Colo. App. 2005).

Defendant's attorney, without defendant's personal consent, may obtain a continuance of a trial setting subject to the discretion of the trial court and the continuance will extend the speedy trial deadline an additional six months from the granting of the continuance. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Defendant's motion to dismiss, because defense counsel was unable to proceed on the scheduled trial date within the speedy trial period, was considered tantamount to a request for a continuance in order to protect the defendant's sixth amendment right to counsel. *People v. Wilson*, 972 P.2d 701 (Colo. App. 1998).

Compliance with speedy trial requirements is jurisdictional. Failure to comply with the requirements of the speedy trial act is jurisdictional in the sense that defendant may request mandatory dismissal of the charges upon expiration of the allotted time. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Failure to comply not automatic deprivation of jurisdiction. However, failure to bring defendant to trial within the allotted time does not automatically deprive the trial court of jurisdiction because defendant's failure to demand dismissal prior to trial waives any speedy trial objection. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Relief in nature of prohibition under C.A.R. 21, is appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

Whether a speedy trial has been afforded is a judicial question. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966).

Exclusions and extensions applied concomitantly. Nothing prevents a court

from applying concomitantly the exclusionary provisions of subsection (6) and the rule governing extensions in subsection (3) when it makes a speedy trial determination. *People v. Luevano*, 670 P.2d 1 (Colo. 1983).

Entry of negotiated plea which is later withdrawn tantamount to continuance.

Where defendant enters negotiated plea which he later withdraws following the court's rejection of the plea agreement, it is appropriate to view such plea as a continuance requested by the defendant under subsection (3). *People v. Madsen*, 707 P.2d 344 (Colo. 1985).

The fact that defendant was allowed to withdraw his plea because the plea bargain could not be implemented is irrelevant for speedy trial analysis. *People v. Cass*, 68 P.3d 537 (Colo. App. 2002).

A speedy public trial is a relative concept in that the circumstances of each case determine whether or not it has been afforded. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966); *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

Speedy public trial does not mean trial immediately after the accused is apprehended and indicted, but public trial consistent with the court's business. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

Defendants have the burden of proof that an expeditious trial was denied them. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966); *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused; he has the burden of showing that he was not afforded a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

The burden is upon the defendant to establish that he has been denied a speedy trial in violation of the statute or rule or that his constitutional right to a speedy trial requires dismissal. *Saiz v. District Court*, 189 Colo. 555, 542 P.2d 1293 (1975).

Prima facie showing of violation shifts burden of proof to prosecution. Where a defendant has shown a prima facie violation of this section with no evidence in the record to the contrary, the burden of showing compliance with the time requirements of the rule and statute rests with the trial court and the prosecution. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Dismissal of charges. The people cannot indiscriminately dismiss and refile charges in order to avoid the mandate of this section and Crim. P. 48(b)(1). However, to be entitled to dismissal on these grounds, the defendant must affirmatively establish the existence of such a course of action on the part of the prosecution. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988); *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

Charges in an original information properly dismissed without prejudice within the speedy trial limits for that case become a nullity; upon defendant's arraignment under a subsequent information,

speedy trial period begins anew. *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

The speedy trial period is calculated separately for each criminal complaint brought against a defendant, and, generally, if the charges in a summons and complaint are properly dismissed without prejudice, that case becomes a nullity, and a new speedy trial period begins if and when the accused enters a plea to subsequently filed charges, unless the defendant can establish that the prosecution acted in bad faith to circumvent the speedy trial limits. *People in Interest of C.O.*, 870 P.2d 1266 (Colo. App. 1994).

Where original case was properly dismissed without prejudice by the county court, the speedy trial period started anew in the juvenile case, and the juvenile waived his right to speedy trial by not objecting when the juvenile trial was scheduled outside the speedy trial limits. *People in Interest of C.O.*, 870 P.2d 1266 (Colo. App. 1994).

Dismissing a claim in an earlier case for the legitimate purpose of joinder does not support a conclusion that prosecutor was indiscriminately dismissing and refiling charges in order to avoid the speedy trial mandate. *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

Finding of good cause for denial of motion for severance is specifically required by subsection (6)(c). Although court properly denied motion for severance on evidentiary grounds, under § 16-7-101, it was an abuse of discretion to deny motion for severance on speedy trial grounds under

this section where court made no finding of good cause why severance should not be granted. *People v. Hernandez*, 829 P.2d 392 (Colo. App. 1991).

Insufficient proof. The burden of establishing that the prosecution indiscriminately dismissed and refiled charges in order to avoid the mandate of this section and Crim. P. 48(b)(1) is not satisfied by proof only that the district attorney sought and obtained a subsequent indictment for different offenses arising from the same transaction. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

Dismissal of charges sufficient to protect defendant's rights. Where defendant's trial took place within six months of defendant's plea of not guilty to the charges in the second indictment, and while the trial was not held until more than six months after defendant's plea to the charges of the original indictment, those charges were dismissed by the trial court, such dismissal was sufficient to protect defendant's rights under this section and Crim. P. 48(b)(1). *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

Defendant waived right to speedy trial. Although the first trial which resulted in a mistrial took place beyond the period fixed by statute, the defendant waived any right to discharge he may have had under this section by going to trial without objection. Such an objection is a prerequisite to his

claim for discharge under this section and under § 16 of art. II, Colo. Const., guaranteeing a speedy trial. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963); *Keller v. Tinsley*, 335 F.2d 144 (10th Cir. 1964).

Agreement by defendant and defense counsel at hearing within six-month period that defendant was responsible for 20 days of delay in bringing case to trial deemed express consent to a 19-day delay in the trial and waiver of any speedy trial claims. *People v. Barnes*, 636 P.2d 1323 (Colo. App. 1981).

Defendant expressly waived the requirements concerning trial within period fixed by statute. Under such circumstances, this section is not applicable. *Wilson v. People*, 156 Colo. 243, 398 P.2d 35 (1965).

Defendant's failure to object to the trial date or to seek an earlier trial date, and his request for a continuance, all operated to waive his constitutional and statutory rights to discharge because he was not brought to trial within the time limits set by this section. *Adargo v. People*, 159 Colo. 321, 411 P.2d 245 (1966); *Adargo v. Patterson*, 371 F.2d 822 (10th Cir. 1967).

Where the record does not disclose any objection to delay made by defendant at the time of trial and further and where defendant's motion for postconviction relief under Crim. P. 35(b) does not set forth any facts showing that the delay was in any manner oppressive or arbitrary nor that he

was in any way deprived of any defense or that any witness was unavailable, the court is not required to hold an evidentiary hearing. *Valdez v. People*, 174 Colo. 268, 483 P.2d 1333 (1971).

Motion for discharge not waived. *Rude v. People*, 44 Colo. 384, 99 P. 317 (1909).

Delay justified discharge. *In re Garvey*, 7 Colo. 502, 4 P. 758 (1884); *Rude v. People*, 44 Colo. 384, 99 P. 317 (1909); *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919).

Duty of court to dismiss if dismissal required because right denied. If the constitution, the statutes, the rules, or the case law requires dismissal of a prosecution because of a denial to right of a speedy trial, it is the duty of the trial court to order that the case be dismissed. *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975).

Section does not apply to an action where the alleged offense was committed prior to July 1, 1972. *People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).

Defendant cannot be required to pursue his C.A.R. 21 proceeding in a separate action only at the expense of his right to a speedy trial. *People v. Rosidivito*, 940 P.2d 1038 (Colo. App. 1996).

Test in subsection (6)(g)(I) applied in *People v. Koolbeck*, 703 P.2d 673 (Colo. App. 1985).

18-1-406. Right to jury trial.

(1) Except as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve whose verdict shall be unanimous. In matters involving misdemeanors, the accused is entitled to be tried by a jury of six. In matters involving petty offenses, the accused has the right to be tried by a jury under the terms and conditions of section 16-10-109, C.R.S.

(2) Except as to class 1 felonies, the person accused of a felony or misdemeanor may waive a trial by jury by express written instrument filed of record or by announcement in open court appearing of record.

(3) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of the trial.

(4) Except as to class 1 felonies, the defendant in any felony or misdemeanor case may, with the approval of the court, elect, at any time before the swearing in of the jury, or after the swearing in of the jury and before verdict, with the agreement of the district attorney and the approval of the court, to be tried by a number of jurors less than the number to which he would otherwise be entitled.

(5) Upon request of the defendant in advance of the commencement of the trial, the defendant shall be furnished with a list of prospective jurors who will be subject to call in the trial.

(6) Either the district attorney or the defendant may challenge the array on the ground that there has been a material departure from the requirements of the law governing the selection of jurors, but such challenge shall be made in writing setting forth the particular grounds upon which it is based and shall be filed prior to the swearing in of the jury selected to try the case.

(7) Except as to class 1 felonies, with respect to a twelve-person jury, if the court excuses a juror for just cause after the jury has retired to consider its verdict, the court in its discretion may allow the remaining eleven jurors to return the jury's verdict.

Source: L. 71: R&RE, p. 400, § 1. C.R.S. 1963: § 40-1-506. L. 72: p. 268, § 6. L. 86: (1) amended, p. 769, § 3, effective July 1. L. 91: (4) amended, p. 405, § 7, effective June 6. L. 94: (1) amended and (7) added, p. 1716, § 5, effective July 1.

Editor's note: In *People v. Taylor*, 2021 COA 133, 503 P.3d 912, the Colorado Court of Appeals held that subsection (7) is unconstitutional because it conflicts with a defendant's state

constitutional right under section 23 of article II to have a felony case decided by a jury of twelve.

Cross references: For similar provisions concerning the right to trial by jury, see Crim. P. 23.

ANNOTATION

Law reviews. For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with the right to a jury trial, see 62 Den. U. L. Rev. 1982 (1985).

Annotator's note. For other annotations concerning the right to trial by jury, see § 23 of art. II, Colo. Const., and Crim. P. 23.

Although there is a statutory right to a unanimous verdict in criminal cases in Colorado, the state constitution does not explicitly guarantee the right to a unanimous verdict. Nevertheless, there are some cases in which the jury may return a general verdict of guilty when instructed on alternative theories of principal and complicitor liability and in which the state constitution has provided a criminal defendant the right to a unanimous jury verdict. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Subsection (1) of this section and Crim. P. 23, which provide for six jurors in misdemeanor cases, are constitutional under § 23 of art. II of the Colorado Constitution. *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005).

Subsection (7) is unconstitutional because it conflicts with the right to 12 jurors in felony cases guaranteed in § 23 of

article II of the state constitution. The constitutional right to have 12 jurors is effectuated only when 12 jurors complete the trial and deliberate to a conclusion in the case. *People v. Taylor*, 2021 COA 133, 503 P.3d 912.

Jury to have at least six persons. One accused of a noncapital felony or class 1 misdemeanor who elects, pursuant to subsection (4), to be tried by a jury of less than 12 persons may not be tried by a jury of less than six persons. *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981); *People v. Byerley*, 635 P.2d 542 (Colo. 1981).

Right to waive trial by jury is substantive in nature. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Even though subsection (2) fails to provide a procedure for waiving a jury trial in class 1 felonies, because the criminal defendant has a substantive right to waive a jury trial, the lack of a waiver procedure does not prohibit the waiver right of the criminal defendant. *People v. Cisneros*, 720 P.2d 982 (Colo. App. 1986).

Requirement of § 16-8-105 (2) that prosecution consent to waiver of jury in sanity trial applied to trial of defendant

prosecuted for second degree murder rather than this subsequently enacted general statute which does not refer to prosecutor's consent to waiver of jury trial. People v. District Court, 731 P.2d 720 (Colo. 1987).

Colorado constitution does not afford criminal defendants the right to waive jury and be tried by the court. People v. District Court, 843 P.2d 6 (Colo. 1992); People v. District Court, 953 P.2d 184 (Colo. 1998).

A court exceeds its jurisdiction if it allows a defendant to waive his or her right to a jury trial over the objection of the district attorney based on defendant's claim that his due process rights would be violated by testifying and that he would be subject to impeachment about his past criminal convictions and his ties to drug use. It is not a due process violation to be subject to impeachment about prior criminal convictions; the choice to testify or not is part of adversarial trial process and does not create an unfair trial for the defendant. People v. McKeel, 246 P.3d 638 (Colo. 2010).

In construing the provisions of subsection (2) with § 16-10-101, requiring the prosecution to consent to waiver of jury trial, due process compels conclusion that prosecution alone cannot compel trial by jury where defendant may not receive a fair trial. People v. District Court, 843 P.2d 6 (Colo. 1992).

Constitutional right to a jury of 12 lies only with felony cases and does not extend to misdemeanor cases. A defendant in a misdemeanor case does not have a

constitutional right under art. II, § 23, of the Colorado Constitution to demand a 12-person jury. People v. Rodriguez, 112 P.3d 693 (Colo. 2005).

The statutory right to a 12-person jury could be waived by counsel's statements. The requirement that a defendant must make a written or oral "announcement" of his intention to waive a jury does not extend to a reduction in the number of jurors. People v. Chavez, 791 P.2d 1210 (Colo. App. 1990).

Allotment of right to select mode of trial made in unequivocal terms. When the general assembly has allotted to one party only, such as the accused in a criminal proceeding, the right to select the appropriate mode of trial, it has done so in unequivocal terms. S.A.S. v. District Court, 623 P.2d 58 (Colo. 1981).

Subsection (2) and Crim. P. 23(a)(5) are not reconcilable and directly conflict with each other because the rule provides an additional requirement not present in subsection (2), that the prosecutor's consent must be obtained as a condition before a defendant's oral request to waive his right to a jury trial may be allowed. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980).

Subsection (2) controls over Crim. P. 23(a)(5). Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980).

Defendants voluntarily waived jury. Where, when the jury was assembled in the courtroom ready for trial, defendants' counsel orally announced that defendants had decided to waive their right to a jury trial, and the court inquired of each

defendant if that was their desire and both indicated in the affirmative, and as a further precaution, the court then insisted that a written waiver of jury trial be prepared and be signed by each defendant and their counsel, which was done, it will be presumed that defendants understandingly, voluntarily, and deliberately decided to waive the jury. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Waiver precludes defendant's complaint that judge rules on evidence and renders verdict. Where the defendant voluntarily and with advice of counsel waived a jury trial, defendant in such circumstances cannot be heard to complain when he creates a situation which necessarily makes the trial judge both the

one who decides the admissibility of evidence and the one who renders the verdict. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Judge attempted to use office to force defendant to waive right. When the trial judge couples his intervention into plea negotiations with threats of a longer sentence if the defendant goes to trial and is found guilty, he has attempted to use his office to force the defendant to waive his right to a jury trial or be penalized for exercising this constitutionally guaranteed right. *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

Applied in *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981).

18-1-407. Affirmative defense.

(1) "Affirmative defense" means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue.

(2) If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.

Source: L. 71: R&RE, p. 400, § 1. C.R.S. 1963: § 40-1-507.

Cross references: For the affirmative defense of impaired mental condition, see §§ 16-8-103.5 and 18-1-803; for other provisions concerning affirmative defenses generally, see §§ 18-1-710 and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 through 15 of this title 18.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Choice of Evils in Colorado", see 18 Colo. Law. 1117 (1989). For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

Choice of evils is affirmative defense covered by this section. People v. Strock, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981); People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

As is impaired mental condition. The issue of responsibility due to an impaired mental condition is an affirmative defense. People v. Ledman, 622 P.2d 534 (Colo. 1981).

Duress is affirmative defense. Bailey v. People, 630 P.2d 1062 (Colo. 1981).

Justification is recognized as an affirmative defense to the charge of speeding but the defendant must present credible evidence as to the specific threat of injury and the lack of a reasonable alternative other than commission of the offense. People v. Dover, 790 P.2d 834 (Colo. 1990).

Heat of passion is affirmative defense. People v. Harris, 797 P.2d 816 (Colo. App. 1990).

The defense of alibi is not an affirmative defense and therefore no

special instructions are necessary to inform the jury of the prosecution's burden to prove a defendant alleged to have committed an offense did commit that offense. People v. Huckleberry, 768 P.2d 1235 (Colo. 1989).

Because the defendant's tendered instruction improperly suggested that alibi was an affirmative defense, the trial court properly refused to give the tendered instruction based on People v. Huckleberry, 768 P.2d 1235 (Colo. 1989); however, the question of whether the trial court properly refused the instruction does not resolve the issue of whether the trial court erred in failing to provide a theory of the case instruction. People v. Nunez, 841 P.2d 261 (Colo. 1992).

Court, not jury, must determine whether affirmative defense is raised. People v. Fincham, 799 P.2d 419 (Colo. App. 1990).

When an exception is included in a statutory section defining the elements of the offense, it is usually the burden of the prosecution to prove the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant's burden to claim it as an affirmative defense. People v. Reed, 932 P.2d 842 (Colo. App. 1996).

When an affirmative defense is raised by the defendant, the prosecution must prove each element of the crime beyond a reasonable doubt in addition to disproving beyond a reasonable doubt the affirmative

defense. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

Prosecution must prove beyond a reasonable doubt an exception to self-defense for the jury to reject a defendant's claim of self-defense on that basis. *People v. Castillo*, 2014 COA 140M, 488 P.3d 26, rev'd on other grounds, 2018 CO 62, 421 P.3d 1141.

When a trial court instructs the jury on the affirmative defense of self-defense, it should instruct the jury on the provocation exception, or any other exception to the affirmative defense, if the exception is supported by some evidence. *Galvan v. People*, 2020 CO 82, 476 P.3d 746.

Jury instruction which is in conflict with the legislative intent of this section should not be used. *People v. Rex*, 689 P.2d 669 (Colo. App. 1984).

Instructions containing erroneous statements of law which improperly relegated to the jury the function of determining whether an affirmative defense was an issue in a case and which had the effect of relieving the prosecution of its burden of proof were at odds with standard jury instructions on affirmative defenses. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Insanity is an affirmative defense to a crime. Once any credible evidence of insanity is introduced the prosecution bears the burden of proving the defendant's sanity beyond a reasonable doubt. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

By the plain meaning of subsection (2), only when some credible evidence supports an affirmative defense is the prosecution required to disprove it as though it were another element of the defense. In the absence of express statutory language to the contrary, the threshold determination as to whether some credible evidence exists to support an affirmative defense is a matter of law for the court to decide. *People v. Hill*, 934 P.2d 821 (Colo. 1997).

Under subsection (2), a defendant has not "raised the issue" of the affirmative defense of insanity, in the sense that it has become an issue for consideration by the factfinder, until the court determines credible evidence on that issue has been presented. *People v. Hill*, 934 P.2d 821 (Colo. 1997).

Lawful possession of marihuana under § 18-18-406 (10) is an affirmative defense to charges of unlawful possession with intent to distribute marihuana and unlawful possession of eight or more ounces of marihuana. The provision provides a legal justification to what would otherwise be criminally culpable behavior. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

When analyzing whether a defendant may raise the affirmative defense of

involuntary intoxication under § 18-1-804, a court must determine whether a defendant has offered some evidence that their intoxication was not self-induced. *People v. Mion*, 2026 CO 5, __ P.3d __.

The affirmative defense of involuntary intoxication is unavailable if a defendant's intoxication was self-induced -- if their conduct was caused by one or more "substances" that they both (1) "knowingly introduced" and (2) knew or ought to have known would have a tendency to cause intoxication. *People v. Mion*, 2026 CO 5, __ P.3d __.

This definition entails two requisite levels of responsibility or blameworthiness involved in voluntarily intoxicating oneself. As defined in § 18-1-501, a person acts "[k]nowingly" when they have an awareness of the nature of their conduct and the circumstances. The phrase "ought to know"

engenders a reasonableness standard: what a reasonable person would have or should have known under the circumstances. *People v. Mion*, 2026 CO 5, __ P.3d __.

Applied in *People v. Villa*, 43 Colo. App. 284, 605 P.2d 481 (1979); *People v. Taggart*, 621 P.2d 1375 (Colo. 1981)(justified physical force for disciplinary purposes as affirmative defense in child abuse prosecution); *People v. Traubert*, 625 P.2d 991 (Colo. 1981) (renunciation and abandonment as affirmative defense in prosecution for attempted second degree burglary); *People v. Smith*, 623 P.2d 404 (Colo. 1981); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982); *People v. Quintana*, 665 P.2d 605 (Colo. 1983); *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983); *People v. Huckleberry*, 738 P.2d 17 (Colo. App. 1986).

18-1-408. Prosecution of multiple counts for same act.

(1) When any conduct of a defendant establishes the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not be convicted of more than one offense if:

- (a) One offense is included in the other, as defined in subsection (5) of this section; or
- (b) One offense consists only of an attempt to commit the other; or
- (c) Inconsistent findings of fact are required to establish the commission of the offenses; or
- (d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
- (e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods or instances of such conduct constitute separate offenses.

(2) If the several offenses are actually known to the district attorney at the time of commencing the prosecution and were committed within the district attorney's judicial district, all such offenses upon which the district attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution; except that, if at the time jeopardy attaches with respect to the first prosecution against the defendant the defendant or counsel for the defendant actually knows of additional pending prosecutions that this subsection (2) requires the district attorney to charge and the defendant or counsel for the defendant fails to object to the prosecution's failure to join the charges, the defendant waives any claim pursuant to this subsection (2) that a subsequent prosecution is prohibited.

(3) When two or more offenses are charged as required by subsection (2) of this section and they are supported by identical evidence, the court upon application of the defendant may require the state, at the conclusion of all the evidence, to elect the count upon which the issues shall be tried. If more than one guilty verdict is returned as to any defendant in a prosecution where multiple counts are tried as required by subsection (2) of this section, the sentences imposed shall run concurrently; except that, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences.

(4) When a defendant is charged with two or more offenses based on the same act or series of acts arising from the same criminal episode, the court, on application of either the defendant or the district attorney, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(5) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(6) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(7) If the same conduct is defined as criminal in different enactments or in different sections of this code, the offender may be prosecuted under any one or all of the sections or enactments

subject to the limitations provided by this section. It is immaterial to the prosecution that one of the enactments or sections characterizes the crime as of lesser degree than another, or provides a lesser penalty than another, or was enacted by the general assembly at a later date than another unless the later section or enactment specifically repeals the earlier.

(8) Without the consent of the prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense.

Source: L. 71: R&RE, p. 400, § 1. C.R.S. 1963: § 40-1-508. L. 85: (3) amended, p. 661, § 1, effective July 1. L. 94: (2) amended, p. 1049, § 2, effective July 1. L. 2000: (8) added, p. 452, § 6, effective April 24.

Cross references: For the sentencing of a defendant convicted of multiple crimes of violence arising out of the same incident, see § 18-1.3-406 (1)(a).

ANNOTATION

I. General Consideration.

I. GENERAL CONSIDERATION.

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 14 (June 1931). For note, "Larceny, Embezzlement, and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with the failure to instruct or lessen included offense, see 62 Den. U. L. Rev. 191 (1985). For comment, "Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course", see 66 U. Colo. L.

Rev. 523 (1995). For article, "Lesser Included and Nonincluded Offenses and Jury Instructions", see 25 Colo. Law. 35 (June 1996). For article, "Convict My Client of Something Else! Lesser Included Offenses after Reyna-Abarca", see 47 Colo. Law. 38 (Nov. 2018).

Annotator's note. Since § 18-1-408 is similar to former § 39-3-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Constitutional limitations. Insofar as this section is concerned, a defendant may be prosecuted for each offense that he allegedly commits, with certain well-defined limitations. The limitations are primarily those embodied within the constitutional

concepts of double jeopardy, amendment V, U.S. Const., and § 18 of art. II, Colo. Const., impermissible joinder, and the doctrine of collateral estoppel. *People v. Pinyan*, 190 Colo. 304, 546 P.2d 488 (1976).

This section does not conflict with the double jeopardy clause of the United States Constitution. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Notions of double jeopardy were the underpinnings of this statute. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973).

A defendant's double jeopardy rights are not violated when the court sentences a defendant to consecutive sentences based on separate incidents involving the same victim. *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004).

This section does not apply to municipal code violations. The compulsory joinder bar has no application when the initial prosecution is in a municipal court for a municipal ordinance violation and the later prosecution is in a state court for state offenses based on different conduct but arising out of the same criminal episode as the ordinance violation. *People v. Wright*, 742 P.2d 316 (Colo. 1987); *Priday v. People*, 742 P.2d 321 (Colo. 1987).

As long as the criminal episode which is the basis for the municipal code violations and the state offenses gives rise to separate offenses, each of which requires proof of a fact which the other does not, the constitutional prohibition against double

jeopardy is not violated. *People v. Wright*, 742 P.2d 316 (Colo. 1987).

Compulsory joinder provisions extend further than constitutional guarantee against double jeopardy. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983); *People v. Taylor*, 732 P.2d 1172 (Colo. 1987).

Statutory language of this section clearly recognizes that a district attorney's authority to initiate a criminal prosecution is limited to crimes committed within the geographical district served by the district attorney. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987).

Term "judicial district", as used in this section, means that the offenses must have been committed within the same judicial district in which the accused has previously been subjected to a completed prosecution. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987).

More than one felony conviction may be based upon same occurrence without running afoul of either federal or state double jeopardy prohibitions. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

A defendant may be convicted for multiple offenses arising out of a single transaction if the defendant has violated more than one statute. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

That conduct may give rise to more than one offense is irrelevant so long as the offenses have not merged for purposes of

double jeopardy. *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979).

A single transaction that violates two criminal statutes may generally be prosecuted under either. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Subsection (3) requires the trial court to impose concurrent sentences, if two or more charged offenses arise from the same criminal episode. *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

A court must impose concurrent sentences on crimes that are based upon identical evidence. The evidence supporting the attempted sexual assault was not identical to evidence for kidnapping, therefore, the court had discretion to impose consecutive sentences for the two crimes. *People v. McAfee*, 160 P.3d 277 (Colo. App. 2007).

Crimes involving multiple victims do not fall within the concurrent sentencing mandate of subsection (3). Offenses defined in terms of their victimization of another and committed against different victims are not capable of being proved by identical evidence, whether or not the defendant's volitional act causing harm was the same. *People v. Espinoza*, 2020 CO 43, 463 P.3d 855.

Trial court did not err in determining that the prosecution was not required to elect between two counts of first degree burglary since each of the two counts consisted of different elements that were proved by evidence of different conduct, there were multiple victims, and, even if two

counts were supported by identical evidence, defendant received concurrent sentences, thereby meeting the requirements of subsection (3). *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

Prosecutor determines under which statute to proceed. A single transaction may give rise to the violation of more than one statute, and in such a situation it is a proper function of the prosecutor to determine under which of the statutes he wishes to prosecute. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972).

Enactment of a specific criminal statute does not preclude prosecution under a general criminal statute unless a legislative intent to limit prosecution to the special statute is shown. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972); *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

In a situation where a single transaction violates two criminal statutes, it is the proper function of the district attorney to determine under which of the statutes, he wishes to prosecute. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Prosecution under the general burglary statutes was precluded where the defendant's actions violated the specific provisions of criminal offenses included in the Limited Gaming Act of 1991. Because the Act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal offenses related to gambling both in the Act and in sections reproduced verbatim in this title, the general assembly adequately

demonstrated its intention that conduct violating the specific limited gaming provisions be prosecuted under those provisions only. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

A defendant does not impliedly waive his right to rely upon the statute and rule by entering a plea of guilty in a county court case with knowledge that the district court case is pending. *People v. Robinson*, 774 P.2d 884 (Colo. 1989).

The right to imposition of concurrent sentences applies equally to a conviction arising from a trial or one arising from the entry and acceptance of a guilty plea. Construing statute to allow the imposition of a more severe sentence for a guilty plea than for a conviction resulting from trial would likely raise constitutional concerns. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

Right to compulsory joinder may be waived by raising the issue after jeopardy attaches in the second prosecution. *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991).

"Single prosecution", as used in this section, means those proceedings from the commencement of the criminal action until further prosecution is barred. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973); *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

Where there are two separate and distinct offenses which violate the laws of two different jurisdictions, each offense must be prosecuted in the jurisdiction where the respective criminal acts occurred and neither offense could be tried in the court of

the other jurisdiction. *People v. Pinyan*, 190 Colo. 304, 546 P.2d 488 (1976).

Prosecution in both municipal and state systems not precluded. This section does not preclude prosecution in both municipal and state systems for crimes arising from the same criminal episode, at least in situations where there was no counterpart to the municipal offense under state law. *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977).

Where there was no knowledge or participation by the district attorney in the decision to prosecute different offenses in both the municipal and state systems, this section does not apply. *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977); *Blum v. County Court*, 631 P.2d 1191 (Colo. App. 1981).

Guilty plea to related charge bars subsequent prosecution. Crim. P. 8(a) and this section bar the prosecution of a defendant for two pending charges arising out of a single criminal episode after the defendant has pleaded guilty and has been sentenced for a third related charge. *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

The denial of a motion to dismiss for failure to comply with this section is appealable. *County Court v. Ruth*, 194 Colo. 352, 575 P.2d 1 (1977).

Concurrent sentence does not affect fines for separate counts. Although the defendant is concurrently sentenced, this has no effect on individual fines for separate counts. *People v. Blair*, 195 Colo. 462, 579

P.2d 1133 (1978); *People v. Kern*, 2020 COA 96, 474 P.3d 197.

Defendant's multiple convictions arise from crimes committed upon different victims and, therefore, evidence is not identical and prohibition against consecutive sentences in this section is not applicable. *People v. Wafai*, 713 P.2d 1354 (Colo. App. 1985), *aff'd*, 750 P.2d 37 (Colo. 1988) (decided under law in effect prior to 1985 amendment); *People v. Grant*, 30 P.3d 667 (Colo. App. 2000), *aff'd* on other grounds, 48 P.3d 543 (Colo. 2002); *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

When determining whether to sentence two crimes of violence consecutively or concurrently in relation to § 16-11-309, the determining factor is whether the evidence supporting the convictions is identical. If the evidence supporting the convictions is not identical, the sentences are consecutive. *People v. Jurado*, 30 P.3d 769 (Colo. App. 2001).

The test for identical evidence is an evidentiary test rather than an elemental test. The court of appeals incorrectly interpreted "identical evidence" to entail an analysis of the evidence necessary to prove the elements of the offenses charged, rather than what evidence supports the conviction. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

Test applied in *Thompson v. People*, 2020 CO 72, 471 P.3d 1045.

Convictions not based upon identical evidence. Kidnapping occurred at a different time and in a different place than the sexual

assault. *People v. Glasser*, 293 P.3d 68 (Colo. App. 2011).

Because the evidence supporting the convictions for conspiracy and solicitation was identical, concurrent sentencing was required even though the crime of solicitation requires proof of inducement and conspiracy requires proof of an agreement and an act in furtherance thereof. The convictions here were based on the same acts: The planning by the members of the group to rob the home of the victim and the performance of that robbery. *People v. Le*, 74 P.3d 431 (Colo. App. 2003).

Trial court erred in imposing consecutive sentences. The evidence presented at trial supported no reasonable inference other than that defendant's convictions of first degree murder and of child abuse resulting in death were based on identical evidence. *People v. Phillips*, 2012 COA 176, 315 P.3d 136.

Identical evidence was presented at trial to establish the sexual assault on a child, sexual assault on a child by one in a position of trust, and aggravated incest charges as to each victim. *People v. Aldridge*, 2018 COA 131, 446 P.3d 897.

Convictions for first degree assault and vehicular assault were supported by identical evidence because both convictions were based on one distinct act rather than multiple acts separated by time or place. Consequently, pursuant to the mandate in subsection (3), the trial court lacked the authority to impose consecutive sentences where the convictions were

supported by identical evidence. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

By waiving the establishment of a factual basis for the added second degree assault charge, defendant also waived right to rely on subsection (3). If defendant wanted to ensure that all of the sentences imposed pursuant to the plea bargain would be subject to concurrent sentencing mandate of subsection (3), defendant could have rejected any plea agreement that called for guilty pleas to multiple charges or by rejecting any plea agreement that did not include a stipulation for concurrent sentences. *People v. Maestas*, 224 P.3d 405 (Colo. App. 2009).

Unless multiple victims are involved, concurrent sentences are required where two or more convictions are based upon the same act or series of acts arising from the same criminal episode and the evidence supporting the counts is identical. *People v. Farrell*, 10 P.3d 672 (Colo. App. 2000), rev'd on other grounds, 34 P.3d 401 (Colo. 2001).

Even though identical evidence is used for multiple convictions of felony murder and attempted aggravated robbery, the court may impose consecutive sentences because there were two separate victims involved. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Thus, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences. *People v. Trujillo*, 114 P.3d 27 (Colo. App. 2004).

The mere possibility that the jury may have relied on identical evidence in returning more than one conviction is not sufficient to trigger the mandatory concurrent sentencing provision. There was sufficient evidence for the trial court to conclude that the two acts were sufficiently separate to justify consecutive sentencing. The mandatory concurrent sentencing provision is only implicated when the evidence supports no conclusion that the charges are based on identical evidence. *People v. Muckle*, 107 P.3d 380 (Colo. 2005) (overruling *People v. Page*, 907 P.2d 624 (Colo. App. 1995)).

Prosecutor not required to select specific instances of sexual assault on which the state would rely when there were numerous counts of sexual assault on a child. *People v. Elinger*, 754 P.2d 396 (Colo. App. 1987).

Court could properly impose consecutive sentences for multiple sexual exploitation convictions since the crime recognizes that each sexually exploitive image of a child constitutes a discrete act of victimization of the child. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

Conduct that violates a specific provision of the liquor code may only be filed under the penal provisions specifically provided by said code. *People v. Bagby*, 734 P.2d 1059 (Colo. 1987).

When the jury could have relied on identical evidence to support separate charges, and the record provides no basis to determine that each charge is supported by separate evidence,

subsection (3) requires concurrent sentencing. People v. Brown, 119 P.3d 486 (Colo. App. 2004).

Defendant's convictions for theft and unauthorized use of a financial instrument were supported by identical evidence, so the sentences must be concurrent not consecutive. People v. Patton, 2016 COA 187, 425 P.3d 1152, aff'd on other grounds, 2018 CO 67, 421 P.3d 184.

Imposition of concurrent or consecutive sentences lies in trial court's discretion if the multiple counts are not supported by identical evidence. People v. Fincham, 799 P.2d 419 (Colo. App. 1990).

Trial court did not abuse its discretion in imposing consecutive sentences where the conspiracy conviction was not based on the same evidence as the robbery convictions. People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003).

Consecutive sentencing was proper for convictions of first degree sexual assault, second degree kidnapping, and second degree assault committed against one victim when evidence establishing each charge was not identical for purposes of subsection (3) and when taking into account the gravity of defendant's conduct toward both victims. People v. Martinez, 32 P.3d 520 (Colo. App. 2001).

When multiple victims are involved, court has discretion to impose consecutive sentences. People v. Hogan, 114 P.3d 42 (Colo. App. 2004).

More than one felony conviction may be based upon same occurrence. People v. Ball, 813 P.2d 759 (Colo. App. 1990).

When an identical act gives rise to multiple charges, the court must impose concurrent sentences for convictions on the multiple charges. People v. Blankenship, 30 P.3d 698 (Colo. App. 2000); People v. Dotson, 55 P.3d 175 (Colo. App. 2002).

Court not required to impose concurrent sentences when evidence supporting two crimes was not identical even though the jury could have relied on the same evidence in finding defendant guilty of both counts. People v. Douglas, 2012 COA 57, 296 P.3d 234.

Because defendant could not be convicted of first degree assault without proof that he committed a class 3 felony sexual assault under § 18-3-202 (1)(d), the latter offense was a lesser included offense of the first degree assault charge and he could not, therefore, be convicted of both offenses. People v. Moore, 860 P.2d 549 (Colo. App. 1993).

Court can deny request to include lesser included offense instruction where the record does not present any evidence leading to a rational basis for acquitting a defendant of the greater offense and convicting him or her of the lesser offense. People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000).

A defendant may be convicted of more than one offense arising out of a single incident if the defendant has violated more

than one statute. *People v. Moore*, 877 P.2d 840 (Colo. 1994); *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

A defendant may be convicted of both assault and menacing based on the same criminal transaction when the facts support both convictions. There is no conflict or disqualifying overlap in the statutory elements, and none of the provisions of subsection (1) prohibit the multiple convictions. *Margerum v. People*, 2019 CO 100, 454 P.3d 236.

Assaults committed within a relatively short period of time did not constitute a continuing course of conduct. Each incident constituted a separate offense and the charges were not multiplicitous. *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003), *aff'd*, 105 P.3d 585 (Colo. 2005); *People v. Gillis*, 2020 COA 68, 471 P.3d 1197.

Applied in *People v. Hauschel*, 37 Colo. App. 114, 550 P.2d 876 (1976); *People v. Bielecki*, 41 Colo. App. 256, 588 P.2d 377 (1978); *People v. Hanes*, 42 Colo. App. 527, 596 P.2d 395 (1978); *People v. Taylor*, 197 Colo. 161, 591 P.2d 1017 (1979); *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Scott*, 615 P.2d 680 (Colo. 1980); *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Riddick*, 626 P.2d 641 (Colo. 1981); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Clerkin*, 638 P.2d 808 (Colo. App. 1981); *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v.*

Williams, 654 P.2d 319 (Colo. App. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Hepler*, 665 P.2d 627 (Colo. App. 1982); *People v. Santisteven*, 693 P.2d 1008 (Colo. App. 1984); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986); *People v. Avila*, 770 P.2d 1330 (Colo. App. 1988); *People v. Rodriguez-Ortiz*, 2025 COA 61, 574 P.3d 1196.

II. JOINDER AND ELECTION OF OFFENSES.

A. In General.

B. Illustrative Cases.

A. In General.

Offenses defined in terms of general and specific conduct. Subsection (1)(d) of this section is intended to deal with situations where the offenses themselves are defined in terms of general and specific kinds of conduct. *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979).

Statutory elements to be satisfied to bar subsequent prosecution. This section can be broken down into the following elements, all of which must be satisfied in order for the bar to apply to a subsequent prosecution: (1) Several offenses committed within the same judicial district; (2) a prosecution against the offender; (3) prosecutorial knowledge of the several offenses at the commencement of the prosecution; (4) the several offenses arising from the same criminal episode; and (5) the offender previously having been subjected to a single prosecution. *Jeffrey v. District Court*, 626

P.2d 631 (Colo. 1981); *People v. Garcia*, 735 P.2d 897 (Colo. App. 1986); *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Test for "same criminal episode" under this section should be identical to the standard for joinder under Crim. P. (8)(a). *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

The term "same criminal episode" contemplates a joinder standard sufficiently broad to include offenses committed within the same unit of time at the same location, irrespective of whether these offenses are otherwise related to each other by some underlying unity of purpose or scheme. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Factors to consider when making the determination as to whether a series of acts arose from the same criminal episode include whether the physical acts were committed simultaneously or in close sequence, whether they occurred in the same place or closely related places, and whether they formed part of a schematic whole. Where the two incidents occurred at different times, at different places, with different victims, and under different circumstances and were not part of any schematic whole, it can be concluded that the two offenses did not arise from the same criminal episode. *People v. Garcia*, 735 P.2d 897 (Colo. App. 1986).

Test must be interpreted to include the condition that the offenses be connected in such a manner that prosecution of the offenses involve substantially interrelated proof. *People v. Rogers*, 742 P.2d 912 (Colo. 1987); *People v. Miranda*, 754 P.2d 377

(Colo. 1988); *People v. Patrick*, 773 P.2d 575 (Colo. 1989).

Where a six-day interval existed between the distribution, possession, and conspiracy offenses charged in the separate prosecutions and where there were other factual differences relating to the charges alleged in the separate prosecutions, proof of the offenses at issue involved evidence substantially different from the evidence underlying the former prosecution. *People v. Miranda*, 754 P.2d 377 (Colo. 1988).

Where the seizure of drugs from defendant's car occurred after defendant was arrested on an outstanding warrant and the car was impounded and inventoried, the drug possession charge did not arise from the same criminal episode as the speeding charges which were the initial cause for which defendant was stopped. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

The crime of identity theft under § 18-5-902 (1)(a) is not a continuing course of conduct, and each discrete use of another's identity is a separate chargeable offense. *People v. Allman*, 2017 COA 108, 454 P.3d 289, *aff'd*, 2019 CO 78, 451 P.3d 826.

Charges against the defendant were based on identical evidence when the defendant engaged in a continuous attack of the victim and there was no break in the time and change in circumstances between the inflicted wounds. *People v. DeBoer*, 829 P. 2d 447 (Colo. App. 1991).

The compulsive joinder rule did not bar subsequent prosecution for drug possession arising from the discovery of

drugs in defendant's car where the district attorney was not involved in disposing of the original traffic infraction in county court. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

Required before dismissal. Trial court must determine extent to which two prosecutions would burden defendant with repetitive proof before it could dismiss for violation of compulsory joinder statute. *People v. Rogers*, 742 P.2d 912 (Colo. 1987).

The compulsory joinder bar of subsection (2) is applicable even though it might have been one of a series of criminal acts committed in several judicial districts as part of a single criminal episode. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987).

Because § 42-4-1505.3 clearly contemplates separate trials and hearings where separate complaints alleging traffic infractions and crimes are filed, and the district attorney does not participate in the decision to "prosecute" traffic infractions, the compulsory joinder statute does not apply. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Section permitting joinder of offenses is a declaration of the common law on the subject of joinder of counts in one indictment. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

This section permits the joinder of crimes or offenses which may be properly joined as consistent with the common-law rule upon the subject. At common law, disconnected and independent felonies might not be

properly joined. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

This section is in reality but an embodiment of a well established principle of the common law, and is no broader than was that rule unless it be in the consolidation of causes, and confers no greater power than that enjoyed and exercised prior to the enactment of the statute. *Cummins v. People*, 4 Colo. App. 71, 34 P. 734 (1893).

Subsection (2) was adapted from the model penal code, section 108 (2). *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977).

The purpose of subsection (2) was to prevent the bringing of successive prosecutions based upon essentially the same conduct. *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977); *Brutcher v. District Court*, 195 Colo. 579, 580 P.2d 396 (1978).

The evil which subsection (2) was designed to cure was harassment of the defendant by means of multiple prosecution for the same act. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974); *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977).

The concern of the general assembly in enacting this section was not an insufficient number of charges, but rather duplicitous charges which charge in the same count two or more separate offenses. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

The purpose of the joinder statute is to "prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the

same criminal episode". Subsequent prosecution is permissible when the statute by its terms does not apply. *County Court v. Ruth*, 194 Colo. 352, 575 P.2d 1 (1977); *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

The purposes of compulsory joinder are to protect the accused against the oppressive effect of sequential prosecutions based on conduct occurring during the same criminal episode and to conserve judicial and legal resources that otherwise would be wasted in duplicative proceedings. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of subsection (2) of this section is broader than both the "same offense" principle of double jeopardy as codified in § 18-1-301 and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in § 18-1-302. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Attachment of jeopardy triggers bar of subsection (2). Jeopardy attaches upon the court's acceptance of a plea of guilty, and the attachment of jeopardy is what triggers the statutory bar of subsection (2). *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Compulsory joinder claim is waived if the defendant fails to raise the issue prior to the time at which jeopardy attaches in the second prosecution. *People v. Bossert*, 722 P.2d 998 (Colo. 1986); *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

Compulsory joinder defense not waived. Where compulsory joinder defense was not available when prosecution of felony offense was initiated because second charge had not been filed, defendant did not waive compulsory joinder claim when he failed to raise issue within twenty days after arraignment on felony charge. *People v. Rogers*, 742 P.2d 912 (Colo. 1987).

Compulsory joinder section provides no exceptions to requirement of a single multiple-count prosecution. A juvenile faced with a misdemeanor charge and related traffic charges committed as part of the same act or series of acts should be afforded the protection of the compulsory joinder statute despite the fact that under the juvenile code a juvenile court has no authority to try traffic charges when such charges are the sole basis for a delinquency petition. *Marquez v. County Court*, 719 P.2d 797 (Colo. App. 1986).

Several counts based on one transaction proper. It was not error to consolidate two informations upon the statement of the district attorney that the several counts in the two informations referred to the same transaction, and where the evidence showed that such was the case. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900).

Several cognate offenses growing out of the same transaction may be charged in separate counts in the same indictment or information. *Roland v. People*, 23 Colo. 283, 47 P. 269 (1896).

A single transaction may give rise to the violation of more than one statutory

provision, and in such a situation separate offenses are perpetrated, each of which may be subject to prosecution. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Since a dismissal of a felony complaint by a county court does not bar further prosecution, this statute does not prohibit the filing of a direct information joining any or all offenses arising from a criminal episode. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973).

Where the acts involved were committed at the same time or in immediate succession and at the same place, they arose out of the same criminal episode; therefore, it is appropriate to include the separate counts in a single information. *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981).

All offenses alleged must be alleged in separate counts. Subsection (2) does not provide that all offenses upon which the prosecution desires to proceed must be alleged, but rather that all offenses which the district attorney does allege must be alleged in separate counts. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

State's amendment to information adding charge of sale of narcotic drugs to conspiracy charge complied with provision which requires that all offenses against defendant be "prosecuted by separate counts in a single prosecution". *People v. Wright*, 678 P.2d 1072 (Colo. App. 1984).

Each count must charge a distinct offense. When separate counts are charged in the same indictment, each count, to be valid, must be independent of the others, and

in itself charge the defendant with a different and distinct offense. *Roland v. People*, 23 Colo. 283, 47 P. 269 (1896).

Not more than one offense should be charged in one count. *Sweek v. People*, 85 Colo. 479, 277 P. 1 (1929).

Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. *Leyba v. People*, 174 Colo. 1, 481 P.2d 417 (1971).

Exception made in cases of embezzlement over period of time. Under this section an indictment which charges a clerk of the district court with failure to pay over a large number of jury and witness fees amounting to several thousand dollars is not defective as charging a number of offenses in one count because the fees were collected by him at various times in small amounts, nor because part of it was collected during each of three different appointments under which he acted in discharge of his official duties. *Adams v. People*, 25 Colo. 532, 55 P. 806 (1898).

It is proper for the prosecution in a charge of embezzlement to lump several items into one count of an information and to try them as a single transaction. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

When counts may not be joined. Wherever the felonies are separate and distinct, are not provable by the same evidence, and have been committed at different times, so that they cannot be

deemed to result from the same series of acts, they may not be joined in one indictment; and, if several indictments be found, the court cannot consolidate the causes. *Cummins v. People*, 4 Colo. App. 71, 34 P. 734 (1893).

If the actions or transactions covered by the information are so connected together as to bring them within the provisions of this section the same should be charged in separate counts of the information. If, on the other hand, they were separate, distinct, and disconnected acts and transactions, they should be charged in separate and distinct informations or indictments. *Trask v. People*, 35 Colo. 83, 83 P. 1010 (1905).

This section is undoubtedly clear as to the joinder of charges growing out of the same transaction or transactions that are connected; however, "transactions of the same class of crimes or offenses, which may be properly joined", presents a debatable question when a felony and misdemeanor are joined. *Eckhardt v. People*, 126 Colo. 18, 247 P.2d 673 (1952).

A motion to dismiss will lie. Upon a motion to quash the information interposed at the close of the state's case, at which time it appeared from the evidence that several offenses had been charged in one count, it is error not to sustain the motion. *Trask v. People*, 35 Colo. 83, 83 P. 1010 (1905).

The question of whether or not an information is duplicitous must be presented either by motion to quash or demurrer, and in limine. *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932).

Duplicity may be overcome by election of district attorney. If an information is duplicitous the defect is overcome where the district attorney in his opening statement elects to proceed on one specific charge. *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932).

It is improper to include distinct offenses in the same indictment, and either in the case of duplicity or of misjoinder of counts, if objection is made in apt time, the court will in the one case quash the indictment, and in the other compel the prosecutor to elect on which count he will proceed. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

Subsection (3) relates to court's discretionary power requiring prosecutor to elect between multiple counts. Subsection (3) relates to the discretionary power of the trial court, upon motion of the defendant at the conclusion of all of the evidence, to require the prosecution to elect between multiple counts when they are supported by identical evidence. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974).

Motion to compel election. A motion to compel a prosecutor to elect upon which count in an indictment he will proceed, when such indictment contains more than one count, each charging a felony, is a matter addressed to the discretion of the trial court. *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888).

Compelling election is discretionary with the court. *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

Motions to compel the prosecutor to elect upon which of several counts of a criminal information he will proceed are addressed to the sound discretion of the trial court. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

A motion to require the district attorney to elect upon which of two counts relating to the same transaction he desired to proceed generally is addressed to the sound discretion of the court. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942); *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Defendant's remedy, in cases where two sections overlap and evidence is identical, is to move for an election as between counts as provided for by this section; and if no such application is filed, he is limited to the remedy of concurrent sentencing. *People v. Blair*, 195 Colo. 462, 579 P.2d 1133 (1978).

Knowledge and actions of deputies and assistants imputed to district attorney. Deputies and assistant district attorneys function only by virtue of the district attorney's authority, and their knowledge and official actions are imputed to the district attorney for purposes of the compulsory joinder statute. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Power of court to protect accused in this regard. When the evidence in this case disclosed that the defendant was being prosecuted under two counts for distinct and different felonies, the court should have interposed sua sponte to protect him from being tried and convicted upon both counts

together. Not to do so was reversible error. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

Prosecutor need not elect where different counts properly joined. Where different counts are properly joined in a criminal information, the prosecutor is not obliged to elect one upon which he will proceed to trial. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

Prosecutor may go to jury on both counts. Where a criminal information embraces two counts, one for larceny and the other for receiving stolen goods, the same evidence being admissible to support both charges, the prosecutor is not required to elect, but may go to the jury on both. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

Or request jury be instructed verdict of guilt is returnable on one count only. Where two counts were based upon the same transaction, counsel may request the court to instruct the jury that a verdict of guilty could be returned on only one of the counts. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942).

While a conviction on joined counts of confidence game and false pretenses predicated upon the same transaction cannot necessarily stand, the question is solved where the trial court instructs the jury that, if it finds the defendant guilty of confidence game it cannot find him guilty of false pretenses; that if it finds him guilty of false pretenses it cannot find him guilty of confidence game; and if it finds him guilty of conspiracy to commit one of the

foregoing felonies, it cannot find him guilty of conspiracy to commit the other. *Small v. People*, 173 Colo. 304, 479 P.2d 386 (1970).

Subsection (3) requires concurrent sentences only where the counts of which the accused was convicted were supported by identical evidence. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974); *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986); *People v. Ellinger*, 754 P.2d 396 (Colo. App. 1987); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); *People v. Le*, 74 P.3d 431 (Colo. App. 2003); *People v. Torrez*, 2013 COA 37M, 316 P.3d 25; *People v. Chirinos-Raudales*, 2021 COA 37, 491 P.3d 538, *aff'd*, 2023 CO 33, 532 P.3d 1200.

If, under the discretionary authority of subsection (3), the trial court chooses not to require the prosecution to elect, and the defendant is convicted on multiple counts based on identical evidence, then "the sentences imposed must run concurrently". *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974); *People v. Tivis*, 727 P.2d 392 (Colo. App. 1986).

Section 18-1.3-1004 (5)(a) does not create an exception to the general rule found in subsection (3) of this section that a court must impose concurrent sentences for counts based on identical evidence. *People v. Torrez*, 2013 COA 37M, 316 P.3d 25.

The trial court has discretion to impose consecutive or concurrent sentences when a defendant is convicted of multiple offenses. Such authority is not affected by this section unless the crimes are supported

by identical evidence. *People v. Dixon*, 950 P.2d 686 (Colo. App. 1997).

Evidence supporting different crimes is considered identical for purposes of this section when the same act or acts gave rise to both charges. *People v. Dixon*, 950 P.2d 686 (Colo. App. 1997).

No requirement that sentences run concurrently. Where the offenses for which a defendant are convicted are not based on the same act or series of acts arising from the same criminal episode, there is no requirement that the sentences for each offense run concurrently. *People v. Early*, 692 P.2d 1116 (Colo. App. 1984); *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986).

Inapplicable to different theories of same crime. Subsection (3) applies only to cases charging several different offenses, and not to the various theories of first-degree murder. *People v. Bowman*, 669 P.2d 1369 (Colo. 1983).

Consecutive sentencing for same transaction improper. When the burglary and the larceny involve one transaction, typical of many burglary-larceny situations, consecutive, double sentencing for the same transaction is inherently wrong and basically unjust and evades the legislative intent. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969). But see *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

But consecutive sentences proper for multiple offenses occurring during one continuous criminal episode where offenses, although involving some common elements of proof, were nevertheless separate and distinct, and required proof of different facts to establish their disparate elements. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Consecutive sentences may be imposed when the crimes require proof of different elements and are supported by different evidence. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

Concurrent sentences are not prejudicial. The denial of a motion to compel election might constitute prejudicial error, but where the sentences run concurrently, there was no prejudice. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942).

Law depends on facts in each particular case. The law relating to joinder and severance and that which permits consolidation of charges depends on the facts in each particular case. *Hunter v. District Court*, 193 Colo. 308, 565 P.2d 942 (1977).

Applicability to proceedings against juvenile. When a court has jurisdiction to entertain criminal proceedings against a juvenile under § 19-1-104(4)(b)(II), any additional charges arising out of the same act or series of acts can and must be prosecuted in that same action, even though they do not rise to the seriousness of class 3 felonies. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

Compulsory joinder section provides no exceptions to requirement of a single multiple-count prosecution. A juvenile faced with a misdemeanor charge and related traffic charges committed as part of the same act or series of acts should be afforded the protection of the compulsory joinder statute despite the fact that under the juvenile code a juvenile court has no authority to try traffic charges when such charges are the sole basis for a delinquency petition. *Marquez v. County Court*, 719 P.2d 797 (Colo. App. 1986).

Where multiple convictions are erroneously entered based on identical evidence, the appropriate remedy is to sustain the conviction that gives maximum effect to the jury's verdicts and vacate the duplicate convictions. *People v. Denton*, 91 P.3d 388 (Colo. App. 2003).

Where defendant is convicted of multiple counts arising out of the same incident, but proof of each count was not based on identical evidence, the imposition of consecutive sentences was appropriate. *People v. Jiron*, 796 P.2d 499 (Colo. App. 1990).

This section is designed to protect an accused defendant from an oppressive second trial and to preserve judicial and legal resources. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

By extending the constitutional guarantee against double jeopardy, this section establishes the specific circumstances under which a subsequent prosecution may be barred. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

This section contains five elements which must be satisfied before a subsequent prosecution is barred: (1) The offenses must have been committed in the same judicial district; (2) there must be a prosecution against the offender; (3) the prosecutor must have had knowledge of the several offenses at the commencement of the prosecution; (4) the offenses must have arisen out of the same criminal episode; and (5) the offender must have been previously subjected to a single prosecution. *People v. McCormick*, 859 P.2d 846 (Colo. 1993); *Zipse v. County Ct. for Jefferson County*, 917 P.2d 331 (Colo. App. 1996); *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

In determining whether the third element has been met, the focus should be on prosecutorial knowledge at the commencement of the jeopardy phase of the criminal prosecution. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

This section does not bar a subsequent prosecution where the attorney had no knowledge and does not participate in the decision to prosecute the different offenses. *People v. McCormick*, 859 P.2d 846 (Colo. 1993); *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

For a subsequently charged offense to be properly barred, the offense must have been ready for prosecution prior to the first trial, in addition to the district attorney having knowledge of the offense. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

Wife's authority as a private party to seek contempt sanctions for violation of a restraining order was independent of

district attorney's authority to file criminal charges. Contempt of court proceeding and prosecution for criminal trespass and misdemeanor menacing, therefore, were not subject to compulsory joinder pursuant to this section. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Absent contrary evidence, fact that police officers issue separate summonses and complaints for multiple misdemeanors or petty offenses arising out of the same criminal episode provides no basis in fact or law to impute the knowledge of the separate offenses to the district attorney. *Zipse v. County Ct. for Jefferson County*, 917 P.2d 331 (Colo. App. 1996).

A defendant may not oppose a prosecution's failed motion to join two cases and then later move to dismiss the second case because the court did not join the cases originally. A defendant waives his or her joinder rights when he or she objects to a joinder motion and the court denies the motion. *People v. Marshall*, 2014 COA 42, 348 P.3d 462.

Court did not abuse its discretion by rejecting defendant's guilty plea prior to joinder of two cases where doing so would prevent prosecution of a felony charge. Defendant attempted to plead guilty to a misdemeanor charge before the prosecution moved to join the cases. The compulsory joinder statute would therefore prevent prosecution of the second charge. There is no absolute right to have a guilty plea accepted. The maneuver was an attempt to manipulate the legal system. *People v. Leverton*, 2017 COA 34, 405 P.3d 402.

B. Illustrative Cases.

Count for murder and one for manslaughter may be tried together.

Where the first count of an indictment was for murder and the second for manslaughter, it was held that the prosecutor might proceed to trial upon both counts at the same time, and that he could not properly be required to elect upon which count he would rely, so long as it appeared from the evidence that the two counts related to the same transaction. *Kelly v. People*, 17 Colo. 130, 29 P. 805 (1892).

Counts for burglary, larceny, and related offenses. One indictment may contain a count for burglary and one for larceny. *Parker v. People*, 13 Colo. 155, 21 P. 1120 (1889).

An information charging defendants in separate counts with breaking ore from certain mines with intent to steal, and with removing ore from the same premises with intent to defraud, was properly consolidated for trial with an information charging the same defendants in separate counts with larceny and receiving stolen goods knowing them to have been stolen, where both informations and both counts in each information refer to one and the same transaction and constitute but one offense. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

The stealing of several articles of property at the same time and place as one continuous transaction may be prosecuted as a single offense, although the several articles belonged to several owners. *Sweek v. People*, 85 Colo. 479, 277 P. 1 (1929).

Rape and assault to commit rape. When relating to the same transaction, completed rape and an assault to commit that offense rightly may be charged in separate counts of the same information. *Abeyta v. People*, 112 Colo. 195, 147 P.2d 481 (1944).

Joinder of count for assault on child under 16 with count for contributing to juvenile delinquency was proper. *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949).

Two separate counts charging perjury were properly joined in one indictment where the two counts were admittedly based upon the same facts, and such facts would render defendants guilty under both sections. *People v. Swanson*, 109 Colo. 371, 125 P.2d 637 (1942).

Marijuana possession and motor vehicle offenses. Where a charge of possession of a marijuana concentrate involves an act which occurs at practically the same time and in the same place as the offenses of speeding and driving under the influence, the marijuana charge arises out of the "same criminal episode" as those other offenses for purposes of the compulsory joinder statute. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Concealed weapon and possession of controlled substance. Where a defendant enters a plea of guilty to a concealed weapons charge, the trial court can later dismiss a charge of possession of a controlled substance which arises out of the same criminal episode when the police and district attorney, through a field test, had probable cause to believe that the capsules seized contained barbiturates and when they

could have and should have learned of the specific identity of the capsules prior to the time of the first preliminary hearing. *People v. Deschamp*, 662 P.2d 171 (Colo. 1983).

Second degree kidnapping and violation of custody. Where charges resulted from long family dispute and defendants took their children from guardians who had legal custody, trial court abused its discretion in not requiring district attorney to elect one charge or in not instructing jury that it could find defendants guilty of only one offense. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Court did not abuse its discretion by not requiring election between kidnapping and violation of custody where, in contrast with *Tippet* case, defendant never attempted to contact police or child welfare agency, never initiated proceeding to obtain custody, and apparently was motivated only by a desire to punish his former wife for the marital dissolution. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Second degree kidnapping and second degree kidnapping involving sexual assault are not separate offenses; therefore this section held not to apply. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Either the crime of first degree sexual assault or the crime of sexual assault on a child, depending on the facts of the case, is necessarily a lesser included offense of second degree kidnapping including sexual assault. Defendant's conviction for at least one of such sexual assault crimes must merge into the defendant's conviction for

second degree kidnapping including sexual assault. Because the two sexual assault crimes are not lesser included crimes of each other, and because the sexual assault elements in the kidnapping conviction are satisfied by proof of either of the sexual assault crimes, the defendant's conviction for only one of the sexual assault crimes must be vacated. *People v. Henderson*, 794 P.2d 1050 (Colo. App. 1990).

There can be only one conviction for first degree murder when there is only one victim. *People v. Fincham*, 799 P. 2d 419 (Colo. App. 1990).

Convictions may not be entered for both second degree murder and first degree felony murder when there is only one victim. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Defendant cannot be convicted of both felony murder and aggravated robbery when felony murder conviction is based upon offense of aggravated robbery. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Defendant may not be simultaneously convicted of felony murder and the felony on which the felony murder conviction rests. Where a defendant is convicted of multiple felonies, all of which are alleged as the legal predicates for the commission of felony murder, only that felony that most directly contributes to the death of the victim should be vacated. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Convictions for aggravated motor vehicle theft and attempted aggravated robbery are factually and legally

inconsistent. People v. James, 981 P.2d 637 (Colo. App. 1998).

Trial court did not abuse its discretion in denying motion to elect between second degree murder and second degree assault.

The two offenses are separate offenses having different elements, and in any event, the court sentenced defendant to concurrent sentences as required by subsection (3). People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

III. LESSER INCLUDED OFFENSES.

A. In General.

B. Legal Standard.

C. Jury Instructions.

D. Finding of Lesser Included Offenses.

E. Not A Lesser Included Offense.

A. In General.

Burden on defendant not enough to make constructive notice unconstitutional. It is true that a prosecution's use of the lesser included offense doctrine places some burden upon a defendant to determine the specific charges that have been made against him. This fact, in itself, however, is not enough to make the constructive notice that is embodied in the greater charge unconstitutional. The effectiveness of many constitutional rights of an accused depends upon the self-initiative of the accused. People v. Cooke, 186 Colo. 44, 525 P.2d 426 (1974).

Defendant presumed on notice that he or she can be convicted of lesser included

offense. The provisions of this section and Crim. P. 31(c) are embodiments of the rule at common law that a defendant was presumed to be on notice that he or she could be convicted of the crime charged or a lesser offense included therein. If this presumption of notice can be said to satisfy the sixth amendment guarantees of notice, the prosecution's right to an instruction on an offense necessarily included within the offense charged must be upheld. People v. Cooke, 186 Colo. 44, 525 P.2d 426 (1974).

One count may incorporate another count by reference. People v. Incerto, 180 Colo. 928, 505 P.2d 1309 (1973).

A defendant cannot be convicted of more than one offense if one offense is a lesser included offense of the other. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974); People v. Martinez, 640 P.2d 255 (Colo. App. 1981); People v. Ball, 813 P.2d 759 (Colo. App. 1990); Armintrout v. People, 864 P.2d 576 (Colo. 1993); People v. Moore, 877 P.2d 840 (Colo. 1994); People v. Fisher, 904 P.2d 1326 (Colo. App. 1994); Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001); Page v. People, 2017 CO 88, 402 P.3d 468; People v. Wilson, 2025 COA 94, 585 P.3d 248; People v. Ramirez-Armas, 2026 COA 1, 586 P.3d 209.

The rule of merger in Colorado treats an offense as lesser included when proof of the essential elements of the greater offense necessarily establishes the elements required to prove the lesser offense. Armintrout v. People, 864 P.2d 576 (Colo. 1993); Boulies v. People, 770 P.2d

1274 (Colo. 1989); Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001).

The lesser included offense "merges" into the conviction of the greater offense, and the defendant cannot be separately punished for it. Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001).

When defendant is convicted of multiple lesser included offenses, the court must vacate the conviction of the offense that most directly relates to the elements of the greater offense. People v. Halstead, 881 P.2d 401 (Colo. App. 1994).

When the trial court must vacate a conviction among multiple convictions, the court should enter as many convictions and impose the longest sentences that are legally possible to fully effectuate the jury's verdict. People v. Glover, 893 P.2d 1311 (Colo. 1995) (standard established subsequent to the decision in People v. Halstead annotated above).

Jury not required to acquit defendant of offense charged in order to consider lesser nonincluded offenses. People v. Skinner, 825 P.2d 1045 (Colo. App. 1991).

B. Legal Standard.

In determining whether an offense is a lesser included offense of another, a court applies the strict comparison of the elements test, comparing the elements of the statutes involved. People v. Rivera, 186 Colo. 24, 525 P.2d 431 (1974); People v. Chapman, 192 Colo. 322, 557 P.2d 1211 (1977); People v. Martinez, 640 P.2d 255 (Colo. App. 1981); People v. Ball, 813 P.2d 759 (Colo. App. 1990); Patton v. People, 35

P.3d 124 (Colo. 2001); Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001); People v. Griffith, 58 P.3d 1111 (Colo. App. 2002); People v. Delci, 109 P.3d 1035 (Colo. App. 2004); People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005).

The strict elements test to determine whether an offense is a lesser included offense of another offense is if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816; People v. Gillis, 2020 COA 68, 471 P.3d 1197.

If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater. People v. Futamata, 140 Colo. 233, 343 P.2d 1058 (1959); Howard v. People, 173 Colo. 209, 477 P.2d 378 (1970); People v. Velasquez, 178 Colo. 264, 497 P.2d 12 (1972); People v. Ellinger, 754 P.2d 396 (Colo. App. 1987); People v. Ager, 928 P.2d 784 (Colo. App. 1996); People v. Ortiz, 155 P.3d 532 (Colo. App. 2006).

The test requires a comparison of the elements, not the evidence presented on those elements. Armintrout v. People, 864 P.2d 576 (Colo. 1993); People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994); People v. Delci, 109 P.3d 1035 (Colo. App. 2004).

The statutory elements test is not the exclusive test for determining whether an offense is a lesser included offense of another. People v. Hoggard, 2017 COA 88, 468 P.3d 15, aff'd on other grounds, 2020 CO 54, 465 P.3d 34.

Statutory test better view and will be applied. The better view is that the statutes, and not the evidence, must establish the essential elements of the lesser included offense. In other words, in determining whether an offense is lesser included, the statutory test, which mandates that the greater offense must establish every essential element of the lesser included offense, will be applied. People v. Rivera, 186 Colo. 24, 525 P.2d 431 (1974); Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Because the statutory test is easily and more uniformly applied and a defendant is entitled to fair notice of the charges against him, the only reasonable method of ensuring such notice is the statutes that set forth the constituent elements. It would be haphazard and unfair to say to a defendant that he must defend on the principal charge and any other charge that the evidence established. People v. Rivera, 186 Colo. 24, 525 P.2d 431 (1974).

The "statutory elements test" is described as: If proof of the facts establishing the statutory elements of the greater offense necessarily establishes all of the elements of the lesser offense, the lesser offense is included for the purposes of subsection (5)(a). If, however, each offense necessarily requires proof of at least one

additional fact that the other does not, the test is not satisfied. People v. Leske, 957 P.2d 1030 (Colo. 1998); People v. Griffith, 58 P.3d 1111 (Colo. App. 2002).

The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971); People v. Wieckert, 191 Colo. 511, 554 P.2d 688 (1976), overruled on other grounds in Villafranca v. People, 194 Colo. 472, 573 P.2d 540 (1978).

Subsection (5)(c) does not create a single distinction test. An offense is included in another offense under subsection (5)(c) if it differs from the original offense charged only in the respect that: (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. Pellegrin v. People, 2023 CO 37, 532 P.3d 1224.

As used in subsection (5)(c), "or", particularly when used with "only", means that an offense is included in another when it differs in either or both of the ways set forth in that subsection but in no other way. Pellegrin v. People, 2023 CO 37, 532 P.3d 1224.

An offense is included within another if it is impossible to commit one offense without also committing the other, or if the only difference between the charges is in the degree of mens rea required or in the severity of the injury inflicted by the

criminal conduct. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Greater offense includes a lesser offense when the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

It is the character of the evidence that must control in determining whether the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

C. Jury Instructions.

A court should instruct a jury on a lesser included offense only when there is a rational basis, warranted by the evidence, for acquitting the defendant of the greater offense and convicting him or her of the lesser. *People v. Hansen*, 191 Colo. 175, 551 P.2d 710 (1976); *People v. Bowers*, 42 Colo. App. 467, 600 P.2d 95 (1979); *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (Colo. 1980); *Bowers v. People*, 617 P.2d 560 (Colo. 1980); *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986); *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000); *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

When a jury could entertain a reasonable doubt of a defendant's guilt of a greater offense, and simultaneously be convinced beyond a reasonable doubt of the defendant's guilt of a lesser included offense, the defendant is entitled to have

the jury instructed on the lesser included offense. *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *People v. Castro*, 10 P.3d 700 (Colo. App. 2000).

A defendant is not entitled to an instruction on a lesser included offense unless there is some evidence that, if believed, would render the defendant guilty of the lesser included offense, rather than the specifically charged offense. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Evidence must justify submission of lesser included offense to jury. The submission of a lesser degree or an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime and yet guilty of the lower one. *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972).

In determining whether a lesser nonincluded offense instruction is appropriate, a court should use the same legal standard used to determine whether a lesser included offense instruction is required. A lesser included offense instruction is required whenever there is a rational basis for the jury to acquit the defendant on the greater charge and convict on the lesser offense. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

When prosecutor may obtain lesser included offense instruction. Mindful of the primacy of notice within the constitutional guarantee of due process of law and of the duty of the courts to safeguard this right, where the lesser included offense upon which the prosecution

requested an instruction is easily ascertainable from the charging instrument and not so remote in degree from the offense charged that the prosecution's request appears to be an attempt to salvage a conviction from a case that has proven to be weak, the prosecution may obtain a lesser included offense instruction over the defendant's objection. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

Before a lesser nonincluded offense may be submitted to a jury in a theory of the case instruction, there must be a rational basis for the jury to acquit the defendant of the offense charged and simultaneously find him guilty of the lesser offense. *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986).

A rational basis does not exist when the lesser offense instruction is inconsistent with defendant's theory of defense. *People v. Chavez*, 190 P.3d 760 (Colo. App. 2007).

When the record failed to present any evidence that would lead to a rational basis for acquitting the defendant of the greater offense but convicting the defendant of the lesser offense, request to instruct jury on lesser included offense was properly denied. *People v. Price*, 969 P.2d 766 (Colo. App. 1998).

A criminal defendant who maintains his or her innocence at trial is not automatically barred from seeking jury instructions on a lesser included offense or on a related defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no

rational basis in the evidence for the lesser included offense instruction or the voluntary intoxication instruction. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

No error for trial court to fail to instruct jury on second and third degree criminal trespass as lesser offense of second degree burglary of a building since there was no rational basis for acquitting the defendant of the offense charged and convicting him of the included offense. *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

It was not error for the trial court to refuse defendant's requested instruction that stated that false imprisonment was a lesser included offense of attempted second degree kidnapping since there was no rational basis, supported by the evidence, for acquitting the defendant of the greater offense charged and convicting him of the lesser included offense. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

Subsection (8) prohibits the trial court to instruct the jury to return a guilty verdict on a lesser included offense without the prosecutor's consent if the jury has reached consensus as to the defendant's guilt but is deadlocked as to the degree of guilt. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

However, it does not prevent a jury from being presented with a verdict form that gives jurors the option of considering the charge and its lesser included offenses on an individual basis, and acquitting the defendant on some or all of them. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Therefore, the verdict form that allowed the jurors to return a not guilty verdict only if they found defendant not guilty of first degree murder, second degree murder, manslaughter, and criminally negligent homicide was not required by subsection (8). *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Claim of innocence alone does not disentitle defendant to lesser included offense instruction. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

Instruction not required. Mere chance of the jury's rejection of uncontroverted testimony and conviction on a lesser charge does not necessitate an instruction on the lesser charge. *People v. Campbell*, 678 P.2d 1035 (Colo. App. 1983).

When the undisputed evidence clearly established the completed crime of second degree kidnapping, the trial court did not err in refusing to submit to the jury the defendant's instruction on the lesser offense of attempted second degree kidnapping. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Instruction on lesser offense when evidence supported conviction for greater offense. When the evidence supported a conviction for felony menacing, the fact that

the trial court improperly submitted an instruction on misdemeanor menacing to the jury did not affect defendant's conviction for the lesser included offense of misdemeanor menacing. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Lesser offense instruction is properly refused when an element that distinguishes the greater offense from the lesser offense is uncontested. Defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Error to refuse instruction on included offense. Where the evidence is sufficient to support a charge of assault with the intent to commit rape, and such as to justify a simultaneous acquittal of the charge of rape, refusal of a trial court to submit a verdict and instruction on assault with intent to commit rape is error. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Trial court's refusal to give a lesser nonincluded offense instruction does not justify reversal if the court instructed on a comparable lesser nonincluded offense. *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Jury instruction that characterizes lesser nonincluded offenses as lesser included offenses is harmless error when jury does not convict defendant of any lesser nonincluded offenses. *People v. Skinner*, 825 P.2d 1045 (Colo. App. 1991).

D. Finding of Lesser Included Offenses.

For purposes of determining which of the underlying felonies constitutes the lesser included offense of felony murder, the felony that most directly contributes to the death of the victim should serve as the legal predicate for the felony murder conviction. *Callis v. People*, 692 P.2d 1045 (Colo. 1984).

When conviction for felony murder is based upon kidnapping, conviction on the lesser included offense of kidnapping is precluded; however, defendant may be convicted on the separate crimes of kidnapping and first degree murder. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990); *People v. McCormick*, 881 P.2d 423 (Colo. App. 1994).

When conviction for felony murder was predicated on the death of a robbery victim, a simultaneous conviction for robbery is precluded. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Aggravated robbery within felony murder based on robbery victim's death. Where the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of subsection (5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Rape within felony murder based on rape victim's death. Where first degree sexual assault victim is killed during the course of the assault, charge of first degree

sexual assault is a lesser included offense of felony murder charge. *People v. Horton*, 683 P.2d 358 (Colo. App. 1984); *Callis v. People*, 692 P.2d 1045 (Colo. 1984); *People v. Angelini*, 706 P.2d 2 (Colo. App. 1985).

Under the circumstances present in the case, subsections (1)(a) and (5)(a) prohibit a judgment of conviction for attempted sexual assault in addition to a conviction for felony murder. *People v. Blackmer*, 888 P.2d 343 (Colo. App. 1994).

The predicate offenses for "felony" first degree assault under § 18-3-202 fit the statutory test for a lesser included offense. As such, the conviction of the predicate offense must merge into the conviction for "felony" first degree assault, even though the predicate offense is a more serious offense and carries a greater punishment. *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994).

The trial court correctly merged defendant's conviction for first degree assault into one of his convictions for first degree sexual assault. *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Since defendant could not be convicted of both felony assault and aggravated robbery (since commission of robbery is an element of the assault), the assault conviction, rather than the robbery conviction, should be vacated. *People v. Fisher*, 926 P.2d 170 (Colo. App. 1996).

Attempted first degree murder is a lesser included offense of first degree murder. The elements of attempted first degree murder are a subset of first degree

murder. When the defendant in this case aimed at and shot the victim, he intended and attempted to kill the victim, even if he mistakenly believed the victim was someone else. Therefore the particular attempted first degree murder in this case is a lesser included offense of the particular first degree murder in this case, and the defendant cannot be convicted of both. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

Generally, the crimes of second degree murder and attempted second degree murder are, respectively, lesser included offenses of first degree murder or attempted first degree murder under any theory, and second degree murder is a lesser included offense of first degree murder by extreme indifference. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

When jury convicted defendant of both extreme indifference murder and second degree murder and attempted murder, the trial court erred in applying the rule of lenity by vacating the more serious offenses instead of the lesser offenses. The proper course of action under such circumstances is to vacate the lesser offenses. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

When a defendant tries to kill one person but mistakenly kills a different person and is convicted of both attempted murder of the intended victim and murder of the actual victim, the attempted murder conviction must be vacated because it is a lesser included offense of the murder conviction. Under the doctrine of transferred intent the specific

intent to kill the intended victim transferred to the actual victim and makes the defendant criminally liable for that death. *People v. Jackson*, 2018 COA 79, 474 P.3d 60, *aff'd* on other grounds, 2020 CO 75, 472 P.3d 553.

Reckless endangerment is a lesser included offense of first degree assault with intent to cause serious bodily injury. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

Assault to rape is an included offense of the crime of rape, both include the necessary aggravated intent and both contain the element of assault. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010), overruled in *Page v. People*, 2017 CO 88, 402 P.3d 468, as annotated below.

Unlawful sexual contact is a lesser included offense of sexual assault. *Page v. People*, 2017 CO 88, 402 P.3d 468 (overruling *Loyas v. People*, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise); *People v. Sabell*, 2018 COA 85, 452 P.3d 91.

Because defendant's two child abuse charges were based on identical conduct,

the criminal negligence abuse charge was a lesser included offense of the knowing or reckless abuse charge, and the trial court must merge the two child abuse convictions and amend the mittimus. *People v. Wilson*, 2025 COA 94, __ P.3d __.

When a defendant is convicted of both offenses based on the same conduct, the conviction for unlawful sexual contact merges into the conviction for sexual assault. *Page v. People*, 2017 CO 88, 402 P.3d 468 (overruling *Loyas v. People*, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise); *People v. Sabell*, 2018 COA 85, 452 P.3d 91.

Establishing the elements of sexual assault by means of penetration necessarily establishes the elements of unlawful sexual contact. The elements of unlawful sexual contact are a subset of the elements of sexual assault by means of penetration. *Page v. People*, 2017 CO 88, 402 P.3d 468 (overruling *Loyas v. People*, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise).

One who commits reckless driving necessarily has been guilty of careless driving, for the greater degree of negligence includes the lesser. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

In terms of subsection (5), careless driving "is established by proof of the same or less than all the facts required to establish . . ." reckless driving. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

Careless driving is not a lesser included offense of vehicular assault (reckless). *People v. Zwegardt*, 2012 COA 119, 298 P.3d 1018.

Reckless driving is a lesser included offense of vehicular eluding. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

DUI is a lesser included offense of vehicular assault-DUI and vehicular homicide-DUI. *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

Trial court erred when it failed to merge a conviction of reckless endangerment with a conviction for attempted first degree murder with extreme indifference. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Assault, a predicate offense for first degree burglary, is a lesser included offense of first degree burglary. Therefore, the two counts merge. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

Attempt to induce child prostitution is a lesser included offense encompassed within the crime of inducement of child prostitution. *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985).

Possession of an illegal weapon under § 18-12-102 (4) is a lesser included offense of possession of weapon by a previous offender under § 18-12-108 (1) when the same weapon is alleged in each charge. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Second degree trespass is a lesser included offense of second degree burglary. People v. Rock, 2017 CO 84, 402 P.3d 472.

First degree criminal trespass is a lesser included offense of first degree burglary. People v. Gillis, 2020 COA 68, 471 P.3d 1197. But see People v. Satre, 950 P.2d 667 (Colo. App. 1997), annotated under III.E. below.

First degree criminal trespass is a lesser included offense of second degree burglary. An offense is a lesser included offense if at least one of the ways to commit the greater offense necessarily establishes all the elements of the lesser offense. Whiteaker v. People, 2024 CO 25, 547 P.3d 1122.

In a case where the lesser included offense carries a higher penalty, the court must vacate the conviction carrying the lower penalty and impose the higher penalty in order to maximize the jury's verdict. People v. Delci, 109 P.3d 1035 (Colo. App. 2004).

But an appellate court is not required to enter judgment of conviction of a lesser offense implied in a jury verdict reversed on appeal, nor is an appellate court required to "maximize" the jury's verdict by entering judgment of conviction for as many lesser offenses as possible. Halaseh v. People, 2020 CO 35M, 463 P.3d 249.

First degree possession of contraband under § 18-8-204.1 (1) is a lesser included offense of first degree introducing contraband by making under § 18-8-203

(1)(b). People v. Jamison, 2018 COA 121, 436 P.3d 569.

Second degree possession of contraband is a lesser included offense of first degree possession of contraband. People v. Oliver, 2020 COA 97, 474 P.3d 207.

Criminal mischief involving damage to another's building or occupied structure is included in first degree arson involving burning the same building or occupied structure because first degree arson, by its very nature, occurs in a single criminal episode. People v. Welborne, 2018 COA 127, 457 P.3d 71.

Court did not err by instructing the jury on the lesser included offense of soliciting for prostitution in a soliciting for child prostitution case. People v. Ross, 2019 COA 79, 482 P.3d 452, aff'd on other grounds, 2021 CO 9, 479 P.3d 910.

E. Not A Lesser Included Offense.

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. People v. Valdez, 874 P.2d 415 (Colo. App. 1994).

Sexual assault on a child does not differ from sexual assault on a child by one in a position of trust only in the respect that a less serious injury or risk of injury to the

same person, property, or public interest or a lesser kind of culpability suffices to establish its commission. In fact, these offenses do not involve different degrees of culpability, injury, or risk of injury, but they do differ with respect to other elements. Because the offenses differ in ways other than those contemplated by subsection (5)(c), sexual assault on a child is not a lesser included offense of sexual assault by one in a position of trust. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Conviction of sexual assault on a child by one in a position of trust does not encompass the offense of sexual assault on a child as a lesser included offense. Subsection (5)(a) does not require an "evidentiary test" for determining lesser included offenses. Instead, a "strict elements test", or a comparison of the statutory elements of the offenses in question, is required in order to determine whether an offense is lesser included. Applying this test, the language of sexual assault on a child offense requires that the victim be 15 years of age or younger, whereas the position of trust offense requires only that the victim be less than 18 years of age. Thus, each offense requires proof of a fact that the other does not, and sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Convictions for solicitation to commit sexual assault on a child by one in a position of trust and attempted sexual assault on a child do not merge because each requires proof of intent to commit a

different underlying offense. *People v. Douglas*, 2012 COA 57, 296 P.3d 234.

Second degree burglary not lesser included offense of first degree burglary because conviction of class 3 felony second degree burglary required proof of a fact beyond the proof required for first degree burglary, even though entry was made into only one condominium unit. *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

When defendant's burglary conviction for first degree burglary is vacated as to victim, defendant's conviction for third degree assault as to the same victim is not a lesser included offense and thus does not merge. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Burglary is an offense against property, and the general assembly intended the additional element of assault in the first degree burglary statute to modify and aggravate the offense of burglary and not to change the gravamen of the crime. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

A single entry can support only one conviction of first degree burglary, even if multiple assaults occur. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Not error to impose consecutive sentences of 32 years for first degree assault and life sentence for murder. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. The use

of a deadly weapon is an element of attempted assault in the first degree but not of attempted murder. *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004).

Under former criminal code, assault with deadly weapon was not a lesser included offense of assault with intent to commit murder. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974).

Heat of passion manslaughter is not a pure lesser included offense of either first or second degree murder because the greater inclusive offenses do not necessarily establish every essential element of this form of manslaughter. *People v. Lewis*, 676 P.2d 682 (Colo. 1984).

Attempted reckless manslaughter is not a lesser included offense of first degree assault with intent to cause serious bodily injury, because the fact that a defendant causes serious bodily injury to a person does not necessarily mean that he or she recklessly took a step toward causing the death of a person. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

Convictions do not merge when the elements required to be proven to convict defendant as a complicitor to an assault committed by another are not identical to those required to be proven to convict him of committing first degree assault as a principal. *People v. Martinez*, 1 P.3d 192 (Colo. App. 1999).

Second degree assault is not a lesser included offense of aggravated robbery because second degree assault requires proof

of bodily injury and specific intent. *People v. Dotson*, 55 P.3d 175 (Colo. App. 2002).

Menacing is not a lesser included offense of second degree assault because the offenses differ with respect to both the culpability required and the injury or risk of the injury required. *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd in part*, *rev'd in part* on other grounds, 964 P.2d 524 (Colo. 1998).

Third degree assault not included in robbery. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery; therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

First degree criminal trespass is not a lesser included offense of first degree burglary. However, it is a lesser nonincluded offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997). But see *People v. Gillis*, 2020 COA 68, 471 P.3d 1197, annotated under III.D. above.

First degree criminal trespass is not a lesser included offense of second degree burglary. *People v. Denhartog*, 2019 COA 23, 452 P.3d 148.

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

When the essential elements of vehicular homicide are compared to those of criminally negligent homicide, it becomes clear that criminally negligent homicide is not a lesser included offense in a charge brought under § 18-3-106 (1)(b). People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984).

Reckless driving is not a lesser included offense of vehicular homicide and vehicular assault because reckless driving posed an additional risk of injury to other persons and property in the vicinity of the accident. People v. Clary, 950 P.2d 654 (Colo. App. 1997).

Eluding a police officer, as defined in § 42-4-1413, is not a lesser included offense of vehicular eluding, as defined in § 18-9-116.5. People v. Fury, 872 P.2d 1280 (Colo. App. 1993) (decided prior to 1994 amendment relocating former § 42-4-1512 to § 42-4-1413); People v. Pena, 962 P.2d 285 (Colo. App. 1997); People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

None of the elements of the offense of possession of drug paraphernalia are the same as those that relate to the charge of possession of a controlled substance, and thus a jury's finding that a defendant was guilty of the lesser offense would in no way tend to disprove the greater charge nor present a rational basis on which the jury could have chosen between them. People v. Bustos, 725 P.2d 1174 (Colo. App. 1986).

Possession of a controlled substance is not a lesser included offense of distribution of the same controlled

substance. People v. Thurman, 948 P.2d 69 (Colo. App. 1997).

Information charging possession of narcotics with intent to sell was sufficient to advise the defendant that he must be prepared to controvert evidence of possession and to defend on that charge. Because possession is an essential element of possession with intent to sell, the defendant can scarcely claim surprise by the introduction of evidence establishing possession. People v. Cooke, 186 Colo. 44, 525 P.2d 426 (1974).

Rape and incest, as well as the other named kindred offenses, remain separate and distinct offenses. McGee v. People, 160 Colo. 46, 413 P.2d 901 (1966).

As do assault and kidnapping. The facts necessary to prove that the defendant was guilty of assault with a deadly weapon were not the same as those required to prove that the defendant was guilty of kidnapping. Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971).

Sexual assault is not a lesser included offense of, and therefore not merged into, second degree kidnapping involving sexual assault. People v. Henderson, 810 P.2d 1058 (Colo. 1991); People v. Martinez, 32 P.3d 520 (Colo. App. 2001); People v. Ramirez, 140 P.3d 169 (Colo. App. 2005); Lewis v. People, 261 P.3d 480 (Colo. 2011).

Because the offenses of harassment and stalking differ in more ways than the two distinctions identified in subsection (5)(c), harassment is not a lesser included offense

of stalking under that subsection. *Pellegrin v. People*, 2023 CO 37, 532 P.3d 1224.

Harassment is not a lesser included offense of either second or third degree assault. Harassment contains a culpable mental state element--intent to harass, annoy, or alarm--that is not required by the elements of either second degree assault (intent to cause bodily injury) or third degree assault (knowingly or recklessly or with criminal negligence). *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

Harassment is not a lesser included offense of second degree assault under the subsection (5)(c) test. Because harassment and second degree assault require two different, equally culpable intents, those two offenses do not differ only in one of the three possible respects provided in subsection (5)(c). Thus, those convictions do not merge. *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

Harassment is not a lesser included offense of third degree assault. Although third degree assault requires a lesser kind of culpability than harassment, thereby meeting one of the three ways to establish merger under subsection (5)(c), third degree assault nevertheless fails to merge into harassment because it differs in an additional way--namely, it requires a greater risk of injury. Conversely, although harassment requires a lesser risk of injury, thereby meeting one of the three ways to establish merger under subsection (5)(c), harassment nevertheless fails to merge into third degree assault because it differs in an additional way--namely, it requires a greater kind of

culpability. *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

Since reckless endangerment requires proof of an element that is not required to prove first degree assault on a peace officer, it is not a lesser included offense of such charge. The trial court did not err when it refused defendant's tendered jury instruction on reckless endangerment as a lesser included offense on that charge. *People v. Delgado-Elizarras*, 131 P.3d 1110 (Colo. App. 2005).

Arson is distinct from criminal mischief because each contains elements not required for the other. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

Littering is not a lesser included offense of throwing a missile at a vehicle. A throwing a missile offense is completed once a person knowingly projects a missile, regardless of where it lands. A littering offense is completed only if the object later lands on property. The two offenses occur sequentially and not simultaneously. *People v. Kern*, 2020 COA 96, 474 P.3d 197.

Criminal possession of a financial device, such as a credit or debit card, is not a lesser included offense of identity theft. *People v. Poot-Baca*, 2023 COA 112, 544 P.3d 683.

A defendant is entitled to a jury instruction on a lesser nonincluded offense where there exists a rational basis in the evidence to simultaneously acquit the defendant of the greater charged offense and convict the defendant of the lesser offense. *Montoya v. People*, 2017 CO 40, 394 P.3d

676; People v. Naranjo, 2017 CO 87, 401 P.3d 534.

Court did not err in not giving lesser nonincluded offense instruction. Here,

there was no rational basis for the jury to simultaneously acquit defendant of felony menacing and convict him of disorderly conduct. People v. Naranjo, 2017 CO 87, 401 P.3d 534.

18-1-409. Appellate review of sentence for a felony.

(1) When a sentence is imposed upon any person following a conviction of any felony, other than a class 1 felony in which a death sentence is automatically reviewed pursuant to section 18-1.3-1201 (6) for an offense charged prior to July 1, 2020, or pursuant to section 18-1.3-1302 (6) for an offense charged prior to July 1, 2020, or pursuant to section 18-1.4-102 (6), the person convicted shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based; except that, if the sentence is within a range agreed upon by the parties pursuant to a plea agreement, the defendant shall not have the right of appellate review of the propriety of the sentence. The procedures employed in the review shall be provided by supreme court rule.

(2) No appellate court shall review any sentence which is imposed unless, within forty-nine days from the date of the imposition of sentence, a written notice is filed in the trial court to the effect that review of the sentence will be sought; said notice must state the grounds upon which it is based.

(2.1) and (2.2) Repealed.

(3) The reviewing court shall have power to affirm the sentence under review, substitute for the sentence under review any penalty that was open to the sentencing court other than granting probation or other conditional release, or remand the case for any further proceedings that could have been conducted prior to the imposition of the sentence under review, and for resentencing on the basis of such further proceedings. No sentence in excess of the one originally imposed shall be given unless matters of aggravation in addition to those known to the court at the time of the original sentence are brought to the attention of the court during the hearing conducted under this section. If the court imposes a sentence in excess of the one first given, it shall specifically identify the additional aggravating facts considered by it in imposing the increased sentence.

Source: L. 71: R&RE, p. 401, § 1. **C.R.S. 1963:** § 40-1-509. **L. 76:** (2) R&RE, p. 549, § 8, effective July 1. **L. 79:** (2.1) repealed and (2.2) R&RE, pp. 670, 672, §§ 17, 24, effective July 1; (1) amended, p. 675, § 2, effective August 1. **L. 81:** (2.2) repealed, p. 969, § 2, effective July 1.

L. 91, 2nd Ex. Sess.: (1) amended, p. 14, § 2, effective September 20; (1) amended, p. 22, § 2, effective October 11. **L. 93:** (2) amended, p. 1460, § 4, effective June 6. **L. 99:** (1) amended, p. 799, § 21, effective July 1. **L. 2002:** (1) amended, p. 1510, § 179, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1) amended, pp. 33, 34, §§ 29, 30, effective July 12. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 862, § 102, effective July 1. **L. 2020:** (1) amended, (SB 20-100), ch. 61, p. 208, § 8, effective March 23.

Cross references: (1) For the supreme court rule concerning appellate review of felony sentences, see rule C.A.R. 4(c).

(2) For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (1), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

The power to declare by statute what punishment may be assessed against those convicted of crime is legislative and not judicial. If the statute is not in violation of the constitution, then any punishment assessed by a court within the limits fixed thereby cannot be adjudged excessive. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

This section is constitutional. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

Not improper exercise of commutation reserved to executive. Appellate review of sentences by supreme court, before finality of judgment of conviction, as allowed by this section, is a proper judicial function and not an improper exercise of the power of

commutation reserved to the executive department. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

This section is a constitutionally permitted expansion of appellate jurisdiction by the general assembly. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

And does not amount to a legislative grant of additional original jurisdiction to the supreme court. It is exactly what it expressly purports to be — an appellate review of sentencing — clearly within the jurisdiction of the supreme court under § 2 of art. VI, Colo. Const. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

This section sets the parameters for an appellate court's review of a defendant's sentence. *People v. Williams*, 916 P.2d 624 (Colo. App. 1996).

But this section does not limit sentencing following new trial, as opposed to remand after review of sentence. Where defendant did not seek a review of his sentence but, rather, appealed the judgment of conviction, this section did not bar sentencing of defendant as an habitual criminal. *People v. Williams*, 916 P.2d 624 (Colo. App. 1996).

Defendant cannot appeal sentence imposed following his plea of guilty to vehicular homicide and leaving the scene of an accident involving death because his claim that the sentencing judge was biased, depriving him of his constitutional right to have an impartial judge determine his sentence, was not filed in a timely manner. By failing to file his claim in a timely manner, he waived his argument that the sentencing judge should have recused himself based on an appearance of partiality. *People v. Dobler*, 2015 COA 25, 369 P.3d 686.

This section does not preclude review of constitutional challenges. An eighth amendment challenge is of a different magnitude than a statutory challenge. The issue is not whether a particular sentence was a wise exercise of discretion, but whether it was so disproportionate as to constitute cruel and unusual punishment. *People v. McCulloch*, 198 P.3d 1264 (Colo. App. 2008).

Jurisdiction to review propriety of sentence. Neither the court of appeals nor the supreme court of Colorado has jurisdiction to review the propriety of a sentence except on direct appeal from the

initial sentence and then only under the limitations established in § 18-1-409 and C.A.R. 4(c)(I). *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Good cause standard under C.A.R. 26(b) for an enlargement of time to file appeal encompasses the statutory deadline in this section. *People v. Hill*, 296 P.3d 121 (Colo. App. 2011).

Propriety of imposing a consecutive sentence is reviewable on appeal under subsection (1) even though defendant's plea was subject to a sentencing cap. Review of the propriety of a sentence involves a review of the intrinsic fairness or appropriateness of the sentence itself taking into account the nature of the offense, the character of the offender, and the public interest. The question of whether the trial court was statutorily prohibited from imposing consecutive rather than concurrent sentences is not a matter of the intrinsic fairness or appropriateness of the sentence, but rather of whether the trial court exceeded its statutory authority in determining the sentence. Thus, subsection (1) does not preclude review of defendant's appeal. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

Filing of notice of appeal is jurisdictional prerequisite for appellate review of a lower court decision to deny a Crim. P. 35(a) motion. *People v. Silvola*, 198 Colo. 228, 597 P.2d 583 (1979); *People v. Boespflug*, 107 P.3d 1118 (Colo. App. 2004).

Review of denial of Crim. P. 35(b) motion. It is only in situations where the trial court has refused to consider any

information in mitigation and does not make findings in support of its decision, that an error in denying a Crim. P. 35(b) motion is sufficient to invoke appellate jurisdiction. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Only exception to rule that relief from sentence imposed lies only with executive. *People v. Spann*, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on other grounds, 193 Colo. 53, 561 P.2d 1268 (1977).

Mandates appellate court correction. This section not only permits but also directs the appellate court to mandate the correction of a sentence excessive in length, having due regard for the protection of the public interest, the nature of the offense, and the character of the offender as it relates to the probability of his rehabilitation. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

A sentencing hearing is a critical stage of a criminal proceeding. However, hearsay is admissible because of the substantial difference between the sentencing hearing and the trial itself. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

A trial court has wide discretion in the imposition of a sentence. *Rochon v. People*, 134 Colo. 448, 306 P.2d 1080 (1957).

The choice of place of confinement is within the sound discretion of the court, just as is the length of term of imprisonment. *People v. Weihs*, 187 Colo. 124, 529 P.2d 317 (1974).

Of necessity the trial judge has wide latitude in imposing sentence. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentencing by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

A sentencing judge has wide discretion in selecting the appropriate disposition. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

The trial court has wide discretion in sentencing and, absent a finding of abuse of discretion, an appellate court will not substitute its judgment for that of the trial judge. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Sentencing discretion reposes in court. It is the court, however, and not the probation department, in whom sentencing discretion is reposed. *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979).

Cause may be remanded for proper sentence. Where specifications of error principally stressed the question of whether punishment may be decreed properly for both rape and kidnapping offenses upon the theory that the evidence showed no more than a single continuous act, it was held that where sentence for kidnapping was excessive, the cause should be remanded to the district court for the imposition of a proper sentence for the kidnapping offense within the limits of the proper section. *Abeyta v. People*, 112 Colo. 49, 145 P.2d 884 (1944).

Or correction may be made in appellate court. An erroneous judgment of the district court sentencing one guilty of second degree murder to confinement in the penitentiary at hard labor for the remainder of his natural life may be corrected by appeal or other like proceeding in the appellate court. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

Appellate court should not modify sentence imposed by trial judge unless record exhibits clear abuse of discretion by the trial judge in his determination. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

The supreme court of Colorado should not modify a sentence unless it appears that the trial court has failed to give appropriate consideration to both the needs of the defendant and those of society. *People v. Cameron*, 200 Colo. 279, 613 P.2d 1312 (1980).

Guidelines for appellate review. The appellate court's determination of whether a

sentence is intrinsically unfair or excessive requires consideration of its propriety or fairness within the context of the nature of the offense, the character of the offender, and the public interest. *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

Sentencing error where extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. *People v. Jenkins*, 674 P.2d 981 (Colo. App. 1983).

Guidelines for the determination of a sentence involve weighing several factors, including the nature of the offense, the character of the offender, rehabilitation of the defendant, the development of respect for law and deterrence of crime, and the protection of the public. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975); *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Magee*, 626 P.2d 1139 (Colo. 1981).

In deciding what sentence is most appropriate, the trial judge must attempt to work out a fair accommodation between the need to protect society at large and to deter potential offenders, to punish the convicted offender, and to rehabilitate him. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976);

People v. Cameron, 200 Colo. 279, 613 P.2d 1312 (1980).

The sentencing judge properly may consider the public interest in safety and deterrence in sentencing an offender, especially in crimes of serious personal violence. People v. Self, 200 Colo. 406, 615 P.2d 693 (1980).

Before imposing sentence, the trial court should consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence. People v. Hunt, 632 P.2d 572 (Colo. 1981).

In reviewing the district court's imposition of sentence, the supreme court is to consider the following factors: The nature of the offense, the character of the offender, the public interest in safety and deterrence, and the sufficiency and accuracy of the information on which the sentence was based. People v. Mattas, 645 P.2d 254 (Colo. 1982).

Trial judge held to have properly considered evidence of the defendant's improved conduct while in prison, the nature of the offense, the character of the offender and the public interest in safety and deterrence in arriving at the decision to reduce the defendant's sentence. People v. Bridges, 662 P.2d 161 (Colo. 1983).

All factors to be considered in imposition of sentence. Although a sentencing court may consider a defendant's false testimony as probative of his rehabilitative potential, the fact that defendant may have lied under oath is insufficient justification, standing alone, to

warrant the imposition of a maximum sentence. Equal weight must be given to all factors which comprise the goals of sentencing. People v. Wilson, 43 Colo. App. 68, 599 P.2d 970 (1979).

Although the absence of a prior felony conviction or significant criminal involvement, by itself, certainly may constitute a mitigating factor worthy of consideration, it is only one factor and is not conclusive on the sentencing decision. People v. Scott, 200 Colo. 402, 615 P.2d 35 (1980).

Sentence must be supported by reasons in record. In felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement to a correctional facility. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

A sentence for an extended term must be clearly justified in the record. People v. Scott, 200 Colo. 402, 615 P.2d 35 (1980); People v. Cohen, 617 P.2d 1205 (Colo. 1980).

Where a sentence of an extended duration is imposed, the record must establish a clear

justification for the trial judge's action. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

When sentence is within presumptive range without regard to crime of violence-bodily injury aggravator, defendant is not prejudiced by jury's finding that victim suffered bodily injury as to each count even though there was no evidence of bodily injury on one of the counts. *People v. Anderson*, 183 P.3d 649 (Colo. App. 2007).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentence may not be based on speculation. Speculation or conjecture regarding possible future facts is not accurate information upon which a sentence may be crafted. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Consideration of trauma of witnesses is not proper factor. Any consideration of the trauma to the victims caused by their having to testify in determining the length of sentence would be error in light of defendant's fundamental right to require the prosecution to prove every element of the case. *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979).

In sentencing, the court's responsibility is to individualize a sentence and to tailor the sentence to fit the crime and the

particular defendant who is before the court. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Presentence investigation report should always be made part of record on appeal when review of the appropriateness of a sentence is sought. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

Any imposition of the maximum or close to the maximum penalty must be supported by sound reasons in the record for a sentence that is too long tends to reenforce the criminal tendencies of the convicted defendant. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979).

A long sentence may sometimes be justified on the basis of the depravity of the crime for which the defendant has been convicted. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

Where a vicious or serious crime is committed by a hardened criminal, the need for a maximum or near-maximum sentence may be clearer still. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

Or because of repeated convictions. A long or even maximum sentence may also be justified where the defendant's past record reveals repeated convictions and where the public safety can only be assured if the offender is confined. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

Trial court acted within its discretion when it accorded substantial weight to defendant's pattern of criminal behavior and

the likelihood he would commit further crimes that would endanger the public, and the court made sufficient findings to exceed the presumptive sentence range. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Judgment and sentence not final until appellate remedies exhausted. For the purposes of reviewing and granting relief from sentences validly imposed, the judgment and sentence is not final until after appellate remedies for review have been exhausted. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

Defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes, when relief is sought before finality has attached to the judgment of conviction. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

Possible ameliorative benefits of an amended habitual criminal statute must be made available to a defendant notwithstanding the requirements of this section. *People v. Vigil*, 39 Colo. App. 371, 570 P.2d 13 (1977).

Defendant may seek such relief by direct appeal under section. A defendant, who is entitled to the benefits of amendatory legislation which mitigates penalties for crimes, when relief is sought before finality has attached to the judgment of conviction, may seek such relief by direct appeal under this section. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

Section limited to felonies. Where the defendant was convicted of simple assault and was sentenced to six months in jail and

fined \$500, all within the statutory limits, even had the present statute on review of sentences been in effect, the sentence imposed would not be subject to review, for it is limited to felonies. *People v. DeJesus*, 184 Colo. 230, 519 P.2d 944 (1974).

No review for misdemeanor. There is no provision for appellate review of the propriety of a misdemeanor sentence. *People v. Roberts*, 668 P.2d 977 (Colo. App. 1983).

A minimum sentence is a prerequisite to appellate review. Otherwise, there is no means to determine whether the minimum given is three years greater than the minimum provided in the statute. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974) (decided prior to the 1976 amendment to this section).

This section entitled defendant to benefits of §§ 16-11-101 and 16-11-304. Defendant, who was sentenced prior to the effective date of the 1973 amendments to §§ 16-11-101 and 16-11-304 — which legislation provided for the imposition of indeterminate sentences for class 4 and class 5 felonies — was entitled to the benefit of this legislation under relief sought by this section. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

A defendant who was sentenced to a term with a fixed minimum and fixed maximum for conviction of a class 4 felony was entitled under this section to the benefits of §§ 16-11-101 and 16-11-304. *People v. Race*, 187 Colo. 204, 529 P.2d 629 (1974).

Failure to impose equal sentences on criminal confederates not violative of

equal protection. Due to the individualized nature of sentencing, there is no rule that confederates in crime must receive equal sentences, nor that failure to impose equal sentences violates equal protection of the law under the Colorado or United States Constitutions. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Contention that statutory penalties cruel and unusual not justifiable where sentence suspended. Where accused was given a suspended sentence and granted probation, his contention on appeal that the penalties statutorily prescribed for the offense of which he was convicted were "cruel and unusual punishments" did not present a justifiable question. *People v. Summit*, 183 Colo. 421, 517 P.2d 850 (1974).

Ten- to 15-year term for assault in the first degree was not excessive in light of appellant's active participation in the planning and execution of the crimes, and the violence involved in the attempt to flee the scene of the crimes and avoid capture by law enforcement officers. *People v. Campbell*, 188 Colo. 79, 532 P.2d 945 (1975).

Sentence may be imposed to run consecutively to sentence already imposed. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon a defendant. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983); *People v. Cullen*, 695 P.2d 750 (Colo. App.

1984); *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

But not to sentence not yet imposed. A trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Consecutive sentences for separate assaults not excessive. A defendant convicted by a jury on two counts of assault and sentenced on each count, the sentences to run consecutively, contended that the sentences amounted to excessive, cruel, and unusual punishment because the defendant must serve an entire term before being eligible for probation on the second consecutive term, and because the second assault following so closely upon the first assault amounted to one transaction. It was held that this was clearly not the case as the two victims were in two different places and were not assaulted contemporaneously. *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971).

Statute inapplicable where defendant sentenced in 1969 and rehearing held in 1970. *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972).

Since the offense for which the defendant was sentenced was committed prior to July 1, 1972, the right of appeal under this section is not available to him. *People v. Knight*, 185 Colo. 364, 525 P.2d 425 (1974).

This section applies only to offenses committed after July 1, 1972. *People v. Silvola*, 198 Colo. 228, 597 P.2d 583 (1979).

Invoking fifth amendment at codefendant's trial. Where a defendant is appealing his sentence and fears that his testimony in the trial of his codefendant might be used at a subsequent hearing to enhance the sentence should it be vacated, he may invoke his fifth amendment right against self-incrimination. *People v. Villa*, 671 P.2d 971 (Colo. App. 1983).

Claim of unjust sentencing not allowed after plea bargain. Where trial court repeatedly reminded the defendant of what the sentence would be when it advised him, at the time of the acceptance of his plea of guilty, pursuant to Crim. P. 11, and at no time did the defendant or his counsel protest the sentence or raise an objection that the trial court was not properly exercising its discretion in imposing the sentence, the defendant could not, after benefitting from the plea bargain, claim on appeal that he has been unjustly sentenced. *People v. Cunningham*, 200 Colo. 303, 614 P.2d 886 (1980).

A sentence imposed within a range agreed upon by the parties pursuant to a plea bargain precludes challenging the sentence on appeal. Subsection (1) does not require a sentencing range or cap to confer a benefit or concession on the defendant. *People v. Scofield*, 74 P.3d 385 (Colo. App. 2002).

Section precludes review of sentence imposed within limits of the plea agreement.

People v. Garcia, 55 P.3d 243 (Colo. App. 2002).

The plea agreement proviso in subsection (1) precludes nonconstitutional challenges to a sentencing proceeding by a defendant whose sentence did not exceed the cap agreed to in the plea agreement. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005), overruled in *Sullivan v. People*, 2020 CO 58, 465 P.3d 25.

Statute creates single right to review the propriety of the sentence not a separate right to review of sentencing proceedings. While the manner in which the sentence was imposed is an enumerated factor that may affect the propriety of the sentence, there is no separate right to review of the manner of the sentencing. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005), overruled in *Sullivan v. People*, 2020 CO 58, 465 P.3d 25.

For defendants whose sentences did not exceed the agreed cap, the proviso's prohibition against appellate review of the propriety of the sentence bars review of all statutory factors that may have affected propriety, including the manner in which the sentence was imposed. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005), overruled in *Sullivan v. People*, 2020 CO 58, 465 P.3d 25.

"[T]he propriety of the sentence," as that phrase is used in subsection (1), does not comprehend the manner in which a sentence was imposed. The plea proviso does not preclude an appeal related to the manner in which the sentence was imposed, including the sufficiency and accuracy of the

information on which the sentence was based. *Sullivan v. People*, 2020 CO 58, 465 P.3d 25 (overruling *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005)).

The plea proviso does not preclude a defendant whose sentence did not exceed the cap agreed to in the plea agreement from raising nonconstitutional challenges to the manner in which the sentence is imposed. *Sullivan v. People*, 2020 CO 58, 465 P.3d 25 (overruling *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005)).

Review not precluded if aggravating circumstances imposed on sentence but plea bargain did not include agreement that aggravating factors existed. Defendant cannot be said to have agreed to a sentence within an aggravated range if plea agreement merely identified the number of years the sentence was not to exceed, not an acknowledgment that aggravating factors existed. *People v. Misenhelter*, 121 P.3d 230 (Colo. App. 2004).

Sentence in a plea agreement can be subject to appellate review if there is no indication in the record that the defendant's agreement included any type of agreed sentencing range or cap under subsection (1). *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

Refusal to grant defendant credit for presentence confinement not error. *People v. Magee*, 626 P.2d 1139 (Colo. 1981).

An order of restitution becomes part of the sentence which, in accordance with Crim. P. 32(c), is part of the judgment of conviction. When a court orders a defendant,

over his objection, to pay restitution to the victim or the victim's family as part of the judgment of conviction for a felony, the order of restitution is appealable pursuant to the statutory procedures applicable to the appellate review of a felony sentence. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Where a defendant agrees to make restitution when entering a plea, the defendant cannot later disavow the agreement on the basis that there was no showing that he or she had caused the victim's injury. *People in Interest of A.V.*, 2018 COA 138M, 446 P.3d 887.

A fine was unconstitutionally excessive where the court failed to consider the particular financial circumstances of the defendant in setting the fine and the court set the fine in an amount that was so disproportionate to the defendant's circumstances that there could be no realistic expectation that the defendant would be able to pay the fine. *People v. Malone*, 923 P.2d 163 (Colo. App. 1995).

Statute as basis for jurisdiction. See *People v. Pacheco*, 41 Colo. App. 188, 581 P.2d 741 (1978); *Triggs v. People*, 197 Colo. 229, 591 P.2d 1024 (1979).

Rule of appellate review on filing notice of appeal of criminal sentence governs over conflicting statute which had not been amended after rule was changed. *People v. Arevalo*, 835 P. 2d 552 (Colo. App. 1992).

However, the statute prevails over a conflicting supreme court rule in

substantive matters. *People v. Prophet*, 42 P.3d 61 (Colo. App. 2001).

The prohibition on a trial court increasing a sentence on remand in subsection (3) applies only if, in the original appeal, the defendant challenged that particular sentence's propriety under the statute. *People v. Johnson*, 2015 CO 70, 363 P.3d 169.

Trial court violated defendant's statutory right when it imposed a harsher department of corrections sentence on resentencing than the original sentence to community corrections. The court imposed a sentence based on what it would have done if it had been the original sentencing court, in violation of subsection (3). *People v. Hopkins*, 190 P.3d 833 (Colo. App. 2008).

Applied in *People v. Cushon*, 189 Colo. 230, 539 P.2d 1246 (1975); *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975); *People v. District Court*, 196 Colo. 401, 586 P.2d 31 (1978); *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Espinosa*, 200 Colo. 307, 614 P.2d 889 (1980); *People v. Foster*, 200 Colo. 283, 615 P.2d 652 (1980); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. District Court*, 638 P.2d 65 (Colo. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

18-1-409.5. Appellate review of sentence not within the presumptive range. (Repealed)

Source: **L. 79:** Entire section added, p. 670, § 18, effective July 1. **L. 81:** Entire section repealed, p. 969, § 2, effective July 1.

18-1-410. Postconviction remedy.

(1) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review. Except as otherwise required by subsection (1.5) of this section, an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(a) That the conviction was obtained or sentence imposed in violation of the constitution or laws of the United States or the constitution or laws of this state;

(b) That the applicant was convicted under a statute that is in violation of the constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(c) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(d) That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(e) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(f) (I) That there has been significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

(II) The ground set forth in this paragraph (f) may not be asserted if, prior to filing for relief pursuant to this paragraph (f), a person has not sought appeal of a conviction within the time prescribed therefor or if a judgment of conviction has been affirmed upon appeal.

(g) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(h) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(1.5) An application for postconviction review in a class 1 felony case where a sentence of death has been imposed shall be limited to claims of newly discovered evidence and ineffective assistance of counsel; except that, for any sentence of death imposed on or after the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established by part 2 of article 12 of title 16, C.R.S., any application for postconviction review in such case shall be governed by the provisions of part 2 of article 12 of title 16, C.R.S.

(2) (a) Except as otherwise required by paragraph (b) of this subsection (2), procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by rule of the supreme court of the state of Colorado.

(b) In any class 1 felony case where a sentence of death has been imposed, the district court shall expeditiously consider an application for postconviction remedy. It is the general assembly's intent that the district court give priority to cases in which a sentence of death has been imposed.

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), an appeal of any order by the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed shall be to the Colorado supreme court as provided by section 13-4-102 (1)(h), C.R.S. The procedures to be followed in the implementation of such review shall be in accordance with any rules adopted by the Colorado supreme court in response to the legislative intent expressed in section 16-12-101.5 (1), C.R.S.

(b) In any class 1 felony case in which a sentence of death is imposed on or after the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established under part 2 of article 12 of title 16, C.R.S., the procedures for appealing any order by the district court granting or denying postconviction relief and review by the Colorado supreme court of such order shall be governed by the provisions of part 2 of article 12 of title 16, C.R.S., and by such rules adopted by the supreme court.

Source: **L. 71:** R&RE, p. 402, § 1. **C.R.S. 1963:** § 40-1-510. **L. 73:** p. 533, § 2. **L. 75:** (1)(f) amended, p. 211, § 28, effective July 16. **L. 94:** IP(1) and (2) amended and (1.5) and (3) added, p. 1474, § 2, effective July 1. **L. 97:** (1.5) and (3) amended, p. 1583, § 5, effective June 4.

Cross references: For limitations on collateral attacks, see § 16-5-402; for similar provisions concerning postconviction remedies, see Crim. P. 35.

ANNOTATION

Law reviews. For comment on *People v. Herrera* (183 Colo. 155, 516 P.2d 626 (1973)), see 46 U. Colo. L. Rev. 311 (1974). For article, "Crim. P. 35(c): Colorado Law Regarding Postconviction Relief", see 22 Colo. Law. 729 (1993).

Interests of justice control. Unless otherwise required in the interests of justice, any grounds for postconviction relief which have been fully and finally litigated should not be relitigated. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

Proceedings where relief applicable. It is apparent on the federal constitutional level

and on the state level, both as a matter of constitutional policy as expressed by the supreme court and of legislative policy, that criminal safeguards attach regardless of the formal designation of a proceeding if the proceeding substantively involves incarceration or other criminal sanctions. *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972).

Relief granted where after-discovered evidence would render conviction uncertain. This section shows a legislative intent that in situations where it cannot be said with certainty that the jury would have

convicted the defendant had it known the after-discovered evidence and where there is a possibility of perjury, at least for alleged crimes committed after July 1, 1972, postconviction relief may be granted. *People v. Armstead*, 179 Colo. 387, 501 P.2d 472 (1972).

The general assembly intended subsection (1)(f) to confer a right of review of sentences, to the end that sentences might be equalized in light of changes in the Colorado criminal laws. *People v. Herrera*, 183 Colo. 155, 516 P.2d 626 (1973).

But subsection (1)(f) invades the governor's exclusive power to grant a commutation after conviction as provided in § 7 of art. IV, Colo. Const., and therefore violates the doctrine of separation of powers embodied in art. III, Colo. Const. *People v. Herrera*, 183 Colo. 155, 516 P.2d 626 (1973); *People v. Johnson*, 185 Colo. 285, 523 P.2d 1403 (1974); *People v. Rupert*, 185 Colo. 288, 523 P.2d 1406 (1974); *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974); *People v. Chavez*, 185 Colo. 310, 524 P.2d 307 (1974); *People v. Simms*, 186 Colo. 447, 528 P.2d 228 (1974).

Relief from a sentence validly imposed may not be obtained through the judiciary after final conviction. *People v. Rupert*, 185 Colo. 288, 523 P.2d 1406 (1974).

After conviction and exhaustion of appellate remedies, relief from a validly imposed criminal sentence may not be obtained through the judiciary. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974).

Trial court was without jurisdiction to grant postconviction relief from sentence imposed upon conviction for second-degree murder which became final on December 11, 1968. *People v. Fulmer*, 185 Colo. 366, 524 P.2d 606 (1974).

Because once a criminal conviction has become final, any remedy lies in the executive department by way of commutation. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974); *People v. Chavez*, 185 Colo. 310, 524 P.2d 307 (1974).

Where the governor has commuted defendant's sentence, the supreme court lacks jurisdiction to reduce or in any way alter or amend the sentence as commuted. *People v. Simms*, 186 Colo. 447, 528 P.2d 228 (1974).

Where appellant filed his motion for postconviction remedy before his conviction had become final, the court had jurisdiction to entertain his motion for relief. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Because a defendant whose conviction has not become final is entitled to the benefits of amendatory legislation mitigating the penalty for the crime of which he was convicted. *McClure v. District Court*, 187 Colo. 359, 532 P.2d 340 (1975); *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *People v. Macias*, 631 P.2d 584 (Colo. 1981).

A defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment

of conviction. *Shook v. District Court*, 188 Colo. 76, 533 P.2d 41 (1975); *Litsey v. District Court*, 193 Colo. 341, 565 P.2d 1343 (1977).

A defendant is entitled to the benefits of amendatory legislation mitigating the penalty for a crime where a defendant seeks relief from the sentence imposed before his conviction has become final. *Naranjo v. District Court*, 189 Colo. 21, 536 P.2d 36 (1975).

Sentence imposed by the trial court which did not afford the defendant the benefit of amendatory legislation was not a valid and legal sentence. As such, it was subject to correction by the trial court at any time. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

A defendant is not entitled to the benefit of a statutory amendment when the defendant does not seek relief based on that amendatory legislation until after his or her conviction becomes final. *People v. Cali*, 2020 CO 20, 459 P.3d 516.

Subsection (1)(f)(II) and Crim. P. 35 (c)(1) bar any postconviction claims seeking retroactive application of a significant nonconstitutional change in the law once the conviction has become final. *People v. Cooper*, 2023 COA 113, 544 P.3d 679.

Where criminal statute declared unconstitutional. Where, within 120 days of imposition of sentence, the criminal statute underlying a conviction for disorderly conduct was declared unconstitutional, the court had jurisdiction to

set aside the convictions and sentences and dismiss the charged offenses, even though the sentences for disorderly conduct were to be served concurrently with the sentences imposed for another offense for which defendants were properly convicted. *People v. Henderson*, 40 Colo. App. 147, 574 P.2d 872 (1977).

Subsection (1)(f) provides for the application of changed legal standards where there is a change in law mitigating penalties for crimes, and the application of the changed legal standards is mandatory. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974).

Subsection (1)(f) is especially appropriate where a change in the law intervenes before conviction is had and sentence is imposed. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Remedy not applicable to § 42-4-1202. While this section provides for consideration of a significant change in the law upon review of a conviction of a crime, such review is not afforded to one who fails to comply with the implied consent statute, former § 42-4-1202 (3)(e), because no crime is involved there. *Noe v. Dolan*, 197 Colo. 32, 589 P.2d 483 (1979).

Repeal of § 16-11-101 (1)(d) effective three months after sentencing. Where the effective date (July 1, 1979) of the repeal of § 16-11-101 (1)(d) was more than three months after the defendant was sentenced under its provisions, the repeal did not entitle the defendant to relief under subsection (1)(f)(I). *People v. Steelman*, 200 Colo. 177, 613 P.2d 334 (1980).

Subsection (1)(f)(I) of this section permits the provisions of art. XVIII, § 16, of the state constitution (known as amendment 64), which decriminalized possession of one ounce or less of marijuana for personal use, to apply retroactively to defendants whose convictions were subject to appeal or postconviction motion on the effective date of the amendment, December 10, 2012. People v. Russell, 2014 COA 21M, 396 P.3d 71, aff'd, 2017 CO 3, 387 P.3d 750.

Therefore, defendant's convictions for possession of less than one ounce of marijuana and possession of marijuana concentrate must be vacated. People v. Russell, 2014 COA 21M, 396 P.3d 71, aff'd, 2017 CO 3, 387 P.3d 750.

A conviction for possession of one ounce or less of marijuana on appeal when art. XVIII, § 16(3), of the state constitution passed must be vacated. Article XVIII, § 16(3), of the state constitution applies retroactively to a conviction for possession of less than one ounce that was pending on appeal when that constitutional provision passed. The ameliorating effect of subsection (1)(f) applies to significant changes in the law adopted in the constitution. People v. Boyd, 2015 COA 109, 395 P.3d 1128, aff'd, 2017 CO 2, 387 P.3d 755.

When motions under subsection (1)(f) to be filed. Motions filed pursuant to Crim. P. 35(b) and subsection (1)(f) may be filed at any time before the conviction becomes final. Litsey v. District Court, 193 Colo. 341, 565 P.2d 1343 (1977).

A person may not seek postconviction relief based on a "significant change in the law" unless (1) the person has filed a timely appeal and (2) an appellate court has not affirmed the person's judgment of conviction. People v. Hamm, 2019 COA 90, 461 P.3d 559.

No modification where old crimes repealed and replaced by new ones. It was clearly not the legislative intent behind this section to permit the modification of sentences where the earlier crimes have been subsequently repealed and substantially new crimes have been enacted in their place. People v. Marlott, 191 Colo. 304, 552 P.2d 491 (1976).

It was not the legislative intent behind this section to permit the modification of sentences where the earlier crimes have been subsequently repealed and substantially new crimes have been enacted in their place. People v. Lake, 195 Colo. 454, 580 P.2d 788 (1978).

Relitigation of a claim based on a change of law is specifically prohibited in a postconviction proceeding once a judgment of conviction has been affirmed upon appeal. People v. Banks, 924 P.2d 1161 (Colo. App. 1996).

Effect of § 16-5-402. Even though the Colorado criminal code grants a convicted offender the right to seek collateral review of a constitutionally flawed conviction, the effect of § 16-5-402 (1) is to immediately cut off this right for all persons whose convictions antedate the statute by an interval of time in excess of the statutory limitation period. Such retrospective

elimination of an existing statutory right, which the general assembly itself has recognized as a matter of "substantive right" included "within the concept of due process of law", cannot be squared with the constitutional prohibition against retrospectively depriving a person of a statutory right without due process of law. *People v. Germany*, 674 P.2d 345 (Colo. 1983) (decided under former law).

Motion properly denied without evidentiary hearing where only issues of law raised. Where motion for postconviction relief of sentence reduction, alleging that the penalty for the degree of burglary of which defendant had been convicted had been reduced from five to 20 years to one to 10 years confinement in the state penitentiary, raised only issues of law, it was properly denied without an evidentiary hearing. *People v. Martinez*, 184 Colo. 155, 524 P.2d 73 (1974).

No error occurred in manner hearing conducted. Where court had no jurisdiction to deal with motion for postconviction relief, no error occurred in the manner in which the hearing on such motion was conducted. *People v. Mankowsky*, 187 Colo. 145, 529 P.2d 314 (1974).

When final conviction becomes basis for imposition of life sentence pursuant to the provisions of the habitual criminal statute, the supreme court has jurisdiction to determine whether that conviction may validly be considered under the terms of the recidivist statute. *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978).

Defendant convicted of theft by receiving does not receive ameliorative benefit when retroactive application of amendatory legislation is clearly not intended by its own terms. Legislation that amended theft by receipt statute to provide that amendment shall apply to acts committed on or after July 1, 1985 makes it clear that amendatory legislation is to apply prospectively only. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

If a statute is silent as to whether it applies only prospectively, a defendant may seek retroactive application if defendant benefits from a significant change in the law. Defendant who committed and was charged with theft prior to the statutory amendment but was convicted and sentenced after the amendment should receive the benefit of the amendment to the theft statute when the amendment does not explicitly state that it is either retroactive or prospective. *People v. Trujillo*, 2018 COA 12, 433 P.3d 78.

Five-year grace period from the effective date of § 16-5-402 on July 1, 1984, was implied for person seeking to challenge a constitutionally flawed conviction under this section, where conviction predated the length of time specified as a limitation period in § 16-5-402. *People v. Fagerholm*, 768 P.2d 689 (Colo. 1989).

Time limitations in § 16-5-402 are supplementary to and not in conflict with § 18-1-410. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Statute as basis for jurisdiction. See *People v. White*, 623 P.2d 868 (Colo. 1981).

Irreconcilable conflict exists between this section and § 16-5-402, and § 16-5-402 prevails as it is the later enacted statute. *People v. Heitzman*, 852 P.2d 443 (Colo. 1993).

Time bar in § 16-5-402 applies where defendant's motion is a collateral attack and is a request for post-conviction relief under this section. *People v. Vigil*, 983 P.2d 805 (Colo. App. 1999).

For purposes of postconviction review and collateral attack limitations, a "conviction" occurs when the trial court enters judgment and sentence is imposed, if there is no appeal; if an appeal is pursued, then the conviction is not final until the appellate process is exhausted. *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992), *aff'd*, 876 P.2d 1236 (Colo. 1994); *Hunsaker v. People*, 2021 CO 83, 500 P.3d 1110.

Trial court erred in granting defense counsel's motion to dismiss defendant's application for postconviction relief. Although trial counsel is generally accepted to be the "captain of the ship" with regard to tactics and matters of trial strategy, every person convicted of a crime has a statutory right to make application for postconviction relief on any of a number of designated grounds. *Dooly v. People*, 2013 CO 34, 302 P.3d 259.

Applied in *People v. McClure*, 190 Colo. 250, 545 P.2d 1038 (1976); *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Orr*, 39 Colo. App. 289, 566 P.2d 1361 (1977); *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

18-1-410.5. Relief from improperly entered guilty pleas - legislative declaration.

(1) The general assembly finds that:

(a) A criminal defendant cannot challenge an unconstitutional guilty plea when that plea has been withdrawn and the underlying charges dismissed following the successful completion of a deferred judgment or the dismissal of charges pursuant to section 18-18-404 (3) prior to its repeal in 2010;

(b) Based on the statutory language of sections 18-1.3-102 and 18-18-404 (3), together with the written deferred judgment agreement and court colloquy that accompanies such agreements, many noncitizen defendants did not understand that the guilty plea would continue to constitute a conviction for immigration purposes and result in adverse immigration consequences, despite the subsequent withdrawal of the guilty plea and dismissal of the charges upon successful completion of the deferred judgment or dismissal pursuant to section 18-18-404 (3); and

(c) In the absence of an appropriate mechanism, many noncitizen defendants have been unfairly deprived of the opportunity to challenge guilty pleas that were entered in violation of the

constitution or laws of the United States or of this state that resulted in adverse immigration consequences.

(2) Notwithstanding the time limitation contained in section 16-5-402, at any time following the withdrawal of the guilty plea and dismissal of the charges upon successful completion of a deferred judgment, or upon the dismissal of charges pursuant to section 18-18-404 (3) prior to its repeal, a criminal defendant may challenge the guilty plea on the grounds set forth in subsection (3) of this section. The court in which the guilty plea was originally entered has jurisdiction and authority to decide the motion.

(3) A defendant moving to vacate a guilty plea that has already been withdrawn following the successful completion of a deferred judgment or upon the dismissal of charges pursuant to section 18-18-404 (3) prior to its repeal must, in good faith, allege the following:

(a) As a result of the guilty plea, the defendant has suffered, is currently suffering, or will suffer, an adverse immigration consequence; and

(b) The guilty plea was obtained in violation of the constitution or laws of the United States or of this state under one or more of the following grounds:

(I) The defendant was not informed that the guilty plea would continue to result in adverse immigration consequences despite the subsequent withdrawal of the guilty plea and dismissal of the charges with prejudice;

(II) The defendant was not adequately advised of the immigration consequences of the guilty plea; or

(III) The guilty plea was constitutionally infirm for any other reason set forth in section 18-1-410 (1).

(4) (a) Upon receipt of the motion, the court shall direct the prosecution to respond within twenty-one days or request additional time for good cause shown. If a response is not filed, the motion is deemed unopposed and the court shall grant the motion. If the prosecution opposes the motion, it shall allege, in good faith, the facts upon which it bases its opposition. If the response raises an issue of material fact, the court shall set the matter for an evidentiary hearing.

(b) Unless the prosecution proves by a preponderance of the evidence that the defendant will not suffer an immigration consequence or that the guilty plea was constitutionally entered, the court shall grant the motion.

(c) For claims raised pursuant to subsection (3)(b)(I) of this section, the prosecution can neither raise an issue of material fact to obtain an evidentiary hearing nor defeat a claim at the hearing by relying on written documents, such as a deferred judgment agreement, plea paperwork, or transcript of a court colloquy, unless those documents clearly show that the defendant was informed that the immigration consequences resulting from a guilty plea would

remain despite the subsequent withdrawal of that guilty plea and the dismissal of the charges with prejudice.

(5) If the defendant succeeds in challenging a guilty plea under subsection (3) of this section, the court shall vacate the guilty plea as constitutionally infirm. The order constitutes an additional independent basis for the vacatur of the guilty plea and does not result in the reinstatement of charges.

Source: L. 2019: Entire section added, (SB 19-030), ch. 301, p. 2770, § 1, effective May 28.

18-1-410.6. Relief from improperly entered guilty pleas for certain misdemeanor and municipal offenses - legislative declaration.

(1) The general assembly finds that:

(a) Since the Colorado supreme court decision in *People v. Pozo*, 746 P.2d 523 (Colo. 1987), noncitizen defendants in Colorado have a constitutional right to effective assistance of counsel that requires defense counsel who knows the client is a noncitizen to inform itself of relevant immigration law. The United States supreme court in *Padilla v. Kentucky*, 559 U.S. 356 (2010) further held that defense counsel must inform a client of the immigration consequences of a plea.

(b) Many noncitizen defendants received ineffective assistance of counsel regarding immigration consequences of a guilty plea;

(c) Many pro se noncitizen defendants received inadequate advisements that did not explain that the right to counsel includes the right to be advised of immigration consequences of a guilty plea. Consequently, many pro se noncitizen defendants did not knowingly, intelligently, and voluntarily waive their right to counsel when entering a guilty plea.

(d) Many noncitizen defendants have been unfairly deprived of the opportunity to challenge an unconstitutional guilty plea due to a time limitation contained in section 16-5-402, a municipal ordinance, or a municipal court rule of procedure, despite valid claims of ineffective assistance of counsel or an invalid waiver of the right to counsel; and

(e) Protecting the constitutional rights of all Coloradans and ensuring that all defendants are treated consistently in their opportunity to affirm their constitutional rights is a matter of statewide concern.

(2) Therefore, the general assembly declares that noncitizen defendants must have the opportunity to meaningfully challenge an unconstitutionally entered guilty plea for certain class 1 misdemeanors, class 2 misdemeanors, class 3 misdemeanors, misdemeanor traffic offenses, petty offenses, and municipal offenses.

(3) (a) Notwithstanding a limitation contained in section 16-5-402, a municipal ordinance, or a municipal court rule of procedure, at any time following the entry of a guilty plea, a criminal defendant may challenge the guilty plea on the grounds set forth in subsection (4) of this section to a:

(I) Class 1, class 2, or class 3 misdemeanor as classified at the time the guilty plea was entered that is not defined in section 24-4.1-302 (1);

(II) Municipal offense that is not substantially similar to an offense defined in section 24-4.1-302 (1);

(III) Misdemeanor traffic offense; or

(IV) Petty offense.

(b) The court in which the guilty plea was originally entered has jurisdiction and authority to decide the motion.

(4) A defendant moving to vacate a guilty plea to a class 1, class 2, or class 3 misdemeanor as classified at the time the guilty plea was entered; a misdemeanor traffic offense; a petty offense; or a municipal offense, must, in good faith, allege the following:

(a) As a result of the guilty plea, the defendant has suffered, is currently suffering, or will suffer an adverse immigration consequence; and

(b) The guilty plea was obtained in violation of the constitution or laws of the United States or of this state on one or more of the following grounds:

(I) The defendant was not adequately advised of the adverse immigration consequences of the guilty plea by defense counsel;

(II) The defendant did not knowingly, intelligently, and voluntarily waive the right to counsel because the defendant was not advised that the right to counsel includes the right to be advised regarding the immigration consequences of a guilty plea; or

(III) The guilty plea was constitutionally infirm for any other reason set forth in section 18-1-410 (1)(a) to (1)(d).

(5) (a) Upon receipt of the defendant's motion, the prosecution shall respond within sixty-three days or request additional time for good cause shown. If a response is not filed, the defendant's motion is deemed unopposed, and the court shall grant the defendant's motion. If the prosecution opposes the defendant's motion, it shall allege, in good faith, the facts upon which it bases its opposition. If the response raises an issue of material fact, the court shall set the matter for an evidentiary hearing within twenty-one days.

(b) Unless the prosecution proves by a preponderance of the evidence that the defendant will not suffer an adverse immigration consequence or that the guilty plea was constitutionally entered, the court shall grant the defendant's motion.

(c) For claims raised pursuant to subsection (4)(b)(II) of this section, the prosecution shall not rely solely on written documents, such as a deferred judgment agreement, plea paperwork, or transcript of a court colloquy, to raise an issue of material fact to obtain an evidentiary hearing or defeat a claim at the hearing unless the documents clearly show that the defendant was informed by the court that the right to counsel included the right to be advised regarding the immigration consequences resulting from a guilty plea and that the defendant then knowingly, intelligently, and voluntarily waived that right.

(6) If the defendant succeeds in challenging a guilty plea pursuant to this section, the court shall vacate the guilty plea as constitutionally infirm and set the case for an arraignment.

Source: L. 2022: Entire section added, (SB 22-103), ch. 105, p. 487, § 1, effective April 18. **L. 2025:** (2), (3)(a), and IP(4) amended, (SB 25-276), ch. 240, p. 1211, § 5, effective May 23. **L. 2026:** (2), (3)(a)(III), and IP(4) amended, (HB 26-1297), ch. 123, p. 533, § 1, effective August 12.

Cross references: For the legislative declaration in SB 25-276, see section 1 of chapter 240, Session Laws of Colorado 2025.

18-1-410.7. Vacating certain criminal convictions for victims of human trafficking.

(1) (a) An individual may file a motion with the court where a conviction was obtained against the individual requesting that the conviction be vacated if the underlying offense resulting in the conviction was committed as a result of the individual being a victim of human trafficking. The individual shall serve a copy of the motion on the district attorney's office or municipal attorney's office that obtained the conviction.

(b) This section applies to all state and municipal convictions for crimes except for crimes defined in section 24-4.1-302 (1).

(c) This section does not apply to a conviction if the individual raised an affirmative defense described in section 18-7-201.3 or 18-3-504 (2.5) at trial and was still convicted after raising the defense.

(d) Official documentation is not required for an individual to seek or be granted relief pursuant to this section, but if the individual provides official documentation from a federal,

state, local, or tribal government agency indicating that the individual was a victim of human trafficking at the time of the offense, the documentation creates a rebuttable presumption that the individual was a victim of human trafficking at the time of the offense and is eligible for relief pursuant to this section.

(2) The district attorney's office or municipal attorney's office that obtained the conviction must file a response within thirty-five days from receiving a copy of the motion. If the district attorney's office or municipal attorney's office opposes the motion or the court determines a hearing is necessary, the court shall set the motion for hearing.

(3) (a) If the court determines by clear and convincing evidence that the offense was committed as a result of the individual being a victim of human trafficking at the time of the offense, the court shall vacate the conviction.

(b) A conviction vacated pursuant to subsection (3)(a) of this section is deemed vacated due to a substantive defect in the underlying criminal proceedings.

(4) Nothing in this section prevents the individual from applying for any other relief allowed by law.

(5) (a) If the court issues an order vacating the conviction, the court shall send the order to the Colorado bureau of investigation and the bureau shall remove the conviction from the individual's record.

(b) If the court issues an order vacating the conviction pursuant to this section, the individual may petition to have the other related records sealed pursuant to the procedure in section 24-72-707.

Source: L. 2024: Entire section added, (HB 24-1345), ch. 317, p. 2125, § 10, effective May 31.

18-1-411. Postconviction testing of DNA - definitions.

As used in this section and in sections 18-1-412 to 18-1-416, unless the context otherwise requires:

(1) Repealed.

(2) "Actual or constructive possession" means the biological evidence is maintained or stored on the premises of the law enforcement agency or at another location or facility under the custody or control of the law enforcement agency, including pursuant to an agreement or contract with the law enforcement agency and a third-party service provider, in Colorado or elsewhere.

(3) "DNA" means deoxyribonucleic acid.

(3.3) "Eligible person" means a person convicted of a felony offense in Colorado or adjudicated not guilty by reason of insanity for a felony offense in Colorado pursuant to section 16-8-105.5, including a person currently incarcerated; a person on parole or probation for a felony offense; a person subject to sex offender registration pursuant to section 16-22-103; or a person who has completed the sentence imposed for the felony offense.

(3.5) "Favorable result" means a result that indicates a reasonable probability that the petitioner would not have been convicted.

(4) "Incarcerated" means physically housed in a department of corrections facility, a private correctional facility under contract with the department of corrections, or a county jail following a felony conviction, or in a juvenile facility following adjudication for an offense that would have been a felony if committed by an adult, or under parole supervision.

Source: L. 2003: Entire section added, p. 815, § 1, effective August 6. **L. 2023:** (1) repealed and (3.3) and (3.5) added, (HB 23-1034), ch. 15, p. 44, § 1, effective October 1.

18-1-412. Procedure for application for DNA testing - appointment of counsel.

(1) An eligible person may apply at any time to the district court in the district where the conviction was secured for DNA testing concerning the conviction and sentence.

(2) A motion filed pursuant to this section shall include specific facts sufficient to support a prima facie showing that post-conviction relief is warranted under the criteria set forth in section 18-1-413. The motion shall include the results of all prior DNA tests, regardless of whether a test was performed by the defense or the prosecution.

(3) If the motion, files, and record of the case show to the satisfaction of the court that the petitioner is not entitled to relief based on the criteria specified in section 18-1-413, the court shall deny the motion without a hearing and without appointment of counsel.

(4) If the court does not deny the petitioner's motion for testing, the court shall appoint counsel if the court determines the petitioner is indigent and has requested counsel. The court shall forward a copy of the motion for DNA testing to the district attorney.

(5) Counsel for the defendant may request the court to set the matter for a hearing, if, upon investigation of the petitioner's motion for testing, counsel believes sufficient grounds exist to support an order for DNA testing. If the petitioner represents himself or herself, the court may set the matter for a hearing upon his or her request.

(6) Following a request for a hearing, the court shall allow the district attorney a reasonable amount of time, but not less than thirty-five days, to respond to the motion and any supplement filed by the petitioner's counsel and to prepare for the hearing.

(7) A court shall not order DNA testing without a hearing, except upon written stipulation of the district attorney.

(8) The court shall deny a motion for production of transcripts unless the petitioner makes a prima facie showing that a transcript will be necessary at a hearing conducted pursuant to this section.

(9) Upon motion of the defendant or the defendant's counsel, the court shall order a database search by a law enforcement agency in both national and local databases if the court determines that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. DNA profiles must meet current national DNA database index system eligibility standards and conform to current federal bureau of investigation quality assurance standards in order to be eligible for search against the state index system.

Source: **L. 2003:** Entire section added, p. 816, § 1, effective August 6. **L. 2009:** (9) added, (SB 09-241), ch. 295, p. 1582, § 11, effective July 1. **L. 2012:** (6) amended, (SB 12-175), ch. 208, p. 862, § 103, effective July 1. **L. 2023:** (1), (3), and (9) amended, (HB 23-1034), ch. 15, p. 44, § 2, effective October 1.

ANNOTATION

Appointment of counsel for a postconviction request for DNA testing does not imply that testing is warranted, and the mere granting of a hearing does not, by

itself, implicitly demonstrate that the statutory requirements of § 18-1-413 have been met. *People v. Young*, 2014 COA 169, 412 P.3d 676.

18-1-413. Content of application for DNA testing.

(1) The court shall order DNA testing if:

(a) It finds a reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution;

(b) It finds by a preponderance of the evidence that a law enforcement agency collected biological evidence pertaining to the offense;

(c) (I) It finds by a preponderance of the evidence that DNA results were not available prior to the petitioner's conviction or, if previously available and tested, the evidence can be subjected to more advanced, scientifically reliable DNA testing that provides a reasonable likelihood of more probative results; or

(II) The petitioner did not secure the requested DNA testing prior to the petitioner's conviction because DNA testing was not reasonably available or for reasons that constitute justifiable excuse, ineffective assistance of counsel, or excusable neglect; and

(d) The petitioner consents to provide a biological sample for DNA testing.

(2) A petitioner may only file a subsequent petition with new grounds for relief not raised in the prior petition if the petitioner exercised due diligence to raise all viable claims at the time of the initial petition or if the petitioner was not granted a hearing on the initial petition and the subsequent petition raises viable grounds for relief. If the court determines these criteria are satisfied, the court may consider the subsequent petition if the petitioner establishes good cause why a successive petition should be considered or the court finds that the interests of justice so require. If the court considers the subsequent petition, the court shall determine whether to grant the petition pursuant to subsection (1) of this section.

Source: L. 2003: Entire section added, p. 816, § 1, effective August 6. **L. 2023:** IP(1), (1)(a), (1)(b), and (1)(c) amended and (2) added, (HB 23-1034), ch. 15, p. 45, § 3, effective October 1.

ANNOTATION

Defendant not entitled to DNA testing under this section because defendant failed to establish by a preponderance of the evidence that favorable results of DNA testing would demonstrate his actual innocence. *People v. Young*, 2014 COA 169, 412 P.3d 676.

Defendant failed to satisfy the actual innocence prong. The absence of

defendant's DNA on the mattress pad, blanket, extension cord, and victim's clothes would not constitute "clear and convincing evidence such that no reasonable juror would have convicted the defendant." DNA testing of these items would not necessarily or logically rebut other strong evidence of the defendant's guilt. *People v. Thompson*, 2020 COA 117, 485 P.3d 566.

18-1-414. Preservation of evidence.

(1) A petitioner shall not be entitled to relief based solely on an allegation that a law enforcement agency failed to preserve biological evidence.

(2) (a) A court granting a motion for hearing pursuant to section 18-1-412 shall order the appropriate law enforcement agency to preserve existing biological evidence for DNA testing.

(b) If a law enforcement agency, through negligence, destroys, loses, or otherwise disposes of biological evidence that is the subject of an order pursuant to this subsection (2) before the evidence may be tested, the court shall set a hearing to determine whether a remedy is warranted. If the court determines that a remedy is warranted, the court may order whatever remedy the court finds is just, equitable, and appropriate. Nothing in this subsection (2) shall be construed to limit or eliminate the court's authority to order any remedy otherwise available under law for the destruction, loss, or disposal of evidence.

(c) For the purposes of this subsection (2), "negligence" means a departure from the ordinary standard of care.

(d) When a motion for postconviction DNA testing is granted, the primary investigative agency that handled the case shall prepare an inventory of the evidence related to the case and issue a copy of the inventory to the petitioner and the court.

(3) Except as provided in subsection (2) of this section, this section does not create a duty to preserve biological evidence. Notwithstanding the provisions of subsection (2) of this section, this section does not create a liability on the part of a law enforcement agency for failing to preserve biological evidence.

Source: **L. 2003:** Entire section added, p. 817, § 1, effective August 6. **L. 2008:** (2) and (3) amended, p. 1513, § 2, effective May 28. **L. 2023:** (2)(d) added, (HB 23-1034), ch. 15, p. 46, § 4, effective October 1.

Cross references: For the legislative declaration contained in the 2008 act amending subsections (2) and (3), see section 1 of chapter 322, Session Laws of Colorado 2008.

ANNOTATION

Defendant not entitled to relief under this section because defendant failed to establish entitlement to DNA testing

under § 18-1-413. People v. Young, 2014 COA 169, 412 P.3d 676.

18-1-415. Testing - payment.

If the court orders DNA testing, the testing must be conducted by the Colorado bureau of investigation; except that the court, upon request of the petitioner and after the petitioner establishes good cause, may order testing by another testing laboratory or agency that conforms to the current version of ISO/IEC 17025 requirements, the appropriation quality assurance standards required by the federal bureau of investigation, and forensic-specific requirements and is accredited by an organization that is signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangements for Testing Laboratories. The petitioner shall pay for the testing. The parties shall consult and negotiate on an agreement on testing methods and techniques. If the parties cannot agree, the court shall designate the testing methods and techniques, considering the totality of the circumstances. In considering the totality of the circumstances, the court shall consider whether the testing would be consumptive in nature, whether the testing would allow for the best possible collection of evidence, and whether the testing would allow for the most probative results to be obtained. If the petitioner is indigent and represented by either the public defender or alternate defense counsel, and with the approval of the public defender or the alternate defense counsel, the costs of the testing shall be paid from the public defender's budget or the alternate defense counsel's budget.

Source: **L. 2003:** Entire section added, p. 817, § 1, effective August 6. **L. 2010:** Entire section amended, (HB 10-1422), ch. 419, p. 2073, § 31, effective August 11. **L. 2023:** Entire section amended, (HB 23-1034), ch. 15, p. 46, § 5, effective October 1.

18-1-416. Results of the DNA test.

(1) Notwithstanding any law or rule of procedure that bars a motion for postconviction review as untimely or successive, a petitioner may use the results of a DNA test ordered pursuant to section 18-1-413 as the grounds for filing a motion for postconviction review pursuant to section 18-1-410 and the Colorado rules of criminal procedure.

(1.5) If forensic DNA testing ordered provides a favorable result to the petitioner, the court shall schedule a hearing within thirty days after the result to determine the appropriate relief to be granted. Based on the results of the testing and any evidence or other information presented at the hearing, the court shall enter an order within thirty days after the hearing that serves the interests of justice, including, but not limited to, an order setting aside or vacating the petitioner's judgment of conviction.

(2) The testing laboratory shall make the results of a DNA test ordered pursuant to section 18-1-413 available to the combined DNA index system and to any Colorado, federal, or other law enforcement DNA databases.

(3) The court shall ensure compliance with the notification procedures and rights afforded to victims provided for in sections 24-4.1-301 to 24-4.1-305.

Source: L. 2003: Entire section added, p. 817, § 1, effective August 6. **L. 2023:** (1) amended and (1.5) and (3) added, (HB 23-1034), ch. 15, p. 46, § 6, effective October 1.

18-1-417. Ineffective assistance of counsel claims - waiver of confidentiality.

(1) Notwithstanding any other provision of law, whenever a defendant alleges ineffective assistance of counsel, the defendant automatically waives any confidentiality, including attorney-client and work-product privileges, between counsel and defendant, and between the defendant or counsel and any expert witness retained or appointed in connection with the representation, but only with respect to the information that is related to the defendant's claim of ineffective assistance. After the defendant alleges ineffective assistance of counsel, the allegedly ineffective counsel and an expert witness may discuss with, may disclose any aspect of the representation that is related to the defendant's claim of ineffective assistance to, and may produce documents related to such representation that are related to the defendant's claim of ineffective assistance to the prosecution without the need for an order by the court that confidentiality has been waived.

(2) If the allegedly ineffective counsel or an expert witness has released his or her file or a portion thereof to defendant or defendant's current counsel, defendant or current counsel shall permit the prosecution to inspect and copy any or all portions of the file that are related to the defendant's claim of ineffective assistance upon request of the prosecution.

Source: L. 2005: Entire section added, p. 424, § 2, effective April 29.

ANNOTATION

Law reviews. For article, "Trial Counsel's Continued Duty of Confidentiality in Postconviction Proceedings", see 48 Colo. Law. 32 (Dec. 2019).

For an ineffective assistance of counsel claim, (1) when alleged, the defendant automatically waives attorney-client privilege, but only for information related to the claim; (2) the procedures set forth in

Crim. P. 35(c)(3)(V) do not modify this statute; (3) it is improper for the prosecution to request an order for or subpoena covered information because the waiver is automatic; (4) the prosecution does not have an inherent right to an in camera review of the allegedly ineffective counsel's file; and (5) the court may grant an in camera review of the entire file if the People v. Madera, 112

P.3d 688 (Colo. 2005), standard is satisfied. 506 P.3d 835.
People v. Cortes-Gonzalez, 2022 CO 14,

PART 5

PRINCIPLES OF CRIMINAL CULPABILITY

Law reviews: For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to erroneous malice presumption, see 15 Colo. Law. 1616 (1986).

18-1-501. Definitions.

The following definitions are applicable to the determination of culpability requirements for offenses defined in this code:

- (1) "Act" means a bodily movement, and includes words and possession of property.
- (2) "Conduct" means an act or omission and its accompanying state of mind or, where relevant, a series of acts or omissions.
- (3) "Criminal negligence". A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.
- (4) "Culpable mental state" means intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence, as these terms are defined in this section.
- (5) "Intentionally" or "with intent". All offenses defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are declared to be specific intent offenses. A person acts "intentionally" or "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.
- (6) "Knowingly" or "willfully". All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

(7) "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.

(8) "Recklessly". A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

(9) "Voluntary act" means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.

Source: L. 71: R&RE, p. 403, § 1. C.R.S. 1963: § 40-1-601. L. 75: (3), (5), (6), and (8) R&RE, p. 616, § 1, effective July 21. L. 77: (4) amended and (5) and (6) R&RE, p. 959, §§ 1, 2, effective July 1.

ANNOTATION

Law reviews. For comment on *Trujillo v. People* (133 Colo. 186, 292 P.2d 980 (1956)), see 28 Rocky Mt. L. Rev. 409 (1956). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L.J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-1-501 (1) is similar to former § 40-1-2, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

General assembly may establish statutory constituents of criminal culpability. The constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the general assembly's competence to establish the statutory constituents of criminal culpability for various offenses and to formulate

particular rules of justification or excuse for acts that otherwise might be criminally punishable. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

The narcotics act is not governed by the definitions in the criminal code. People v. Quick, 190 Colo. 171, 544 P.2d 629 (1976).

"Criminal negligence", as applied to homicide, means a failure to perceive, through a gross deviation from the standard of reasonable care, a substantial and unjustifiable risk that death will result from certain conduct. People v. Taggart, 621 P.2d 1375 (Colo. 1981).

Intent is an act or purpose of the mind rarely discoverable except by the acts of the person committing them; consequently, acts which tend to prove a specific intent are direct evidence of that intent. Wechter v. People, 53 Colo. 89, 124 P. 183 (1912).

Circumstances attending an act give character to it, inasmuch as they evince the intention of the actor at the time of the act. Usually, the proof of a homicide will disclose the circumstances attending it, and the character of the crime is demonstrated by the same evidence which establishes it. Hill v. People, 1 Colo. 436 (1872).

Intention to commit an offense is manifested by circumstances attendant upon the commission of the offense. Arridy v. People, 103 Colo. 29, 82 P.2d 757 (1938).

Intent may be shown by inference from all the surrounding circumstances, if they are sufficient to prove this element beyond a reasonable doubt. However, if the circumstances themselves are insufficient or if the defendant feels required to rebut facts or inferences from other evidence adduced at trial detrimental to his position, it is axiomatic that, this being material, his offer

should be allowed in as evidence. Gallegos v. People, 159 Colo. 379, 411 P.2d 956 (1966).

The mind of an alleged offender may be read from his acts, his conduct, and the reasonable inferences which may be drawn from the circumstances of the case. Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971).

Intent is a state of mind existing at the time a person commits an offense; however, that intent is not required to be proven by direct substantive evidence, for to do so would make it impossible to convict in any case where there was not a culmination of the intent. Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971).

Intent is a question of fact, provable like any other fact in issue in a criminal case. Wechter v. People, 53 Colo. 89, 124 P. 183 (1912).

Instructions on specific intent phrased in language of this section are proper and will be upheld by the supreme court. Blincoe v. People, 178 Colo. 34, 494 P.2d 1285 (1972).

Instruction defining "intentionally" properly refused. Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense had occurred prior to that time, trial court did not err in refusing such request. People v. Crawford, 191 Colo. 504, 553 P.2d 827 (1976).

Defendant cannot avoid his conviction of criminally negligent homicide on the ground that he did not intend death to

result from his act. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

"Knowingly." The definition of "knowingly" in subsection (6) is an accurate expression of the common-law understanding of "knowingly". *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983).

The definition of "knowingly" or "willfully" in subsection (6) applied in *People v. Riley*, 708 P.2d 1359 (Colo. 1985); *People v. Eastepp*, 884 P.2d 305 (Colo. 1994); *People v. Parga*, 964 P.2d 571 (Colo. App. 1998).

A person may be found to act "intentionally" even though the length of time for deliberation is not long. *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991), *aff'd*, 856 P.2d 805 (Colo. 1993).

A person acts intentionally if the person's "conscious objective" is to cause the specific result prohibited by statute. *People v. Moore*, 877 P.2d 840 (Colo. 1994); *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996); *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Phrase "reasonably should be aware" is not the equivalent of "knowingly". *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982); *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

Menacing is a general intent crime requiring only that the defendant be aware that the defendant's conduct is practically certain to cause the result. *People v. Zieg*, 841 P.2d 342 (Colo. App. 1992).

Omission of conduct-and-circumstance factor from instruction on "knowingly" held not error. No substantial rights of the defendant are seriously affected by the omission of the conduct-and-circumstance factor of the mental culpability requirement of "knowingly" from the instructions, as provided in subsection (6), where the instruction given refers to both conduct and result. If one is aware that his conduct will achieve a certain result, then of necessity he must also be aware of that conduct. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

A mental culpability instruction defining "knowingly" as an awareness by the defendant that his conduct is "practically certain to cause the result" would necessarily require the jury to be satisfied beyond a reasonable doubt that he also was aware that "his conduct is of such nature" and that "the circumstance exists" before he could be found guilty of these offenses. Although such an instruction is technically incomplete, the trial court's failure to instruct the jury on the conduct and circumstance components of "knowingly" is not plain error because the substantial rights of the defendant are not affected. *People v. Derrerra*, 667 P.2d 1363 (Colo. 1983).

"Knowingly" instruction which is equivalent to negligence is error. Where the court's definition of "knowingly" permits a finding, not on the defendant's guilty knowledge, but rather on a basis that amounts to a negligence standard, that instruction is fundamentally flawed. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

Where an instruction permits the jury to find that the defendant acted intentionally on the basis of his actions alone, rather than on the precise "conscious objective" standard required by statute, the instruction is erroneous. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

Evidence of mental slowness may be offered to negate the culpable mental state for the crime charged. *People v. Vanrees*, 125 P.3d 403 (Colo. 2005).

Offenses requiring knowledge as the culpable mental state are not specific intent crimes. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

No requirement that "knowing conduct" be directed against person killed. There is no requirement that the "knowing conduct" essential to extreme indifference murder and second-degree murder be directed against the person actually killed. On the contrary, both offenses are general intent crimes, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Willful and ordinary negligence distinguished. The demarcation between ordinary negligence and willful and wanton disregard is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in

prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful. *Trujillo v. People*, 133 Colo. 186, 292 P.2d 980 (1956).

Before defendant could be convicted of manslaughter under former provisions, there must have been evidence tending to prove he recklessly and wantonly failed to exercise the care and caution that a reasonably prudent person would have exercised under similar circumstances, and that his conduct was such as to indicate a reckless and wanton disregard for the safety of others. Ordinary or simple negligence was not sufficient to sustain the former charge of involuntary manslaughter. *Bennett v. People*, 155 Colo. 101, 392 P.2d 657 (1964).

"Recklessly" and "criminally negligent" distinguished. The difference between acting "recklessly" and being "criminally negligent" is the distinction between becoming aware of a risk yet consciously choosing to disregard it as opposed to negligently failing to become aware of the risk. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

Instruction defining "recklessly" properly refused where it contained the term "accidentally". *People v. Bookman*, 646 P.2d 924 (Colo. 1982).

Instruction defining "recklessly" pursuant to this section, rather than defining "reckless driving" under § 42-4-1401, was properly given as to an element of the offense of vehicular homicide involving reckless driving. The definition

of "recklessly" in subsection (8) is contained in the criminal code and is plainly intended to be used in interpreting other statutory sections, such as vehicular homicide, within the criminal code. *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

"Recklessly" in second degree assault requires that a defendant consciously disregard a substantial and unjustifiable risk that a result will occur (or that a circumstance exists), not that a defendant disregard the result that ultimately occurs. Therefore, the people did not have to prove that defendant had knowledge of the existence of the specific deadly weapon held by the victim of the assault. *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Conspiracy to commit reckless manslaughter is not a crime in Colorado. *Palmer v. People*, 964 P.2d 524 (Colo. 1998).

Finding of knowing or willful conduct sufficient for recklessness. A finding of knowing or willful conduct is sufficient to establish the culpable mental state of recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. App. 1981); *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008).

To determine whether a risk is substantial and unjustified, trier of fact must weigh the likelihood and potential magnitude of harm presented by the conduct and consider whether the conduct constitutes a gross deviation from the reasonable standard of care. *People v. Hall*, 999 P.2d 207 (Colo. 2000).

The phrase "starts or maintains a fire" in § 18-4-105 must be read in accordance with subsection (9) and § 18-1-502. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Intoxication provision applicable in analysis of "voluntary act". Section 18-1-804 applies not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a "voluntary act", as that phrase is used in the definition of "criminal liability" in § 18-1-502. *People v. Huskey*, 624 P.2d 899 (Colo. App. 1980).

Different culpable mental states may exist simultaneously. *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. People v. Howard*, 215 P.3d 1134 (Colo. App. 2008).

For discussion of culpable mental state required for conviction of criminal attempt, see *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Applied in *McPhee v. People*, 105 Colo. 539, 100 P.2d 148 (1940); *Gallegos v. Tinsley*, 139 Colo. 157, 337 P.2d 386 (1959); *Mora v. People*, 172 Colo. 261, 472 P.2d 142 (1970); *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974); *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976); *People v. Sexton*, 192 Colo. 181, 555 P.2d 1151 (1976); *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Brown*, 632 P.2d 1025 (Colo. 1981); *People v.*

Christian, 632 P.2d 1031 (Colo. 1981); People v. Noble, 635 P.2d 203 (Colo. 1981); Bollier v. People, 635 P.2d 543 (Colo. 1981); People v. R.V., 635 P.2d 892 (Colo. 1981); People v. Morgan, 637 P.2d 338 (Colo. 1981); People v. Padilla, 638 P.2d 15 (Colo. 1981); People v. Madson, 638 P.2d 18 (Colo. 1981); People v. Mack, 638 P.2d 257 (Colo. 1981); People v. Thatcher, 638 P.2d 760 (Colo. 1981); People v. Founds, 631 P.2d 1166 (Colo. App. 1981); People v. Shaw, 646 P.2d 375 (Colo. 1982); Hendershott v. People, 653 P.2d 385 (Colo.

1982); People v. Bartowsheski, 661 P.2d 235 (Colo. 1983); People v. Giles, 662 P.2d 1073 (Colo. 1983); People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986); People v. Lybarger, 700 P.2d 910 (Colo. 1985); People v. Breland, 728 P.2d 763 (Colo. App. 1986); People v. Bowman, 738 P.2d 387 (Colo. App. 1987); People v. District Court, 779 P.2d 385 (Colo. 1989); People v. Luna, 2020 COA 123M, 474 P.3d 230.

18-1-502. Requirements for criminal liability in general and for offenses of strict liability and of mental culpability.

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of "strict liability". If a culpable mental state on the part of the actor is required with respect to any material element of an offense, the offense is one of "mental culpability".

Source: L. 71: R&RE, p. 404, § 1. C.R.S. 1963: § 40-1-602.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L.J. 137 (1972). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

The minimum requirements for criminal liability are set out in this section. People v. Caddy, 189 Colo. 353, 540 P.2d 1089 (1975).

Conscious mental activity required. The minimal requirement for a "strict liability" offense is proof that the proscribed conduct was performed voluntarily — i.e., that such act must be the product of conscious mental

activity involving effort or determination. People v. Rostad, 669 P.2d 126 (Colo. 1983).

Intoxication provision applicable in analysis of "voluntary act". Section 18-1-804 applies not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a "voluntary act", as that phrase is used in the definition of criminal liability in this section. People v. Huskey, 624 P.2d 899 (Colo. App. 1980).

This section expressly removes any ambiguity as to the culpability requirement of § 18-4-105. That section states that if an offense does not require a culpable mental state on the part of the actor, the offense is one of strict liability. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Construed in accordance with this section, § 18-4-105 would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor's control. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

However, the phrase "starts or maintains a fire" in § 18-4-105 must be

read in accordance with § 18-1-501(9) and this section. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Cruelty to animals as proscribed by § 35-42-112 held to be strict liability offense. People v. Wilhelm, 676 P.2d 702 (Colo. 1984).

Cruelty to animals as proscribed by § 18-9-202 held to be an offense of mental culpability. People v. Wilhelm, 676 P.2d 702 (Colo. 1984).

Defendant did not perform a voluntary act required to commit the offense of taking protected wildlife without authorization where the taking was accomplished by events beyond defendant's control. A rainstorm, and not defendant's own conduct, caused one of defendant's wastewater containment ponds to flood into a river and kill fish downstream. Dept. of Nat. Res. v. 5 Star Feedlot, 2021 CO 27, 486 P.3d 250.

Applied in People v. Marcy, 628 P.2d 69 (Colo. 1981); People v. Noble, 635 P.2d 203 (Colo. 1981); Hendershott v. People, 653 P.2d 385 (Colo. 1982); People v. Saiz, 660 P.2d 2 (Colo. App. 1982).

18-1-503. Construction of statutes with respect to culpability requirements.

(1) When the commission of an offense, or some element of an offense, requires a particular culpable mental state, that mental state is ordinarily designated by use of the terms "intentionally", "with intent", "knowingly", "willfully", "recklessly", or "criminal negligence" or by use of the terms "with intent to defraud" and "knowing it to be false" describing a specific kind of intent or knowledge.

(2) Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with

respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.

(3) If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

(4) When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears.

Source: L. 71: R&RE, p. 404, § 1. C.R.S. 1963: § 40-1-603. L. 77: (1) amended, p. 960, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Specific intent is element of crime and is not presumed. Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. Mere general malice or criminal intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence. The general rule that a criminal intention will be presumed from the commission of the unlawful act does not apply; and proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent.

Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971).

Proof of specific intent. Specific intent is ordinarily inferable from the facts, and proof thereof is necessarily by circumstantial evidence. Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971).

Mental state required may be implied. Because a crime ordinarily requires the conjunction of an act and a culpable mental state, legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental state is required. Rather, the requisite mental state may be implied from the statute. People v. Moore, 674 P.2d 354 (Colo. 1984).

If a statute merely implies a mens rea, that mental state must be deemed to apply to every element of the offense. People v.

Trevino, 826 P.2d 399 (Colo. App. 1991). But see *Gorman v. People*, 19 P.3d 662 (Colo. 2000).

If there is no clear intent to limit the application of the culpable mental state to a particular element of the offense, it applies to all elements of the offense. *People v. Coleby*, 34 P.3d 422 (Colo. 2001); *People v. Hoggard*, 2017 COA 88, 468 P.3d 15, *aff'd*, 2020 CO 54, 465 P.3d 54.

Where the statute merely implies a mens rea, subsection (2), rather than subsection (4), applies. Thus, the implied mens rea may not apply to all elements of the offense, depending on the legislature's intent in criminalizing the offense. The implied mens rea for § 18-6-701, contributing to the delinquency of a minor, applies only to the defendant's actions in knowingly inducing, aiding, or encouraging a minor to violate the law, and not to whether the defendant knows the minor's age, because the intent of this offense is to protect the minor. *Gorman v. People*, 19 P.3d 662 (Colo. 2000).

Finding of knowing or willful conduct sufficient for recklessness. A finding of knowing or willful conduct is sufficient to establish the culpable mental state of recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. App. 1981).

Even if there is a logical inconsistency between acting knowingly or recklessly and acting with criminal negligence, no legal inconsistency exists based on

subsection (3). By returning a guilty verdict on child abuse that required a finding of knowingly or recklessly, the jury, as a matter of law, necessarily found that the defendant had acted with criminal negligence and was guilty of child abuse that required criminal negligence. *People v. Struckmeyer*, 2020 CO 76, 474 P.3d 57.

Instruction errors inure to defendant's benefit. Where an instruction requires the prosecution to prove a higher degree of culpability than otherwise required by statute in relation to the various elements of the offense, any errors in the instruction inure solely to the defendant's benefit. *People v. Mack*, 638 P.2d 257 (Colo. 1981).

Subsection (2) inapplicable to violation of custody under § 18-3-304. The language of that section requiring intent is limited to the deprivation of custody of the child, and is not extended to the additional elements of the offense. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Applied in *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *Bollier v. People*, 635 P.2d 543 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Walker*, 634 P.2d 1026 (1981); *People v. Mattas*, 645 P.2d 254 (Colo. 1982); *People v. Hart*, 658 P.2d 857 (Colo. 1983); *People v. Saiz*, 660 P.2d 2 (Colo. App. 1982); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983); *People v. Thompson*, 756 P.2d 353 (Colo. 1988).

18-1-503.5. Principles of criminal culpability.

(1) If the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older. This affirmative defense shall not be available if the criminality of conduct depends on the defendant being in a position of trust.

(2) If the criminality of conduct depends on a child's being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.

(3) If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be fifteen years of age or older.

Source: L. 2001: Entire section added, p. 859, § 6, effective July 1. L. 2007: (1) amended, p. 1687, § 4, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Subsection (1) eliminates the culpable mental state as to age prescribed by § 18-6-403 (3), "knowingly", and replaces it with that of subsection (1), "lack of reasonable belief". People v. Bath, 890 P.2d 269 (Colo. App. 1994).

The affirmative defense created in this section applies to the offense of contributing to the delinquency of a minor under § 18-6-107. But where defendant did not raise this affirmative defense in a manner sufficient to meet the defendant's initial burden, the trial court did not err in refusing to instruct the jury on this

affirmative defense. People v. Hastings, 983 P.2d 78 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000); People v. Gorman, 983 P.2d 92 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000).

Subsection (1), by providing for the affirmative defense of reasonable belief, manifests a clear legislative intent that the culpable mental state of "knowingly" in § 18-6-403 does not apply to the age of the victim. People v. Bath, 890 P.2d 269 (Colo. App. 1994).

Subsection (1) of this section does not apply to offenses charged under § 18-7-

407. People v. Houser, 2013 COA 11, 337 P.3d 1238.

Subsection (2) limits an affirmative defense and creates a strict liability crime, both of which are within the constitutional power of the general assembly. People v. Salazar, 920 P.2d 893 (Colo. App. 1996).

By applying subsection (2), the trial court did not relieve the prosecution of its

burden to prove essential elements of the offense charged. People v. Salazar, 920 P.2d 893 (Colo. App. 1996).

Legislative history relating to the adoption of subsection (2) and § 18-3-405 (1) demonstrates that the general assembly intended the offense of sexual assault on a child to be a strict liability offense. People v. Salazar, 920 P.2d 893 (Colo. App. 1996).

18-1-504. Effect of ignorance or mistake upon culpability.

(1) A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact, unless:

(a) It negatives the existence of a particular mental state essential to commission of the offense; or

(b) The statute defining the offense or a statute relating thereto expressly provides that a factual mistake or the mental state resulting therefrom constitutes a defense or exemption; or

(c) The factual mistake or the mental state resulting therefrom is of a kind that supports a defense of justification as defined in sections 18-1-701 to 18-1-707.

(2) A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one or more of the following:

(a) A statute or ordinance binding in this state;

(b) An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado;

(c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law. If such interpretation is by judicial decision, it must be binding in the state of Colorado.

(3) Any defense authorized by this section is an affirmative defense.

Source: L. 71: R&RE, p. 404, § 1. C.R.S. 1963: § 40-1-604.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 through 18 of this title 18.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Section 18-2-101 and this section may be harmonized. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Subsection (1)(a) of this section and § 18-2-101(1) do not conflict. Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977).

No defense of impossibility in attempt prosecution. The general assembly intended that the defense of factual or legal impossibility not be available in an attempt prosecution. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Defendant may raise defense of general mistake of fact. A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft, but may raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

If the defendant does every act within his power to commit an offense and would have committed the offense if the facts had

been as he believed them to be, then he may not escape criminal liability. People v. Borrego, 738 P.2d 59 (Colo. App. 1987).

A mistaken belief that one's conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct. Becker & Tenenbaum v. Eagle Restaurant, 946 P.2d 600 (Colo. App. 1997); People v. Bruno, 2014 COA 158, 342 P.3d 587; People v. Gutierrez-Vite, 2014 COA 159, 411 P.3d 119.

Mistake of law defense not available when acting upon unauthorized directions from sheriff. Sheriff is not empowered or authorized to place listening device without court order. Deputy sheriff, then, cannot rely upon such direction as a defense to his actions. People v. Lesslie, 24 P.3d 22 (Colo. App. 2000).

Reliance upon court opinion is not basis for mistake of law defense when opinion is clearly factually distinguishable. People v. Lesslie, 24 P.3d 22 (Colo. App. 2000).

Language for a mistake-of-fact jury instruction that is almost identical to the statutory language is proper. People v. Manyik, 2016 COA 42, 383 P.3d 77.

Applied in *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Castro*, 657 P.2d 932 (Colo. 1983).

18-1-505. Consent.

(1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is not a defense unless the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to that conduct or to the infliction of that injury is a defense only if the bodily injury consented to or threatened by the conduct consented to is not serious, or the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport, or the consent establishes a justification under sections 18-1-701 to 18-1-707.

(3) Unless otherwise provided by this code or by the law defining the offense, assent does not constitute consent if:

(a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) It is given by a person who, by reason of immaturity, behavioral or mental health disorder, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is given by a person whose consent is sought to be prevented by the law defining the offense; or

(d) It is induced by force, duress, or deception.

(4) Any defense authorized by this section is an affirmative defense.

Source: **L. 71:** R&RE, p. 405, § 1. **C.R.S. 1963:** § 40-1-605. **L. 81:** (2) amended, p. 980, § 1, effective May 13. **L. 2017:** (3)(b) amended, (SB 17-242), ch. 263, p. 1305, § 138, effective May 25.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

The clause "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense" is ambiguous because it is unclear and subject to alternative constructions. *Hotsenpiller v. Morris*, 2017 COA 95, 488 P.3d 219.

The harm or evil sought to be prevented by a civil protection order (CPO), including enforcing it through criminal charges for a violation of such an order, is not mere contact with the protected person but preventing the societal harms of violence, domestic abuse, and serious harm or death. *Hotsenpiller v. Morris*, 2017 COA 95, 488 P.3d 219.

A protected person simply cannot "consent," under this section, to another person's violation of a court order. Under the plain language of subsection (3)(c), assent by the victim does not constitute consent if the assent is "given by a person whose consent is sought to be prevented by the law defining the offense". *Hotsenpiller v. Morris*, 2017 COA 95, 488 P.3d 219.

Subsection (3)(c) is intended to prevent improvident consent, that is, the very objective sought to be prevented by the law defining the offense. *Hotsenpiller v. Morris*, 2017 COA 95, 488 P.3d 219.

The defense of consent of the victim is not available regarding a violation of a permanent CPO. As stated in § 13-14-106, a CPO is an order of the court and not an order issued by the protected person, and the protected person's consent cannot, as a matter of law, constitute a restrained party's

defense to the crime for violation of a CPO. *Hotsenpiller v. Morris*, 2017 COA 95, 488 P.3d 219.

Consent defense is available under subsection (2) only when the victim consents to a minor injury. An injury that causes a victim's death is necessarily "serious" — and thus not minor — because it involves a permanent and dangerous impairment of the victim's physical condition. *People v. Bagwell*, 2022 COA 44, 514 P.3d 953.

The plain meaning of the phrase "bodily injury that is not serious" focuses on the degree of injury inflicted, not on the intent of the defendant, and this section does not suggest that a victim's injury is any less "serious" merely because the victim's pre-existing condition is dire. *People v. Bagwell*, 2022 COA 44, 514 P.3d 953.

General assembly did not intend for subsection (2) to allow the defense of consent to murder, and therefore, there is no basis for applying the rule of lenity. *People v. Bagwell*, 2022 COA 44, 514 P.3d 953.

Husband is not entitled to an affirmative defense of consent where husband intentionally killed his wife who consented to her own death. *People v. Bagwell*, 2022 COA 44, 514 P.3d 953.

Whether the victim consented to sexual contact is directly relevant to submission. Thus, if the victim consented to having sex with the defendant, the element of submission would be negated because the

victim cannot both consent to sexual contact and be made to submit against her will to such contact. *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

Trial court committed reversible error by refusing defendants' request to instruct the jury on the affirmative defense of consent where the evidence bearing on the possible existence of consent, while not strong, at least satisfied the "scintilla" standard required for an instruction on an affirmative defense. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

Because the alleged victim's alleged consent would have "negative[d] an element of the [sexual assault] offense", the trial court was required to instruct the jury on the affirmative defense of consent.

People v. Cruz, 903 P.2d 1198 (Colo. App. 1995).

This section does not impose a requirement that the jury be instructed on an affirmative defense of consent in a case under the first degree sexual assault statute which itself requires, in effect, that the prosecution prove a lack of consent. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

Trial court did not err in refusing to give jury instruction defining the affirmative defense of consent where proof of the elements of the charged offense necessarily required disproof of the issues raised by said defense. *People v. Bush*, 948 P.2d 16 (Colo. App. 1997).

PART 6

PARTIES TO OFFENSES - ACCOUNTABILITY

Law reviews: For article, "Colorado Law Concerning Accomplices and Complicity", see 18 Colo. Law. 2317 (1989); for article, "1992 Criminal Law Legislative Update", see 21 Colo. Law. 2200 (1992).

18-1-601. Liability based upon behavior.

A person is guilty of an offense if it is committed by the behavior of another person for which he is legally accountable as provided in sections 18-1-602 to 18-1-607.

Source: L. 71: R&RE, p. 406, § 1. **C.R.S. 1963: § 40-1-701.**

ANNOTATION

Applied in People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979); People v. R.V., 43

Colo. App. 349, 606 P.2d 1311 (1979); People v. R.V., 635 P.2d 892 (Colo. 1981).

18-1-602. Behavior of another.

(1) A person is legally accountable for the behavior of another person if:

(a) He is made accountable for the conduct of that person by the statute defining the offense or by specific provision of this code; or

(b) He acts with the culpable mental state sufficient for the commission of the offense in question and he causes an innocent person to engage in such behavior.

(2) As used in subsection (1) of this section, "innocent person" includes any person who is not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.

Source: L. 71: R&RE, p. 406, § 1. **C.R.S. 1963:** § 40-1-702.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Applied in People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977).

18-1-603. Complicity.

A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.

Source: L. 71: R&RE, p. 406, § 1. **C.R.S. 1963:** § 40-1-703. **L. 97:** Entire section amended, p. 1540, § 3, effective July 1.

ANNOTATION

I. General Consideration.

III. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-1-603 is similar to former § 40-1-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common law. At common law an accessory before the fact is he who, being absent at the time of the actual perpetration of the offense, procures, counsels, commands, assists, or abets another to commit it. One who is present aiding and abetting the fact to be committed was considered a principal in the second degree. *Komrs v. People*, 31 Colo. 212, 73 P. 25 (1903).

If general assembly has power to forbid anything, it has power to forbid incitement thereto. *People v. UMW, Dist. 15*, 70 Colo. 269, 201 P. 54 (1921).

Purpose of section. Essence of accessory statute establishing guilt equal to that of principal is to punish for participation in the criminal act. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Complicity and conspiracy are not separate offenses with essentially identical elements. *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

Conspiracy distinguished. Under this section, a defendant is held accountable for a criminal offense committed by another if the defendant participates in the criminal act by intentionally aiding, abetting, or advising the other person in planning or committing the offense. In contrast, the essence of the crime of conspiracy is an illegal agreement or combination, plus an overt act in furtherance of that agreement. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Complicity is not a separate and distinct crime or offense. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Complicity is not a separate and distinct crime or offense under the criminal code and it is not necessary to specifically charge complicity. *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

Complicity is merely a theory by which a defendant becomes accountable for a criminal offense committed by another. *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997); *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

No fine or imprisonment may be imposed for complicity since it is merely a theory of law by which a defendant becomes accountable for a criminal offense committed through the conduct of another, the punishment is imposed for the underlying crime and not for complicity. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Conviction of defendant upheld on theory of complicity to criminally negligent

homicide on basis that jury could find defendant guilty if it believed that defendant knew that the principal was about to engage in conduct that was a gross deviation from the standard of care that a reasonable person would exercise, even though the principal was not charged with criminally negligent homicide. Such knowledge on the part of the alleged complicitor is sufficient to meet the requirement that the complicitor had knowledge that the principal intended to commit the crime. *People v. Wheeler*, 772 P.2d 101 (Colo. 1989).

Accomplice liability tracks that degree of knowledge that the complicitor's actions of aiding and abetting evince, and, where the complicitor is engaged in a common enterprise with the principal, he or she may be held liable as a complicitor for reckless crimes. *Grissom v. People*, 115 P.3d 1280 (Colo. 2005).

Conviction as a complicitor, under the complicity statute, requires that: (1) the principal committed the crime; (2) the complicitor had knowledge that the principal intended to commit the crime; and (3) the complicitor aided or encouraged, with specific intent to aid or encourage, the principal's commission of the crime. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994).

A complicitor can be held strictly liable for the sentence enhancer when the complicitor is unaware that an at-risk victim is present if the complicitor intended to aid in the theft and was aware of the circumstances constituting the elements of

the underlying offense. *People in Interest of B.D.*, 2020 CO 87, 477 P.3d 143; *People in Interest of N.D.O.*, 2021 COA 100, 497 P.3d 1070.

A complicitor is liable for a principal's act of money laundering if the prosecution can prove that (1) the principal committed an act of money laundering; (2) the complicitor aided, abetted, advised, or encouraged that specific act of money laundering; (3) the complicitor intended to do so; (4) the complicitor was aware that the principal knew or believed that the property involved in the specific money laundering transaction represented the proceeds of a criminal offense; and (5) the complicitor was aware that the principal knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the criminal offense. *Butler v. People*, 2019 CO 87, 450 P.3d 714.

A criminal defendant may be a complicitor to the crime of accessory by rendering assistance to another who is engaged in destroying evidence of a crime, even though the crime underlying the accessory charge may have been committed by the defendant. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

Requirement that a defendant knew another person intended to commit a crime for purposes of being convicted as a complicitor is met where the principal consciously caused the prohibited sexual contact with the child. *People v. Moore*, 877 P.2d 840 (Colo. 1994).

Section distinguished from solicitation statute. Although encouragement of a criminal offense is prohibited under both § 18-2-301 and this section, the solicitation statute concerns incomplete acts, and the complicity statute covers consummated criminal offenses. Because the provisions proscribe distinguishable behavior, there is no violation of equal protection. *Alonzi v. People*, 198 Colo. 160, 597 P.2d 560 (1979).

Liability of accessory and associates governed by same principle. Where one is an accessory he of necessity must act in concert with some other or others and whether charged jointly or separately the legal consequences arising from his conduct and that of his associates are measured by the same principle. *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939).

There is no statutory distinction between accessories before the fact and principals. *Noble v. People*, 23 Colo. 9, 45 P. 376 (1896); *Pacheco v. People*, 96 Colo. 401, 43 P.2d 165 (1935); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959); *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

Thus, one who is an accessory to a crime is guilty of the same degree of crime as the principal. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

One who comes under this section is equivalent to a principal. *People v. Saiz*, 42 Colo. App. 469, 600 P.2d 97 (1979).

An accessory who stands by and aids, abets, or assists in the perpetration of a crime is deemed and considered as a

principal and punished accordingly. *Medina v. People*, 168 Colo. 255, 450 P.2d 662 (1969).

An accessory standing by, aiding, abetting, or assisting in a kidnapping is guilty as a principal. *Brady v. People*, 175 Colo. 252, 486 P.2d 436 (1971).

An accessory to a crime of violence as defined by § 16-11-309 (2) may be charged, tried, and punished as a principal. *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People in Interest of N.D.O.*, 2021 COA 100, 497 P.3d 1070.

A person who intends to aid the principal in committing murder and who possesses the intent to murder a person is criminally liable for the killing of an unintended third party by the principal. To decide otherwise would defeat the purpose of the complicity statute, which provides that a complicitor is "legally accountable as principal". *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd in part, rev'd in part on other grounds*, 148 P.3d 178 (Colo. 2006).

No transferred intent where a shooter meant to kill the very person he did kill, and that person was not someone the indirect participant wanted to kill. When the direct perpetrator deliberately changes the object of the offense, the doctrine of transferred malice does not apply to the indirect participant despite the fact that from his point of view the displacement of harm was accidental. *People v. Hunt*, 2016 COA 93, 412 P.3d 838.

It is not true that if one is not a conspirator he cannot be an accessory. Jacobs v. People, 174 Colo. 403, 484 P.2d 107 (1971).

One who merely aids and advises another in a legitimate matter is not an accessory within the meaning of this section. French v. People, 6 Colo. App. 311, 40 P. 463 (1895).

Definition of "abets" encompasses "encourages". Alonzi v. People, 198 Colo. 160, 597 P.2d 560 (1979).

A bystander is not required to endanger his own safety by interfering and giving help to prevent the commission of a crime, in order to avoid being held an accessory under this section. Farrell v. People, 8 Colo. App. 524, 46 P. 841 (1896).

Defendant's involvement as a conspirator and as a complicitor was tied to separate and distinct crimes, and the doctrine of merger did not apply. People v. Shannon, 189 Colo. 287, 539 P.2d 480 (1975).

Section applies to felony murder. A complicitor, being a principal, is included in the felony murder statute as one who commits or attempts to commit the underlying felony. People v. Saiz, 42 Colo. App. 469, 600 P.2d 97 (1979).

Complicitor liability can apply to strict liability crimes. A person is legally accountable as a principal for the behavior of another constituting a criminal offense if he or she aids, abets, advises, or encourages the other person in planning or committing that offense, and he or she does so with: (1)

the intent to aid, abet, advise, or encourage the other person in his or her criminal act or conduct, and (2) an awareness of circumstances attending the act or conduct he or she seeks to further, including a required mental state, if any, that are necessary for commission of the offense in question. People v. Childress, 2015 CO 65M, 363 P.3d 155; People v. Butler, 2017 COA 98, 454 P.3d 280, aff'd on other grounds, 2019 CO 87, 450 P.3d 714.

There is no temporal element imputed to the dual mental state determined by the above test. People v. Sandoval, 2018 COA 156, 488 P.3d 441.

Rosemond v. United States, 572 U.S. 65 (2014), does not apply to crimes charged under this section. People v. Sandoval, 2018 COA 156, 488 P.3d 441.

Colorado courts have recognized that complicity liability applies to attempt offenses. Thus, attempted murder is not an inchoate crime. People v. Candelaria, 107 P.3d 1080 (Colo. App. 2004), aff'd in part, rev'd in part on other grounds, 148 P.3d 178 (Colo. 2006).

Applied in Polochio v. People, 76 Colo. 574, 233 P. 833 (1925); Stewart v. People, 83 Colo. 289, 264 P. 720 (1928); De Salvo v. People, 98 Colo. 368, 56 P.2d 28 (1936); Thompson v. People, 139 Colo. 15, 336 P.2d 93 (1959); Kelley v. People, 166 Colo. 322, 443 P.2d 734 (1968); Mingo v. People, 171 Colo. 474, 468 P.2d 849 (1970); Brady v. People, 175 Colo. 252, 486 P.2d 436 (1971); People v. Cox, 190 Colo. 326, 546 P.2d 956 (1976); People v. Brionez, 39 Colo. App.

396, 570 P.2d 1296 (1977); *People v. Simien*, 656 P.2d 698 (Colo. 1983).

II. TRIAL AND PUNISHMENT.

A. In General.

B. Indictment or Information.

C. Evidence.

D. Instructions.

A. In General.

In order for a defendant to be accountable as a principal under this section, it must be shown (1) that the principal actually committed the robbery; (2) that defendant had knowledge that the principal intended to commit the crime; and (3) that defendant aided, abetted, or advised the principal in planning or committing the offense. *People v. Martin*, 192 Colo. 491, 561 P.2d 776 (1977); *People v. Thompson*, 655 P.2d 416 (Colo. 1982).

It is immaterial whether the principal was identified by name in the complicity count against the defendant. *People v. Martin*, 192 Colo. 491, 561 P.2d 776 (1977).

Formal agreement is not required. It is not necessary that persons implicated in crime shall have reached a formal or distinct agreement either orally or in writing as to the exact procedure in the accomplishment thereof. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Defendant need not perform all acts necessary to offense. Where two or more are involved in the commission of a criminal offense and one helps the other, though not actually performing all the acts necessary to

the commission of the offense, all are, nevertheless, principal offenders and are punishable as though all have committed the necessary acts. *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970).

Absence from state at time of crime does not prevent conviction. That defendant charged as accessory in a criminal case was at all times during the happening of the events involved in the crime in another state does not invalidate conviction. *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935).

No election required as to which defendant was accessory. There was no error in the trial court's refusing to compel the district attorney to elect, before the evidence was presented, as to which defendant was principal and which accessory. *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1951).

An accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal, and in the case of codefendants it is unnecessary to spell out which one is the principal and which the accessory, nor is it necessary to characterize and classify the specific acts of each. *Schreiner v. People*, 146 Colo. 19, 360 P.2d 443 (1961).

In the case of codefendants it is unnecessary to spell out which one is the principal and which the accessory. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

When two persons are charged with the same crime, the prosecution is not required to spell out which one is the principal and

which is the accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Applied in *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978); *People v. Alonzi*, 40 Colo. App. 507, 580 P.2d 1263 (1978).

B. Indictment or Information.

An accessory may be charged as principal. *Voris v. People*, 75 Colo. 574, 227 P. 551 (1924); *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935); *Pacheco v. People*, 96 Colo. 401, 43 P.2d 165 (1935); *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939); *Erwin v. People*, 126 Colo. 28, 245 P.2d 1171 (1952); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959); *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

An accessory may be indicted and punished as a principal. *People v. Zobel*, 54 Colo. 284, 130 P. 837 (1913); *Mulligan v. People*, 68 Colo. 17, 189 P. 5 (1920); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

If accessories are under the law deemed and considered as principals, then they are principals insofar as the indictment, trial, and punishment are concerned. *Mulligan v. People*, 68 Colo. 17, 189 P. 5 (1920); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

The acts of the principal are the acts of the accessory, and the accessory may be charged and punished accordingly as a principal. *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

A person who aids, abets, or assists in the perpetration of a criminal offense becomes an accessory to that offense and is chargeable and punishable as a principal.

Reed v. People, 171 Colo. 421, 467 P.2d 809 (1970).

An accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

An accessory charged as a principal for an accessory is deemed and considered a principal, punishable as a principal, and plainly shall be charged as a principal. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Nothing substantial was added to the charge by adding the charge that defendants had aided, counseled, and procured the burning, since, in Colorado, one who aids and abets or advises or encourages is deemed and considered a principal, and may be charged as a principal. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

A defendant may be charged as the principal in a criminal transaction and subsequently tried as an accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

One charged as a principal may be tried and convicted as a complicitor. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

Proper charge satisfies constitution. All participants in the crime are made guilty of the crime under the statute, and therefore when properly charged with the crime, they are sufficiently advised of the accusation against them, within the requirement of the constitutional provision that accused shall have the right to demand the nature and cause of the accusation against him.

Mulligan v. People, 68 Colo. 17, 189 P. 5 (1920); Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

Particulars in which he aided need not be recited. The particulars in which an accessory aided and abetted or advised and encouraged the principal need not be recited. Newton v. People, 96 Colo. 246, 41 P.2d 300 (1935); Martinez v. People, 166 Colo. 524, 444 P.2d 641 (1968).

In the case of codefendants it is unnecessary to characterize and classify the specific acts of the principal and the accessory. McGregor v. People, 176 Colo. 309, 490 P.2d 287 (1971).

It is ultimately the jury's responsibility to determine the specific role a defendant plays. People v. Scheidt, 182 Colo. 374, 513 P.2d 446 (1973).

C. Evidence.

Elements may be established by reasonable inference. That one charged as accessory to crime had knowledge of the principal's intention, coincided therewith, and cooperated in his efforts may be established by reasonable inference from other established facts and circumstances. Harris v. People, 139 Colo. 9, 335 P.2d 550 (1959).

In the trial of an alleged accessory, the state must show by some substantial proof, either directly or by conclusive circumstances, that the accessory had some knowledge of the principal's offense. Dressel v. People, 178 Colo. 115, 495 P.2d 544 (1972).

An admission by alleged principal may be introduced as evidence of the principal's guilt so long as all references to the defendant-accessory are effectively deleted. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Defendants' statements were admissible in prosecution for attempted theft where those statements were not offered to prove conspiracy, but rather to show each defendant's complicity in offense, and court made it clear that it considered any statement offered only as evidence against the defendant who made it. People v. Adams, 678 P.2d 572 (Colo. App. 1984).

Prosecutor at defendant-accessory's trial permitted to introduce evidence establishing principal's guilt. Before a defendant may be convicted as an accessory, the jury must be convinced beyond a reasonable doubt that his accomplice, as the principal, is also guilty of the crime, and in order to satisfy that burden of proof, the prosecution is allowed to introduce evidence otherwise inadmissible at the defendant-accessory's trial for the limited purpose of establishing the guilt of the principal. People v. Scheidt, 182 Colo. 374, 513 P.2d 446 (1973).

Principal's mental state not relevant. Only the defendant's mental state is relevant in proving a charge of complicity. Accordingly, it is no defense that the person with whom the defendant acted is legally not responsible for the crime. People v. McCoy, 944 P.2d 577 (Colo. App. 1996).

Evidence established intent. Where the evidence discloses that the defendants,

acting in concert with another, inflicted stab wounds upon the complaining witness and other victims of the assault, a claim that a defendant had no specific intent to commit bodily injury on the person of the complaining witness, and therefore is not accountable for injuries to her, is without merit. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Evidence sufficient to make a prima facie case. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

D. Instructions.

Evidence warranting instruction on accessory. *Erwin v. People*, 126 Colo. 28, 245 P.2d 1171 (1952).

Where two persons are acting in concert, one holding the victims at bay, the other emptying the cash register, an instruction on accessory is in order. *Schreiner v. People*, 146 Colo. 19, 360 P.2d 443 (1961); *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961).

An accomplice or accessory instruction is applicable and proper where the evidence indicates that one of the defendants was standing by and was aiding, abetting, or assisting in the perpetration of the crime. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Where two or more persons jointly engage in the commission of a crime, the giving of an accessory instruction is proper. *Tanksley v. People*, 171 Colo. 77, 464 P.2d 862 (1970); *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

Complicity instruction given when joint crime. An instruction on complicity may be given when two or more people engage jointly in a crime. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

But court is not required to instruct jury that it must reach a unanimous decision as to whether defendant is convicted as a principal or as a complicitor. Committing a crime either as a principal or complicitor are alternative legal theories and two means of committing a single offense, and are not an impermissible definitional distinction pertaining to a party's status. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Instruction not error simply because possibility of inconsistent verdict. The trial court did not err by instructing on complicity and on sexual assault when the defendant was aided or abetted by others simply because the instructions, when given together, could lead to an inconsistent verdict. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980).

If request made, court required to give limiting instruction. If a request is made for an instruction limiting the use of evidence introduced to establish guilt of principal, the court is required to caution the jury that the evidence can be considered only to show the guilt of the principal and not that of the defendant-accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

If no request made, no duty to limit jury's consideration. Where the defendant failed to request a limiting instruction both

at the time the evidence was introduced and at the close of the trial, absent such a request, there was no duty on the trial court to limit the jury's consideration of the testimony. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Instruction on criminal responsibility held not erroneous. An instruction designed to inform the jury regarding the criminal responsibility of the persons engaged in the concerted common purpose of committing a felony, where the accessory, made a principal by statute, is tried under a separate information is not erroneous. *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939).

Instruction using phrase has "advised or encouraged" is not erroneous. Under the provisions of this section that an accessory is one who has "advised and encouraged, etc.", a court instruction using the phrase, has "advised or encouraged", held not erroneous. *Voris v. People*, 75 Colo. 574, 227 P. 551 (1924).

Instruction given was sufficient. Instruction given, which was couched in the language of the statute and which was read together with the courts' general reasonable doubt instruction, was sufficient to instruct jury properly on complicity. *People v. Lillie*, 707 P.2d 1043 (Colo. App. 1985).

Words "with intent to promote or facilitate" are not words of uncommon meaning which are apt to be misunderstood by a jury and therefore require further definition. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Failure of trial court to give cautionary instruction on accomplices does not constitute reversible error, where there was ample corroboration. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Statutory definitions of mens rea not applicable to complicity. Since complicity is not a substantive crime, the statutory definitions of mens rea do not apply, and instructions defining the mens rea elements of "specific intent" and "intentionally or with intent" are not applicable to, or a necessary element of, the definition of complicity. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Erroneous instruction including mens rea is harmless error. The statutory definitions of mens rea are not necessary elements of complicity. Where an erroneous instruction on complicity requires the finding of a higher standard of culpability, such failure inures to the benefit of the defendant and constitutes harmless error. *People v. Simien*, 671 P.2d 1021 (Colo. App. 1983).

Asserted errors are not structural because the plain language of the pattern complicity instruction sufficiently reflects the complicitor's two mental state requirements under the complicity statute: (1) The defendant had the requisite mens rea for the underlying crime committed by the principal; and (2) the defendant intended that his own conduct would promote or facilitate the commission of the crimes committed by the principal. *Bogdanov v. People*, 941 P.2d 247 (Colo.

1997) (disapproved of by Supreme Court in Griego v. People, 19 P.3d 1 (Colo. 2001)).

An incorrect jury instruction in a criminal case is not a structural error; instead, such instruction is subject only to harmless or plain error review, following the U.S. supreme court precedent in Neder v. United States, 527 U.S. 1 (1999). Therefore, if a conviction is not attributable to the incorrect instruction, a conviction shall not be overturned and all contrary precedent is disapproved of. Griego v. People, 19 P.3d 1 (Colo. 2001) (disapproving on this point Cooper v. People, 973 P.2d 1234 (Colo. 1999), Bogdanov v. People, 941 P.2d 247 (Colo. 1997), People v. Vance, 933 P.2d 576 (Colo. 1997), People v. Villa-Villa, 983 P.2d 181 (Colo. App. 1999)).

"All or part of" language in the standard complicity instruction was not plain error, even though the defendant being charged with the underlying crime under a complicity theory did not actually commit any of the essential elements of that crime and one principal alone committed all elements of the crime. Bogdanov v. People, 941 P.2d 247 (Colo. 1997).

Trial court did not err when it included the "all or part of" language in the complicity instruction. The jury could have reasonably concluded the defendant and another committed the essential elements of the crimes related to the complicity charges. People v. Clark, 2015 COA 44, 370 P.3d 197.

Evidence sufficient to warrant complicity instruction. Evidence led to a reasonable inference that defendant knew of

the other man's possession and intent to distribute controlled substances and that defendant facilitated that conduct by allowing the other man to use his apartment for those purposes. People v. Chavez, 190 P.3d 760 (Colo. App. 2007).

Submission of complicity instruction was error and not harmless where there was no evidence with respect to the existence of an accomplice, despite strong evidence of defendant's guilt on the underlying offense. People v. Gonzales, 728 P.2d 384 (Colo. App. 1986).

Trial court erred in giving complicity instruction. Although the jury was instructed on first degree assault and sexual assault charges that, in order to convict, it must find that defendant's wife intended to commit the crime of sexual assault on a child, that defendant must have known that she intended to commit that crime, and that the defendant did not intentionally aid, abet, advise or encourage her in committing this crime, the evidence did not justify that the wife voluntarily committed sexual assault on her daughter or that defendant's actions were designed to aid her in carrying out such an intent. People v. Moore, 860 P.2d 549 (Colo. App. 1993).

But trial court erred in refusing to give complicity instruction where evidence supported theory that defendant and co-defendant had engaged jointly in crimes. Complicity instruction was warranted when there was evidence that defendant had previously confessed to shootings and admitted that co-defendant had driven car, and that neighborhood residents had seen

two persons, a shooter and a driver, involved in the crimes. Despite defendant's assertion at trial that he had falsely admitted to the shootings and had switched roles with co-defendant, the evidence was sufficient to support a jury instruction on complicity. *People v. Grant*, 30 P.3d 667 (Colo. App. 2000), *aff'd* on other grounds, 48 P.3d 543 (Colo. 2002).

Erroneous instruction on value of stolen property received. Where defendant received property knowing it to have been stolen, and subsequently received from the same parties additional property, fruits of a burglary committed at his suggestion but in which he did not participate, it was error for the trial court to instruct the jury that in arriving at the value of the property received they were limited to the value of such as was "shown to have been stolen prior to the time any knowledge thereof came to the defendant". *People v. Spinuzza*, 99 Colo. 303, 62 P.2d 471 (1936).

III. ILLUSTRATIVE CASES.

Insufficient evidence to show occupant of automobile was accessory. Where two men were charged with causing death by operating a car in a reckless manner while intoxicated, and the only evidence supporting the charge that defendant was an accessory was that he was in the car and was under the influence of intoxicating liquor at the time of the accident, it could not be successfully contended from the evidence that defendant in any way aided and abetted in that regard. *Quintana v. People*, 106 Colo. 174, 102 P.2d 486 (1940).

Participant in robbery during which homicide is committed. If a homicide is committed by one of defendant's associates while engaged in a robbery in furtherance of a common purpose, defendant is guilty of murder in the first degree. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

To convict defendant of attempted murder as a complicitor, defendant must have had the culpable mental state required for attempted murder and must have intended that his own conduct promote or facilitate the commission of attempted first degree murder committed by the principal. *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd* in part, *rev'd* in part on other grounds, 148 P.3d 178 (Colo. 2006).

Culpability of participant in assault. Where defendants and another agree to embark upon an enterprise of stealing hubcaps from automobiles, stole a hubcap from a car belonging to one of the victims of their assault, and upon being pursued and overtaken attack their pursuers, severely cutting and beating them, the assault and the use of knives being concerted and participated in by all three thieves, all are guilty of assault with a deadly weapon. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Where the evidence disclosed that only slight injury was inflicted on deceased in an altercation with defendant, and that thereafter deceased was severely beaten by a third party, resulting in his death, and there was no evidence that defendant participated therein or that there was an express or tacit understanding between defendant and such

third party to injure deceased through a common unlawful purpose, defendant was not an accessory to the acts of such third party. *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960).

Principles of complicity apply to sexual assault in the first degree such that if the actor or an accomplice is armed with and uses a deadly weapon then both may be found to have committed a class 2 felony. *People v. Walford*, 716 P.2d 137 (Colo. App. 1985).

Proof that the complicitor had some knowledge of the principal's offense may be sufficient. Evidence was sufficient to establish that defendant knew that his companion had a knife in his possession and planned to rob the male robbery victim after both men were informed by the woman victim that her husband was in the house. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Record supported jury's determination that defendant was guilty beyond a reasonable doubt of first degree assault where defendant was a complicitor in the robbery of the victim, and in the course of or in furtherance of that crime, the victim was seriously injured by one of the individuals involved in the robbery. Defendant may be held responsible for that serious bodily injury whether or not he knew that someone else intended to inflict it. *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of § 18-3-202 (1)(d)).

One agreeing in advance to buy stolen property. Under this section if one agrees in

advance to buy stolen property, knowing that the property is to be stolen, he thereby encourages the perpetration of the theft, and if the crime is committed he is deemed and considered as principal and punished accordingly. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Where there was evidence presented at trial to the effect that the defendant had stated, prior to the theft, that he would take all the color television sets which could be provided, and there was evidence from which a jury could properly infer that the defendant knew that the television sets would be stolen, the evidence was sufficient to permit submission of the theft by taking count to the jury, it being properly instructed as to an accessory becoming liable as a principal. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Purchaser from one knowingly unauthorized to sell liquor. Under this section each person presenting himself as a buyer from one knowingly unauthorized to sell liquor, became a participant in the act of selling. *Walt v. People*, 46 Colo. 136, 104 P. 89 (1909).

One who knowingly rents premises to be occupied for the purpose of prostitution, and which with his knowledge are conducted as a bawdy house, aids, abets, and assists in keeping and maintaining a house of ill-fame, for the obvious reason that by his affirmative act he knowingly aids another to commit that offense, and as this section makes him a principal, he may be proceeded against and punished accordingly.

Griffin v. People, 44 Colo. 533, 99 P. 321 (1908).

Employee not liable for embezzlement of manager. A conviction for embezzlement by a warehouseman of property must be reversed when there is no evidence to show that the defendant actually took part in the crime and the prosecution failed to establish that the defendant had some knowledge that the manager had perpetrated the crime. Dressel v. People, 178 Colo. 115, 495 P.2d 544 (1972).

Complicity in arson. Evidence was sufficient to make prima facie case against two defendants as complicitors. People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

Convictions for internet luring of a child and internet sexual exploitation of a child under a complicity theory vacated because prosecution failed to prove that defendant committed the crimes or that defendant acted as an accomplice to a principal who committed the crimes. People v. Douglas, 2012 COA 57, 296 P.3d 234.

18-1-604. Exemptions from liability based upon behavior of another.

(1) Unless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting an offense if he is a victim of that offense or the offense is so defined that his conduct is inevitably incidental to its commission.

(2) It shall be an affirmative defense to a charge under section 18-1-603 if, prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-704.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-1-605. Liability based on behavior of another - no defense.

In any prosecution for an offense in which criminal liability is based upon the behavior of another pursuant to sections 18-1-601 to 18-1-604, it is no defense that the other person has not been prosecuted for or convicted of any offense based upon the behavior in question or has been convicted of a different offense or degree of offense, or the defendant belongs to a class of

persons who by definition of the offense are legally incapable of committing the offense in an individual capacity.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-705.

ANNOTATION

Annotator's note. Since § 18-1-605 is similar to former § 40-1-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

At common law a conviction of the principal was required to precede or accompany that of one charged as an accessory and the accessory was subject to the same punishment as the principal. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The conviction of the principal is not a condition precedent to the conviction of an accessory after the fact, before, or during the fact. *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

An accessory is subject to independent prosecution and can be convicted even though principal actor has been neither charged nor convicted of an offense. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo.), *aff'd*

on other grounds, 400 F.2d 392 (10th Cir. 1968).

He may be convicted of a greater crime than the principal, who pled guilty to a lesser included crime, and according to the state, acted under influence of accessory when shooting decedent; such conviction does not deny accessory due process. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo.), *aff'd* on other grounds, 400 F.2d 392 (10th Cir. 1968).

Dismissal of information as to principal does not justify discharge of accessory by court. The dismissal of an information as to a principal, and his discharge, does not justify the discharge of the accessory by the court of its own motion, against the protests of the district attorney. *People v. Zobel*, 54 Colo. 284, 130 P. 837 (1913).

Applied in *People v. Fletcher*, 37 Colo. App. 173, 546 P.2d 980 (1975), *rev'd* on other grounds, 193 Colo. 314, 566 P.2d 345 (1977).

18-1-606. Criminal liability of business entities - definitions.

(1) A business entity is guilty of an offense if:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body or individual authorized to manage the affairs of the business entity or by a high managerial agent acting within the scope of his or her employment or in behalf of the business entity.

(2) As used in this section:

(a) "Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees.

(b) "Business entity" means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; foreign corporations qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.

(3) Every offense committed by a corporation prior to July 1, 1985, which would be a felony if committed by an individual shall subject the corporation to the payment of a fine of not less than one thousand dollars nor more than fifteen thousand dollars. For such offenses committed on or after July 1, 1985, the corporation shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1)(a)(III). Every offense committed by a corporation which would be a misdemeanor, petty offense, or civil infraction if committed by an individual shall subject the corporation to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted. For an offense committed on or after July 1, 2003, a business entity shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1)(a)(III). An offense committed by a business entity that would be a misdemeanor, petty offense, or civil infraction if committed by an individual shall subject the business entity to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the business entity is convicted.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-706. L. 85: (3) amended, p. 658, § 7, effective July 1. L. 2002: (3) amended, p. 1511, § 180, effective October 1. L. 2003: Entire section amended, p. 982, § 18, effective April 17. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3167, § 179, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Criminal Deaths and Injuries", see 16 Colo. Law. Prosecution of Employers for Workplace 1974 (1987).

18-1-607. Criminal liability of an individual for corporate conduct.

A person is criminally liable for conduct constituting an offense which he performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him in his own name or behalf.

Source: L. 71: R&RE, p. 407, § 1. **C.R.S. 1963: § 40-1-707.**

ANNOTATION

Law reviews. For article, "Criminal Prosecution of Employers for Workplace Deaths and Injuries", see 16 Colo. Law. 1974 (1987).

Colo. 1, 240 P.2d 907 (1951) (decided under CSA, C. 108, § 102).

A corporate officer may be criminally liable for embezzlement or larceny of property of third person through a corporate act where the act was performed by the individual officer, or at his direction, or by his permission. Hartson v. People, 125

It is not grounds for dismissal that defendant did not personally participate in every part of the transaction if, as the evidence indicates, he was the causative force behind acts performed in the corporation's name. People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977).

PART 7

JUSTIFICATION AND EXEMPTIONS FROM CRIMINAL RESPONSIBILITY

18-1-701. Execution of public duty.

(1) Unless inconsistent with other provisions of sections 18-1-702 to 18-1-710, defining justifiable use of physical force, or with some other provision of law, conduct which would

otherwise constitute an offense is justifiable and not criminal when it is required or authorized by a provision of law or a judicial decree binding in Colorado.

(2) A "provision of law" and a "judicial decree" in subsection (1) of this section mean:

- (a) Laws defining duties and functions of public servants;
- (b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;
- (c) Laws governing the execution of legal process;
- (d) Laws governing the military service and conduct of war;
- (e) Judgments and orders of court.

Source: L. 71: R&RE, p. 407, § 1. C.R.S. 1963: § 40-1-801.

ANNOTATION

Process server's entry onto land to effect service was legal. And while land owner quickly revoked the implied license once the owner began interacting with the process server, to the extent the process server's conduct was consistent with the laws governing the execution of legal process, the conduct remained statutorily privileged even after the owner revoked the implied license. *People v. Neckel*, 2019 COA 69, 487 P.3d 1036.

Defense not available to penitentiary guard accused of aiding escape. A penitentiary guard, accused of aiding an escape, whose theory of the case is that he was attempting to apprehend an escaped criminal by using undercover techniques is not entitled to a jury instruction on the

affirmative defense of execution of public duty when his authority to make an arrest is limited to penitentiary grounds and there is no evidence he had any authorization to engage in undercover activities. *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979).

Defense not available to deputy sheriff when directed to perform an unauthorized act by sheriff. Deputy sheriff's installation of an eavesdropping device at the direction of the sheriff was not an execution of a public duty when sheriff did not have legal authority to place electronic listening device without court order. *People v. Lesslie*, 24 P.3d 22 (Colo. App. 2000).

18-1-702. Choice of evils.

(1) Unless inconsistent with other provisions of sections 18-1-703 to 18-1-707, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

Source: L. 71: R&RE, p. 407, § 1. C.R.S. 1963: § 40-1-802.

ANNOTATION

Law reviews. For comment, "Civil Disobedience as the Lesser Evil", see 59 U. Colo. L. Rev. 961 (1988). For article, "Choice of Evils in Colorado", see 18 Colo. Law. 1117 (1989). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

The "choice of evils" defense has its roots in the common-law doctrine of necessity, and has long been recognized in criminal law under the latter description. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975).

This section is really no more than a codification of the common law on

"justification defenses". *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

The statutory codification of the choice of evils defense has its roots in the common-law doctrine of necessity. *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Choice of evils defense may be found even though defendant has requisite intent of "knowingly" with respect to offense charged. *People v. Trujillo*, 682 P.2d 499 (Colo. App. 1984).

For this defense to be available, it must first be shown that defendant's conduct was necessitated by a specific and

imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979); *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Normal conditions of confinement will not support a defense of choice of evils pursuant to this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Defense is available in prison escape situation where the prisoner is motivated by a definite, specific, and imminent threat of death or substantial bodily injury. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may be available to justify a prison escape if the facts of the case, as a matter of law, satisfy the conditions stated in this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

But only if escapee immediately reports duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Where the charge is escape, the defendant must also show that the escape was committed without violence and that he voluntarily submitted to authorities as soon as a position of safety was reached. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

As condition for admitting evidence relating to defense, proper foundation must be laid. As a condition to the admission of evidence relating to the choice of evils defense, a proper foundation must be laid, as indicated by this section. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may only be invoked when an offer of proof is made that establishes the requisite statutory foundation. *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

Court may refuse to give choice of evils instruction when defendant fails to comply with procedural requirements of statute and was given reasonable opportunity to comply. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

Choice of evils is potentially available as a defense to any criminal charge unless it is inconsistent with other enumerated affirmative defenses or other explicit provisions of the law. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

Once defense credibly raised, burden of proof shifts to prosecution. Choice of evils is an affirmative defense covered by § 18-1-407, which provides that once "some credible evidence" is presented to raise a defense, the burden is on the prosecution to disprove the defense beyond a reasonable doubt as to that issue as well as all other elements of the offense. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981).

Evidence entitling defendant to choice of evils instruction. Where defense testimony indicated that three men wearing masks and carrying knives attempted to kill the defendant a few nights prior to the escape, that defendant was informed that there was a "contract on his life", and that defendant's cellmates received notes the night of the escape threatening them and the defendant, these facts, if believed by the jury, would show that the defendant was faced with specific and imminent threats mandating a choice of evils instruction. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

"Morality" and "advisability" of statute are not to be tried to jury. Subsection (2) of this section does nothing but emphasize that "morality" or "advisability" of a statute are not things to be tried to a jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

Preliminary determination of admissibility to be decided by court rather than by the jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

And preliminary ruling by court required. It was well within the province of the general assembly to require that a preliminary ruling by the court would serve as a prerequisite in invoking the defense of choice of evils. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Defense of choice of evils is very similar to duress and the foundation requirements set forth in the choice of evils statute was

intended as a safeguard against abuse of the defense. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Before a choice of evils defense may be presented to the jury, the trial court must make an initial determination of whether the allegations of facts by the defendant, if proven, would constitute legal justification for the prohibited conduct. *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

The threat to defendant's person must be so definite, specific, and imminent as to rise beyond mere speculation. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

The felon with a gun statute, § 18-12-108, must be read in pari materia with this section. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

***People v. Carbajal*, 2014 CO 60, 328 P.3d 104, implicitly overruled *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011),** to the extent that *DeWitt* stands for the proposition that a defendant charged under § 18-12-108 (possession of a weapon by a previous offender) is entitled to assert the affirmative defense of choice of evils based solely on a showing that the defendant possessed a firearm while walking in a high-crime neighborhood. *Carbajal's* requirement to show a threat of imminent harm applies. *People v. Hasadinratana*, 2021 COA 66, 493 P.3d 925.

Trial court finding that no emergency existed to justify a choice of evils defense did not conflict with a finding of an emergency sufficient to permit a reduced sentence. People v. Weiser, 789 P.2d 454 (Colo. App. 1989).

Test for sufficiency of offer of proof. A sufficient offer of proof must establish that: (1) All other potentially viable and reasonable alternative actions were pursued or shown to be futile; (2) the action taken had a direct causal connection with the harm sought to be prevented and would bring about the abatement of the harm; and (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. Andrews v. People, 800 P.2d 607 (Colo. 1990).

Offer of proof is insufficient if the defendants fail to show that their criminal actions, rather than legal actions taken by themselves and others, brought about the abatement of the harm or if the offer merely alleges that other persons have attempted to pursue reasonable alternatives or that the criminal action taken was a more effective alternative. Andrews v. People, 800 P.2d 607 (Colo. 1990).

Evidence of a generalized fear of future injury is not sufficient to warrant the invocation of a choice of evils defense. The evidence must affirmatively demonstrate the existence of a specific threat or likelihood of an imminent injury necessitating the actor's conduct. People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990); People v. Metcalf, 926 P.2d 133 (Colo. App. 1996).

A choice of evils defense cannot be based upon economic necessity. People v. Fontes, 89 P.3d 484 (Colo. App. 2003).

If a reasonable legal alternative was available to defendants as a means to avoid the threatened injury, they properly may be foreclosed from asserting a choice of evils defense. People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

A defendant who seeks to assert a choice of evils defense must offer evidence that his conduct did not exceed that reasonably necessary to avoid the impending injury. People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

If a defendant has a viable legal alternative available to him, he is unable to assert the choice of evils defense. People v. Berumen, 2025 COA 93, 583 P.3d 1264.

18-1-703. Use of physical force - special relationships.

(1) The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(a) A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor, may use reasonable and appropriate physical force upon the minor or incompetent person

when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person.

(b) A superintendent or other authorized official of a jail, prison, or correctional institution may, in order to maintain order and discipline, use objectively reasonable and appropriate physical force when and to the extent that he or she reasonably believes it necessary to maintain order and discipline, but he or she may use deadly physical force only when he or she objectively reasonably believes the inmate poses an immediate threat to the person using deadly force or another person.

(c) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use reasonable and appropriate physical force when and to the extent that it is necessary to maintain order and discipline, but he may use deadly physical force only when it is reasonably necessary to prevent death or serious bodily injury.

(d) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use reasonable and appropriate physical force upon that person to the extent that it is reasonably necessary to thwart the result.

(e) A duly licensed physician, advanced practice registered nurse, or a person acting under his or her direction, may use reasonable and appropriate physical force for the purpose of administering a recognized form of treatment that he or she reasonably believes to be adapted to promoting the physical or mental health of the patient if:

(I) The treatment is administered with the consent of the patient, or if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision; or

(II) The treatment is administered in an emergency when the physician or advanced practice registered nurse reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

Source: L. 71: R&RE, p. 408, § 1. C.R.S. 1963: § 40-1-803. L. 76: (1)(b) amended, p. 534, § 15, effective April 9. L. 81: (1)(b) to (1)(d) amended, p. 980, § 2, effective May 13. L. 2008: IP(1)(e) and (1)(e)(II) amended, p. 128, § 8, effective January 1, 2009. L. 2020: IP(1) and (1)(b) amended, (SB 20-217), ch. 110, p. 453, § 4, effective September 1.

Cross references: (1) For the justified use of weapons or other aid to enforce obedience at state correctional facilities, see § 17-20-122; for the use of force in preventing escape from a detention facility, see § 18-1-707 (8); for provisions concerning child abuse, see §§ 18-6-401 and

19-3-102 and part 3 of article 3 of title 19; for the use of force in administering medication to persons with mental illness, see § 27-65-111 (5).

(2) For the legislative declaration in SB 20-217, see section 1 of chapter 110, Session Laws of Colorado 2020.

ANNOTATION

Parental privilege is common-law principle codified. The parental privilege set out in subsection (1)(a) and the definition of criminal child abuse in § 18-6-401 codify common-law principles concerning the limits of permissible parental chastisement. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

At common law, so long as the chastisement was moderate and reasonable in light of the child's age and condition, the misconduct being punished, the kind of punishment inflicted, the degree of harm done to the child and other relevant circumstances, the parent or custodian would incur neither civil nor criminal liability, even though identical behavior against a stranger would be grounds for an action in tort or prosecution for assault and battery or a similar offense. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

Prosecution must establish guilt of child abuse defendant beyond reasonable doubt. Where in a prosecution for child abuse the evidence raises the affirmative defense of justified physical force for disciplinary purposes, the prosecution must establish the guilt of the defendant beyond a reasonable doubt as to that issue as well as

all other elements of the offense. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Acts similar in character admissible to negate claim of justification. Where all the prior acts of child abuse the prosecution sought to introduce into evidence were committed against the same person, each act was occasioned by normal childhood behavior on the part of the victim, each act was similar in severity in that noticeable bruises and marks were left on the child's body, each act took place while the child's mother was absent, and, finally, each act was followed by the defendant's explanation that it was for disciplinary purposes, the acts were sufficiently similar in character to be admissible for purposes of establishing criminal culpability and of negating any claim of accident or justification. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Where statutory affirmative defense of reasonable and appropriate discipline was not raised by defense, failure to include the phrase "without justifiable excuse" in a jury instruction on crime of child abuse was not error. *People v. Lybarger*, 700 P.2d 910 (Colo. 1985).

Applied in *People v. R.V.*, 43 Colo. App. 349, 606 P.2d 1311 (1979).

18-1-704. Use of physical force in defense of a person - definitions.

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or

(b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary as defined in sections 18-4-202 to 18-4-204; or

(c) The other person is committing or reasonably appears about to commit kidnapping as defined in section 18-3-301 or 18-3-302, robbery as defined in section 18-4-301 or 18-4-302, sexual assault as set forth in section 18-3-402, or in section 18-3-403 as it existed prior to July 1, 2000, or assault as defined in sections 18-3-202 and 18-3-203.

(3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:

(a) With intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or

(b) He or she is the initial aggressor; except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force;

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law; or

(d) The use of physical force against another is based on 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. Nothing in this subsection (3)(d) precludes the admission of evidence, which is otherwise admissible, of a victim's or witness's conduct, behavior, or statements.

(4) In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction. The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted recklessly, with extreme indifference, or in a criminally negligent manner. However, the self-defense law instruction shall not be an affirmative defense instruction and the prosecuting attorney shall not have the burden of disproving self-defense. This section shall not apply to strict liability crimes.

(5) As used in this section, unless the context otherwise requires:

(a) "Gender identity" and "gender expression" have the same meaning as in section 18-1-901 (3)(h.5).

(b) "Intimate relationship" has the same meaning as in section 18-6-800.3.

(c) "Sexual orientation" has the same meaning as in section 18-9-121 (5)(b).

Source: **L. 71:** R&RE, p. 409, § 1. **C.R.S. 1963:** § 40-1-804. **L. 72:** p. 274, § 1. **L. 75:** (2)(c) amended, p. 632, § 4, effective July 1. **L. 79:** (2)(c) amended, p. 726, § 1, effective July 1. **L. 81:** (2)(a) and (3)(a) amended, p. 981, § 3, effective May 13. **L. 2000:** (2)(c) amended, p. 703, § 27, effective July 1. **L. 2003:** (4) added, p. 795, § 1, effective March 25. **L. 2020:** (3)(b) and (3)(c) amended and (3)(d) and (5) added, (SB 20-221), ch. 279, p. 1365, § 3, effective July 13.

Cross references: (1) For limitations on civil suits against persons using physical force in defense of a person or to prevent the commission of a felony, see § 13-80-119.

(2) For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For comment on *Vigil v. People* (143 Colo. 328, 353 P.2d 82 (1960)), see 33 Rocky Mt. L. Rev. 430 (1961). For article, "One Year Review of Criminal Law and Procedure", see 40 Den.

L. Ctr. J. 89 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L.J. 137 (1972). For note, "True Equality for Battered Women: The Use of Self-Defense in Colorado", see 70 Den. U. L. Rev. 117 (1992). For article, "Self-

Defense in Colorado", see 24 Colo. Law. 2717 (1995).

Annotator's note. Since § 18-1-704 is similar to former § 40-2-15, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Doctrine of retreat is from common law. There is no statutory provision regarding the duty of a person to retreat before countering the use of force with force. The doctrine derives from the common law. *People v. Watson*, 671 P.2d 973 (Colo. App. 1983).

The common-law doctrine of retreat to the wall has been modified and is applicable in this jurisdiction only to cases where the defendant voluntarily enters into a fight, or the parties engage in mutual combat, or the defendant, being the assailant, does not endeavor in good faith to decline any further struggle before firing the fatal shot, and possibly to other similar cases. *Harris v. People*, 32 Colo. 211, 75 P. 427 (1904); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

The defendant, if he did not provoke the assault, is not obliged to retreat or flee to save his life, but may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose, and this right of the defendant goes even to the extent, if necessary, of taking human life. *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

The "initial aggressor" is the person who initiated the physical conflict by using or threatening the imminent use of unlawful physical force. *Castillo v. People*, 2018 CO 62, 421 P.3d 1141.

Trial court erred in giving the initial aggressor instruction because, in viewing the crime as one episode, there was no evidence that suggested the defendant initiated the physical conflict by using unlawful physical force. *Castillo v. People*, 2018 CO 62, 421 P.3d 1141.

The error was not harmless because the prosecution extensively relied on the initial aggressor exception instruction and thus transformed that instruction into something that substantially influenced the verdict or, at the very least, affected the fairness of the trial proceedings. *Castillo v. People*, 2018 CO 62, 421 P.3d 1141.

Unless a clear agreement to fight can be gleaned from the facts presented, the trial court should not instruct the jury on the mutual combat exception to self-defense. In other words, in the absence of a clear prior agreement between the combatants, the affirmative defense of self-defense is available to a defendant. *United States v. Eddington*, 65 F.4th 1231 (10th Cir. 2023).

Court was correct in not instructing the jury on the mutual combat limitation. There must be a definite agreement to fight in place for the court to issue the instruction. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Subsection (2)(a) does not require the innocent victim of an assault to retreat

before defending himself or herself. People v. Willner, 879 P.2d 19 (Colo. 1994).

The right of self-defense is a natural right and is based on the natural law of self-preservation. Vigil v. People, 143 Colo. 328, 353 P.2d 82 (1960).

Self-defense is available as an affirmative defense for crimes against property. An individual may take only those actions that are reasonably necessary to defend himself or herself, whether the individual's actions are upon the other person directly or indirectly, and which in turn cause property damage, including actions designed to have an impact on that other person, change his or her conduct, or trigger a reaction. People v. Coahran, 2019 COA 6, 436 P.3d 617.

Right to kill in self-defense is not limited to cases where assailant intends to commit a felony. Ritchey v. People, 23 Colo. 314, 47 P. 272 (1896).

The affirmative defense of self-defense requires that "a reasonable person would have believed and acted as the defendant did", and, in this context, a "reasonable person" means an objectively reasonable individual. People v. Castillo, 2014 COA 140M, 488 P.3d 26, rev'd on other grounds, 2018 CO 62, 421 P.3d 1141.

Defendant was entitled to a jury instruction specifying that the defendant was justified in using deadly physical force if she reasonably perceived that the aggressor appeared about to commit a sexual assault upon her and a degree of force less than deadly physical force was

inadequate. This section does not limit the actor's right to use deadly force to those situations in which the aggressor is committing or is about to commit sexual assault on someone other than the actor. People v. Garcia, 1 P.3d 214 (Colo. App. 1999), aff'd, 28 P.3d 340 (Colo. 2001).

Right to kill in defense of another. Where a known felony is attempted upon a person, the party assaulted may repel force by force, and any other person present may interpose for preventing mischief, and if death ensues the party so interposing will be justified. The right thus to assist applies with peculiar force where a relationship exists, such as father, son, brother, or husband. Bush v. People, 10 Colo. 566, 16 P. 290 (1887).

Prosecution must prove beyond a reasonable doubt an exception to self-defense for the jury to reject a defendant's claim of self-defense on that basis. People v. Castillo, 2014 COA 140M, 488 P.3d 26, rev'd on other grounds, 2018 CO 62, 421 P.3d 1141.

When a trial court instructs the jury on the affirmative defense of self-defense, it should instruct the jury on the provocation exception, or any other exception to the affirmative defense, if the exception is supported by some evidence. Galvan v. People, 2020 CO 82, 476 P.3d 746.

"Provocation" is not a technical term requiring a court to define it. While the statute does not include a definition, persons of reasonable intelligence would be familiar with its meaning, which is neither

mysterious nor technical. *People v. Perez*, 2024 COA 94, 559 P.3d 652.

The jury does not need to unanimously agree on how self-defense is disproved by the prosecution. The jury only needs to unanimously agree that self-defense was disproved beyond a reasonable doubt. *People v. Mosely*, 2021 CO 41, 488 P.3d 1074.

Jurors do not need to unanimously agree on a particular exception to self-defense. *People v. Roberts-Bicking*, 2021 COA 12, 490 P.3d 1128.

A party who seeks a difficulty cannot avail himself of the doctrine of self-defense. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887).

The one invoking the right of self-defense cannot be the aggressor or assailant. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Right of self-defense is not lost if danger develops from mild argument. The mere fact that one has interjected himself into a crowd or into a mild situation, does not deprive him of the right of self-defense if the situation beginning with only an argument, develops to a point where he is being subjected to or threatened with such physical violence that he might have to resort to justifiable homicide to protect his person. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

In order to justify theory of self-defense where the defendant used deadly force, he must have reasonably believed that a lesser degree of force was inadequate and that he or another person was in imminent danger of

being killed or of receiving great bodily harm (now great bodily injury). *People v. Ferrell*, 200 Colo. 128, 613 P.2d 324 (1980).

Apparent necessity may justify application of doctrine of self-defense. The doctrine applies whether the danger is actual or only apparent; actual danger is not necessary in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

Person assailed may act on appearances. When a person has reasonable grounds for believing, and does in fact actually believe, that danger of his being killed or of receiving great bodily harm is imminent, he may act on such appearances and defend himself, even to the extent of taking human life when necessary, although it may turn out that the appearances were false, or although he may have been mistaken as to the extent of the real or actual danger. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910); *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964).

One is entitled to act on appearances in using a deadly weapon to defend himself, but the appearances must be such as, taking into consideration the circumstances at the particular instant, would have caused a reasonable and prudent man to use such weapon for his protection. *Henwood v.*

People, 57 Colo. 544, 143 P. 373, 1916A Ann. Cas. 1111 (1914).

Person coming to the aid of a third party is entitled to assert defense of others even if the third party is not entitled to assert self-defense. Person must only have a reasonable belief that intervention is necessary to protect the third party whom he or she believed was under attack. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Character of threat or provocation must be shown. To support the defense of self-defense, it must be shown that the provocation or threat occurred immediately prior to the homicide, and must be of such a character as to place the accused in sudden fear of his life or in fear of great bodily injury. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Belief that lesser degree of force is inadequate must be reasonable, and a reckless perception that defendant needed to use the force he did was inconsistent with a reasonable perception, thus, court did not err in ruling that a self-defense instruction was unavailable. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

In construing subsection (3)(b), according words their plain and ordinary meaning, it is apparent that "initial" means first. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

When an initial aggressor withdraws from an encounter and effectively communicates his withdrawal to the initial victim, the aggressor becomes a victim entitled to act in self-defense should the

initial victim retaliate for the attack. Thus, if the initial victim continues the attack, the victim then becomes the aggressor and is no longer entitled to act in self-defense. *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986).

When a trial court is presented with some evidence that a defendant used force in self-defense, and some evidence that the defendant is the initial aggressor, the court should instruct the jury on both self-defense and the initial aggressor exception. *People v. Newell*, 2017 COA 27, 395 P.3d 1203.

It is then the prosecution's burden to prove beyond a reasonable doubt that defendant's conduct was not authorized as self-defense; the prosecution may meet that burden by proving that the defendant was the initial aggressor. *People v. Newell*, 2017 COA 27, 395 P.3d 1203.

A self-defense instruction should be given when there is any evidence — including circumstantial evidence — that a defendant acted in self-defense. The defendant need not provide direct evidence that he was not the initial aggressor. Instead, the language of the initial aggressor exception should be given in the self-defense instruction when the prosecution points to some evidence that the defendant was the initial aggressor. The jury can then decide if the prosecution met its burden of proof. *People v. Newell*, 2017 COA 27, 395 P.3d 1203.

In determining whether "initial aggressor" jury instruction is appropriate in case in which hostilities commence

among a group of individuals and escalate to a conclusion without interruption, the conduct of the defendant in the context of the developing situation must be the focus of any analysis of defendant's right to self-defense. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

Not error for trial court to instruct jury on the initial aggressor exception to self-defense once the court determined to give the self-defense instruction requested by the defendant. *People v. Montoya*, 928 P.2d 781 (Colo. App. 1996); *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Court may give an initial aggressor instruction if there is an inference that defendant initiated the physical conflict by using or threatening the imminent use of unlawful force. Although defendant's initial confrontation was insufficient to make defendant an initial aggressor, returning to the argument with a gun was sufficient. *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009).

Court did not err in failing to define initial aggressor. Although the court may define the term, there is no basis for error in not defining it when it is unlikely the jury would have relied on the wrong event to apply the initial aggressor doctrine. *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009).

When evidence is sufficient to raise a question of fact concerning defendant's right to come to the defense of another person who might have been the initial aggressor, it would be proper for the court to instruct the jury concerning the limitation on an initial aggressor's right to assert self-

defense, and the right of defendant to act upon a reasonable belief under the circumstances. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

If a participant determines to withdraw from combat and he effectively communicates that intent to his opponent or opponents, then the requisite intent to commit the crime charged has been abandoned. Under these circumstances, the right of self-defense must be reinstated because there is no requirement in Colorado that one "retreat to the wall" before defending himself. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

Even if a person is a trespasser, the person does not have to "retreat to the wall" before using deadly force to defend himself, unless the person was the initial aggressor. *People v. Toler*, 981 P.2d 1096 (Colo. App. 1998), *aff'd*, 9 P.3d 341 (Colo. 2000).

The pattern jury instruction, COLJI-Crim No. 7:68-7 (15) (1983), improperly suggests that a person who is not an initial aggressor may not use physical force to defend himself if the person is not "where he had a right to be". *People v. Toler*, 981 P.2d 1096 (Colo. App. 1998), *aff'd*, 9 P.3d 341 (Colo. 2000).

But a trespasser who is subjected to lawful physical force by a property owner has no privilege under this section to use physical force in self-defense because the privilege applies only when the defendant faces unlawful force. Whether a defendant faces unlawful force will depend on whether the defendant entered the property unlawfully. In such a case, it is the better

practice for the trial court to give an instruction to the jury indicating that, in determining whether a defendant unlawfully entered a dwelling and whether the defendant reasonably believed that unlawful force was used or imminent, the "make-my-day" provision in § 18-1-704.5 should be considered. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Defendant entitled to raise "transferred intent self-defense" as affirmative defense. Therefore, the trial court erred in rejecting self-defense jury instructions. *People v. Koper*, 2018 COA 137, 488 P.3d 409.

Question for jury. Evidence held to clearly justify the submission to the jury of the question as to whether or not the deceased was a person who manifestly intended and endeavored in a violent, riotous, or tumultuous manner to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person dwelling or being therein. *Bailey v. People*, 54 Colo. 337, 130 P. 832 (1913).

Use of word "enormous" instead of "great" in instruction is improper. In an instruction defining the bodily harm to prevent which one may justifiably kill his assailant, the use of the word "enormous" instead of "great" is improper. *Ritchey v. People*, 23 Colo. 314, 47 P. 272 (1896).

Instruction on use of deadly physical force is to be used only if the victim died. Because no victim died, instruction that defendant was justified in use of physical force if he used that degree of force which he reasonably believed to be necessary was

proper. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Defendant entitled to instruction on lesser offense of manslaughter. Where during the trial for first degree murder defendant presented a plausible case for self-defense, which even if the jury deemed it to be an overreaction, nevertheless would negate the elements of murder, the trial court should have instructed the jury on the lesser offense of manslaughter, as defendant requested. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Defendant entitled to have jury instructed on self-defense. A person charged with homicide and defending upon the ground of self-defense is entitled, upon request, to have the jury instructed, when there is conflicting testimony upon the evidence of apparent danger and apparent necessity to kill, as well as upon real danger and actual necessity, and in every aspect of the testimony. To refuse the instruction is a determination by the court of matter of fact, and deprives the accused of his constitutional right to a trial by jury. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

A defendant is entitled to a self-defense instruction if there is any evidence in the record to support the theory that he acted in self-defense. *People v. Dillon*, 631 P.2d 1153 (Colo. App. 1981), rev'd on other grounds, 655 P.2d 841 (Colo. 1982); *People v. Smith*, 682 P.2d 493 (Colo. App. 1983).

Trial court's rejection of defendant's jury instructions on self-defense as an affirmative defense is not harmless error where the jury instructions that were used did not require

the prosecution to disprove self-defense beyond a reasonable doubt. *People v. Koper*, 2018 COA 137, 488 P.3d 409.

When there is at least a scintilla of evidence in support of a self-defense instruction, the court must give a self-defense instruction even if the defendant's claim of accidental shooting is somewhat inconsistent with the claim of self-defense. There was sufficient evidence to require the self-defense instruction, and failure to give the instruction is reversible error. *People v. Wakefield*, 2018 COA 37, 428 P.3d 639.

There is an intent element in the consideration of "deadly" physical force. Since defendant's testimony created a dispute about whether he intended to produce death by use of force, the defendant is entitled to self-defense instructions related to both ordinary physical force and deadly physical force. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

Defendant not entitled to jury instruction on self-defense where defendant did not admit to having engaged in the conduct that led to the charge and then offer self-defense as justification for his action. Also, defendant produced no evidence that he reasonably believed that unlawful force was about to be or was being used against him. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

The prosecution bears no burden in disproving self-defense when self-defense is not an affirmative defense. Self-defense is not an affirmative defense if the crime's mental state is recklessness, criminal negligence, or extreme indifference; rather,

it is an element-negating traverse. The court did not err in instructing the jury that the prosecution did not bear the burden of disproving self-defense in relation to the reckless manslaughter charge. *People v. Pickering*, 276 P.3d 553 (Colo. 2011) (overruling *People v. Lara*, 224 P.3d 388 (Colo. App. 2009) and *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009)); *People v. Luna*, 2020 COA 123M, 474 P.3d 230.

Defense of others is an element-changing defense against extreme indifference murder, rather than a mere circumstance for the jury to consider, and must be portrayed as such in instructions to the jury. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled on other grounds in *People v. Pickering*, 276 P.3d 553 (Colo. 2011).

Prosecution must disprove that defendant acted in reasonable defense of a person in order to prove the elements of extreme indifference murder when that defense is asserted with credible evidence at trial. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled in *People v. Pickering*, 276 P.3d 553 (Colo. 2011).

Court violated defendant's due process right by instructing jurors that prosecution "shall not have the burden of disproving self-defense", when defense of others is asserted with credible evidence at trial. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled in *People v. Pickering*, 276 P.3d 553 (Colo. 2011).

Self-defense instruction is not necessary in every case where force or the threat of force is used, but only where there is

evidence in the record to support it. *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

The trial court properly refused to instruct the theory of self-defense because there was no evidence that the defendant reasonably believed that unlawful physical force was imminent against him. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Even though the general assembly has defined self-defense in this section, it is not improper for the courts to instruct further upon the issue of self-defense. *People v. Berry*, 703 P.2d 613 (Colo. App. 1985).

The court's instruction for physical self-defense was sufficient. Generally, a jury instruction that tracks the statutory language is considered to be sufficient. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

Self-defense instruction required for case involving unreasonable or excessive force during an arrest. Self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

Defendant asserting self-defense, who was not initial aggressor, was entitled to jury instruction regarding no duty to retreat so as to dispel inference that lesser force would have been adequate. *Idrogo v. People*, 818 P.2d 752 (Colo. 1991); *Cassels v. People*, 92 P.3d 951 (Colo. 2004).

Defendant was entitled to a jury instruction on the doctrine of no retreat where, on cross examination, the prosecution elicited evidence that defendant had other choices besides killing her husband, implying that she could have retreated rather than kill him. Also, in closing, the prosecution argued that defendant had many choices besides using force upon her husband, including withdrawal from the situation. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

Self-defense is available as an affirmative defense against charge of heat of passion manslaughter. The general assembly has recognized a reasonable person, suddenly and unexpectedly confronted with potentially deadly or gravely injurious conduct does not act unreasonably by instinctively and passionately striking out at the source of such provoking conduct. *Sanchez v. People*, 820 P.2d 1103 (Colo. 1991).

Instructions on self-defense held proper. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969); *People v. Willner*, 879 P.2d 19 (Colo. 1994).

In a case where some of the evidence indicated that defendant killed in self-defense to protect his person, an instruction to the effect that a defendant may safely act upon appearances to avoid apprehended danger even though it develops later that the appearances were false and that there was in effect no danger to do him serious injury is appropriate. *People v. Tapia*, 183 Colo. 141, 515 P.2d 453 (1973).

Instruction held denial of right of self-defense. An instruction to the effect that in order for the doctrine of self-defense to apply, the jury must believe that deceased intended to assault or kill the inmates of the house is error as a denial of the right of self-defense as defined in this section. *Bailey v. People*, 54 Colo. 337, 130 P. 832 (1913).

Instruction held denial of right to present a defense. When no evidence was presented at trial that defendant intended to provoke a fight with the victims or their friend for the purpose of inflicting injury upon them under a guise of provocation, an instruction on the issue of provoking the victim as an exception to self-defense violated the defendant's right to present a defense. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Instruction on self-defense held deficient because it only stated that self-defense is an affirmative defense to the crime of manslaughter if the defendant had reasonable grounds to believe, and did believe, that he or another person was in imminent danger or being killed or receiving great bodily injury; the instruction failed to inform the jury that self-defense is an affirmative defense if the deceased had been committing or reasonably appeared about to commit first or second degree assault. *People v. Janes*, 982 P.2d 300 (Colo. 1999).

An instruction that defendant must retreat to the wall is erroneous. Where the jury is instructed that the defendant in every case must retreat to the wall before he is entitled to resort to self-defense, the error is manifest. *Ritchey v. People*, 23 Colo. 314,

47 P. 272 (1896); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

Instruction on combat by agreement held deficient because it provided no guidelines as to elements which must be proved by prosecution. *People v. Cuevas*, 740 P.2d 25 (Colo. App. 1987).

Self-defense may be asserted as a defense to attempted heat of passion manslaughter. *Thomas v. People*, 820 P.2d 656 (Colo. 1991).

Defendant charged with heat of passion manslaughter may assert a claim of self-defense. Evidence of low IQ and physical and sexual abuse of the defendant in the past is admissible to prove the claim of self defense. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

Self-defense is an available defense against a charge of obstructing a peace officer when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer. *People v. Barrus*, 232 P.3d 264 (Colo. App. 2009).

As is instruction that slayer must have had no other probable means of escape. It was error to charge the jury to the effect that to justify homicide on the plea of self-defense it must appear that the slayer had no other possible, or at least probable, means of escaping. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

When the "make-my-day" statute (§18-1-704.5) is being used as an affirmative defense, it is error for a jury instruction to

place the burden on the defendant to prove the affirmative defense. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Assertion of error for failure to give instruction not well taken. Where the record discloses that the defendant did not tender nor request the giving of an instruction on self-defense, nor did he assign the court's failure to give the instruction as a ground for new trial, nor was there evidence to support the giving of such an instruction, for all these reasons the assertion of error for failure to give such instruction is not well taken. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Instruction on provocation of the victim given over defense objection held reversible error because the court failed to determine which issues were raised by the evidence prior to giving the instruction; accordingly, the error was not harmless because the giving of the instruction created a situation that could have been misleading and confusing to the jury. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Limitation of right to emergencies is erroneous. In a prosecution for murder an instruction on self-defense which advised the jury that the right of self-defense is based upon the law of necessity, and is only given in emergencies to persons who are attacked, was erroneous. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Limitation of right of self-defense to persons who do not bring on the difficulty themselves is too broad a statement. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Defendant is entitled to present evidence of prior violent act of victim if:

(1) The defendant contends that he acted in self-defense and there is competent evidence to support the contention; (2) either the act occurred or the defendant became aware of its occurrence within a reasonable time of the homicide; and (3) the defendant knew of the victim's prior violence at the time of the homicide. *People v. Ferrell*, 200 Colo. 128, 613 P.2d 324 (1980).

Spouse justified in aiding victimized spouse. A wife is clearly justified in attempting to aid her husband when he is the victim of an assault, and the husband's assailant who, as a result, then assaults the wife cannot claim that his actions were justified on the basis of self-defense. *People v. Schliesser*, 671 P.2d 993 (Colo. App. 1983).

Self-defense instruction is not appropriate where defendant presents evidence of "battered woman syndrome" but is on trial for contract-for-hire murder of her husband. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1991).

Self-defense instruction based on battered woman syndrome is not available in murder-for-hire cases, regardless of the definition of "imminent" under this section. A defendant is entitled to an instruction embodying the defendant's theory of the case only if there is evidence to support the theory. In case where a wife hired her husband's killers, the wife's evidence that she suffered from battered woman syndrome was insufficient as a matter of law to support her theory that she

was in imminent danger at the time her husband was killed. The trial court, therefore, erred in allowing a self-defense instruction. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1992).

Lay witness may offer opinion testimony on intent of victim if witness had sufficient opportunity to observe the person and draw a rational conclusion about the person's state of mind. *People v. Jones*, 907 P.2d 667 (Colo. App. 1995).

Whether use of knife in defense is excessive force is a jury question. *People v. Smith*, 682 P.2d 493 (Colo. App. 1983).

No error in refusing to instruct the jury regarding felony menacing where the record was devoid of any evidence or indication that the defendant could have held a reasonable belief that the man he threatened with a knife was engaged in the imminent use of unlawful physical force against defendant's brother. *People v. Williams*, 827 P.2d 612 (Colo. App. 1992).

Unless a defendant demonstrates the required level of prejudice under a

harmless error or plain error standard, giving an unsupported instruction on a self-defense exception does not necessarily warrant reversal. *People v. Castillo*, 2014 COA 140M, 488 P.3d 26, rev'd on other grounds, 2018 CO 62, 421 P.3d 1141.

Trial court committed plain error requiring reversal of conviction in not giving self-defense law instruction to jury on the charge of reckless manslaughter. Court informed jury only that it could consider self-defense with respect to count of reckless manslaughter without describing the law of self-defense. *People v. McClelland*, 2015 COA 1, 350 P.3d 976; *People v. Luna*, 2020 COA 123M, 474 P.3d 230.

Applied in *Hardy v. People*, 133 Colo. 201, 292 P.2d 973 (1956); *Maes v. People*, 166 Colo. 15, 441 P.2d 1 (1968); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Jones*, 675 P.2d 9 (Colo. 1984); *People v. Reed*, 695 P.2d 806 (Colo. App. 1984); *People v. Jones*, 2023 COA 104, 543 P.3d 419.

18-1-704.5. Use of deadly physical force against an intruder.

(1) The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes.

(2) Notwithstanding the provisions of section 18-1-704, any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

(3) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force.

(4) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.

(5) As used in this section, unless the context otherwise requires, "dwelling" does not include any place of habitation in a detention facility, as defined in section 18-8-211 (4).

Source: **L. 85:** Entire section added, p. 662, § 1, effective June 6. **L. 2016:** (5) added, (HB 16-1190), ch. 87, p. 245, § 1, effective August 10.

Cross references: For limitations on civil suits against persons using physical force in defense of a person or to prevent the commission of a felony, see § 13-80-119.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

Conducting a hearing under this section using videoconferencing technology does not violate a defendant's confrontation right or the spirit of Crim. P. 43. The confrontation right does not include an absolute right to face-to-face confrontation, it only reflects a preference for it. *People v. Hernandez*, 2021 CO 45, 488 P.3d 1055.

The court detailed findings in its order granting videoconferencing that indicated that the decision was based on the COVID-19 public health risk of in-person hearings.

The findings provided sufficient justification that defendant's confrontation right was not violated. *People v. Hernandez*, 2021 CO 45, 488 P.3d 1055.

Crim. P. 43 does not require an in-person hearing. If the defendant objects to videoconferencing, a court can permit the prosecution and witnesses to appear by videoconferencing while the defendant and counsel appear in person during a public health crisis. *People v. Hernandez*, 2021 CO 45, 488 P.3d 1055.

Prerequisite for immunity under this section is an unlawful entry into the dwelling, meaning a knowing, criminal entry. *People v. McNeese*, 892 P.2d 304 (Colo. 1995); *People v. Jones*, 2018 COA

112, 434 P.3d 760; *People v. Jones*, 2023 COA 104, 543 P.3d 419.

To be immune from prosecution under this section a defendant must establish by a preponderance of the evidence that he or she had a reasonable belief that the intruder was committing or intended to commit a crime against a person or property in addition to the uninvited entry. This inquiry focuses on the reasonable belief of the occupant, not on the actual conduct of the intruder. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

Sufficient evidence existed to support trial court's denial of defendant's pre-trial motion to dismiss on the basis defendant had not met his burden as established by the supreme court. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Trial court is authorized to dismiss criminal prosecution at pretrial stage when conditions of statute are satisfied, and this does not infringe upon prosecution's discretion to file charges. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *Young v. District Court*, 740 P.2d 982 (Colo. 1987).

Defendant bears burden of establishing right to immunity by preponderance of evidence when issue of immunity is raised at pre-trial stage. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Fact that a homicide victim was on the defendant's porch does not permit the defendant to claim immunity from prosecution for unlawful entry to defendant's dwelling unless the court finds that defendant believed that the victim

intended to commit a crime or use physical force against the defendant. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

A person inside a dwelling who uses force against a person on an outdoor doorstep of the dwelling is not immune from prosecution. A person on an outdoor doorstep is a non-entrant. *People v. Howell*, 2024 CO 42, 550 P.3d 679.

Defendant may still raise immunity as defense at trial when pretrial motion to dismiss is denied. *People v. Guenther*, 740 P.2d 971 (Colo. 1987).

Like ordinary self-defense, the force-against-intruders defense is an affirmative defense only with respect to offenses requiring a mental state of knowing or intentionally; the affirmative defense of force against intruders is inconsistent with conduct involving a reckless mental state. *People v. Martinez*, 2022 COA 111, 522 P.3d 725, *aff'd*, 2024 CO 48, 550 P.3d 713.

The force-against-intruders defense is a traverse to crimes involving reckless conduct because the force-against-intruders defense, like self-defense, only protects defendants who acted justifiably and reasonably. These requirements make the force-against-intruders defense irreconcilable with reckless conduct, which is intrinsically unjustifiable and unreasonable. *Martinez v. People*, 2024 CO 48, 550 P.3d 713.

When the charged offense involves reckless conduct, the force-against-intruders defense is an elemental traverse. The jury may consider evidence that the

defendant acted in self-defense in determining whether the prosecution proved each element of the offense beyond a reasonable doubt, but the defendant is not entitled to an affirmative force-against-intruders defense instruction. *People v. Martinez*, 2022 COA 111, 522 P.3d 725.

For purposes of this section, "dwelling" includes an apartment building's shared basement that is accessible to all tenants. The basement was part of the building that the defendant used for habitation. Some of the usual uses of the basement were incidental to and part of the defendant's use of the residence. *People v. Rau*, 2022 CO 3, 501 P.3d 803 (overruling *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1993)).

For purposes of this section, an outdoor doorstep is not part of a dwelling. *People v. Howell*, 2024 CO 42, 550 P.3d 679.

For purposes of this section, the common areas of an apartment building do not constitute a dwelling. *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1993), overruled in *People v. Rau*, 2022 CO 3, 501 P.3d 803.

However, the basement of an apartment building that is accessible to all tenants for the purpose of managing utilities in the tenant's individual apartment is considered part of the tenant's "dwelling". *People v. Rau*, 2020 COA 92, 490 P.3d 804, *aff'd*, 2022 CO 3, 501 P.3d 803 (overruling *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1993)).

Where pretrial motion to dismiss on grounds of statutory immunity provided in this section is denied, defendant may raise it as an affirmative defense at trial. In such case, the burden of proof which is generally applicable to affirmative defenses would apply. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

Section does not authorize an appeal from a pretrial order denying immunity. An order denying defendant's pretrial motion to dismiss under this section is not a final judgment and therefore not subject to appeal. In general, the jury's verdict subsumes the trial court's pretrial ruling. A defendant may, however, seek review prior to trial under C.A.R. 21. *Wood v. People*, 255 P.3d 1136 (Colo. 2011).

Because this section creates an immunity defense as well as an affirmative defense, and because the burden of proof for each defense is different, when raised at trial, this section poses special problems when instructing a jury. In such a case, instruction based on language from *People v. McNeese*, annotated above, which dealt with pretrial immunity, must be put into context so as not to confuse or mislead the jury about the burden of proof with respect to an affirmative defense raised at trial. *People v. Janes*, 982 P.2d 300 (Colo. 1999).

Defendant did not establish by a preponderance of the evidence that he was entitled to immunity under this section where he could not show the struggle and wounding of the victim took place in defendant's bedroom of the house he shared

with the victim. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Trial court did not commit reversible error by refusing to instruct the jury that it need only determine whether the victim made an unlawful entry into a part of a dwelling that was occupied by defendant, as defendant failed to show that the bedroom was exclusively his province and that the victim's entry into the bedroom was unlawful. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

An instruction clarifying the meaning of "unlawful entry" is necessary when the evidence supports a theory that the defendant accidentally entered the dwelling or otherwise entered without the requisite mental state. *People v. Jones*, 2018 COA 112, 434 P.3d 760.

Trial court erred in failing to instruct the jury that this section requires a "knowingly" unlawful entry into the home. Because the jury could have found defendant's entry to be mistaken or accidental, it could have further determined that the homeowners did not have the exclusive right to use force during the encounter. *People v. Jones*, 2018 COA 112, 434 P.3d 760.

Instruction requiring jury to find that defendant had a reasonable belief that victim "had committed" a crime and omitting "was committing or intended to commit" a crime was erroneous but did not constitute plain error. There was no evidence that the victim's entry into defendant's house was unlawful and, therefore, no basis on which a reasonable jury could have otherwise acquitted

defendant under this section. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

Jury instructions in error. Jury instruction that states that entry into a dwelling "must have been made in knowing violation of the law" could mislead the jury and thus is in error. Language is misleading in that it could be taken to mean that an intruder must know his or her conduct violates a criminal statute rather than that the intruder must not have a reasonable belief that his or her entry is licensed, invited, or otherwise privileged. *People v. Zukowski*, 260 P.3d 339 (Colo. App. 2010).

Jury instruction that states "[a]n entry made in the good faith belief that it is lawful, is not an entry made in knowing violation of the criminal law" allows an interpretation that the entry would not be unlawful under the make-my-day statute, and, thus, the instruction is also in error. An intruder may act under a mistaken belief of fact that he or she was lawfully on the premises and that this type of entry would not be unlawful under the make-my-day statute. A mistaken belief that an entry, although uninvited, is lawful does not make it lawful. *People v. Zukowski*, 260 P.3d 339 (Colo. App. 2010).

Trial court erred in interpreting subsection (2) as including the concept of "remain lawfully" within the statutory phrase "unlawful entry". Defendant failed to establish the legal elements of this section to bar prosecution where the victim was initially invited into defendant's residence and, after arguing, was later asked to leave.

People v. Drennon, 860 P.2d 589 (Colo. App. 1993).

The reference to "uninvited entry" in subsection (2) refers back to the term "unlawful entry" used in the same subsection. People v. McNeese, 892 P.2d 304 (Colo. 1995).

Victim's entry was unlawful and uninvited for the purposes of statute providing immunity for use of force where wife of murder victim did not have authority to invite the decedent into defendant's apartment and was staying with the

defendant on the condition that she not invite the victim into defendant's apartment. People v. McNeese, 865 P.2d 881 (Colo. App. 1993).

When this section is being used as an affirmative defense, it is error for a jury instruction to place the burden on the defendant to prove the affirmative defense. People v. Janes, 962 P.2d 315 (Colo. App. 1998).

Applied in People v. Arellano, 743 P.2d 431 (Colo. 1987).

18-1-705. Use of physical force in defense of premises.

A person in possession or control of any building, realty, or other premises, or a person who is licensed or privileged to be thereon, is justified in using reasonable and appropriate physical force upon another person when and to the extent that it is reasonably necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises. However, he may use deadly force only in defense of himself or another as described in section 18-1-704, or when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit first degree arson.

Source: L. 71: R&RE, p. 409, § 1. C.R.S. 1963: § 40-1-805.

Cross references: For first degree arson, see § 18-4-102.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

Common-law doctrine of retreat not applicable. Where the jury was told that though the defendant was in his place of business, and was in no way the aggressor, a deadly and unprovoked assault was made

upon him by one armed with a loaded pistol, he was under duty to flee unless it was more dangerous to retreat than to fight, it was held a pernicious application of the common-law doctrine of retreat to the wall long since abrogated in this jurisdiction. *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919) (decided under R.S. 08, § 1634).

One cannot instantly kill in defense of property. While a man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who

comes to dispossess him without right, he cannot instantly carry his defense to the extent of killing the aggressor. If no other way is open, he must yield and get himself righted by resort to the law. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887) (decided under G. S. § 721).

This section is not, by its terms, inapplicable to unlawful entries where the trespassers happen to be police officers. *People v. Lutz*, 762 P.2d 715 (Colo. App. 1988).

18-1-706. Use of physical force in defense of property.

A person is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the other person to commit theft, criminal mischief, or criminal tampering involving property, but he may use deadly physical force under these circumstances only in defense of himself or another as described in section 18-1-704.

Source: L. 71: R&RE, p. 409, § 1. C.R.S. 1963: § 40-1-806.

Cross references: For theft, see part 4 of article 4 of this title 18; for criminal mischief, see § 18-4-501; for criminal tampering, see §§ 18-4-505 and 18-4-506.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

One cannot instantly kill in defense of property. While a man may use all

reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who comes to dispossess him without right, he cannot instantly carry his defense to the extent of killing the aggressor. If no other way is open, he must yield and get himself righted by resort to the law. *Bush v. People*,

10 Colo. 566, 16 P. 290 (1887) (decided under G. S. § 721).

When instruction on defense appropriate. A defendant is entitled to a

jury instruction on an affirmative defense only if evidence in the record supports it. Here record does not support entitlement to instruction. *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986).

18-1-706.5. Justification and exemption from liability when rendering emergency assistance to an at-risk person or animal in a locked vehicle.

A person is justified and exempt from criminal liability for criminal mischief, criminal trespass, or criminal tampering involving property if such action occurred when he or she rendered emergency assistance to an at-risk person or animal in a locked vehicle, provided the person rendering assistance acted in accordance with the provisions of section 13-21-108.4.

Source: L. 2017: Entire section added, (HB 17-1179), ch. 127, p. 436, § 2, effective August 9.

18-1-707. Use of force by peace officers - definitions.

(1) Peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. A peace officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of injury to the peace officer or another person.

(1.5) (a) Pursuant to section 18-8-805 (1) and (2)(a)(I), peace officers shall not use, direct, or unduly influence the use of ketamine upon another person nor compel, direct, or unduly influence an emergency medical service provider to administer ketamine. If a peace officer violates this prohibition, the district attorney may charge the officer with any crime based on the facts of the case.

(b) As used in this subsection (1.5), unless the context otherwise requires, "unduly influence" means the improper use of power or trust in a way that deprives a person of free will and substitutes another's objective.

(c) Notwithstanding subsection (1.5)(a) of this section, a peace officer who is also certified as an emergency medical service provider may administer ketamine pursuant to the restrictions set forth in section 25-3.5-209 and when the decision to administer ketamine is based on the emergency medical service provider's training and expertise.

(2) When physical force is used, a peace officer shall:

(a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;

(b) Use only a degree of force consistent with the minimization of injury to others;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and

(d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.

(2.5) (a) A peace officer is prohibited from using a chokehold upon another person.

(b) (I) As used in this subsection (2.5), "chokehold" means a method by which a person applies sufficient pressure to a person to make breathing difficult or impossible and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing or reduce intake of air.

(II) "Chokehold" also means applying pressure to a person's neck on either side of the windpipe, but not to the windpipe itself, to stop the flow of blood to the brain via the carotid arteries.

(2.7) (a) As used in this subsection (2.7), unless the context otherwise requires:

(I) "Mechanical restraint" means a physical device used to involuntarily restrict the movement of a person or the movement or normal function of a portion of a person's body.

(II) "Prone position" means a position in which a person is lying on a solid surface with the person's chest and abdomen positioned downward even if the person's face is turned to the side or the person has one shoulder lifted.

(III) "Prone restraint" means a use of physical force, including, but not limited to, the use of a mechanical restraint, in which the person who is being restrained is in a prone position.

(IV) "Recovery position" means a position other than a prone position that allows the person to breathe normally.

(b) On or before July 1, 2025, any Colorado law enforcement agency that employs a peace officer required to be certified by the P.O.S.T. board pursuant to section 16-2.5-102, a sheriff, and the Colorado state patrol shall:

(I) Adopt written policies and procedures concerning use of the prone position and prone restraint by:

(A) Peace officers required to be certified by the P.O.S.T. board pursuant to section 16-2.5-102 employed by a Colorado law enforcement agency;

(B) Sheriff's deputies, regardless of P.O.S.T. certification, who are engaged in patrol, arrest, taking suspects into custody, transporting detainees, or who have direct contact with inmates within county or local jails; or

(C) Colorado state patrol officers; and

(II) Post the adopted policies and procedures on the entity's publicly accessible website, or, if the entity does not have a publicly accessible website, make the policy and procedures publicly available upon request.

(c) The policies and procedures adopted pursuant to subsection (2.7)(b) of this section must include, but need not be limited to, the following:

(I) When and how to request medical aid for use of force involving a prone restraint;

(II) When to get medical clearance for use of force involving a prone restraint when there are injuries or complaints of injuries;

(III) How and when appropriate medical aid within the scope of a peace officer's training should be rendered for any use of force involving prone restraint; and

(IV) How and when to appropriately and safely transition any person placed in a prone position into a recovery position as soon as practicable.

(d) Each entity must review policies and procedures adopted pursuant to subsection (2.7)(b) of this section at least every five years to ensure the policies and procedures are updated to include current best practices.

(e) Beginning on or before July 1, 2026, each entity required to adopt policies and procedures pursuant to subsection (2.7)(b) of this section shall implement and train its peace officers on the provisions of the policies and procedures adopted pursuant to subsection (2.7)(b) of this section.

(f) The P.O.S.T. board, created in section 24-31-302, shall make its training on the use of the prone position available to all law enforcement agencies in the state.

(3) A peace officer is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:

(a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;

(b) The suspect poses an immediate threat of death or serious bodily injury to the peace officer or another person;

(c) The force employed does not create a substantial risk of injury to other persons.

(4) A peace officer shall identify himself or herself as a peace officer and give a clear verbal warning of his or her intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would unduly place peace officers at risk of injury or would create a risk of death or injury to other persons.

(4.5) Notwithstanding any other provision in this section, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving serious bodily injury.

(5) Except as provided in subsection (6) of this section, a person who has been directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody is justified in using reasonable and appropriate physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction, unless he knows that the arrest or prospective arrest is not authorized.

(6) A person who has been directed to assist a peace officer under circumstances specified in subsection (5) of this section may use deadly physical force to effect an arrest or to prevent an escape only when:

(a) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by the peace officer to use deadly physical force and does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances.

(7) A private person acting on his own account is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of an arrested person who has committed an offense in his presence; but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

(8) A guard or peace officer employed in a detention facility is justified:

(a) In using deadly physical force when he reasonably believes it necessary to prevent the escape of a prisoner convicted of, charged with, or held for a felony or confined under the maximum security rules of any detention facility as such facility is defined in subsection (9) of this section;

(b) In using reasonable and appropriate physical force, but not deadly physical force, in all other circumstances when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility.

(9) "Detention facility" as used in subsection (8) of this section means any place maintained for the confinement, pursuant to law, of persons charged with or convicted of an offense, held pursuant to the "Colorado Children's Code", held for extradition, or otherwise confined pursuant to an order of a court.

(10) Repealed.

Source: **L. 71:** R&RE, p. 410, § 1. **C.R.S. 1963:** § 40-1-807. **L. 75:** (2)(b) R&RE, p. 616, § 2, effective July 21. **L. 2016:** IP(1), (3), and (4) amended and (2.5) added, (HB 16-1264), ch. 341, p. 1390, § 1, effective July 1. **L. 2020:** (2.5) and (3) R&RE and (10) added, (SB 20-217), ch. 110, pp. 454, 456, §§ 5, 7, effective June 19; (1), (2), and (4) R&RE and (4.5) added, (SB 20-217), ch. 110, p. 454, § 5, effective September 1. **L. 2021:** (1) and (3)(b) amended, (HB 21-1250), ch. 458, p. 3063, § 8, effective July 6; (1.5) added, (HB 21-1251), ch. 450, p. 2959, § 3, effective July 6. **L. 2024:** (2.7) added, (HB 24-1372), ch. 348, p. 2354, § 1, effective June 3.

Editor's note: Subsection (10)(b) provided for the repeal of subsection (10), effective January 1, 2021. (See L. 2020, p. 456.)

Cross references: (1) For the "Colorado Children's Code", see title 19.

(2) For the legislative declaration in SB 20-217, see section 1 of chapter 110, Session Laws of Colorado 2020.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers", see 33 Colo. Law. 55 (Mar. 2004). For article, "Police Use of Force Standards Under Colorado and Federal Law", see 36 Colo. Law. 47 (May 2007).

Annotator's note. Since § 18-1-707 is similar to former § 40-2-16, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Officer may use reasonable force to protect himself or detain offender. An officer who is making a lawful arrest, or has

made an arrest, is justified in using such force as is reasonably necessary to secure and detain the offender, overcome his resistance, prevent his escape, recapture him if he escapes, and to protect himself from bodily harm; but he is never justified in using unnecessary force or treating his prisoner with wanton violence, or in resorting to dangerous means when the arrest could be effected otherwise. *People ex rel. Little v. Hutchinson*, 9 F.2d 275 (8th Cir. 1925).

Officer cannot use excessive force in making an arrest or bringing one into submission. *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613 (1972).

Officer is not required to retreat. A police officer who is assaulted by one whom he is lawfully attempting to arrest is not required to retreat to the wall before resorting to such defensive measures as may reasonably seem necessary to protect himself against loss of life or great bodily injury. *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896).

Authority to take life based on apparent necessity. This section does not clothe an officer with authority to judge arbitrarily that it is necessary to take life in order to prevent the rescue of his prisoner. He is not warranted in taking life unless there is an apparent necessity for it and if he does so he is not permitted to take shelter behind his official character. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

Use of force is ordinarily a question for jury. An officer who intentionally uses more

force than is reasonably necessary in making an arrest is oppressively discharging the duties of his office. What amounts to reasonable force depends upon the facts of each particular case and is ordinarily a question of fact for the jury. *People ex rel. Little v. Hutchinson*, 9 F.2d 275 (8th Cir. 1925); *People v. Fuller*, 756 P.2d 390 (Colo. App. 1987), *aff'd in part, rev'd in part on other grounds*, 781 P.2d 647 (Colo. 1989).

The question of the absence or existence of the necessity to take the life of a prisoner is finally for the jury. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

Police officer's actions were not within section. Where complaining witness remarked that the police officer was "some kind of a pig" when the officer twice refused to tell the complaining witness why he was being arrested and the officer reacted by pulling his revolver on the complaining witness, the officer's actions were not within the statute authorizing the use of deadly physical force. *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977).

Before a private person can use physical force to effect an arrest pursuant to subsection (7), the arrest must first be authorized under § 16-3-201. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

In addition, the person on whom physical force is used under subsection (7) must have either committed a crime in the presence of or attempted escape from custody in the presence of the person using the physical force. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

18-1-708. Duress.

A person may not be convicted of an offense, other than a class 1 felony, based upon conduct in which he engaged at the direction of another person because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been unable to resist. This defense is not available when a person intentionally or recklessly places himself in a situation in which it is foreseeable that he will be subjected to such force or threatened use thereof. The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application.

Source: L. 71: R&RE, p. 411, § 1. C.R.S. 1963: § 40-1-808. L. 88: Entire section amended, p. 712, § 15, effective July 1.

ANNOTATION

Defense of choice of evils is very similar to duress and the foundation requirements set forth in the choice of evils statute was intended as a safeguard against abuse of the defense. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Defense available where imminent threat of use of unlawful force. Generally, where the threat of unlawful use of force is alleged, this defense is available only if the threat is one of present, impending, and imminent use of force, and a threat of future injury is not enough. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978).

Defendant must show specific and imminent threat. The defense of duress is unavailable unless a defendant shows a specific and imminent threat of injury to his person under circumstances which leave him no reasonable alternative other than the

violation of the law for which he stands charged; mere speculation that injury may occur is not sufficient. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981); *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

A defendant must make a threshold showing of: (1) An immediate threat of death or bodily injury; (2) a well-grounded fear the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002); *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

Any threat must be more than mere speculation or a veiled threat of unspecified future harm. *People v. Trujillo*, 586 P.2d 235 (Colo. App. 1978); *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Prosecution to establish lack of duress. Because duress is an affirmative defense, the

prosecution must establish, beyond a reasonable doubt, the defendant's guilt as to that issue. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

When an accused presents some credible evidence on the issue of duress, the prosecution must establish beyond a reasonable doubt the defendant's guilt as to that issue as well as all other elements of the offense. *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

Whether threat is imminent is question of fact. The question whether a threat is imminent is, in all but the clearest of cases, to be decided by the trier of fact after considering all of the surrounding circumstances, including the defendant's opportunity and ability to avoid the harm. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978); *People v. Speer*, 216 P.3d 18 (Colo. App. 2007).

Where defendant improperly denied opportunity to present evidence on issue. Where a defendant was allowed to testify only about the most recent of a series of events occurring over a five-month period, he was unreasonably deprived of the opportunity to detail the evidence that would lend credence to his affirmative defense under this section. *People v. Trujillo*, 41 Colo. App. 223, 586 P.2d 235 (1978).

Where evidence goes to defendant credibility rather than submissibility of defense. Where a defendant testifies that he was specifically threatened with injury to himself and to his family if he refused to hold contraband or if he reported the incident to the authorities, his failure to

identify the person who threatened him goes to the credibility of the explanation, rather than to the submissibility of the defense to the jury. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978).

Defense not available to escapee unless he immediately reports duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

The trial court erred in allowing jury instruction on the affirmative defense of duress in a contract for murder case where a wife claiming that she suffered from battered woman syndrome hired her husband's killers. There was no evidence that the defendant acted at the direction of another person. Although this section did not require that person act at the direction of another person at the time of the murder, case law required such a condition to exist. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1992).

No error in district court's rejection of defendant's proffered jury instruction concerning duress. Where it was undisputed that defendant had a gun and drove himself to the scene of the crime, the court found that there was no evidence from which a reasonable jury could conclude that defendant acted under duress. *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

The common-law theory that control by the husband is presumed was abolished by statute. The law of this state requires the coercion by the husband to be proved.

Dalton v. People, 68 Colo. 44, 189 P. 37 (1920) (decided under R. S. 08, § 1616).

Applied in People v. DeJesus, 184 Colo. 230, 519 P.2d 944 (1974); People v. Bailey, 41 Colo. App. 385, 590 P.2d 508 (1978).

18-1-709. Entrapment.

The commission of acts which would otherwise constitute an offense is not criminal if the defendant engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and the methods used to obtain that evidence were such as to create a substantial risk that the acts would be committed by a person who, but for such inducement, would not have conceived of or engaged in conduct of the sort induced. Merely affording a person an opportunity to commit an offense is not entrapment even though representations or inducements calculated to overcome the offender's fear of detection are used.

Source: L. 71: R&RE, p. 411, § 1. C.R.S. 1963: § 40-1-809.

ANNOTATION

Law reviews. For article, "Criminal Law", which discusses a Tenth Circuit decision dealing with the entrapment defense, see 61 Den. L.J. 272 (1984). For article, "The Entrapment Defense in Colorado", see 40 Colo. Law. 47 (Jan. 2011).

Entrapment may be asserted as an affirmative defense only to acts that would otherwise constitute an offense and is not applicable to sentencing provisions such as the sentence enhancing provisions of § 18-18-107, which merely impact the degree of punishment imposed. Vega v. People, 893 P.2d 107 (Colo. 1995).

The defense of entrapment has long been recognized in Colorado when the prosecution, through its agents, in fact,

induces, instigates, and causes a criminal offense to be committed. People v. Bucher, 182 Colo. 211, 511 P.2d 895 (1973).

States are free to define defense of entrapment as they choose, since it is not of constitutional stature. Bailey v. People, 630 P.2d 1062 (Colo. 1981).

This section is patterned upon § 40.05 of article 40 N.Y. Penal Law Consol. Bailey v. People, 630 P.2d 1062 (Colo. 1981).

Detection of crime distinguished from entrapment. A suspected person may be tested by being offered the opportunity to transgress the law in such a manner as is usual in the activity alleged to be unlawful. However, law enforcement officers may not induce persons, who would not otherwise

have committed the crime, to violate the law. The former is legitimate "detection" of crime. The latter is "entrapment" to commit the crime in which the officer's conduct instigates the offense, the commission of which was nonexistent in the mind of the intended victim of the entrapment. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

To prove entrapment, the defense must show that the prosecution played the primary role. *People v. Bucher*, 182 Colo. 211, 511 P.2d 895 (1973).

Test of entrapment focuses on defendant's conduct. In determining whether the affirmative defense of entrapment exists, the court focuses on the conduct of the defendant. An examination is made of the circumstances surrounding the sale to see whether the officers merely afforded the defendant the opportunity to commit the offense, or whether the defendant had been improperly induced to do something he otherwise would not have done. *People v. Williams*, 654 P.2d 319 (Colo. App. 1982).

Entrapment is a subjective test that focuses on a defendant's state of mind. This section does not set forth general standards for police conduct. Thus, evidence of federal drug enforcement agency's system for rewarding and promoting agents was irrelevant to a narcotics case where entrapment issue was raised. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

While police methods are relevant to the defense of entrapment, police motives

are not relevant because they do not impact the subjective state of mind of the defendant. However, such motives may be relevant for the purpose of establishing bias in DEA agents' testimony. *Vega v. People*, 893 P.2d 107 (Colo. 1995).

This section codifies subjective test, as the defendant's predisposition to commit the crime, rather than the conduct of the government agent, remains the dispositive factor in determining whether entrapment has occurred. *People v. Sanchez*, 40 Colo. App. 552, 580 P.2d 1270 (1978); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

However, the carefully crafted requirements of the entrapment statute are swept aside by a jury instruction which selectively excerpted the statement from *Bailey v. People* (630 P.2d 1062 (Colo. 1981)) that "the defendant's predisposition to commit the crime, rather than the conduct of the [police, is] the dispositive factor.", because statements from opinions do not necessarily translate with clarity into jury instructions. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

This section creates a subjective test which is concerned with the state of mind of a particular defendant; it does not set general standards for police conduct. Thus, evidence of a law enforcement agency's internal reward system generally would not be relevant to whether a particular defendant was entrapped. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993).

Section requires the defendant to admit committing the acts before being entitled to

assert the defense of entrapment. The court did not err in refusing to give an instruction on the defense when the defendant denied committing the acts. *People v. Hendrickson*, 45 P.3d 786 (Colo. App. 2001); *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006).

Elements of the defense: (1) The defendant must be a person who, but for the offered inducement offered, would not have conceived of or engaged in conduct of the sort induced; (2) the defendant must in fact have engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and not as a result of the defendant's own predisposition; (3) the methods used to obtain such evidence must have been such as to create a substantial risk that this particular defendant would engage in the sort of conduct induced; and (4) the methods used must have been more persuasive than merely affording the defendant an opportunity to commit an offense, even when such an opportunity was coupled with representations or inducements calculated to overcome the defendant's fear of detection. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Predisposition and inducement are inextricably interwoven within the first three elements of the defense. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Existence of any predisposition on the part of the defendant must be determined first; then the extent of any such predisposition must be considered in relation to the character of the inducements to

determine whether the second and third elements have been satisfied. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Prosecution must prove defendant not entrapped. The prosecution must prove beyond a reasonable doubt that the defendant was not entrapped. *People v. Williams*, 654 P.2d 319 (Colo. App. 1982).

Prosecution may rely solely on the defendant's predisposition only if they are able to prove that the defendant would have committed the crime even if the police had offered no inducement more persuasive than merely affording the defendant an opportunity to commit the crime. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

In reviewing the sufficiency of predisposition evidence, courts may rely upon evidence obtained after the government's initial contact with the defendant, so long as such evidence is relevant to the defendant's state of mind as it existed prior to the government's suggestion of the crime. *People v. Sprouse*, 983 P.2d 771 (Colo. 1999).

Intent to commit the crime must originate with the defendant. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

Entrapment operates where police originate criminal intent. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials, that is, only where the criminal design originates in the mind of the police officer and not with the accused. *Gonzales v. People*, 168 Colo. 545, 452 P.2d

46 (1969); *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

Notwithstanding aim of capturing old offenders. When detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

And not where officer merely supplies opportunity for crime. Defense of entrapment is not available where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

The Colorado courts have drawn a strong distinction between the seduction by a government agent of an innocent person into doing an unlawful act not contemplated by him, and a government agent affording an opportunity to one who has the intent and design to commit a criminal offense to do

so. The first situation affords a complete defense to one charged with a crime under those circumstances, but the second is a perfectly proper tool in the arsenal of law enforcement agents. *People v. Simmons*, 179 Colo. 431, 501 P.2d 119 (1972).

Entrapment does not occur when government agent merely offers person the opportunity to commit the offense. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

When an undercover police agent merely provides one with the opportunity to transgress the law, there is no entrapment. *People v. Ross*, 182 Colo. 267, 512 P.2d 1154 (1973).

There is no entrapment when the representations of a government agent merely afford an opportunity for the defendant to commit a criminal act in the belief that the representations were true. *People v. Adler*, 629 P.2d 569 (Colo. 1981).

There is no entrapment if the police agent merely furnishes an opportunity for the criminal act to one ready and willing to commit it. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

The plain wording of this section indicates that the defense of entrapment cannot be established in those cases where the police merely furnish the defendant with an opportunity to commit a crime. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

The mere use of an undercover agent does not prove that the prosecution induced the crime and thereby vitiated any subsequent conviction of the crime. *People*

v. Bucher, 182 Colo. 211, 511 P.2d 895 (1973).

Question of fact. Where many of the elements of entrapment are in the record in a libel case, but on the issue of good faith and belief in the truth of the statements made there is at least a doubt, summary judgment should not be granted. *Abrahamsen v. Mtn. States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Entrapment defense available where agent induced, instigated, and caused commission of offense. The defense of entrapment is available only where the defendant shows that law enforcement agents, in fact, induced, instigated, and caused a criminal offense to be committed. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

Entrapment not present simply because defendant initially approached victim with humanitarian intentions. When the defendant testified that although he approached the apparent drunk (decoy police officer) with humanitarian intentions, he later decided that if dead the drunk would have no further use of his money, the police agents provided only an opportunity for a thief who was ready and willing and thus entrapment was not present as a matter of law. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

Entrapment in narcotics cases. Where released narcotics suspect agrees to make arrangements for undercover police agents to purchase dangerous drugs, and where he notifies police that defendant has LSD for sale and arranges a meeting which results in

defendant's selling LSD to police, entrapment is not established. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Entrapment does not consist of mere act of making sale to person who has offered to purchase narcotics. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Defense of entrapment is not intended to be escape hatch for those who mistakenly sell narcotics to police officer. When person who has narcotics for sale is ready, willing, and able to effect sale with no more than ordinary persuasion, he has not been entrapped and must suffer consequences for dispensing or selling narcotics. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Encouragement by police informant for a defendant to import cocaine into this state did not amount to outrageous conduct. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

Even if undercover police agent sought out drugs and asked defendant if she had any or knew where she could get some, this behavior did not constitute entrapment. *People v. Ross*, 182 Colo. 267, 512 P.2d 1154 (1973); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

Fourteenth amendment violated when a jury instruction could lead a jury to believe that it was enough for the prosecution to prove that the defendant has some predisposition to commit the crime. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Court did not err in refusing to instruct jury on entrapment as an affirmative

defense. Since entrapment is an affirmative defense, it only applies if the defendant admits to committing the crime. In this case, the only contested issue was whether the substance was a controlled substance. Since defendant had to distribute a controlled substance to commit the crime, by disputing that the substance was a controlled substance, defendant did not admit to all

elements of the crime. Thus, defendant was not entitled to an entrapment defense instruction. *People v. Santana*, 240 P.3d 302 (Colo. App. 2009), rev'd on other grounds, 255 P.3d 1126 (Colo. 2011); *People v. Taylor*, 2012 COA 91, 296 P.3d 317.

Evidence held insufficient to establish entrapment. *People v. Simmons*, 179 Colo. 431, 501 P.2d 119 (1972).

18-1-710. Affirmative defense.

The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-810.

Cross references: For the affirmative defense of impaired mental condition, see §§ 16-8-103.5 and 18-1-803; for other provisions concerning affirmative defenses generally, see §§ 18-1-407 and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title 18.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

If evidence is intended to show entrapment, it should be presented in defendant's case-in-chief, since entrapment is an affirmative defense. *People v. McKay*, 191 Colo. 381, 553 P.2d 380 (1976).

Heat of passion is not an affirmative defense to first-degree or second-degree murder and no jury instruction regarding heat of passion needs to be given. *People v. Carrier*, 791 P.2d 1204 (Colo. App. 1989).

Applied in *Bailey v. People*, 630 P.2d 1062 (Colo. 1981); *People v. Rex*, 636 P.2d 1282 (Colo. App. 1981).

18-1-711. Immunity for persons who suffer or report an emergency drug or alcohol overdose event - definitions.

(1) A person is immune from arrest and prosecution for an offense described in subsection (3) of this section if:

(a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider, or the person aids or seeks aid for the person who suffered the emergency drug or alcohol overdose;

(b) The person remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the person remains at the facilities of the medical provider until a law enforcement officer arrives;

(c) The person identifies himself or herself to, and cooperates with, the law enforcement officer, emergency medical responder, or medical provider; and

(d) The offense arises from the same course of events from which the emergency drug or alcohol overdose event arose.

(2) The immunity described in subsection (1) of this section also extends to the person who suffered the emergency drug or alcohol overdose event if all of the conditions of subsection (1) of this section are satisfied.

(3) The immunity described in subsection (1) of this section applies to the following criminal offenses:

(a) Unlawful possession of a controlled substance, as described in section 18-18-403.5 (2) or (2.5);

(b) Unlawful use of a controlled substance, as described in section 18-18-404;

(c) If committed on or after March 1, 2020, unlawful possession of two ounces or less of marijuana, as described in section 18-18-406 (5)(a)(I) prior to its repeal in 2021; or more than two ounces of marijuana but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate, as described in section 18-18-406 (4)(c); or more than six ounces of marijuana or more than three ounces of marijuana concentrate, as described in section 18-18-406 (4)(b);

(d) Open and public display, consumption, or use of less than two ounces of marijuana, as described in section 18-18-406 (5)(b)(I);

(e) Transferring or dispensing two ounces or less of marijuana from one person to another for no consideration, as described in section 18-18-406 (5)(c);

(f) Use or possession of synthetic cannabinoids or salvia divinorum, as described in section 18-18-406.1;

(g) Possession of drug paraphernalia, as described in section 18-18-428;

(h) Illegal possession or consumption of ethyl alcohol or marijuana by an underage person or illegal possession of marijuana paraphernalia by an underage person, as described in section 18-13-122;

(i) A violation of section 18-18-405 (2)(a)(III)(A), if the unlawful distribution, manufacturing, dispensing, or sale of the material, compound, mixture, or preparation weighs not more than four grams and contains any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g); and

(j) A violation of section 18-18-405 (2)(d)(II) involving unlawful distribution or transferring.

(4) Nothing in this section shall be interpreted to prohibit the prosecution of a person for an offense other than an offense listed in subsection (3) of this section or to limit the ability of a district attorney or a law enforcement officer to obtain or use evidence obtained from a report, recording, or any other statement provided pursuant to subsection (1) of this section to investigate and prosecute an offense other than an offense listed in subsection (3) of this section.

(5) As used in this section, unless the context otherwise requires, "emergency drug or alcohol overdose event" means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

(6) Repealed.

Source: L. 2012: Entire section added, (SB 12-020), ch. 225, p. 986, § 2, effective May 29. **L. 2013:** (3)(c), (3)(d), and (3)(e) amended, (SB 13-250), ch. 333, p. 1934, § 52, effective October 1. **L. 2014:** (3)(h) amended, (SB 14-129), ch. 387, p. 1938, § 6, effective June 6. **L. 2016:** IP(1) amended, (HB 16-1390), ch. 184, p. 649, § 1, effective August 10. **L. 2017:** (3)(a) amended, (SB 17-294), ch. 264, p. 1393, § 37, effective May 25. **L. 2019:** IP(3) and (3)(c) amended, (HB 19-1263), ch. 291, p. 2679, § 5, effective March 1, 2020. **L. 2021:** (3)(c) amended, (HB 21-1090), ch. 157, p. 900, § 1, effective May 20. **L. 2022:** (3)(g) and (3)(h) amended and (3)(i) and (6) added, (HB 22-1326), ch. 225, p. 1630, § 5, effective July 1. **L. 2023:** (1)(a), (3)(a), (3)(h), and (3)(i) amended and (3)(j) added, (HB 23-1167), ch. 144, p. 615, § 1, effective May 1.

Editor's note: Subsection (6)(d) provided for the repeal of subsection (6), effective July 1, 2026. (See L. 2022, p. 1630.)

Cross references: For the legislative declaration in the 2012 act adding this section, see section 1 of chapter 225, Session Laws of Colorado 2012. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Subsection (1)(a) requires both that: (1) a person report in good faith what the person subjectively perceives is an acute condition caused by the consumption or use of drugs or alcohol and that (2) a layperson would reasonably believe that the reported condition is a drug or alcohol overdose needing medical assistance. The good-faith requirement renders the subjective perception of the person making the report relevant. *People v. Harrison*, 2020 CO 57, 465 P.3d 16.

The introduced evidence, when viewed as a whole and in the light most favorable to the prosecution, was sufficient to disprove the affirmative defense, which was based on this section, beyond a reasonable doubt. The person who called the police stated that it never crossed her mind that the defendant may have had a drug overdose. *People v. Harrison*, 2020 CO 57, 465 P.3d 16.

18-1-712. Immunity for a person who administers an opioid antagonist during an opioid-related drug overdose event - definitions.

(1) **Legislative declaration.** The general assembly hereby encourages the administration and distribution of opioid antagonists, including expired opioid antagonists, by persons and entities, including law enforcement personnel, school district personnel, and health-care providers, for the purpose of saving the lives of people who suffer opioid-related drug overdose events. The general assembly also encourages each person who administers an opioid antagonist to another person to call for emergency medical services immediately.

(2) General immunity.

(a) A person, other than a health-care provider, is immune from criminal prosecution if the person acts in good faith to:

(I) Furnish or administer an opioid antagonist to an individual the person believes to be suffering an opioid-related drug overdose event or to an individual who is in a position to assist the individual at risk of experiencing an opioid-related drug overdose event; or

(II) Distribute the opioid antagonist.

(b) This subsection (2) also applies to:

(I) An eligible entity described in section 25-1.5-115.1 (1); except that an employee or agent of a school, or an employee or agent of a school district, a district school, the charter school institute, an institute charter school, or a nonpublic school who operates or is on a school bus, must be acting in accordance with section 12-30-110 (1)(b), (2)(b), and (4)(b), and, as applicable, section 22-1-119.1; and

(II) A person who acts in good faith to furnish or administer an opioid antagonist in accordance with section 25-20.5-1001.

(3) (a) **Licensed prescribers and dispensers.** An individual who is licensed by the state under title 12 and is permitted by section 12-30-110 or by other applicable law to prescribe or dispense an opioid antagonist is immune from criminal prosecution for:

(I) Prescribing or dispensing an opioid antagonist in accordance with the applicable law; or

(II) Any outcomes resulting from the eventual administration of the opioid antagonist by a layperson.

(b) Repealed.

(4) The provisions of this section shall not be interpreted to establish any duty or standard of care in the prescribing, dispensing, or administration of an opioid antagonist.

(5) **Definitions.** As used in this section, unless the context otherwise requires:

(a) Repealed.

(b) (I) "Health-care provider" means:

(A) A licensed or certified physician, nurse practitioner, physician assistant, or pharmacist; or

(B) A health maintenance organization licensed and conducting business in this state.

(II) "Health-care provider" does not include a podiatrist, optometrist, dentist, or veterinarian.

(c) "Opioid" has the same meaning as "opiate", as set forth in section 18-18-102 (21).

(d) "Opioid antagonist" has the same meaning as set forth in section 12-30-110 (7)(d).

(e) "Opioid-related drug overdose event" means an acute condition, including a decreased level of consciousness or respiratory depression, that:

- (I) Results from the consumption or use of a controlled substance or another substance with which a controlled substance was combined;
- (II) A layperson would reasonably believe to be an opioid-related drug overdose event; and
- (III) Requires medical assistance.

Source: **L. 2013:** Entire section added, (SB 13-014), ch. 178, p. 656, § 2, effective May 10. **L. 2015:** (2), IP(3)(a), (3)(a)(I), and (5)(e) amended and (3)(b) repealed, (SB 15-053), ch. 78, p. 216, § 9, effective April 3. **L. 2019:** (2) amended, (SB 19-227), ch. 273, p. 2579, § 7, effective May 23; (2) and IP(3)(a) amended, (HB 19-1172), ch. 136, p. 1674, § 90, effective October 1. **L. 2020:** (2)(b)(I) amended, (HB 20-1206), ch. 304, p. 1526, § 7, effective July 14; (2)(a) amended, (HB 20-1065), ch. 287, p. 1420, § 5, effective September 14. **L. 2021:** (2)(b)(I) amended, (SB 21-122), ch. 33, p. 137, § 3, effective April 15. **L. 2022:** (2)(b)(I) amended, (HB 22-1326), ch. 225, p. 1644, § 18, effective July 1. **L. 2024:** (1), (2)(a), (2)(b)(II), (3)(a), (4), (5)(c), (5)(d), IP(5)(e), and (5)(e)(II) amended and (5)(a) repealed, (HB 24-1037), ch. 458, p. 3163, § 3, effective June 6; (2)(b)(I) amended, (HB 24-1003), ch. 121, p. 397, § 8, effective August 7. **L. 2025:** (2)(b)(I) amended, (SB 25-164), ch. 168, p. 684, § 8, effective August 6.

Editor's note: Amendments to subsection (2) by SB 19-227 and HB 19-1172 were harmonized.

Cross references: (1) For the legislative declaration in the 2013 act adding this section, see section 1 of chapter 178, Session Laws of Colorado 2013. For the legislative declaration in HB 24-1003, see section 1 of chapter 121, Session Laws of Colorado 2024.

(2) For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

18-1-712.3. Possession of opioid antagonist - insufficient for probable cause.

The mere presence of a drug approved by the federal food and drug administration for opioid overdose reversal is not indicative of a crime and shall not be used to support probable cause.

Source: L. 2024: Entire section added, (HB 24-1037), ch. 458, p. 3164, § 4, effective June 6.

18-1-712.5. Immunity for sex workers and persons who are victims of human trafficking for sexual servitude and who suffer or report an assault - definition.

- (1) As used in this section, unless the context otherwise requires, "person" means:
 - (a) A person who is the victim of an offense set forth in subsection (3) of this section;
 - (b) A person who is a victim of human trafficking of a minor for sexual servitude pursuant to section 18-3-504; or
 - (c) A witness to an offense set forth in subsection (3) of this section.
- (2) A person is immune from arrest and prosecution for prostitution as described in section 18-7-201, soliciting for prostitution as described in section 18-7-202, and a prostitute making display as described in section 18-7-207, if the person seeks assistance from a law enforcement officer, the 911 system, or a medical provider and if the evidence for the charge of prostitution, soliciting prostitution, or a prostitute making display was obtained as a result of the person seeking assistance, as a result of the need for assistance, or as a result of the reporting of assistance. This subsection (2) also applies to equivalent municipal charges and arrests.
- (3) A person who is a victim of one of the following offenses, or a person who witnesses one of the following offenses, qualifies for the immunity from prostitution charges as described in subsection (2) of this section:
 - (a) Murder in the first degree, as described in section 18-3-102;
 - (b) Murder in the second degree, as described in section 18-3-103;
 - (c) Manslaughter, as described in section 18-3-104;
 - (d) Criminally negligent homicide, as described in section 18-3-105;
 - (e) Vehicular homicide, as described in section 18-3-106;
 - (f) Assault in the first degree, as described in section 18-3-202;
 - (g) Assault in the second degree, as described in section 18-3-203;
 - (h) Assault in the third degree, as described in section 18-3-204;
 - (i) Vehicular assault, as described in section 18-3-205;
 - (j) Menacing, as described in section 18-3-206;
 - (k) Criminal extortion or aggravated extortion, as described in section 18-3-207;

- (l) Reckless endangerment, as described in section 18-3-208;
- (m) First degree kidnapping, as described in section 18-3-301;
- (n) Second degree kidnapping, as described in section 18-3-302;
- (o) False imprisonment, as described in section 18-3-303;
- (p) Enticement of a child, as described in section 18-3-305;
- (q) Internet luring of a child, as described in section 18-3-306;
- (r) Sexual assault, as described in section 18-3-402;
- (s) Unlawful sexual contact, as described in section 18-3-404;
- (t) Sexual assault on a child, as described in section 18-3-405;
- (u) Human trafficking for involuntary servitude or human trafficking of a minor for involuntary servitude, as described in section 18-3-503;
- (v) Human trafficking for sexual servitude or human trafficking of a minor for sexual servitude, as described in section 18-3-504; or
- (w) Stalking, as described in section 18-3-602.

(4) The immunity described in subsection (2) of this section for the offense of prostitution is not grounds for suppression of evidence in other criminal charges. Nothing in this section prohibits the prosecution of a person for offenses other than those listed in subsection (2) of this section, or to limit the ability of a district attorney or law enforcement officer to obtain or use evidence from a report, recording, or any other statement provided pursuant to subsection (2) of this section to prosecute an offense other than those listed in subsection (2) of this section. Nothing in this section prohibits the provision of immunity pursuant to other sections of law, as applicable, including section 18-1-711.

Source: L. 2022: Entire section added, (HB 22-1288), ch. 148, p. 954, § 1, effective May 2.

18-1-713. Victims of human trafficking of a minor for involuntary servitude or sexual servitude - affirmative defenses.

(1) Except as provided in section 18-7-209, it is an affirmative defense to any charge, other than a class 1 felony, if the minor being charged proves, by a preponderance of the evidence, that he or she was, at the time of the offense:

- (a) A victim of human trafficking of a minor for involuntary servitude pursuant to section 18-3-503 or human trafficking of a minor for sexual servitude pursuant to section 18-3-504; and
- (b) Forced or coerced into engaging in the criminal act charged.

Source: L. 2019: Entire section added, (SB 19-185), ch. 147, p. 1766, § 5, effective May 6.

Cross references: For the legislative declaration in SB 19-185, see section 1 of chapter 147, Session Laws of Colorado 2019.

18-1-714. Protective hearing - victim's, defendant's, or witness's gender identity, gender expression, or sexual orientation - definitions.

(1) Evidence of a victim's, defendant's, or witness's actual or perceived gender identity, gender expression, or sexual orientation offered in relation to an affirmative defense or pursuant to rule 404 of the Colorado rules of evidence may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to subsection (2) of this section. At trial, evidence of a victim's, defendant's, or witness's actual or perceived gender identity, gender expression, or sexual orientation offered by any party in relation to an affirmative defense or pursuant to rule 404 of the Colorado rules of evidence is presumed to be irrelevant.

(2) In any criminal prosecution, if evidence of a victim's, defendant's, or witness's actual or perceived gender identity, gender expression, or sexual orientation is to be offered by any party at trial in relation to an affirmative defense or pursuant to rule 404 of the Colorado rules of evidence, the following procedures shall be followed:

(a) A written motion must be made at least thirty-five days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the specific factual relevancy and materiality of evidence of a victim's, defendant's, or a witness's actual or perceived gender identity, gender expression, or sexual orientation;

(b) The written motion must be accompanied by an affidavit in which the offer of proof is stated;

(c) If the court finds that the offer of proof is sufficient, the court shall notify the other parties. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set an in-camera hearing prior to trial. In the hearing, to the extent the facts are in

dispute, the court may allow a presentation of the offer of proof, including but not limited to the presentation of witnesses.

(d) An in-camera hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown;

(e) At the conclusion of the hearing, or by written order if no hearing is held, if the court finds that the evidence proposed to be offered regarding a victim's, defendant's, or a witness's actual or perceived gender identity, gender expression, or sexual orientation is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

(f) All motions and supporting documents filed pursuant to this section must be filed under seal and may be unsealed only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence contained in the motion is admissible, only that portion of the motion and supporting documents pertaining to the admissible portion may be unsealed.

(g) The court shall seal all court transcripts, digital or other recordings, and records of proceedings, other than minute orders, of a hearing held pursuant to this section. The court may unseal the transcripts, digital or other recordings, and records only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence is admissible, only the portion of the hearing pertaining to the admissible evidence may be unsealed.

(3) (a) In any criminal prosecution, the court may, at any time upon motion of the prosecution or on the court's own motion, issue a protective order pursuant to the Colorado rules of criminal procedure concerning disclosure of information relating to the victim or witness. The court may, at any time upon motion of the defendant or on the court's own motion, issue a protective order pursuant to the Colorado rules of criminal procedure concerning disclosure of information relating to the defendant. The court may punish a violation of a protective order by contempt of court.

(b) The person who would be the subject of the protective order may object to the motion for a protective order.

(4) If evidence of a victim's, defendant's, or witness's actual or perceived gender identity, gender expression, or sexual orientation is admitted at trial, the court shall instruct the jury to not allow bias or any kind of prejudice based upon gender identity, gender expression, or sexual orientation to influence its decision. If admitted for a limited purpose, the court shall further instruct the jury as to the limited purpose or purposes for which the evidence is admitted and for which the jury may consider it.

(5) This section does not apply when evidence of a victim's actual or perceived gender identity, gender expression, or sexual orientation is offered in a criminal prosecution for a bias-motivated crime as described in section 18-9-121. In such prosecutions, the rules of evidence shall govern the admissibility of evidence of a victim's actual or perceived gender identity, gender expression, or sexual orientation.

(6) As used in this section, unless the context otherwise requires:

(a) "Gender identity" and "gender expression" have the same meaning as in section 18-1-901 (3)(h.5).

(b) "Intimate relationship" has the same meaning as in section 18-6-800.3.

(c) "Sexual orientation" has the same meaning as in section 18-9-121 (5)(b).

Source: L. 2020: Entire section added, (SB 20-221), ch. 279, p. 1366, § 4, effective July 13.

Cross references: For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

PART 8

RESPONSIBILITY

18-1-801. Insufficient age.

The responsibility of a person for his conduct is the same for persons between the ages of ten and eighteen as it is for persons over eighteen except to the extent that responsibility is modified by the provisions of the "Colorado Children's Code", title 19, C.R.S. No child under ten years of age shall be found guilty of any offense.

Source: L. 71: R&RE, p. 412, § 1. **C.R.S. 1963:** § 40-1-901.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For comment,

"Arrested Development: An Alternative to Juveniles Serving LIFE Without Parole in

Colorado", see 78 U. Colo. L. Rev. 1059 (2007).

Annotator's note. Since § 18-1-801 is similar to former § 40-1-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

An infant is presumed incapable of committing crime because he is presumed not to possess criminal intent. Calkins v. Albi, 163 Colo. 370, 431 P.2d 17 (1967).

An infant under the age of 10 years shall not be found guilty of any offense. Gallegos v. Tinsley, 139 Colo. 157, 337 P.2d 386 (1959); LeCoq ex rel. LeCoq v. Klemme, 28 Colo. App. 590, 476 P.2d 280 (1970).

Although a child under the age of 10 cannot be charged with an offense, it does not necessarily follow that the child cannot violate the law. In enacting the statute, the general assembly determined those persons who could be held responsible for their criminal acts, not that such persons could not commit the acts. People v. Miller, 830 P.2d 1092, (Colo. App. 1991).

Minor who is over 14 years of age is accountable for crimes committed by him.

Gallegos v. Tinsley, 139 Colo. 157, 337 P.2d 386 (1959).

Though the children's code may not in so many words raise the age below which there can be no criminal responsibility as concerns a felony from 10 to 14 years, in effect, that is exactly what it did. People ex rel. Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967).

Incapacity is a defense. The incapacity of a party, by reason of his tender years, to commit the crime charged may be a good defense on the trial, as it may effectually negative the charge. Mitchell v. People, 24 Colo. 532, 52 P. 671 (1898).

Capacity is not required to be stated in the indictment, and its omission furnishes no ground for arresting the judgment after a verdict against the accused. Mitchell v. People, 24 Colo. 532, 52 P. 671 (1898).

This section is not relevant to a determination of liability for the commission of an intentional tort. LeCoq ex rel. LeCoq v. Klemme, 28 Colo. App. 590, 476 P.2d 280 (1970).

Applied in People v. Gallegos, 628 P.2d 999 (Colo. 1981).

18-1-802. Insanity.

(1) (a) A person who is insane, as defined in section 16-8-101, C.R.S., is not responsible for his or her conduct defined as criminal. Insanity as a defense shall not be an issue in any prosecution unless it is raised by a plea of not guilty by reason of insanity as provided in section 16-8-103, C.R.S.

(b) This subsection (1) applies to offenses committed before July 1, 1995.

(2) (a) A person who is insane, as defined in section 16-8-101.5, C.R.S., is not responsible for his or her conduct defined as criminal. Insanity as a defense shall not be an issue in any prosecution unless it is raised by a plea of not guilty by reason of insanity as provided in section 16-8-103, C.R.S.

(b) This subsection (2) shall apply to offenses occurring on or after July 1, 1995.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-902. L. 72: p. 268, § 7. L. 96: Entire section amended, p. 5, § 4, effective January 31.

Cross references: (1) For pleading the defense of insanity, see Crim. P. 11(e).

(2) For the legislative intent of the 1996 amendments to this section, see §16-8-101.3.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Trauma, Crime and the Affirmative Defense", see 11 Colo. Law. 2401 (1982). For article, "Checklists to Evaluate Vietnam Vet Stress Disorders", see 12 Colo. Law. 273 (1983).

Annotator's note. Since § 18-1-803 is similar to former § 40-1-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

By asserting insanity defense, defendant admits the act charged but denies criminal responsibility for the act. Leick v. People, 322 P.2d 674 (Colo. 1958); People v. Gilliland, 769 P.2d 477 (Colo. 1989).

One insane when he commits act prohibited by law cannot be held guilty of a crime. A statute providing that insanity

shall be no defense to a criminal charge would be unconstitutional. Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

No matter how brutal a homicide may be, a person who is insane at the time of committing it cannot lawfully be convicted of murder, but if found guilty of committing the act must be confined in a state institution under the laws governing that institution. Graham v. People, 95 Colo. 544, 38 P.2d 87 (1934).

At commencement of the trial defendant is presumed to have been sane at the time of the alleged commission of the crime charged. Shank v. People, 79 Colo. 576, 247 P. 559 (1926).

Accused must produce evidence raising reasonable doubt as to sanity. The killing being admitted or proven, an accused who relies upon the absence of sanity as a defense must produce evidence which will at

least raise a reasonable doubt of its existence. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Burden is on the state to prove sanity.

When the question of defendant's sanity is properly raised, the burden is upon the people to prove beyond a reasonable doubt that he was sane at the time he committed the act charged. If the evidence raises in the minds of the jury a reasonable doubt of defendant's sanity at the time of the commission of the crime charged, they must find him not guilty. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

The people are not required in the first instance to offer proof of sanity, sanity being presumed in the absence of evidence tending to show the contrary. But when evidence is introduced tending to show insanity, the people have the burden of proving beyond a reasonable doubt the sanity of the defendant. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934).

Every criminal defendant is presumed sane, but once any evidence of insanity is introduced at trial, the burden of proof is on the people to prove sanity beyond a reasonable doubt. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Question of reasonable doubt as to sanity is for jury. In a homicide case the question of reasonable doubt as to defendant's sanity is for the jury, and its finding thereon, based on conflicting evidence, is not reviewable. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

The question of sanity in a criminal case is an issue of fact to be determined by the trier of fact. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Accused is entitled to have jury pass on question of his sanity. One accused of a crime is entitled to raise and have a jury pass upon the question of whether he was sane or insane when he committed the act with which he is charged. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Upon the trial for murder, evidence of the insanity of a grandfather and of an aunt of the defendant is competent to show hereditary insanity in the family and proper for the jury to consider with the other evidence in the case as an aid in passing upon the mental condition of the defendant at the time of the homicide. When such evidence has been introduced, an instruction the effect of which is to deprive the defendant of its benefit is erroneous. *Jones v. People*, 23 Colo. 276, 47 P. 275 (1896).

Where in the trial of an indictment there is evidence tending to show that the accused in committing the act was not mentally accountable, an instruction that withdraws this defense from the jury, or from which the jury may reasonably infer that in the opinion of the court this defense is not in the case, is error. *Pribble v. People*, 49 Colo. 210, 112 P. 220 (1910).

Defendant's status as a ward of the state was not conclusive evidence of insanity. It does not follow from a commitment to such an institution that one necessarily is incapable of forming an intent

to commit a crime. *McConnell v. People*, 157 Colo. 235, 402 P.2d 75 (1965).

Defendant found sane in separate sanity hearing. The argument that the defendant was incapable of forming the requisite mens rea and, therefore, could not be criminally responsible for his acts, is unpersuasive where the defendant was found sane in a separate sanity hearing prior to trial, and no objection was raised as to the propriety of the proceedings. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Insanity adjudication results in a presumptive continuation of a state of mental incapacity until it is shown that sanity has been restored. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Committed person not incapable of committing crime. An insanity adjudication represents a judicial determination that an accused is not legally responsible for a past criminal act by reason of a mental disease or defect which existed at the time the act was

committed. It is simply not true, however, that an insanity adjudication renders a committed person legally incapable of committing future crimes during the period of commitment. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Insanity is an affirmative defense to a crime. *People v. Serravo*, 823 P.2d 128 (Colo. 1992); *People v. Hill*, 934 P.2d 821 (Colo. 1997).

The "deific-decree" delusion is recognized in Colorado; a defendant may be judged legally insane if the defendant's cognitive ability to distinguish right from wrong with respect to the act has been destroyed as a result of a psychotic delusion that God has decreed the act. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

Applied in *Gould v. People*, 167 Colo. 113, 445 P.2d 580 (1968); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

18-1-803. Impaired mental condition.

(1) Evidence of an impaired mental condition, as defined in section 16-8-102 (4), though not legal insanity, may be offered in a proper case as bearing upon the capacity of the accused to form the culpable mental state that is an element of the offense charged.

(2) An intention to assert the affirmative defense of impaired mental condition shall be made pursuant to section 16-8-103.5, C.R.S.

(3) When the affirmative defense of impaired mental condition has been raised, the jury will be given special verdict forms containing interrogatories. The trier of fact shall decide first the question of guilt as to felony charges which are before the court. If the trier of fact concludes that guilt has been proven beyond a reasonable doubt as to one or more of the felony charges submitted for consideration, the special interrogatories shall not be answered. Upon completion of its deliberations on the felony charges as previously set forth in this subsection (3), the trier of

fact shall consider any other charges before the court in a similar manner; except that it shall not answer the special interrogatories regarding such charges if it has previously found guilt beyond a reasonable doubt with respect to one or more felony charges. The interrogatories shall provide for specific findings of the jury with respect to the affirmative defense of impaired mental condition in accordance with the Colorado rules of criminal procedure. When the court sits as the trier of fact, it shall enter appropriate specific findings with respect to the affirmative defense of impaired mental condition. If the trier of fact finds that the defendant is not guilty by reason of the affirmative defense of impaired mental condition, the court shall commit the defendant to the department of human services pursuant to section 16-8-103.5 (5), C.R.S.

(4) This section shall apply to offenses committed before July 1, 1995.

Source: **L. 71:** R&RE, p. 412, § 1. **C.R.S. 1963:** § 40-1-903. **L. 83:** Entire section amended, p. 677, § 11, effective July 1. **L. 94:** (3) amended, p. 2654, § 136, effective July 1. **L. 96:** (4) added, p. 5, § 5, effective January 31. **L. 2025:** (1) amended, (HB 25-1058), ch. 15, p. 58, § 25, effective August 6.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title 18.

(2) For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Trauma, Crime and the Affirmative Defense", see 11 Colo. Law. 2401 (1982). For article, "Insanity Defense Reform", see 11 Colo. Law. 3006 (1982). For article, "Checklists to Evaluate Vietnam Vet Stress Disorders", see 12 Colo. Law. 273 (1983).

Limitation of defense to specific intent crimes constitutional. Former section which limited the affirmative defense of

impaired mental condition to specific intent crimes was a reasonable exercise of legislative power and did not infringe upon a defendant's due process protections. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Procedure for submitting defense of impaired mental condition to jury does not violate due process. This section does not prohibit the jury from considering the affirmative defense of impaired mental condition individually with respect to each charge, and instructions requiring such

consideration are proper. *People v. Collins*, 752 P.2d 93 (Colo. 1988).

Former section was premised on the proposition that a mental disease or defect may be less than legal insanity but nonetheless sufficient to negate the requisite mens rea of specific intent. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982).

No presumption of culpability nor derogation of due process rights. Former section neither created a presumption of culpability for general intent crimes nor derogated an accused's due process right to prosecutorial proof of guilt beyond a reasonable doubt. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

General assembly may establish statutory constituents of criminal culpability. The constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the general assembly's competence to establish the statutory constituents of criminal culpability for various offenses and to formulate particular rules of justification or excuse for acts that otherwise might be criminally punishable. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Evidence not restricted to specific intent crimes. Former section did not restrict evidence of impaired mental condition to specific intent crimes. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982).

Mental impairment evidence is evidence of a mental disease or defect

which affects the defendant's cognitive or volitional faculties to the point of rendering him incapable of entertaining the mens rea for the crime charged against him. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982) (decided under former section).

Issue of responsibility due to an impaired mental condition is an affirmative defense. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Unless prosecution raises mental condition issue, defendant must present evidence. Unless the prosecution's evidence raises the issue involving the defendant's impaired mental condition, the defendant must present some credible evidence to raise it. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Former section did not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Once mental impairment is raised, prosecution must prove defendant's guilt beyond a reasonable doubt. Once the issue of the defendant's impaired mental condition is raised, the prosecution must prove beyond a reasonable doubt the guilt of the defendant as to that issue — the defendant's capacity to form the requisite intent — as well as all other elements of the offense. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980) (decided under former section).

No affirmative defense to second degree murder. Under former section, the

affirmative defense of diminished responsibility due to impaired mental condition was not an affirmative defense to the general intent crime of second degree murder. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

Applied in *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Stitt*, 40 Colo. App. 355, 575 P.2d 446 (1978); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (1978); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

18-1-804. Intoxication.

(1) Intoxication of the accused is not a defense to a criminal charge, except as provided in subsection (3) of this section, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged.

(2) Intoxication does not, in itself, constitute mental disease or defect within the meaning of section 18-1-802.

(3) A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements of the law.

(4) "Intoxication", as used in this section means a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.

(5) "Self-induced intoxication" means intoxication caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly introduced or allowed to be introduced into his body, unless they were introduced pursuant to medical advice or under circumstances that would afford a defense to a charge of crime.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-904.

ANNOTATION

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Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-1-804 is similar to former § 40-1-9, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1) is not an unconstitutional burden on a defendant's due process rights. Subsection (1) does not reduce the prosecution's burden to prove every element of the offense beyond a reasonable doubt and does not prevent a defendant from presenting a complete defense; therefore, it does not violate the defendant's due process rights. *People v. Stone*, 2020 COA 23, 471 P.3d 1148.

This section is declaratory of the common law. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Involuntary intoxication and insanity are legally separate and distinct defenses with significantly distinct consequences. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

The accountability of one who becomes drunk voluntarily is defined by this section. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Intoxication is not an excuse for crime. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970); *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

This section provides that drunkenness will not be an excuse for any crime where only the general intent is necessary for its commission. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Impaired mental state resulting from voluntary intoxication is not a defense to a general intent crime. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

The mental culpability requirement of both second-degree kidnapping and first-degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

Voluntary intoxication may serve to establish an affirmative defense to specific intent crimes. *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981) (disapproved of by supreme court in *People v. Harlan*, 8 P.3d 448 (Colo. 2000)).

Voluntary intoxication does not constitute an affirmative defense. To the extent that prior decisions indicate otherwise, they are disapproved. *People v. Harlan*, 8 P.3d 448 (Colo. 2000); *People v. Lucas*, 232 P.3d 155 (Colo. App. 2009).

A criminal defendant who maintains his or her innocence at trial is not automatically barred from seeking jury instructions for a voluntary intoxication defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no rational

basis in the evidence for the voluntary intoxication instruction. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

Claim of innocence does not disentitle defendant to voluntary intoxication offense. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on voluntary intoxication because there was no evidence that defendant was intoxicated while committing the crime. Defendant's testimony that he passed out drunk would have made it physically impossible for him to commit the offense. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

Subsection (1) is an evidentiary rule permitting the introduction of evidence of voluntary intoxication to negate the requisite specific intent of the charged offense. *People v. Harlan*, 8 P.3d 448 (Colo. 2000); *People v. Lucas*, 232 P.3d 155 (Colo. App. 2009).

"After deliberation" is part of the culpable mental state required by first degree murder and may be negated by evidence of voluntary intoxication. *People v. Miller*, 113 P.3d 743 (Colo. 2005).

Use of term "negate" instead of "negative" in jury instruction concerning voluntary intoxication and specific intent not erroneous. Although "negative" is the term contained in subsection (1), the two terms may be used interchangeably in this context. *People v. Souva*, 141 P.3d 845 (Colo. App. 2005).

Section applicable in analysis of "voluntary act". This section applies not

only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a "voluntary act", as that phrase is used in the definition of criminal liability in § 18-1-502. *People v. Huskey*, 624 P.2d 899 (Colo. App. 1980).

Intoxication does not negate culpability element of "knowingly". Evidence of self-induced intoxication is not admissible to negate the culpability element of "knowingly". *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Breland*, 728 P.2d 763 (Colo. App. 1986).

Trial court did not err in instructing the jury that it should not consider evidence of intoxication in determining whether the prosecution had proved the mental state of knowingly beyond a reasonable doubt. *People v. Vanrees*, 80 P.3d 840 (Colo. App. 2003), *rev'd on other grounds*, 125 P.3d 403 (Colo. 2005).

If evidence of intoxication is presented at trial and the jury is given an instruction on the effect of the evidence, the instruction must incorporate the complete provision in subsection (1) not just the first clause. *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004).

Consumption of heroin by an addict causes self-induced, not involuntary, intoxication. *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

Voluntary intoxication sufficient to support general intent for crime. One who voluntarily drinks himself into unconsciousness intends whatever the foreseeable consequences or inevitable

results of such intoxication are, and that intent is sufficient to supply general intent for second degree murder. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Alcohol idiosyncratic intoxication not a defense to general intent crime because, although the result of the ingestion of alcohol may be more severe, the ingestion is still voluntary. *People v. Matthews*, 717 P.2d 970 (Colo. App. 1985).

"Settled insanity" arising from the long-term use of intoxicants cannot be maintained as a defense. The settled insanity doctrine conflicts with the state's statutory scheme regarding insanity and self-induced intoxication. *Bieber v. People*, 856 P.2d 811 (Colo. 1993).

Voluntary intoxication not to be considered as a defense or mitigating factor to the crime of extreme indifference murder. Voluntary intoxication only a defense to specific intent crimes such as homicide with deliberation. Extreme indifference murder requires only that defendant have the general intent to act "knowingly". *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991); *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

Or to any other crime having as an element the mental state of "knowingly" or "recklessly". *People v. Quintana*, 996 P.2d 146 (Colo. App. 1998).

It is admissible to show absence of specific intent. When a particular intent forms the gist of the offense, as distinguished from the intent necessarily entering into every crime, and is made to

depend on the state and condition of the mind of the accused at the time with reference to acts committed, intoxication, as a fact affecting the control of the mind, is proper for the consideration of the jury in determining whether the accused was capable of entertaining the positive and particular intent requisite to make out the offense. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Voluntary drunkenness is no legal excuse for a crime perpetrated under the influence of intoxicating liquor unless its effect is to destroy the ability of the accused to form a specific intent, the existence of which is an element of the offense charged. *Dolan v. People*, 168 Colo. 19, 449 P.2d 828 (1969).

Drunkenness can be considered only as bearing upon the ability of a defendant to form the intent necessary to commit the crime charged. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

The actor's intent is an element of the offense of escape and defendant is entitled to introduce evidence to the effect that he was too drunk to form the state of mind required for the commission of the offense. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Under subsection (1), a defendant's voluntary intoxication may be evidence of his inability to entertain the specific intent required for conviction of second-degree murder. *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978).

And in homicide cases to show lesser offense. For the purposes of the defense in a trial for homicide, insanity, intoxication, or any other fact that tends to prove that the prisoner was incapable of deliberation was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the lesser and not the greater offense was in fact committed. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906).

It is only because of the specific intent required for first degree murder that a voluntary drunkenness is an excuse even for that crime. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Limitation on use of defense of voluntary intoxication. The policies adopted by the general assembly in refusing to permit a defense of voluntary intoxication in general intent crimes, defined in the criminal code, apply with equal force to general intent narcotics violation crimes, under part 3 of article 22, title 12. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

Self-induced intoxication involves moral culpability. Self-induced intoxication, by its very nature, involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others.

Hendershott v. People, 653 P.2d 385 (Colo. 1982).

But involuntary intoxication does not. Involuntary intoxication, in contrast, is without moral culpability and, for this reason, is a complete defense to all crimes. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982); *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).

When analyzing whether a defendant may raise the affirmative defense of involuntary intoxication under this section, a court must determine whether the defendant has offered some evidence that their intoxication was not self-induced. *People v. Mion*, 2026 CO 5, __ P.3d __.

The affirmative defense of involuntary intoxication is unavailable if a defendant's intoxication was self-induced -- if their conduct was caused by one or more "substances" that they both (1) "knowingly introduced" and (2) knew or ought to have known would have a tendency to cause intoxication. *People v. Mion*, 2026 CO 5, __ P.3d __.

This definition entails two requisite levels of responsibility or blameworthiness involved in voluntarily intoxicating oneself. As defined in § 18-1-501, a person acts "[k]nowingly" when they have an awareness of the nature of their conduct and the circumstances. The phrase "ought to know" engenders a reasonableness standard: what a reasonable person would have or should have known under the circumstances. *People v. Mion*, 2026 CO 5, __ P.3d __.

Involuntary intoxication as an affirmative defense. Where the defendant presented evidence that he was unaware of the effect of ingesting excessive doses of a prescribed drug, it is reversible error not to submit that issue to the jury. *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).

A person is involuntarily intoxicated when he or she takes a substance pursuant to medical advice and does not know that he or she is ingesting an intoxicant or ingests a substance that is not known to be an intoxicating substance. *People v. Low*, 732 P.2d 622 (Colo. 1987); *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

When a defendant contends that there are multiple intoxicants in a product that defendant consumed, a "substance" under subsection (5) is the entire product, not each particular intoxicant within the product. *People v. Mion*, 2026 CO 5, __ P.3d __.

The medical condition of insulin-induced hypoglycemia may, depending on the particular facts and circumstances involved, constitute the affirmative defense of involuntary intoxication. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

Evidence held not to show excuse within terms of this section. *Seiwald v. People*, 66 Colo. 332, 182 P. 20 (1919); *Nieto v. People*, 152 Colo. 526, 383 P.2d 321 (1963).

Prosecution's involuntary intoxication instruction lessened the prosecution's burden of proof. The instruction asked whether defendant's intoxication was self-induced without clarifying that the people

bore the burden of disproving involuntary intoxication beyond a reasonable doubt. The effect of the instruction was to tell the jury not to consider the people's burden of proof until after it first decided whether defendant's intoxication was self-induced. *People v. Sabell*, 2018 COA 85, 452 P.3d 91.

Evidence of addiction not sufficient to support a finding that defendant's drug use was involuntary, therefore defendant could not avail himself of the defense of involuntary intoxication. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

Question for jury. Where there was evidence tending to prove drunkenness, it was for the jury to determine whether the defendant was so intoxicated as to be unable to form the deliberate intent necessary. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

While intoxication may be relevant to a determination of whether the defendant did form or had the capacity to form the requisite specific intent, the issue of intoxication is one for the jury. *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Jury decision on intoxication affirmed. Where the jury was properly instructed on specific intent and on defendant's affirmative defense of intoxication and where evidence is sufficient to support the jury's conclusion that defendant was not too intoxicated to form a specific intent to commit a crime that decision must be affirmed. *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981).

In order to warrant submission of the defense of involuntary intoxication to the jury, the defendant must introduce some credible evidence of involuntary intoxication. *People v. Somerville*, 703 P.2d 615 (Colo. App. 1985).

Defendant did not meet "some credible evidence" standard to warrant an involuntary intoxication instruction when defendant claimed he intended to consume cocaine, but instead believed he involuntarily consumed methamphetamine, stating the cocaine "tasted like" methamphetamine. Evidence showed that defendant began hallucinating after consuming alcohol but before consuming the illicit drug; thus, there was insufficient evidence from which a jury could infer that the defendant's mental disturbances were caused by the alleged involuntary intoxication (from suspected methamphetamine) rather than voluntary intoxication (from alcohol). *People v. Williams*, 2025 COA 26, 568 P.3d 1267.

Requested instructions covered by given instructions. There is no error in the refusal of the trial court to give a requested instruction as to drunkenness when the law therein contained is fully covered by the instructions given. *McPhee v. People*, 105 Colo. 539, 100 P.2d 148 (1940), distinguishing *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906).

Court may be required to give instruction. Under some circumstances, a court's failure to instruct sua sponte on intoxication may result in reversible error. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

The district court committed reversible error in refusing to instruct the jury on defendant's affirmative defense of voluntary intoxication as allowed by this section in a prosecution of second-degree murder. *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

The trial court properly instructed the jury that "any mental illness suffered by defendant is not a defense in this case". Defendant's mental illness does not support the defense of involuntary intoxication since the defense of involuntary intoxication involves a temporary condition, and bipolar is not a temporary condition. Defendant's bipolar condition would have provided evidence for an insanity defense, but defendant did not plead insanity, which requires a special pleading. Therefore, the court properly instructed the jury that mental illness was not a defense in this case. *People v. Sommers*, 200 P.3d 1089 (Colo. App. 2008).

The term "substance" excludes viruses as a matter of law, and, therefore, defendant is barred from using the affirmative defense of involuntary intoxication. *People v. Voth*, 2013 CO 61, 312 P.3d 144.

Applied in *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975); *People v. Lundborg*, 39 Colo. App. 498, 570 P.2d 1303

(1977); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Brown*, 632 P.2d 1025 (Colo.

1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986); *People v. Low*, 732 P.2d 622 (Colo. 1987).

18-1-805. Responsibility - affirmative defense.

The issue of responsibility under sections 18-1-801 to 18-1-804 is an affirmative defense.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-905.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407 and 18-1-710; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title 18.

ANNOTATION

Law reviews. For article, "Trauma, Crime and the Affirmative Defense", see 11 Colo. Law. 2401 (1982). For article, "Checklists to Evaluate Vietnam Vet Stress Disorders", see 12 Colo. Law. 273 (1983).

Applied in *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982).

PART 9

DEFINITIONS

18-1-901. Definitions.

(1) Definitions set forth in any section of this title apply wherever the same term is used in the same sense in another section of this title unless the definition is specifically limited or the context indicates that it is inapplicable.

(2) The terms defined in section 18-1-104 and in section 18-1-501, as well as the terms defined in subsection (3) of this section, are terms which appear in various articles of this code.

Other terms which need definition but which are used only in a limited number of sections of this code are defined in the particular section or article in which the terms appear.

(3) (a) "To aid" or "to assist" includes knowingly to give or lend money or extend credit to be used for, or to make possible or available, or to further the activity thus aided or assisted.

(b) "Benefit" means any gain or advantage to the beneficiary including any gain or advantage to another person pursuant to the desire or consent of the beneficiary.

(c) "Bodily injury" means physical pain, illness, or any impairment of physical or mental condition.

(d) "Deadly physical force" means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.

(e) "Deadly weapon" means:

(I) A firearm, whether loaded or unloaded; or

(II) A knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury.

(III) and (IV) (Deleted by amendment, L. 2013.)

(f) "Deface" means to alter the appearance of something by removing, distorting, adding to, or covering all or a part of the thing.

(g) "Dwelling" means a building which is used, intended to be used, or usually used by a person for habitation.

(h) "Firearm" means any handgun, automatic, revolver, pistol, rifle, shotgun, or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.

(h.5) "Gender identity" and "gender expression" mean a person's gender-related identity and gender-related appearance or behavior whether or not that gender-related identity, appearance, or behavior is associated with the person's assigned sex at birth.

(i) "Government" includes the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

(j) "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government.

(k) "Motor vehicle" includes any self-propelled device by which persons or property may be moved, carried, or transported from one place to another by land, water, or air, except devices operated on rails, tracks, or cables fixed to the ground or supported by pylons, towers, or other structures.

(l) Repealed.

(m) "Pecuniary benefit" means benefit in the form of money, property, commercial interests, or anything else, the primary significance of which is economic gain.

(n) "Public place" means a place to which the public or a substantial number of the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities.

(o) "Public servant" means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

(o.5) "Restorative justice practices" means practices that emphasize repairing the harm caused to victims and the community by offenses. Restorative justice practices include victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim's representatives, the victim's supporters, the offender, and the offender's supporters and may include community members. By engaging the parties to the offense in voluntary dialogue, restorative justice practices provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm, to the extent possible, including but not limited to apologies, community service, reparation, restoration, and counseling. Restorative justice practices may be used in addition to any other conditions, consequences, or sentence imposed by the court.

(p) "Serious bodily injury" means bodily injury that, either at the time of the actual injury or at a later time, involves a substantial risk of death; a substantial risk of serious permanent disfigurement; a substantial risk of protracted loss or impairment of the function of any part or organ of the body; or breaks, fractures, a penetrating knife or penetrating gunshot wound, or burns of the second or third degree.

(q) "Tamper" means to interfere with something improperly, to meddle with it, or to make unwarranted alterations in its condition.

(r) "Thing of value" includes real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith.

(r.5) "Transgender identity" means identity based on an individual's gender identity or expression being different from that typically associated with their sex at birth.

(s) "Utility" means an enterprise which provides gas, sewer, electric, steam, water, transportation, or communication services, and includes any carrier, pipeline, transmitter, or source, whether publicly or privately owned or operated.

Source: L. 71: R&RE, p. 413, § 1. C.R.S. 1963: § 40-1-1001. L. 73: p. 534, § 1. L. 75: (3)(l) amended, p. 1315, § 8, effective July 14. L. 77: (3)(l) amended, p. 949, § 11, effective August 1. L. 79: (3)(l) amended, p. 1212, § 1, effective June 21; (3)(r) amended, p. 726, § 2, effective July 1; (3)(e) amended, p. 731, § 1, effective October 1. L. 80: (3)(l) amended, p. 531, § 1, effective January 29. L. 81: (3)(e) and (3)(l) amended, p. 972, §§ 2, 3, effective July 1. L. 82: (3)(l) amended, p. 384, § 2, effective April 30. L. 84: (3)(l) amended, p. 921, § 8, effective January 1, 1985. L. 85: (3)(p) amended, p. 664, § 1, effective March 1. L. 86: (3)(l) R&RE, p. 773, § 1, effective July 1; (3)(l)(III) amended, p. 1236, § 45, effective July 1. L. 87: (3)(l)(III) amended, p. 1489, § 1, effective April 30; (3)(l)(IV) amended, p. 817, § 20, effective October 1. L. 88: (3)(l)(II) and (3)(l)(IV) amended and (3)(l)(IV.5) added, pp. 664, 720, §§ 5, 1, effective July 1. L. 89: (3)(l)(II) and (3)(l)(III) amended, p. 888, § 1, effective April 6; (3)(l)(II) amended, p. 890, § 1, effective April 8. L. 90: (3)(l)(IV) and (3)(l)(IV.5)(C) amended, pp. 1613, 565, §§ 8, 38, effective July 1. L. 91: (3)(l)(III) amended, p. 1582, § 7, effective June 4; (3)(p) amended, p. 405, § 8, effective June 6. L. 92: (3)(l)(I), (3)(l)(II), and IP(3)(l)(IV.5) amended, p. 1097, § 6, effective March 6; (3)(l)(II) and (3)(l)(III) amended, p. 431, § 1, effective April 23. L. 93: (3)(l)(IV.5)(A) and (3)(l)(IV.5)(B) amended, p. 56, § 1, effective March 22; (3)(l)(II)(B) amended, p. 1776, § 38, effective June 6; (3)(l)(IV) amended, p. 1236, § 5, effective July 1. L. 94: (3)(l)(III) amended, p. 1731, § 11, effective May 31; (3)(l)(II)(A) amended, p. 1716, § 6, effective July 1; (3)(l)(IV) amended, p. 1311, § 11, effective July 1. L. 95: (3)(l)(II)(A) and (3)(l)(III) amended, p. 870, § 1, effective May 24; (3)(l)(III) amended, p. 109, § 1, effective July 1. L. 96: (3)(l)(III) and (3)(l)(IV) amended, p. 1004, § 10, effective May 23; (3)(l)(IV.5) and (3)(l)(V) amended and (3)(l)(IV.7) added, p. 1574, § 6, effective June 3; (3)(l)(IV) amended, p. 1691, § 24, effective January 1, 1997. L. 97: (3)(l)(III) amended, p. 301, § 12, effective July 1. L. 98: (3)(l)(III) amended, p. 1186, § 3, effective July 1. L. 99: (3)(l)(II)(A) and (3)(l)(III) amended, p. 424, § 4, effective April 30. L. 2000: (3)(l)(II)(A) amended, p. 42, § 1, effective March 10; (3)(l)(II)(A) amended, p. 230, § 4, effective March 29. L. 2002: (3)(l)(I) and (3)(l)(III) amended, p. 839, § 1, effective May 30; (3)(l)(II)(A) amended, p. 1212, § 8, effective June 3; (3)(l)(III) amended, p. 71, § 4, effective August 7; (3)(l)(III) amended, p. 1511, § 181, effective October 1. L. 2003: (3)(l) repealed, p. 1605, § 1, effective August 6. L. 2011: (3)(o.5) added, (HB 11-1032), ch. 296, p. 1402, § 6, effective August 10. L. 2013: (3)(e) amended, (HB 13-1043), ch. 39, p. 110, § 1, effective March 15; (3)(o.5) amended, (HB 13-1254), ch. 341, p. 1981, § 1, effective August 7. L. 2020: (3)(h.5) added, (SB 20-221), ch. 279, p. 1368, § 5, effective

July 13. **L. 2023:** (3)(p) amended, (SB 23-034), ch. 316, p. 1916, § 1, effective July 1. **L. 2024:** (3)(r.5) added, (SB 24-189), ch. 305, p. 2068, § 3, effective July 1.

Editor's note: Amendments to subsection (3)(l)(II) in House Bill 89-1236 and Senate Bill 89-66 were harmonized. Amendments to subsection (3)(l)(II) in House Bill 92-1192 and House Bill 92-1276 were harmonized. Amendments to subsection (3)(l)(III) in House Bill 95-1087 and House Bill 95-1280 were harmonized. Amendments to subsection (3)(l)(IV) in Senate Bill 96-176 and House Bill 96-1005 were harmonized, effective January 1, 1997. Amendments to subsection (3)(l)(II)(A) in Senate Bill 00-077 and House Bill 00-1421 were harmonized. Amendments to subsection (3)(l)(III) by House Bill 02-1313, House Bill 02-1046, and Senate Bill 02-005 were harmonized.

Cross references: For the legislative declaration contained in the 1992 act amending subsections (3)(l)(I), (3)(l)(II), and IP(3)(l)(IV.5), see section 12 of chapter 167, Session Laws of Colorado 1992. For the legislative declaration contained in the 2002 act amending subsection (3)(l)(III), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986). For article, "Legal Malpractice Under Colorado Law", see 52 Colo. Law. 26 (Apr. 2023).

The term "serious bodily injury" is not facially unconstitutionally vague. Defendant's challenge that "serious bodily injury" included subjective undefined terms making it constitutionally infirm did not show the term was so vague that a person of ordinary intelligence must guess at its meaning and may differ as to its application. The term was also constitutional as applied to the defendant. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd in part*,

rev'd in part on other grounds, 132 P.3d 320 (Colo. 2006).

The terms "serious bodily injury" and "bodily injury" do not suffer from an equal protection problem, because they only overlap if serious bodily injury is given an unreasonably broad interpretation. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd in part, rev'd in part on other grounds*, 132 P.3d 320 (Colo. 2006).

The phrase "substantial risk of death" under subsection (3)(p) refers to the facts of the actual injury, not the dangers that are generally associated with the action or injury in question. *People v. Vigil*, 2021 CO 46, 488 P.3d 1150.

As used in the term **"serious bodily injury"**, **"protracted"** means a loss or impairment that is prolonged, continued, or extended. It does not have the same meaning as "permanent". *People v. Duncan*, 2023 COA 122, 545 P.3d 963.

Applicability of definition "to aid". The general definition of "to aid" in subsection (3)(a) is applicable to the definition of professional gambling in § 18-10-102(8). *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

Deadly weapon. A knife is a deadly weapon, as is any weapon which is likely to produce death or great bodily injury from the manner in which it is used. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Whether an object is a deadly weapon does not depend upon the ultimate result of the object's use. *People v. Saleh*, 45 P.3d 1272 (Colo. 2002); *People v. Buell*, 2017 COA 148, 442 P.3d 961, *aff'd* on other grounds, 2019 CO 27, 439 P.3d 857.

A dangerous weapon is an article of offense which in its intended or easily adaptable use is likely to produce death or serious bodily injury. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

Even if a knife blade was dull, because of its size, four to five inches, the jury could have reasonably concluded that it was capable of producing serious bodily injury. *People v. Buell*, 2017 COA 148, 442 P.3d 961, *aff'd* on other grounds, 2019 CO 27, 439 P.3d 857.

A simulated pistol, not per se dangerous, may become so factually because of its

substance, size, and weight as a bludgeon wielded within striking distance of the person to be robbed. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

Under the felony menacing statute an unloaded firearm is a deadly weapon. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980) (decided prior to 1981 amendment to subsection (3)(e)).

A quart bottle of whiskey is not a bludgeon but it may satisfy the statutory test defining a deadly weapon as a "device, instrument, material, or substance, . . . which in the manner it is used . . . is capable of producing death or serious bodily injury". *Bowers v. People*, 617 P.2d 560 (Colo. 1980) (decided prior to 1981 amendment to subsection (3)(e)).

Fire qualifies as a deadly weapon under at least two of the categories listed in subsection (3)(e)(II). *People v. Strickler*, 2022 COA 1, 507 P.3d 1018.

Ordinarily hands or fists are not means likely to produce death unless used in such manner and under such circumstances as are reasonably calculated to produce death. *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960).

A fist may be considered a deadly weapon in circumstances where the manner of its use is capable of producing death or serious bodily injury. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991) (declining to follow *People v. Ross*, 819 P.2d 507 (Colo. App. 1991), annotated below).

Fists may be a deadly weapon if in the manner they are used or intended to be

used they are capable of producing death or serious bodily injury. Defendant used his fist in a manner capable of producing death or serious bodily injury where defendant admitted striking the victim, as a result of the blow, the victim was admitted to a hospital and treated for major trauma, and the treating physician testified that the victim sustained multiple facial fractures and was at great risk of sustaining severe permanent damage. *People v. Ross*, 831 P.2d 1310 (Colo. 1992).

In some circumstances, fists may be considered a deadly weapon based on facts at issue, and statute that specifies that a deadly weapon may be any device, material, or substance which in the manner of its use is capable of producing death or serious bodily injury. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

BB gun can be a deadly weapon. Testimony that if a person hit with a BB in a vulnerable area of the body, such as the eyes, the BB could cause serious bodily injury was sufficient to prove that the BB gun was a deadly weapon. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

The issue in evaluating whether a device is a deadly weapon is whether, in the manner it was used, the device could have caused death or serious bodily injury. The fact that in this particular case death or serious bodily injury did not occur is irrelevant. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended

opponent or adversary. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

Any object, including a foot, may be a deadly weapon when used to start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death. The object does not have to be the direct cause of the injury. Where defendant kicked the victim in the back, causing her to fall down a flight of stairs, it was irrelevant that her injuries were caused by the stairs rather than the defendant's foot. The defendant's foot qualified as a deadly weapon because he used it to set in motion a sequence of events causing a serious bodily injury. *People v. Saleh*, 45 P.3d 1272 (Colo. 2002).

Where there is doubt as to whether an article is a deadly weapon, the question should be left to the jury under an instruction as to what constitutes a deadly weapon. *J.D.C. v. District Court 18th Jud. Dist.*, 910 P.2d 684 (Colo. 1996).

Question of whether automobile constitutes a deadly weapon in the context of the case is a factual question to be determined by a factfinder. *J.D.C. v. District Court 18th Jud. Dist.*, 910 P.2d 684 (Colo. 1996).

The intention to cause death or serious injury is not part of the definition of a deadly weapon; rather, this section requires only that in its actual or intended use the object is capable of producing death or serious injury. *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

The term "intended to be used" in the deadly weapon definition refers to the defendant's, not the manufacturer's, intent. The statute does not classify a firearm as a deadly weapon per se. *Montez v. People*, 2012 CO 6, 269 P.3d 1228.

Subsection (3)(e) prescribes test to determine whether certain items constitute deadly weapons. Subsection (3)(e) expressly prescribes a test to determine whether items other than firearms, knives, and bludgeons are deadly weapons, based not on the intrinsic nature of the items but upon their use or intended use. *Bowers v. People*, 617 P.2d 560 (Colo. 1980) (decided prior to 1981 amendment to subsection (3)(e)).

A knife is not a deadly weapon per se. A knife is only a deadly weapon when it is used or intended to be used during the commission of another crime. *People ex rel. J.W.T.*, 93 P.3d 580 (Colo. App. 2004).

Certain weapons deadly as matter of law. Certain weapons are by their very design and make so lethal in nature that a trial court should rule as a matter of law that they are deadly weapons. Other instruments or things, though perhaps not deadly weapons per se, are within the meaning of statutory provisions, depending upon the nature of the instrument and the manner in which the instrument or thing is used in accomplishing the assault. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

Otherwise, nature of weapon question for jury. Whether an article used as a weapon is dangerous may be, because of its very character or the circumstances of its

use, a matter of doubt, and in such case the question should be left to the jury under an instruction as to what constitutes a dangerous weapon. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

The trial court did not err in generally instructing the jury that a shoe was not in and of itself a deadly or dangerous weapon, and that in determining whether an instrument, not inherently deadly or dangerous, assumes the characteristics of a deadly weapon the jury should consider the nature of the instrument or thing, the manner of its use, the location on the body of the injuries inflicted, and the extent of such injuries. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

Defendant not entitled to instruction on physical force other than deadly force when there was no evidence that defendant's use of force was anything other than deadly physical force. *People v. Opana*, 2017 CO 56, 395 P.3d 757.

There is an intent element in the consideration of "deadly" physical force. Since defendant's testimony created a dispute about whether he intended to produce death by use of force, defendant is entitled to self-defense instructions related to both ordinary physical force and deadly physical force. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

Because deadly force requires death, courts should not instruct the jury on deadly physical force if the victim did not die. *People v. Tardif*, 2017 COA 136, 433 P.3d 60.

"Dwelling" construed. The statutory definition of "dwelling" in this section comprehends an entire building. There is no room to exclude from the meaning of "dwelling" those parts of a residence that are not "usually used by a person for habitation". *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

A garage attached to a residence is part of a "dwelling" within the meaning of § 18-4-203 (2), burglary of a dwelling. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

"Dwelling" encompasses the entire residential structure, including an attached garage, within the meaning of § 18-4-502, first degree criminal trespass. *People v. Hanna*, 981 P.2d 627 (Colo. App. 1998).

"Dwelling" includes an apartment building's shared basement that is accessible to all tenants. *People v. Rau*, 2022 CO 3, 501 P.3d 803 (overruling *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1993)).

"Dwelling" does not include an uncovered, unenclosed, unsecured doorstep. *People v. Howell*, 2024 CO 42, 550 P.3d 679.

"[C]apable or intended to be capable" modifies only "other instrument or device" and, therefore, under subsection (3)(h), a pistol, no matter what its condition, no matter what a defendant's intent may be with respect to it, is a per se firearm. *People v. O'Neal*, 228 P.3d 211 (Colo. App. 2009).

Because subsection (3)(h) was enacted prior to § 2-4-214, the court must look to the rules of statutory construction in effect when

subsection (3)(h) was enacted in 1971 and, therefore, it is appropriate to rely upon the last antecedent rule. *People v. O'Neal*, 228 P.3d 211 (Colo. App. 2009).

Under subsection (3)(h), handguns, automatics, revolvers, pistols, rifles, and shotguns qualify as per se firearms, without need of any further inquiry into whether they are capable or intended to be capable of discharging bullets, cartridges, or other explosive charges. *People v. O'Neal*, 228 P.3d 211 (Colo. App. 2009).

General definition of "government" in subsection (3)(i) is limited by subsection (1). *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Government includes urban renewal effort. The general definition of "government" in subsection (3)(i) includes corporations such as the Colorado Springs urban renewal effort. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

The method of transportation a person uses on a highway does not alter the fact that a person is on a highway, and therefore in a "public place". *People v. Naranjo*, 2015 COA 56, 405 P.3d 279, rev'd on other grounds, 2017 CO 87, 401 P.3d 534.

The common area in a prison facility is a "public" area for purposes of subsection (3)(n) because it is used by other inmates and staff. *People v. Lopez*, 2020 COA 119, 471 P.3d 1285.

Employee of the Colorado Springs urban renewal effort is not a "public servant" performing a "governmental

function" on behalf of a "government" as defined in this section. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

And defendant cannot be convicted of bribing effort's employee. A defendant cannot be convicted of the bribery of a public servant under § 18-8-302 where the alleged public servant was an employee of the Colorado Springs urban renewal effort. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

A police officer is a public servant as defined in subsection (3)(o). *People v. Sena*, 2016 COA 161, 395 P.3d 1148.

Difference between "serious bodily injury" and "bodily injury". At least one difference between "serious bodily injury" and "bodily injury" is that of degree. *People v. Benjamin*, 197 Colo. 188, 591 P.2d 89 (1979).

Serious bodily injury. "Substantial risk" applies only to death, and not to permanent disfigurement or protracted loss or impairment of any part or organ of the body. *People v. Sheldon*, 198 Colo. 519, 602 P.2d 869 (1979).

"Fractures" carries its common and ordinary meaning of "the breaking of hard tissue (as a bone, tooth, or cartilage)". Thus, fractures include fractured cartilage under the definition of serious bodily injury. *People v. Jaramillo*, 183 P.3d 665 (Colo. App. 2008).

Any break or fracture is sufficient to establish "serious bodily injury". The term "of the second or third degree" refers only to burns and not to breaks or fractures.

People v. Daniels, 240 P.3d 409 (Colo. App. 2009).

"Protracted loss or impairment of the function of any part or organ of the body" is applied in *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Determination that injury falls within the meaning of "serious bodily injury" must be made at the time of injury, not at the time of trial. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

Whether injury at the time it occurred involved a substantial risk of protracted loss or impairment of the function of any part or organ of the body is a question for the jury. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

The fact that a victim healed well and made a good recovery is not relevant to the determination that he suffered a serious bodily injury. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Evidence sufficient to prove "serious bodily injury". Gunshot wounds to the leg that involve substantial risk of disfigurement and infection and require surgery satisfy "serious bodily injury". *People v. Whittiker*, 181 P.3d 264 (Colo. App. 2006).

Criminal code's definition of "bodily injury" not applicable to term as used in automobile insurance policy. *Lampton v. United Servs. Auto. Ass'n*, 835 P.2d 532 (Colo. App. 1992).

An apartment lease is a "thing of value" for purposes of this section and § 18-5-902. An apartment lease is both a

"contract right" and a "right of use" of "real property". *People v. Molina*, 2017 CO 7, 388 P.3d 894.

When defendant used the last name and social security number of another person to obtain a lease, she committed identity theft. *People v. Molina*, 2017 CO 7, 388 P.3d 894.

Applied in *People v. Rice*, 37 Colo. App. 346, 551 P.2d 1081 (1976), rev'd on other grounds, 193 Colo. 270, 565 P.2d 940 (1977); *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977); *People v. Hines*, 194 Colo. 331, 572 P.2d 467 (1977); *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977); *People v. Marshall*, 196 Colo. 381,

586 P.2d 41 (1978); *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978); *People v. Bailey*, 41 Colo. App. 252, 595 P.2d 252 (1978); *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979); *City & County of Denver v. Waits*, 197 Colo. 563, 595 P.2d 248 (1979); *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *Stroup v. People*, 656 P.2d 680 (Colo. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Reed*, 695 P.2d 806 (Colo. App. 1985); *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

PART 10

ORDERS AND PROCEEDINGS AGAINST DEFENDANT

Law reviews: For article, "1994 Legislature Strengthens Domestic Violence Protective Orders", see 23 Colo. Law. 2327 (1994); for article, "Dissolution of Marriage and Domestic Violence: Considerations for the Family Law Practitioner", see 37 Colo. Law. 43 (Oct. 2008).

18-1-1001. Protection order against defendant - definitions.

(1) (a) There is created a mandatory protection order against a person charged with a criminal violation of the provisions of this title 18, which order remains in effect from the time that the person is advised of the person's rights at arraignment or the person's first appearance before the court and is informed of the order until final disposition of the action, unless otherwise ordered by the court pursuant to subsection (3)(a) or (6.5) of this section. The order must restrain the person charged from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged.

(b) The protection order issued pursuant to this section must be on a standardized form prescribed by the judicial department, and a copy provided to the protected parties. The standardized form must:

(I) Include the information necessary to properly identify the names of persons and locations from which the person is restrained by the order;

(II) Include any other orders of the protection order that restrain the person from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged; and

(III) Identify if the protection order is issued in a case involving domestic violence, as defined in section 18-6-800.3, or a case involving crimes listed in section 24-4.1-302.

(c) A protection order issued pursuant to this section is limited to orders for the protection of a witness to, or victim of, the acts charged and must not include orders that relate to the conditions of pretrial release as provided in section 16-4-105. An order prohibiting the restrained person from possession or consumption of alcohol or controlled substances as a condition of a protection order must comply with the requirements in subsection (3)(a)(II)(D) of this section.

(2) At the time of arraignment or the person's first appearance before the court, the court shall inform the defendant of the protection order effective pursuant to this section and shall inform the defendant that a violation of such order is punishable by contempt and may constitute a misdemeanor offense of violation of a protection order as provided in section 18-6-803.5. As applicable, the court shall also inform the defendant that conduct that violates the protection order may constitute a felony offense of intimidating a witness or victim as provided in section 18-8-704 or retaliation against a witness or victim as provided in section 18-8-706.

(3) (a) (I) Nothing in this section precludes the defendant from applying to the court at any time for modification or dismissal of the protection order issued pursuant to this section or the district attorney from applying to the court at any time for further orders, additional provisions under the protection order, or modification or dismissal of the same. The trial court retains jurisdiction to enforce, modify, or dismiss the protection order until final disposition of the action.

(II) Upon motion of the district attorney or on the court's own motion, for the protection of the alleged victim or witness, the court may enter any of the following further orders against the defendant for the protection of the alleged victim or witness:

(A) An order to vacate or stay away from the home of the alleged victim or witness and to stay away from any other location where an alleged victim or witness is likely to be found;

(B) An order to refrain from contact or direct or indirect communication with the alleged victim or witness;

(C) An order prohibiting possession or control of firearms or other weapons;

(D) When available information supports a sufficient nexus between the possession or consumption of alcohol or controlled substances and the safety of the alleged victim or witness,

an order prohibiting possession or consumption of alcohol or controlled substances without a valid prescription; except that, in a case involving domestic violence, as defined in section 18-6-800.3, or a case involving crimes listed in section 24-4.1-302, the court may enter an order prohibiting possession or consumption of alcohol or controlled substances without a valid prescription if the court deems it appropriate for the safety of an alleged victim or witness;

(E) An order prohibiting the taking, transferring, concealing, harming, disposing of, or threatening to harm an animal owned, possessed, leased, kept, or held by an alleged victim or witness; and

(F) Any other order the court deems necessary to protect the protected person from imminent danger to the protected person's life or health.

(b) Any further orders issued pursuant to subsection (3)(a) of this section are only for the protection of a victim of or witness to the offense charged. A court shall not include an order in a protection order for the protection of the defendant, including for the protection of the defendant from the use of alcohol or other substances, or to enforce a condition of bond mandated pursuant to section 16-4-105 (3), (5), or (6) or a condition of bond that assists in obtaining the appearance of the defendant in court or ensuring community safety as described in section 16-4-105 (8).

(4) Repealed.

(5) Before a defendant is released on bail pursuant to article 4 of title 16, C.R.S., the court shall, in cases involving domestic violence as defined in section 18-6-800.3 (1), in cases of stalking pursuant to section 18-3-602, or in cases involving unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., state the terms of the protection order issued pursuant to this section, including any additional provisions added pursuant to subsection (3) of this section, to the defendant on the record, and the court shall further require the defendant to acknowledge the protection order in court and in writing prior to release as a condition of any bond for the release of the defendant. The prosecuting attorney shall, in such domestic violence cases, stalking cases, or in cases involving unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., notify the alleged victim, the complainant, and the protected person of the order if such persons are not present at the time the protection order is issued.

(6) The defendant or, in cases involving domestic violence as defined in section 18-6-800.3 (1), in cases of stalking pursuant to section 18-3-602, or in cases involving unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., the prosecuting attorney may request a hearing before the court to modify the terms of a protection order issued pursuant to this section. Upon such a request, the court shall set a hearing and the prosecuting attorney shall send notice of the hearing to the defendant and the alleged victim. At the hearing the court shall review the terms of the protection order and any further orders entered and shall consider the modifications, if any, requested by the defendant or the prosecuting attorney.

(6.5) At the time of sentencing or other resolution of the criminal case that does not involve sentencing the defendant, the court shall review each provision of the protection order to ensure that all information in the protection order is accurate and determine whether to, given the circumstances of the criminal case, modify any provisions of the protection order. The court may dismiss a protection order if the court determines the provisions of the protection order are no longer necessary and the protection order was not issued in a case involving domestic violence, as defined in section 18-6-800.3, or a case involving crimes listed in section 24-4.1-302.

(7) The duties of peace officers enforcing orders issued pursuant to this section shall be in accordance with section 18-6-803.5 and any rules adopted by the Colorado supreme court pursuant to said section.

(8) For purposes of this section:

(a) "Court" means the trial court or a designee of the trial court.

(a.5) "Protection order" shall include a restraining order entered pursuant to this section prior to July 1, 2003.

(b) "Until final disposition of the action" means until the case is dismissed, until the defendant is acquitted, until the defendant completes the defendant's sentence, or until the defendant's commitment is terminated and the defendant is discharged from supervision following a verdict of not guilty by reason of insanity pursuant to section 16-8-115. Any defendant sentenced to probation is deemed to have completed the defendant's sentence upon discharge from probation. A defendant sentenced to incarceration is deemed to have completed the defendant's sentence upon release from incarceration and discharge from parole supervision.

(9) (a) **Order requirements.** When the court subjects a defendant to a mandatory protection order that the court, using the probable cause standard of review, determines on the record after reviewing the probable cause statement or arrest warrant that the order includes a crime that includes an act of domestic violence, as defined in section 18-6-800.3 (1), and the act of domestic violence involved the threat of use, use of, or attempted use of physical force, the court, as part of such order:

(I) Shall order the defendant to:

(A) Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and

(B) Relinquish, for the duration of the order, any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control; and

(II) May require that before the defendant is released from custody on bond, the defendant relinquish, for the duration of the order, any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control; and

(III) Shall schedule a compliance hearing pursuant to subsection (9)(e) of this section and notify the defendant of the hearing date and that the defendant shall appear at the hearing in person unless the hearing is vacated pursuant to subsection (9)(e)(I) of this section.

(b) **Time period to relinquish.** Upon issuance of an order pursuant to subsection (9)(a) of this section, the defendant shall relinquish, in accordance with subsection (9)(d) of this section, any firearm or ammunition not more than twenty-four hours, excluding legal holidays and weekends, after being served with the order; except that a court may allow a defendant additional time based on a showing of good cause to relinquish a firearm if the defendant demonstrates to the satisfaction of the court that the defendant is unable to comply within the time frame set forth in this subsection (9)(b).

(c) **Additional time to comply if defendant is in custody.** If a defendant is unable to satisfy the provisions of this subsection (9) because the defendant is incarcerated or otherwise held in the custody of a law enforcement agency, the court shall require the defendant to satisfy the provisions of this subsection (9) not more than twenty-four hours, excluding legal holidays and weekends, after the defendant's release from incarceration or custody or be held in contempt of court. Notwithstanding any provision of this subsection (9)(c), the court may, in its discretion, require the defendant to relinquish any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control before the end of the defendant's incarceration or release from custody. In such a case, a defendant's failure to relinquish a firearm or ammunition as required constitutes contempt of court.

(d) **Relinquishment options.** To satisfy the requirement in subsection (9)(b) of this section, the defendant shall either:

(I) Sell or transfer possession of the firearm or ammunition to a federally licensed firearms dealer described in 18 U.S.C. sec. 923, as amended; except that this provision must not be interpreted to require any federally licensed firearms dealer to purchase or accept possession of any firearm or ammunition; or

(II) Arrange for the storage of the firearm or ammunition by a law enforcement agency or by a storage facility with which the law enforcement agency has contracted for the storage of transferred firearms or ammunition, pursuant to subsection (9)(g) of this section; except that this provision must not be interpreted to require any law enforcement agency to provide storage of firearms or ammunition for any person; or

(III) Sell or otherwise transfer the firearm or ammunition to a private party who may legally possess the firearm or ammunition; except that a defendant who sells or transfers a firearm

pursuant to this subsection (9)(d)(III) shall satisfy all of the provisions of section 18-12-112 concerning private firearms transfers, including but not limited to the performance of a criminal background check of the transferee.

(e) Compliance hearing, conditions of release on bond, and affidavit.

(I) The court shall conduct a compliance hearing to ensure the defendant has complied with this subsection (9) by requiring the defendant to comply with subsection (9)(e)(II) of this section. The court may consider the issue in other proceedings before the court in the criminal case. The hearing is considered a court action involving a bond reduction or modification as described in section 24-4.1-302 (2)(c). A defendant shall comply with section 16-4-105 (4.1) as it relates to the conditions of release on bond. The court may vacate the hearing if the court determines that the defendant has completed the affidavit described in subsection (9)(e)(II) of this section. Failure to appear at a hearing described in this subsection (9)(e)(I) constitutes contempt of court.

(II) The defendant shall complete an affidavit, which must be filed in the court record within seven business days after the order is issued, stating the number of firearms in the defendant's immediate possession or control or subject to the defendant's immediate possession or control, the make and model of each firearm, any reason the defendant is still in immediate possession or control of such firearm, and the location of each firearm. If the defendant does not possess a firearm at the time the order is issued pursuant to subsection (9)(a) of this section, the defendant shall indicate such nonpossession in the affidavit.

(III) If the defendant possessed a firearm at the time of the qualifying incident giving rise to the duty to relinquish the firearm pursuant to this subsection (9) but transferred or sold the firearm to a private party prior to the court's issuance of the order, the defendant shall disclose the sale or transfer of the firearm to the private party in the affidavit described in subsection (9)(e)(II) of this section. The defendant, within seven business days after the relinquishment period established by the court pursuant to this subsection (9), shall acquire a written receipt and signed declaration that complies with subsection (9)(h)(I)(A) of this section, and the defendant shall file the signed declaration at the same time the defendant files the affidavit pursuant to subsection (9)(e)(II) of this section.

(IV) No testimony or other information compelled pursuant to this subsection (9), or any information directly or indirectly derived from such testimony or other information, may be used against the defendant in any criminal case, except prosecution for perjury pursuant to section 18-8-503.

(V) The state court administrator shall develop the affidavit described in subsection (9)(e)(II) of this section and all other forms necessary to implement this subsection (9) no later than January 1, 2022. State courts may use the forms developed by the state court administrator pursuant to this subsection (9)(e) or another form of the court's choosing, so long as the forms comply with the requirements of this subsection (9)(e).

(VI) Upon the sworn statement or testimony of the petitioner or of any law enforcement officer alleging there is probable cause to believe the respondent has failed to comply with the provisions of this section, the court shall determine whether probable cause exists to believe that the respondent has failed to relinquish all firearms or a concealed carry permit in the respondent's custody, control, or possession. If probable cause exists, the court shall issue a search warrant that states with particularity the places to be searched and the items to be taken into custody.

(f) **Relinquishment to a federally licensed firearms dealer.** A federally licensed firearms dealer who takes possession of a firearm or ammunition pursuant to this subsection (9) shall issue a written receipt and signed declaration to the defendant at the time of relinquishment. The declaration must memorialize the sale or transfer of the firearm. The federally licensed firearms dealer shall not return the firearm or ammunition to the defendant unless the dealer:

(I) Contacts the Colorado bureau of investigation, referred to in this subsection (9) as the "bureau", to request that a criminal background check of the defendant be performed; and

(II) Obtains approval of the transfer from the bureau after the performance of the criminal background check.

(g) **Storage by a law enforcement agency or storage facility.**

(I) A local law enforcement agency may elect to store firearms or ammunition for a defendant pursuant to this subsection (9). The law enforcement agency may enter into an agreement with any other law enforcement agency or storage facility for the storage of transferred firearms or ammunition. If a law enforcement agency elects to store firearms or ammunition for a defendant:

(A) The law enforcement agency may charge a fee for the storage, the amount of which must not exceed the direct and indirect costs incurred by the law enforcement agency in providing the storage;

(B) The law enforcement agency shall establish policies for disposal of abandoned or stolen firearms or ammunition; and

(C) The law enforcement agency shall issue a written receipt and signed declaration to the defendant at the time of relinquishment. The declaration must memorialize the sale or transfer of the firearm.

(II) If a local law enforcement agency elects to store firearms or ammunition for a defendant pursuant to this subsection (9)(g), the law enforcement agency shall not return the firearm or ammunition to the defendant unless the law enforcement agency:

(A) Contacts the bureau to request that a criminal background check of the defendant be performed; and

(B) Obtains approval of the transfer from the bureau after the performance of the criminal background check.

(III) (A) A law enforcement agency that elects to store a firearm or ammunition for a defendant pursuant to this subsection (9) may elect to cease storing the firearm or ammunition. A law enforcement agency that elects to cease storing a firearm or ammunition for a defendant shall notify the defendant of the decision and request that the defendant immediately make arrangements for the transfer of the possession of the firearm or ammunition to the defendant or, if the defendant is prohibited from possessing a firearm, to another person who is legally permitted to possess a firearm.

(B) If a law enforcement agency elects to cease storing a firearm or ammunition for a defendant and notifies the defendant as described in subsection (9)(g)(III)(A) of this section, the law enforcement agency may dispose of the firearm or ammunition if the defendant fails to make arrangements for the transfer of the firearm or ammunition and complete the transfer within ninety days after receiving the notification.

(IV) A law enforcement agency that elects to store a firearm or ammunition shall obtain a search warrant to examine or test the firearm or ammunition or facilitate a criminal investigation if a law enforcement agency has probable cause to believe the firearm or ammunition has been used in the commission of a crime, is stolen, or is contraband. This subsection (9)(g)(IV) does not preclude a law enforcement agency from conducting a routine inspection of the firearm or ammunition prior to accepting the firearm for storage.

(h) Relinquishment to a private party.

(I) If a defendant sells or otherwise transfers a firearm or ammunition to a private party who may legally possess the firearm or ammunition, as described in subsection (9)(d)(III) of this section, the defendant shall acquire:

(A) From the federally licensed firearms dealer, a written receipt and signed declaration memorializing the transfer, which receipt must be dated and signed by the defendant, the transferee, and the federally licensed firearms dealer; and

(B) From the federally licensed firearms dealer who requests from the bureau a criminal background check of the transferee, as described in section 18-12-112, a written statement of the results of the criminal background check.

(II) The defendant shall not transfer the firearm to a private party living in the same residence as the defendant at the time of the transfer.

(III) Notwithstanding section 18-12-112, if a private party elects to store a firearm for a defendant pursuant to this subsection (9), the private party shall not return the firearm to the defendant unless the private party acquires from the federally licensed firearms dealer who

requests from the bureau a criminal background check of the defendant, a written statement of the results of the background check authorizing the return of the firearm to the defendant.

(i) **Requirement to file signed declaration.**

(I) The defendant shall file a copy of the signed declaration issued pursuant to subsection (9)(f), (9)(g)(I)(C), or (9)(h)(I)(A) of this section, and, if applicable, the written statement of the results of a criminal background check performed on the defendant, as described in subsection (9)(h)(I)(B) of this section, with the court as proof of the relinquishment at the same time the defendant files the signed affidavit pursuant to subsection (9)(e)(II) of this section. The signed declaration and written statement filed pursuant to this subsection (9)(i) are only available for inspection by the court and the parties to the proceeding. If a defendant fails to timely transfer or sell a firearm or file the signed declaration or written statement as described in this subsection (9)(i)(I):

(A) The failure constitutes a violation of the protection order pursuant to section 18-6-803.5 (1)(c); and

(B) The court shall issue a warrant for the defendant's arrest.

(II) In any subsequent prosecution for a violation of a protection order described in this subsection (9)(i), the court shall take judicial notice of the defendant's failure to transfer or sell a firearm, or file the signed declaration or written statement, which constitutes prima facie evidence of a violation of the protection order pursuant to section 18-6-803.5 (1)(c), and testimony of the clerk of the court or the clerk of the court's deputy is not required.

(j) Nothing in this subsection (9) limits a defendant's right to petition the court for dismissal of a protection order.

(k) A defendant subject to a mandatory protection order issued pursuant to this subsection (9) who possesses or attempts to purchase or receive a firearm or ammunition while the protection order is in effect violates the order pursuant to section 18-6-803.5 (1)(c).

(l) (I) A law enforcement agency that elects in good faith to not store a firearm or ammunition for a defendant pursuant to subsection (9)(g) of this section is not criminally or civilly liable for such inaction.

(II) A law enforcement agency that returns possession of a firearm or ammunition to a defendant in good faith as permitted by subsection (9)(g) of this section is not criminally or civilly liable for such action.

(m) **Immunity.** A federally licensed firearms dealer, law enforcement agency, storage facility, or private party that elects to store a firearm pursuant to this subsection (9) is not civilly liable for any resulting damages to the firearm, as long as such damage did not result from the

willful and wrongful act or gross negligence of the federally licensed firearms dealer, law enforcement agency, storage facility, or private party.

(10) The issuance of a protection order pursuant to this section does not preclude a court from issuing a protective order in a civil proceeding.

Source: **L. 84:** Entire part added, p. 500, § 3, effective July 1. **L. 85:** (1) and (2) amended, p. 617, § 10, effective July 1. **L. 91:** Entire section amended, p. 419, § 3, effective May 31. **L. 94:** (1) and (3) amended, p. 2023, § 3, effective June 3; (3) amended and (5) and (6) added, p. 2041, § 24, effective July 1; (1) amended and (7) added, p. 2009, § 6, effective January 1, 1995. **L. 98:** (1) and IP(3) amended and (8) added, p. 1442, § 28, effective July 1. **L. 2003:** (1), (2), IP(3), (4), (5), and (6) amended and (8)(a.5) added, pp. 1002, 1003, §§ 4, 5, effective July 1. **L. 2011:** IP(3), (3)(a), (3)(b), and (3)(e) amended, (HB 11-1267), ch. 273, p. 1234, § 1, effective June 2. **L. 2012:** (5) and (6) amended, (HB 12-1114), ch. 176, p. 632, § 3, effective May 11. **L. 2013:** (9) added, (SB 13-197), ch. 366, p. 2134, § 4, effective June 5; (8)(b) amended, (HB 13-1109), ch. 33, p. 79, § 1, effective August 7. **L. 2015:** (5) and (6) amended, (HB 15-1060), ch. 45, p. 112, § 2, effective March 20. **L. 2018:** (9)(l)(I) amended, (HB 18-1375), ch. 274, p. 1701, § 21, effective May 29; IP(3), (3)(d), and (3)(e) amended and (3)(f) and (10) added, (SB 18-060), ch. 50, p. 487, § 1, effective November 1. **L. 2021:** (9) amended, (HB 21-1255), ch. 293, p. 1742, § 2, effective June 22; (3) amended, (SB 21-271), ch. 462, p. 3167, § 180, effective March 1, 2022. **L. 2022:** (1) amended, (HB 22-1229), ch. 68, p. 343, § 17, effective March 1. **L. 2023:** (8)(b) amended, (HB 23-1199), ch. 263, p. 1567, § 4, effective May 25. **L. 2025:** (1), (2), and (3) amended, (4) repealed, and (6.5) added, (HB 25-1148), ch. 154, p. 622, § 1, effective July 1 (see editor's note).

Editor's note: (1) Amendments to subsection (1) in House Bill 94-1092 and House Bill 94-1090 were harmonized. Amendments to subsection (3) in House Bill 94-1092 and House Bill 94-1253 were harmonized.

(2) Subsections (9)(d)(I), (9)(d)(II), and (9)(d)(III) are similar to former § 18-1-1001 (9)(b)(I), (9)(b)(II), and (9)(b)(III) as they existed prior to 2021.

(3) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (1) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

(4) Section 3 of chapter 347, (HB 25-1098), Session Laws of Colorado 2025, amended section 4 of chapter 154, (HB 25-1148), Session Laws of Colorado 2025, to change the effective date for amendments to subsection (1)(b) by HB 25-1148 from July 1, 2025, to October 1, 2025.

Cross references: (1) For protection orders against children under the "Colorado Children's Code", see § 19-2.5-607; for additional provisions concerning protection orders, see the "Colorado Victim and Witness Protection Act of 1984", part 7 of article 8 of this title 18.

(2) For the legislative declaration in the 2013 act adding subsection (9), see section 1 of chapter 366, Session Laws of Colorado 2013.

ANNOTATION

Classifying a violation of a criminal restraining order as a crime more serious than the offense of violating a domestic abuse restraining order does not violate equal protection of the laws. This section seeks to protect those who must present evidence in the criminal justice system while § 14-4-102 is designed to protect persons in a volatile domestic setting. *People v. Brockelman*, 862 P.2d 1040 (Colo. App. 1993).

The first two sentences of subsection (3), providing for broad authority to modify a mandatory protection order (MPO), also apply generally to every MPO issued in a title 18 case. This section read as a whole indicates that the specific conditions pertaining to domestic violence cases and certain victims' rights act cases are referenced in subsection (3) not as a restriction on that broad authority but rather to set out what conditions are subject to the special procedural requirements of subsections (5) and (6). *People v. Yoder*, 2016 COA 50, 409 P.3d 430.

In order to uphold an MPO when a defendant moves the court to modify an MPO that infringes on the defendant's

constitutional right to parental association, the court must first find that (1) there are compelling circumstances to justify the infringement of the defendant's constitutional right, and (2) the purpose of the MPO cannot be accomplished by less restrictive means. *People v. Zoller*, 2023 COA 117, 544 P.3d 1251; *People v. Manzanares*, 2025 COA 62, 575 P.3d 452.

When a defendant is serving an illegal sentence but the defendant has not obtained a court order reversing or vacating the conviction, entering a new sentence, or dismissing the protection order, the protection order associated with the case remains in effect through the entire illegal sentence and any violation of the protection order during that time is punishable. *People v. Delfeld*, 2021 COA 131, 503 P.3d 902.

Dismissal of some charges, in the context of a plea of guilty to others, is not the dismissal of a "case" or "final disposition of the action" under subsection (8)(b). A single case may include several charges. Adding or dropping a single charge within a multi-charge case does not dispose of the case. *People v. Sterns*, 2013 COA 66, 318 P.3d 535.

Thus, when the trial court dismissed a charge involving defendant's daughter, it did not thereby dispose of the action against defendant. The action continued pursuant to the plea agreement. Accordingly, the trial court's mandatory protection order properly included defendant's daughter. *People v. Sterns*, 2013 COA 66, 318 P.3d 535.

Under the plain language of subsections (1) and (8)(b), a mandatory protection order terminates upon a verdict of not guilty by reason of insanity (NGRI) because, under case law, NGRI is an acquittal and "final disposition of the action". *People v. Licata*, 2023 COA 34, 533 P.3d 234.

Section 16-4-105 (1)(o) permits a court to designate persons to prepare information concerning the accused in

order to assist the judge in deciding whether to order release on personal recognizance. Pursuant to this statutory authority, the judges of the first judicial district authorized the pretrial service officers, as bond commissioners, to implement the bond schedule of the district. Although the bond schedule did not address temporary restraining orders specifically, in cases involving allegations of domestic violence, the pretrial service officers, acting as bond commissioners, were expected to deliver to the defendant a temporary restraining order pursuant to this section. The court concluded that, as a matter of law, these are judicial acts integral to the judicial process and therefore are cloaked in absolute quasi-judicial immunity. *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000).

18-1-1001.5. Protection order against defendant - transfer of wireless telephone service in domestic violence cases - definitions.

(1) In addition to the options described in section 18-1-1001 (3), upon a discretionary motion of the district attorney or on the court's own motion for the protection of an alleged victim or witness in a case involving domestic violence, as defined in section 18-6-800.3 (1), and cases involving crimes listed in section 24-4.1-302 (1), except those listed in subsections (1)(cc.5) and (1)(cc.6) of that section, the court may enter an order directing a wireless telephone service provider to transfer the financial responsibility for and rights to a wireless telephone number or numbers to the alleged victim or witness if the alleged victim or witness:

- (a) Is not the account holder; and
 - (b) Proves by a preponderance of the evidence that the alleged victim or witness and any minor children in his or her care are the primary users of each wireless telephone number that will be ordered to be transferred by a court pursuant to this section.
- (2) (a) An order transferring the financial responsibility for and rights to a wireless telephone number or numbers to an alleged victim or witness pursuant to this section must be a separate written order that is directed to the wireless telephone service provider.

(b) The order must list the name and billing telephone number of the account holder, the name and contact information of the alleged victim or witness to whom the telephone number or numbers will be transferred, and each telephone number to be transferred to the alleged victim or witness.

(c) The court shall ensure that the alleged victim's or witness's contact information is not provided to the account holder in proceedings held pursuant to this section.

(d) The order must be sent or delivered in person or electronically by the protected party to the wireless telephone service provider's registered agent.

(e) A wireless telephone service provider shall terminate the account holder's use of a telephone number that the court has ordered to be transferred to the alleged victim or witness pursuant to this section unless the wireless telephone service provider notifies the alleged victim or witness and the court within five business days after the wireless telephone service provider receives the order either that an account holder named in the order has terminated the account or that the requested transfer cannot be effectuated due to differences in network technology that prevent functionality of a device on the network or due to geographic limitations on network or service availability.

(3) A transfer ordered pursuant to this section does not preclude a wireless telephone service provider from applying any routine and customary requirements for account establishment to the alleged victim or witness as part of the transfer of financial responsibility for a wireless telephone number or numbers and any devices attached to the number or numbers, including, without limitation, identification, financial information, and customer preferences.

(4) A wireless telephone service provider is immune from civil liability for complying with an order to transfer a telephone number pursuant to this section.

(5) The issuance of a protection order pursuant to this section does not preclude a court from issuing a protective order in a civil proceeding.

(6) For purposes of this section:

(a) "Account holder" means a defendant who:

(I) Is charged with an offense, the underlying basis of which includes an act of domestic violence, as defined in section 18-6-800.3 (1), or a crime listed in section 24-4.1-302 (1), except for those crimes listed in subsections (1)(cc.5) and (1)(cc.6) of that section; and

(II) Maintains an account with a wireless telephone service provider.

(b) "Financial responsibility" means an obligation to pay service fees and other costs and charges associated with any telephone number.

(c) "Wireless telephone service provider" means a person or entity that provides or resells commercial mobile service, as defined in section 47 U.S.C. sec. 332 (d)(1).

Source: L. 2018: Entire section added, (SB 18-060), ch. 50, p. 488, § 2, effective November 1.

18-1-1002. Criminal contempt proceedings - notice to district attorney.

Before a criminal contempt proceeding is heard before the court, notice of the proceedings shall be provided to the district attorney for the district of the court where the proceedings are to be heard and the district attorney for the district of the court where the alleged act of criminal contempt occurred. The district attorney for either district shall be allowed to appear and argue for the imposition of contempt sanctions.

Source: L. 94: Entire section added, p. 1717, § 7, effective July 1.

ANNOTATION

District attorney need not be notified of criminal contempt hearing against father in arrears in child support. While the general assembly may limit jurisdiction, no statute will be held to limit court power unless the limitation is explicit in the statute. There was no prejudice to the party's substantial rights as the statute was enacted to protect state's interest in prosecution, not for the protection of fathers in arrears in

child support. In re Helmich, 937 P.2d 897 (Colo. App. 1997).

Prisoner incarcerated in county jail for punitive contempt is entitled to the benefit of earned good time credit. To the extent that the language of an order purports to limit "good time" credit, it is beyond the power of the court to do so. In re Helmich, 937 P.2d 897 (Colo. App. 1997).

PART 11

PRESERVATION OF DNA EVIDENCE

Editor's note: This part 11 was added in 2008 and was not amended prior to 2009. The substantive provisions of this part 11 were repealed and reenacted in 2009, resulting in the addition, relocation, and elimination of sections as well as subject matter. For the text of this part 11 prior to 2009, consult the 2008 Colorado Revised Statutes. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

18-1-1101. Definitions.

As used in this part 11, unless the context otherwise requires:

- (1) "Disposed of" means evidence is destroyed, thrown away, or returned to the owner or his or her designee.
- (2) "DNA" means deoxyribonucleic acid.
- (3) "DNA evidence" means all evidence collected by law enforcement in a criminal investigation, which evidence may be reasonably believed to contain DNA that is relevant to a disputed issue in the investigation and prosecution of the case.
- (4) "DNA profile" means an identifier obtained as a result of a specific DNA analysis.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 97, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1101 as it existed prior to 2009.

18-1-1102. Scope.

- (1) The provisions of this part 11 shall apply to the preservation of DNA evidence only when:
 - (a) The investigation of a felony does not result in or has not resulted in charges being filed; or
 - (b) The filed charges resulted in a conviction for a class 1 felony or for a sex offense that carries an indeterminate sentence pursuant to section 18-1.3-1004; or
 - (c) The filed charges resulted in a conviction for a felony not covered by paragraph (b) of this subsection (1); or
 - (d) The filed charges resulted in a conviction for any offense not covered by paragraphs (b) and (c) of this subsection (1), and at least one of the charges filed involved a sex offense as defined in section 18-1.3-1003 (5).
- (2) For purposes of subsection (1) of this section, conviction shall include a verdict of guilty by a judge or jury, a plea of guilty or nolo contendere, or a deferred judgment and sentence. For purposes of paragraph (d) of subsection (1) of this section, conviction shall also include a juvenile delinquent adjudication or deferred adjudication.

(3) This part 11 does not impose a statutory duty to retain or store evidence other than in the situations described in this section.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 97, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

18-1-1103. Duty to preserve DNA evidence.

(1) A law enforcement agency that collects DNA evidence in conducting a criminal investigation of a felony that does not result in or has not resulted in charges being filed shall preserve the DNA evidence for the length of the statute of limitations for the felony crime that was investigated.

(2) Except as provided in sections 18-1-1105 to 18-1-1107, a law enforcement agency that collects DNA evidence in conducting a criminal investigation that results in a conviction listed in section 18-1-1102 (1) shall preserve the DNA evidence for the life of the defendant who is convicted.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 98, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

18-1-1104. Manner and location of preservation of DNA evidence.

(1) When DNA evidence that is subject to preservation pursuant to section 18-1-1103 is processed for the development of a DNA profile, the DNA profile shall be preserved by the accredited laboratory in Colorado that develops the DNA profile. If the DNA profile is not developed by an accredited laboratory in Colorado, the laboratory that processes the DNA profile shall send the DNA profile to an accredited laboratory in Colorado for preservation.

(2) A law enforcement agency that has custody of DNA evidence that is subject to preservation pursuant to section 18-1-1103 shall preserve the evidence in an amount and manner sufficient to develop a DNA profile, based on the best scientific practices at the time of collection, from the biological material contained in or included on the evidence. If DNA

evidence is of such a size, bulk, or physical character as to render retention impracticable, the law enforcement agency shall remove and preserve portions of the evidence likely to contain DNA related to the offense in a quantity sufficient, based on the best scientific practices at the time of collection, to permit future DNA testing. The preserved DNA evidence shall, whenever possible, include a sample sufficient to allow for independent testing by the defendant. After preserving the necessary amount of the DNA evidence, the law enforcement agency may dispose of the remainder of the evidence.

(3) If a law enforcement agency is asked to produce DNA evidence that is subject to preservation pursuant to section 18-1-1103 and cannot produce the evidence, the chief evidence custodian for the law enforcement agency shall provide an affidavit in which he or she describes, under penalty of perjury, the efforts taken to locate the DNA evidence and affirms that the DNA evidence could not be located.

(4) If upon request a law enforcement agency cannot produce DNA evidence that is subject to preservation pursuant to section 18-1-1103, the court shall determine whether the disposal of the DNA evidence violated the defendant's due process rights, and, if so, the court shall order an appropriate remedy.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 98, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

ANNOTATION

Defendant's due process rights not violated because of destruction of DNA evidence. Defendant failed to show that evidence possessed exculpatory value that

was apparent before it was destroyed. *People v. Young*, 2014 COA 169, 412 P.3d 676.

18-1-1105. Law enforcement agency request for permission to dispose of evidence - procedures.

(1) A law enforcement agency may not request permission to dispose of DNA evidence in cases described in section 18-1-1102 (1)(a) and (1)(b).

(2) In cases described in section 18-1-1102 (1)(c) and (1)(d), a law enforcement agency may seek to dispose of DNA evidence by providing notice, in the form developed pursuant to section 18-1-1108, to the district attorney that prosecuted the charges arising out of the investigation.

(3) Upon receipt of the notice described in subsection (2) of this section, the district attorney shall determine whether to object to the disposal of the DNA evidence. The district attorney may determine that a portion of the DNA evidence may be disposed of and a portion of the DNA evidence shall be preserved.

(4) (a) If the district attorney determines that the DNA evidence should not be disposed of, the district attorney shall provide notice to the law enforcement agency that the DNA evidence shall be preserved. Upon the receipt of the notice from the district attorney to preserve the DNA evidence, the law enforcement agency shall preserve the DNA evidence until such time as the law enforcement agency is permitted by a court order to dispose of the DNA evidence.

(b) (I) If the district attorney determines that all or a portion of the DNA evidence may be disposed of, he or she shall send notice to the defendant and the law enforcement agency specifying which DNA evidence may be disposed of. Notice to the defendant shall include a copy of the notice form prepared by the law enforcement agency pursuant to subsection (2) of this section.

(II) The defendant shall have ninety-eight days from the date the notice was sent by the district attorney to file a motion to preserve DNA evidence in the court in which the defendant was convicted. The motion shall state specific grounds supporting the preservation of the DNA evidence, and the defendant shall provide copies of the motion to the district attorney and the law enforcement agency.

(III) If no motion is filed within the ninety-eight-day period, the district attorney or the law enforcement agency requesting disposal of the evidence shall file with the court a copy of the notice sent to the defendant pursuant to subparagraph (I) of this paragraph (b), and the court shall forthwith, without hearing, enter an order authorizing disposal of the DNA evidence and provide copies of the order to the defendant, district attorney, and law enforcement agency.

(IV) If the defendant files a motion, the court shall follow the procedure set forth in subsection (6) of this section.

(c) (I) If the law enforcement agency does not receive notice from the district attorney as described in paragraph (a) or (b) of this subsection (4) within a reasonable amount of time or does receive timely notice from the district attorney pursuant to paragraph (a) of this subsection (4), the law enforcement agency may file a motion with the court that entered the conviction in the case in which the evidence was collected, asking for a court order to dispose of the DNA evidence. The motion shall include a copy of the notice the law enforcement agency provided to the district attorney. The law enforcement agency shall provide a copy of the disposal motion to the district attorney and the defendant contemporaneously with the filing of the motion. The law enforcement agency shall specify the DNA evidence for which disposal is requested in the motion.

(II) The defendant or the district attorney shall have ninety-eight days after the disposal motion is sent to file an objection in the court in which the disposal motion was filed. The objection shall state specific grounds supporting the preservation of the DNA evidence. If the district attorney files an objection, the district attorney shall provide copies of the objection to the defendant and the law enforcement agency. If the defendant files an objection, the defendant shall provide copies of the objection to the district attorney and the law enforcement agency.

(5) The defendant, through legal counsel, shall have a reasonable right to review the DNA evidence to prepare the filing of a timely objection to the disposal motion or the district attorney's notice received pursuant to paragraph (b) of subsection (4) of this section.

(6) (a) Upon receipt pursuant to subparagraph (II) of paragraph (c) of subsection (4) of this section of a timely filed objection, the court may deny the objection without a hearing if it finds on the face of the objection no grounds supporting the request to preserve the DNA evidence. The court shall then enter an order authorizing disposal of the DNA evidence and provide copies of the order to the defendant, district attorney, and law enforcement agency.

(b) If the court determines that a timely filed objection or motion to preserve states adequate grounds to require preservation of the DNA evidence, the court may set a hearing on the objection or motion to preserve, with notice to the district attorney, the law enforcement agency, and the defendant, or the court may deny the disposal motion without a hearing.

(c) In considering an objection or motion to preserve pursuant to this subsection (6), the court shall consider the following factors in determining whether to order preservation of the DNA evidence:

- (I) Whether identification was a disputed issue;
- (II) Whether the evidence contains known DNA;
- (III) Whether it is possible to perform DNA testing on the evidence that has not previously been performed;
- (IV) Whether the defendant has served all of his or her sentence; and
- (V) Whether the defendant has state appellate or collateral attack rights that have not been exhausted, in which case there shall be a presumption that the DNA evidence should be preserved.

(d) Following a hearing on a disposal motion or motion to preserve, the court shall enter an order either authorizing disposal of the DNA evidence or ordering the DNA evidence to be preserved. If the court orders preservation, the order may state the length of time the DNA evidence shall be preserved or establish a condition precedent for the disposition of the DNA evidence.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 99, § 1, effective March 18. **L. 2012:** (4)(b)(II), (4)(b)(III), and (4)(c)(II) amended, (SB 12-175), ch. 208, p. 863, § 104, effective July 1.

Editor's note: This section is similar to former § 18-1-1103 as it existed prior to 2009.

18-1-1106. Defendant request for disposition of or waiver of preservation of DNA evidence - procedures.

(1) In a case described in section 18-1-1102 (1), a defendant may petition the court on his or her own behalf for the disposal of DNA evidence in his or her case. The defendant shall provide a copy of the petition to the district attorney, who may join with or object to the defendant's petition. Upon the filing of the petition, the timing and procedures of section 18-1-1105 shall apply. By filing a petition for disposition of DNA evidence, the defendant waives any right to preservation of that evidence under this part 11. However, a defendant may not be compelled to file a motion under this section in order to obtain a plea or sentence agreement.

(2) In a case described in section 18-1-1102 (1), a defendant may waive his or her right to preservation of DNA evidence under this part 11 at any stage of the proceeding by making a knowing and voluntary waiver. A waiver executed as a part of a plea bargain or sentencing agreement shall be voluntarily agreed to by all parties and shall include a written list describing all evidence to be disposed of.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 101, § 1, effective March 18.

18-1-1107. Victim request for disposition of DNA evidence - procedures.

In a case described in section 18-1-1102 (1), if DNA evidence is being held that is the property of the victim, as defined in section 24-4.1-302 (5), C.R.S., of the crime, the victim may request the district attorney to review whether the DNA evidence may be returned. If the district attorney determines the DNA evidence may be returned, the district attorney may file a petition with the court for the return of the DNA evidence. The district attorney shall provide notice to the defendant of the petition. Upon the filing of the petition, the timing and procedures of section 18-1-1105 shall apply.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

18-1-1108. Notice - form and sufficiency.

(1) Notice to the defendant as required by this part 11 shall be proper if it is sent by United States mail or hand-delivered to the attorney of record for the defendant as defined in rule 44 of the Colorado rules of criminal procedure. If there is no attorney of record, notice to the defendant shall be proper if it is sent by United States mail to the last-known address of the defendant as reflected in the current motor vehicle records or, if no such record exists, the last-known address in the court file. Prior to sending notice by United States mail, however, the district attorney shall first review the department of corrections records to determine whether the defendant is in the physical custody of the department of corrections or on parole. If the defendant is in the physical custody of the department of corrections or on parole, the district attorney shall send notice by United States mail to the correctional facility in which, according to the department's records, the defendant is housed or to the address to which the defendant has been paroled. If the letter is returned because the defendant has been transferred to a different correctional facility, the district attorney shall send notice to the new facility in which the defendant is housed.

(2) The department of public safety, in consultation with state and local law enforcement agencies, shall develop a form to be used by all law enforcement agencies for providing notice to the district attorney and the defendant as described in section 18-1-1105 (2).

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

18-1-1109. Court data collection - DNA evidence cases - repeal. (Repealed)

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

Editor's note: (1) This section was similar to former § 18-1-1104 as it existed prior to 2009.

(2) Subsection (4) provided for the repeal of this section, effective July 1, 2010. (See L. 2009, p. 102.)

18-1.3 ARTICLE 1.3

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PART 12

SPECIAL PROCEEDINGS -
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SPECIAL PROCEEDINGS -
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- 18-1.3-1301. Applicability of procedure
for the imposition of
sentences in class 1
felony cases.
- 18-1.3-1302. Imposition of sentences in
class 1 felonies for crimes
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PART 14

COMPETENCY OF PERSONS TO BE
EXECUTED

- 18-1.3-1401. Definitions.
- 18-1.3-1402. Mental competency to be
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- 18-1.3-1405. Mentally incompetent to be executed - untimely or successive motions. 18-1.3-1407. Appeal of determination of mental incompetency to be executed.
- 18-1.3-1406. Persons mentally incompetent to be

PART 1

ALTERNATIVES IN SENTENCING

18-1.3-101. Pretrial diversion - appropriation - repeal.

(1) (a) **Legislative intent.** The intent of this section is to facilitate and encourage the diversion of defendants and defendants with behavioral health disorders, referred to collectively in this section as "defendants", from the criminal justice system when diversion may prevent such defendants from committing additional criminal acts, restore victims of crime, facilitate the defendant's ability to pay restitution to victims of crime, and reduce the number of cases in the criminal justice system. Diversion should ensure defendant accountability while allowing defendants to avoid the collateral consequences associated with criminal charges and convictions. In addition, diversion programs shall consider individuals with behavioral health disorders who are eligible for diversion pursuant to subsection (3) of this section and divert such individuals out of the criminal justice system and into community treatment programs.

(b) A district attorney's office may develop or continue to operate its own diversion program that is not subject to the provisions of this section. If a district attorney's office accepts state money to create or operate a diversion program pursuant to this section, the district attorney's office must comply with the provisions of this section.

(2) **Period of diversion.** In any case, either before or after charges are filed, the district attorney may suspend prosecution of the offense for a period not to exceed two years. The period of diversion may be extended for an additional time up to one year if the failure to pay restitution is the sole condition of diversion that has not been fulfilled, because of inability to pay, and the defendant has a future ability to pay. During the period of diversion the defendant may be placed under the supervision of the probation department or a diversion program approved by the district attorney.

(3) **Guidelines for eligibility.** Each district attorney that uses state money for a diversion program pursuant to this section shall adopt policies and guidelines delineating eligibility criteria for pretrial diversion, including types and levels of offenses so long as those offenses are

consistent with subsections (5) to (7) of this section, and may agree to diversion in any case in which there exists sufficient admissible evidence to support a conviction. In determining whether an individual is appropriate for diversion, the district attorney shall consider:

- (a) The nature of the crime charged and the circumstances surrounding it;
- (b) Any special characteristics or circumstances of the defendant, which may include whether the defendant has a mental health or other behavioral health disorder or whether the defendant is a pregnant or postpartum defendant, as defined in section 18-1.3-103.7;
- (c) Whether diversion is consistent with the defendant's rehabilitation and reintegration; and
- (d) Whether the public interest will be best served by diverting the individual from prosecution.

(4) Before entering into a pretrial diversion agreement, the district attorney may require a defendant to provide information regarding prior criminal charges, education and work experience, family, residence in the community, and other information relating to the diversion program. The defendant shall not be denied the opportunity to consult with legal counsel before consenting to diversion. Legal counsel may be appointed as provided under article 1 of title 21, C.R.S.

(5) In a jurisdiction that receives state moneys for the creation or operation of diversion programs pursuant to this section, an individual accused of an offense, the underlying factual basis of which involves domestic violence as defined in section 18-6-800.3 (1), is not eligible for pretrial diversion unless charges have been filed, the individual has had an opportunity to consult with counsel, and the individual has completed a domestic violence treatment evaluation, which includes the use of a domestic violence risk assessment instrument, conducted by a domestic violence treatment provider approved by the domestic violence offender management board as required by section 16-11.8-103 (4), C.R.S. The district attorney may agree to place the individual in the diversion program established by the district attorney pursuant to this section if he or she finds that, based on the results of that evaluation and the other factors in subsection (3) of this section, the individual is appropriate for the program.

(6) In a jurisdiction that receives state moneys for the creation or operation of diversion programs pursuant to this section, an individual accused of a sex offense as defined in section 18-1.3-1003 (5) is not eligible for pretrial diversion unless charges have been filed and, after the individual has had an opportunity to consult with counsel, the individual has completed a sex-offense-specific evaluation, which includes the use of a sex-offense-specific risk assessment instrument, conducted by an evaluator approved by the sex offender management board as required by section 16-11.7-103 (4). The district attorney may agree to place the individual in the diversion program established by the district attorney pursuant to this section if he or she finds that, based on the results of that evaluation and the other factors in subsection (3) of this section,

the individual is appropriate for the program. Notwithstanding that a successfully completed diversion agreement does not constitute a history of sex offenses for purposes of sections 16-11.7-102 (2)(a)(II), 16-11.7-102 (2)(a)(IV)(C), and 16-22-103 (2)(d), the information constituting the crimes charged and facts alleged shall be available for use by a court, district attorney, any law enforcement agency, or agency of the state judicial department, if otherwise permitted by law, in any subsequent criminal investigation, prosecution, risk or needs assessment evaluation, sentencing hearing, or during a probation or parole supervision period.

(7) Notwithstanding any other provision of this section, an individual accused of any of the following sexual offenses is not eligible for participation in a diversion program established in a jurisdiction that receives state money for the creation or operation of diversion programs pursuant to this section:

- (a) Sexual assault as described in section 18-3-402;
 - (b) Sexual assault on a child as described in section 18-3-405;
 - (c) Any sexual offense committed against an at-risk adult or an at-risk juvenile, as defined in section 18-6.5-102 (2) and (4);
 - (d) Any sexual offense committed with the use of a deadly weapon as described in section 18-1-901 (3)(e);
 - (e) Enticement of a child, as described in section 18-3-305;
 - (f) Sexual exploitation of a child as described in section 18-6-403;
 - (g) Procurement of a child for exploitation, as described in section 18-6-404;
 - (h) Sexual assault on a child by one in a position of trust, as described in section 18-3-405.3;
- or
- (i) An offense in part 4 of article 7 of this title 18.

(8) Diversion programs may include, but are not limited to, programs operated by law enforcement upon agreement with a district attorney, district attorney internally operated programs, programs operated by other approved agencies, restorative justice programs, or supervision by the probation department. References to "deferred prosecution" in Colorado statutes and court rules shall apply to pretrial diversion as authorized by this section.

(9) Diversion agreements.

(a) All pretrial diversions are governed by the terms of an individualized diversion agreement signed by the defendant, the defendant's attorney if the defendant is represented by an attorney, and the district attorney.

(b) The diversion agreement must include a written waiver of the right to a speedy trial for the period of the diversion. All diversion agreements must include a condition that the defendant not commit any criminal offense during the period of the agreement. Diversion agreements may also include provisions, agreed to by the defendant, concerning payment of restitution and court costs, payment of a supervision fee not to exceed that provided for in section 18-1.3-204 (2)(a)(V), participation in restorative justice practices as defined in section 18-1-901 (3)(o.5), or an agreement to receive treatment, for any of the defendant's behavioral health disorders. Any pretrial diversion supervision fees collected may be retained by the district attorney for purposes of funding its adult pretrial diversion program. The conditions of diversion are limited to those specific to the individual defendant or necessary for proper supervision of the individual defendant. A diversion agreement must provide that if the defendant fulfills the obligations described therein, the court shall order all criminal charges filed against the defendant dismissed with prejudice.

(c) The diversion agreement may require an assessment of the defendant's criminogenic and behavioral health needs, to be performed after the period of diversion has begun by either the probation department, diversion program, or community treatment program approved by the district attorney. Based on the results of that assessment, the probation department or approved diversion or community treatment program may direct the defendant to participate in programs offering medical, therapeutic, behavioral health, educational, vocational, corrective, preventive, or other rehabilitative services. Defendants with the ability to pay may be required to pay for such programs or services.

(d) The diversion agreement may include a statement of the facts the charge is based upon authored by the defendant and agreed to by the defendant's attorney if the defendant is represented by an attorney and the district attorney. The statement is admissible as impeachment evidence against the defendant in the criminal proceedings if the defendant fails to fulfill the terms of the diversion agreement and criminal proceedings are resumed.

(e) A defendant shall not be required to enter any plea to a criminal charge as a condition of pretrial diversion. A defendant's or counsel's statement in a diversion conference or in any other discussion of a proposed diversion agreement, including an evaluation performed pursuant to subsections (5) and (6) of this section, other than a statement provided for in paragraph (d) of this subsection (9), shall not be admissible as evidence in criminal proceedings on the crimes charged or facts alleged.

(f) If the district attorney agrees to offer diversion in lieu of further criminal proceedings and the defendant agrees to all of the terms of the proposed agreement, the diversion agreement may be either filed with the court or held by the parties. A court filing shall be required only if the probation department supervises the defendant. When a diversion agreement is reached, the court shall stay further proceedings.

(g) If a defendant's competency to proceed is raised pursuant to section 16-8.5-102 or a defendant is found incompetent to proceed pursuant to section 16-8.5-103, the following apply:

(I) The defendant may enter into a diversion agreement with the consent of the district attorney and the court if the court finds that the defendant has the ability to participate and is advised of the potential consequences of failure to comply;

(II) Notwithstanding subsection (1)(b) of this section, the defendant's entrance into a diversion agreement constitutes a waiver of the defendant's right to a speedy trial for the period of diversion pursuant to section 18-1-405 (6) regardless of whether a written waiver is completed; and

(III) The defendant's entrance into the diversion agreement does not waive the issue of competency to stand trial if there is a violation of the diversion agreement and proceedings on the charges resume. The diversion agreement alone is not evidence of competency.

(10) Diversion outcomes.

(a) During the period of diversion, the supervising program or agency designated in the diversion agreement shall provide the level of supervision necessary to facilitate rehabilitation and ensure the defendant is completing the terms of the diversion agreement.

(b) Upon the defendant's satisfactory completion of and discharge from supervision, the court shall dismiss with prejudice all charges against the defendant. The effect of the dismissal is to restore the defendant to the status he or she occupied before the arrest, citation, or summons. A successfully completed diversion agreement shall not be considered a conviction for any purpose. A person with an order of dismissal entered pursuant to this article may not be subject to charge, prosecution, or liability under Colorado law of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge the arrest, citation, or summons in response to any inquiry made for any purpose.

(c) At any point after a diversion agreement is completed, the court shall seal all arrest and other criminal records pertaining to the offense using the procedure described in sections 24-72-704 and 24-72-705.

(d) If the defendant violates the conditions of the diversion agreement, the supervising entity shall provide written notice of the violation to the defendant, the district attorney, and the court. The district attorney, in his or her sole discretion, may initiate revocation of a diversion agreement by the filing of a criminal complaint, information, or indictment, or if charges have already been filed, by giving the court notice of intent to proceed with the prosecution. The defendant may, within fourteen days after the first court appearance following such a filing, request a hearing to contest whether a violation occurred. The district attorney has the burden by a preponderance of the evidence to show that a violation has in fact occurred, and the procedural safeguards required in a revocation of probation hearing pursuant to section 16-11-206, C.R.S.,

shall apply. The court may, when it appears that the alleged violation of the diversion agreement is a pending criminal offense against the defendant, continue the diversion revocation hearing until the completion of the criminal proceeding. If the court finds a violation has occurred, or a hearing is not requested, the prosecution may continue. If the court finds the district attorney has not proven a violation, the court shall dismiss the criminal case without prejudice and return the defendant to the supervision of the diversion program to complete the terms of the agreement.

(e) If a defendant is prosecuted following a violation of a diversion agreement, a factual statement entered pursuant to paragraph (d) of subsection (9) of this section is admissible as impeachment evidence. Any other information concerning diversion, including participation in a diversion program, including an evaluation performed pursuant to subsections (5) and (6) of this section, the terms of a diversion agreement, or statements made to treatment providers during a diversion program, shall not be admitted into evidence at trial for any purpose.

(f) (I) Upon completion of diversion in a case managed by a district attorney diversion program prior to charges being filed, the district attorney shall seal the district attorney's diversion record without a court order. This subsection (10)(f) does not apply to cases with offenses listed in section 24-4.1-302 (1).

(II) The district attorney shall notify the Colorado bureau of investigation and the law enforcement agency that had contact with the individual that diversion is complete and the criminal justice records are sealed. Any law enforcement agency that receives a notice shall acknowledge receipt of the notice. The Colorado bureau of investigation, law enforcement agency, diversion provider, and district attorney shall treat the records as sealed within thirty-five days after the completion of diversion, and all provisions of section 24-72-703 shall apply to those records.

(11) (a) For the 2022-23 state fiscal year, the general assembly shall appropriate four million dollars from the behavioral and mental health cash fund created in section 24-75-230 to the judicial department for pretrial diversion programs. Any unexpended or unencumbered money appropriated pursuant to this subsection (11) remains available for expenditure until December 31, 2026, for the same purpose without further appropriation and the department shall obligate and spend the money in accordance with section 24-75-226 (4)(d). The judicial department may use up to five percent of the money appropriated pursuant to this section for administrative expenses. The judicial department shall allocate one million eight hundred thousand dollars of the money appropriated pursuant to this subsection (11) to recipients that provide diversion for individuals with behavioral health disorders.

(b) This subsection (11) is repealed, effective July 1, 2027.

Source: **L. 2002:** Entire article added with relocations, p. 1365, § 2, effective October 1. **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 863, § 105, effective July 1. **L. 2013:** Entire section R&RE, (HB 13-1156), ch. 336, p. 1952, § 1, effective August 7. **L. 2014:** (10)(c) amended, (SB 14-206), ch. 317, p. 1377, § 1, effective August 1. **L. 2016:** (7)(c) amended, (SB 16-189), ch. 210, p. 759, § 28, effective June 6. **L. 2019:** (10)(c) amended, (HB 19-1275), ch. 295, p. 2747, § 2, effective August 2. **L. 2022:** (11) added, (SB 22-196) ch. 193, p. 1290, § 4, effective May 19; (1), (3), (9)(a), (9)(b), and (9)(c) amended, (SB 22-010), ch. 147, p. 951, § 1, effective August 10; (10)(c) amended and (10)(f) added, (SB 22-099), ch. 276, p. 1984, § 4, effective August 10. **L. 2023:** (6) amended, (SB 23-164), ch. 349, p. 2094, § 7, effective June 5; (3)(b) amended, (HB 23-1187), ch. 246, p. 1341, § 5, effective August 7. **L. 2024:** (9)(g) added, (SB 24-006), ch. 30, p. 95, § 2, effective March 22; (11) amended, (HB 24-1465), ch. 257, p. 1681, § 3, effective May 24. **L. 2026:** IP(7) and (7)(i) amended, (SB 26-015), ch. 335, p. 2039, § 18, effective July 1.

Cross references: For the legislative declaration in SB 22-196, see section 1 of chapter 193, Session Laws of Colorado 2022. For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-101 is similar to § 16-7-401 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

The obvious legislative intent in passing the deferred prosecution statute was to delay prosecution for a probationary period, which, if completed satisfactorily, would then require that the charge against a defendant be dismissed with prejudice by the trial court. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

Defendant alone benefits. In those cases where the trial court approves a defendant's application for deferred prosecution, it is the defendant alone who benefits by this procedure which may result in the dismissal of charges against him. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

And the period of any delay in the prosecution of a case is obviously at the instance of the defendant. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

Under § 18-1-405(6)(f) of the speedy trial statute, it specifically states that the period of any delay in the prosecution of a case "caused at the instance of the defendant" shall be excluded in computing the time within which the defendant shall be

brought to trial. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

Thus failure to execute waiver does not inure to defendant's benefit. The fact that the defendant did not execute a written waiver of her right to a speedy trial as required in the deferred prosecution statute and as she agreed to do in open court does not inure to her benefit. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

The prosecutor's consent is a matter of prosecutorial discretion just as is the choice of several possible charges to press or the decision to move for the dismissal of a criminal charge. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

Which is limited by pragmatic factors.

A prosecutor's discretion in charging, deferring, or requesting dismissal is limited by pragmatic factors, but not by judicial intervention. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

District court cannot require prosecutor to give reasons for refusing to consent. Because of the doctrine of separation of powers and because the district attorney is a part of the executive branch, the district court can no more require the district attorney to give his reasons for refusing to consent to a deferred prosecution than a court can require a Colorado governor to give his reasons for failing to grant a pardon. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

18-1.3-101.5. Alternative pilot programs to divert individuals with mental health conditions - legislative intent - eligibility - process of diversion - grant program - program management - definitions - repeal. (Repealed)

Source: **L. 2018:** Entire section added, (SB 18-249), ch. 320, p. 1921, § 1, effective May 30. **L. 2019:** (6)(a), (6)(b), and (7) amended and (6.5) added, (SB 19-211), ch. 119, p. 499, § 1, effective April 16. **L. 2020:** (1), (3), IP(5), and (6)(a) amended, (HB 20-1393), ch. 212, p. 1028, § 1, effective June 30.

Editor's note: Subsection (7) provided for the repeal of this section, effective June 30, 2022. (See L. 2019, p. 499.)

18-1.3-102. Deferred sentencing of defendant.

(1) (a) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his or her attorney of record and the district attorney, to continue the case for the purpose of entering judgment and sentence

upon the plea of guilty for a period not to exceed four years for a felony or two years for a misdemeanor or petty offense or traffic offense. The period shall begin to run from the date that the court continues the case.

(b) The period may be extended for an additional time:

(I) Up to one hundred eighty-two days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department; or

(II) Up to two years if the deferred judgment is for an offense listed in section 16-11.7-102 (3), C.R.S., good cause is shown, and the district attorney and defendant consent to the extension.

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, is authorized to enter into a written stipulation to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation and the responses to violation behavior are similar to probation. A person convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), shall stipulate to the conditions specified in section 18-1.3-204 (2)(b). In addition, the stipulation may require the defendant to perform community or charitable work service projects or make donations thereto. Upon full compliance with such conditions by the defendant, the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice. The stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon the guilty plea; except that, if the offense is a violation of article 18 of this title 18, the court may accept an admission or find a violation of the stipulation without entering judgment and imposing sentence if the court first makes findings of fact on the record stating the entry of judgment and sentencing would not be consistent with the purposes of sentencing, that the defendant would be better served by continuing the deferred judgment period, and that public safety would not be jeopardized by the continuation of the deferred judgment. If the court makes those findings and continues the deferred judgment over the objection of the prosecution, the court shall also impose additional and immediate sanctions upon the defendant to address the violation, to include, but not be limited to, the imposition of further terms and conditions that will enhance the likelihood of the defendant's success, respond to the defendant's noncompliance, and promote further individual accountability, including extending the time period of the deferred judgment for up to two additional years or incarceration in the county jail for a period not to exceed ninety days consistent with the provisions of section 18-1.3-202 (1), or both. When, as a condition of the

deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney or a probation officer and upon notice of hearing thereon of not less than seven days to the defendant or the defendant's attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney or a probation officer at any time within the term of the deferred judgment or within thirty-five days thereafter. The burden of proof at the hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.

(3) When a defendant signs a stipulation by which it is provided that judgment and sentence shall be deferred for a time certain, he or she thereby waives all rights to a speedy trial, as provided in section 18-1-405.

(4) A warrant for the arrest of any defendant for breach of a condition of a deferred sentence may be issued by any judge of a court of record upon the report of a probation officer, or upon the verified complaint of any person, establishing to the satisfaction of the judge probable cause to believe that a condition of the deferred sentence has been violated and that the arrest of the defendant is reasonably necessary. The warrant may be executed by any probation officer or by a peace officer authorized to execute warrants in the county in which the defendant is found.

Source: L. 2002: Entire article added with relocations, p. 1366, § 2, effective October 1. **L. 2012:** (1) amended, (HB 12-1310), ch. 268, p. 1396, § 11, effective June 7; (1) and (2) amended, (SB 12-175), ch. 208, p. 863, § 106, effective July 1. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1941, § 64, effective October 1. **L. 2022:** (2) amended, (HB 22-1257), ch. 69, p. 357, § 9, effective April 7.

Editor's note: (1) This section is similar to former § 16-7-403 as it existed prior to 2002.

(2) Amendments to subsection (1) by House Bill 12-1310 and Senate Bill 12-175 were harmonized.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-102 is similar to § 16-7-403 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases

construing that provision have been included in the annotations to this section.

Constitutional due process requirements regarding advisement of possible penalties do not apply to Crim. P. 11(b) in a hearing to revoke a deferred judgment. Defendant's admission that he violated the terms of the deferred judgment was valid. Due process does not require that defendant be readvised of the potential penalties after defendant was advised of the possible penalties when entering into the deferred judgment. *People v. Finney*, 2012 COA 38, 328 P.3d 205, *aff'd*, 2014 CO 38, 325 P.3d 1044.

Probation-like supervision of a defendant by adult diversion program in a district attorney's office was not a violation of separation of powers. Probation is not a necessary function of the judiciary, and there is no constitutional requirement that defendants on deferred judgment be supervised by the judicial branch. *People v. Method*, 900 P.2d 1282 (Colo. App. 1994).

The diversion program does not constitute an unconstitutional delegation of power to the district attorney because the probation statutes set forth adequate guidelines for imposing conditions of probation and provide adequate standards and safeguards for imposing conditions of deferred judgment. *People v. Bishop*, 7 P.3d 184 (Colo. App. 1999).

This section does not limit the broad grant of power to the courts under the probation statutes. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Prohibiting a sex offender from having contact with children including his or her own without approval of the court as a condition of a deferred judgment is permissible. The condition falls under "any other conditions reasonably related to his or her rehabilitation and the purpose of the supervisory period imposed by the court" provision. The condition does not infringe upon the parent's liberty interest in raising his or her children when children are potential victims of the offender. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Beyond reasonable doubt standard of proof. An adult charged with a violation of his deferred sentencing which constitutes a criminal offense has the right to demand that the charge be proven "beyond a reasonable doubt". *People v. Van Deusen*, 677 P.2d 402 (Colo. App. 1983).

Under the provisions of subsection (2), a defendant who enters into a deferred sentencing agreement "is obligated to adhere to such stipulation." *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003); *Walker-Lawrence v. District Court of Teller County*, 74 P.3d 521 (Colo. App. 2003).

Thus, the general assembly has determined as a matter of public policy that the terms of stipulations are to be enforced. *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003).

Because a defendant who enters into a deferred sentencing agreement is obligated to adhere to the stipulation, the trial court must be permitted to review the terms of the agreement to determine whether the

defendant is in compliance with those terms. Walker-Lawrence v. District Court of Teller County, 74 P.3d 521 (Colo. App. 2003).

Purpose of the written stipulation is to ensure that the defendant knows prior to the entry of a guilty plea the consequences of violating the conditions of the deferred judgment and sentence. People v. Widhalm, 642 P.2d 498 (Colo. 1982).

District court has jurisdiction to order a deferred judgment and sentence even when defendant appears pro se. The written authorization requirement set forth is not jurisdictional in nature. People v. Loveall, 231 P.3d 408 (Colo. 2010).

Appeal dismissed for lack of jurisdiction. A guilty plea entered pursuant to a deferred judgment and sentence agreement is not subject to review in the same manner as a guilty plea that results in a final conviction or delinquency adjudication. People ex rel. K.W.S., 192 P.3d 579 (Colo. App. 2008).

When a defendant has received the benefit of a bargain made and has at no time objected to any term of the subsequent judgment and stipulation, there is no basis in public policy to permit the defendant to renege on that portion of the agreement expressly waiving the right to request the sealing of the record. People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003); Walker-Lawrence v. District Court of Teller County, 74 P.3d 521 (Colo. App. 2003).

Permitting defendant to do so would contravene the language and policy of the

statute and could greatly reduce the use of such stipulations in practice. People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003).

Trial court lacks authority under this section to act unilaterally to modify the terms of a stipulation without the district attorney's consent. People v. Ward-Garrison, 72 P.3d 423 (Colo. App. 2003); Walker-Lawrence v. District Court of Teller County, 74 P.3d 521 (Colo. App. 2003).

Trial court had no authority to order a deferred sentence in absence of written consent of defendant, defendant's attorney, and district attorney under plain language of subsection (1). People v. Appelhanz, 738 P.2d 1182 (Colo. 1987).

Subsection (1) requires the written consent of defense counsel only if the defendant is represented. People v. Loveall, 203 P.3d 540 (Colo. App. 2008), *aff'd* on other grounds, 231 P.3d 408 (Colo. 2010).

Trial court does not have authority to act unilaterally with deferred sentence agreements, including shortening a stipulated length of a deferred sentence and a sentence agreement without the district attorney's consent. People v. C.G., 12 P.3d 861 (Colo. App. 2000).

Court has authority to consider a plea of nolo contendere in circumstances involving plea agreements that contemplate deferred sentences under the statute. People v. Darlington, 105 P.3d 230 (Colo. 2005).

There is no distinction between a plea of nolo contendere and a plea of guilty for

sentencing purposes. *People v. Darlington*, 105 P.3d 230 (Colo. 2005).

Trial court has authority to impose an aggravated range sentence even though it had previously imposed a deferred sentence. Nothing in the plain language of this section suggests that the sentencing range upon imposition of a previously deferred sentence differs in any way from the range that would have applied absent deferral. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Evidence from a dismissed revocation complaint of a deferred judgment may not form the basis of a subsequent revocation complaint. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Section mandates that court impose sentence and does not leave such imposition to the court's discretion. *People v. Adair*, 44 Colo. App. 423, 620 P.2d 46 (1980), *aff'd* in part, *rev'd* in part on other grounds, 651 P.2d 389 (Colo. 1982).

"Sentence" does not mean imprisonment. A "sentence" generally refers to that part of a judgment which describes the punishment imposed by the court following the defendant's conviction for a criminal offense. To constitute a "sentence", the punishment need not take the form of imprisonment. *People v. Turner*, 644 P.2d 951 (Colo. 1982).

Although the defendant's sentence to imprisonment and mandatory parole was not inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of

the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Discretion implicit in sentencing decision is not unrestricted discretion devoid of reason or principle. *People v. Watkins*, 613 P.2d 633 (Colo. 1980).

Extension of deferred judgment discretionary. While there is not express statutory authority that permits the court to extend the period of a deferred judgment and sentence beyond that initially imposed, such authority is encompassed in the broad discretionary power of the court. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978) (decided prior to 1985 amendment to subsection (1)).

However, the court has no jurisdiction to extend the deferral to more than the two-year period in the statute. *People v. Perkins*, 676 P.2d 711 (Colo. App. 1983) (decided prior to 1985 amendment to subsection (1)); *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

Under subsection (1), a trial court may extend a deferred judgment for any legitimate reason and as many times as it deems appropriate, so long as the period of deferred judgment does not exceed four years. *Carrera v. People*, 2019 CO 83, 449 P.3d 725 (decided under former law).

When a defendant has been on a deferred judgment for four years, the trial court may extend the deferred

judgment for a period not to exceed 180 days, so long as the payment of restitution is the only condition of supervision not yet fulfilled. *Carrera v. People*, 2019 CO 83, 449 P.3d 725 (decided under former law).

A deferred judgment is created and authorized by statute and a trial court lacks authority to impose a deferred judgment outside of the statute's limitations. The trial court exceeded its jurisdiction by extending defendant's deferred judgment beyond the statutory limits. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

Once the court imposes a deferred judgment, the four-year time period starts the day defendant entered his or her plea. Judgment and sentence must be entered within four years unless the deferred judgment is revoked or extended for restitution. The statute divests the court of its authority to hear revocation petitions filed more than 30 days after the deferred judgment expires. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

Because the court lacks the authority to enforce an agreed-upon extension of the deferred judgment beyond the statutory time limitations, it also lacks authority to enforce such an extension framed as a stipulation to new supervision requirements. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

The court has discretion to extend the deferral period, subject to the time limitations in this section, in order to give the defendant additional time to pay

restitution. *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Trial court had no authority to revoke a deferred judgment sua sponte. In absence of an application by the district attorney, specifically required by subsection (2), revocation was improper. *People v. Berquist*, 916 P.2d 629 (Colo. App. 1996).

District court did not exceed its jurisdiction in granting district attorney's application, entering judgment against defendant for sexual assault on a child by one in a position of trust, and sentencing defendant to six years of probation. Because the district attorney's application was only withdrawn on condition that the court continue the case for an additional four-year period, which it lacked the authority to do, the application was never abandoned. *People v. Simonds*, 113 P.3d 762 (Colo. 2005).

Time limit for filing of application for entry of judgment not tolled by order of revocation. Where district attorney did not file application "within the term of the deferred judgment or within thirty days thereafter," as required by subsection (2), such application would not be permitted upon remand. *People v. Berquist*, 916 P.2d 629 (Colo. App. 1996).

Constitutional rights somewhat limited. Persons alleged to have violated a condition of a deferred sentence are not entitled to the full panoply of constitutional rights accorded persons who have not admitted guilt of criminal conduct. *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

But adequate notice deemed minimum right. Consistent with principles of due process, persons alleged to have violated a condition of a deferred sentence must, at a minimum, be given adequate notice of the charges against which they must defend. *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981); *People v. Allen*, 952 P.2d 764 (Colo. App. 1997), rev'd on other grounds, 973 P.2d 620 (Colo. 1999).

Trial court advising defendant and counsel three days before revocation hearing held to be adequate notice of charge against which person had to defend. *People v. Galloway*, 677 P.2d 1380 (Colo. App. 1983).

Proceedings to revoke deferred judgment are conducted according to procedures used to revoke probation. Thus, the defendant is not entitled to the full range of constitutional rights in a criminal trial. The right to confront witnesses is satisfied by the right to cross examine hearsay statements and presentation of evidence to the contrary. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Corroboration of a confession is not required in deferred judgment. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Nothing in this section or the state or federal constitutions requires the trial court to advise the defendant of his or her right to testify at a deferred judgment revocation proceeding. *People v. Allen*, 973 P.2d 620 (Colo. 1999).

Counsel not necessary where defendant makes request for extension. Where the

defendant requests an extension of the supervisory period, the granting of the extension does not violate due process because he was not represented by counsel, or because the trial court did not make a determination as to whether fundamental fairness required that counsel be appointed to represent him. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978).

Revocation hearing is trial-type procedure. A revocation hearing under this section is a trial-type procedure conducted by the trial court for the purpose of making a factual determination as to whether there has been a failure to abide by the conditions of a deferred sentence. *Hallman v. People*, 652 P.2d 173 (Colo. 1982).

And 15-day limitation for hearing applies. Since the 15-day limitation imposed by § 16-11-206 (4) is a procedural safeguard required for probation revocation hearings, it applies to a deferred sentence revocation pursuant to this section. *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982); *People v. Allen*, 952 P.2d 764 (Colo. App. 1997), rev'd on other grounds, 973 P.2d 620 (Colo. 1999).

Since the five-day limitation specified in § 16-11-205 (4) is not a procedural safeguard required in a probation revocation hearing pursuant to § 16-11-206, but rather is a prehearing requirement imposed on the probation officer, it is not within the contemplation of subsection (2). *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982).

Conviction entered upon finding that defendant violated condition. This section

requires the court to enter a judgment of conviction upon finding at a revocation hearing that the defendant has violated the condition of a deferred judgment. *People v. Widhalm*, 642 P.2d 498 (Colo. 1982); *People v. Wilder*, 687 P.2d 451 (Colo. 1984); *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Once the trial court finds that a violation has been proven by a preponderance of the evidence, the deferred sentence must be revoked. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Scope of revocation hearing. In a revocation hearing, the court need only apprise itself of facts which convince it that the conditions of the deferred sentence have been breached. *People v. Adair*, 44 Colo. App. 423, 620 P.2d 46 (1980), *aff'd in part, rev'd in part on other grounds*, 651 P.2d 389 (Colo. 1982).

Standard of proof for violation of deferred sentence. To support a revocation, a violation of the deferred sentence need only be proven by a preponderance of the evidence. Once the proof has been made and the court finds that the terms of the deferred judgment were violated the court must act to revoke the deferred judgment status, enter judgment, and impose sentence upon the defendant's guilty plea. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Beyond reasonable doubt standard of proof. An adult charged with a violation of his deferred sentencing which constitutes a criminal offense has the right to demand that the charge be proven "beyond a reasonable doubt". *People v. Van Deusen*, 677 P.2d 402 (Colo. App. 1983).

Court does not have to find reasonable doubt that defendant violated law because the court's acceptance of defendant's guilty plea amounted to a conviction. *People v. Blackwell*, 2016 COA 136, 409 P.3d 558.

Question of whether the defendant failed to cooperate in a treatment program which was a condition of the deferred judgment is one of fact for the trial court. *People v. Galloway*, 677 P.2d 1380 (Colo. App. 1983).

Statutory standard that defendant had ability to pay restitution but failed to do so was satisfied by the district court finding that defendant had money during the deferral period which he could have paid to the probation department, but which he chose, instead, to pay to his mother. *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

Defendant's financial ability to pay restitution is a defense to a charge of violating restitution requirement of deferred sentence. *People v. Afentul*, 773 P.2d 1081 (Colo. 1989). But see *Williams v. People*, 2019 CO 101, 454 P.3d 219.

Defendant must prove his or her financial inability to pay restitution. Once the prosecution presents evidence of the defendant's failure to pay restitution, the burden shifts to the defendant to prove his or her financial inability to pay restitution. *People v. Rivera-Bottzeck*, 119 P.3d 546 (Colo. App. 2004).

When a defendant introduces some evidence of inability to pay restitution, the court must make ability-to-pay findings

under § 18-1.3-702 (3)(c) before revoking a deferred judgment for failure to pay.

The prosecution bears the burden of proving by a preponderance of evidence that the defendant (1) has the ability to comply with the court's order to pay a monetary amount due without undue hardship to the defendant or the defendant's dependents, and (2) has not made a good-faith effort to comply with the order. *Williams v. People*, 2019 CO 101, 454 P.3d 219.

Court may grant probation upon revocation of deferred judgment and sentence. As long as a defendant is otherwise eligible for probation, a court may grant him probation upon the revocation of a deferred judgment and sentence. *People v. Turner*, 644 P.2d 951 (Colo. 1982).

Evidence of defendant's failure to pay restitution is prima facie evidence that defendant has violated the conditions of his deferred sentencing which, if not rebutted or contradicted, will sustain the entry of a judgment of conviction and the imposition of sentence. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

Defendant's two-year deferred sentence for a traffic violation in Colorado could not be used to enhance his criminal history category under the federal sentencing guidelines for a later conviction involving distribution of cocaine. *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993).

Battery, in violation of Aurora Municipal Code, was an "offense" in violation of stipulation for deferred

judgment and sentence. *People v. Slayton*, 878 P.2d 106 (Colo. App. 1994).

Absence of defendant's signature on joint motion immaterial where defendant received benefits under deferred judgment, signed consent form in interview with probation officer, and made initial payment of restitution. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

This section does not limit the broad grant of power to the courts under the probation statutes. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

As sentence imposed following revocation is within trial court's discretion. When a deferred judgment is revoked in a felony case, sentencing to the penitentiary is not mandatory. The type of sentence to be imposed after the revocation of the deferred sentence is a matter within the discretion of the trial court, and a defendant is entitled to a consideration of all statutory sentencing alternatives at the time the deferred sentence is revoked and judgment of conviction is entered against him. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Appeal or review of revocation of deferred sentence available. A defendant may either appeal an order revoking a deferred sentence, pursuant to C.A.R. 1 or file a motion for post-conviction review, pursuant to Crim. P. 35(c). *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

When revocation of deferred sentence reviewable. The provisions of Crim. P. 33(a), precluding appellate review absent a

motion for a new trial, apply to the revocation of a deferred sentence. *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980), *aff'd*, 652 P.2d 173 (Colo. 1982).

Where two-year limitation on revocation of deferred sentence tolled. Where a complaint and arrest warrant are issued within the statutory period and the defendant is voluntarily absent from the jurisdiction, or is imprisoned on another offense, the two-year limitation on revocation of a deferred sentence is tolled. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980).

A revocation petition must be filed within the term of the deferred judgment or within 30 days thereafter, unless the time limitation is tolled. A letter from the investigator to the court and the issuance of a bench warrant during the term of the deferred judgment was not sufficient to toll the time limitation. *People v. Guerrero*, 26 P.3d 537 (Colo. App. 2001).

Amended revocation petition filed after expiration of the deferred judgment term is proper if initial petition is filed before expiration and effectively tolls the time limitation of this section. *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Motion for new trial is prerequisite for appellate review of revocation of probation except when the propriety of a sentence is being appealed as provided in C.A.R. 4(c). *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980), *aff'd*, 652 P.2d 173 (Colo. 1982).

Compliance with the motion for a new trial requirement of Crim. P. 33(a) is a prerequisite for appellate review of a trial court's judgment revoking a deferred sentence and imposing a sentence. *Hallman v. People*, 652 P.2d 173 (Colo. 1982).

And procedural considerations governing section are analogous to those governing probation. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980); *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

Therefore, filing of the revocation petition by the probation department in no way prejudiced the defendant. *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

No double jeopardy prohibition was implicated when deferred judgment and sentence for possession of a controlled substance was revoked, where the trial court based its sentencing decision, in part, on the facts of the later vehicular homicide offense. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Application for deferred sentencing does not constitute waiver of right to preliminary hearing. *Celestine v. District Court*, 199 Colo. 514, 610 P.2d 1342 (1980).

Guilty plea accepted by court constitutes jeopardy. A plea of guilty under this section, when accepted by the court, resolves the issue of guilt and constitutes jeopardy. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

So withdrawal or cancellation of deferred sentence affects sentence not conviction. Where the trial court withdraws

or cancels the imposition of the deferred sentence, its order affects only the sentence and does not touch the conviction. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980).

Deferred judgment revoked but reinstated. Where the commission of a crime charged and the conviction thereof is the sole basis of the revocation of a previous deferred judgment and subsequent imposition of sentence, the validity of the revocation must be tested by the validity of the conviction. Where the conviction is then reversed, and a judgment of acquittal was entered on the criminal charges, defendant is entitled to have the deferred judgment reinstated. *People v. Anzures*, 670 P.2d 1258 (Colo. App. 1983).

Section not applicable to mandatory sentence. The sentence requirement in § 42-2-206 remains mandatory and is not subject to plea bargaining to obtain a deferred sentence as generally allowed by this section. *Walker v. District Court*, 199 Colo. 128, 606 P.2d 70 (1980).

Prosecution dismissed under this section not basis for civil action. As a matter of public policy, one who acknowledges his guilt of a criminal act, even though the case is subsequently dismissed under the deferred judgment plan, may not use that criminal prosecution as a

basis for a civil malicious prosecution action. *Land v. Hill*, 644 P.2d 43 (Colo. App. 1981).

Subsection (2) requires that a plea be deemed withdrawn and the charge dismissed once a deferred judgment is successfully completed, and when an order to this effect is not entered, it occurs by operation of law. *Flores-Heredia v. People*, 2017 CO 64, 395 P.3d 800.

When defendant successfully completed a deferred judgment, defendant's plea was withdrawn and the charge was dismissed with prejudice pursuant to subsection (2). The plain terms of Crim. P. 32(d) require a plea to exist in order for it to be withdrawn. Because defendant's plea had already been withdrawn and the case dismissed, there was no plea to be withdrawn. *People v. Corrales-Castro*, 2017 CO 60, 395 P.3d 778; *Espino-Paez v. People*, 2017 CO 61, 395 P.3d 786; *Zafiro-Guillen v. People*, 2017 CO 62, 395 P.3d 781; *People v. Roman*, 2017 CO 63, 395 P.3d 799.

Applied in *People v. Vollentine*, 643 P.2d 800 (Colo. App. 1982); *People v. Martinez*, 657 P.2d 967 (Colo. App. 1982); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983); *Hafelfinger v. District Court*, 674 P.2d 375 (Colo. 1984).

18-1.3-103. Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)

Source: L. 2002: Entire article added with relocations, p. 1367, § 2, effective October 1.

Editor's note: (1) This section was similar to former § 16-7-403.7 as it existed prior to 2002.

(2) Subsection (6) provided for the repeal of this section, effective July 1, 2006. (See L. 2002, p. 1367.)

18-1.3-103.4. Senate Bill 13-250 - legislative intent - clarification of internal reference to level 4 drug felonies.

The intent of the general assembly in enacting Senate Bill 13-250 was to allow courts, for offenses committed on and after October 1, 2013, to vacate certain level 4 drug felony convictions and enter misdemeanor convictions if the offender completes community-based sentencing. While the term "level 4 drug felony" to which section 18-1.3-103.5 (3)(b) refers was described in section 18-18-405 (2)(c)(II) of the introduced version of Senate Bill 13-250, an amendment to the bill during the legislative process moved the level 4 drug felony description to section 18-18-405 (2)(d). The conforming change was not made to the internal reference in section 18-1.3-103.5 (3)(b), resulting in an incorrect internal reference being published in the 2013 version of the Colorado Revised Statutes. When enacting Senate Bill 13-250, it was the intent of the general assembly that the level 4 drug felonies to which section 18-1.3-103.5 (3)(b) refers be those described in section 18-18-405 (2)(d). Accordingly, by the passage of Senate Bill 14-163, enacted in 2014, the general assembly corrects the internal reference found in section 18-1.3-103.5 (3)(b). The correction to the internal reference is effective as of the effective date of Senate Bill 13-250, October 1, 2013, and applies to offenses committed on or after October 1, 2013.

Source: L. 2014: Entire section added, (SB 14-163), ch. 391, p. 1970, § 7, effective June 6. **L. 2018:** Entire section amended, (HB 18-1375), ch. 274, p. 1701, § 22, effective May 29.

18-1.3-103.5. Felony convictions - vacate and enter conviction on misdemeanor after successful completion.

(1) In order to expand opportunities for offenders to avoid a drug felony conviction, to reduce the significant negative consequences of that felony conviction, and to provide positive reinforcement for drug offenders who work to successfully complete any community-based sentence imposed by the court, the legislature hereby creates an additional opportunity for those drug offenders who may not otherwise have been eligible for or successful in other statutorily created programs that allow the drug offender to avoid a felony conviction, such as diversion or deferred judgment.

(2) (a) In a case in which the defendant enters a plea of guilty or is found guilty by the court or a jury for a crime listed in subsection (3) of this section, the court shall order, upon successful completion of any community-based sentence to probation or to a community corrections program, the drug felony conviction vacated and shall enter a conviction for a level 1 drug misdemeanor offense of possession of a controlled substance pursuant to section 18-18-403.5. Upon entry of the judgment of conviction pursuant to section 18-18-403.5, the court shall indicate in its order that the judgment of conviction is entered pursuant to the provisions of this section.

(b) Whether a sentence is successfully completed shall be determined by the court without a jury with notice to the district attorney and the defendant or the defendant's attorney of record. A community-based sentence is not successfully completed if the defendant has not successfully completed the treatment as ordered by the court and determined appropriate to address the defendant's treatment needs.

(3) This section applies to convictions for the following offenses:

(a) On or after March 1, 2020, possession of a controlled substance, but only when the quantity of the controlled substance is not more than four grams of any material, compound, mixture, or preparation containing any quantity of gamma hydroxybutyrate, including its salts, isomers, and salts of isomers; not more than two grams of ketamine or cathinones; or not more than four milligrams of flunitrazepam. The district attorney and defendant may stipulate to the amount of the controlled substance possessed by the defendant at the time of sentencing, or the court shall determine the amount at the time of sentencing.

(b) A level 4 drug felony for distribution pursuant to the provisions of section 18-18-405 (2)(d)(II);

(c) Possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate;

(d) A violation of section 18-18-415; or

(e) A violation of section 18-18-403.5 (2.5)(a).

(4) Notwithstanding any provision of this section to the contrary, a defendant is not eligible for relief under this section if:

(a) The defendant has a prior conviction for a crime of violence as described in section 18-1.3-406 or a prior conviction for an offense that is required to be sentenced pursuant to the provisions of section 18-1.3-406 in this state, or a crime in another state, the United States, or any territory subject to the jurisdiction of the United States that would be a crime of violence or an offense required to be sentenced pursuant to the provisions of section 18-1.3-406 in this state;

(b) The defendant is ineligible for probation pursuant to section 18-1.3-201; or

(c) (I) The defendant has two or more prior felony convictions for a drug offense pursuant to this title, or a crime in another state, the United States, or any territory subject to the jurisdiction of the United States that would be a drug offense violation of this title.

(II) For purposes of this paragraph (c), a felony conviction includes any diversion, deferred prosecution, or deferred judgment and sentence, whether or not completed, for a felony, and any conviction entered as a result of relief previously granted pursuant to this section or as a result of a guilty plea to a misdemeanor offense, as described in article 18 of this title, originally charged as a felony drug offense, as described in article 18 of this title.

Source: L. 2013: Entire section added, (SB 13-250), ch. 333, p. 1900, § 1, effective October 1. **L. 2014:** (2)(a), (3), (4)(a), and (4)(c) amended, (SB 14-163), ch. 391, p. 1971, § 8, effective July 1. **L. 2019:** (3)(a) amended, (HB 19-1263), ch. 291, p. 2681, § 7, effective March 1, 2020. **L. 2022:** (3)(c) and (3)(d) amended and (3)(e) added, (HB 22-1326), ch. 225, p. 1651, § 31, effective July 1.

Cross references: For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Court may reduce a defendant's felony conviction to a misdemeanor conviction pursuant to subsection (2)(a) after revoking defendant's probation if the court resentences the defendant to probation and the defendant successfully completes any subsequent community-based probation sentence. *People v. Argott*, 2021 COA 42, 486 P.3d 500.

The conversion of a defendant's felony conviction to a misdemeanor conviction under this section does not affect the amount of the drug offender surcharge required to be

imposed pursuant to § 18-19-103. Under this section, if a defendant successfully completes his or her sentence to probation or community corrections, the court must substitute a misdemeanor conviction for the original felony conviction. The statute, however, does not similarly authorize the court to vacate any part of the defendant's original sentence and re-impose a new sentence. The drug offender surcharge is not an adverse collateral consequence of a drug felony conviction that the statute was designed to ameliorate, but a part of the

defendant's sentence. People v. DeBorde, 2016 COA 185, 411 P.3d 220.

18-1.3-103.7. Alternative options for pregnant and postpartum people - legislative declaration - definitions.

(1) (a) The general assembly finds and declares that:

(I) There is an increasing female population in prisons and jails;

(II) While no system is perfect in responding to the medical conditions of pregnancy, correctional facilities and county jails are particularly ill-equipped to do so;

(III) During criminal cases involving a pregnant or postpartum defendant, the physical and mental health needs of the pregnant defendant or the postpartum defendant and newborn must be considered at all stages of the proceeding as a matter of community health and safety;

(IV) Timely attention to medical conditions and mental health during the perinatal period can improve health and welfare for multiple generations of a family unit;

(V) Pregnancy is a time-sensitive process that has many potential outcomes and variations. A pregnant person may feel healthy and experience no complications. A pregnant person may also experience sudden, harmful medical conditions, such as preeclampsia or placental abruption, or develop complex medical conditions that result in the early termination of a pregnancy or threaten the life of the pregnant person, such as an ectopic pregnancy. At any stage of the perinatal period, situations can occur that cause long-term physical and mental health trauma for the pregnant person.

(VI) Criminal proceedings are not responsive to the timeline or complexity of the perinatal period;

(VII) When a substance use disorder intersects with a pregnancy, it is best handled as a health condition. Increasing the time a pregnant person with a substance use disorder is in a correctional facility or county jail is counter to public health and may drive the pregnant person away from medical care and support services.

(VIII) The end of the pregnancy does not immediately terminate the effects of the pregnancy on the person who was pregnant;

(IX) The postpartum period is an essential time frame for both the person who gave birth and the newborn. It is an opportunity for the newborn:

(A) To develop healthy physiologic responses; and

(B) To benefit from the attachment and bonding that occurs during this period;

(X) Bonding between a newborn and parent during the postpartum period can improve conditions for other children and care providers in the same family unit and prevent child abuse and neglect; and

(XI) Bonding between a newborn and a parent can improve the overall health of the newborn and the parent and may prevent or reduce long-term health risks that may be increased by separating the newborn from the parent. For example:

(A) A postpartum person who does not breastfeed or chestfeed a newborn may have an increased likelihood of premenopausal breast cancer, ovarian cancer, or type 2 diabetes;

(B) A newborn who is not breastfed or chestfed may have an increased likelihood of childhood obesity, asthma, type 1 or type 2 diabetes, leukemia, or sudden infant death syndrome; and

(C) A child who is separated from any parent may experience stress hormones, which may lead to difficulty sleeping, developmental regression, heart disease, hypertension, obesity, diabetes, or decreased life span. A newborn who is separated from a parent may also experience permanent architectural changes in the brain, including a lower intelligence quotient or an increased likelihood of depression, suicidal ideation, or addiction to alcohol or gambling.

(b) The general assembly finds, therefore, that all alternatives to prosecution, commitment, and incarceration of a pregnant or postpartum person must be considered, including a stay of criminal proceedings or sentencing to reduce the likelihood of negative health and social outcomes for the parent, newborn child, and community.

(c) It is the intent of the general assembly that a person who coerces or extorts a pregnant or postpartum person in the commission of crimes should be subject to being investigated and, as appropriate, prosecuted for a criminal act pursuant to this title 18.

(2) As used in this section, unless the context otherwise requires:

(a) "Newborn" means a person who has been born and who is less than one year old.

(b) "Postpartum period" means a period of one year after the end of a pregnancy, regardless of whether the pregnancy ends with a live birth.

(c) "Pregnant or postpartum defendant" means a person who is pregnant or in a postpartum period who has been accused or convicted of a crime.

(d) "Stay of execution" means delaying the imposition of a sentence or the incarceration portion of the sentence for a pregnant or postpartum defendant after the sentence is announced by a court.

(3) (a) There is a rebuttable presumption against detention and incarceration of a pregnant or postpartum defendant if the defendant provides the court and district attorney with notice of the

defendant's status as a pregnant or postpartum defendant at each applicable stage of the proceedings. Subject to subsection (5) of this section and if the court decides to detain or incarcerate the pregnant or postpartum defendant after weighing the applicable legal standards and considerations set forth in subsections (3)(a)(I) to (3)(a)(VI) of this section, the court shall make specific findings on the record that the risk to public safety or any other factor the court is required to consider is substantial enough to outweigh the risk of incarceration. The court shall apply the rebuttable presumption described in this subsection (3)(a) to a pregnant or postpartum defendant in determining whether to:

- (I) Issue bond pursuant to article 4 of title 16;
- (II) Accept a diversion agreement pursuant to section 18-1.3-101;
- (III) Accept or continue a deferred judgment pursuant to section 18-1.3-102;
- (IV) Impose a sentence pursuant to section 18-1-102.5, including whether to grant probation pursuant to part 2 of this article 1.3;
- (V) Impose an alternative sentence pursuant to section 18-1.3-104 or 18-1.3-106; or
- (VI) Grant a stay of execution pursuant to this section.

(b) A court shall not use a pregnant or postpartum defendant's pregnancy or postpartum period as a basis for imposing a greater restriction on the defendant's liberty than a similarly situated defendant who is not pregnant or postpartum, including when a pregnant or postpartum defendant has a substance use disorder.

(4) (a) A person who may be pregnant or postpartum who is arrested or in custody in a county jail or correctional facility may request a pregnancy test upon or following admission to the county jail or correctional facility. Staff at the county jail or correctional facility shall provide a pregnancy test upon request and allow the person to take the pregnancy test within twenty-four hours after the request.

(b) Requesting a pregnancy test, taking a pregnancy test, and the results of a pregnancy test are confidential medical information. This confidential medical information must not be disclosed to outside parties unless the information is required for the person to receive medical care or to allow staff at the county jail or correctional facility to provide necessary care.

(c) If a person is represented by an attorney in a criminal proceeding and the county jail or correctional facility has a signed medical release from the person, the county jail or correctional facility shall give notice to the person's attorney within forty-eight hours, excluding state holidays and weekends, concerning the person's request for a pregnancy test pursuant to subsection (4)(a) of this section.

(5) (a) A pregnant or postpartum defendant may raise the issue of the defendant's pregnancy or postpartum period at any time during criminal proceedings or while serving a sentence. If the pregnancy or postpartum period is raised, the pregnant or postpartum defendant shall provide notice to the district attorney by providing evidence of the pregnancy or the start of the postpartum period with a limited waiver of privilege. A positive pregnancy test or medical record confirming pregnancy or the end of pregnancy, or a birth certificate of a newborn, is prima facie evidence of pregnancy or the start of the postpartum period.

(b) If the prosecution contests that the defendant is pregnant or in a postpartum state, the court shall hold a hearing to make a determination as soon as practicable, but no later than fourteen days after the issue is raised, unless the defendant requests the hearing be held later than fourteen days after the issue is raised. If the defendant requests a later hearing, the court shall make the determination within the timeline requested. The court shall hold the hearing immediately if the circumstances of the defendant or the defendant's newborn require it. The defendant shall prove, by a preponderance of the evidence, that the defendant is a pregnant or postpartum defendant.

(c) The court shall protect medical information provided to the court as confidential medical information. A defendant's waiver of medical privilege to present medical evidence of pregnancy or the end of a pregnancy in court is limited to information relevant to determine whether the defendant is or was pregnant and whether the pregnancy has ended.

(6) (a) Notwithstanding the provisions of this section, a court shall not:

(I) Set or release the pregnant or postpartum defendant on bond if the pregnant or postpartum defendant is ineligible for bond;

(II) Accept an agreement or impose an alternative sentence if the pregnant or postpartum defendant is ineligible for a diversion program, deferred judgment, probationary sentence, or another form of alternative sentence; or

(III) Apply the rebuttable presumption pursuant to this section if a pregnant or postpartum defendant was convicted of a crime of violence, as defined in section 18-1.3-406 (2).

(b) The court shall impose any mandatory sentence required by law on a pregnant or postpartum defendant, but the court may grant a stay of execution as set forth in subsection (7) of this section.

(7) (a) Any pregnant or postpartum defendant may request a stay of execution by filing a written request to the court if the pregnant or postpartum defendant is detained or incarcerated in a county jail or correctional facility for any period of time through the end of the pregnancy or the postpartum period.

(b) The court shall hold a hearing to determine the matter as soon as practicable, but no later than fourteen days after the pregnant or postpartum defendant requests a stay of execution, unless the pregnant or postpartum defendant requests a later hearing. If the pregnant or postpartum defendant requests a later hearing, the court shall make the determination within the timeline requested. The court shall hold the hearing immediately if the circumstances of the pregnant or postpartum defendant or newborn require it. The defendant shall prove, by a preponderance of the evidence, that the defendant is a pregnant or postpartum defendant.

(c) In ruling upon the pregnant or postpartum defendant's request pursuant to subsection (7)(b) of this section, the court shall apply the rebuttable presumption set forth in subsection (3)(a) of this section.

(d) The district attorney and the court shall comply with the requirements of the "Victim Rights Act" pursuant to part 3 of article 4.1 of title 24 in any proceeding conducted pursuant to this section.

(e) Following the hearing conducted pursuant to subsection (7)(b) of this section, the court may order a stay of execution of the sentence for any period of time through the end of the pregnancy or the postpartum period. The court shall order a date, time, and place for the defendant to appear to serve the sentence upon completion of the stay of execution.

(f) If the court grants a stay of execution pursuant to subsection (7)(e) of this section, the court shall order the bond and the conditions of the bond to remain in effect until the date the pregnant or postpartum defendant is ordered to start serving the defendant's sentence.

(g) Notwithstanding this section, a pregnant or postpartum defendant who is ineligible for bail pursuant to section 16-4-101 or 16-4-201.5 is not eligible for a stay of execution.

(h) If the pregnant or postpartum defendant is charged with a new violation or the court receives a verified motion from the district attorney or an agency responsible for supervising the pregnant or postpartum defendant that establishes a prima facie case that the pregnant or postpartum defendant has violated the conditions of the stay of execution and presents a substantial risk to public safety, the court shall set a hearing and require the pregnant or postpartum defendant to appear. After the hearing, the court may end the stay of execution, add new conditions, issue a warrant, or continue the stay of execution.

(8) If a defendant who is sentenced to incarceration learns that the defendant is pregnant following the sentencing hearing, or a postpartum defendant experiences changes to the defendant's postpartum condition following the sentencing hearing, this section does not preclude the pregnant or postpartum defendant from requesting reconsideration of the sentence pursuant to rule 35 (b) of the rules of criminal procedure. During the reconsideration hearing, this section applies.

Source: L. 2023: Entire section added, (HB 23-1187), ch. 246, p. 1335, § 1, effective August 7.

18-1.3-104. Alternatives in imposition of sentence.

(1) Within the limitations of the applicable statute pertaining to sentencing and subject to the provisions of this title 18, the trial court has the following alternatives in entering judgment imposing a sentence:

(a) The defendant may be granted probation unless any provision of law makes him or her ineligible for probation. The granting or denial of probation and the conditions of probation including the length of probation shall not be subject to appellate review unless probation is granted contrary to the provisions of this title.

(b) Subject to the provisions of sections 18-1.3-401 and 18-1.3-401.5, in class 2, class 3, class 4, class 5, and class 6 felonies and level 1, level 2, level 3, and level 4 drug felonies, the defendant may be sentenced to imprisonment for a definite period of time.

(b.5) (I) Except as otherwise provided by subparagraph (II) of this paragraph (b.5), any defendant who, in the determination of the court, is a candidate for an alternative sentencing option and who would otherwise be sentenced to imprisonment pursuant to paragraph (b) of this subsection (1) may, as an alternative, be sentenced to a specialized restitution and community service program pursuant to section 18-1.3-302, which may include restorative justice practices, as defined in section 18-1-901 (3)(o.5), if such defendant is determined eligible and is accepted into such program. To be eligible for restorative justice practices, the defendant shall not have been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., a crime in which the underlying factual basis involves domestic violence, as defined in section 18-6-800.3 (1), stalking as defined in section 18-3-602, or violation of a protection order as defined in section 18-6-803.5. If the court orders the defendant to attend a restorative justice practices victim-offender conference, the facilitator of the conference shall provide his or her services for a fee of no more than one hundred twenty-five dollars, based on a sliding scale; however, the fee may be waived by the court. Any statements made during the conference shall be confidential and shall not be used as a basis for charging or prosecuting the defendant unless the defendant commits a chargeable offense during the conference.

(II) (A) The court shall consider and may sentence any defendant who is a nonviolent offender as defined in sub-subparagraph (B) of this subparagraph (II) pursuant to subsection (2) of this section.

(B) As used in this section, "nonviolent offender" means a person convicted of a felony other than a crime of violence as defined in section 18-1.3-406 (2), one of the felonies set forth in section 18-3-104, 18-4-203, 18-4-301, or 18-4-401 (2)(c) or (5), or a felony offense committed

against a child as set forth in articles 3, 6, and 7 of this title 18, and who is not subject to the provisions of section 18-1.3-801.

(c) The defendant shall be sentenced to death in those cases in which a death sentence is required pursuant to section 18-1.3-1201 for an offense charged prior to July 1, 2020, or pursuant to section 18-1.3-1302 for an offense charged prior to July 1, 2020, or pursuant to section 18-1.4-102.

(d) The defendant may be sentenced to the payment of a fine or to a term of imprisonment or to both a term of imprisonment and the payment of a fine; except that 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 is not eligible to receive a fine in lieu of imprisonment. No fine shall be imposed for conviction of a felony except as provided in sections 18-1.3-401 and 25-15-310, articles 22 to 29 of title 39, or article 3 of title 42, C.R.S.

(e) The defendant may be sentenced to comply with any other court order authorized by law.

(f) The defendant may be sentenced to payment of costs.

(g) The defendant may be sentenced pursuant to part 4 or 5 of this article.

(h) (I) If the defendant is eligible pursuant to section 18-1.3-407.5 or section 19-2.5-801 (5), the defendant may be sentenced to the youthful offender system in accordance with section 18-1.3-407.

(II) Repealed.

(i) Notwithstanding any provision of this subsection (1) to the contrary, the court shall sentence any person convicted of a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, pursuant to the provisions of part 10 of this article.

(2) (a) The sentencing court shall consider the following factors in sentencing nonviolent offenders:

(I) The nature and character of the offense;

(II) The character and record of the nonviolent offender, including whether the offender is a first-time offender;

(III) The offender's employment history;

(IV) The potential rehabilitative value of the sentencing alternatives available to the court;

(V) Any potential impact on the safety of the victim, the victim's family, and the general public based upon sentencing alternatives available to the court; and

(VI) The offender's ability to pay restitution to the victim or the victim's family based upon the sentencing alternatives available to the court.

(b) Repealed.

(c) The court shall consider and may sentence a nonviolent offender to any one or any combination of the sentences described in this paragraph (c) if, upon consideration of the factors described in paragraph (a) of this subsection (2), the court does not grant probation pursuant to paragraph (b) of this subsection (2) or does not sentence the offender to the department of corrections as provided under paragraph (d) of this subsection (2):

(I) A community corrections program pursuant to section 18-1.3-301;

(II) A home detention program pursuant to section 18-1.3-105; or

(III) A specialized restitution and community service program pursuant to section 18-1.3-302.

(d) Nothing in this subsection (2) shall be construed as prohibiting a court from exercising its discretion in sentencing a nonviolent offender to the department of corrections based upon, but not limited to, any one or more factors described in paragraph (a) of this subsection (2).

(3) (a) In determining the appropriate sentencing alternative for a defendant who has been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), the sentencing court shall consider the defendant's previous criminal and juvenile delinquency records, if any, set forth in the presentence investigation report prepared pursuant to section 16-11-102 (1)(a), C.R.S.

(b) For purposes of this subsection (3), "convicted" means a conviction by a jury or by a court and shall also include a deferred judgment and sentence, a deferred adjudication, an adjudication, and a plea of guilty or nolo contendere.

Source: **L. 2002:** Entire article added with relocations, p. 1368, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1)(c) amended, p. 32, § 24, effective October 1. **L. 2003:** IP(1), (1)(a), and (1)(b) amended, p. 975, § 12, effective April 17. **L. 2004:** (1)(h)(II) repealed, p. 243, § 1, effective April 5. **L. 2009:** (1)(h)(I) amended, (HB 09-1122), ch. 77, p. 280, § 3, effective October 1. **L. 2010:** (1)(h)(I) amended, (HB 10-1413), ch. 264, p. 1204, § 4, effective August 11. **L. 2011:** (1)(b.5)(I) amended, (HB 11-1032), ch. 296, p. 1402, § 7, effective August 10. **L. 2013:** (1)(b) amended and (2)(b) repealed, (SB 13-250), ch. 333, p. 1935, § 53, effective October 1. **L. 2014:** (1)(b) amended, (SB 14-163), ch. 391, p. 1972, § 9, effective June 6. **L. 2020:** IP(1) and (1)(c) amended, (SB 20-100), ch. 61, p. 208, § 9, effective March 23. **L. 2021:** (1)(h)(I) amended, (SB 21-059), ch. 136, p. 718, § 40, effective October 1; (1)(b.5)(II)(B) amended, (SB 21-271), ch. 462, p. 3168, § 181, effective March 1, 2022.

Editor's note: This section is similar to former § 16-11-101 as it existed prior to 2002.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(c), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to increased sentence after retrial, see 15 Colo. Law. 1604 (1986). For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with questions of criminal sentencing, see 63 Den. U.L. Rev. 291 (1986).

Annotator's note. Since § 18-1.3-104 is similar to § 16-11-101 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Only the general assembly may define crimes and prescribe punishments. People v. Hinchman, 196 Colo. 526, 589 P.2d 917 (1978).

It is the general assembly's prerogative to define crimes and prescribe punishments; the courts have no jurisdiction to impose sentences not in accord with the minimum and maximum terms specified by statute.

People v. Trujillo, 631 P.2d 146 (Colo. 1981).

Trial court had no authority to order alternate sentence in the event that death penalty statute was later found unconstitutional and, therefore, alternate sentence is illegal and void. People v. Corbett, 713 P.2d 1337 (Colo. App. 1985).

The purpose of this section is to give greater flexibility in sentencing. Nugent v. District Court, 184 Colo. 353, 520 P.2d 592 (1974).

Probation is accorded only to a defendant who seeks it or is willing to accept it as a sentence. People v. Rollins, 771 P.2d 32 (Colo. App. 1989).

A trial court cannot impose a sentence to probation without the defendant's consent to the terms and conditions of the probationary sentence. Veith v. People, 2017 CO 19, 390 P.3d 403.

Defendant consented to probation in lieu of incarceration; the trial court exceeded the scope of defendant's consent when it imposed a sentence of ten years of incarceration in addition to probation. The

trial court lacked authority to impose that sentence. *Veith v. People*, 2017 CO 19, 390 P.3d 403.

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Under this section, the trial court may grant probation, if a defendant is eligible for probation, or the trial court may impose a sentence of imprisonment for a definite period of time. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Under parole procedures an indeterminate sentence usually results in an earlier release. It cannot be said to be harsh or excessive so as to require the scrutiny of an appellate court. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974).

Convicted defendant entitled to indeterminate sentence where act effective prior to conviction. A defendant convicted in a criminal proceeding which was not yet final was entitled to indeterminate sentencing in a Crim. P. 35 proceeding since this section and § 16-11-304 requiring such sentencing became effective after the commission of the crime but prior to the date of conviction and sentencing. *People v. Griswold*, 190 Colo. 136, 543 P.2d 1251 (1975).

Section 18-1-409 entitled defendant to benefit of this section. Defendant, who was

sentenced prior to the effective date of the 1973 amendments to this section and § 16-11-304 — which legislation provided for the imposition of indeterminate sentences for class 4 and class 5 felonies — was entitled to the benefit of this legislation under relief sought by § 18-1-409. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

A defendant who was sentenced to a term with a fixed minimum and fixed maximum for conviction of a class 4 felony was entitled under § 18-1-409 to the benefits of this section and § 16-11-304. *People v. Race*, 187 Colo. 204, 529 P.2d 629 (1974).

Repeal of subsection (1)(d) after sentence no ground for relief. Where the effective date (July 1, 1979) of the repeal of § 16-11-101 (1)(d) was more than three months after the defendant was sentenced under its provisions, the repeal did not entitle the defendant to relief under § 18-1-410 (1)(f)(I). *People v. Steelman*, 200 Colo. 177, 613 P.2d 334 (1980).

Supreme court was without power to alter minimum sentence to indeterminate sentence. Where defendant, who was sentenced to a minimum term of three years for the crime of manslaughter, sought a declaration that he was immediately eligible for parole consideration on the ground that this section and § 16-11-304, enacted subsequent to his sentencing, required that a maximum sentence be imposed but eliminated the minimum sentence for the crime of manslaughter, the supreme court held that it did not have the power to alter defendant's minimum sentence to make the

sentence indeterminate. *People v. Davis*, 186 Colo. 186, 526 P.2d 312 (1974).

Duration of period of probation is limited to maximum term of imprisonment specified for the offense in question, and the provision of § 16-11-202 permitting the court to grant probation "for such a period and upon such terms and conditions as it deems best", does not give the court the authority to extend the terms of probation beyond the maximum term of imprisonment. *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Benavidez*, 58 P.3d 1142 (Colo. App. 2002).

For the period of probation allowable for offenses within the presumptive ranges established by § 18-1-105, see *People v. Flenniken*, 749 P.2d 395 (Colo. 1988) and *People v. Hunter*, 757 P.2d 631 (Colo. 1988).

A trial court may not impose a probationary term that is greater than the longest possible period of incarceration for the underlying misdemeanor. *People v. Kennaugh*, 80 P.3d 315 (Colo. 2003).

The maximum sentences established in § 18-1-105 for imprisonment periods do not apply to probation periods to which a defendant may be sentenced. *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

District court possessed jurisdiction to sentence defendant to a term of probation which did not exceed the maximum term of imprisonment in the aggravated range for the crime committed; the term of probation was not limited to the presumptive range for the crime committed. *Hunter v. People*, 757 P.2d 631 (Colo. 1988).

Incarceration a possible condition of probation. Incarceration, while a sentencing alternative, is also a possible specific condition of probation. *People v. Horton*, 628 P.2d 117 (Colo. App. 1980).

Sentencing following revocation of deferred judgment. When a deferred judgment is revoked in a felony case, sentencing to the penitentiary is not mandatory. The type of sentence to be imposed after the revocation of the deferred sentence is a matter within the discretion of the trial court, and a defendant is entitled to a consideration of all statutory sentencing alternatives at the time the deferred sentence is revoked and judgment of conviction is entered against him. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Court cannot suspend portion of sentence to alter limits of sentence. The court may not circumvent legislative dictates by first sentencing within legislatively prescribed parameters, and then suspending a portion of the minimum and maximum, for to do so would be an invasion of the general assembly's exclusive province to set punishments. *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978).

Trial court may not suspend sentence after denying probation. There are no provisions in this article authorizing the suspension of imposition or execution of sentence apart from a concomitant grant of probation, and a trial court may not circumvent the statutory requirements by denying probation and thereafter undertaking to suspend a sentence validly

imposed. *People v. Patrick*, 38 Colo. App. 103, 555 P.2d 182 (1976).

A trial court, having rejected probation, cannot circumvent legislative dictates by sentencing within prescribed parameters, suspending the sentence, and then imposing conditions which are authorized only in connection with probation. *People v. District Court*, 673 P.2d 991 (Colo. 1983); *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

District court had no statutory authority to suspend the sentence of imprisonment and to impose conditions on that suspension. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Decision to deny probation is not subject to appellate review where trial court considered all circumstances and available evidence. *People v. Godwin*, 679 P.2d 1095 (Colo. App. 1983); *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983); *People v. Robinson*, 713 P.2d 1333 (Colo. App. 1985); *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

Appellate court has jurisdiction to review conditions of probation. The appellate court has jurisdiction under subsection (1)(a) to review the conditions of defendant's probation where the argument is that the conditions of probation are contrary to the provisions of this title. *People v. Cera*, 673 P.2d 807 (Colo. App. 1983); *People v. Brockelman*, 916 P.2d 592 (Colo. App. 1995), *aff'd* on other grounds, 933 P.2d 1315 (Colo. 1997); *People v. Watkins*, 2012 COA 15, 282 P.3d 500; *People v. Jenkins*, 2013 COA 76, 305 P.3d 420.

However, the appellate court has no jurisdiction under subsection (1)(a) to review the conditions of probation where the argument is that the conditions of probation are contrary to the provisions of title 17. *People v. Smith*, 681 P.2d 525 (Colo. App. 1983).

When credit for presentence confinement presumed. Credit for presentence confinement must be presumed when the sentence imposed, plus the presentence confinement, does not exceed the maximum possible sentence. *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977).

Having initially taken into consideration the presentence confinement, it was not necessary for a court in resentencing to again recite what had been expressly stated before — that presentence confinement had been considered by the court. *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977).

This section defines the sentencing alternatives that are within a court's jurisdiction which do not include the authority to enter orders modifying parole eligibility. *People v. Anaya*, 894 P.2d 28 (Colo. App. 1994).

The substance of the principles articulated in the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 3.5, insofar as they are consistent with the stated general purposes of the Colorado code of criminal procedure, may be deemed to be "authorized by law" within the meaning of paragraph (f) of subsection (1) of this section and Crim. P. 32(b). *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977).

Applied in *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975); *People v. Soper*, 628 P.2d 604 (Colo. 1981); *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People v. Quintana*, 634 P.2d 413 (Colo. 1981),

overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922; *People v. Madonna*, 651 P.2d 378 (Colo. 1982); *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985).

18-1.3-104.5. Alternatives in imposition of sentence in drug felony cases - exhaustion of remedies.

(1) The general assembly finds that it is essential in certain level 4 drug felony cases that the court consider all sentencing options to ensure that the state's costly prison resources are used for those offenders for whom another sentence is not appropriate or will not properly meet the goals of community safety and rehabilitation of the offender.

(2) (a) Prior to the imposition of any sentence to the department of corrections for a level 4 drug felony offense at sentencing or at resentencing after a revocation of probation or community corrections sentence, the court shall exhaust all reasonable and appropriate alternative sentences for the offense considering all factors outlined in paragraph (b) of this subsection (2).

(b) If the court sentences the defendant to the department of corrections for a level 4 drug felony offense, it must determine that incarceration is the most suitable option given the facts and circumstances of the case, including the defendant's willingness to participate in treatment. Further, the court must also determine that all other reasonable and appropriate sanctions and responses to the violation that are available to the court have been tried and failed, do not appear likely to be successful if tried, or present an unacceptable risk to public safety.

(c) In making the determination in paragraph (b) of this subsection (2), the court shall review, to the extent available, the information provided by the supervising agency, which includes, but is not limited to, a complete statement as to what treatment and sentencing options have been tried and have failed, what other community options are available and the reasons why any other available community options appear to be unlikely to be successful. The supervising agency shall provide to the court the risk level of the offender as determined by an evidence-based risk assessment tool employed by the supervising agency and any other information relevant to the defendant's risk to public safety.

Source: L. 2013: Entire section added, (SB 13-250), ch. 333, p. 1902, § 2, effective October 1.

18-1.3-105. Authority of sentencing courts to utilize home detention programs.

(1) (a) A sentencing judge is authorized to sentence any offender, as defined in subsection (5) of this section, to a home detention program operated pursuant to a contractual agreement with the department of public safety pursuant to this article for all or part of such offender's sentence.

(b) Prior to sentencing any offender directly to a home detention program, the sentencing judge shall consider the following factors:

(I) The safety of victims and witnesses of the offender's criminal acts;

(II) The safety of the public at large;

(III) The seriousness of any offense committed by the offender together with any information relating to the original charge against the offender;

(IV) The offender's prior criminal record; and

(V) The ability of the offender to pay for the costs of home detention and any restitution to victims of his or her criminal acts.

(c) The sentencing judge shall make every reasonable effort to notify the victims of crime that the offender has been sentenced to a home detention program. Such notice shall be sent to the last address in the possession of the court, and the victim of the crime has the duty to keep the court informed of his or her most current address.

(d) An offender who has been convicted of a crime, the underlying factual basis of which was found by the court to include an act of domestic violence, as defined in section 18-6-800.3 (1), shall not be eligible for home detention in the home of the victim pursuant to this article.

(2) Any offender who is directly sentenced to a home detention program pursuant to subsection (1) of this section and fails to carry out the terms and conditions prescribed by the sentencing court in his or her sentence to a home detention program shall be returned to the court and resentenced as soon as possible.

(3) A sentencing judge is authorized to require any offender, as defined in subsection (5) of this section, as a condition of probation, to serve an appropriate period of time extending from ninety days to one year in a home detention program operated directly by the judicial department, or in a home detention program operated pursuant to a contractual agreement with the department of public safety.

(4) The general assembly hereby declares that this section shall be effective July 1, 1990, only in the counties of Boulder, Larimer, and Pueblo in order to facilitate a pilot program in Boulder, Larimer, and Pueblo counties which shall extend from July 1, 1990, until July 1, 1992.

(5) As used in this section, unless the context otherwise requires:

(a) "Home detention" means an alternative correctional sentence or term of probation supervision wherein a defendant convicted of any felony, other than a class 1 or violent felony, is allowed to serve his or her sentence or term of probation, or a portion thereof, within his or her home or other approved residence. Such sentence or term of probation shall require the offender to remain within his or her approved residence at all times except for approved employment, court-ordered activities, and medical needs.

(b) "Offender" means any person who has been convicted of or who has received a deferred sentence for a felony, other than a class 1 or violent felony.

Source: L. 2002: Entire article added with relocations, p. 1371, § 2, effective October 1.

Editor's note: This section is similar to former § 17-27.8-102 as it existed prior to 2002.

18-1.3-106. County jail sentencing alternatives - work, educational, and medical release - home detention - day reporting - definition.

(1) (a) Any county may provide a program whereby any person sentenced to the county jail upon conviction for a crime, nonpayment of any fine or forfeiture, or contempt of court may be granted by the court the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

(I) Seeking employment;

(II) Working at his or her employment;

(III) Working at a self-employed job or occupation, when properly verified;

(III.5) Working to provide child or family care services that are reasonable and necessary to support the immediate needs of the family, when properly verified;

(IV) Attendance at an educational institution;

(V) Medical treatment;

(VI) Home detention;

(VII) Day reporting;

(VIII) Behavioral health treatment; or

(IX) Reentry program.

(b) A court may order a person who would otherwise be sentenced to the county jail upon conviction of a crime to be sentenced directly to an available day reporting program, residential behavioral health treatment program, or residential reentry program if the court deems such a sentence to be appropriate for the offender.

(1.1) For purposes of this section, "home detention" means an alternative correctional sentence or term of legal supervision wherein a defendant charged or convicted of a misdemeanor, felony, nonpayment of any fine, or contempt of court is allowed to serve his or her sentence or term of supervision, or a portion thereof, within his or her home or other approved residence. Such sentence or term of supervision shall cause the defendant to remain within such defendant's approved residence at all times except for approved employment, court-ordered activities, and medical needs. Supervision of the defendant shall include personal monitoring by an agent or designee of the referring unit of government and monitoring by electronic or global positioning devices that are capable of detecting and reporting the defendant's absence or presence within the approved residence.

(1.3) Before a court may grant a person sentenced to the county jail the privilege of leaving the jail to attend a postsecondary educational institution, the court shall first notify the prosecuting attorney and the postsecondary educational institution of its intention to grant the privilege and request their comments thereon. The notice shall include all relevant information pertaining to the person and the crime for which he or she was convicted. Both the prosecuting attorney and the postsecondary institution shall reply to the court in writing within fourteen days after receipt of the notification or within such other reasonable time in excess of fourteen days as specified by the court. The postsecondary educational institution's reply shall include a statement of whether or not it will accept the person as a student. Acceptance by a state postsecondary educational institution shall be pursuant to section 23-5-106, C.R.S.

(2) Unless directly sentenced to a day reporting program, residential behavioral health treatment program, or residential reentry program, pursuant to subsection (1)(b) of this section or unless such privilege is otherwise expressly granted by the sentencing court, the prisoner shall be confined as sentenced. The prisoner may petition the court for such privilege at the time of sentencing or thereafter and, in the discretion of the court, may renew his or her petition. The court may withdraw the privilege at any time by order entered with or without notice.

(3) The sheriff or the director of an alternative sentencing program may endeavor to secure employment for unemployed prisoners under this section. If a prisoner is employed for wages or salary, the sheriff may collect the same or require the prisoner to turn over his or her wages or salary in full when received, and the sheriff shall deposit the same in a trust checking account and shall keep a ledger showing the status of the account of each prisoner.

(4) Every prisoner gainfully employed may be liable for the cost of his or her board in the jail or the cost of the supervision and administrative services if he or she is home-detained, as

fixed by the board of county commissioners. If necessarily absent from jail at mealtime, he or she may, at his or her request, be furnished with an adequate nourishing lunch to carry to work. The sheriff or the director of the alternative sentencing program, as may be applicable, may charge his or her account, if he or she has one, for such board. If the prisoner is gainfully self-employed, he or she may pay the sheriff or the director of the alternative sentencing program for such board, in default of which his or her privilege under this section is automatically forfeited. If the jail food is furnished directly by the county, the sheriff or the director of the alternative sentencing program may account for and pay over such board payments to the county treasurer. The board of county commissioners may, by resolution, provide that the county furnish or pay for the transportation of prisoners employed under this section to and from the place of employment. The sheriff or the director of the alternative sentencing program shall reimburse the county or other disbursing agent for all such expenses incurred in accordance with this section and article 26 of title 17 as soon as adequate funds are available in the prisoner's account and in accordance with subsection (5)(b) of this section.

(5) By order of the court, the wages or salaries of employed prisoners shall be disbursed by the sheriff for the following purposes, in the order stated:

- (a) Payment of any current child support order;
- (b) Payment of any child support arrearage;
- (b.3) Payment of any child support debt order;
- (c) Payment of any spousal maintenance;
- (d) Payment of costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
- (e) Payment of surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
- (f) Payment of restitution;
- (g) Payment of a time payment fee;
- (h) Payment of late fees;
- (i) Payment of any other fines, fees, or surcharges;
- (j) Payment of the board of the prisoner;
- (k) Payment of the supervision and administrative services provided to the prisoner during his or her home detention;
- (l) Payment of necessary travel expense to and from work and other incidental expenses of the prisoner;

(m) Payment, either in full or ratably, of the prisoner's obligations acknowledged by him or her in writing or which have been reduced to judgment; and

(n) The balance, if any, to the prisoner upon his or her discharge.

(6) The court may by order authorize the sheriff to whom the prisoner is committed to arrange with another sheriff for the employment or home detention of the prisoner in the other's county and, while so employed or so detained, for the prisoner to be in the other's custody but in other respects to be and continue subject to the commitment.

(7) If the prisoner was convicted in a court in another county, the court of record having criminal jurisdiction may, at the request or with the concurrence of the committing court, make all determinations and orders under this section which might otherwise be made by the sentencing court after the prisoner is received at the jail.

(8) The board of county commissioners may, by resolution, direct that functions of the sheriff pursuant to either subsection (3) or (5) of this section, or both, be performed by the county department of human or social services; or, if the board of county commissioners has not so directed, a court of record may order that the prisoner's earnings be collected and disbursed by the clerk of the court. Such order must remain in force until rescinded by the board or the court, whichever made it.

(9) The county department of human or social services shall, at the request of the court, investigate and report to the court the amount necessary for the support of the prisoner's dependents.

(10) The sheriff may refuse to permit the prisoner to exercise his or her privilege to leave the jail as provided in subsection (1) of this section for any breach of discipline or other violation of jail regulations. Any such breach of discipline or other violation of jail regulations shall be reported to the sentencing court.

(11) A prisoner who has been convicted of one of the crimes of violence as defined in section 18-1.3-406 (2), who has been convicted of a sex offense as defined in sections 18-1.3-903 (5) and 18-3-411, who has been convicted of a crime, the underlying factual basis of which was found by the court to include an act of domestic violence, as defined in section 18-6-800.3 (1), or who has been convicted of a class 1 misdemeanor in which a deadly weapon is used shall not be eligible for home detention pursuant to this section.

(12) Repealed.

Source: L. 2002: Entire article added with relocations, p. 1372, § 2, effective October 1. **L. 2006:** (1.1) amended, p. 18, § 2, effective March 8. **L. 2008:** (5)(d) amended, p. 1888, § 51, effective August 5. **L. 2012:** (1.3) amended, (SB 12-175), ch. 208, p. 864, § 107, effective July 1.

L. 2017: (3) and (4) amended and (12) repealed, (HB 17-1015), ch. 71, p. 225, § 10, effective August 9. **L. 2018:** (8) and (9) amended, (SB 18-092), ch. 38, p. 405, § 24, effective August 8. **L. 2021:** (1)(a)(III), (1)(a)(VI), (1)(b), (2), and (4) amended and (1)(a)(III.5), (1)(a)(VIII), and (1)(a)(IX) added, (SB 21-271), ch. 462, p. 3168, § 182, effective March 1, 2022.

Editor's note: This section is similar to former § 17-26-128 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

ANNOTATION

Subsection (4) requires sheriff to charge the trust checking account of an inmate on work release for board only if the inmate has such an account, which is not required. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Sheriff did not take any public moneys or public property pursuant to this section where trust checking accounts are not required. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

18-1.3-107. Conviction - collateral relief - applicability - definitions.

(1) At the time of conviction or at any time thereafter, upon the request of the defendant or upon the court's own motion, a court may enter an order of collateral relief in the criminal case for the purpose of preserving or enhancing the defendant's employment or employment prospects and to improve the defendant's likelihood of success in the community.

(2) Application contents.

(a) An application for an order of collateral relief must cite the grounds for granting the relief, the type of relief sought, and the specific collateral consequence from which the applicant is seeking relief and must include a copy of a recent criminal history record check. The state court administrator may produce an application form that an applicant may submit in application.

(b) The applicant shall provide a copy of the application to the district attorney and to the regulatory or licensing body that has jurisdiction over the collateral consequence from which the applicant is seeking relief, if any, by certified mail or personal service within ten days after filing the application with the court.

(c) An application filed after a sentence has been imposed must include a copy of a recent Colorado bureau of investigation fingerprint-based criminal history record check, the filing fee required by law, and an additional filing fee of thirty dollars to cover the actual costs related to the application. A court shall waive the filing fees if it finds that the defendant is indigent.

(3) An order of collateral relief may relieve a defendant of any collateral consequences of the conviction, whether in housing or employment barriers or any other sanction or disqualification that the court shall specify, including but not limited to statutory, regulatory, or other collateral consequences that the court may see fit to relieve that will assist the defendant in successfully reintegrating into the community.

(4) (a) Notwithstanding any other provision of law, an order of collateral relief cannot relieve any collateral consequences imposed by law for licensure by the department of education or any collateral consequences imposed by law for employment with the judicial branch, the department of corrections, division of youth services in the department of human services, or any other law enforcement agency in the state of Colorado.

(b) A court shall not issue an order of collateral relief if the defendant:

(I) Has been convicted of a felony that included an element that requires a victim to suffer a serious bodily injury and the victim suffered a permanent impairment of the function of any part or organ of the body;

(II) Has been convicted of a crime of violence as described in section 18-1.3-406; or

(III) Is required to register as a sex offender pursuant to section 16-22-103, C.R.S.

(5) Hearing.

(a) The court may conduct a hearing on any matter relevant to the granting or denial of an application or include a hearing on the matter at the defendant's sentencing hearing and may take testimony under oath.

(b) The court may hear testimony from victims or any proponent or opponent of the application and may hear argument from the petitioner and the district attorney.

(6) Standard for granting relief.

(a) A court may issue an order of collateral relief if the court finds that:

(I) The order of collateral relief is consistent with the applicant's rehabilitation; and

(II) Granting the application would improve the applicant's likelihood of success in reintegrating into society and is in the public's interest.

(b) The court that previously issued an order of collateral relief, on its own motion or either by cause shown by the district attorney or on grounds offered by the applicant, may at any time issue a subsequent judgment to enlarge, limit, or circumscribe the relief previously granted.

(c) Upon the motion of the district attorney or probation officer or upon the court's own motion, a court may revoke an order of collateral relief upon evidence of a subsequent criminal conviction or proof that the defendant is no longer entitled to relief. Any bars, prohibitions, sanctions, and disqualifications thereby relieved may be reinstated as of the date of the written order of revocation. The court shall provide a copy of the order of revocation to the holder and to any regulatory or licensing entity that the defendant noticed in his or her motion for relief.

(7) If the court issues an order of collateral relief, it shall send a copy of the order of collateral relief through the Colorado integrated criminal justice information system to the Colorado bureau of investigation, and the Colorado bureau of investigation shall note in the applicant's record in the Colorado crime information center that the order of collateral relief was issued.

(8) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Collateral consequence" means a collateral sanction or a disqualification.

(b) "Collateral sanction" means a penalty, prohibition, bar, or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense, which penalty, prohibition, bar, or disadvantage applies by operation of law regardless of whether the penalty, prohibition, bar, or disadvantage is included in the judgment or sentence. "Collateral sanction" does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, costs of prosecution, or a restraint or sanction on an individual's driving privilege.

(c) "Conviction" or "convicted" means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court or a conviction of a crime under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, which, if committed within this state, would be a crime. "Conviction" or "convicted" also includes having received a deferred judgment and sentence.

(d) "Disqualification" means a penalty, prohibition, bar, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual's conviction of an offense.

(9) The provisions of this section apply to convictions entered before, on, or after September 7, 2021.

Source: L. 2013: Entire section added, (SB 13-123), ch. 289, p. 1548, § 11, effective May 24. **L. 2017:** (4)(a) amended, (HB 17-1329), ch. 381, p. 1971, § 21, effective June 6. **L. 2018:** (1), (2)(a), (3), (4)(b)(I), (5)(a), (6)(c), and (8)(c) amended and (2)(c) added, (HB 18-1344), ch. 259, p. 1589, § 1, effective July 1. **L. 2021:** (9) added, (HB 21-1214), ch. 455, p. 3029, § 1, effective September 7.

PART 2

PROBATION

18-1.3-201. Application for probation.

(1) (a) A person who has been convicted of an offense, other than a class 1 felony or a civil infraction, is eligible to apply to the court for probation.

(b) Repealed.

(2) (a) The provisions of this subsection (2) shall apply to any person whose application for probation is based on a conviction for a felony, which conviction occurred before May 25, 2010.

(a.5) A person who has been twice or more convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction on which his or her application is based shall not be eligible for probation.

(b) Notwithstanding any other provision of law except the provisions of paragraph (c) of this subsection (2), a person who has been convicted of one or more felonies under the laws of this state, any other state, or the United States within ten years prior to a class 1, 2, or 3 felony conviction on which his or her application is based shall not be eligible for probation.

(c) Notwithstanding the provisions of paragraph (a.5) of this subsection (2) and subsection (4) of this section, an offender convicted of a violation of section 18-18-403.5 may be eligible for probation upon recommendation of the district attorney.

(d) Repealed.

(2.1) Repealed.

(2.5) (a) The provisions of this subsection (2.5) shall apply to any person whose application for probation is based on a conviction for a felony, which conviction occurred on or after May 25, 2010.

(b) Except as described in subsection (4)(a) of this section, a person who has been twice or more convicted of a felony upon charges separately brought and tried and arising out of separate and distinct criminal episodes under the laws of this state, any other state, or the United States

prior to the conviction on which the person's application is based is not eligible for probation if the current conviction or a prior conviction is for:

- (I) First or second degree murder, as described in section 18-3-102 or 18-3-103;
- (II) Manslaughter, as described in section 18-3-104;
- (III) First or second degree assault, as described in section 18-3-202 or 18-3-203;
- (IV) First or second degree kidnapping, as described in section 18-3-301 or 18-3-302;
- (V) A sexual offense as described in part 4 of article 3 of this title;
- (VI) First degree arson, as described in section 18-4-102;
- (VII) First or second degree burglary, as described in section 18-4-202 or 18-4-203;
- (VIII) Robbery, as described in section 18-4-301;
- (IX) Aggravated robbery, as described in section 18-4-302, or aggravated robbery of controlled substances, as described in section 18-4-303, as it existed prior to October 1, 2023;
- (X) Theft from the person of another, as described in section 18-4-401 (5);
- (XI) Any felony offense committed against a child, as described in article 3, 6, or 7 of this title; or
- (XII) Any criminal attempt or conspiracy to commit any of the offenses specified in this paragraph (b).

(c) Failure to register as a sex offender, as described in section 18-3-412.5, shall not constitute a sexual offense for the purposes of subparagraph (V) of paragraph (b) of this subsection (2.5).

(3) An application for probation shall be in writing upon forms furnished by the court, but, when the defendant has been convicted of a misdemeanor or any petty offense, the court, in its discretion, may waive the written application for probation.

(4) (a) (I) The restrictions upon eligibility for probation in subsections (2) and (2.5) of this section may be waived by the sentencing court regarding a particular defendant upon recommendation of the district attorney approved by an order of the sentencing court.

(II) Repealed.

(b) Upon entry of an order pursuant to this subsection (4) regarding a particular defendant, such defendant shall be deemed to be eligible to apply to the court for probation pursuant to this section.

(5) For purposes of paragraph (a.5) of subsection (2) of this section and paragraph (a) of subsection (2.5) of this section, "conviction" means a verdict of guilty or the entry of a plea of guilty or nolo contendere. "Conviction" does not include a plea to a deferred judgment and sentence pursuant to section 18-1.3-102 until the deferred judgment and sentence is revoked.

Source: **L. 2002:** Entire article added with relocations, p. 1375, § 2, effective October 1. **L. 2003:** (2) amended and (2.1) added, p. 2689, § 7, effective July 1. **L. 2007:** (2)(d) and (2.1) repealed, p. 1689, § 10, effective July 1. **L. 2010:** (1)(b) and (4)(a)(II) repealed, (2) and (4)(a)(I) amended, and (2.5) added, (HB 10-1338), ch. 257, pp. 1147, 1145, §§ 2, 1, effective May 25; (2)(c) amended, (HB 10-1352), ch. 259, p. 1173, § 16, effective August 11. **L. 2012:** (5) added, (HB 12-1310), ch. 268, p. 1396, § 12, effective June 7. **L. 2013:** (3) amended, (SB 13-250), ch. 333, p. 1935, § 54, effective October 1. **L. 2021:** (1)(a) amended, (SB 21-271), ch. 462, p. 3169, § 183, effective March 1, 2022. **L. 2023:** IP(2.5)(b) and (2.5)(b)(IX) amended, (HB 23-1293), ch. 298, p. 1783, § 4, effective October 1.

Editor's note: (1) This section is similar to former § 16-11-201 as it existed prior to 2002.

(2) Amendments to subsection (2)(c) by House Bill 10-1338 and House Bill 10-1352 were harmonized.

Cross references: (1) For procedures relevant to application for probation, see Crim. P. 32.

(2) For the legislative intent contained in the 2003 act amending subsection (2) and enacting subsection (2.1), see section 1 of chapter 424, Session Laws of Colorado 2003.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "Criminal Law", which discusses a Tenth Circuit decision dealing with probation proceedings, see 61 Den. L.J. 274 (1984).

Annotator's note. Since § 18-1.3-201 is similar to § 16-11-201 as it existed prior to

the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

This section is general in nature, and excepts only class one felonies and class two petty offenses. *People v. Burke*, 185 Colo. 19, 521 P.2d 783 (1974).

Misdemeanant may apply for probation. An offense specifically designated by statute as a misdemeanor, although for some purposes might be characterized as a petty offense, comes plainly within the law permitting application for probation. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972) (decided under repealed § 39-16-3, C.R.S. 1963).

The general assembly did not intend to repeal the mandatory sentencing provision of § 42-2-130, sub silentio, by implication, or otherwise by enactment of this section. *People v. Burke*, 185 Colo. 19, 521 P.2d 783 (1974).

Subsection (2) cannot be read to exclude persons convicted of two prior felonies from community correctional programs, since such programs are not purely probationary. *People ex rel. VanMeveren v. District Court*, 195 Colo. 34, 575 P.2d 4 (1978).

Court may not disregard legislative sentencing mandates. A court is not free to disregard the legislative mandate of §§ 16-11-301 and 16-11-308 and this section, even when it appears to dictate a sentence which the court considers inappropriate to a particular case. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

Unconstitutionally obtained conviction cannot be considered for eligibility for probation. *People v. McIntosh*, 695 P.2d 795 (Colo. App. 1984).

Subsection (2) prohibits judge from utilizing suspended sentence as means for granting probation. The legislative

mandate of subsection (2) is intended to prohibit a trial judge from circumventing the clear wording of the statute by utilizing a suspended sentence as a means for granting probation. The statutory command requires incarceration when any defendant, before the court for imposition of sentence, has been previously convicted of two felonies. *Herrman v. District Court*, 186 Colo. 350, 527 P.2d 1168 (1974).

Trial court may not suspend sentence after denying probation. There are no provisions in this article authorizing the suspension of imposition or execution of sentence apart from a concomitant grant of probation, and a trial court may not circumvent the statutory requirements by denying probation and thereafter undertaking to suspend a sentence validly imposed. *People v. Patrick*, 38 Colo. App. 103, 555 P.2d 182 (1976).

Two felonies need not be separately brought and tried for purposes of determining eligibility for probation. *People v. Nicholas*, 700 P.2d 921 (Colo. App. 1984).

A conviction from another state can satisfy the two prior felony rule for purposes of making the defendant ineligible for probation. *People v. Dominguez*, 2021 COA 76, 494 P.3d 682.

Court properly determined that defendant's attempted burglary conviction from another state was a disqualifying offense under the two prior felony rule. Even though the other state's attempt statute does not include the substantial step element of this state's attempt statute, there is no functional

difference between the two statutes. *People v. Dominguez*, 2021 COA 76, 494 P.3d 682.

The more restrictive provisions of subsection (4)(a)(II) for placing a defendant twice convicted of a felony on probation do not prevent the court from placing any defendant twice convicted of a felony on probation under the provisions of subsection (4)(a)(I). *Chism v. People*, 80 P.3d 293 (Colo. 2003).

To interpret subsection (4)(a)(II) as prescribing the exclusive conditions for waiver of the two-felony rule would repeal by implication subsection (4)(a)(I), which clearly permits a broader class of waivers. Constructions that work a repeal by implication are not favored unless unavoidable. *Chism v. People*, 80 P.3d 293 (Colo. 2003).

The court's duty to fix the amount of restitution is not confined to sentences to probation but applies equally to sentences to imprisonment. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Court agreed with defendant's construction that "conviction" referenced in subsection (2)(a.5) refers to defendant's guilty plea, not the subsequent revocation of defendant's deferred judgment and sentence. Therefore, other felony convictions that occurred before the revocation cannot be considered "prior" felonies under this section, thus allowing probation to be an option. *People v. Kiniston*, 262 P.3d 942 (Colo. App. 2011).

Defendant who had two prior convictions at the time a third conviction

was handed down was ineligible for probation. Defendant's argument that he had only one conviction at the time of commission of the underlying third crime must fail. This section clearly sets the cut-off point for determining the existence of prior convictions at the time of the third conviction. *People v. Harvey*, 819 P.2d 1087 (Colo. App. 1991).

If prosecution recommends waiver of the two-felony rule prior to sentencing, court may resentence defendant to probation after the revocation hearing without a second recommendation of prosecution to waive the two-felony rule. *People v. Nance*, 221 P.3d 428 (Colo. App. 2009).

Length of probation term not subject to statutes governing length of prison term. Imposition of prison term of six years is not controlling of length of probation term. *People v. Martinez*, 844 P.2d 1203 (Colo. App. 1992).

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where the defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Applied in *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975); *People v. Crandall*, 37 Colo. App. 220, 544 P.2d 411 (1975); *People v. Turner*, 644 P.2d 951 (Colo. 1982).

18-1.3-202. Probationary power of court.

(1) (a) When it appears 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 served thereby, the court may grant the defendant probation for such period and upon such terms and conditions as it deems best. The length of probation shall be subject to the discretion of the court and may exceed the maximum period of incarceration authorized for the classification of the offense of which the defendant is convicted but shall not exceed five years for any misdemeanor or petty offense. If the court chooses to grant the defendant probation, the order placing the defendant on probation shall take effect upon entry and, if any appeal is brought, shall remain in effect pending review by an appellate court unless the court grants a stay of probation pursuant to section 16-4-201. Unless an appeal is filed that raises a claim that probation was granted contrary to the provisions of this title, the trial court shall retain jurisdiction of the case for the purpose of adjudicating complaints filed against the defendant that allege a violation of the terms and conditions of probation. In addition to imposing other conditions, the court has the power to commit the defendant to any jail operated by the county or city and county in which the offense was committed during such time or for such intervals within the period of probation as the court determines. Except as described in subsections (1)(b) and (1)(c) of this section, the aggregate length of any such commitment whether continuous or at designated intervals may not exceed ninety days for a felony, sixty days for a misdemeanor, or ten days for a petty offense unless it is a part of a work release program pursuant to section 18-1.3-207. That the defendant submit to commitment imposed under this section is deemed a condition of probation.

(b) For a defendant who is convicted of a felony offense described in section 42-4-1301 (1)(a), (1)(b), or (2)(a), the aggregate length of any commitment to a county jail is determined as provided in section 42-4-1307 (6.5)(b).

(c) For a defendant who is convicted of an offense described in section 18-7-402, the aggregate length of any commitment to a county jail is determined as provided in section 18-7-402 (2)(c).

(2) The probation department in each judicial district may enter into agreements with any state agency or other public agency, any corporation, and any private agency or person to provide supervision or other services for defendants placed on probation by the court. The agreements shall not include management of any intensive supervision probation programs created pursuant to section 18-1.3-208.

Source: L. 2002: Entire article added with relocations, p. 1376, § 2, effective October 1. **L. 2003:** (1) amended, p. 976, § 13, effective April 17. **L. 2013:** (2) amended, (SB 13-250), ch. 333,

p. 1942, § 68, effective October 1. **L. 2017:** (1) amended, (HB 17-1288), ch. 387, p. 2005, § 3, effective August 9. **L. 2026:** (1)(a) amended and (1)(c) added, (SB 26-015), ch. 335, p. 2034, § 11, effective July 1.

Editor's note: This section is similar to former § 16-11-202 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Annotator's note. Since § 18-1.3-202 is similar to § 16-11-202 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed § 39-16-6, C.R.S. 1963, relevant cases construing those provisions have been included in the annotations to this section.

No equal protection violation. This section and the work release statute, § 16-11-212, establish general statutory probation dispositions for all defendants eligible for probation and do not create classifications resulting in disparate treatment. *People v. Garberding*, 787 P.2d 154 (Colo. 1990).

Probation is a creature of statute. *People v. Ray*, 192 Colo. 391, 560 P.2d 74 (1977).

Probation is a privilege, not a right, and an order of probation may be revoked if a probationer violates any condition of probation. *People v. Colabello*, 948 P.2d 77 (Colo. App. 1997).

This section is similar to the original federal probation law. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Probation is accorded only to a defendant who seeks it or is willing to accept it as a sentence. *People v. Rollins*, 771 P.2d 32 (Colo. App. 1989).

Subject to the requirement that any conditions imposed as terms of probation must be authorized by the general assembly, trial courts are given wide discretion in imposing conditions upon a sentence of probation. *People v. Richards*, 795 P.2d 1343 (Colo. 1990).

Court may not sentence a defendant to both imprisonment and probation in the same case. If the court determines that imprisonment is the more appropriate sentence, it may not impose a sentence to probation on a separate count in the same case. *Allman v. People*, 2019 CO 78, 451 P.3d 826.

However, although the general sentencing statutes reflect the legislature's

disapproval of consecutive prison-probation sentences, the Sex Offender Lifetime Supervision Act (SOLSA) reflects the legislature's approval of such sentencing in cases including a sentence for a non-sex offense and a sentence for a sex offense. Therefore, the Allman sentencing prohibition for consecutive prison-probation sentences does not apply in cases where a defendant receives a prison sentence for a non-sex offense and a consecutive probation sentence for sex offender intensive supervision probation. *People v. Manaois*, 2021 CO 49, 488 P.3d 1099.

Furthermore, the Allman sentencing prohibitions do not apply when sentencing a defendant in a multi-count case that involves a non-sex offense and a sex-related offense (as opposed to a sex offense, as was the case in *People v. Manaois* annotated above). So long as the probation portion of the prison-probation sentence in the scenario falls within the confines of SOLSA, Allman's sentencing restriction is inapplicable. *People v. Keen*, 2021 CO 50, 488 P.3d 1127.

Nor do the Allman sentencing prohibitions apply when a defendant receives a prison sentence for a sex-related offense and a consecutive sex offender intensive supervision probation sex offense. *People v. Lowe*, 2021 CO 51, 488 P.3d 1122.

Nor when a defendant receives a prison sentence for a non-sex offense and a consecutive probation sentence for an offense that does not qualify as a "sex offense" but that nevertheless falls within

SOLSA's scope and requires participation in sex offender intensive supervision probation. *People v. Coleman*, 2021 CO 52, 488 P.3d 1086; *People v. Rainey*, 2021 CO 53, 488 P.3d 1081.

Trial court has statutory authority to order that a sentence to probation be served consecutively to another sentence. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Subsection (1) does not preclude deferring commencement of a probationary sentence. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

The trial court has the authority to order domestic violence treatment as a condition of defendant's probation without a jury finding that the defendant committed an "act of domestic violence". Because the court had the authority to attach whatever conditions to probation the court deemed appropriate, the U.S. supreme court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not require a jury finding of an act of domestic violence before domestic violence treatment was ordered as a condition of probation. *People v. Goldfuss*, 98 P.3d 935 (Colo. App. 2004).

A trial court has jurisdiction to grant probation either by suspending imposition of sentence or suspending execution of the sentence. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972).

It acts upon probation report. The court acts pursuant to this section upon all data relating to the applicant for probation submitted to a court in the form of a written

report. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

A trial court shall give careful consideration to the information supplied by the probation officer. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

No automatic stay of probation order pending appeal. Under subsection (1), the trial court retains jurisdiction to modify and terminate probation during the pendency of an appeal unless a stay has been granted. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

The broad grant of power under this section encompassed a deferred judgment procedure. *People v. Ray*, 192 Colo. 391, 560 P.2d 74 (1977).

Each time a defendant is sentenced or resentenced to probation, the court may sentence the defendant to a commitment to jail for up to the maximum allowed by statute. *People v. Gravina*, 2013 COA 22, 300 P.3d 990.

Inapplicable to delinquent child. The plain intent of the Colorado Children's Code militates against the application of this section via § 16-11-210 to a delinquent child under the age of 18 years. *People in Interest of A.F.*, 37 Colo. App. 185, 546 P.2d 972 (1975), *aff'd*, 192 Colo. 207, 557 P.2d 418 (1976).

A juvenile court does not have the statutory authority to impose a limited or partial confinement in county jail as a condition of probation for a juvenile under 18 years of age. *People v. A.F.*, 192 Colo. 207, 557 P.2d 418 (1976).

Although this section does grant courts the authority to condition probation upon service of sentences in city or county jails, such conditions are clearly contravention of numerous expressions of legislative intent in the Colorado Children's Code. *People v. A.F.*, 192 Colo. 207, 557 P.2d 418 (1976).

This section applies to sex offender intensive supervision program (SOISP) sentences except where the language conflicts with more specific provisions contained in the statutes governing SOISP sentences. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Trial court had authority to direct that defendant's SOISP would commence consecutively at the end of his incarceration on another conviction. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Trial court had jurisdiction to grant probation. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972).

The maximum sentences in the presumptive ranges established in § 18-1-105 for imprisonment periods do not apply to probation periods to which a defendant may be sentenced. *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

The decision of the supreme court in *People v. Flenniken* will be given retroactive effect. *People v. Cagle*, 780 P.2d 13 (Colo. App. 1989).

The minimum sentences established in § 18-1-105 do not establish the minimum period of probation to which a defendant may be sentenced. The length of probation

is at the sentencing judge's discretion. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

Probationary sentence is not illegal because it exceeds the maximum length authorized for a sentence to incarceration. *People v. Salas*, 42 P.3d 68 (Colo. App. 2001).

But the provisions of this section authorizing a court to grant "probation for such period and upon such terms and conditions as it deems best" does not give the court unlimited discretion to determine the probationary period. A trial court thus exceeds its authority if it sentences a defendant to a probationary term longer than the maximum sentence to incarceration allowed for a misdemeanor offense. *People v. Benavidez*, 58 P.3d 1142 (Colo. App. 2002).

A trial court may not impose a probationary term that is greater than the longest possible period of incarceration for the underlying misdemeanor. *People v. Kennaugh*, 80 P.3d 315 (Colo. 2003).

Court may impose an indeterminate term of probation that may exceed

maximum range of incarceration for offense. The court's discretion to impose probation is not limited by statutory ranges governing sentences to incarceration. The court had authority to order indeterminate probation of ten years to life even though the maximum period of incarceration permitted for the crime was twelve years and the defendant could not properly be classified as a sex offender subject to lifetime supervision. *People v. Jenkins*, 2013 COA 76, 305 P.3d 420.

The specific statutory provisions of § 42-4-1301 that contain a mandatory sentencing scheme for alcohol-related driving offenses and which provide for extended treatment of the underlying cause of the criminal conduct, prevail over the general provisions of this section. *People v. Martinnillie*, 940 P.2d 1090 (Colo. App. 1996).

Applied in *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975); *People v. Horton*, 628 P.2d 117 (Colo. App. 1980); *People v. Martinez*, 657 P.2d 967 (Colo. App. 1982); *People v. Trujillo*, 2018 COA 12, 433 P.3d 78.

18-1.3-202.5. Veterans court probation supervision.

(1) If the defendant is a veteran or is currently serving in the United States armed forces and is suffering from a diagnosable mental health condition that is related to the veteran's military service and the jurisdiction of trial does not have a veterans treatment court, the defendant, with the consent of the district attorney and any victim in a victim's rights case, may petition the court to transfer the supervision of any post disposition of the case to a jurisdiction with a veterans treatment court.

(2) A defendant filing a petition pursuant to subsection (1) of this section must identify the jurisdiction where the supervision of the probation in the case may be transferred and the services or supports available in that jurisdiction's veterans treatment court that the defendant is seeking to access.

(3) When a court receives a petition pursuant to subsection (1) of this section, the court shall confer with the judge administering the veterans treatment court in the jurisdiction identified in the petition and the district attorney of the jurisdiction identified in the petition. The court may grant the petition to transfer the supervision of probation in the case if the veterans treatment court and the district attorney in the hosting jurisdiction consent to the transfer and that jurisdiction has the current ability to provide the resources and support necessary to responsibly accept the transfer.

(4) If the host jurisdiction files a motion for revocation of the veterans treatment court program probation, the host jurisdiction shall conduct the revocation hearing. If probation is revoked, the host jurisdiction shall refer the matter to the original jurisdiction for resentencing.

(5) Nothing in this section prohibits the host jurisdiction from utilizing program policies related to minor violations that are typically addressed through graduated sanctions.

Source: L. 2021: Entire section added, (HB 21-1016), ch. 214, p. 1135, § 2, effective September 7.

18-1.3-203. Criteria for granting probation.

(1) The court, subject to the provisions of this title and title 16, C.R.S., and having considered the purposes of sentencing described in section 18-1-102.5, in its discretion may grant probation to a defendant unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) There is undue risk that during a period of probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment as authorized by section 18-1.3-104; or

(c) A sentence to probation will unduly depreciate the seriousness of the defendant's crime or undermine respect for law; or

(d) His or her past criminal record indicates that probation would fail to accomplish its intended purposes; or

(e) The crime, the facts surrounding it, or the defendant's history and character when considered in relation to statewide sentencing practices relating to persons in circumstances substantially similar to those of the defendant do not justify the granting of probation.

(2) The following factors, or the converse when appropriate, while not controlling the discretion of the court, must be accorded weight in making determinations called for by subsection (1) of this section:

(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his or her property;

(b) The defendant did not plan or expect that his or her criminal conduct would cause or threaten serious harm to another person or his or her property;

(c) The defendant acted under strong provocation;

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) The victim of the defendant's conduct induced or facilitated its commission;

(f) The defendant has made or will make restitution or reparation to the victim of his or her conduct for the damage or injury which was sustained;

(g) The defendant has no history of prior criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) The defendant's conduct was the result of circumstances unlikely to recur;

(i) The character, history, and attitudes of the defendant indicate that he or she is unlikely to commit another crime;

(j) The defendant is particularly likely to respond affirmatively to probationary treatment;

(k) The imprisonment of the defendant would entail undue hardship to himself or herself or his or her dependents;

(l) The defendant is elderly or in poor health;

(m) The defendant did not abuse a public position of responsibility or trust;

(n) The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise;

(o) The defendant is a pregnant or postpartum defendant, if the defendant complied with the notice requirement set forth in section 18-1.3-103.7.

(3) Nothing in this section shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

Source: **L. 2002:** Entire article added with relocations, p. 1377, § 2, effective October 1. **L. 2011:** IP(1) amended, (HB 11-1180), ch. 96, p. 283, § 3, effective August 10. **L. 2023:** IP(2) amended and (2)(o) added, (HB 23-1187), ch. 246, p. 1341, § 6, effective August 7.

Editor's note: This section is similar to former § 16-11-203 as it existed prior to 2002.

Cross references: For provisions concerning the presentence or probation investigation, see § 16-11-102 and Crim. P. 32(a).

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-203 is similar to § 16-11-203 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed § 39-16-6, C.R.S 1963, and § 39-16-6, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

A court may sentence a defendant to prison in one case and to probation in another case. People v. Snedeker, 2023 COA 46, 535 P.3d 128, aff'd, 2025 CO 10, 564 P.3d 301.

The granting of probation involves the exercise of discretion on the part of a trial judge. Logan v. People ex rel. Alamosa County, 138 Colo. 304, 332 P.2d 897 (1958).

It is not a matter of right for a defendant. It is a matter of grace and suspends conditionally what otherwise would be a harsher decree. Gehl v. People, 161 Colo. 535, 423 P.2d 332 (1967).

Probation is a privilege rather than a right. It suspends conditionally what might be a harsher judgment. It is, in effect, a contract made by the court and sanctioned by the statute with the convicted person. Holdren v. People, 168 Colo. 474, 452 P.2d 28 (1969).

Judge considers community, offense, and offender. A trial judge in the exercise of his discretion in a probation matter considers three facets of the problem - the community, the offense, and the offender, in that order - and if upon consideration of these factors he concludes that the applicant is a worthy risk for probation, he has the power to grant it. Logan v. People ex rel. Alamosa County, 138 Colo. 304, 332 P.2d 897 (1958).

The setting, nature, and circumstances of an offense, particularly as they furnish a clue to the personality of an offender, whether an offense is violent or nonviolent, and the motives actuating a defendant in committing an offense are components which a trial court will evaluate when considering the offense as a factor in the question of granting probation, as well as the background of a defendant and information corroborating or denying the defendant's will to reform and his ability to adjust himself to community life. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

The public interest in safety and deterrence, when considered in isolation, might well justify an alternative to sentencing in the case of a first-time offender, at least in crimes not causing or threatening serious harm to the person or property of others. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980).

Although the absence of a prior felony conviction or significant criminal involvement, by itself, certainly may constitute a mitigating factor worthy of consideration, it is only one factor and is not conclusive on the sentencing decision. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980).

Trial court did not err or impermissibly infringe upon defendant's fifth amendment rights in denying him the privilege of probation when defendant would not, during the pendency of his appeal and in the course of sex offender treatment, admit

responsibility for his crime. *People v. Whitlock*, 2014 COA 162, 412 P.3d 667.

Trial court did not err in stating that it had considered the factors set forth in this section prior to imposing sentence. This section requires the court to consider factors similar to those allowed under the sentencing statute, and the court did not abuse its discretion in doing so. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Power to suspend sentence not affected by failure to grant probation. So long as the circumstances would have justified a grant of probation and the defendant was eligible for probation, the fact that the judge did not impose it does not vitiate his power to suspend sentences. *People v. Henderson*, 196 Colo. 441, 586 P.2d 229 (1978), overruled on other grounds in *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Surrounding circumstances of defendant's alien status may be relevant to a sentencing court's decision whether to grant or deny probation. Although consideration of defendant's status as a foreign national, in and of itself, is improper, the fact that defendant is in the United States illegally may, under certain circumstances, provide substantial and compelling reasons to depart from sentencing guidelines and deny probation. *People v. Hernandez-Clavel*, 186 P.3d 96 (Colo. App. 2008).

A court may resentence a defendant to probation if the defendant has served prison time in a prison-plus-probation sentence found to be illegal. *People v. Snedeker*, 2023 COA 46, 535 P.3d 1258, *aff'd*, 2025 CO 10, 564 P.3d 301.

18-1.3-204. Conditions of probation - interstate compact probation transfer cash fund - creation.

(1) (a) The conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so. The court shall provide as explicit conditions of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation, that the defendant make restitution pursuant to part 6 of this article and article 18.5 of title 16, C.R.S., that the defendant comply with any court orders regarding substance abuse testing and treatment issued pursuant to sections 18-1.3-209 and 18-1.3-211 and article 11.5 of title 16, C.R.S., and that the defendant comply with any court orders regarding the treatment of sex offenders issued pursuant to article 11.7 of title 16, C.R.S. The court shall provide as an explicit condition of every sentence to probation that the defendant not harass, molest, intimidate, retaliate against, or tamper with the victim of or any prosecution witnesses to the crime, unless the court makes written findings that such condition is not necessary.

(b) Notwithstanding the provisions of subsection (1)(a) of this section, unless the defendant is sentenced to probation for a conviction of a crime under article 10 of title 44, the possession or use of medical marijuana, as authorized pursuant to section 14 of article XVIII of the state constitution, shall not be considered another offense such that its use constitutes a violation of the terms of probation.

(c) Notwithstanding the provisions of subsection (1)(a) of this section, the possession or use of natural medicine or natural medicine product, as authorized pursuant to section 18-18-434, article 170 of title 12, or article 50 of title 44, must not be considered another offense such that its use constitutes a violation of the terms of probation.

(1.5) If the defendant is being sentenced to probation as a result of a conviction of a felony offense or a qualifying misdemeanor offense pursuant to the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S., a condition of probation shall be that the court shall require the defendant to execute or subscribe a written prior waiver of extradition stating that the defendant consents to extradition to this state and waives all formal proceedings in the event that he or she is arrested in another state while at liberty on such bail bond and acknowledging that he or she shall not be admitted to bail in any other state pending extradition to this state. If the offender is returned to the state pursuant to the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S., a court may not impose the cost of the offender's return on the offender.

(2) (a) When granting probation, the court may, as a probation condition, require that the defendant:

(I) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip the defendant for suitable employment;

(II) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose. In any case where inpatient psychiatric treatment is indicated, the court shall proceed in accordance with article 65 of title 27 and require the defendant to comply with the recommendation of the professional person in charge of the evaluation required pursuant to section 27-65-106.

(III) Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;

(III.5) Participate in restorative justice practices, as defined in section 18-1-901 (3)(o.5), if available in the jurisdiction, and the defendant is determined suitable by a designated restorative justice practices facilitator. If a defendant wants to participate in restorative justice practices, the defendant must make the request to the district attorney or the law enforcement agency administering the program and may not make the request to the victim. If requested by the defendant, district attorney, or law enforcement agency, a victim-offender conference may only be conducted after the victim is consulted by the district attorney and offered the opportunity to participate or submit a victim impact statement. If a victim elects not to attend, a victim offender conference may be held with a suitable victim surrogate or victim advocate, and the victim may submit a victim-impact statement. To be eligible for restorative justice practices, the defendant shall not have been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., a crime in which the underlying factual basis involves domestic violence, as defined in section 18-6-800.3 (1), stalking as defined in section 18-3-602, or violation of a protection order as defined in section 18-6-803.5. Any statements made during a restorative justice conference shall be confidential and shall not be used as a basis for charging or prosecuting the defendant unless the defendant commits a chargeable offense during the conference. Failure to complete the requirements arising from a restorative justice conference may be considered a violation of probation. Nothing in this subparagraph (III.5) shall be construed to require a victim to participate in restorative justice practices or a restorative justice victim-offender conference.

(IV) Support the defendant's dependents and meet other family responsibilities, including arranging and fulfilling a payment plan for current child support, child support arrearages, and child support debt due under a court or administrative order through any delegate child support enforcement unit that may have a child support case with the defendant;

(V) Pay reasonable costs of the court proceedings or costs of supervision of probation, or both. The court shall not require a defendant to pay probation supervision fees in more than one case when the defendant is granted probation in multiple cases. The probation supervision fee is

fifty dollars per month for the length of ordered probation. Notwithstanding the amount specified in this subsection (2)(a)(V), the court may lower or waive court costs and the costs of supervision of probation for an indigent defendant. The court shall fix the manner of performance for payment of the fee. If the defendant receives probation services from a private provider, the court shall order the defendant to pay the probation supervision fee directly to the provider. The fee shall be imposed for the length of ordered probation.

(VI) Pay any fines or fees imposed by the court;

(VI.5) Repay all or part of any reward paid by a crime stopper organization that led to the defendant's arrest and conviction in accordance with article 15.7 of title 16, C.R.S.;

(VII) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the court or probation officer;

(VIII) Refrain from excessive use of alcohol or any unlawful use of controlled substances, as defined in section 18-18-102 (5), or of any other dangerous or abusable drug without a prescription; except that the court shall not, as a condition of probation, prohibit the possession or use of natural medicine or natural medicine product, as authorized pursuant to section 18-18-434, article 170 of title 12, or article 50 of title 44. Furthermore, the court shall not, as a condition of probation, prohibit the possession or use of medical marijuana, as authorized pursuant to section 14 of article XVIII of the state constitution, unless:

(A) The defendant is sentenced to probation for conviction of a crime under article 10 of title 44; or

(B) The court determines, based on any material evidence, that a prohibition against the possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing as stated in section 18-1-102.5;

(IX) Meet with a probation officer at reasonable times as directed by the court or the probation officer. Unless inconsistent with other conditions imposed by the court, the court shall allow a person on probation to meet with a probation officer at reasonable times through a telephone call or audio-visual communication technology. Unless inconsistent with other conditions imposed by the court, in directing that a person on probation meet with a probation officer at reasonable times, the court or the probation officer shall schedule, in good faith, the meeting with the person on probation at mutually agreeable times that do not conflict with the person's essential obligations, including work, education, job training, dependent care, medical appointments, and other probation requirements.

(X) Permit the probation officer to visit the defendant at reasonable times at the defendant's home and elsewhere;

(XI) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

(XII) Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

(XIII) Be subject to home detention as defined in section 18-1.3-106 (1.1);

(XIV) Be restrained from contact with the victim or the victim's family members in cases in which the defendant was convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1);

(XIV.5) Be subject to electronic or global position monitoring;

(XV) Satisfy any other conditions reasonably related to the defendant's rehabilitation and the purposes of probation.

(b) When granting probation, in addition to the consideration of the provisions set forth in paragraph (a) of this subsection (2), the court shall order as a condition of probation in cases in which the defendant was convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), that the defendant:

(I) Comply with existing court orders regarding family support;

(II) Comply with any existing court orders concerning a proceeding to determine paternity, custody, the allocation of decision-making responsibility, parenting time, or support;

(III) Comply with the terms of any protection order in effect against the defendant during the probation period;

(IV) Refrain from possessing a firearm, destructive device, or other dangerous weapon, unless granted written permission by the court or probation officer which shall not be granted in such domestic violence cases unless:

(A) It is required by the defendant's employment; and

(B) The court finds that the defendant's possession of the weapon does not endanger the victim or the victim's children; and

(C) The weapon is stored away from the home and the yard surrounding the home.

(c) If the court orders counseling or treatment as a condition of probation, unless the court makes a specific finding that treatment in another facility or with another person is warranted, the court shall order that the treatment or counseling be at a facility or with a person:

(I) Approved by the behavioral health administration in the department of human services if the treatment is for alcohol or drug abuse;

(II) Certified or approved by the sex offender management board, established in section 16-11.7-103, C.R.S., if the offender is a sex offender;

(III) Certified or approved by the domestic violence offender management board created in section 16-11.8-103, C.R.S., if the offender was convicted of or the underlying factual basis of the offense included an act of domestic violence as defined in section 18-6-800.3; or

(IV) Licensed or certified by the division of adult parole in the department of corrections, the department of regulatory agencies, the behavioral health administration in the department of human services, the state board of nursing, or the Colorado medical board, whichever is appropriate for the required treatment or counseling.

(d) Notwithstanding the provisions of paragraph (c) of this subsection (2), if the court orders counseling or treatment as a condition of probation for an offender convicted of an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., the court shall order such treatment or counseling be at a facility or with a person listed in paragraph (c) of this subsection (2), and the court may not make a specific finding that treatment in another facility or with another person is warranted.

(e) If the defendant is convicted of an offense that subjects the defendant to genetic testing pursuant to section 16-11-102.4, C.R.S., the court shall assess to the defendant the cost of collecting and testing a biological substance sample from the defendant as required in section 16-11-102.4, C.R.S.

(2.2) When granting probation, the court may include as a condition of probation a requirement that the defendant participate in drug treatment. If the defendant's assessed treatment need is for residential treatment, the court may make residential drug treatment a condition of probation and may place the offender in a community corrections program that can provide the appropriate level of treatment subject to the provision of section 18-1.3-301 (4).

(2.3) (a) When granting probation, the court may, as a condition of probation, require any defendant who is less than eighteen years of age at the time of sentencing to attend school or an educational program or to work toward the attainment of a high school diploma or the successful completion of a high school equivalency examination, as that term is defined in section 22-33-102 (8.5), C.R.S.; except that the court shall not require any such juvenile to attend a school from which he or she has been expelled without the prior approval of that school's local board of education.

(b) Following specification of the terms and conditions of probation for a defendant who is less than eighteen years of age at the time of sentencing, where the conditions of probation include the requirement that the defendant attend school, the court shall notify the school district in which the defendant will be enrolled of such requirement.

(2.5) The order of priority for any payments required of a defendant pursuant to subparagraph (IV), (V), (VI), or (VI.5) of paragraph (a) of subsection (2) of this section shall be as follows:

- (a) Payment of a current child support order;
- (b) Payment of child support arrearage;
- (c) Payment of child support debt order;
- (d) Payment of spousal maintenance;
- (e) Payment of costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
- (f) Payment of surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
- (g) Payment of restitution;
- (h) Payment of a time payment fee;
- (i) Payment of late fees;
- (i.2) Payment of probation supervision fees;
- (i.4) Payment of a drug offender surcharge pursuant to article 19 of this title;
- (i.6) Payment of a sex offender surcharge pursuant to article 21 of this title;
- (i.7) Payment of a surcharge for a crime against an at-risk person pursuant to section 18-6.5-107;
- (i.8) Payment of collection and chemical testing of a biological substance to determine the genetic markers thereof;
- (i.9) Payment of a surcharge related to the address confidentiality program pursuant to section 24-30-2114, C.R.S.;
- (j) Payment of any other fines, fees, or surcharges; and
- (k) Repayment of all or part of any reward paid by a crime stopper organization that led to the defendant's arrest and conviction.

(3) When a defendant is granted probation, he or she shall be given a written statement explicitly setting forth the conditions on which he or she is being released.

(4) (a) For good cause shown and after notice to the defendant, the district attorney, and the probation officer, and after a hearing if the defendant or the district attorney requests it, the judge may reduce or increase the term of probation or alter the conditions or impose new conditions.

(b) (I) If an offender applies to transfer his or her probation to another state, the offender shall pay a filing fee of one hundred dollars, unless the offender is indigent.

(II) (A) The clerk of the court shall transmit all moneys collected pursuant to this paragraph (b) to the state treasurer, who shall credit the same to the interstate compact probation transfer cash fund, which fund is hereby created and referred to in this paragraph (b) as the "fund". Beginning January 1, 2013, the moneys in the fund are subject to annual appropriation by the general assembly to the judicial department for the direct and indirect costs associated with returning probationers to Colorado. The state treasurer may invest any moneys in the fund not expended for the purpose of this paragraph (b) as provided by law. The state treasurer shall credit all interest and income derived from the investment and deposit of moneys in the fund to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year remain in the fund and shall not be credited or transferred to the general fund or another fund.

(B) On or after January 1, 2013, a law enforcement agency may submit to the state court administrator a request to be reimbursed for the costs of returning a probationer pursuant to the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S., incurred on or after January 1, 2013. The state court administrator shall, to the extent that funds are available, reimburse reasonable costs incurred by a law enforcement agency for the return of the probationer.

Source: **L. 2002:** Entire article added with relocations, p. 1378, § 2, effective October 1. **L. 2003:** (2)(a)(V) amended, p. 2016, § 116, effective May 22; (2)(b)(III) amended, p. 1014, § 21, effective July 1. **L. 2006:** (2)(a)(XIV.5) added, p. 19, § 3, effective March 8; (1.5) added, p. 342, § 4, effective July 1; (2)(e) amended p. 1690, § 9, effective July 1, 2007. **L. 2007:** (2.5)(i.9) added, p. 1700, § 3, effective July 1. **L. 2008:** (2)(c)(III) and (2.5)(e) amended, p. 1889, § 52, effective August 5. **L. 2010:** (2)(a)(II) and (2)(c)(I) amended, (SB 10-175), ch. 188, p. 785, § 28, effective April 29; (2)(c)(IV) amended, (HB 10-1260), ch. 403, p. 1987, § 77, effective July 1. **L. 2011:** (2.5)(i.9) amended, (HB 11-1080), ch. 256, p. 1123, § 6, effective June 2; (2)(a)(III.5) added, (HB 11-1032), ch. 296, p. 1403, § 8, effective August 10; (2)(c)(IV) amended, (HB 11-1303), ch. 264, p. 1157, § 32, effective August 10. **L. 2012:** (2.3)(a) amended, (HB 12-1345), ch. 188, p. 748, § 37, effective May 19; (1.5) and (4) amended, (HB 12-1310), ch. 268, p. 1396, § 13, effective June 7; (2)(a)(VIII) amended, ch. 281, p. 1618, § 37, effective July 1; (2.5)(i.7) added, (HB 12-1226), ch. 279, p. 1489, § 3, effective August 15. **L. 2013:** (2)(a)(III.5) amended, (HB 13-1254), ch. 341, p. 1981, § 2, effective August 7; (2.2) added, (SB 13-250), ch. 333, p.

1925, § 33, effective October 1. **L. 2014:** (2.3)(a) amended, (SB 14-058), ch. 102, p. 379, § 5, effective April 7. **L. 2015:** (1) and (2)(a)(VIII) amended, (HB 15-1267), ch. 168, p. 515, § 1, effective May 8. **L. 2016:** (2.2) amended, (HB 16-1278), ch. 188, p. 664, § 1, effective May 20; (2)(a)(VIII) amended, (HB 16-1359), ch. 349, p. 1420, § 1, effective August 10. **L. 2017:** IP(2)(c), (2)(c)(I), and (2)(c)(IV) amended, (SB 17-242), ch. 263, p. 1254, § 13, effective May 25. **L. 2018:** (1)(b) and (2)(a)(VIII)(A) amended, (HB 18-1023), ch. 55, p. 586, § 12, effective October 1. **L. 2019:** (1)(b) and (2)(a)(VIII)(A) amended, (SB 19-224), ch. 315, p. 2937, § 16, effective January 1, 2020. **L. 2022:** (2)(c)(I) and (2)(c)(IV) amended, (HB 22-1278), ch. 222, p. 1496, § 25, effective July 1; (2)(a)(II) amended, (HB 22-1256), ch. 451, p. 3228, § 26, effective August 10. **L. 2023:** (1)(c) added and IP(2)(a)(VIII) amended, (SB 23-290), ch. 249, p. 1419, § 35, effective July 1. **L. 2024:** IP(2)(a), (2)(a)(V), and (2)(a)(IX) amended, (HB 24-1445), ch. 353, p. 2406, § 4, effective September 1.

Editor's note: (1) This section is similar to former § 16-11-204 as it existed prior to 2002.

(2) Subsection (1)(c) is similar to former § 12-170-109 (4) as it existed prior to 2023.

Cross references: (1) For the legislative declaration contained in the 2007 act adding subsection (2.5)(i.9), see section 4 of chapter 385, Session Laws of Colorado 2007. For the legislative declaration in the 2012 act amending subsection (2.3)(a), see section 21 of chapter 188, Session Laws of Colorado 2012. However, section 21 of chapter 188 was repealed by section 7 of chapter 323 (HB 15-1273), Session Laws of Colorado 2015.

(2) For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2016, see sections 21 and 46 of chapter 188, Session Laws of Colorado 2012. However, sections 21 and 46 of chapter 188 were repealed by sections 7 and 8 of chapter 323 (HB 15-1273), Session Laws of Colorado 2015.

(3) For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

Law reviews. For article, "The Problem of Compelling Fathers to Support their Dependent Children", see 27 Dicta 442 (1950). For article, "New Legislation Concerning the Mentally Disabled", see 11

Colo. Law. 2131 (1982). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "Criminal Procedure", which discusses a Tenth Circuit decision

dealing with extension of probation, see 62 Den. U.L. Rev. 187 (1985). For article, "When May a Probation Condition Allowing Use of Medical Marijuana Violate the Code of Judicial Conduct? Judicial Respect for the Law and Promoting Public Confidence in the Judiciary", see 89 Denv. U.L. Rev. 1017 (2012).

Annotator's note. Since § 18-1.3-204 is similar to § 16-11-204 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed §§ 39-16-6 and 39-16-7, C.R.S. 1963, and §§ 39-16-6 and 39-16-7, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

The purpose of probation is educational and reconstructive rather than primarily punitive or oppressive. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958); *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

The basic purpose of probation is to provide a program which offers an offender the opportunity to rehabilitate himself without confinement, under the tutelage of a probation officer and under the continuing power of the court to impose a sentence for the original offense. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

By its very nature and definition, probation means and signifies liberty under certain imposed conditions. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Probationary conditions serve the dual purpose of enhancing the reintegration of the

offender into a responsible life style and affording society a measure of protection against recidivism. *People v. Ressin*, 620 P.2d 717 (Colo. 1980).

Void for vagueness doctrine applies to conditions of probation. Court will apply the same constitutional standards to conditions of probation as to statutes. There was nothing vague in the requirement that defendant actively participate and successfully complete treatment to the satisfaction of the probation officer and treatment provider. *People v. Firth*, 205 P.3d 445 (Colo. App. 2008).

Surrounding circumstances of defendant's alien status may be relevant to a sentencing court's decision whether to grant or deny probation. Although consideration of defendant's status as a foreign national, in and of itself, is improper, the fact that defendant is in the United States illegally may, under certain circumstances, provide substantial and compelling reasons to depart from sentencing guidelines and deny probation. *People v. Hernandez-Clavel*, 186 P.3d 96 (Colo. App. 2008).

Trial courts have a wide discretion in imposing certain conditions upon a probationer. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Psychosexual evaluation may be required as a condition of probation. Defendant charged with attempted first degree sexual assault who pleads guilty to the lesser offense of third degree misdemeanor assault may be required to undergo a psychosexual evaluation as a

condition of probation. *People v. Fleming*, 3 P.2d 449 (Colo. App. 1999).

A court may impose a variety of monetary conditions in connection with granting probation, including a requirement to make a charitable contribution. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Probation supervision fee need not be refunded. Unlike fines and surcharges, which are primarily punitive in nature, probation supervision fees are part of the rehabilitative process, from which a defendant benefits. *People v. Noel*, 134 P. 3d 484 (Colo. App. 2005).

The trial court's power to revoke an individual's probation for failure to pay restitution does not extend beyond the expiration of the probation term imposed. The restitution statute cannot be read as automatically extending a probation term for collection of restitution checks. *People v. Gore*, 774 P.2d 877 (Colo. 1989).

Clear purpose of subsection (3) is to provide criminal defendant with notice of terms of his probation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

But failure to comply with subsection (3) did not require reversal of revocation in and of itself. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

Parole revocation order must be reversed because defendant did not receive written or actual notice of the condition of probation that he was alleged

to have violated. *People v. Calderon*, 2014 COA 144, 356 P.3d 993.

Noncompliance with subsection (4), by failing to provide defendant notice of changes in probation conditions, is improper. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

The provisions of subsection (4)(a) do not give the court the discretion to terminate a sex offender's indeterminate probation prior to the offender's completion of the statutory minimum period of probation. *People v. Dinkel*, 2013 COA 19, 321 P.3d 569.

Subsection (4)(a) is not applicable to the resentencing of an offender terminated from community corrections. A resentencing on a termination from community corrections is analogous to resentencing on a probation revocation. *People v. Reyes*, 2016 COA 98, 409 P.3d 501.

The terms of probation must be derived from this section, as probation is purely a statutory creation. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

The program of probation should envisage only such terms and conditions as are clearly and specifically spelled out in the statutes, and such other conditions as fit the probationer by education and rehabilitation to take his place in society. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958); *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

If an applicant is worthy, his release on probation should not be weighted with terms and conditions having nothing to do with the

purpose and policy of probation laws. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Condition of making charitable contribution was reasonably related to defendant's rehabilitation and to general purposes of probation. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Conditions of probation may impinge on defendant's constitutional right to freedom of association when those conditions bear a reasonable relationship to the goals of probation. Trial court was within its discretion in imposing conditions that prohibited defendant, convicted of second degree assault on a client by a psychotherapist, not only from continuing to practice as a psychotherapist, but also from engaging in any type of counseling of at-risk persons or contacting former psychotherapy clients. *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

Condition of probation imposed by probation officer that limited defendant's discussion in therapy, when defendant was not a therapist or a psychologist licensed to ascertain the appropriate subject matter for sex offender treatment, was not reasonably related to defendant's rehabilitation. *People v. Harmon*, 3 P.3d 480 (Colo. App. 2000).

The absence of an authorizing law or condition of probation does not necessarily render unconstitutional a warrantless search of a probationer's residence if based on a reasonable suspicion. The totality of all other relevant circumstances may render such a search reasonable. The defendant's status as a

probationer on intensive supervised probation greatly reduced his reasonable expectation of privacy in his residence, and, combined with the other circumstances of the situation, justified the search by his probation officer. *People v. Samuels*, 228 P.3d 229 (Colo. App. 2009).

Defendant presumed to know that violation may result in revocation. Probation is a privilege, and a criminal defendant is presumed to know that the violation of any term of his probation may result in revocation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

A court may require a defendant to make restitution or reparation to the victim of his transgression, and to pay court costs and expenses of supervision by the probation office. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Defendant must have ability to pay restitution. The reason for requiring that ability to pay restitution be established before probation can be revoked is to allow revocation only where the probationer unreasonably or willfully fails to comply with the terms of his probation, because before revocation of probation for failure to make ordered restitution payments can be effected, the trial court must find that the defendant had the ability to pay at the time the payments should have been made. *Strickland v. People*, 197 Colo. 488, 594 P.2d 578 (1979).

Before revoking probation the court must make a finding of present ability to pay under subsection (2)(e). *People v.*

Romero, 192 Colo. 106, 559 P.2d 1101 (1976); Strickland v. People, 197 Colo. 488, 594 P.2d 578 (1979).

It is required that one have the present ability to pay which contemplates that: (1) A job for which the probationer is qualified is available; (2) the job would produce an income adequate to meet his obligations; and (3) the probationer unjustifiably refuses to take it. People v. Romero, 192 Colo. 106, 559 P.2d 1101 (1976); Strickland v. People, 197 Colo. 488, 594 P.2d 578 (1979).

Absent such finding, probation to be reinstated. If the court finds that the defendant did not have the ability to pay at the time of the revocation hearing, it shall reinstate defendant's probation. People v. Romero, 196 Colo. 102, 559 P.2d 1101 (1976).

Court may require defendant to make child support payments. People v. Silcott, 177 Colo. 451, 494 P.2d 835 (1972).

But may not require posting of appearance bond. Nothing in the statutory law on probation expressly or implicitly clothes a trial court with the discretionary power to require the posting of an appearance bond as a condition of probation. Whether a prisoner is worthy of probation should not hinge on his ability to furnish a bond. To permit a court to require such a bond as a condition of probation would enlarge the punitive powers of a court beyond that contemplated by the laws of this state. Logan v. People ex rel. Alamosa County, 138 Colo. 304, 332 P.2d 897 (1958).

When a probationer defends against an alleged violation of a nonpayment condition of probation based on a lack of financial means, the trial court cannot revoke probation and impose imprisonment without first determining whether the probationer failed to comply with probation willfully or failed to make sufficient bona fide efforts to acquire resources to comply with probation. Sharrow v. People, 2019 CO 25, 438 P.3d 730.

Probation cannot be contingent upon partial service of sentence in penitentiary. Since this section does not include a provision for service of a portion of a sentence in the state penitentiary as a condition of probation, a court is not free to impose as a condition of probation any period of incarceration in the state penitentiary nor may any period of incarceration in a county jail exceed the prescribed time limits. People ex rel. Gallagher v. District Court, 197 Colo. 481, 593 P.2d 1372 (1979).

The court may not change the conditions of probation, including the payment of restitution, without notice and an opportunity for a hearing. People v. Stephenson, 12 P.3d 266 (Colo. App. 1999).

Court cannot order as a condition of probation that a qualified retirement plan be liquidated to pay restitution. People v. Stephenson, 12 P.3d 266 (Colo. App. 1999).

To read this section harmoniously with § 16-11-206, the proper standard of proof is a preponderance of the evidence when it is alleged that a condition of probation has been breached, even though the breaching

conduct also may have constituted a criminal offense. *People v. Moses*, 64 P.3d 904 (Colo. App. 2002).

The costs of probation supervision assessed against the defendant should be for the period actually served before revocation, and not based on the probationary period originally imposed. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Where supervisory period extended by defendant's request. Although this section requires notice, a hearing, and a showing of good cause before a supervisory period is increased, the provisions of this section in this respect are not applicable when an extension of the period of supervision is granted at the defendant's own request. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978).

When a defendant agrees to an extension of probation, the defendant does not have a due process right to be advised of or receive the right to counsel before signing the extension. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

When a defendant agrees to an extension of probation, the defendant does not have a sixth amendment right to be advised of or receive the right to counsel before signing the extension. A motion to extend probation is not a critical stage of the proceeding requiring the right to counsel because the defendant is not faced with a consequential significant deprivation of liberty and is not entitled to a hearing in the absence of such a request. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

When a defendant agrees to an extension of probation, the statutory provisions concerning notice, a hearing, and a showing of good cause are not applicable. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

Where defendant consents to an extension of the period of probation, there is no requirement for a hearing or other proceeding designed to assure that defendant is making a knowing and voluntary decision. The due process protections afforded in a probation revocation hearing do not apply to an extension of probation. *People v. Conner*, 148 P.3d 235 (Colo. App. 2006).

Trial court did not lose jurisdiction over defendant's case when it did not enter the order extending defendant's probation until one day after defendant's probation term had ended. The procedures to extend defendant's probationary period were initiated before defendant's probationary term ended, which included the filing of a motion with the court that satisfied the requirements of subsection (4) while defendant was still on probation. *People v. Romero*, 198 P.3d 1209 (Colo. App. 2007).

No presentence confinement credit for time spent in halfway house. Where residency in a community corrections facility is imposed as a condition of probation, it does not involve confinement as contemplated by § 16-11-306; thus no presentence confinement credit may be given for time spent at a community corrections halfway house. *People v. Radar*, 652 P.2d 1085 (Colo. App. 1982).

Condition that probationer not impose his religious beliefs on other people while performing public service during probationary period is neither necessary to ensure that the defendant lead a law-abiding life, nor does it enhance the probationer's rehabilitation. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

The trial court has broad discretion in setting the terms and conditions of restitution orders, and it did not abuse its discretion in ordering that restitution include the amount paid by the victim in reward money. The court found that payment of the reward was reasonable under the circumstances and would not have occurred but for the defendant's actions. The fact that the victim had no legal obligation to offer a reward and may not have been contractually bound to pay the award was immaterial. *People v. Dillingham*, 881 P.2d 440 (Colo. App. 1994).

To determine whether a specific geographic restriction is reasonably related to the statutory purposes of probation, the following factors should be considered: (1) Whether the restriction is reasonably related to the underlying offense; (2) whether the restriction is punitive to the point of being unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides in the area and is forced to relocate or is employed or anticipates employment in the area; (4) whether the defendant may petition the court to lift the restriction temporarily when necessary; and (5) whether less

restrictive means are available. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997).

These factors are not exhaustive but are helpful tools which, at a minimum, should form a basis to guide trial courts in imposing a geographic restriction as a condition of probation. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997).

Factors applied and a nexus found to exist between the underlying offense and the probation condition imposed. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997); *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

At least in situations where the need for familial association restrictions is not self-evident, probation conditions that infringe on a defendant's fundamental constitutional rights must be supported by a specific finding that (1) compelling circumstances require their imposition and (2) less restrictive means are not available. *People v. Cooley*, 2020 COA 101, 469 P.3d 1219.

"Compelling circumstances" requirement under *People v. Cooley*, 2020 COA 101, 469 P.3d 1219, does not imply a right to live with family members without regard to the nature of the relationship. *People v. Salah*, 2022 COA 134M-2, 525 P.3d 298, aff'd, 2024 CO 54, 550 P.3d 698.

Whether a probation condition implicates a probationer's constitutional right to familial association with an extended relative depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship

with the family member. The probationer bears the burden of demonstrating the nature of the relationship. *Salah v. People*, 2024 CO 54, 550 P.3d 698.

Where the defendant did not present any evidence demonstrating the nature of his relationship with his nephew, his right to familial association was not implicated, and the trial court therefore did not err by prohibiting him from contacting or living with his nephew or by failing to make specific findings regarding the compelling circumstances justifying the imposition of these probation conditions. *Salah v. People*, 2024 CO 54, 550 P.3d 698.

The court's order restricting defendant's access to the internet and social media as a part of the defendant's sentence to sex offender intensive supervision probation was reasonably related to the defendant's rehabilitation and the purposes of probation. In determining whether the conditions are reasonably related to the defendant's rehabilitation and purposes of probation, the court must consider (1) whether the conditions are reasonably related to the underlying offense; (2) whether the conditions are punitive to the point of being unrelated to rehabilitation; (3) whether the conditions are unduly severe and restrictive; (4) whether the defendant may petition the court to lift the conditions temporarily when necessary; and (5) whether less restrictive means are available. Since the defendant's victim was a child, it was reasonable to limit access to the internet and social media since those mediums provide easy means to contact other children. The defendant has

the opportunity to earn access to those mediums during the probation sentence. *People v. Landis*, 2021 COA 92, 497 P.3d 39.

A district court may, as a condition of probation, prohibit a defendant from having unsupervised contact with his or her children. The court properly considered defendant's parenting history, the severity of her offense, and the necessity to assist her in leading a law-abiding life while affording society and her young children a measure of protection against recidivism. *People v. Forsythe*, 43 P.3d 652 (Colo. App. 2001).

Trial court had the authority under former §§ 16-11-204 (4) and 17-27-105 (1)(h) (now §§ 18-1.3-204 (4) and 18-1.3-301 (1)(h)) to modify defendant's community corrections sentence before it expired. The court retained this authority after defendant's release date passed because re-sentencing proceedings were initiated prior to that date. *People v. Knott*, 83 P.3d 1147 (Colo. App. 2003).

Not plain error to impose probation conditions that prohibit sex offender who victimized children from having sexual contact with adults without prior approval and from possessing pornography. The probation conditions were not unconstitutionally overbroad or vague. *People v. Lientz*, 2012 COA 118, 317 P.3d 1215.

Possession or use of marijuana for medical purposes is an "offense" within the meaning of this section. For the purposes of subsection (1), "offense" includes violations of federal law, and

federal law makes it unlawful for any person to knowingly or intentionally possess marijuana. *People v. Watkins*, 2012 COA 15, 282 P.3d 500.

The plain language of subsection(2)(a) creates a presumption that a defendant may use medical marijuana while on probation unless an exception applies. In order for a sentencing court to enter an order prohibiting a defendant from using medical marijuana as part of a sentence, it must do so based on material evidence that prohibiting the defendant's otherwise-authorized medical marijuana use is necessary and appropriate to promote statutory sentencing goals. It is error for the court to require the defendant to present evidence as to why the

defendant should be allowed to use medical marijuana while on probation. *Walton v. People*, 2019 CO 95, 451 P.3d 1212.

A district court has no authority to collect the fee imposed pursuant to subsection (2)(a)(V) after the completion of a deferred sentence and dismissal of the underlying charges. *Pineda-Liberato v. People*, 2017 CO 95, 403 P.3d 160.

Trial court erred when it extended probation for good cause under subsection (4)(a) because defendant failed to pay the full amount of restitution. Otherwise, probation of an indigent defendant could be extended repeatedly and indefinitely simply because of the defendant's indigence. *People v. Martinez*, 2022 COA 142, 526 P.3d 231.

18-1.3-205. Restitution as a condition of probation.

As a condition of every sentence to probation, the court shall order that the defendant make full restitution pursuant to the provisions of part 6 of this article and article 18.5 of title 16, C.R.S. Such order shall require the defendant to make restitution within a period of time specified by the court. Such restitution shall be ordered by the court as a condition of probation.

Source: L. 2002: Entire article added with relocations, p. 1382, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-204.5 as it existed prior to 2002.

Cross references: For administrative proceedings to compensate victims of crime, see article 4.1 of title 24; for restitution as a condition of parole, see § 17-2-201 (5)(c); for restitution to victims of crime generally, see article 28 of title 17; for charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution or

deferred sentence, see § 16-7-404; for restitution by delinquent children under the "Colorado Children's Code", see § 19-2.5-1104.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-205 is similar to § 16-11-204.5 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

The legislative purpose underlying the statutory scheme is obvious from the statutory test: In all cases in which a convicted defendant's criminal conduct causes pecuniary damages to a victim, the sentencing court is obliged to order the defendant to pay restitution to the victim or the victim's immediate family and to fix the amount of such restitution as part of the judgment, whether the sentence be to probation or to a term of incarceration. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Restitution is intended to make the victim whole. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Replacement value should be the measure of restitution when the plaintiff demonstrates that they will have to replace an item that is not readily

available at fair market value. Where restitution is sought for "anticipated future expense" there is the possibility that the plaintiff will reap a windfall. Nonetheless, a victim who anticipates incurring future expenses is entitled to be placed in the same financial position he or she would have been in had the wrong not been committed. *People v. Stafford*, 93 P.3d 572 (Colo. App. 2004).

Restitution is not a substitute for a civil action to recover damages. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983).

Mere pendency of civil suit between criminal and victim does not vitiate trial court's duty to order restitution. *People v. Smith*, 754 P.2d 1168 (Colo. 1988).

A release from liability obtained in a civil settlement cannot limit a criminal court's authority to order restitution equivalent to actual pecuniary damages. A contrary conclusion would violate the plain language of this section and would frustrate the rehabilitative purposes of probation by permitting criminal defendants to avoid financial responsibility for their conduct. *People v. Maxich*, 971 P.2d 268 (Colo. App. 1998).

Application of 1985 amendment at 1994 restitution hearing not additional punishment within meaning of ex post facto

prohibition of state constitution. *People v. Stewart*, 926 P.2d 105 (Colo. App. 1996).

Restitution provisions of this section do not apply where defendant, who pleaded guilty to theft by receiving, was not sentenced to probation, but trial court could impose restitution under statutes requiring restitution as a condition of parole (§§ 16-11-104 (4) and 17-2-201 (5)(c)(I)). *People v. Schmidt*, 700 P.2d 925 (Colo. App. 1985).

The court's duty to fix the amount of restitution is not confined to sentences to probation but applies equally to sentences to imprisonment. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

The fact that the victim might have filed a civil claim for damages against the convicted offender, or intends to do so in the future does not dispense with the courts obligation to order the offender to pay restitution and to fix the amount of the restitution at the time of sentencing. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

"Victim" construed. The term "victim", as it appears in this section, refers to the party immediately and directly aggrieved by the criminal act, and not to others who suffer loss because of some relationship, contractual or otherwise, to the directly aggrieved party. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Jones*, 701 P.2d 868 (Colo. App. 1984) (all cases decided prior to 1985 amendment).

Towing company is a "victim" for purposes of restitution because it sustained a pecuniary loss as a result of defendant's

criminal conduct and is therefore a person aggrieved by the offender's conduct. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

A decedent's minor children are not "victims" within the meaning of the statute even though it is obvious that minor children suffer a loss at the death of a parent. *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Quinonez*, 701 P.2d 74 (Colo. App. 1984), *aff'd in part, rev'd in part on other grounds*, 735 P.2d 159 (Colo. 1987) (both cases decided prior to 1985 amendment).

Where the crime results in death, the "victim" for purposes of restitution is the decedent. The decedent's personal representative may properly be designated to receive, as restitution, such damages suffered by the victim as the trial court may order to be paid as a condition of probation. *People v. Catron*, 678 P.2d 1 (Colo. App. 1983) (decided prior to 1985 amendment).

The term "victim" refers to the person named in the charge of which defendant was convicted and not to persons named in charges which were dismissed. *People v. Canseco*, 689 P.2d 673 (Colo. App. 1984); *People v. Quinonez*, 701 P.2d 74 (Colo. App. 1984), *aff'd in part, rev'd in part on other grounds*, 735 P.2d 159 (Colo. 1987).

County department of human services is not a "victim" for purposes of restitution because an essential element of the underlying crime in the case requires wrongful conduct against a child pursuant to § 18-6-401 (1)(a) and (7)(b)(I). Accordingly, the court erred in imposing restitution to the county department, and any expenses the department incurred were incidental to its

duties. *People v. Padilla-Lopez*, 298 P.3d 967 (Colo. App. 2010), *aff'd*, 2012 CO 49, 279 P.3d 651.

An insurance carrier may be considered a victim pursuant to this section since it includes within the definition of "victim" parties "who have suffered losses because of a contractual relationship". *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

If a party sustains damages as a result of defendant's conduct, the damages are recoverable regardless of whether the party was named as a victim in the prosecution. *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

The defendant's son was a victim of the crime of contributing to the delinquency of a minor where the defendant was convicted of using her son to shoplift video games. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

The minor child is the victim of the crime of contributing to the delinquency of a minor. Therefore, he is entitled to restitution. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

Under the definition of "victim" in effect when the crime took place, an insurance company could not be reimbursed. Court order allocating restitution payments to insurance company under new definition of "victim" did not violate ex post facto clause. Under either version of the statute the court was authorized to order full restitution, therefore, there is no change in the quantum

of punishment. *People v. Woodward*, 11 P.3d 1090 (Colo. 2000).

This statute does not limit monetary conditions of probation only to restitution and a court may impose a variety of monetary conditions in connection with granting probation, including a requirement to make a charitable contribution. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

This section specifically provides for restitution to be made for the actual pecuniary damage incurred by the victim as the direct result of the defendant's conduct. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Restitution is part of the criminal sentence rather than merely a debt between the defendant and the victim. Trial courts are required to impose restitution in an amount equal to the actual pecuniary damages sustained by the victim, regardless of the defendant's ability to pay. *People v. Salas*, 42 P.3d 68 (Colo. App. 2001).

Section contemplates restitution for losses resulting only from criminal conduct by the defendant. *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

Because post-judgment interest on the restitution amount awarded has the statutory purpose to encourage speedy payment of the restitution order, which is different from the purpose of pre-judgment interest, a trial court must impose both pre-judgment interest and post-judgment interest in probationary restitution orders. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006).

The trial court is prohibited from ordering restitution for losses attributed to conduct that was not prosecuted because of the applicable statute of limitations. People v. Davalos, 30 P.3d 841 (Colo. App. 2001).

Restitution order should not include payment for future counseling for victim where nothing in the victim impact statement justified the need for future counseling. People v. Miller, 830 P.2d 1092 (Colo. App. 1991).

Absent evidence supporting the need for future counseling, the trial court erred in entering an order for undetermined future counseling expenses. People v. Estes, 923 P.2d 358 (Colo. App. 1996).

Payment of restitution is authorized only as to the victim of a defendant's conduct and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. People v. Miller, 830 P.2d 1092 (Colo. App. 1991).

Because this section authorizes payment of restitution in the amount of the actual pecuniary damages sustained by the victim, an order of restitution in the amount paid by the victim to repair the stolen vehicle was reasonable even though it exceeded the fair market value of the vehicle before it was stolen. People v. Courtney, 868 P.2d 1126 (Colo. App. 1993).

An order of restitution should be limited to the difference between the total amount of the victim's actual, pecuniary damages and any proceeds attributable to those damages received by the victim from

the settlement of the civil claim. People v. Acosta, 860 P.2d 1376 (Colo. App. 1993).

"Actual pecuniary damages" are not limited to out-of-pocket expenditures, but encompass other losses or injuries that can be reasonably calculated and recompensed in money. Thus, the value of employees' time spent in conducting inventories for missing goods and installing and using security devices was recompensable under this section, regardless of whether any funds in addition to regular salaries were expended by the victim company. People v. Duvall, 908 P.2d 1178 (Colo. App. 1995).

Restitution is not limited to the value of the damaged item. It may include repair costs, even if those costs exceed the damage object's value. People v. Smith, 181 P.3d 324 (Colo. App. 2007).

Defendant's financial ability to pay restitution is a defense to a charge of violating restitution requirement of deferred sentence. People v. Afentul, 773 P.2d 1081 (Colo. 1989). But see Williams v. People, 2019 CO 101, 454 P.3d 219.

If the victim has suffered a pecuniary loss, full restitution is to be ordered regardless of the defendant's ability to pay. Ordering restitution regardless of the defendant's ability to pay is not imposing an excessive fine, because restitution is not a fine. A fine is solely a monetary penalty where restitution is to make the victim whole. People v. Stafford, 93 P.3d 572 (Colo. App. 2004).

Interest on the unpaid balance of the restitution amount does not constitute

actual pecuniary loss caused by the defendant's conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Defendant has the right to an opportunity to ascertain the amount of the injury sustained as a result of his conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Where a defendant's conduct requires a victim to borrow funds to cover losses, both the principal and the interest constitute actual pecuniary damage and are properly includable in a restitution order. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Victim's loss of the use of money can be, under appropriate circumstances, pecuniary damage and interest may be awarded as compensation for that damage. *People v. Acosta*, 860 P.2d 1376 (Colo. App. 1993); *People v. Stewart*, 926 P.2d 105 (Colo. App. 1996).

Payments may be ordered to cover costs incurred by nonsurviving victims. Expenses relating to items such as medical care, funeral arrangements, and property damage caused by the defendant's criminal conduct may be the basis for an order of restitution to the estate or appropriate representatives of a decedent. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984); *People v. Quinonez*, 735 P.2d 159 (Colo. 1987).

Trial court properly included in restitution to be paid to insurer the costs incurred by the insurer in processing the case, including adjustment expenses,

investigation costs, and attorney fees. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Noneconomic damages may be included in restitution as long as the damages are actual pecuniary damages sustained by a party entitled to restitution. An insurance company may recover pain and suffering damages as a part of a restitution order. *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

Section does not prescribe a maximum restitution amount. Therefore, the rule set forth in *Apprendi* and *Blakely* concerning prescribed statutory maximum sentences does not apply to restitution orders in Colorado. Restitution is not limited by the jury's findings, but rather includes any pecuniary losses suffered by the victim as a proximate cause of the offender's conduct. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Awarding interest is compensation for actual, pecuniary damage suffered by the victim incidental to the defendant's crime of fraudulently obtaining funds because the victim loses the use of the money involved. Interest is awarded as restitution to compensate the victim for such loss of use, it is not intended to reimburse the victim for interest that otherwise would have been earned on the funds. *Valenzuela v. People*, 893 P.2d 97 (Colo. 1995).

Interest payable for fraudulently obtained food stamps accrues from the time the state reimburses the federal government for the fraudulently obtained food stamps. Interest should accrue only from the time of the actual injury and the

state suffer actual loss only when it reimburses the federal government. Valenzuela v. People, 893 P.2d 97 (Colo. 1995).

As part of restitution for fraudulently obtained AFDC funds, court properly included interest from the time of the theft. Valenzuela v. People, 893 P.2d 97 (Colo. 1995).

When viewed in its entirety, the statute requires pre-judgment interest as part of the restitution amount to compensate fully the victim, and it also requires post-judgment interest for as long as the victim has not been paid in full. Nothing in the post-judgment interest provision precludes imposing pre-judgment interest. Roberts v. People, 130 P.3d 1005 (Colo. 2006).

Trial court did not abuse its discretion in ordering that restitution include the amount paid by the victim in reward money. The court found that payment of the reward was reasonable under the circumstances and would not have occurred but for the defendant's actions. The fact that the victim had no legal obligation to offer a reward and may not have been contractually bound to pay the award was immaterial. People v. Dillingham, 881 P.2d 440 (Colo. App. 1994).

As part of restitution for fraudulently obtained food stamps in violation of § 26-2-128, the court properly included interest calculated in accordance with § 5-12-102. People v. Valenzuela, 874 P.2d 420 (Colo. App. 1994), *aff'd in part, rev'd in part* on other grounds, 893 P.2d 97 (Colo. 1995).

A governmental entity may qualify as a victim to whom restitution is payable. People v. Cera, 673 P.2d 807 (Colo. App. 1983); People v. Witt, 15 P.3d 1109 (Colo. App. 2000).

Costs incurred by the county department of social services in investigating fraudulently obtained food stamps constituted out-of-pocket losses resulting from that conduct and were properly includable in restitution. People v. Witt, 15 P.3d 1109 (Colo. App. 2000).

Fact that victim's loss was partially covered by insurance was irrelevant to a determination of the defendant's restitution obligation imposed as a condition of parole. People v. Jewett, 693 P.2d 381 (Colo. App. 1984).

Trial court erred in ordering defendant mother to pay restitution for her son's future counseling sessions where mother was found guilty of contributing to the delinquency of her minor son but there was no testimony in the record at sentencing about the need for future counseling sessions. People v. Miller, 830 P.2d 1092 (Colo. App. 1991).

Terms and conditions of probation are statutory. Cumhuriyet v. People, 200 Colo. 466, 615 P.2d 724 (1980); People v. Deadmond, 683 P.2d 763 (Colo. 1984).

This section mandates that the court provide that the defendant make restitution as a condition of every sentence to probation, therefore insurer's contractual waiver of its right to recover pursuant to the insurance policy had no effect on insurer's

statutory right to criminal restitution. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Victim's injury must result from defendant's conduct. This section requires that the injury of the victim be sustained as a result of the conduct of the defendant. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

Restitution, which is intended to make the victim whole, means that a defendant should not be forced to repay a victim when there has been no indication that the damage or injury sustained by the victim was inflicted by the defendant. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

Defendant can be subject to criminal liability only for the loss that was the result of his criminal conduct. *People v. Brigner*, 978 P.2d 163 (Colo. App. 1999).

And more than speculation is required for defendant to bear responsibility for the injury the victim sustained. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

The people bear the burden of proving that the restitution sought is attributable to the defendant's conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Sentencing court not barred by collateral estoppel and double jeopardy principles from considering acquitted conduct in determining an award of restitution. *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006). But see *Cowen v. People*, 2018 CO 96, 431 P.3d 215 (disapproving restitution for acquitted charges).

Preponderance of the evidence is the proper burden of persuasion to establish restitution in criminal cases. *People v. Carpenter*, 885 P.2d 334 (Colo. App. 1994).

Burden of proof for establishing amount of restitution owed is a preponderance of the evidence. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

The standard of review on an appeal challenging the sufficiency of the evidence of a district court's restitution conclusion is to review de novo whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, establishes by a preponderance of the evidence that the defendant caused that amount of loss. But this standard might not apply in every appeal where the proper amount of restitution is at issue. *People v. Barbre*, 2018 COA 123, 429 P.3d 95.

Victim need not be specifically named as party in criminal indictment or information. If there is sufficient evidence in the record to determine that an individual is directly and immediately aggrieved by the defendant's conduct, then restitution shall be paid to that individual. *People v. Jones*, 701 P.2d 868 (Colo. App. 1984).

Where defendant agrees to pay restitution to "victims" named in dismissed counts but not named in counts to which the defendant pleads guilty as part of a plea bargain, a restitution order issued as a condition of sentence is valid. However, a defendant who did not agree to pay restitution to victims of counts other than those to which he pled guilty until after

his plea has been taken could not be ordered to pay restitution to unnamed victims. *People v. Quinonez*, 735 P.2d 159 (Colo. 1987).

Payments not dischargeable in bankruptcy. The purpose evidenced by the statutory language in this section is rehabilitative. The general assembly did not intend restitution to be a method of debt collection and did not intend to create a debtor-creditor relationship between the victim and the defendant or the state and the defendant. Therefore, restitution payments ordered by the court cannot be discharged under a federal Chapter 13 plan. *In re Johnson*, 32 B.R. 614 (Bankr. D. Colo. 1983).

The fact that a debtor will remain obligated to make restitution payments does not make his bankruptcy plan nonconfirmable under 11 U.S.C. § 1325, provided that all the statutory requirements, especially good faith and feasibility, are satisfied. *In re Johnson*, 32 B.R. 614 (Bankr. D. Colo. 1983).

Restitution is appropriately imposed following a conviction for selling securities without a license, and is not precluded by the discharge in bankruptcy of defendant's liability on any civil claim arising out of the discharged debt. *People v. Milne*, 690 P.2d 829 (Colo. 1984), overruled on other grounds in *Thompson v. People*, 2020 CO 72, 471 P.3d 1045.

Failure of trial court to make express findings regarding the defendant's ability to pay restitution is not reversible error where defendant's own testimony during trial and

the presentence report showed the defendant was in a sufficient financial position to meet the restitution obligation imposed. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

In ordering a defendant to pay restitution to the state for fraudulently obtained food stamps, it was error for a court to consider only the victim's pecuniary loss and not the defendant's ability to pay. *People v. Valenzuela*, 874 P.2d 420 (Colo. App. 1994), *aff'd in part, rev'd in part on other grounds*, 893 P.2d 97 (Colo. 1995).

When the record was unclear as to whether the defendant had or had not been ordered to pay restitution as a condition of his probation, the defendant's refusal to acknowledge such a non-specific condition did not provide sufficient grounds for the revocation of his probation. *People v. Dirgo*, 773 P.2d 621 (Colo. App. 1989).

When, at the time of the revocation hearing, there was no order directing defendant to make any installment payments of restitution in any specific amount, other than for the first six months and the evidence was undisputed that defendant complied with that order, a revocation order based upon defendant's failure to comply with the court's order to pay restitution cannot be affirmed. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

In setting amount of restitution, trial court should consider the factors set out in subsection (1) but need not make express findings with respect to such factors. *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987).

Defendant was appropriately ordered to pay restitution for thefts that were not specifically included in her guilty plea. People v. Borquez, 814 P.2d 382 (Colo. 1991).

A codefendant is jointly responsible for restitution when he is also a complicitor in the crime. People v. Fichtner, 869 P.2d 539 (Colo. 1994).

Codefendants were participants and complicitors in the same criminal acts, therefore, each is responsible for the damage he caused and also for the damage caused by the other. People v. Fichtner, 869 P.2d 539 (Colo. 1994).

Subsection (2) provides no right to offender to present evidence of ability to pay restitution during revocation hearing

when hearing is based on other grounds. People v. McCarty, 851 P.2d 181 (Colo. App. 1992), *aff'd*, 874 P.2d 394 (Colo. 1994).

Defendant's act of stealing a vehicle was the proximate cause of the towing company's losses because, without it, such losses would not have been sustained. While the police department's failure to impound the vehicle on its own lot and the vehicle owner's failure to retrieve the vehicle earlier may have contributed to the towing company's losses, there is no evidence that these events were not reasonably foreseeable. People v. Clay, 74 P.3d 473 (Colo. App. 2003).

Applied in Cross v. District Court, 643 P.2d 39 (Colo. 1982); People v. Cheek, 734 P.2d 654 (Colo. App. 1987).

18-1.3-206. Repayment of crime stopper reward as a condition of probation.

(1) As a condition of every sentence to probation where information received through a crime stopper organization led to the arrest and felony conviction of a defendant, the court may require such defendant, as a condition of probation, to repay all or part of any reward paid by such organization. The amount of such repayment shall not exceed the actual reward paid by any crime stopper organization and shall be used solely for paying rewards. The court shall fix the manner and time of repayment.

(2) In the event the defendant fails to repay the crime stopper reward in accordance with an order of the court, the defendant shall be returned to the sentencing court and the court, upon proof of failure to pay, may:

- (a) Modify the amount of the repayment;
- (b) Extend the period of probation;
- (c) Order the defendant committed to jail with work release privileges; or
- (d) Revoke probation and impose the sentence otherwise required by law.

(3) When, as a result of a plea bargain agreement, a defendant is ordered to repay a reward pursuant to subsection (1) of this section, the department or agency supervising the collection of such repayment may assess a charge of fifteen dollars to the defendant for collection of each bad check or each bad check received as a repayment.

(4) Any order for the repayment of all or part of a crime stopper reward as a condition of probation shall be prioritized in accordance with section 18-1.3-204 (2.5).

(5) As used in this section, unless the context otherwise requires:

(a) "Bad check" has the same meaning provided in section 16-7-404.

(b) "Crime stopper organization" has the same meaning provided in section 16-15.7-102 (1), C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1382, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-204.6 as it existed prior to 2002.

18-1.3-207. Work and education release programs.

(1) As a specific condition of probation for a person convicted of a felony or misdemeanor, the court may require the probationer to participate for a period not to exceed two years or the term to which he or she might be sentenced for the offense committed, whichever is less, in a supervised work release or education release program. Utilization of the county jail, a municipal jail, or any other facility may be used for the probationer's full-time confinement, care, and maintenance, except for the time he or she is released for scheduled work or education.

(1.1) Before a final ruling by the court authorizing a probationer to participate in a supervised education release program, the court shall notify the prosecuting attorney and the postsecondary educational institution requesting their comments on the pending release. The notice shall include all relevant information pertaining to the probationer and to the nature of the crime for which he or she was convicted. Both the prosecuting attorney and the postsecondary educational institution shall reply to the court in writing within fourteen days after receipt of the notification or within such other reasonable time in excess of fourteen days as specified by the court. The postsecondary educational institution's reply shall include a statement of whether or not it will accept the probationer as a student. Acceptance by a state postsecondary educational institution shall be pursuant to section 23-5-106, C.R.S.

(2) All employment income of a probationer participating in a work release program shall be received and deposited by the probation officer in the registry of the court. The court shall order disbursement of the funds so deposited in payment of the following items which are listed in the order of their priority:

- (a) Any current child support order;
- (b) Any child support arrearage;
- (c) Any child support debt order;
- (d) Any spousal maintenance;
- (e) Costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
- (f) Surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
- (g) Restitution;
- (h) A time payment fee;
- (i) Late fees;
- (j) Any other fines, fees, or surcharges;
- (k) Room, board, and work supervision inside and outside the county jail or other facility;
and
- (l) The probationer.

(3) Any acts by the probationer in violation of the conditions of probation under subsection (1) of this section may be asserted as a basis for revocation of probation as provided in sections 16-11-205 and 16-11-206, C.R.S., and any willful failure to return to the jail or other facility may be punishable as an escape under section 18-8-208.

Source: L. 2002: Entire article added with relocations, p. 1383, § 2, effective October 1. **L. 2008:** (2)(e) amended, p. 1889, § 53, effective August 5. **L. 2012:** (1.1) amended, (SB 12-175), ch. 208, p. 865, § 108, effective July 1.

Editor's note: This section is similar to former § 16-11-212 as it existed prior to 2002.

ANNOTATION

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Annotator's note. Since § 18-1.3-207 is similar to § 16-11-212 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Illegal sentences. The combination of a sentence for a definite period with a work-release program which is only permitted as a condition of probation results in an illegal sentence. *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Probation cannot be contingent upon partial service of sentence in penitentiary. This section does not include a provision for service of a portion of a sentence in the state penitentiary as a condition of probation. A court, therefore, is not free to impose as a condition of probation any period of incarceration in the state penitentiary nor may any period of incarceration in a county jail exceed the prescribed time limits. *People ex rel. Gallagher v. District Court*, 197 Colo. 481, 593 P.2d 1372 (1979).

Where trial court commits a probationer to a county or municipal jail

as a facility utilized in conjunction with a work release program, upon revocation of probation, the probationer is entitled to presentence confinement credit for the actual time confined to the county or municipal jail. *People v. Lee*, 678 P.2d 1030 (Colo. App. 1983).

No equal protection violation. This section and § 16-11-202, relating to probation establish general statutory probation dispositions for all defendants eligible for probation and do not create classifications resulting in disparate treatment. *People v. Garberding*, 787 P.2d 154 (Colo. 1990).

Imposition of a two-year jail term as part of a work release program is not contingent upon an offender having compensated employment or being enrolled in educational courses at the time of sentencing. *People v. Simpson*, 969 P.2d 751 (Colo. App. 1998).

Applied in *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

18-1.3-208. Intensive supervision probation programs - legislative declaration.

(1) The general assembly finds and declares that intensive supervision probation programs are an effective and desirable alternative to sentences to imprisonment, community corrections, or jail. It is the purpose of this section to encourage the judicial department to establish programs for the intensive supervision of selected probationers. It is the intent of the general assembly that such programs be formulated so that they protect the safety and welfare of the public in the community where the programs are operating and throughout the state of Colorado.

(2) The judicial department may establish an intensive supervision probation program in any judicial district or combination of judicial districts in order to provide supervision tailored to the specific characteristics that produce a risk classification requiring intensive services for the

offender and to facilitate the offender's participation in rehabilitative programs intended to address those characteristics. When establishing such programs, the judicial department shall seek the counsel of the chief judge of the district court, the office of the district attorney, the state public defender or his or her designee, the county sheriff, the chief probation officer in the judicial district, the department of corrections, the local community corrections board, and members of the public at-large.

(3) The judicial department shall require that offenders in the program receive the highest level of supervision that is provided to probationers.

(4) When the court sentences any offender to probation, the probation department shall complete an initial assessment of the offender's risk and needs, using valid assessment tools approved by the state court administrator's office. Offenders who are determined through assessment to be high risk and who meet the acceptance criteria may be placed in an intensive supervision probation program by probation. Furthermore, intensive supervision probation may be used for an offender who has been under the supervision of probation for a period of time and a reassessment indicates the offender's risk of reoffense has increased to high and the offender meets the acceptance criteria of the intensive program. For purposes of this section, "offender" shall have the same meaning as that set forth in section 17-27-102 (6), C.R.S.

(5) The judicial department shall have the power to establish and enforce standards and criteria for the administration of intensive supervision probation programs.

(6) (a) It is the intent of the general assembly in enacting this subsection (6) to recognize that high-risk offenders can be managed in the community with the appropriate supervision and the use of evidence-based treatment programs and practices.

(b) The judicial department is directed to create and implement intensive supervision probation programs based on the current evidence for reducing recidivism by October 1, 2013. Intensive supervision probation programs must require the use of validated assessments to determine the offender's risk of reoffending. The judicial department shall develop acceptance criteria for placement in all intensive supervision probation programs. The judicial department shall develop criteria for offenders to transition from intensive supervision probation programs to regular probation, based on assessment of risk and need and program compliance. An offender may not be placed in or transferred out of an intensive supervision probation program without meeting established criteria.

Source: L. 2002: Entire article added with relocations, p. 1384, § 2, effective October 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1925, § 35, effective October 1.

Editor's note: This section is similar to former § 16-11-213 as it existed prior to 2002.

18-1.3-209. Substance abuse assessment required.

(1) Each person convicted of a felony committed on or after July 1, 1992, and each person convicted of a misdemeanor or petty offense on or after July 1, 2008, who is to be considered for probation or a deferred judgment and sentence that includes supervision by the probation department, shall be required to submit to an assessment for the use of controlled substances or alcohol developed pursuant to section 16-11.5-102 (1)(a), C.R.S., as part of the presentence or probation investigation required pursuant to section 16-11-102, C.R.S., or, if the investigation is waived pursuant to section 16-11-102 (4), C.R.S., and the person is sentenced to probation or supervised by a probation officer, then as a part of intake.

(2) The court shall order each person required to submit to an assessment pursuant to subsection (1) of this section to comply with the recommendations of the alcohol and drug assessment. If the person is sentenced to probation, a deferred judgment and sentence that includes supervision by the probation department, or any other sentence except a sentence only to jail, the person shall be ordered to comply with the recommendations as a condition or as part of the sentence imposed, at the person's own expense, unless the person is indigent.

(3) The assessment required by subsection (1) of this section shall be at the expense of the person assessed, unless the person is indigent.

Source: L. 2002: Entire article added with relocations, p. 1385, § 2, effective October 1. **L. 2008:** Entire section amended, p. 1714, § 1, effective July 1. **L. 2011:** (1) amended, (HB 11-1200), ch. 158, p. 544, § 1, effective August 10.

Editor's note: This section is similar to former § 16-11.5-103 as it existed prior to 2002.

18-1.3-210. Counseling or treatment for alcohol or drug abuse or substance use disorder.

(1) In any case in which treatment or counseling for alcohol or drug abuse or a substance use disorder is authorized in connection with a deferred prosecution, deferred judgment and sentence, or probation, the court may require the defendant to obtain counseling or treatment for the condition. If the court orders the counseling or treatment, the court shall order that the counseling or treatment is obtained from a treatment facility or person approved by the behavioral health administration in the department of human services, unless the court makes a

finding that counseling or treatment in another facility or with another person is warranted. If the defendant voluntarily submits the defendant's self for treatment or counseling, the district attorney and the court may consider the defendant's willingness to correct the defendant's condition as a basis for granting deferred prosecution or deferred judgment and sentence.

(2) Notwithstanding the provisions of subsection (1) of this section, in any case in which treatment or counseling for alcohol or drug abuse or a substance use disorder is authorized and ordered by the court in connection with a deferred prosecution, deferred judgment and sentence, or probation for an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), the court shall order that the counseling or treatment is obtained from a treatment facility or person approved by the behavioral health administration in the department of human services.

Source: **L. 2002:** Entire article added with relocations, p. 1385, § 2, effective October 1. **L. 2008:** Entire section amended, p. 1715, § 2, effective July 1. **L. 2010:** Entire section amended, (SB 10-175), ch. 188, p. 785, § 29, effective April 29. **L. 2017:** Entire section amended, (SB 17-242), ch. 263, p. 1305, § 139, effective May 25. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1496, § 26, effective July 1.

Editor's note: This section is similar to former § 16-7-402 as it existed prior to 2002.

Cross references: (1) For the duties of the office of behavioral health in the department of human services concerning alcohol and drug abuse or substance use disorders, see article 80 of title 27.

(2) For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-1.3-211. Sentencing of felons - parole of felons - treatment and testing based upon assessment required.

(1) Each person sentenced by the court for a felony committed on or after July 1, 1992, is required, as a part of any sentence to probation, community corrections, or incarceration with the department of corrections, to undergo periodic testing and treatment for substance abuse that is appropriate to the felon based upon the recommendations of the assessment made pursuant to section 18-1.3-209, or based upon any subsequent recommendations by the department of corrections, the judicial department, or the division of criminal justice in the department of public safety, whichever is appropriate. Any testing or treatment must be at a facility or with a person approved by the behavioral health administration in the department of human services and at the felon's own expense, unless the felon is indigent.

(2) Each person placed on parole by the state board of parole on or after July 1, 1992, is required, as a condition of parole, to undergo periodic testing and treatment for substance abuse that is appropriate to the parolee based upon the recommendations of the assessment made pursuant to section 18-1.3-209 or any assessment or subsequent reassessment made regarding the parolee during the parolee's incarceration or any period of parole. Any testing or treatment must be at a facility or with a person approved by the behavioral health administration in the department of human services and at the parolee's own expense, unless the parolee is indigent.

Source: **L. 2002:** Entire article added with relocations, p. 1385, § 2, effective October 1. **L. 2010:** Entire section amended, (SB 10-175), ch. 188, p. 786, § 30, effective April 29. **L. 2017:** Entire section amended, (SB 17-242), ch. 263, p. 1254, § 14, effective May 25. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1497, § 27, effective July 1.

Editor's note: This section is similar to former § 16-11.5-104 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

18-1.3-212. Drug testing of offenders by judicial department - pilot program.

The judicial department is hereby authorized and directed to develop as soon as possible a pilot program for the drug testing of persons during presentence investigation and on probation. Such program shall include testing of persons during presentence investigation and may include

random drug testing when an offender is assigned to specialized treatment and rehabilitation programs.

Source: L. 2002: Entire article added with relocations, p. 1386, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-102.5 as it existed prior to 2002.

18-1.3-213. Sentencing order - collateral relief - definitions. (Repealed)

Source: L. 2013: Entire section added, (SB 13-123), ch. 289, p. 1550, § 12, effective May 24. **L. 2017:** (4)(a) amended, (HB 17-1329), ch. 381, p. 1971, § 22, effective June 6. **L. 2018:** Entire section repealed, (HB 18-1344), ch. 259, p. 1590, § 2, effective July 1.

PART 3

COMMUNITY CORRECTIONS AND SPECIALIZED RESTITUTION AND COMMUNITY SERVICE PROGRAMS

18-1.3-301. Authority to place offenders in community corrections programs.

(1) (a) A judge of a district court may refer an offender convicted of a felony to a community corrections program unless the offender is required to be sentenced pursuant to section 18-1.3-406 (1) or a sentencing provision that requires a sentence to the department of corrections. If an offender who is sentenced pursuant to section 18-1.3-406 (1) has such sentence modified upon the finding of unusual and extenuating circumstances pursuant to such section, the offender may be referred to a community corrections program if the offender is otherwise eligible for such program and is approved for placement pursuant to section 17-27-103 (5) and section 17-27-104 (3). For the purposes of this article 1.3, persons sentenced pursuant to sections 19-2.5-1118 (2) and 19-2.5-1126 (1)(a)(I) and (1)(c)(I)(B) are deemed to be offenders.

(b) In making a direct sentence to a community corrections program, the sentencing court may impose a sentence to community corrections which includes terms, lengths, and conditions pursuant to section 18-1.3-401. The sentencing court may also refer any offender to a community corrections program as a condition of probation pursuant to section 18-1.3-202. Any placement of offenders referred as a direct sentence or as a condition of probation shall be subject to approval pursuant to section 17-27-103 (5), C.R.S., and section 17-27-104 (3), C.R.S.

(b.5) As a condition of every placement in a community corrections program, the court shall require the offender, as a condition of placement, to execute or subscribe a written prior waiver of extradition stating that the offender consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that the offender is arrested in another state upon an allegation that the offender has violated the terms of his or her community corrections placement, and acknowledging that the offender shall not be admitted to bail in any other state pending extradition to this state.

(c) A probation officer, in making a presentence report to the court pursuant to section 16-11-102, C.R.S., or in making a report to the court after a probation violation, may recommend the utilization of a community corrections program in sentencing or resentencing an offender.

(d) If an offender is rejected by a community corrections board or a community corrections program before placement in a program, the court shall promptly resentence the offender. If a sentence to the department of corrections was imposed upon the offender prior to the referral of the offender to community corrections, the resentence shall not exceed the sentence which was originally imposed upon the offender.

(e) If an offender is rejected after acceptance by a community corrections board or a community corrections program, the court may resentence the offender without any further hearing so long as the offender's sentence does not exceed the sentence which was originally imposed upon the offender.

(f) The probation department of the judicial district where the offender was sentenced to a community corrections program has jurisdiction over all offenders sentenced directly to a community corrections program, regardless of where the community corrections program is located. Such probation department shall initiate arrest warrants, process reports or other official documents regarding offenders at the direction of the court, coordinate with community corrections boards and community corrections programs, review offender supervision and treatment, authorize offender transfers between residential and nonresidential phases of placement, and carry out such other duties as the court directs.

(g) The sentencing court may make appropriate orders for the detention, transfer, or resentencing of any offender whose placement in a community corrections program is terminated pursuant to section 17-27-103 (7) or section 17-27-104 (5). As to any offender held pursuant to section 17-27-104 (6) in a jail operated by a unit of local government in a county other than where the offender's original conviction occurred, the sentencing court shall order the transfer of the offender to the jail of the county where the original conviction occurred as soon as possible. The sentencing court shall provide the offender with a new sentencing hearing, for any termination from a community corrections program, including a violation of section 18-8-208.2. At any new sentencing hearing, the court may consider any sentencing alternative originally available to the court when ordering the appropriate sentence.

(g.5) Notwithstanding any other provision of law to the contrary, if an offender is terminated or rejected from a community corrections program after having been sentenced to the program for a level 4 drug felony, the court shall conduct a resentencing hearing in order to comply with each exhaustion of remedy provision in section 18-1.3-104.5 or shall make written findings regarding resentencing after consideration of all the information provided to the court pursuant to section 18-1.3-104.5 (2)(c). Nothing in this section requires that a community corrections program accept or maintain an offender who has been terminated from a community corrections program.

(h) (I) The sentencing court shall have the authority to modify the sentence of an offender who has been directly sentenced to a community corrections program in the same manner as if the offender had been placed on probation.

(II) A defendant who successfully completes the residential phase of a community corrections sentence, has paid the costs of the residential program in full, and is being supervised on nonresidential status at either a minimum or administrative level is eligible for consideration for early termination of his or her community corrections sentence by the court.

(III) When the defendant has met the eligibility criteria enumerated in subparagraph (II) of this paragraph (h), the defendant's probation officer shall submit a petition for early termination of sentence to the court and notify the district attorney and the defendant.

(IV) Unless the victim has opted out of victim notifications from community corrections, the community corrections program agent for the community corrections program shall provide victim notifications regarding an offender's request for early termination of a direct sentence to community corrections, if the offender's crime falls under section 24-4.1-302 (1). The community corrections program agent for the community corrections program shall notify the probation department of the victim's position, and the probation department shall provide timely notification to the community corrections program of the hearing date, if a hearing is set. Regardless of whether a hearing is set, the probation department shall notify the community corrections program of the outcome of the offender's motion for early termination of a direct sentence to the community corrections program and the community corrections program agent shall notify the victim.

(V) In determining whether to grant or deny the petition, the court may consider the following factors:

- (A) The defendant's assessed risk of reoffense;
- (B) Victim input, if any;
- (C) The defendant's compliance with the terms and conditions of the sentence or community corrections program;

(D) Completion of any treatment required by the court or community corrections program; and

(E) Other factors deemed relevant by the court.

(VI) The fact that the defendant owes restitution, costs, fees, fines, or surcharges shall not prohibit the court from granting the motion for early termination if the court finds the motion otherwise appropriate.

(i) (I) An offender sentenced directly to a community corrections program by the sentencing court pursuant to this subsection (1) shall be eligible for time credit deductions from the offender's sentence not to exceed ten days for each month of placement upon a demonstration to the program administrator by the offender that the offender has made consistent progress in the following categories:

(A) Maintenance of employment, education, or training, including attendance, promptness, performance, cooperation, care of materials, and safety;

(B) Development and maintenance of positive social and domestic relations;

(C) Compliance with rules, regulations, and requirements of residential or nonresidential program placement;

(D) Completion and compliance with components of the individualized program plan; and

(E) Demonstration of financial responsibility and accountability.

(II) The administrator of each community corrections program shall develop objective standards for measuring progress in the categories listed in subparagraph (I) of this paragraph (i), shall apply such standards consistently to evaluations of all such offenders, and shall develop procedures for recommending the award of time credits to such offenders.

(III) The administrator of each community corrections program shall review the performance record of each offender directly sentenced to such program. Such review shall be conducted at intervals to be determined by each program administrator. Such reviews shall be conducted at least once every six months, but may be conducted at more frequent intervals as determined by the program administrator. If the program administrator determines that the offender engaged in criminal activity during the time period for which the time credits were granted, the program administrator may withdraw the time credits granted during such period. Prior to the time of the offender's release, the program administrator shall submit to the sentencing court the time credit deductions granted, withdrawn, or restored consistent with the provisions of this paragraph (i). Such time credit deductions shall be submitted on standardized forms prepared by the division of criminal justice of the department of public safety that include verification by the program administrator that the time credit deductions are true and accurate. The sentencing court shall certify such time credit deductions as part of the offender's permanent record. Any time credits

authorized under this paragraph (i) shall vest upon certification of time credit deductions by the sentencing court at the time of the offender's release from the program.

(IV) An offender shall not be credited with more than one-half the allowable time credits for any month or portion thereof unless the offender was employed, was unable to be employed due to a disability waiver, or was participating in training, education, or treatment programs which precluded the ability to remain employed. This subparagraph (IV) shall not apply to those offenders excused from such employment or training by the program administrator or for medical reasons.

(V) No time credit deductions shall be granted to any offender for time spent in jail, whether awaiting sentencing, placement in the program, disciplinary action, or as a result of a subsequent arrest, unless such time spent in jail was a prearranged component of the offender's individualized program plan and the offender has made consistent progress in the categories listed in subparagraph (I) of this paragraph (i).

(VI) (Deleted by amendment, L. 2011, (SB 11-254), ch. 274, p. 1236, § 1, effective June 2, 2011.)

(j) Except as otherwise provided in paragraph (k) of this subsection (1), any offender sentenced to the department of corrections subsequent to placement in a community corrections program is entitled to credit against the term of confinement as described in section 17-27-104 (9), C.R.S. The court shall make a finding of the amount of such time credits and include such finding in the mittimus that orders the offender to be placed in the custody of the department of corrections. The department of corrections shall apply credits for residential and nonresidential time completed in a community corrections program in the same manner as credits for time served in a department of corrections facility.

(k) Any offender who escapes from a residential community corrections program or who absconds from a nonresidential community corrections program shall forfeit any time credit deductions earned pursuant to paragraph (i) of this subsection (1) and shall not be credited with any time on escape or absconder status. Within thirty-five days after an offender's escape or abscondment, the program administrator shall submit to the sentencing court a statement on the form described in subparagraph (III) of paragraph (i) of this subsection (1) of the time credit deductions that would have been earned by the offender.

(2) (a) (I) **Initial referral.** The executive director of the department of corrections may transfer any offender who is eligible pursuant to this subsection (2) to a community corrections program if such offender is accepted for placement by a community corrections board pursuant to section 17-27-103, and a community corrections program pursuant to section 17-27-104.

(II) When the executive director makes a referral or subsequent referral request, the referral packet must include the following related to the offender:

- (A) A current risk and needs assessment that was administered in the last twelve months;
- (B) Projected release dates;
- (C) Prior supervision outcomes;
- (D) Institutional programming recommendations including participation and completion information;
- (E) A verified parole plan or community plan;
- (F) A victim statement, if applicable;
- (G) An offender statement, if submitted;
- (H) The parole board action sheet, if applicable;
- (I) A recommendation or the reason why placement is or is not recommended from the case manager for the community placement based on an individualized review that considers risk, institutional conduct, and responsivity factors;
- (J) The number of prior referrals;
- (K) A mental health assessment, if available;
- (L) A substance use disorder assessment, if available;
- (M) A sex offender assessment, if applicable; and
- (N) The specific referral being requested.

(b) Unless the offender has an active felony warrant or detainer, the executive director of the department of corrections shall refer an offender who has displayed acceptable institutional behavior for placement in a community corrections program according to the following timeline:

- (I) Repealed.
- (II) No more than sixteen months prior to the offender's parole eligibility date for any offender who is not serving a sentence for an offense referred to in section 18-1.3-406; and
- (III) No more than one hundred eighty days prior to the parole eligibility date for any other offender not described in subsection (2)(b)(II) of this section.

(c) (I) Prior to placement of an offender in any community corrections program, the executive director of the department of corrections shall give the first right to refuse placement of such offender to the community corrections board and community corrections programs in the community where the offender intends to reside after release from custody of the department of corrections or parole by the state board of parole; except that the first right to refuse does not apply if the executive director seeks to place the offender in a specialized community corrections

program or the offender requests a specific community corrections program placement, subject to acceptance by the community corrections board pursuant to section 17-27-103 and the community corrections program pursuant to section 17-27-104.

(II) An offender may refuse placement in a community corrections program after the offender has been accepted by a community corrections board pursuant to section 17-27-103 and a community corrections program pursuant to section 17-27-104.

(d) As to any offender held in a county jail pursuant to section 17-27-104 (6), the executive director of the department of corrections shall order transfer of such offender to a facility of the department of corrections as soon as possible.

(e) Subsequent referrals.

(I) For an offender who is serving a sentence for a class 1 or 2 felony that constitutes a crime of violence under section 18-1.3-406, excluding escape, and whose parole hearing has been deferred for at least thirty-six months, the executive director of the department of corrections shall not refer the offender for placement in community corrections earlier than six months prior to the date of the offender's second or any subsequent parole hearing.

(II) (A) When an offender is denied placement in a community corrections program, the executive director shall make a subsequent referral for that offender who is eligible pursuant to subsection (2)(e)(II)(B) of this section no sooner than six months after the denial and no later than twelve months after the denial unless the offender is subject to section 17-2-201 (4)(a).

(B) An offender is eligible for a subsequent referral if he or she has had no class I code of penal discipline violations in the last twelve months, the offender does not have a consecutive misdemeanor sentence to serve, the offender does not have an immigration and customs enforcement detainer, the offender does not have pending felony charges, or the offender does not have an extraditable warrant.

(III) When an offender refuses placement in a community corrections program, the executive director may make a subsequent referral for the offender, if eligible pursuant to subsection (2)(e)(II)(B) of this section, after the offender informs the executive director that the circumstance that formed the basis for the refusal has changed or resolved.

(f) Requirements for sex offenders.

(I) Notwithstanding any other provision of law to the contrary, the executive director of the department of corrections shall not transfer an offender sentenced pursuant to the "Colorado Sex Offender Lifetime Supervision Act of 1998", part 10 of this article 1.3, unless:

(A) The offender has successfully progressed in the treatment required by section 16-11.7-105, as determined by the department of corrections after consideration of the criteria developed pursuant to section 18-1.3-1009 (1)(b), and would not pose an undue threat to the community if

transferred to a community corrections program under appropriate treatment and monitoring requirements; and

(B) There is a strong and reasonable probability that the offender would not thereafter commit a new criminal offense.

(II) In making the determination pursuant to subsection (2)(f)(I) of this section, the executive director of the department of corrections shall consider the relevant criteria established pursuant to section 18-1.3-1009 and any other relevant factors.

(3) The state board of parole may refer any parolee for placement in a community corrections program. Such placement, if approved by the community corrections board pursuant to section 17-27-103, C.R.S., and the community corrections program pursuant to section 17-27-104, C.R.S., may be made a condition of release on parole or as a modification of the conditions of an offender's parole after release or upon temporary revocation of parole pursuant to section 17-2-103 (11), C.R.S.

(4) (a) District courts, county courts, and other local criminal justice officials may enter into agreements with community corrections programs which include the use of such programs to supervise offenders awaiting trial for felony or misdemeanor offenses, offenders convicted of misdemeanors, or offenders under deferred judgments, or to accept for residential placement persons convicted of misdemeanor offenses as an alternative sentence to a county jail sentence. Such agreements are subject to review and approval by the community corrections board of the jurisdiction in which any community corrections program making such agreement is located. Any such use of a community corrections program may be supported with funding from local governments, public or private grants, offender fees, and other sources other than the state general fund.

(b) A district court, county court, and any other criminal justice official may enter into agreements with community corrections programs that provide residential substance abuse treatment, for the placement and supervision of offenders as a term and condition of probation when assessed treatment need levels indicate that residential substance abuse treatment is necessary and appropriate. The agreement is subject to review and approval by the community corrections board in the jurisdiction where a community corrections program is located. A community corrections program used pursuant to this subsection (4)(b) may receive funds from the correctional treatment cash fund, as well as local funding, public or private grants, or offender fees.

Source: L. 2002: Entire article added with relocations, p. 1386, § 2, effective October 1. **L. 2003:** (1)(a) amended, p. 1429, § 14, effective April 29. **L. 2006:** (1)(b.5) added, p. 342, § 6, effective July 1. **L. 2011:** (1)(h), IP(1)(i)(I), (1)(i)(IV), (1)(i)(VI), (1)(j), and (1)(k) amended, (SB

11-254), ch. 274, pp. 1237, 1236, §§ 3, 1, effective June 2; (2)(b) amended and (2)(e) added, (HB 11-1085), ch. 48, p. 124, § 1, effective August 10. **L. 2012:** (1)(k) amended, (SB 12-175), ch. 208, p. 865, § 109, effective July 1. **L. 2013:** (1)(g.5) added and (4) amended, (SB 13-250), ch. 333, p. 1902, § 3, effective October 1. **L. 2016:** (4)(b) amended, (HB 16-1278), ch. 188, p. 664, § 2, effective May 20. **L. 2017:** (1)(g.5) amended, (SB 17-294), ch. 264, p. 1393, § 38, effective May 25. **L. 2018:** (2) amended, (HB 18-1251), ch. 272, p. 1670, § 3, effective August 8. **L. 2020:** (1)(g) amended, (HB 20-1019), ch. 9, p. 26, § 7, effective March 6; (2)(f) added, (SB 20-085), ch. 245, p. 1176, § 1, effective July 7. **L. 2021:** (1)(a) amended, (SB 21-059), ch. 136, p. 718, § 41, effective October 1; (4) amended, (SB 21-271), ch. 462, p. 3169, § 184, effective March 1, 2022. **L. 2022:** (1)(f) and (1)(h)(IV) amended, (SB 22-049), ch. 152, p. 976, § 7, effective May 6. **L. 2025:** IP(2)(b) and (2)(c) amended, (SB 25-209), ch. 111, p. 466, § 1, effective August 6.

Editor's note: This section is similar to former § 17-27-105 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Annotator's note. Since § 18-1.3-301 is similar to § 17-27-105 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Two prior felony convictions do not foreclose a court from sentencing a defendant to a community correctional program. People ex rel. VanMeveren v. District Court, 195 Colo. 34, 572 P.2d 483 (1977) (decided under repealed § 27-27-105).

Individual sentenced pursuant to § 42-2-206 (1) may be considered for

community correctional program. People v. Scott, 200 Colo. 365, 615 P.2d 680 (1980).

Where defendant is serving three concurrent sentences, one of which is for a violent crime, the defendant is not eligible for community corrections placement more than six months before his parole eligibility date. People v. Santisteven, 868 P.2d 415 (Colo. App. 1993).

The parole board, not a parole officer, has the authority to direct that an offender attend a community corrections program as a condition of parole. People v. Lanzieri, 996 P.2d 156 (Colo. App. 1999), rev'd on other grounds, 25 P.3d 1170 (Colo. 2001).

Sentence to community correctional facility is not the same as a sentence to probation. People v. Johnson, 42 Colo.

App. 350, 594 P.2d 601 (1979); *People v. Kastning*, 738 P.2d 807 (Colo. App. 1987).

"Original sentence" construed. Where court suspended the execution, but not the imposition, of a four-year term in the department of corrections on condition that defendant serve two years in a community corrections facility, the court was not thereafter precluded from resentencing defendant to four years in the department because the "original sentence" was four years, not two. *People v. Seals*, 899 P.2d 359 (Colo. App. 1995).

Court cannot increase original sentence. There is nothing in this article which authorizes the court to increase the length of the original sentence. *People v. Johnson*, 42 Colo. App. 350, 594 P.2d 601 (1979).

For this reason, a defendant is entitled to credit for time served in community corrections on direct sentence if he is later rejected. *People v. Washington*, 709 P.2d 100 (Colo. App. 1985).

Trial court is without jurisdiction to reimpose a sentence that extends beyond the length of the original sentence. *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986); *Downing v. People*, 895 P.2d 1046 (Colo. 1995).

The statutory maximum for a community corrections sentence for purposes of the *Blakely v. Washington*, 542 U.S. 296 (2004), rule is no different than the statutory maximum for a prison sentence. The firmly established rule from *Blakely* as applied to Colorado's sentencing

scheme in *Lopez v. People*, 113 P.3d 713 (Colo. 2005), also applies to a direct sentence to community corrections in Colorado. *People v. Sandoval*, 2016 COA 19, 488 P.3d 98, *aff'd*, 2018 CO 21, 413 P.3d 1274.

District court plainly erred in aggravating defendant's community corrections sentence based on facts that were neither *Blakely*-compliant nor *Blakely*-exempt. *People v. Sandoval*, 2016 COA 19, 488 P.3d 98, *aff'd*, 2018 CO 21, 413 P.3d 1274.

Where the defendant originally received a sentence to three years of probation, which was revoked, followed by a sentence to six years of community corrections, from which the defendant was rejected, the "original sentence" referred to in subsection (1)(e) means the sentence to community corrections. Since this section deals only with resentencing following the failure of community corrections placement, the sentence "originally imposed", referred to in subsection (1)(e), is the sentence to community corrections, not any prior sentence to probation. Because the defendant received a hearing and representation of counsel when he was resentenced to community corrections, he was not entitled to a further hearing or counsel when the community corrections sentence was revoked and he received a sentence to the department of corrections, which did not exceed the length of the sentence to community corrections. *People v. McPherson*, 53 P.3d 679 (Colo. App. 2001).

Effect of changing a sentence from concurrent to consecutive because of defendant's escape was not extending the sentence beyond the length originally ordered. Defendant who escaped from community corrections program while serving concurrent sentences, who subsequently completed one sentence but failed to clear the second arrest warrant, was subject to being sentenced to the department of corrections for the length of the original sentence. *People v. Taylor*, 7 P.3d 1030 (Colo. App. 2000).

Subsection (1)(k) does not apply to awards of presentence confinement credit. By the provision's express terms, only credits earned pursuant to subsection (1)(i) are forfeited. *People v. Jim*, 2017 COA 123, 424 P.3d 455.

When the court revokes an offender's sentence to community corrections, subsection (1)(e) read in conjunction with subsection (1)(h) authorizes the sentencing court to increase the offender's sentence, provided that the court holds a hearing. *Romero v. People*, 179 P.3d 984 (Colo. 2007).

Imposing a sentence increase under subsection (1)(e) does not violate the double jeopardy clauses of the United States and Colorado constitutions because defendant lacked a legitimate expectation of finality in the sentence. *Romero v. People*, 179 P.3d 984 (Colo. 2007).

Subsection (1)(e) does not condition a district court's authority to set a resentencing hearing on a request from one of the parties. There is no perceived legislative intent to

restrict the court's ability to set a resentencing hearing only if the prosecutor or defendant requests it. *People v. Reyes*, 2016 COA 98, 409 P.3d 501.

Because subsection (1)(h) authorizes the trial court, following defendant's termination from community corrections, to sentence him or her in the "same manner as if [he or she] had been placed on probation", the trial court, under such circumstances, is authorized to run a defendant's sentence consecutively to the sentence in the other case. *People v. Adams*, 128 P.3d 260 (Colo. App. 2005).

Term "offender's sentence" in subsection (1)(e) refers to the length of time the trial court sentences an offender to the department of corrections and does not include any period of mandatory parole that attaches to that sentence by operation of § 18-1-105 (1)(a)(V). *People v. Johnson*, 13 P.3d 309 (Colo. 2000).

The mandatory period of parole is not included in calculating the length of a defendant's term of imprisonment to which he is resented after termination from community corrections and, therefore, does not exceed the original sentence. *People v. Snare*, 7 P.3d 1025 (Colo. App. 1999).

Trial court did not violate this section when it imposed the six-year department of corrections sentence, even though that sentence requires an additional mandatory three-year period of parole. *People v. McGraw*, 30 P.3d 835 (Colo. App. 2001).

Trial court had the authority under former §§ 16-11-204 (4) and 17-27-105 (1)(h) (now §§ 18-1.3-204 (4) and 18-1.3-301 (1)(h)) to modify defendant's community corrections sentence before it expired. The court retained this authority after defendant's release date passed because re-sentencing proceedings were initiated prior to that date. *People v. Knott*, 83 P.3d 1147 (Colo. App. 2003).

Because defendant's post-release supervisory period was imposed at a sentence reduction hearing and not at original sentencing, such period is not counted as part of the original sentence for the purpose of resentencing a person pursuant to this section. *People v. Carroll*, 779 P.2d 1375 (Colo. App. 1989).

The reference to "time credits" in subsection (1)(j) is intended to include both "earned time" and "good time" credits. *People v. McCreadie*, 938 P.2d 528 (Colo. 1997).

Subsection (1)(j) requires the sentencing court to include the written summary prepared by the administrator of a community corrections program in the mittimus or attach it thereto. *People v. Lopez*, 961 P.2d 602 (Colo. App. 1998).

If an offender violates a rule or condition of community corrections placement while on nonresidential status, the offender is not entitled upon resentencing to credit for time served while on nonresidential status. *People v. Hoecher*, 822 P.2d 8 (Colo. 1991) (overruling *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986)); *People v. Galvin*, 835 P.2d 603 (Colo. App.

1992); *People v. Pimble*, 2015 COA 112, 369 P.3d 729.

The addition of the word "nonresidential" by the legislature to subsection (1)(j) was to ensure that offenders receive earned time and good time credits based on time spent in both residential and nonresidential programs. It was not an attempt by the legislature to mandate that nonresidential time be counted as presentence confinement credit. *People v. Pimble*, 2015 COA 112, 369 P.3d 729.

Time served on direct sentence to community corrections is the equivalent of time served in the custody of the department of corrections, therefore once the defendant is sentenced to a state correctional facility, all time served in residential community corrections must be credited to the defendant's sentence. *People v. Galvin*, 835 P.2d 603 (Colo. App. 1992).

Defendant has no statutory right to a mandatory resentencing hearing after termination from a direct placement at community corrections, as the legislative history supports the conclusion that general assembly intended to prevent duplication of the sentencing hearing. The legislative history also indicates that the term "evidentiary" was added to distinguish judicial hearing from any administrative hearings conducted by community corrections. *People v. Abdul*, 935 P.2d 4 (Colo. 1997) (decided under law in effect prior to the 1993 repeal and reenactment of this article).

Subsection (1)(d) does not require a court to hold a hearing when converting a

community corrections sentence to a department of corrections sentence. People v. Herrera, 2014 COA 20, 343 P.3d 1012.

Defendant's due process claim was without merit since subsection (1)(g) expressly states that the sentencing court is not required to provide the offender with an evidentiary hearing prior to resentencing and, therefore, there is no right or justifiable expectation created by state law. The defendant could have had no reasonable expectation that he would be transferred only for misbehavior because the statute very clearly gives the community correctional facility discretion to reject the defendant before or after acceptance for any reason. People v. Wilhite, 817 P.2d 1017 (Colo. 1991); People v. Abdul, 935 P.2d 4 (Colo. 1997) (decided under law in effect prior to the 1993 repeal and reenactment of this article).

Direct placement offender who was denied an evidentiary hearing was not treated differently from transitional offenders and thereby denied equal protection of the laws since subsection (1)(g) does not deny such a hearing but makes it discretionary rather than mandatory; and direct placement offenders and transitional offenders are not similarly situated for purposes of equal protection analysis. People v. Wilhite, 817 P.2d 1017 (Colo. 1991).

The denial of a resentencing hearing under subsection (1)(e) has been found to

be constitutional under Wilhite, and this section does not violate defendant's right to due process and specifically, his rights to confrontation and to assistance of counsel. People v. James, 940 P.2d 1092 (Colo. App. 1996).

Subsection (2) does not allow for a hearing or other determination as to whether an individual poses a flight risk notwithstanding the existence of a detainer. Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

The word "felony" does not modify the word "detainer" in the phrase "felony warrant or detainer" in subsection (2)(b); thus, an inmate with an active immigration and naturalization service detainer cannot be referred for placement in a community corrections program under subsection (2)(b). Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

Trial court did not err in summarily resentencing defendant to the custody of the department of corrections since, although the trial court retains its discretion to grant a hearing at the time of resentencing, and such may be the better practice in appropriate cases, the granting of a hearing is not constitutionally required. People v. James, 940 P.2d 1092 (Colo. App. 1996).

Applied in People v. Abila, 670 P.2d 432 (Colo. App. 1983); People v. Patrick, 683 P.2d 801 (Colo. App. 1983); People v. Rodriguez, 55 P.3d 173 (Colo. App. 2002).

18-1.3-302. Legislative declaration - offenders who may be sentenced to the specialized restitution and community service program.

(1) The general assembly hereby finds that:

(a) The taxpayer costs to incarcerate nonviolent offenders, most of whom have committed property-related offenses, usually outbalances the need to incarcerate such persons to protect the public's safety and that imprisonment generally renders offenders less able to compensate their victims. Therefore, the general assembly declares that the purpose for enacting this article regarding specialized restitution and community service programs is to increase the cost-efficiency and the effectiveness of Colorado corrections. This article authorizes the establishment of an intermediate sanction whereby nonviolent offenders, at less taxpayer cost than imprisonment, would be required to work under strict supervision in a highly structured program in order to compensate their victims and society for the damage they have caused; and

(b) Using incarceration as a routine punishment for nonviolent offenders, either upon sentencing or upon the revocation of parole or probation, punishes Colorado's taxpayers. The general assembly finds that limiting the pool of offenders eligible for the specialized restitution and community service program to first-time offenders unreasonably restricts entrance into the program and that the level of supervision mandated for repeat offenders by this article is adequate to ensure public safety from such offenders. The general assembly further finds that the vast majority of repeat offenders do not possess the requisite skills to obtain legitimate employment and that the specialized restitution and community service program will train such repeat offenders for legitimate employment. Therefore, it is in the best interests of the people of the state of Colorado to allow nonviolent repeat offenders and offenders with technical violations of parole or probation into such program.

(2) Any offender shall be eligible to be placed in a specialized restitution and community service program if:

(a) The offender is not eligible for probation pursuant to section 18-1.3-201, and has been convicted of an offense other than a crime of violence, as described in section 18-1.3-406 (2)(a), or any felony offense committed against a child set forth in articles 3, 6, and 7 of this title, or an offense that requires incarceration or imprisonment in the department of corrections or community corrections, or any sexual offense as defined in section 18-1.3-1003; and

(b) (I) A determination is made by the court that the offender would be incarcerated, either pursuant to section 18-1.3-104 (1)(b) or pursuant to a probation revocation, if such offender is not placed in the specialized restitution and community service program; or

(II) A determination is made by the parole board that the offender would be incarcerated pursuant to a parole violation.

(3) Prior to sentencing an eligible offender to a specialized restitution and community service program pursuant to this section, the court shall make the determinations required in subsection (2) of this section and such offender must have been accepted by both of the following:

(a) The provider of the specialized restitution and community service program in which it is proposed that the offender be placed; and

(b) The community corrections board, as defined in section 17-27-102 (2), C.R.S., of the community in which the program is located.

(4) If an eligible offender is accepted by a provider pursuant to subsection (3) of this section, the court may sentence an offender to pay restitution or perform community service, or both, in an amount commensurate with the seriousness of the crime and to the custody of any specialized restitution and community service program adopted pursuant to this section or article 27.9 of title 17, C.R.S. Notwithstanding any other provision of law to the contrary, a minimum of full restitution may be imposed in an amount that exceeds any actual losses or damages suffered by a victim of the crime. An offender shall be supervised in accordance with and subject to the provisions of article 27 of title 17, C.R.S.

(5) The parole board may place parole violators who meet the eligibility criteria of subsection (2) of this section and who have been accepted pursuant to paragraphs (a) and (b) of subsection (3) of this section in specialized restitution and community service programs. Such parole violators shall be supervised in accordance with and subject to the provisions of article 27 of title 17, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1390, § 2, effective October 1. **L. 2003:** (2)(a) amended, p. 1430, § 15, effective April 29.

Editor's note: This section is similar to former §§ 17-27.9-101 and 17-27.9-103 as they existed prior to 2002.

18-1.3-303. Sentencing order - collateral relief - definitions. (Repealed)

Source: L. 2013: Entire section added, (SB 13-123), ch. 289, p. 1553, § 13, effective May 24. **L. 2017:** (4)(a) amended, (HB 17-1329), ch. 381, p. 1971, § 23, effective June 6. **L. 2018:** Entire section repealed, (HB 18-1344), ch. 259, p. 1590, § 2, effective July 1.

PART 4

SENTENCES TO IMPRISONMENT

18-1.3-401. Felonies classified - presumptive penalties.

(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 subsection (1)(a)(III)(E) or (1)(a)(III)(F) of this section, 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 subsection (1)(a)(III) shall be deposited in the judicial collection enhancement cash fund created in section 16-11-101.6 (2).

(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.

(F) On and after June 6, 2018, if a person is convicted of second degree burglary as described in section 18-4-203 (2), in addition to any other sentence, the court may require the person to pay a fine of at least five thousand dollars but not exceeding seven hundred fifty thousand dollars.

(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 18 committed on or after October 1, 2013, as to any person sentenced for a felony committed on or after July 1, 1993, and before July 1, 2018, 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

(A.1) Subject to the provisions of subsection (1)(a)(V)(F) of this section, as to any person sentenced for a felony committed on or after July 1, 2018, and prior to July 1, 2020, 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 if the offense is a crime of violence as described in section 18-1.3-406 (2) Three years if the offense is not a crime of violence as described in section 18-1.3-406 (2)
3	Four years imprisonment	Twelve years imprisonment	Three 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, 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 subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section. 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), 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 subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section, 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 18, or part 3 of article 6 of this title 18, shall be five years. Notwithstanding subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section, and except as otherwise provided in subsection (1)(a)(V)(C.5) of this section, 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), but in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court.

(C.3) (Deleted by amendment, L. 2002, p. 124, § 1, effective March 26, 2002.)

(C.5) Notwithstanding the provisions of subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section, 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 1.3.

(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), 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 1.3, shall be subject to the mandatory period of parole specified in subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section.

(D) The mandatory period of parole imposed pursuant to subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section 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 subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section 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 1.3 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), may receive earned time pursuant to section 17-22.5-405, 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 subsection (1)(a)(V).

(E) If an offender is sentenced consecutively for the commission of two or more felony offenses pursuant to subsection (1)(a)(V)(A) or (1)(a)(V)(A.1) of this section, 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.

(F) Notwithstanding any other provision to the contrary, the maximum sentence for a class 1 felony that is charged after July 1, 2020, is life imprisonment.

(V.5) (A) As to any person sentenced for a felony for an offense committed on or after July 1, 2020, 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		None
2	Eight years imprisonment	Twenty-four years imprisonment	Five years if the offense is a crime of violence as described in section 18-1.3-406 (2) Three years if the offense is not a crime of violence as described in section 18-1.3-406 (2)
3	Four years imprisonment	Twelve years imprisonment	Three years
4	Two years imprisonment	Six years imprisonment	Three years
5	One year imprisonment	Three years imprisonment	Two years

(B) Any person who is paroled pursuant to section 17-22.5-403, 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 subsection (1)(a)(V.5)(A) of this section. 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 (8), 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 the provisions of subsection (1)(a)(V.5)(A) of this section, any person sentenced for a sex offense, as defined in section 18-1.3-1003 (5), committed on or after July 1, 2020, shall be sentenced pursuant to the provisions of part 10 of this article 1.3.

(D) Any person sentenced for a felony conviction entered on or after July 1, 2020, involving unlawful sexual behavior, as defined in section 16-22-102 (9), or for a felony committed on or after July 1, 2020, the underlying factual basis of which involved unlawful sexual behavior, and who is not subject to the provisions of part 10 of this article 1.3, shall be subject to the mandatory period of parole specified in subsection (1)(a)(V.5)(A) of this section.

(E) The mandatory period of parole imposed pursuant to subsection (1)(a)(V.5)(A) of this section 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 subsection (1)(a)(V.5)(A) of this section 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 1.3 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 a nonviolent felony offense, as defined in section 17-22.5-405 (5), may receive earned time pursuant to section 17-22.5-405 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 shall be eligible to receive 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 subsection (1)(a)(V.5).

(F) If an offender is sentenced consecutively for the commission of two or more felony offenses pursuant to subsection (1)(a)(V.5)(A) of this section, 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) (I) A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections unless the offense was charged prior to July 1, 2020, and 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.

(II) A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections if the offense was committed during a period of time when Colorado's death penalty was unconstitutional.

(III) 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 subsection (1)(a)(V)(A) of this section and notwithstanding subsection (4)(a) of this section, 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 19-2.5-801 or transfer of proceedings to the district court pursuant to section 19-2.5-802, 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. 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 subsections (1)(a)(V)(A), (4)(a), and (4)(b) of this section, 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 19-2.5-801, or transfer of proceedings to the district court pursuant to section 19-2.5-802, 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), as it existed prior to September 15, 2021, 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, if, after considering the factors described in subsection (4)(c)(II) of this section, 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.

(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), as it existed prior to September 15, 2021, 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.

(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 that are listed in subsection (10)(b) of this section present an extraordinary risk of harm to society and therefore, in the interest of public safety, for such crimes that constitute class 3 felonies, the maximum sentence in the presumptive range is increased by four years; for such crimes that constitute class 4 felonies, the maximum sentence in the presumptive range is increased by two years; for such crimes that constitute class 5 felonies, the maximum sentence in the presumptive range is increased by one year; for such crimes that constitute class 6 felonies, the maximum sentence in the presumptive range is increased by six months.

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

(I) to (VIII) Repealed.

(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;

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

(XIX) Sexual exploitation of a child, as described in section 18-6-403 (5.5).

(c) Repealed.

(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 amendment, L. 2003, p. 2163, § 3, effective 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 pursuant to section 18-1.3-407.5.

Source: L. 2002: Entire article added with relocations, p. 1392, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (4) amended, p. 15, § 8, effective October 1. **L. 2003:** (1)(b)(IV), (4), (8)(d)(I), (8)(e.5), (8)(g), (10)(c), and (11) amended, pp. 1425, 1435, 1429, §§ 4, 32, 13, effective April 29; (1)(a)(VI) amended, p. 2679, § 5, effective July 1; (8)(a)(VI), (9)(a.5), (9)(c.5), and (9)(c.7) amended, p. 1431, § 18, effective July 1; (13)(a)(II) and (13)(a)(III) amended, p. 2163, § 3, effective July 1; (10)(b)(XII) and (10)(b)(XIII) amended and (10)(b)(XIV) added, p. 2387, § 3, effective July 1, 2004. **L. 2004:** (10)(b)(I) to (10)(b)(VIII) and (10)(c) repealed, p. 633, § 1, effective August 4. **L. 2006:** (4) amended, p. 1052, § 2, effective May 25. **L. 2008:** (1)(a)(V)(D) amended, p. 1757, § 6, effective July 1; (1)(a)(III)(A.5) amended, p. 1889, § 54, effective August 5. **L. 2009:** (14) added, (HB 09-1122), ch. 77, p. 280, § 4, effective October 1. **L. 2010:** (10)(b)(XIII) amended, (HB 10-1233), ch. 88, p. 296, § 5, effective August 11; (10)(b)(XIII) and (10)(b)(XIV) amended and (10)(b)(XV) added, (SB 10-128), ch. 415, p. 2046, § 5, effective July 1, 2012. **L. 2014:** IP(1)(a)(V)(A) amended, (SB 14-163), ch. 391, p. 1972, § 10, effective June 6; (10)(b)(XIV) amended and (10)(b)(XVI) and (10)(b)(XVII) added, (HB 14-1273), ch. 282, p. 1154, § 15, effective July 1; (1)(b)(IV) amended, (HB 14-1214), ch. 336, p. 1494, § 1, effective August 6. **L. 2015:** (1)(a)(V)(B) amended, (HB 15-1122), ch. 37, p. 92, § 7, effective March 20; (1)(b)(IV) amended, (HB 15-1303), ch. 211, p. 772, § 2, effective September 1. **L. 2016:** (4)(b)(I) amended and (4)(c) added, (SB 16-181), ch. 353, p. 1447, § 1, effective June 10; (10)(b)(XVI) and (10)(b)(XVII) amended and (10)(b)(XVIII) added, (HB 16-1080), ch. 327, p. 1328, § 3, effective July 1. **L. 2018:** (1)(a)(V) amended, (HB 18-1029), ch. 153, p. 1084, § 1, effective April 23; (1)(a)(III)(A) amended and (1)(a)(III)(F) added, (HB 18-1077), ch. 376, p. 2280, § 2, effective June 6. **L. 2020:** (1)(a)(V)(A.1) and (4)(a) amended and (1)(a)(V)(F) and

(1)(a)(V.5) added, (SB 20-100), ch. 61, p. 209, § 10, effective March 23. **L. 2021:** (10)(a), IP(10)(b), (10)(b)(XVII), (10)(b)(XVIII) amended and (10)(b)(XIX) added (HB 21-1069), ch. 446, p. 2942, § 4, effective September 7; (4)(c)(I) amended, (SB 21-124), ch. 58, p. 237, § 4, effective September 15; (4)(b)(I) and IP(4)(c)(I) amended, (SB 21-059), ch. 136, p. 719, § 42, effective October 1; (1)(a)(III)(F) amended, (SB 21-271), ch. 462, p. 3170, § 185, effective March 1, 2022. **L. 2022:** (1)(a)(III)(D) amended, (HB 22-1336), ch. 132, p. 899, § 1, effective April 25. **L. 2026:** (14) amended, (HB 26-1064), ch. 15, p. 62, § 4, effective August 12.

Editor's note: (1) This section is similar to former § 18-1-105 as it existed prior to 2002.

(2) This section was amended in 2002 prior to its relocation on October 1, 2002. For that history, see the source note to § 18-1-105.

(3) Amendments to subsection (10)(b)(XIII) by House Bill 10-1233 and Senate Bill 10-128 were harmonized, effective July 1, 2012.

(4) Amendments to subsection (4)(c)(I) by SB 21-059 and SB 21-124 were harmonized.

Cross references: (1) For the legislative declaration contained in the 2002 act amending subsection (4), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2003 act amending subsections (10)(b)(XII) and (10)(b)(XIII) and enacting subsection (10)(b)(XIV), see section 1 of chapter 360, Session Laws of Colorado 2003. For the legislative declaration contained in the 2003 act amending subsections (13)(a)(II) and (13)(a)(III), see section 1 of chapter 340, Session Laws of Colorado 2003. For the legislative declaration contained in the 2006 act amending subsection (4), see section 1 of chapter 228, Session Laws of Colorado 2006. For the legislative declaration in HB 15-1122, see section 1 of chapter 37, Session Laws of Colorado 2015.

(2) For the legislative declaration in HB 21-1069 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2024, see sections 1 and 7 of chapter 446, Session Laws of Colorado 2021. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Law reviews. For note, "Disbarment for Rev. 203 (1938). For article, "Criminal Crime in Colorado", see 10 Rocky Mt. L. Prosecutions under the Colorado Securities

Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado Felony Sentencing an Update", see 14 Colo. Law. 2163 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to the death penalty, see 15 Colo. Law. 1596 (1986). For article, "Sentencing Dilemmas", see 29 Colo. Law. 67 (Oct. 2000). For article, "Criminal Sentencing in Colorado After Blakely v. Washington", see 34 Colo. Law. 85 (Jan. 2005). For article, "Adult Parole in Colorado: An Overview", see 44 Colo. Law. 37 (May 2015). For article, "Exceeding Presumptive Maximum Sentences in Colorado", see 44 Colo. Law. 43 (Dec. 2015). For article, "Life after Miller and Montgomery: Colorado's (Revised) Solution for Unconstitutional Juvenile Sentences", see 45 Colo. Law. 31 (Mar. 2016). For article, "The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19", see 98 Denv. L. Rev. 337 (2021).

Annotator's note. Since § 18-1.3-401 is similar to § 18-1-105 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and former § 39-10-17, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality of death penalty. The imposition and carrying out of the death penalty was held to constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments of the

U.S. Constitution. *Furman v. Georgia*, 408 U.S. 238 (1972).

Subsection (6) is not unconstitutionally vague and does not deprive a defendant of due process and equal protection on the grounds that no standards are set out in the statute to guide the trial court on what are extraordinary, aggravating or mitigating circumstances. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Although the phrase "aggravating or mitigating circumstances" is not defined in the legislative act, that failure does not render the statute unconstitutionally vague. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Subsection (6) is not unconstitutionally vague because it allegedly fails to indicate precise standards for imposition of an enhanced sentence. *People v. Wright*, 672 P.2d 518 (Colo. 1983).

Due process requirements for enhanced sentence imposed because of defendant's status at time of offense are met if defendant is given reasonable notice that he is subject to enhanced sentencing and the prosecution proves such status by a preponderance of the evidence if such fact is contested. *People v. Reed*, 723 P.2d 1343 (Colo. 1986); *People v. Simmons*, 723 P.2d 1350 (Colo. 1986); *People v. Anderson*, 784 P.2d 802 (Colo. App. 1989).

Discretionary aggravated range sentence imposed under subsection (6) does not violate due process requirement announced in U.S. supreme court decision *Apprendi v. New Jersey*, 530 U.S. 466

(2000), if defendant was exposed to such sentence when charged with the substantive offense. Trial court, therefore, properly denied post-conviction relief as to 32-year maximum aggravated range sentence imposed for sexual assault on child. *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

Under the mandates of the U.S. supreme court decisions *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi* a discretionary aggravated range sentence may be imposed only when a jury has determined the aggravating factors or when the defendant has admitted them. The fact that the defendant waived the right to a jury determination of the aggravating factors by pleading guilty to the charged offense is irrelevant where no aggravating factors were charged in the information and the defendant did not stipulate to any. *People v. Barton*, 121 P.3d 230 (Colo. App. 2004).

Subsection (13) must be construed in accordance with constitutional precedent. Under *Blakely*, any fact that increases a sentence beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, unless the defendant admits to the facts or stipulates to judicial fact-finding on the issue before the court. *People v. Rodriguez*, 2021 COA 38M, 491 P.3d 547.

Sentence in the aggravated range proper when based upon a prior conviction even after U.S. supreme court decision in *Blakely*. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A defendant's failure to object to facts in a presentence report does not constitute admission for purposes of *Blakely* unless defendant makes a constitutionally sufficient waiver of his or her right to a jury trial on the facts contained in the report. A sentencing court may not use defendant's admissions to sentence him or her in the aggravated range unless defendant knowingly, voluntarily, and intelligently waives his or her sixth amendment right to have a jury find the facts that support the aggravated sentence. *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006).

Aggravated sentence proper under *People v. Isaacks*. Defendant's guilty plea to a single count that named two victims constituted a knowing, voluntary, and intelligently waived right to a jury trial on those facts. Aggravated sentence based upon multiple victims receiving serious bodily injuries was constitutional. *People v. Watts*, 165 P.3d 707 (Colo. App. 2006).

Sentence enhancement statute not violative of procedural due process provided that defendant receives adequate notice that he is subject to enhanced punishment and the prosecution meets its burden of proof concerning defendant's status as a parolee. *People v. Henderson*, 729 P.2d 1028 (Colo. App. 1986).

Although this section does not set forth the procedural framework that must be followed when a defendant is charged with violating the conditions of a suspended sentence, minimum due process protections must be afforded to a person facing revocation of such a

suspended sentence. These requirements include: (1) Written notice of the claimed violations; (2) disclosure to the defendant of evidence against him or her; (3) a fair opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless there is good cause to deny such a right; (5) a neutral and detached hearing officer or judge; and (6) a written statement by the fact finder as to the evidence relied on and reasons for the revocation. *People v. Scura*, 72 P.3d 431 (Colo. App. 2003).

Equal protection does not require same procedural safeguards as are contained in crimes of violence statute since cases involving crimes of violence involve more complicated factual situations than the mere determination of defendant's status at the time of the offense. *People v. Simmons*, 723 P.2d 1350 (Colo. 1986).

No equal protection violation where conviction for child abuse resulting in death under this section is interpreted to preclude a sentence reduction below the mandatory minimum as compared to a reduction or modification of a mandatory crime of violence sentence. *People v. Smith*, 992 P.2d 635 (Colo. App. 1999).

No equal protection violation where person convicted of class 4 felony theft is punished more severely than a class 4 felony sex offender. Felony classes do not themselves create "classes" for purposes of equal protection analysis; defendant is only "similarly situated" with defendants who commit the same or similar acts. *People v.*

Friesen, 45 P.3d 784 (Colo. App. 2001); *People v. Walker*, 75 P.3d 722 (Colo. App. 2002); *People v. Fritschler*, 87 P.3d 186 (Colo. App. 2003).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

No equal protection violation in sentencing co-defendants both convicted of extreme indifference murder as adults to different sentences because one was a juvenile at the time of the crime. One defendant was 18.5 years old at the time of the crime and sentenced to life without the possibility of parole, and the other was two days shy of his 18th birthday at the time of the crime and sentenced to life with the possibility of parole after 40 years because he was a juvenile at the time of the crime. The co-defendants were similarly situated for purposes of an equal protection analysis. Because age is not a suspect classification under equal protection analysis, a rational basis review is applied to the equal protection claim. There was a rational basis for treating the co-defendants differently because providing a harsher penalty for someone who commits murder after turning 18 is reasonably related to preventing and deterring crime and not arbitrary or unreasonable. *People v. Castillo*, 2022 COA 20, 510 P.3d 561.

This section is not unconstitutional for lack of a provision regarding proof of probationary status by the prosecutor. Such proof is only required to be proven by a preponderance of the evidence if the defendant contests his alleged probationary status. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986).

A sentence in the aggravated range under subsection (6) violates the sixth amendment right to trial by jury, unless the facts found by the trial court to support the sentence, including the ultimate finding that these facts are extraordinary: (1) are reflected in the jury's verdict; (2) were admitted by the defendant for purposes of sentencing; or (3) involve prior criminality, to the extent permitted by Apprendi. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

The U.S. supreme court concluded in *Miller v. Alabama*, 567 U.S. 460 (2012), that the eighth amendment prohibits a mandatory life sentence without the possibility of parole for juvenile offenders. *People v. Banks*, 2012 COA 157, 412 P.3d 417, *aff'd in part, rev'd in part on other grounds sub nom. People v. Tate*, 2015 CO 42, 352 P.3d 959; *People v. Wilder*, 2015 COA 14, 412 P.3d 686.

Because defendant was a minor when the trial court mandatorily sentenced him to life imprisonment without the possibility of parole, and because defendant's case was still pending on direct review when the U.S. supreme court decided *Miller*, the no-parole provisions contained in subsection (4)(a) of this section and § 17-22.5-104 (2)(d)(I) are

unconstitutional as applied to defendant in that they deny defendant the opportunity of parole. *People v. Banks*, 2012 COA 157, 412 P.3d 417, *aff'd in part, rev'd in part on other grounds sub nom. People v. Tate*, 2015 CO 42, 352 P.3d 959.

The U.S. supreme court's decision in *Miller* renders a mandatory life without the possibility of parole sentence for juveniles convicted between 1990 and 2006 unconstitutional. For cases on direct appeal, the remedy for those sentenced to mandatory life without parole is a remand to determine through an individual consideration of the defendant's youth and attendant circumstances whether a sentence of life without parole is appropriate. If the sentencing court on remand determines that life without parole is not warranted, then the appropriate sentence, absent legislative action, is life in prison with the possibility of parole after forty years. *People v. Tate*, 2015 CO 42, 352 P.3d 959; *People v. Ellis*, 2015 COA 108, 425 P.3d 1140.

Juvenile sentence of life with the possibility of parole after forty years is constitutional under *Miller*. *People v. Davis*, 2018 COA 113, 429 P.3d 82.

The new rule announced in *Miller* is procedural rather than substantive in nature; therefore it does not apply retroactively to cases on collateral review of final judgments. *People v. Tate*, 2015 CO 42, 352 P.3d 959; *People v. Vigil*, 2015 CO 43, 372 P.3d 1045.

If an individualized sentencing determination is made in accordance with the factors in *Miller*, on remand the trial

court may re-impose the life sentence without parole, or it may impose a life sentence with a possibility of parole after a specified number of years, or it may impose a sentence that it determines is appropriate for the defendant. In making this sentencing determination, the court should consider (1) the presumptive range that applies to the next lowest level felony: a class 2 offense with a presumptive range of 12 to 24 years, and (2) the effect of any applicable extraordinary aggravating factors. *People v. Wilder*, 2015 COA 14, 412 P.3d 686. But see *People v. Banks*, 2012 COA 157, 412 P.3d 417.

The class created by subsection (4)(c)(I) does not violate the special legislation clause. The class is genuine and not illusory and the classification is reasonable. *People v. Brooks*, 2018 CO 77, 426 P.3d 353.

Mandatory parole provision does not violate the constitutional protection against double jeopardy since the general assembly has mandated a period of parole for all convicted felons, in addition to a sentence to the department of corrections, and therefore the defendant has not been subjected to separate proceedings for the imposition of his sentence. *People v. Mayes*, 981 P.2d 1106 (Colo. App. 1999); *People v. Xiong*, 10 P.3d 719 (Colo. App. 2000).

Mandatory period of parole for consecutive sentencing of two or more felony offenses pursuant to subsection (1)(a)(V)(A) not unconstitutionally overbroad, because it does not proscribe any conduct constitutionally protected and it has a rational relationship to a legitimate

governmental interest of promoting the rehabilitation and reintegration of defendants while recognizing the need for public safety. *People v. Boyd*, 23 P.3d 1242 (Colo. App. 2001).

Mandatory parole is part of a sentence imposed by the court. Even though the parole board may administer the parole, that does not mean that the board imposes it; hence there is no separate penalty imposed in a separate proceeding and thus, no violation of double jeopardy. *People v. Xiong*, 10 P.3d 719 (Colo. App. 2000).

Retrospective application of mandatory parole provisions in subsection (1)(a)(V) not violative of ex post facto clause where defendant had pleaded guilty to underlying offense with stipulation that the offense occurred within a time frame that happened to include time periods both prior and subsequent to the date such provisions were enacted. *People v. Flagg*, 18 P.3d 792 (Colo. App. 2000).

1988 amendment establishing lower mandatory aggravated ranged sentencing applicable to offenses committed on or after July 1, 1988 inapplicable to defendant who committed offenses in April and May of 1988, regardless of fact that the amendment had taken effect prior to the time defendant was sentenced. Defendant was properly sentenced under higher mandatory range in effect on dates offenses were committed. *Riley v. People*, 828 P.2d 254 (Colo. 1992).

1988 amendment to former subsection (1)(b)(VII) applicable to post conviction sentence reduction proceedings which

provided for retroactive application of reduced sentences was applicable only to persons eligible for presumptive range sentencing. *Riley v. People*, 828 P.2d 254 (Colo. 1992) (decided under law as it existed prior to June 7, 1990 repeal of subsection).

Classification does not create substantive offense. A classification of felony does not in and of itself create a substantive offense; it merely establishes the boundaries within which a court may impose a sentence. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Retroactive application. This section is to be given retroactive application because a defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment of conviction. *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976); *People v. Johnson*, 638 P.2d 61 (Colo. 1981).

Court should not apply Apprendi retroactively to convictions that were already final when the U.S. supreme court issued its opinion. A new rule of criminal procedure is not applied retroactively unless it forbids criminal punishment of certain kinds of conduct or is a "watershed" rule. *Apprendi* does not represent a "watershed" rule, that is, a rule that implicates the fundamental fairness of the trial. *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002); *People v. Hall*, 87 P.3d 210 (Colo. App. 2003); *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004); *People v. Alexander*, 129 P.3d 1051 (Colo. App. 2005).

The U.S. supreme court held in *Apprendi* that, 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. *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002).

1979 amendment inapplicable where crime committed before July 1, 1979. Where acts for which defendants were convicted occurred well in advance of July 1, 1979, the effective date of H.B. 1589, it was not error to refuse to sentence under the provisions of that legislation. *People v. Lopez*, 624 P.2d 1301 (Colo. 1981).

Since the crime for which a defendant was sentenced was committed well before the effective date of either the 1977 or 1979 version of House Bill 1589, he is not entitled to be resentenced under the provisions of those acts. *People v. Stewart*, 626 P.2d 685 (Colo. 1981).

In resentencing a defendant originally convicted before the 1979 reduction in the sentencing range for class 3 felonies, the trial court may consider the new sentencing range, but is not bound by it. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

For sentencing under H.B. 1589, see *People v. Montoya*, 647 P.2d 1203 (Colo. 1982).

1981 amendments not irreconcilable. The two 1981 amendments, S.B. 304 and H.B. 1156, are not irreconcilable. They can be harmonized by recognizing that nonadversary reviews under former § 18-1-409.5 and C.A.R. 4(d), no longer exist with

respect to sentences imposed for the conviction of a felony committed on or after July 1, 1981. *People v. Rafferty*, 644 P.2d 102 (Colo. App. 1982).

Since § 16-11-802(1)(b) (now § 18-1.3-1302 (1)(b)) has a later effective date, was later enacted, and operates in an ameliorative manner for criminal defendants, it controls and that portion of § 18-1-105(4) (now § 18-1.3-401 (4)) which provides for no possibility of parole for persons sentenced to life imprisonment following conviction for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991, is abrogated by this later enactment. Thus, § 16-11-103(1)(b) (now § 18-1.3-1201 (1)(b)), as amended by House Bill 91S-1001, controls parole eligibility for convictions and sentences to life imprisonment based on class 1 felony offenses occurring on or after September 20, 1991, and § 16-11-802(1)(b) (now § 18-1.3-1302 (1)(b)) controls parole eligibility for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991. *People v. District Court*, 834 P.2d 236 (Colo. 1992).

Legislative intent of subsection (9)(c) is to encourage careful consideration by the trial judge of all relevant factual matters developed during the course of proceedings prior to selecting an appropriate sentence. *People v. Sanchez*, 769 P.2d 1064 (Colo. 1989).

When the court misapprehends the sentencing range, the sentence must be vacated and defendant must be re-sentenced within the correct range.

Defendant's class 4 felony conspiracy conviction was subject to enhanced sentencing under subsection (8)(a)(III), requiring a sentence between four to 12 years, but the court erred in believing the range was 10 to 32 years. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Sentencing is a discretionary decision which requires weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Reed*, 43 P.3d 644 (Colo. 2001).

The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing is discretionary and a judge has wide latitude in arriving at a synthesis which is reflective of the interests of society and the defendant. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

In determining an appropriate sentence, the trial court may conduct a broad inquiry, largely unlimited as to the kinds of information it may consider, and it has wide discretion in determining what sentence is appropriate, and sentences imposed within statutory limits are generally not subject to review. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983).

Sentencing involves an exercise in judicial discretion and, accordingly, a sentencing judge has wide latitude in arriving at a final decision. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentencing is by its very nature a discretionary decision, and many factors must be considered in arriving at a decision that protects the rights of society and the defendant. *People v. Horne*, 657 P.2d 946 (Colo. 1983).

In imposing a sentence, the trial court must weigh many factors, including the nature of the offense and the record of the offender, and must impose a definite sentence within the presumptive range unless it concludes that extraordinary mitigating or aggravating factors are present. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

No abuse of discretion found. See *People v. Sellers*, 762 P.2d 749 (Colo. App. 1988).

Where trial court discussed its reasoning thoroughly and took into account a variety of factors, it did not abuse its discretion in imposing maximum aggravated sentences. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Where trial court considered the nature of the offense, the character of the defendant, the public interest in safety and deterrence, and mitigating and aggravating circumstances, and imposed a sentence within the range prescribed by law, based on appropriate considerations and factually supported by the circumstances, there was no abuse of discretion. *People v. Martinez*,

32 P.3d 582 (Colo. App. 2001); *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

The sentencing court's consideration of defendant's role in the crimes that later led to the murders was not tantamount to punishing him for crimes of which he was acquitted, rather the court properly evaluated the overall circumstances of the crimes of which he was convicted and of the serious risks that attend such crimes. *People v. Le*, 74 P.3d 431 (Colo. App. 2003).

It is not improper for the sentencing court, on its own volition, to sentence contrary to the district attorney's recommendation, when the court considered aggravating factors and its consideration of mitigating factors was implicit in the court's selection of a sentence to a term in the lower end of the presumptive range. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

The range of punishments available to a trial court is determined by the applicable law as of the date of the offense and the factors to be considered by the court in sentencing are those factors existing on the

date of sentencing. *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987).

Factors considered in sentencing. Some of the more common factors to be considered in sentencing are: The gravity of the offense in terms of harm to person or property, or in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation; and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative chosen. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Factors to be considered in imposing sentence include the nature of the offense, the character of the offender, the public interest, and whether the record establishes a clear justification for the sentence imposed. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981).

The factors which should be considered in sentencing include the nature of the offenses, the prior record of the defendant, his probability of rehabilitation, his age, and the criminal justice goals of punishment, deterrence, and protection of society. *People v. Soper*, 628 P.2d 604 (Colo. 1981).

Some factors to be considered in sentencing decision include gravity of offense, defendant's societal history, the risk of future criminal conduct, and the potential

for effective rehabilitation. *People v. Swepton*, 822 P.2d 510 (Colo. App. 1991).

Trial court did not abuse its discretion in sentencing defendant to the maximum sentence since the sentence was within the presumptive range, was based on appropriate considerations in the record, and was factually supported by the circumstances of the case. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

No abuse of discretion in sentencing defendant in the aggravated range. *People v. Heimann*, 186 P.3d 77 (Colo. App. 2007).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of the court's decision. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

Consideration of prior criminal record in sentencing. A defendant's criminal record may be considered by a court as "extraordinary mitigating or aggravating circumstances" as that term is used in subsection (6). *People v. Gonzales*, 44 Colo. App. 411, 613 P.2d 905 (1980); *People v. Cantwell*, 636 P.2d 1313 (1981); *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

The trial court properly considered the defendant's prior criminal history in its determination of extraordinary circumstances. *Flower v. People*, 658 P.2d 266 (Colo. 1983); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

A defendant's record may be a basis for sentencing beyond the presumptive range. *People v. Gonzales*, 44 Colo. App. 411, 613 P.2d 905 (1980).

The lack of a prior criminal record is only one consideration in determining whether to impose a maximum sentence. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

Prior convictions are an appropriate consideration in sentencing outside the presumptive range. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

Defendant's prior criminal record is an appropriate factor in sentencing outside presumptive range. *People v. Abbott*, 690 P.2d 1263 (Colo. 1984).

There is no sixth amendment violation when the sentencing court's conclusion that an enhanced sentence is warranted is based solely upon a factual determination of the defendant's prior convictions. *People v. Orth*, 121 P.3d 256 (Colo. App. 2005).

A prior conviction in violation of a constitutional right of the accused cannot be used to enhance punishment in a subsequent criminal proceeding. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

A court may consider the failure of a defendant to comply with a previous sentence even if such sentence may be constitutionally defective. *People v. Carabajal*, 720 P.2d 991 (Colo. App. 1986).

But, where defendant's previous conviction was under another jurisdiction's youthful offender statute which specified that a youthful offender adjudication was not

a judgment of conviction for a crime, such previous conviction could not be considered an aggravating circumstance justifying sentence beyond the presumptive range. *People v. Pellien*, 701 P.2d 1244 (Colo. App. 1985).

Trial court properly considered serious criminal convictions which occurred between the original sentencing and the resentencing after appeal when the court increased the sentence of the defendant upon remand. *People v. Wiegard*, 743 P.2d 977 (Colo. App. 1987).

A trial court may properly consider an adult's juvenile record as a factor when imposing a sentence within the presumptive range. *People v. Cisneros*, 745 P.2d 262 (Colo. App. 1987); *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987).

Guilty plea constitutes a conviction within the meaning of subsection (9). Defendant, who had pled guilty to a separate offense and was out on bond, asserted that because he or she had not yet been sentenced for the prior felony at the time the trial court for the latter offense sentenced him or her, he or she was not yet "convicted". Defendant's guilt of a prior felony, not the punishment sentenced or received, is what is relevant for the purpose of defining "conviction" under subsection (9)(a). *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part, denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v.*

Huber, 139 P.3d 628 (Colo. 2006), *aff'd*, 165 P.3d 836 (Colo. App. 2007).

The maximum and minimum sentences of imprisonment prescribed in subsection (1)(a)(V)(A) were clearly not intended to be sentences exclusively to the custody of the executive director of the department of corrections. The reference in any specific sentencing provision to the ranges authorized by this section, without more, therefore does not prohibit a sentence to a community corrections program. *Shipley v. People*, 45 P.3d 1277 (Colo. 2002).

Mandatory parole is a direct consequence of a guilty plea, and defendant must be advised of this requirement. However, when the total sentence imposed, including mandatory parole, was less than the potential sentence of which defendant was advised in accepting the plea, the trial court's failure to advise defendant correctly of the mandatory parole term does not invalidate the guilty plea. *People v. Montaine*, 7 P.3d 1065 (Colo. App. 1999).

Although the defendant's sentence to imprisonment and mandatory parole was not inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Court may not eliminate one-year parole. While subsection (1)(a)(I) authorizes

a trial judge to impose a sentence below the minimum presumptive range, it does not authorize a trial court to eliminate the requirement of one year of parole. *People v. McKnight*, 628 P.2d 628 (Colo. App. 1981).

A sentencing court may not waive or suspend a period of mandatory parole under subsection (1)(a)(V)(B) and such a parole period is a required part of defendant's sentence. *People v. Calderon*, 992 P.2d 1201 (Colo. App. 1999).

The trial court's failure to enter the mandatory period of parole on the mittimus does not affect the requirement that it be served. The mittimus may be corrected by the sentencing court to reflect the required period of parole. *People v. Snare*, 7 P.3d 1025 (Colo. App. 1999).

Case remanded for entry of a corrected mittimus to reflect that defendant is subject to a one-year period of mandatory parole. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

Court may not impose parole as part of sentence under subsection (1)(a)(II). Sentencing court exceeded its jurisdiction by imposing parole as part of the sentence for an offense committed after July 1, 1984, and before July 1, 1985. *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986); *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987); *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

No conflict between this section and § 18-18-405. In § 18-18-405, the general assembly defined the elements of the crime of possession with intent to distribute and

incorporated the presumptive range found in subsection (1)(a) of this section. Section 18-18-405 does not preclude the finding that an offense is an extraordinary risk crime and does not preclude the application of subsection (10) of this section to increase the presumptive range found in subsection (1)(a). *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd in part, rev'd in part* on other grounds, 169 P.3d 662 (Colo. 2007).

The provisions of § 17-2-201 (5)(a) and subsection (1)(a)(V)(C) of this section are in conflict. Section 17-2-201 (5)(a) is a specific provision related to the parole of sex offenders while subsection (1)(a)(V)(C) of this section is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a) shall be given effect for all sex offender parole for crimes committed before July 1, 1996. *Martin v. People*, 27 P.3d 846 (Colo. 2001); *People v. Pauley*, 42 P.3d 57 (Colo. App. 2001).

Section 17-2-201(5)(a.5) is a specific provision related to the parole of sex offenders while subsection (1)(a)(V) of this section is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a.5) shall be given effect for all sex offender parole for crimes committed between July 1, 1996, and July 1, 1998. *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

Sex offenders convicted of offenses occurring between July 1, 1993, and July

1, 1998, are subject to discretionary parole pursuant to § 17-2-201 (5)(a), and not mandatory parole pursuant to subsection (1)(a)(V)(C) of this section. *People v. Koehler*, 30 P.3d 694 (Colo. App. 2000).

Habitual offenders are subject to a period of discretionary parole rather than a period of statutory mandatory parole. The provisions of § 17-2-201 (5)(a) and § 17-2-213 irreconcilably conflict with the provisions of § 17-22.5-403 (7) and subsection (1)(a)(V). Thus, the specific provision of § 17-2-201 (5)(a) and § 17-2-213 prevail over the general provisions of § 17-22.5-403 (7) and subsection (1)(a)(V). *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002).

While the parole period in subsection (1)(a)(V)(A) is mandatory, the minimum and maximum sentences are "presumptive ranges." *Bullard v. Dept. of Corr.*, 949 P.2d 999 (Colo. 1997).

Felony sex offenders who committed crimes between July 1, 1996, and November 1, 1998, and who were sentenced to a term of imprisonment were subject to discretionary parole, not mandatory parole. *People v. Jones*, 992 P.2d 710 (Colo. App. 1999).

A sentencing court may not waive or suspend a period of mandatory parole under subsection (1)(a)(V)(A) and thus the two-year period of mandatory parole was a required part of defendant's original sentence. *People v. Barth*, 981 P.2d 1102 (Colo. App. 1999); *People v. Espinoza*, 985 P.2d 68 (Colo. App. 1999).

The period of mandatory parole that attaches by operation of subsection (1)(a)(V) is an incidental and distinct element of the defendant's sentence, separate from the term of incarceration imposed by the trial court. People v. Johnson, 13 P.3d 309 (Colo. 2000).

While an offender subject to discretionary parole will never be confined for a period greater than the original sentence imposed, an offender subject to mandatory parole faces a sentence to prison, a period of parole, and possibly another period of confinement not necessarily limited to the original term of incarceration imposed. People v. Hall, 87 P.3d 210 (Colo. App. 2003).

A period of confinement attributable to parole revocation was not a "period of mandatory parole". When a person is reincarcerated on a parole revocation, he is no longer serving his original sentence. Therefore, when a person is sentenced for the crime of escape during a period of mandatory parole for another offense, ordering such a sentence to run consecutive with the period of incarceration for the parole revocation did not violate subsection (1)(a)(V)(E). People v. Luther, 58 P.3d 1013 (Colo. 2002).

Once paroled, a mandatory parolee has discharged his prison sentence as a matter of law. However, the mandatory parole period is a component of an offender's sentence. People v. Norton, 49 P.3d 344 (Colo. App. 2001), rev'd on other grounds, 63 P.3d 339 (Colo. 2003); In re Miranda, 2012 CO 69, 289 P.3d 957.

Subsection (3) bars convicted felons from practicing law while they serve out all components of their sentences, including parole. In re Miranda, 2012 CO 69, 289 P.3d 957.

Attorney serving mandatory parole portion of felony criminal sentence cannot be reinstated to practice of law until he has completed his felony sentence. In re Miranda, 2012 CO 69, 289 P.3d 957.

A discharge of the sentence to imprisonment under subsection (1)(a)(V)(D) is not equivalent to the satisfaction and discharge of mandatory parole. People v. Taylor, 74 P.3d 396 (Colo. App. 2002).

The maximum sentences in the presumptive ranges set out in this section do not establish maximum periods of probation to which a defendant may be sentenced under part 2 of article 11 of title 16. People v. Flenniken, 749 P.2d 395 (Colo. 1988).

The minimum sentences established under this section do not establish the minimum period of probation to which a defendant may be sentenced under § 16-11-202. The length of probation is at the sentencing judge's discretion. People v. Herr, 868 P.2d 1121 (Colo. App. 1993).

District court possessed jurisdiction to sentence defendant to a term of probation which did not exceed the maximum term of imprisonment in the aggravated range for the crime committed; the term of probation was not limited to the presumptive

range for the crime committed. *Hunter v. People*, 757 P.2d 631 (Colo. 1988).

When charges against defendant are not supported by identical evidence, trial court has discretion in imposing either consecutive or concurrent sentences. *People v. Corbett*, 713 P.2d 1337 (Colo. App. 1985).

No automatic conversion of a death sentence to a life sentence when death penalty statute is held unconstitutional. *People v. Corbett*, 713 P.2d 1337 (Colo. App. 1985).

This section did not put defendants on notice that death was a possible penalty for first degree murder, where death penalty statute is found unconstitutional, this section gives notice that maximum penalty is life imprisonment. Retroactive application of new death penalty statute would violate ex post facto laws. *People v. Aguayo*, 840 P.2d 336 (Colo. 1992).

Legislatively prescribed parameters on sentencing may not be circumvented by suspending part of the sentence. *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978); *People v. White*, 679 P.2d 602 (Colo. 1984).

Effect of conviction for felony. By subsection (2)(now subsection (3)), the consequences resulting from a conviction of a felony are made much more serious than those arising from a conviction of a misdemeanor. *Brooks v. People*, 14 Colo. 413, 24 P. 553 (1890).

This section declares that a person convicted of a felony shall also suffer an additional penalty therefor, namely, that he

be disqualified from holding any office of honor, trust, or profit under the laws of this state, and that he be also disqualified from practicing as an attorney in any of our state courts. This latter disqualification constitutes a part of the total penalty prescribed by the general assembly for anyone convicted of a felony. *People v. Buckles*, 167 Colo. 64, 453 P.2d 404 (1968).

Section consistent with separation of powers. The statute disqualifying a convicted felon of holding an office of trust or practicing as an attorney in nowise interferes with the exclusive right of the supreme court to determine the rules and regulations which shall govern those seeking admission to our bar. Nor does the statute impinge in any real sense the judicial right to discipline those licensed to practice law. Rather, this is an effort by the general assembly under its police power to bar convicted felons from practicing law in the courts. The general assembly has the power to do so, and this section does not violate the separation of powers doctrine. *People v. Buckles*, 167 Colo. 64, 453 P.2d 404 (1968).

For disqualification from practice of law for conviction of felony, see *People ex rel. Colo. Bar Ass'n v. Bryce*, 36 Colo. 125, 84 P. 816 (1906); *People v. Warren*, 91 Colo. 99, 12 P.2d 348 (1932); *People ex rel. Attorney Gen. v. Brayton*, 100 Colo. 92, 65 P.2d 1438 (1937).

For conviction of felony outside Colorado, see *People ex rel. Attorney Gen. v. Laska*, 101 Colo. 221, 72 P.2d 693 (1937).

Relief from a sentence validly imposed may not be obtained through the

judiciary after final conviction. People v. Rupert, 185 Colo. 288, 523 P.2d 1406 (1974).

Court order held within power of court. Court order authorizing a sentence to run concurrently with another sentence, to be served at an out-of-state institution, was within the power and jurisdiction of the sentencing court. People v. Lewis, 193 Colo. 203, 564 P.2d 111 (1977).

Sentence may be imposed to run consecutively to sentence already imposed. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon a defendant. People v. Flower, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983); People v. Martinez, 179 P.3d 23 (Colo. App. 2007).

Multiple sentences may be imposed to run as one continuous sentence with a single period of mandatory parole where defendant is sentenced under subsection (1)(a)(V)(E), and this section is read together with § 17-22.5-101. People v. Starcher, 107 P.3d 1127 (Colo. App. 2004).

A trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case. People v. Flower, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Termination of a first sentence has no effect on a second sentence, and first court cannot modify sentence of second,

where sentences are concurrent. Bullard v. Dept. of Corr., 949 P.2d 999 (Colo. 1997).

When offender's mandatory parole is revoked, the offender is no longer serving parole, but rather incarceration, therefore imposing a consecutive sentence plus another period or mandatory parole does not violate subsection (1)(a)(V)(E). The mandatory parole from the first conviction is extinguished so there are no longer two sentences of mandatory parole. People v. Perea, 74 P.3d 326 (Colo. App. 2002).

Plain language of subsection (1)(a)(V)(E) requires a defendant sentenced to consecutive felony offenses to serve the period of mandatory parole for the highest class felony; the order that the defendant serves the consecutive sentences is irrelevant to the determination of the period of mandatory parole. People v. Boyd, 23 P.3d 1242 (Colo. App. 2001).

Credit required for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense. Godbold v. Wilson, 518 F. Supp. 1265 (D. Colo. 1981).

However, trial court's consideration of the effect of presentence confinement credit on defendant's actual incarceration time does not constitute an infringement on defendant's constitutional rights to due process and fundamental fairness. People v. Reed, 43 P.3d 644 (Colo. 2001).

Applicability of requirement of specific findings. The requirement to have specific findings on the record of the case in justification of a sentence outside the presumptive range is applicable to all sentences which do not come under the exceptions listed in subsection (9). *People v. Rafferty*, 644 P.2d 102 (Colo. App. 1982).

Trial court has obligation under subsection (7) to make specific findings when the sentence-enhancing factors contained in subsection (9.5) are present. *People v. Blackmon*, 20 P.3d 1215 (Colo. App. 2000).

Trial court did not erroneously apply the general sentence enhancer in subsection (8)(a)(IV) of this section to defendant's assault conviction under § 18-3-203 (1)(f.5). Application of the sentence enhancement provisions of this section did not have the effect of raising the class of felony for which defendant was convicted. Plus, the elemental statute under which defendant was charged did not contain specific sentencing requirements that would have superseded the provisions of the sentencing statute. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

"Prior criminal conduct", as used in this section, does not require proof of a prior criminal conviction, but may consist of a record of juvenile offenses or other criminal conduct which has not been the subject of prior prosecution. *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987).

Subsection (1)(b)(I) does not limit consideration of "criminal conduct" to

felony convictions. *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Trial court did not abuse its discretion in determining defendant's sentence by relying on facts from another case before the same court in which defendant was acquitted of first and second degree murder. A trial court may consider a wide range of evidence in determining a defendant's sentence, including facts relating to charges of which the defendant has been acquitted. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Where record contains no indication of prior criminal conduct by defendant, trial court improperly predicted potential for future criminality of defendant. *People v. Garciadealba*, 736 P.2d 1240 (Colo. App. 1986).

Sentence must be supported by reasons in record. When the maximum or near-maximum sentence is imposed, it must be supported by sound reasons in the record. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

In felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. The statement need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Where a sentence is imposed for an extended term, the record must clearly justify the action of the sentencing judge. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981).

There must be sufficient facts in the record to support the trial court's final decision. *People v. Walters*, 632 P.2d 566 (Colo. 1981).

When sentence is in presumptive range, court need only set forth the basic reasons and primary factual considerations bearing on the court's sentencing decision. *People v. Hughes*, 946 P.2d 509 (Colo. App. 1997).

The trial court is required to state on the record the basic reasons for imposing a sentence in a particular case. There is no ritualistic format for placing in the record the trial court's justification of the imposed sentence; however, appellate review of the propriety of a sentence outside the presumptive range requires sufficient findings by the trial court to demonstrate a threshold consideration of the factors set forth in subsection (1)(b), supplemented by sufficient findings pursuant to subsection (6). *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

When a court imposes an aggravated sentence that is not based on a factor set forth in subsection (9)(a), the court must make specific findings, supported by evidence in the record of the sentencing hearing or the presentence report, detailing the extraordinary aggravating factors present. *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

When a sentence outside the presumptive range is imposed, the court is required to place on the record its findings as to the aggravating or mitigating circumstances that justify variation from the presumptive range. *People v. Vela*, 716 P.2d 150 (Colo. App. 1985); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

However, it is not necessary for the sentencing court to refer explicitly to each of the factors. To the extent that *People v. Piro* (671 P.2d 1341) may suggest otherwise, it is disapproved. *People v. Walker*, 724 P.2d 666 (Colo. 1986); *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987); *People v. Sudduth*, 991 P.2d 315 (Colo. 1999); *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002).

A plea agreement that does not constrain the sentencing court's discretion cannot be construed to limit the possible sentence to the presumptive range. *People v. Moriarity*, 8 P.3d 566 (Colo. App. 2000).

The court's statutory authority to sentence a defendant to the department of corrections does not expressly include the authority to dictate the conditions of confinement. The management, supervision, and control of department facilities are exclusively vested in its director. *People v. Harris*, 934 P.2d 882 (Colo. App. 1997).

A trial court may impose a sentence outside the applicable presumptive range only if extraordinary aggravating and mitigating circumstances are present based on evidence in the record of the sentencing hearing and the presentence report. *People v. Walker*, 724 P.2d 666 (Colo. 1986); *People v. Hernandez-Luis*, 879

P.2d 429 (Colo. App. 1994); *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

Subsection (5) conflicts with the provisions of § 18-1.4-102 (8) and (9). Subsection (5) of this section requires the court to impose a life sentence on a defendant sentenced to death under an unconstitutional death penalty scheme. In contrast, § 18-1.4-102 (8) and (9) allow the supreme court to review the death sentence or remand for a new sentencing hearing. Subsection (5) is a mandatory provision and therefore it applies over the discretionary provision. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Subsection (6), properly applied, is constitutional in light of *Apprendi* and *Blakely*. A constitutional aggravated sentence based on subsection (6) must rely on 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 the judge after the defendant stipulates to judicial fact-finding for sentencing purposes; (4) facts regarding prior convictions. The first three are Blakely-compliant facts, and the fourth is a Blakely-exempt fact. Defendant's aggravated sentence was based in part on a prior conviction; therefore, the sentence was constitutional. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *People v. Huber*, 139 P.3d 628 (Colo. 2006); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

A conviction for an offense that occurs after the offense that the court is applying aggravated sentencing to may be a "prior conviction" for Blakely-exempt purposes

if the conviction is entered before the sentencing on the aggravated sentence offense. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

All convictions obtained in accordance with the sixth and fourteenth amendments of the federal constitution fall within the prior-conviction exception to *Apprendi* and *Blakely*. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

The exception extends beyond the fact of conviction to facts regarding prior convictions. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A defendant's prior-conviction-related probation or supervision falls within the exception. The prior-conviction exception extends to facts regarding prior convictions that are contained in conclusive judicial records. Because a defendant's sentence to probation or supervision can be found in the judicial record, a trial court may properly consider this fact without violating the defendant's Blakely rights. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A single Blakely-compliant fact or Blakely-exempt fact is sufficient to support an aggravated sentence. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *DeHerrera v. People*, 122 P.3d 992 (Colo. 2005); *People v. Huber*, 139 P.3d 628 (Colo. 2006).

The sentence is constitutional even if the court relies on facts that satisfy Blakely and facts that violate Blakely. *Lopez v. People*,

113 P.3d 713 (Colo. 2005); DeHerrera v. People, 122 P.3d 992 (Colo. 2005).

Court erred in aggravating the kidnapping sentence based upon the jury's finding that defendant used a deadly weapon during the sexual assault. Because the jury did not specifically find that defendant used the weapon during the kidnapping, the weapon's use was neither a Blakely-compliant nor a Blakely-exempt fact. People v. Glasser, 293 P.3d 68 (Colo. App. 2011).

Prior conviction exception includes prior misdemeanor convictions. Reliance on defendant's prior misdemeanor convictions to enhance defendant's sentence does not violate defendant's constitutional rights under Apprendi and Blakely. People v. Martinez, 128 P.3d 291 (Colo. App. 2005).

Prior conviction exception includes prior juvenile adjudications. Under Apprendi and Blakely, a sentencing court may determine facts regarding juvenile adjudications and use them as a basis to impose an aggravated range sentence despite the lack of a right to a jury trial in delinquency proceedings. People v. Mazzoni, 165 P.3d 719 (Colo. App. 2006).

Extraordinary aggravating circumstances in subsection (6) are the normal circumstances a trial court considers in imposing a sentence, including the character and history of the defendant and the particular circumstances of the offense, which become "extraordinary" because of their quantity or quality. They are not specified facts or considerations that, if found, mandate an increased penalty range

or class of the offense. People v. Allen, 78 P.3d 751 (Colo. App. 2001); People v. Trujillo, 75 P.3d 1133 (Colo. App. 2003).

Sentence of twice the maximum term authorized in the presumptive range not abuse of court's discretion pursuant to subsection (6) where trial court identified a number of extraordinary circumstances beyond those which constituted elements of the offense with which defendant was charged. People v. Jones, 851 P.2d 247 (Colo. App. 1993); People v. Allen, 78 P.3d 751 (Colo. App. 2001); People v. Kitsmiller, 74 P.3d 376 (Colo. App. 2002).

Sentence found excessive. Defendant's sentence of a minimum of 32 years exceeded what is authorized by subsection (6), since the minimum sentence is greater than twice the 12-year presumptive maximum for a class 3 felony. People v. Clark, 214 P.3d 531 (Colo. App. 2009), aff'd on other grounds, 232 P.3d 1287 (Colo. 2010).

To impose a sentence beyond the presumptive range, the court must make a specific finding on the record that the Blakely-compliant or Blakely-exempt fact is extraordinarily aggravating. Although a court may rely on facts that are not Blakely-compliant or Blakely-exempt to further justify its imposition of an aggravated sentence, it may do so only if it has found a Blakely-compliant or Blakely-exempt fact to be extraordinarily aggravating. People v. Fiske, 194 P.3d 495 (Colo. App. 2008).

The determination whether Blakely-compliant or Blakely-exempt facts are extraordinarily aggravating

circumstances remains within the discretion of the trial court. *People v. Fiske*, 194 P.3d 495 (Colo. App. 2008).

A sentence based on extraordinary aggravating factors, subsection (6), does not require an Apprendi jury finding. The sentence was based on unenumerated and unspecified factors frequently considered in sentencing decisions. Those are not the types of factors considered in *Apprendi* and its progeny. *People v. Rivera*, 62 P.3d 1056 (Colo. App. 2002).

Judicial finding of extraordinary aggravating circumstances not unlawful under *Apprendi*. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement to a correctional facility. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Section 18-18-405 (3)(a)(I) is a sentence enhancer that requires a court to impose a mandatory minimum sentence of at least four years and limits its discretion to impose a lesser sentence under subsection (6). *People v. Rice*, 2015 COA 168, 378 P.3d 791 (decided under law in effect prior to the 2012 amendment to § 18-18-405).

If plea agreement does not acknowledge presence of aggravating factors, *Apprendi* is applicable, and no

sentence beyond the presumptive range may be imposed unless the facts relied upon to aggravate the sentence have been submitted to and determined by a jury. *People v. Misenhelter*, 121 P.3d 230 (Colo. App. 2004).

Trial court relied on Blakely-compliant facts as extraordinary aggravating circumstances to justify sentencing the defendant in the aggravating range pursuant to subsection (6). At least one of the aggravating factors for each conviction was based on a fact that the jury had to find to convict defendant of one of the other offenses. *Mountjoy v. People*, 2018 CO 92M, 430 P.3d 389.

While defendant admitted at providency hearing and in written plea agreement that prior misdemeanor conviction constituted a Blakely-exempt fact that widened the sentencing range and that the court could consider to impose an aggravated sentence, defendant did not admit that the prior misdemeanor was an extraordinary aggravating fact. Because the court imposed a sentence beyond the presumptive range without determining whether the sole Blakely-exempt fact was an extraordinarily aggravating fact that supported an aggravated sentence, the sentence was vacated and the case remanded for resentencing. *People v. Fiske*, 194 P.3d 495 (Colo. App. 2008).

Defendant's right to a jury determination of aggravating factors is not waived by pleading guilty to the charged offense. A guilty plea cannot be

interpreted as a waiver of the right to have a jury determine factors exposing a defendant to greater punishment than otherwise authorized by the sentencing statute. A sentence beyond the relevant statutory maximum may be imposed only if a jury has determined the aggravating factors or the defendant has admitted them. *People v. Solis-Martinez*, 121 P.3d 215 (Colo. App. 2004).

Colorado law does not contemplate an increase in the statutory maximum sentence to which a defendant has subjected himself by pleading guilty, based on subsequent jury findings, which are the functional equivalent of elements of a greater offense than the one to which he pled. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Allowing consideration of subsequent jury findings to increase a defendant's statutory maximum sentence would violate the requirement of Crim. P. 11 that the defendant understand the elements of the offense to which he pleads and the effects of his plea before his plea can be accepted. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Defendant has no constitutional right to a jury trial to determine whether or not he or she has a prior conviction. That is an inquiry and finding the trial judge is entitled to make. *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part, denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and

People v. Huber, 139 P.3d 628 (Colo. 2006), aff'd, 165 P.3d 836 (Colo. App. 2007).

The statutory maximum for purposes of applying Apprendi and Blakely is the maximum in the presumptive range. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

The statutory maximum for a community corrections sentence for purposes of the Blakely rule is no different than the statutory maximum for a prison sentence. The firmly established rule from *Blakely* as applied to Colorado's sentencing scheme in *Lopez v. People*, 113 P.3d 713 (Colo. 2005), also applies to a direct sentence to community corrections in Colorado. *People v. Sandoval*, 2016 COA 19, 488 P.3d 98, aff'd, 2018 CO 21, 413 P.3d 1274.

District court plainly erred in aggravating defendant's community corrections sentence based on facts that were neither *Blakely*-compliant nor *Blakely*-exempt. *People v. Sandoval*, 2016 COA 19, 488 P.3d 98, aff'd, 2018 CO 21, 413 P.3d 1274.

If the court resentences an offender to prison after rejection by community corrections, it is not a new sentence (requiring new findings for a sentence outside the presumptive range) unless the offender would suffer some substantial procedural prejudice. The court found no prejudice because the length of the original sentence was not changed and the offender received full credit for time served in community corrections. *People v. Kitsmiller*, 74 P.3d 376 (Colo. App. 2002).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

When the defendant stipulates to a sentence in the aggravated range as part of a plea agreement, the defendant also stipulates that sufficient facts exist to warrant an aggravated sentence, thus the trial court must not make additional findings on the record to comply with subsection (7). *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004).

Trial court was not required to make specific findings detailing its reasons for varying from the presumptive range. *People v. Roy*, 948 P.2d 99 (Colo. App. 1977).

Trial court not required to discuss each factor enumerated in sentencing statute. *People v. Bustamante*, 694 P.2d 879 (Colo. App. 1984).

When written findings of specific extraordinary circumstances not necessary at sentencing. The fact that the court did not enter written findings of the specific extraordinary circumstances justifying a sentence beyond the presumptive stage until a week after the sentencing did not invalidate the sentence, where the judge had stated the reasons for the sentence orally at the time it was imposed. *People v. Cantwell*, 636 P.2d 1313 (Colo. App. 1981).

The decision of the trial court to sentence consecutively for separate offenses is discretionary and, in general, courts are free to impose concurrent or consecutive sentences as the situation warrants. *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987); *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

And in determining the appropriateness of the sentence, the trial court relies on the sentencing factors set forth in § 18-1-102.5. *People v. King*, 765 P.2d 608 (Colo. App. 1988), *aff'd*, 785 P.2d 596 (Colo. 1990).

No abuse of discretion in the sentence imposed under subsection (7) where trial court sufficiently separated its findings of extraordinary aggravating circumstances in the two cases and gave due consideration to all relevant sentencing factors. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

The aggravator for committing a felony while on probation applies to a defendant on probation in another state. *People v. Fogle*, 116 P.3d 1227 (Colo. App. 2004).

When defendant admits the fact that is the basis for the enhanced sentence, the defendant's sentence was not illegal under Apprendi. Even though it was defense counsel that represented the defendant was on probation during the commission of the felony, the defendant did not object to this statement. Thus, the statement was an admission of the defendant. *People v. Fogle*, 116 P.3d 1227 (Colo. App. 2004).

Federal supervised release is effectively the same as parole for purposes of aggravating sentences under subsection

(8)(a)(II). Because federal supervised release and parole have similar purposes and impose similar restrictions, the general assembly must have intended to include federal supervised release within the ambit of subsection (8)(a)(II). *People v. Reed*, 2013 COA 113, 338 P.3d 364.

Court may aggravate sentence pursuant to subsection (8)(a)(III) based on the judge-found fact that defendant was on probation at the time of the crime. *People v. Roberts*, 179 P.3d 129 (Colo. App. 2007).

If a fact admitted by a defendant is a Blakely-compliant factor, it is sufficient to support imposition of an aggravated sentence. *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Imposition of an aggravated range sentence pursuant to subsection (8)(a)(II) satisfies Blakely where defense counsel admitted that defendant had been on parole at the time of the offense and defendant did not object to counsel's statement or dispute the truth of it. *People v. Scott*, 140 P.3d 98 (Colo. App. 2005); *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Where controlled substance offenses were reclassified as class 2 felonies, it was proper for court to apply sentence enhancers of subsection (8)(a)(II). *People v. Robinson*, 187 P.3d 1166 (Colo. App. 2008).

The general sentence aggravator in subsection (8)(a)(IV) of this section does not apply to the crime of second degree assault on a correctional officer. Section 18-3-203 (1)(f) defines second degree

assault on a correctional officer and contains its own aggravator. Therefore, the specific aggravator applies, not the general one. *People v. Willcox*, 80 P.3d 817 (Colo. App. 2002).

Nothing in the language of subsection (8)(g) of this section or § 18-3-106 suggests a legislative intent to preempt the felony murder statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

An aggravated range sentence has both a qualitative and a quantitative dimension. The sentencing court makes a qualitative decision to depart from the presumptive range, which is subject to sixth amendment scrutiny under Blakely. The court then makes a quantitative decision of where to sentence within the aggravated range, which is not subject to further sixth amendment challenge. These two dimensions make exclusion of a constitutionally impermissible factor articulated in support of the sentence especially difficult, unless the record clearly shows that this factor was considered only to determine placement within the aggravated range. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

A sentence within the aggravated range is mandated whenever any of the extraordinary aggravating circumstances specifically enumerated in subsection (9)(a) are present. *People v. District Court*, 713 P.2d 918 (Colo. 1986); *People v. Leonard*, 755 P.2d 447 (Colo. 1988); *People v. Chavez*, 764 P.2d 356 (Colo. 1988); *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part, denied in part,

judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), *aff'd*, 165 P.3d 836 (Colo. App. 2007).

Prior felony conviction that was the event that triggered enhanced sentencing falls within the prior conviction exception to the Apprendi rule. *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005).

Where defendant committed second degree kidnapping while on bond for a felony charge for which he was subsequently convicted by the time of the sentencing hearing for kidnapping, trial court was obligated to impose sentence pursuant to subsection (9)(a). *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005).

Extraordinary circumstances required in findings. Sentence vacated and case remanded for sentencing where trial court failed to make specific findings on the record detailing extraordinary circumstances to vary from the presumptive range. *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993); *People v. Blankenship*, 30 P.3d 698 (Colo. App. 2000).

Mandatory sentencing of defendant on parole status under subsection (9) is a definite, immediate, and automatic consequence of plea which defendant must understand. *People v. Chippewa*, 713 P.2d 1311 (Colo. App. 1985).

Guilty plea constitutes a conviction within the meaning of subsection (9). Defendant, who had pled guilty to a separate

offense and was out on bond, asserted that because he or she had not yet been sentenced for the prior felony at the time the trial court for the latter offense sentenced him or her, he or she was not yet "convicted". Defendant's guilt of a prior felony, not the punishment sentenced or received, is what is relevant for the purpose of defining "conviction" under subsection (9)(a). *People v. French*, 141 P.3d 856 (Colo. App. 2005), *cert. granted in part, denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), *aff'd*, 165 P.3d 836 (Colo. App. 2007).

Escape from confinement while on probation required sentencing in aggravated range. *People v. Herman*, 767 P.2d 752 (Colo. App. 1988).

Due process requires that defendant be given reasonable notice that he is subject to enhanced sentencing under subsection (9)(a)(III) of this section. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986).

Because defendant was convicted of a per se crime of violence under § 16-11-309, the trial court was required to sentence him under the enhanced sentence provisions of subsection (9) of this section. The prosecution was not required to charge a crime of violence separately and the jury was not required to determine its existence in order for the trial court to sentence defendant under the provisions of subsections (9) and (9.7). *People v. Lee*, 989

P.2d 777 (Colo. App. 1999); *People v. Hoang*, 13 P.3d 819 (Colo. App. 2000). But see *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Subsection (9)(a)(III) does not violate equal protection for lack of express provisions concerning the rights to reasonable notice and to have the prosecution prove the asserted probationary status where those rights exist independently of the statute. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986); *People v. Herman*, 767 P.2d 752 (Colo. App. 1988).

Subsection (9)(a)(IV) does not violate defendant's equal protection rights since there is a reasonable basis for the classification. *People v. Anderson*, 784 P.2d 802 (Colo. App. 1989).

Subsection (9)(a)(V) did not apply to the crime of escape and attempted escape where the general assembly had provided for enhanced punishment for the crimes of escape elsewhere, specifically in §§ 18-8-208.1 and 18-8-209, and where the general assembly did not amend this section to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

The prohibition against the suspension of a sentence for felony child abuse contained in subsection (9)(d)(II) is an exception to the general rule for suspending sentences in subsection (10). Subsection (9)(d)(II) is the more specific statute and subsection (10) is a statute of broader scope. *People v. Smith*, 932 P.2d 830 (Colo. App. 1996).

Subsection (9)(a)(III) is a sentence enhancement statute to which procedural safeguards attach. *People v. Lacey*, 723 P.2d 111 (Colo. 1986).

Subsection (9)(a)(III) applies to persons on probation for felonies committed outside of Colorado. This provision was intended to subject all felony probationers sentenced to incarceration to a sentence in the aggravated range, regardless of the jurisdiction in which the felony conviction was entered and, if deemed a felony in another state, irrespective of the offense classification in this state. *People v. Sellers*, 762 P.2d 749 (Colo. App. 1988).

The language of subsection (9)(a)(III) is not ambiguous. The felony for which a defendant is on probation need not be the same felony offense for which he or she is being sentenced. *People v. Moltrier*, 983 P.2d 810 (Colo. App. 1999).

The provisions of subsection (9)(a)(III) that increase the minimum sentence to a point within the original presumptive range do not implicate Apprendi. Thus the allegation of whether defendant was on probation at the time of the offenses need not be submitted to the jury and proved beyond a reasonable doubt. *People v. Gardner*, 55 P.3d 231 (Colo. App. 2002).

Subsection (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of escape under § 18-8-208. *People v. Jackson*, 703 P.2d 618 (Colo. App. 1985); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985); *People v. Brewer*, 720 P.2d 583 (Colo. App. 1985).

Nor does subsection (9)(a)(V) require the imposition of such a sentence upon conviction of the crime of attempted escape under § 18-8-208. *People v. Martinez*, 703 P.2d 619 (Colo. App. 1985).

Nor does subsection (9)(a)(V) require the imposition of such a sentence upon conviction of criminal attempt to commit escape under § 18-2-101. *People v. Lobato*, 703 P.2d 623 (Colo. App. 1985).

Subsection (9)(a)(V) did not apply to the crime of second-degree burglary where defendant had been charged with, but not convicted of, another felony at the time of commission of the burglary. *People v. Nichols*, 920 P.2d 901 (Colo. App. 1996).

Phrase "at least" in § 18-1-105 (9) 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).

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).

Escapee properly sentenced in the aggravated range pursuant to subsection (9.5) when the felony escape occurred while the defendant was charged with a previous felony, and was convicted of that previous felony. *People v. Phillips*, 885 P.2d 359 (Colo. App. 1994).

The intent of the general assembly in enacting subsection (9.5)(b) is to discourage the recidivism by subjecting those persons who are on bond and subsequently convicted of a felony to sentencing in the aggravated range. *People v. Saucerman*, 926 P.2d 130 (Colo. App. 1996).

A defendant who commits a felony while on bond after having pled guilty to a lesser offense is subject to the sentence-enhancing provisions of this statute. *People v. Saucerman*, 926 P.2d 130 (Colo. App. 1996).

Aggravated sentence based upon element which was also element of substantive offense did not offend equal protection or create double jeopardy. Aggravated sentence was permissible where defendant's confinement in correctional facility was both element of controlled substances offense and circumstance requiring sentence in aggravated range under subsection (9)(a)(V). *People v. Leonard*, 755 P.2d 447 (Colo. 1988).

An aggravated sentence is allowed where the defendant's confinement in correctional facility was both an element of attempt to introduce contraband into a detention facility and a circumstance requiring sentence in aggravated range under

subsection (9)(a)(V). *People v. Chavez*, 764 P.2d 356 (Colo. 1988).

Aggravated sentence allowed where the defendant's confinement in a detention facility was an element of unlawful possession of marihuana in a detention facility and the confinement as a convicted felon was a circumstance requiring a sentence in the aggravated range under what is now subsection (8)(a)(IV). *People v. Nitz*, 104 P.3d 240 (Colo. App. 2004).

Violent crime sentence enhancer cannot apply to first degree heat of passion assault. *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

Constitutional bar to subjecting defendant to greater penalty for causing serious bodily injury with deadly weapon than if defendant had caused death of victim. *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

The term "under confinement", for purposes of subsection (9)(a)(V), includes a sentence to community corrections for a prior felony, even if the defendant had been transferred to nonresidential status at community corrections, and such a defendant must be sentenced within the aggravated range. *People v. Miller*, 747 P.2d 12 (Colo. App. 1987).

Parole statutes may be considered as aggravating circumstances. *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

Sentence supported by finding of "aggravating circumstances". A finding of aggravating circumstances justifies the imposition of a sentence at the higher end of

the presumptive range, pursuant to subsection (1)(b), but cannot be the basis for a sentence outside of the presumptive range, because such a finding is not specific enough to satisfy the requirements of subsection (7). *People v. Maldonado*, 635 P.2d 240 (Colo. App. 1981).

There was ample support for the aggravated sentence imposed where the court properly considered the defendant's prior criminal record. The fact that the court found aggravating factors more compelling than mitigating factors does not constitute an abuse of discretion or indicate that the court did not consider mitigating factors. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Sentencing error where extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. *People v. Jenkins*, 674 P.2d 981 (Colo. App. 1983).

Where the court justified variation from the presumptive sentencing range solely upon the harm done to the victim and as a deterrent to others in the community, the trial court erred and is reversed. *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985).

When reviewing sentences for excessiveness, appellate courts must consider the nature of the offense, the

character of the offender, and the public interest in safety and deterrence. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

Appellate courts must also accord considerable deference to a sentence imposed by the trial court because of that court's familiarity with the circumstances of the case. *People v. Fuller*, 791 P.2d 702 (Colo. 1990); *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

No error where trial court considered defendant's presentation of perjured testimony in imposing the maximum aggravated sentence for his felony conviction. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002) (citing *United States v. Dunnigan*, 507 U.S. 87 (1993)).

Trial court considered defendant's presentation of perjured testimony only in determining the appropriate penalty within the sentencing range mandated by statute, rather than making any factual determination that altered the applicable sentencing range. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002) (distinguishing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

Sentencing beyond presumptive range not justified where defendant was under supervision of probation department at time of commission of felony and not under confinement or in an institution as required by statute. *People v. Wells*, 691 P.2d 361 (Colo. App. 1984).

The presumptive range for a class 6 felony could not be doubled and then the sentence quadrupled because the

defendant was also considered an habitual offender. The defendant was convicted of stalking while the defendant was on parole from prison. The stalking offense qualified the defendant as an habitual offender. Stalking is a class 6 felony. This section requires the doubling of the presumptive range of the conviction for offenses that occur while on parole. Section 16-13-101 (2) requires the quadrupling of offenses committed by habitual offenders. Section 16-13-101 (2), however, does not authorize the quadrupling of a sentence that is already increased. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

Person must be convicted of same felony for which charged for court to find extraordinary aggravating circumstance. Conviction of criminal impersonation when sexual assaults were committed did not constitute an aggravating circumstance. *People v. Tuck*, 937 P.2d 810 (Colo. App. 1996).

However, for the extraordinary aggravating circumstance described in subsection (9)(a)(III) to apply, the felony for which a defendant is on probation need not be the same felony offense for which he or she is being sentenced. *People v. Moltrre*, 983 P.2d 810 (Colo. App. 1999).

Where defendant was on probation for another felony at the time of the commission of a felony, the failure of the court to sentence the defendant to a term greater than the presumptive range due to the presence of an extraordinary aggravating circumstance was error. *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

Cost to the taxpayers of the defendant's trials and the fact defendant acted alone are not aggravating sentencing factors and were improperly considered in sentencing. *People v. Arguello*, 737 P.2d 436 (Colo. App. 1987).

Factor which constitutes an element of the substantive crime could not constitute an extraordinary aggravating circumstance. *People v. Garciadealba*, 736 P.2d 1240 (Colo. App. 1986).

However, factual matters relevant to particular elements of an offense but that do not actually establish any elements may be considered by the trial court as extraordinary aggravating circumstances. *People v. Sanchez*, 769 P.2d 1064 (Colo. 1989); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Subsection (9)(c) permits the sentencing court to consider aggravating factors other than those specifically set forth in statute when imposing an extraordinary aggravated sentence. *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Subsection (10) does not apply to crimes of violence that are sexual offenses. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd* on other grounds *sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Aggravated sentence supported by appropriate factors and sufficient findings where the court found that the offense was extremely violent, the victim lay helpless and unconscious through most of the attack, the victim in no way provoked

the attack, the defendant denied his involvement in the attack, and the defendant had consumed alcohol the night of the incident. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

Defendant's argument that the use of force in committing assault was an essential element of the crime and should not be considered as an aggravating factor was without merit. *People v. Silva*, 782 P.2d 846 (Colo. App. 1989).

Defendant's argument that, before a court can consider psychological or other adverse impacts of a crime on victims and their families as an extraordinary aggravating circumstance, there must be evidence that the impact is greater than that which is "normally" experienced by other victims of crime was found to be without merit. Such a requirement would be inconsistent with the legislative intent that sentencing courts be granted broad discretion in distinguishing between "ordinary" and "extraordinary" circumstances depending upon the specific facts of each case. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Sentence modified on appeal only if trial court abused discretion. The trial court has great leeway in imposing sentence and, absent a clear abuse of discretion, the trial court's decision will not be modified on appeal. *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Proof of clear abuse of discretion needed to overturn sentencing decision. The trial court's sentencing decision will not

be overturned on appeal absent a showing that the trial court's wide latitude is marked by a clear abuse of discretion. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981).

Factors considered in appellate review of sentence. On review of the propriety of a sentence, the Colorado supreme court considers three factors: (1) The nature of the offense; (2) the public interest in safety and deterrence; and (3) the character of the offender. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981); *People v. Magee*, 626 P.2d 1139 (Colo. 1981); *People v. Walters*, 632 P.2d 566 (Colo. 1981); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981).

Felonies committed before July 1, 1981. The requirement for written findings survives for felonies committed before July 1, 1981. *People v. Sanchez*, 644 P.2d 95 (Colo. App. 1982).

Sentence upheld. Sentence of 15 to 30 years for second-degree murder was not an abuse of discretion. *People v. La Plant*, 670 P.2d 802 (Colo. App. 1983).

Minimum sentence within presumptive range for criminally negligent child abuse resulting in death was proper when it was supported by the evidence, reflected a proper balancing of mitigating and aggravating factors, and did not give undue weight to any one factor. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Fifteen-year sentence for second-degree arson committed while defendant was on

parole did not constitute abuse of discretion by trial court. *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

Sentence of 40 years' imprisonment for defendant convicted of child abuse resulting in death did not constitute abuse of discretion on the part of the trial court. The sentence was within the range required by subsection (9)(d)(I), and the trial court made extensive and detailed findings in imposing the sentence, took into consideration the sentencing factors set forth in § 18-1-102.5, and appropriately considered mitigating and aggravating factors in imposing the sentence. *People v. Garcia*, 964 P.2d 619 (Colo. App. 1998), rev'd on other grounds, 997 P.2d 1 (Colo. 2000).

The trial court did not abuse its discretion in imposing an aggravated sentence that was not based on a factor specified in subsection (9)(a) where the court made written findings that defendant posed a danger to society, that defendant had inflicted substantial emotional and psychological harm on his victims, that the victims were extremely vulnerable, that defendant was likely to reoffend, and that the jury had determined that one of the counts was a crime of violence. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

In light of the requirement that defendant receive an enhanced sentence if sentenced to a term of imprisonment, the trial court did not err in failing to consider a suspended sentence as a sentencing option. *People v. Nastiuk*, 914 P.2d 421 (Colo. App. 1995).

Sentence vacated and case remanded for re-sentencing where defendant was sentenced in an enhanced range for being on bond for an offense which was later dismissed. People v. Bachofer, 192 P.3d 454 (Colo. App. 2008).

Statutory authority of court to suspend sentences applicable to both misdemeanor and felony offenses. People v. Schwartz, 823 P.2d 1386 (Colo. App. 1991).

When a defendant receives two convictions and challenges only one of the convictions, the trial court has no authority to alter the sentence for the unchallenged conviction. People v. Wiegard, 743 P.2d 977 (Colo. App. 1987).

Under subsection (6), since defendant knew that failure to meet conditions of probation might constitute extraordinary aggravating circumstances which would justify sentencing beyond the presumptive range, the court was justified in doubling of presumptive range of sentence when defendant met neither the community service nor the restitution condition of probation. Montoya v. People, 864 P.2d 1093 (Colo. 1993); People v. Smith, 183 P.3d 726 (Colo. App. 2008).

Trial court properly related aggravating factors to defendant and the circumstances of the crime for conviction as an accessory. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Consideration of request for reduction of sentence for a crime committed after a certain date by a person sentenced after the date that sentences for that crime was

increased does not require that such a sentence be reduced, but rather leaves the matter to the discretion of the trial court. People v. Gallegos, 789 P.2d 461 (Colo. App. 1989) (decided under law in effect prior to 1989 repeal of subsection (1)(b)(VII)).

Persons convicted of child abuse resulting in death are eligible for sentence modification pursuant to § 17-27.7-104 upon successful completion of the regimented inmate training program, but the sentencing court's discretion is limited by the relevant mandatory sentencing limits. People v. Smith, 971 P.2d 1056 (Colo. 1999).

"Incarceration", for purposes of subsection (9)(a), includes a direct sentence to community corrections. People v. Saucedo, 796 P.2d 11 (Colo. App. 1990).

Conspiracy to distribute a controlled substance is not an extraordinary risk crime. A plain reading of the statute does not include inchoate crimes. People v. Valenzuela, 216 P.3d 588 (Colo. 2009).

Where the defendant was convicted of "extraordinary risk of harm" crime and adjudicated as a habitual criminal, trial court properly calculated defendant's sentence by increasing the maximum presumptive range sentence pursuant to subsection (9.7) and then multiplying it by three pursuant to § 16-13-101(1.5). People v. Hoefer, 961 P.2d 563 (Colo. App. 1998).

The trial court appropriately increased the maximum presumptive penalty based

on subsection (9.7)(a) before applying the presumptive penalty provisions applicable to crimes of violence under § 16-11-309. Thus, § 16-11-309 permits a doubling of the maximum penalty that is already increased under subsection (9.7)(a) for certain extraordinary risk crimes. *People v. Greymountain*, 952 P.2d 829 (Colo. App. 1997).

The extraordinary risk sentencing provisions of subsection (9.7) do not apply unless the defendant is actually charged with and convicted of a crime of violence, as described in § 16-11-309. In situations in which the defendant is convicted of a crime, such as second degree assault against a police officer under § 18-3-203 (2)(c), that mandates the same enhanced presumptive sentencing range as applies to a crime of violence, the defendant is not subject to the additional sentence enhancing provisions specified in subsection (9.7) unless the prosecution has specifically alleged and proved the elements of a crime of violence, as described in § 16-11-309. *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Because defendant was convicted of a per se crime of violence under § 16-11-309, the defendant was subject to an increase in the sentencing range under the extraordinary risk crime provisions of subsection (9.7); the prosecution was not required to charge a crime of violence separately and the jury was not required to determine its existence in order for the trial court to sentence defendant under the provisions of subsections (9) and (9.7). *People v. Lee*, 989 P.2d 777 (Colo. App.

1999). But see *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Imposition of a 25-year sentence for second degree murder committed in the heat of passion was not abuse of discretion and was within the range prescribed by law, because it is a per se crime of violence under § 16-11-309 and an extraordinary risk of harm crime pursuant to subsection (9.7); thus, the presumptive sentencing range was 10 to 32 years and the trial court was required to sentence defendant to a term of incarceration of at least the midpoint in the presumptive range, but not more than twice the maximum presumptive term for the offense. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Because defendant's sentence for felony murder was not based on the habitual criminal statutes and because defendant's conviction for robbery, which was based on habitual criminal statutes, was vacated, the habitual criminal convictions must be vacated as well. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Subsection (10) allows the trial court only to suspend the imposition or execution of a sentence, not the length of the sentence, and in light of the mandatory language of § 18-18-107, the trial court was required to sentence the defendant within the range set forth in the statute. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

Distinction between imposition and execution of a sentence under subsection (10). Where court suspended the execution, but not the imposition, of a four-year term in the department of corrections on condition

that defendant serve two years in a community corrections facility, the court was not thereafter precluded from resentencing defendant to four years in the department. *People v. Seals*, 899 P.2d 359 (Colo. App. 1995).

Prison sentence originally imposed becomes final notwithstanding suspension of the sentence. Suspension does not result in withdrawal of the original sentence, but in the suspension of the execution of the sentence subject to express conditions. If a condition is violated, the suspension may be vacated, and execution of the original sentence can be carried out. In such a circumstance, the pronouncement of a new sentence is both unnecessary and improper. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

Amendment to subsection (10), requiring recommendation for suspended sentence, applies prospectively and is inapplicable to defendant who committed crime prior to date amendment was enacted. *People v. Munoz*, 857 P.2d 546 (Colo. App. 1993).

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where the defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Former § 18-1-105 (10) does not authorize a court to suspend a statutorily enhanced sentence where mandatory minimum sentence was applicable to defendant who was on probation at the time

of offense. *People v. Munoz*, 857 P.2d 546 (Colo. App. 1993).

Pursuant to the plain language of former § 18-1-105 (10) (now recodified with amendments under subsection (11)), if a defendant is sentenced pursuant to a mandatory sentencing provision, the sentencing court has no power to suspend either the imposition or execution of the sentence. *People v. Hummel*, 131 P.3d 1204 (Colo. App. 2006).

The statutory authority to impose a sentence is determined by the sentencing scheme in effect on the date of the offense. To the extent *People v. Hummel* annotated above suggests otherwise, the appellate court declined to follow it. *People v. Wolfe*, 213 P.3d 1035 (Colo. App. 2009).

Court not bound to apply original sentence upon revocation of probation. Because suspension of a sentence is in conjunction with, rather than contradistinction to, the imposition of a statutorily prescribed alternative to imprisonment, the sentencing court's resentencing options upon revocation were dictated by statutory provisions governing revocation of probation. *Fierro v. People*, 206 P.3d 460 (Colo. 2009).

Defendant was incorrectly sentenced under the extraordinary risk enhancement provision in subsection (10) because it is inapplicable to offenses committed after November 1, 1998. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

Attempted second degree murder is not a crime of violence "as defined in" § 18-

1.3-406, so it is not subject to extraordinary risk sentencing. The offense does not have an element that meets the definitional criteria in § 18-1.3-406. *People v. Baca*, 2015 COA 153, 378 P.3d 780.

The presumptive sentencing range for the class 4 felony offense of attempted unlawful distribution of a schedule II controlled substance is two years to six years, pursuant to subsection (1)(a)(V)(A). Such an attempt does not constitute a crime that presents an extraordinary risk of harm to society as defined in the legislative intent stated in subsection (10)(a). Thus, the maximum sentence in the presumptive range shall neither be increased nor be subject to subsection (10)(b)(XI). *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Not illegal sentence when court first increased maximum presumptive sentence for extraordinary risk enhancement pursuant to subsection (10) for felony child abuse and then applied mandatory language of subsection (8)(d). *People v. Ortega*, 266 P.3d 424 (Colo. App. 2011).

Applied in *People ex rel. Dunbar v. Moore*, 125 Colo. 571, 245 P.2d 467 (1952); *People v. Peters*, 151 Colo. 409, 378 P.2d 205 (1963); *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975); *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975); *People v. Marchese*, 37 Colo. App. 65, 541 P.2d 1264 (1975); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Smith*, 195 Colo. 404, 579 P.2d 1129

(1978); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978); *People v. Burns*, 197 Colo. 284, 593 P.2d 351 (1979); *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979); *People v. Toomer*, 43 Colo. App. 343, 604 P.2d 1180 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *People v. Wylie*, 605 P.2d 494 (Colo. App. 1980); *People v. Hostetter*, 606 P.2d 80 (Colo. App. 1980); *People v. Abila*, 606 P.2d 80 (Colo. App. 1980); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Hall*, 619 P.2d 492 (Colo. 1980); *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *People v. Macias*, 631 P.2d 584 (Colo. 1981); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Lucero*, 632 P.2d 585 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922; *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Reynolds*, 638 P.2d 43 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Mattas*, 645 P.2d 254 (Colo. 1982); *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *People v.*

Dunoyair, 660 P.2d 890 (Colo. 1983); Corr v. District Court, 661 P.2d 668 (Colo. 1983); People v. Bridges, 662 P.2d 161 (Colo. 1983); People v. Espinoza, 669 P.2d 142 (Colo. App. 1983), aff'd, 712 P.2d 476 (Colo. 1985); People v. Piro, 701 P.2d 878 (Colo. App. 1985); People v. Jenkins, 710

P.2d 1157 (Colo. App. 1985); People v. Lucero, 714 P.2d 498 (Colo. App. 1985); People v. Broga, 750 P.2d 59 (Colo. 1988); People v. Flores, 757 P.2d 159 (Colo. App. 1988); People v. Wilson, 819 P.2d 510 (Colo. App. 1991); Patton v. People, 35 P.3d 124 (Colo. 2001).

18-1.3-401.5. Drug felonies classified - presumptive and aggravated penalties - legislative intent.

(1) The provisions of this section only apply to a conviction for a drug felony offense described in article 18 of this title committed on or after October 1, 2013. For purposes of this section, "felony" means any felony or drug felony defined in the state statutes.

(2) (a) For offenses committed on or after October 1, 2013, drug felonies are divided into four levels that are distinguished from one another by the ranges of penalties, which are authorized upon conviction of a drug felony:

Level	Presumptive Range		Period of Parole
DF1	Eight years	Thirty-two years	Three years
DF2	Four years	Eight years	Two years
DF3	Two years	Four years	One year
DF4	Six months	One year	One year

Level	Aggravated Range		Period of Parole
DF2	Eight years	Sixteen years	Two years
DF3	Four years	Six years	One year
DF4	One year	Two years	One year

(b) (I) As to any person sentenced for a drug felony committed on or after October 1, 2013, except as otherwise provided in subparagraph (V) of this paragraph (b) and in subsection (7) of this section, in addition to, or in lieu of, any sentence to imprisonment, probation, community corrections, or work release, a fine within the following ranges may be imposed for the specified level of drug felonies:

Level	Minimum Sentence	Maximum Sentence
DF1	Five thousand dollars	One million dollars
DF2	Three thousand dollars	Seven hundred fifty thousand dollars
DF3	Two thousand dollars	Five hundred thousand dollars
DF4	One thousand dollars	One hundred thousand dollars

(II) Failure to pay a fine imposed pursuant to this paragraph (b) is grounds for revocation of probation, community corrections, or a suspended sentence, if the defendant has the ability to pay the fine.

(III) If a revocation occurs pursuant to subparagraph (II) of this paragraph (b), the court may impose any sentence legally available, subject to the provisions of section 18-1.3-104.5 (2).

(IV) All fines collected pursuant to this paragraph (b) must be deposited in the fines collection fund created in section 18-1.3-401 (1)(a)(III)(D) and are subject to the provisions of that section.

(V) Notwithstanding the provisions of subparagraph (I) of this paragraph (b), 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 paragraph (a) of this subsection (2) and may receive a fine in addition to said sentence.

(2.5) It is the intent of the general assembly that sentencing for crimes that involve fentanyl, carfentanil, benzimidazole opiate, or any analog thereof, as described in section 18-18-204 (2)(g), even in small quantities, reflect the high risk of addiction and death associated with fentanyl, carfentanil, benzimidazole opiate, or any analog thereof. Therefore, the education and

treatment procedures provided in section 18-1.3-410 must be implemented to address this substantial health risk.

(3) A 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 paragraph (a) of subsection (2) of this section. The mandatory period of parole may not be waived by the offender or waived or suspended by the court and is 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.

(4) The mandatory period of parole imposed pursuant to paragraph (a) of subsection (2) of this section commences 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 is deemed to have discharged the offender's sentence to imprisonment provided for in subsection (2) of this section in the same manner as if such sentence were discharged pursuant to law. 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 must be served by the offender. An offender sentenced for a drug felony 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.

(5) If an offender is sentenced consecutively for the commission of two or more felony offenses pursuant to sentencing provisions in this section or section 18-1.3-401, the mandatory period of parole for the offender must be the longest mandatory period of parole established for a felony for which the offender was convicted.

(6) Any person sentenced for a level 1, 2, 3, or 4 drug felony that is the offender's second or subsequent felony or drug felony offense, regardless of the length of the person's sentence to incarceration and the mandatory period of parole, is not deemed to have fully discharged his or her sentence until the person either completes, or is discharged by the state board of parole from, the mandatory period of parole imposed pursuant to paragraph (a) of subsection (2) of this section.

(7) Except as provided in section 18-18-405 (2)(a)(III)(B), notwithstanding any provision of this section to the contrary, if the defendant is convicted of a level 1 drug felony, the court shall sentence the defendant to a term of incarceration in the department of corrections of at least eight years but not more than thirty-two years. The presence of one or more of the aggravating circumstances provided in subsection (10)(a) of this section or in section 18-18-407 (1) requires the court to sentence a defendant convicted of a level 1 drug felony to a term of incarceration in

the department of corrections of at least twelve years but no more than thirty-two years. The court may impose a fine in addition to imprisonment.

(8) In imposing a sentence to incarceration, the court shall impose a definite sentence that is within the presumptive ranges set forth in subsection (2) of this section; except that, for level 2, level 3, and level 4 drug felonies, the court may sentence the defendant in the aggravated range if it concludes aggravating circumstances exist. The aggravating circumstances must be based on evidence in the record of the sentencing hearing, the presentence report, and any factors agreed to by the parties and must support a different sentence that better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5.

(9) In all cases, except as provided in subsection (10) of this section, in which a sentence that is not within the presumptive range is imposed, the court shall make specific findings on the record, detailing the aggravating circumstances that constitute the reasons for varying from the presumptive sentence.

(10) (a) Except for a level 1 drug felony, the presence of one or more of the following aggravating circumstances at the time of the commission of a drug felony offense requires 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 the maximum term of the aggravated range:

(I) The defendant was on parole for another felony;

(II) The defendant was on probation or was on bond while awaiting sentencing following revocation of probation for another felony;

(III) 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;

(III.5) The defendant was on appeal bond following his or her conviction for a previous felony;

(IV) 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; or

(V) The defendant committed a violation of section 18-18-405 (2)(a)(III)(A), and the unlawful distribution, manufacturing, dispensing, or sale of the material, compound, mixture, or preparation weighed more than fifty grams and contained fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g).

(b) In any case in which one or more of the aggravating circumstances provided for in paragraph (a) of this subsection (10) exist, the provisions of subsection (9) of this section do not apply.

(c) Nothing in this subsection (10) precludes the court from considering aggravating circumstances other than those stated in paragraph (a) of this subsection (10) as the basis for sentencing the defendant to a term greater than the presumptive range for the drug felony.

(11) Except for a level 1 drug felony, the presence of any one or more of the following sentence-enhancing circumstances allows the court, if it sentences the defendant to incarceration, to sentence the defendant to a term in the presumptive or aggravated range:

(a) At the time of the commission of the drug 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;

(b) At the time of the commission of the drug 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;

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

(c.5) At the time of the commission of the drug felony, the defendant was under a deferred judgment and sentence for another felony;

(d) At the time of the commission of the drug 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;

(e) At the time of the commission of the drug 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; or

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

(12) When it appears 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 has 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 the court may not suspend a sentence when the defendant is convicted of a level 1 drug felony. In no instance may 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).

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

(14) (a) Notwithstanding subsection (2)(a) of this section, for the purpose of sentencing a person convicted of a level 4 drug felony committed on or after July 1, 2022, in violation of section 18-18-403.5 (2.5), a court shall either sentence an offender to probation for up to two years, with the possibility of a total of one hundred eighty days in county jail, or for a third or subsequent offense, a total of up to three hundred sixty-four days in county jail, which may be imposed in whole or in part during the time period of probation as a condition of probation or as a sanction for a violation of probation; or sentence an offender to up to one hundred eighty days in the county jail; except that for a third or subsequent offense, the court may sentence an offender to up to three hundred sixty-four days in the county jail if the court sentences the offender to jail. In addition to the sentence to probation or to the county jail, the court may impose a fine of not more than one thousand dollars.

(b) A court may sentence a person convicted of a level 4 drug felony committed on or after July 1, 2022, in violation of section 18-18-403.5 (2.5), to a county jail sentencing alternative provided pursuant to section 18-1.3-106 or placement in a community corrections program as a condition of probation provided pursuant to section 18-1.3-301 (4) as a sentencing alternative.

(c) Notwithstanding any other provision of law to the contrary, an offender convicted of a level 4 drug felony committed on or after July 1, 2022, in violation of section 18-18-403.5 (2.5), is not subject to the jurisdiction of the department of corrections or a mandatory period of parole.

Source: **L. 2013:** Entire section added, (SB 13-250), ch. 333, p. 1903, § 4, effective October 1. **L. 2014:** IP(2)(b)(I), (4), (7), (11), and (12) amended and (2)(b)(V) and (10)(a)(III.5) added, (SB 14-163), ch. 391, p. 1972, § 11, effective June 6. **L. 2015:** (3) amended, (HB 15-1122), ch. 37, p. 92, § 8, effective March 20. **L. 2022:** (2.5), (10)(a)(V), and (14) added and (7), (10)(a)(III), and (10)(a)(IV) amended (HB 22-1326), ch. 225, p. 1631, § 6, effective July 1.

Cross references: For the legislative declaration in HB 15-1122, see section 1 of chapter 37, Session Laws of Colorado 2015. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Law reviews. For article, "Exceeding Colorado", see 44 Colo. Law. 43 (Dec. Presumptive Maximum Sentences in 2015).

The sentencing ranges in this section 2019 COA 90, 461 P.3d 559.
are prospective only. People v. Hamm,

18-1.3-402. Felony offenses not classified.

(1) Any felony defined by state statute without specification of its class shall be punishable as provided in the statute defining it. For felony offenses committed on or after July 1, 1993, if the sentencing court sentences an offender to incarceration pursuant to the provisions of this section, the sentencing court shall also impose a mandatory period of parole of two years.

(2) 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.

Source: L. 2002: Entire article added with relocations, p. 1402, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-108 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal other grounds, 193 Colo. 53, 561 P.2d 1268 Prosecutions under the Colorado Securities (1977) (decided prior to 2002 relocation of § Act", see 47 U. Colo. L. Rev. 233 (1976). 18-1-108).

Applied in People v. Spann, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on

18-1.3-403. Penalty for felony not fixed by statute - punishment.

(1) In all cases where an offense is denominated by statute as being a felony and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than five years in a correctional facility, as defined in section 17-1-102, C.R.S., or a fine of not more than fifteen thousand dollars, or both such imprisonment and fine. For offenses committed on or after July 1, 1985, a fine of not more than one hundred thousand dollars may be levied. For offenses committed on or after July 1, 1993, if the sentencing court sentences an offender to incarceration pursuant to the provisions of this section, the sentencing court shall also impose a mandatory period of parole of two years.

(2) 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.

Source: L. 2002: Entire article added with relocations, p. 1402, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-109 as it existed prior to 2002.

18-1.3-404. Duration of sentences for felonies.

(1) Unless otherwise provided by law and except as otherwise provided in the "Colorado Children's Code", title 19, C.R.S., courts sentencing any person for the commission of a felony to the custody of the executive director of the department of corrections shall fix a definite term as provided by section 18-1.3-401. The persons so sentenced shall be imprisoned and discharged as provided by other applicable statutes. No person sentenced to a correctional facility for the commission of a felony shall be subjected to imprisonment for a term exceeding the term provided by the statute fixing the length of the sentence for the crime of which the person was convicted and for which the person was sentenced.

(2) (a) If a court sentences a defendant to the custody of the department of corrections, the court shall, after fixing a definite term of imprisonment, read the following statement:

"The defendant may spend less time incarcerated than the term announced here today. The actual time served will be influenced by a number of factors including, but not limited to, previous criminal activities, eligibility for earned time for good behavior, correctional education program earned time, credit for time served, or community corrections eligibility."

(b) By requiring the court to read the statement contained in paragraph (a) of this subsection (2), the general assembly does not intend to grant any additional rights to the defendant. Failure of a court to comply with the requirements of paragraph (a) of this subsection (2) shall not be grounds for a defendant to withdraw a guilty plea or in any way gain a reversal of a conviction or reduction in sentence.

(2.5) If a court sentences a defendant to the custody of the department of corrections and the defendant was under twenty-one years of age when the offense was committed, the court shall make a statement that there is the possibility of the defendant being eligible to serve a portion of the defendant's sentence in the department of corrections specialized program created pursuant to section 17-34-102.

(3) (a) Nothing in subsection (2) of this section shall be construed to affect the duties otherwise imposed by law on the court or on the executive director of the department of corrections.

(b) Nothing in subsection (2) of this section shall be construed to limit, expand, or otherwise affect any provision of law concerning the availability, administration, entitlement, or award of good time credits and earned time credits.

Source: L. 2002: Entire article added with relocations, p. 1403, § 2, effective October 1. **L. 2021:** (2.5) added, (HB 21-1209), ch. 448, p. 2952, § 5, effective September 7.

Editor's note: This section is similar to former § 16-11-302 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

18-1.3-405. Credit for presentence confinement.

A person who is confined for an offense prior to the imposition of sentence for said offense is entitled to credit against the term of his or her sentence for the entire period of such confinement. At the time of sentencing, the court shall make a finding of the amount of presentence confinement to which the offender is entitled and shall include such finding in the mittimus. The period of confinement shall be deducted from the sentence by the department of corrections. A person who is confined pending a parole revocation hearing is entitled to credit for the entire period of such confinement against any period of reincarceration imposed in the parole revocation proceeding. The period of confinement shall be deducted from the period of reincarceration by the department of corrections. If a defendant is serving a sentence or is on parole for a previous offense when he or she commits a new offense and he or she continues to serve the sentence for the previous offense while charges on the new offense are pending, the

credit given for presentence confinement under this section shall be granted against the sentence the defendant is currently serving for the previous offense and shall not be granted against the sentence for the new offense.

Source: **L. 2002:** Entire article added with relocations, p. 1403, § 2, effective October 1. **L. 2009:** Entire section amended, (HB 09-1263), ch. 105, p. 383, § 3, effective August 5.

Editor's note: This section is similar to former § 16-11-306 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with the time credited on sentences, see 62 Den. U. L. Rev. 188 (1985). For article, "Colorado Felony Sentencing — an Update", see 14 Colo. Law 2163 (1985). For article, "Criminal Sentencing in Colorado After Blakely v. Washington", see 34 Colo. Law. 85 (Jan. 2005).

Annotator's note. Since § 18-1.3-405 is similar to § 16-11-306 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality. The provisions of this section, giving discretionary power to a sentencing court in granting credit for presentence confinement, are not unconstitutional. *People v. Dennis*, 649 P.2d 321 (Colo. 1982).

There is no constitutional right to receive credit for presentence

confinement. *People v. Martinez*, 192 Colo. 388, 559 P.2d 228 (1977); *Godbold v. District Court*, 623 P.2d 862 (Colo. 1981) (decided under former law); *People v. Corbett*, 713 P.2d 1340 (Colo. App. 1985) (decided under law in effect prior to 1979 repeal and reenactment).

Without legislation providing for credit for time served prior to the commencement of sentence, credit for presentence confinement is not a matter of right, since there is no constitutional right to credit. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)); *People v. White*, 623 P.2d 868 (Colo. 1981) (decided under former law); *People v. Emig*, 676 P.2d 1156 (Colo. 1984).

Constitutional right to credit for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense.

Godbold v. Wilson, 518 F. Supp. 1265 (D. Colo. 1981) (decided under former law).

Three principles should guide courts when applying this statute. First, a defendant is entitled to presentence confinement credit for each day served where there is a substantial nexus between the charge or conduct for which the defendant is confined and the sentence that is ultimately imposed. A substantial nexus exists when the defendant would have remained confined on the charge or conduct for which credit is sought in the absence of any other charge. Therefore, the People v. Torrez, 2017 CO 91, 403 P.3d 189 "but for" causation test is overruled because it is inconsistent with the language of the statute. Second, causation, not geography, is the defining question when determining whether a substantial nexus exists. Third, a defendant is not entitled to duplicative presentence confinement credit. When a defendant commits a new crime while already serving a sentence or on parole, the period of confinement prior to sentencing on the new offense will be credited only against the original sentence. Russell v. People, 2020 CO 37, 462 P.3d 1092.

Presentence confinement credit is not a component of a sentence; instead, it is time served before a sentence is imposed, which is later credited against the defendant's sentence. People v. Baker, 2019 CO 97M, 452 P.3d 759.

Confinement must result from same transaction as sentence. In order for defendant to be given credit for presentence confinement, that confinement must be a

result of the same transaction for which defendant is to be sentenced. People v. Saiz, 660 P.2d 2 (Colo. App. 1982); People v. Freeman, 705 P.2d 528 (Colo. App. 1985), rev'd on other grounds, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment); People v. Etts, 725 P.2d 73 (Colo. App. 1986); People v. Saathott, 728 P.2d 367 (Colo. App. 1986); People v. Fransua, 2016 COA 79, 457 P.3d 64, aff'd, 2019 CO 96, 451 P.3d 1208.

When a defendant is confined prior to sentencing for a different transaction from that for which he is to be sentenced, he is not entitled to credit. People v. Matheson, 671 P.2d 968 (Colo. App. 1983).

A defendant is entitled to credit for the time served as the result of the charge for which the sentence is imposed or the time served as the result of the conduct on which such charge is based, whichever is longer. Schubert v. People, 698 P.2d 788 (Colo. 1985); Torand v. People, 698 P.2d 797 (Colo. 1985); People v. Saathott, 728 P.2d 367 (Colo. App. 1986).

There must be a substantial nexus between the charge or conduct and the period of confinement for which credit is sought. Schubert v. People, 698 P.2d 788 (Colo. 1985); People v. Etts, 725 P.2d 73 (Colo. App. 1986); People v. Murray, 805 P.2d 1175 (Colo. App. 1990); People v. Bray, 819 P.2d 528 (Colo. App. 1991); People v. Finley, 141 P.3d 911 (Colo. App. 2006).

Where defendant has not proven, and the record does not establish, that there was a substantial nexus between the first county's charges and the defendant's imprisonment in

the second county jail or that the issuance of the first county's arrest warrant was the actual cause of the defendant's confinement in the second county, presentence confinement credit cannot be awarded. *People v. Freeman*, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment).

Defendant not entitled to presentence confinement credit for time defendant was confined in jurisdiction other than where defendant sought presentence confinement credit if there is a separate and independent criminal proceeding that was causing defendant's confinement in that other jurisdiction. *People v. Torrez*, 2012 COA 51, 405 P.3d 243, *aff'd in part, rev'd in part* on other grounds, 2017 CO 91, 403 P.3d 189, *overruled on other grounds* in *Russell v. People*, 2020 CO 37, 462 P.3d 1092.

There was no substantial nexus, as matter of law, between the Colorado charges upon which defendant was being sentenced and defendant's confinement in an English prison prior to the date the extradition warrant was served. *People v. Bray*, 819 P.2d 528 (Colo. App. 1991).

"Substantial nexus" required between charges filed in one judicial district and periods of presentence confinement in another in order for defendant to be entitled to an award of presentence confinement credit against defendant's sentence in the first district. *Massey v. People*, 736 P.2d 19 (Colo. 1987).

To receive presentence confinement credit, an offender must have been actually confined, and there must have been a substantial nexus between the

confinement and the charge for which the sentence is ultimately imposed. *People v. Chavez*, 122 P.3d 1036 (Colo. App. 2005).

Credit against maximum term and any minimum term should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

Section is applicable even though defendant was sentenced prior to the time for which defendant seeks credit. *People v. McGraw*, 30 P.3d 835 (Colo. App. 2001).

Defendant should advise judge of time to be credited. If, at the time of sentencing, a defendant or his counsel has any reason to believe that the trial judge is unaware of the length of time the defendant was in custody or is not considering presentence confinement in arriving at a sentence, such information should be presented to the judge, along with other mitigating factors. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

And record should reflect credit. A well prepared mittimus and record should reflect the actual time spent in custody prior to the imposition of sentence and should direct that credit be allowed for the time spent in custody prior to imposition of sentence. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

No distinction between confinement within and without state. The statute does

not distinguish between confinement within Colorado and confinement outside of the state, but instead requires credit for all presentence time that a defendant is confined on the charge for which he is ultimately sentenced. *People v. Hardman*, 653 P.2d 763 (Colo. App. 1982).

Section does not apply to offenses committed prior to July 1, 1979. *Godbold v. District Court*, 623 P.2d 862 (Colo. 1981).

Under the plain meaning of this section and § 17-22.5-104, prisoners are entitled to credit against their life sentences for time spent in presentence confinement. Inmate, therefore, was entitled to a parole eligibility date that was calculated to include 329 days of presentence confinement credit. *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999) (overruling *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997)).

Section does not apply to life sentences. *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997), overruled in *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999).

Section does not apply to probationary sentences even when those probationary sentences include a jail component. *People v. Smith*, 2014 CO 10, 318 P.3d 472.

The provision in this section that precludes presentence confinement credit for time served while on parole also applies to credit for time served for misdemeanor sentences in § 18-1.3-509. *People v. Carrillo*, 2013 COA 3, 297 P.3d 1028.

Section does not refer to the date of eligibility for parole. *People v. Payseno*,

954 P.2d 631 (Colo. App. 1997), overruled in *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999).

Defendant is entitled to presentence confinement credit for both the day of arrest and the day of release. *People v. Houston*, 2014 COA 56, 411 P.3d 808; *People v. Fransua*, 2016 COA 79, 457 P.3d 64, *aff'd*, 2019 CO 96, 451 P.3d 1208.

Duty to assure credit against sentence. This section removes from the trial court the discretion whether to grant or deny a defendant credit against his sentence from presentence confinement time, and imposes upon the department of corrections a duty to assure that credit is given in every case. *People v. Dempsey*, 624 P.2d 374 (Colo. App. 1981); *People v. Hardman*, 653 P.2d 763 (Colo. App. 1982); *People v. Patrick*, 683 P.2d 801 (Colo. App. 1983); *People v. Massey*, 707 P.2d 1038 (Colo. App. 1985), *rev'd on other grounds*, 736 P.2d 19 (Colo. 1987).

Plain meaning of section indicates that any presentence confinement credit earned as a result of being reincarcerated on a parole violation must be applied against the previous offense. *People v. Norton*, 63 P.3d 339 (Colo. 2003); *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

The plain language of the section coupled with legislative intent lead to the conclusion that such an application is the only means by which courts can avoid granting duplicative credit to offenders. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

Mandatory parole was intended to be included in the scope of an offender's "sentence" when the sentencing scheme was amended in 1993. Parole is a clear infringement on an offender's liberty and thus logically part of his or her sentence. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

"Sentence" incorporates both the incarceration component and the mandatory parole component of an offender's penalty. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

Section 17-2-103 (6)(c) does not negate or change the general rule for applying presentence confinement credit set forth in this section, which provides that a defendant receive presentence confinement credit on his or her original sentence and not on the new sentence. Rather, the filing of a parole revocation complaint merely provides jurisdiction to the parole board, but once the parole board makes its decision, the time starts running again from the date of the complaint whether the complaint is dismissed or parole is revoked. *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

Section creates a right to credit only with respect to the presentence confinement served in connection with the charge or conduct for which a particular sentence is ultimately imposed. *Santisteven v. Johnson*, 751 P.2d 621 (Colo. 1988) (decided under section as it existed prior to 1986 amendment).

Defendant, who escaped while serving concurrent sentences, was not entitled to credit for presentence confinement for serving one of the sentences while an arrest warrant was still outstanding for the other.

Confinement did not result from the same transaction as the sentence. *People v. Taylor*, 7 P.3d 1030 (Colo. App. 2000).

Service in Cenikor program does not constitute "confinement" so the defendant was not entitled to credit for such service against his sentence. *People v. Beecroft*, 862 P.2d 973 (Colo. App. 1993).

Service in work release as a condition of probation is a form of "confinement" deserving of presentence confinement credit. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

"Substantial nexus" found between defendant's charges in case and presentence confinement. Although defendant had also been confined on probation violation warrant from a prior case, the defendant would have remained confined on the charges in the other case in the same judicial district in the absence of the prior case. Defendant, therefore, was entitled to presentence confinement for all incarceration time after the arrest. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Credit not mandatory where sentence is to county jail. This section does not mandate a sentencing judge to credit a defendant with time spent in presentence confinement when the sentence is to a county jail. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Smith*, 312 P.3d 1173 (Colo. App. 2010), rev'd on other grounds, 2014 CO 10, 318 P.3d 472.

Additional credit not required to be awarded when sentence on menacing conviction ordered to run concurrently

with a previously imposed sentence. Defendant was already serving a sentence as a result of independent criminal conduct in another case and the menacing charge was not the cause of that confinement, so he was not entitled to receive additional credit for his presentence imprisonment on the menacing charge. *People v. Taylor*, 886 P.2d 302 (Colo. App. 1994).

Credit not mandatory where sentence is to a facility not under the supervision of the department of corrections. However, the trial court must make a finding that the facility is operated by another entity if credit is denied. *People v. Lachicotte*, 713 P.2d 408 (Colo. App. 1985).

The credit for presentence confinement mandated by this section applies only where a defendant is sentenced to a facility under the supervision of the department of corrections. *People v. Garcia*, 757 P. 2d 1110 (Colo. App. 1988).

This section does not mandate presentence confinement credit for a defendant who is sentenced to the youthful offender system. Section 18-1.3-407, enacted after this section, establishes court discretion in awarding presentence confinement credit to a juvenile. *People v. Garcia*, 2016 COA 124, 382 P.3d 1258.

Although the statute does not specifically limit its applicability to sentences to a state correctional facility, the language requiring the department of corrections to deduct the period of presentence confinement from the sentence implies that credit for presentence confinement is mandated only when the

sentence is to be served in a state correctional facility. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990); *People v. Smith*, 312 P.3d 1173 (Colo. App. 2010), rev'd on other grounds, 2014 CO 10, 318 P.3d 472.

If an offender violates a rule or condition of community correctional placement while on nonresidential status, the offender is not entitled upon resentencing to credit for time served while on nonresidential status. *People v. Hoecher*, 822 P.2d 8 (Colo. 1991) (overruling *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986)); *People v. Pimble*, 2015 COA 112, 369 P.3d 729.

A trial court is not statutorily required to give any presentence confinement credits against any misdemeanor sentence. However, a sentencing court may, in the exercise of its discretion, credit the length of any presentence confinement against a misdemeanor sentence. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Trial court has discretion to credit presentence confinement credit to a misdemeanor sentence to county jail rather than to a consecutive felony sentence to a state correctional facility. *People v. Johnson*, 797 P.2d 1296 (Colo. 1990).

Trial court erred in denying defendant presentence confinement credit and failing to include such credit in the

mittimus. A sentencing court has no discretion to deny presentence confinement credit to which a defendant is entitled; its role is to determine the amount and enter it on the mittimus. *People v. Henry*, 2013 COA 104M, 362 P.3d 1084.

An error in presentence confinement credit does not render a sentence "not authorized by law" pursuant to Crim. P. 35(a) because presentence confinement credit is not a component of a sentence. Rather, it is credit earned for time served prior to sentencing that is later applied against the sentence. *People v. Baker*, 2019 CO 97M, 452 P.3d 759.

Where trial court imposed both a felony sentence to which this section was applicable and a misdemeanor sentence to which the statute did not apply, the discretion which the court might otherwise have exercised did not exist and the court was required to credit the pre-sentence confinement time against the sentence imposed upon defendant for his conviction of felony. *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Supervised period following release from community correction facility is not confinement within the meaning of this section. Thus, defendant was not entitled to presentence confinement credit. *People v. Carroll*, 779 P.2d 1375 (Colo. App. 1989).

A suspended sentence subject to the condition that an offender receive treatment for drug abuse does not constitute "confinement" under this section. Defendant was not entitled to

presentence confinement credit. *Beecroft v. People*, 874 P.2d 1041 (Colo. 1994).

Duplicative credit. Where defendant was arrested based on separate felony warrants arising from both of two counties, time served in either first county jail or second county jail between date of arrest until defendant was placed on probation in the second county case related to both of these charges, and thus any days for which the defendant had already received presentence credit under the second county's mittimus could not also be credited against the first county offense. *People v. Massey*, 707 P.2d 1038 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 19 (Colo. 1987).

Defendant not entitled to duplicative credit for time served. *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Garcia*, 757 P.2d 1110 (Colo. App. 1988); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Original offense and subsequent probation violation are the same transaction. When defendant is confined due to parole revocation, he is entitled to presentence confinement credit for all periods of confinement relating to the original charge, as well as time served for violation of probation terms. *People v. Myles*, 702 P.2d 292 (Colo. App. 1985).

This section requires credit to be applied to any existing continuing sentence from a prior offense, not against a sentence for a new offense committed by the same defendant, when the defendant was serving a sentence or was on parole for

a previous offense at the time he committed the new offense. *People v. Ostuni*, 58 P.3d 531 (Colo. 2002); *People v. Dixon*, 133 P.3d 1176 (Colo. 2006).

A probationer is entitled to presentence confinement credit for the actual time confined to the county or municipal jail, where the trial court committed the probationer to a county or municipal jail as a facility utilized in conjunction with a work release program pursuant to § 16-11-212 (1). *People v. Lee*, 678 P.2d 1030 (Colo. App. 1983).

No statutorily mandated deduction of the period of presentence confinement from a term of probation. As with incarceration in a county jail a grant of probation does not put the defendant under the supervision of the department of correction, nor is there a statutorily mandated deduction of the period of presentence confinement from a term of probation. *People v. Freeman*, 705 P.2d 528 (Colo. App. 1985), rev'd on other grounds, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment).

When sentencing an offender to probation, a trial court has discretion to award less than the full amount of presentence confinement against a jail sentence imposed as a condition of probation. *People v. Smith*, 2014 CO 10, 318 P.3d 472.

No credit for time spent at halfway house. Where residency in a community corrections facility is imposed as a condition of probation, it does not involve confinement as contemplated by this section,

thus no credit may be given for time spent at a community corrections halfway house. *People v. Radar*, 652 P.2d 1085 (Colo. App. 1982).

No credit is allowed for time served in a nonresidential community corrections program. *People v. Bonde*, 2023 COA 75M, 539 P.3d 164, aff'd, 2025 CO 24, 569 P.3d 109.

Confinement for first conviction not pretrial confinement for second offense. Where a pretrial defendant is incarcerated pursuant to the sentence imposed in connection with his earlier conviction and he is receiving credit on that sentence for that time period, this confinement is not attributable to a second charge and he is not entitled to pretrial confinement credit on the second offense. *People v. Loggins*, 628 P.2d 111 (Colo. 1981) (decided under former law).

Defendant not entitled to presentence confinement credit for confinement in a different county jail while awaiting federal charges. There was no substantial nexus between the confinement for the federal charges and the confinement for this case. *People v. Lacallo*, 2014 COA 78, 338 P.3d 442.

Sentence for life imprisonment. When the penalty provided by statute is a sentence for life imprisonment, there is no authority in the sentencing court at the time of sentencing thereafter to make the sentence anything but life imprisonment. Consideration of presentence confinement in fixing sentence would be without purpose or

result. *People v. Jones*, 198 Colo. 578, 604 P.2d 679 (1979) (decided under former law).

Where defendant is convicted under death penalty statute later held unconstitutional and court is required to resentence defendant to life imprisonment, there is no authority in sentencing court to award presentence confinement credit for time spent on death row prior to resentencing. *People v. Corbett*, 713 P.2d 1340 (Colo. App. 1985) (decided under law in effect prior to 1979 repeal and reenactment).

In the case of concurrent sentences, the period of presentence confinement should be credited against each sentence. *Schubert v. People*, 698 P.2d 788 (Colo. 1985); *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Roy*, 252 P.3d 24 (Colo. App. 2010).

Defendant is entitled to presentence confinement credit for confinement in one county for an offense committed in another county if the sentences for both offenses are concurrent. There was a substantial nexus between the charges in the second county and the probation revocation in the first county since the revocation was based on the new offense in the second county. *People v. Howe*, 2012 COA 177, 292 P.3d 1186.

When consecutive sentences are imposed, crediting the period of presentence confinement against one of the sentences will assure the defendant full credit against the total term of imprisonment. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

If only one sentence is ultimately imposed and the other concurrently filed

counts or charges are dismissed, then the entire period of presentence confinement should be credited against the sentence imposed. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

But if the case on which the defendant is sentenced has been only recently filed, and the defendant has been confined for a much longer period of time on an older case which relates to a separate criminal transaction and which is to be dismissed as part of a plea agreement, then the defendant is entitled to credit only for that period of confinement attributable to the case resulting in the sentence. The parties may nevertheless agree as part of a sentence concession that credit should be given for the entire period of presentence confinement. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

If defendant's parole is revoked during presentence confinement for pending charges, and defendant thereupon resumes service of sentence unrelated to pending charges, then, with respect to such pending charges, defendant is entitled to credit for presentence confinement prior to, but not following, revocation of his parole. *Torand v. People*, 698 P.2d 797 (Colo. 1985).

An annotation of "credit for time served" on a mittimus must be construed as an order for a specific amount of credit to which the defendant is entitled by statute, not a specific method for applying that credit to the entire sentence or for calculating the defendant's ultimate parole eligibility or mandatory release dates. *People v. Ostuni*, 58 P.3d 531 (Colo. 2002).

Writ of habeas corpus not appropriate.

An order of one district court concerning presentence confinement credit may not be challenged by prosecution of a writ of habeas corpus in a district court of another judicial district. *Pipkin v. Brittain*, 713 P.2d 1358 (Colo. App. 1985).

Retroactive reduction of sentence and parole date does not entitle defendant to presentence confinement credit for offenses committed in different transaction even though practical effect of such reduction was that defendant was confined beyond parole date for separate transaction. *People v. Lepine*, 744 P.2d 81 (Colo. App. 1987).

No credit is allowed where defendant not incarcerated or confined but only supervised. *People v. Winters*, 789 P.2d 1120 (Colo. App. 1990).

No credit is allowed while defendant was on bond despite being subject to electronic monitoring and a curfew. Electronic monitoring and a curfew do not so limit liberty as to constitute confinement under this section. *People v. Chavez*, 122 P.3d 1036 (Colo. App. 2005).

Defendant who is on parole at the time of the commission of a new offense is not entitled to receive presentence confinement credit for the new offense,

and it is not necessary to revoke the defendant's parole in order for the defendant to be ineligible for such presentence confinement credit. *People v. Hays*, 817 P.2d 546 (Colo. App. 1991).

An offender who has earned presentence confinement credit is entitled to have that credit deducted from his mandatory parole if the offender is no longer serving a sentence of confinement. *Edwards v. People*, 196 P.3d 1138 (Colo. 2008).

Trial court has no authority to retain jurisdiction over a defendant after sentencing for the reason that the law may be changed by a subsequent court decision even though the court, at the time of sentencing, is aware of a case appealed to the state supreme court which may change the interpretation of statute regarding credit against the sentence for presentence confinement. *People v. Mortensen*, 856 P.2d 45 (Colo. App. 1993).

Applied in *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Lopez*, 961 P.2d 602 (Colo. App. 1998); *People v. Houston*, 2014 COA 56, 411 P.3d 808; *Sardakowski v. Remaro*, 883 F.3d 1300 (10th Cir. 2018).

18-1.3-406. Mandatory sentences for violent crimes - definitions.

(1) (a) Any person convicted of a crime of violence shall be sentenced pursuant to section 18-1.3-401 (8) to the department of corrections for a term of incarceration of at least the midpoint in, but not more than twice the maximum of, the presumptive range provided for such offense in section 18-1.3-401 (1)(a), as modified for an extraordinary risk crime pursuant to section 18-1.3-401 (10), without suspension; except that, within ninety-one days after the person

has been placed in the custody of the department of corrections, upon the request of the defendant, prosecution, or the court, the department shall transmit to the sentencing court a report on the evaluation and diagnosis of the violent offender, and the court, in a case that it considers to be exceptional and to involve unusual and extenuating circumstances, may thereupon modify the sentence, effective not earlier than one hundred nineteen days after the person's placement in the custody of the department. Such modification may include probation if the person is otherwise eligible therefor. Whenever a court finds that modification of a sentence is justified, the judge shall notify the state court administrator of the judge's decision and shall advise the administrator of the unusual and extenuating circumstances that justified the modification. The state court administrator shall maintain a record, which is open to the public, summarizing all modifications of sentences and the grounds therefor for each judge of each district court in the state.

(b) Except as described in subsection (1)(e) of this section, for offenses committed on or after July 1, 2023, a court shall sentence a person convicted of two or more separate crimes of violence arising out of the same incident so that the person's sentences are served consecutively rather than concurrently; except that if the person has not previously requested a review of the term of years of the mandatory sentences pursuant to subsection (1)(a) of this section, the person may petition the court for a modification of the sentences imposed if at least two calendar years but no more than five calendar years after the entry of final judgment of conviction or sentence have passed. The person is entitled to an evidentiary hearing on the petition for modification of sentence, and the court shall appoint counsel for the defendant for the hearing. The court shall serve an order of appointment on the office of state public defender, which shall represent the defendant or notify the court of a conflict. The court shall allow counsel to supplement the petition.

(c) Following the evidentiary hearing authorized in subsection (1)(b) of this section, the court may modify the terms of the sentence if the court finds substantial mitigating factors surrounding the case and if the person has demonstrated substantial actions toward rehabilitation as evidenced by engagement in positive programming; assigned work; treatment, when available; and behavior that is compliant with the rules of the facility or facilities where the person is or was placed. A modification ordered by the court may include the imposition of concurrent sentences or modification of the length of the sentences to incarceration.

(d) Notwithstanding the provisions of subsection (1)(a) of this section, any person convicted of a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, that constitutes a crime of violence shall be sentenced to the department of corrections for an indeterminate term of incarceration of at least the midpoint in the presumptive range specified in section 18-1.3-401 (1)(a)(V)(A) or (1)(a)(V)(A.1) up to a maximum of the person's natural life, as provided in section 18-1.3-1004 (1).

(e) The court may require a defendant to serve the defendant's sentences concurrently rather than consecutively if the defendant is convicted of two or more separate crimes of violence arising out of the same incident and:

(I) One of the crimes is:

(A) Aggravated robbery, as described in section 18-4-302;

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

(C) Escape, as described in section 18-8-208; or

(II) The parties agreed to waive ineligibility for concurrent sentences; or

(III) The following factors are proven by a preponderance of the evidence by the defendant or stipulated by the parties at the sentencing hearing:

(A) The defendant has no prior felony convictions for a victim rights offense pursuant to section 24-4.1-302; and

(B) The defendant did not use or possess a firearm or explosive in the commission of the offense or threaten the use of a firearm or explosive during the commission of the offense; and

(C) The defendant's action did not result in serious bodily injury or death.

(2) (a) (I) "Crime of violence" means any of the crimes specified in subparagraph (II) of this paragraph (a) committed, conspired to be committed, or attempted to be committed by a person during which, or in the immediate flight therefrom, the person:

(A) Used, or possessed and threatened the use of, a deadly weapon; or

(B) Caused serious bodily injury or death to any other person except another participant.

(II) Subsection (2)(a)(I) of this section applies to the following crimes:

(A) Any crime against an at-risk adult or at-risk juvenile;

(B) Murder;

(C) First or second degree assault;

(D) Kidnapping;

(E) A sexual offense pursuant to part 4 of article 3 of this title;

(F) Aggravated robbery;

(G) First degree arson;

(H) First degree burglary;

- (I) Escape;
- (J) Criminal extortion;
- (K) First or second degree unlawful termination of pregnancy;
- (L) Human trafficking for involuntary servitude of an adult or a minor in violation of section 18-3-503; or
- (M) Human trafficking for sexual servitude of an adult or a minor in violation of section 18-3-504.

(b) (I) "Crime of violence" also means any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (I), "unlawful sexual offense" shall have the same meaning as set forth in section 18-3-411 (1), and "bodily injury" shall have the same meaning as set forth in section 18-1-901 (3)(c).

(II) The provisions of subparagraph (I) of this paragraph (b) shall apply only to felony unlawful sexual offenses.

(c) As used in this section, "at-risk adult" has the same meaning as set forth in section 18-6.5-102 (2), and "at-risk juvenile" has the same meaning as set forth in section 18-6.5-102 (4).

(3) In any case in which the accused is charged with a crime of violence as defined in subsection (2)(a) of this section, the indictment or information shall so allege in a separate count, even though the use or threatened use of such deadly weapon or infliction of such serious bodily injury or death is not an essential element of the crime charged.

(4) The jury, or the court if no jury trial is had, in any case as provided in subsection (3) of this section shall make a specific finding as to whether the accused did or did not use, or possessed and threatened to use, a deadly weapon during the commission of such crime or whether such serious bodily injury or death was caused by the accused. If the jury or court finds that the accused used, or possessed and threatened the use of, such deadly weapon or that such injury or death was caused by the accused, the penalty provisions of this section shall be applicable.

(5) In any case in which the accused is charged with a crime of violence as defined in subsection (2)(b)(I) of this section, the indictment or information shall so allege in a separate count, even though the use of threat, intimidation, or force or the infliction of bodily injury is not an essential element of the crime charged.

(6) The jury, or the court if no jury trial is had, in any case as provided in subsection (5) of this section shall make a specific finding as to whether the accused did or did not use threat, intimidation, or force during the commission of such crime or whether such bodily injury was

caused by the accused. If the jury or court finds that the accused used threat, intimidation, or force or that such bodily injury was caused by the accused, the penalty provisions of this section shall be applicable.

(7) (a) In any case in which the accused is charged with a crime of violence as defined in this section and the indictment or information specifies the use of a dangerous weapon as defined in sections 18-12-101 and 18-12-102, or the use of a semiautomatic assault weapon as defined in paragraph (b) of this subsection (7), upon conviction for said crime of violence, the judge shall impose an additional sentence to the department of corrections of five years for the use of such weapon. The sentence of five years shall be in addition to the mandatory sentence imposed for the substantive offense and shall be served consecutively to any other sentence and shall not be subject to suspension or probation.

(b) For the purposes of this subsection (7), "semiautomatic assault weapon" means any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

Source: **L. 2002:** Entire article added with relocations, p. 1403, § 2, effective October 1. **L. 2003:** (1), (2)(a)(II)(E), and (7)(a) amended, pp. 1424, 1432, §§ 3, 21, effective April 29. **L. 2004:** (1) amended, p. 634, § 2, effective August 4. **L. 2012:** (1)(a) amended, (SB 12-175), ch. 208, p. 865, § 110, effective July 1. **L. 2013:** (2)(c) amended, (SB 13-111), ch. 233, p. 1127, § 11, effective May 16; (2)(a)(II)(I) and (2)(a)(II)(J) amended and (2)(a)(II)(K) added, (HB 13-1154), ch. 372, p. 2193, § 7, effective July 1. **L. 2016:** (3) and (5) amended, (SB 16-189), ch. 210, p. 760, § 29, effective June 6; (1)(a) amended and (1)(c) added, (SB 16-051), ch. 85, p. 241, § 1, effective July 1; IP(1)(c) amended, (SB 16-189), ch. 210, p. 798, § 124, effective July 1. **L. 2018:** (1)(b) amended, (HB 18-1029), ch. 153, p. 1087, § 3, effective April 23. **L. 2023:** (1) amended, (HB 23-1292), ch. 297, p. 1778, § 1, effective July 1. **L. 2024:** IP(2)(a)(II) and (2)(a)(II)(J) amended and (2)(a)(II)(L) and (2)(a)(II)(M) added, (SB 24-035), ch. 54, p. 186, § 2, effective April 11.

Editor's note: This section is similar to former § 16-11-309 as it existed prior to 2002.

Cross references: (1) For the sentencing of a defendant for multiple counts arising from the same act, see § 18-1-408 (3).

(2) For the legislative declaration in the 2013 act amending subsections (2)(a)(II)(I) and (2)(a)(II)(J) and adding subsection (2)(a)(II)(K), see section 1 of chapter 372, Session Laws of

Colorado 2013. For the legislative declaration in the 2013 act amending subsection (2)(c), see section 1 of chapter 233, Session Laws of Colorado 2013.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "Colorado Felony Sentencing — an Update", see 14 Colo. Law. 2163 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to mandatory sentencing, see 15 Colo. Law. 1605 (1986). For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986). For article, "Sentencing Dilemmas", see 29 Colo. Law. 67 (Oct. 2000). For article, "Criminal Sentencing in Colorado After *Blakely v. Washington*", see 34 Colo. Law. 85 (Jan. 2005). For article, "Adult Parole in Colorado: An Overview", see 44 Colo. Law. 37 (May 2015). For article, "Exceeding Presumptive Maximum Sentences in Colorado", see 44 Colo. Law. 43 (Dec. 2015).

Annotator's note. Since § 18-1.3-406 is similar to § 16-11-309 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Under former language of subsection (1)(a) and (b) which existed prior to 1988, subsection (1)(a) and (b) was

constitutional, and did not violate equal protection clause since the two paragraphs could be harmonized and the difference between the two paragraphs was rationally related to a legitimate state interest in preventing crimes of violence and crimes against the elderly and handicapped. *People v. Wells*, 775 P.2d 563 (Colo. 1989).

1988 amendment to subsection (1)(a), changing "two" to "two or more," worked a substantive change in the law and did not merely clarify intent of prior version of statute. *Robles v. People*, 811 P.2d 804 (Colo. 1991).

The general assembly did not mean for all first degree arson by fire to be crimes of violence, and therefore fire alone is not a deadly weapon for the purposes of the crime of violence sentence enhancer for first degree arson. *Magana v. People*, 2022 CO 25, 511 P.3d 585.

The general assembly intended that this section define sentencing standards rather than create a substantive offense by its placement among other sections relating to sentencing. *Brown v. District Court*, 194 Colo. 45, 569 P.2d 1390 (1977).

The general assembly intended subsection (1) to authorize only one sentence reduction by the court, after its receipt of the diagnostic report filed by department of corrections upon the

defendant's placement there. People v. Belgard, 58 P.3d 1077 (Colo. App. 2002).

More than one sentence reduction is not permitted by this section read in conjunction with Crim. P. 35. Although multiple sentence reductions are permitted under Crim. P. 35 if the sentence is reduced to a term within statutory limits, more than one sentence reduction under this section would be outside the statutory limits. People v. Belgard, 58 P.3d 1077 (Colo. App. 2002).

Where a person is initially sentenced pursuant to this section to a term of incarceration greater than the maximum in the presumptive range as the result of the conviction of such person of a crime of violence, such sentence may nonetheless be modified below the maximum presumptive terms if the court finds that "unusual and extenuating circumstances" justify such modification. People v. Beyer, 793 P.2d 644 (Colo. App. 1990) (decided under prior law).

The defendant is convicted of "separate" crimes when guilt for each crime is established by different evidence. In such case, the court must impose consecutive, rather than concurrent, sentences. People v. Hahn, 813 P.2d 782 (Colo. App. 1991).

When each crime is a separate crime of violence, this section requires the court to impose consecutive sentences for each offense. People v. Trujillo, 114 P.3d 27 (Colo. App. 2004).

In addition to consecutive sentences for separate crimes of violence, the court, pursuant to subsection (7), is required to

impose an additional five-year sentence for each crime of violence involving the use of a semiautomatic assault weapon. People v. Trujillo, 114 P.3d 27 (Colo. App. 2004).

Trial court is required to impose consecutive sentences for defendant's convictions of first and second degree assault where convictions do not merge and the evidence supporting the respective convictions was not identical. People v. Martinez, 1 P.3d 192 (Colo. App. 1999).

When determining whether to sentence two crimes of violence consecutively or concurrently in relation to § 18-4-108, the determining factor is whether the evidence supporting the convictions is identical. If the evidence supporting the convictions is not identical, the sentences are consecutive. People v. Jurado, 30 P.3d 769 (Colo. App. 2001).

Imposition of consecutive sentences proper when defendant shot multiple victims in one incident since each separate shot warranted separate counts of attempted first degree extreme indifference murder and defendant was convicted of two counts of attempted first degree extreme indifference murder. People v. Ellis, 30 P.3d 774 (Colo. App. 2001).

Imposition of consecutive sentences improper. The trial court erred in imposing consecutive rather than concurrent sentences when jury may have relied upon the same evidence to convict defendant on each charge. People v. Page, 907 P.2d 624 (Colo. App. 1995), overruled in People v. Muckle, 107 P.3d 380 (Colo. 2005).

When a defendant is convicted of two or more crimes of violence arising out of the same incident, the court must sentence the defendant to consecutive sentences. People v. Hogan, 114 P.3d 42 (Colo. App. 2004).

The phrase "arising out of the same incident" is a reference to, and has the same meaning as, the phrase "arising from the same criminal episode" in § 18-1-408 (2). Because defendant's crimes were not "based on the same act or series of acts arising from the same criminal episode", the court was not required to impose consecutive sentences. Rather, the court was required to exercise its discretion concerning the imposition of consecutive or concurrent sentences. Marquez v. People, 2013 CO 58, 311 P.3d 265.

This section does not require consecutive sentences unless the defendant is convicted of two separate crimes of violence, charged and proven as separate counts. The court was not required to impose consecutive sentences when one of the crimes of violence was proven as a predicate offense for the other. People v. Halstead, 881 P.2d 401 (Colo. App. 1994).

Court not required to impose consecutive sentences under this section when it is unclear whether convictions for four counts of sexual assault on a child occurred during a single incident or multiple incidents. People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005); People v. Simon, 100 P.3d 487 (Colo. App. 2004).

The imposition of concurrent sentences circumvents the requirement of this section that the sentences run consecutively. People v. Beyer, 793 P.2d 644 (Colo. App. 1990).

Court is not required to impose consecutive sentences under this section if the crimes do not arise out of the same incident. Where there were two different victims in offenses separated both by time and physical location, the crimes did not arise out of the same incident. People v. Smith, 881 P.2d 385 (Colo. App. 1994).

"Incident" refers to events that are not separated by time or an intervening event. People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

The evidence tends to show the individual acts of sexual contact occurred over a long period of time, thus the court erred in finding they were part of the same incident and required consecutive sentencing. People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

Statute only requires imposition of two consecutive sentences. It is within the trial court's discretion to decide whether a defendant convicted of more than two separate crimes of violence should serve more than two of the sentences consecutively. People v. Luu, 813 P.2d 826 (Colo. App. 1991).

When the defendant requests a proportionality review of consecutive sentences imposed under this section, the court is required to review the proportionality of each individual

sentence, not the cumulative sentence. The cumulative sentence is not reviewable in the aggregate. Since each sentence represents punishment for a distinct and separate crime, it follows that a separate proportionality review should be completed for each sentence, even though the defendant is required to serve the sentences consecutively. *Close v. People*, 48 P.3d 528 (Colo. 2002).

Where defendant was convicted of multiple crimes of violence, the court of appeals was required to conduct a proportionality review, upon the defendant's request, of the consecutive sentence imposed for the crimes of violence, even though the statute mandates that the sentences be consecutive. Because the statutory mandate strips the trial court of discretion in sentencing and removes the trial court's ability to assess the proportionality of the sentences imposed, the court of appeals must conduct a separate abbreviated proportionality review. *Close v. People*, 48 P.3d 528 (Colo. 2002).

Given the requirement that the court give great deference to legislatively mandated sentencing schemes and given the nature of the defendant's crimes and the sentences imposed, the court found no inference of gross disproportionality and upheld defendant's 60-year sentence for aggravated robbery and assault. The 10-year sentence imposed for each count of aggravated robbery did not give rise to an inference of gross disproportionality where aggravated robbery is a per se grave or serious offense. The court found that the

crime of assault was grave or serious where the defendant, using a stick, caused bruises and lacerations requiring stitches. The legislatively mandated sentence of five years for each count of assault was also not grossly disproportional to the offense. *Close v. People*, 48 P.3d 528 (Colo. 2002).

No preliminary hearing is required for a charge under this section. *Brown v. District Court*, 194 Colo. 45, 569 P.2d 1390 (1977).

A preliminary hearing must be granted under this section when a defendant is charged by information with a class 4 felony committed as a "crime as violence" as defined in subsection (2)(a)(I)(B) and (2)(a)(II)(C), whether or not the defendant would actually be subject to mandatory sentencing for a crime of violence. *People v. Austin*, 2018 CO 47, 419 P.3d 587.

Mandatory sentences for violent crimes do not violate separation of powers doctrine; the judiciary is not granted the absolute right to determine punishment in every case. *People v. Childs*, 199 Colo. 436, 610 P.2d 101 (1980).

Nor equal protection clause. The statute providing mandatory sentences for violent crimes does not violate the equal protection clause by exempting attempted crimes from its enhanced penalties. The general assembly could rationally determine that since an attempt normally involves less severe consequences than are typical of a completed crime, attempts should not be included. *People v. Childs*, 199 Colo. 436, 610 P.2d 101 (1980).

A sentence imposed beyond the presumptive range for a defendant convicted of both first degree sexual assault with a deadly weapon and a crime of violence does not deny equal protection of law since it cannot be said that the sentencing statutes permit different degrees of punishment for persons in the defendant's situation. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

A rational distinction exists in the sentencing scheme for people convicted of first degree sexual assault with a deadly weapon in contrast to convictions of the same crime without a deadly weapon since the legislature could rationally perceive that use of a deadly weapon during the course of such an assault is more reprehensible and dangerous than commission of such a crime without a deadly weapon. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

Defendant's sentencing in the aggravated range for a crime of violence based on the use of a deadly weapon during the commission of first degree assault does not violate the guarantee of equal protection of the laws. *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Montoya*, 736 P.2d 1208 (Colo. 1987).

Mandating sentencing requirement for the crime of violence specified in this section does not deny the defendant his right to equal protection because the sentencing requirement does not permit different degrees of punishment for persons in defendant's situation. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Enhanced crime of violence sentence on conviction for pattern of sexual assault on

a child does not violate defendant's due process and equal protection guarantees. Prosecution not required to charge and prove a separate crime of violence count pursuant to subsections (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

When the crime of violence statute is superimposed on convictions for both aggravated robbery and simple robbery, there are real differences between the two forms of robbery. These differences provide substantial support for the disparate penalty applicable to a crime of violence finding which is superimposed on a conviction for aggravated robbery, and such does not violate equal protection of the laws. *People v. Young*, 758 P.2d 667 (Colo. 1988).

Since the general assembly could have rationally decided that violent crimes committed as part of the same incident pose a greater threat to society than the same criminal conduct committed separately in different violent criminal episodes and since differing punishments have a reasonable relationship to the prevention of crime, the consecutive sentencing provision of subsection (1)(a) does not violate the constitutional requirements of equal protection of the law. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

Convictions for violent crime and underlying offense not double jeopardy. Conviction for "crime of violence" for use of deadly weapon during commission of

substantive offenses, in addition to conviction of substantive crimes, did not violate double jeopardy clause because legislature intended to authorize punishment for crime of violence cumulative to punishment for underlying substantive offense. *People v. Goodman*, 733 P.2d 1204 (Colo. 1987).

Defendant's aggravated sentence did not violate Apprendi principles. Although the sentencing range was beyond the maximum, the enhancement did not require any proof beyond the elements of the charged offenses which were necessarily proved beyond a reasonable doubt. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

Increase in penalty imposed pursuant to § 18-3-202 does not violate equal protection. Mandatory sentencing beyond the presumptive range in § 18-3-202, imposed pursuant to this section, does not violate equal protection even though one of the elements of first degree assault was use of deadly weapon. *People v. Montoya*, 736 P.2d 1208 (Colo. 1987).

The trial court appropriately increased the maximum presumptive penalty based on § 18-1-105 (9.7)(a) before applying the presumptive penalty provisions applicable to crimes of violence under this section. Thus, this section permits a doubling of the maximum penalty that is already increased under § 18-1-105 (9.7)(a) for certain extraordinary risk crimes. *People v. Greymountain*, 952 P.2d 829 (Colo. App. 1997).

The legislature's intent was to treat this section not as a sentence-enhancing

statute but as a presumptive penalty statute. *People v. Terry*, 791 P.2d 374 (Colo. 1990).

Imposition of a 25-year sentence for second degree murder committed in the heat of passion was not abuse of discretion, because it is a per se crime of violence under subsection (1) and an extraordinary risk of harm crime pursuant to § 18-1-105 (9.7); thus, the presumptive sentencing range was 10 to 32 years and the trial court was required to sentence defendant to a term of incarceration of at least the midpoint in the presumptive range, but not more than twice the maximum presumptive term for the offense. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Court did not erroneously permit the jury to consider the crime of violence count after it found the defendant guilty of second degree murder committed in the heat of passion. Second degree murder is a per se crime of violence, even if committed in the heat of passion and defendant was properly sentenced according to this section. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Stipulation by attorney that a guilty verdict to aggravated robbery also established that the defendant was guilty of a crime of violence did not violate the defendant's rights in that the jury returned a verdict form which showed it found the defendant placed another in fear by use of a deadly weapon and in that defendant failed to show how a special interrogatory could have produced a different result. *People v. McMullen*, 738 P.2d 23 (Colo. App. 1986).

Violent crime sentencing for patterned enhanced counts of sexual assault on a child by one in a position of trust only apply to offenses committed on or after July 1, 1998. People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

Although a conviction for sexual assault on a child as part of a pattern of abuse requires violent crime sentencing, that fact does not make it a violent crime as defined in this section. People ex rel. A.B.-B., 215 P.3d 1205 (Colo. App. 2009).

Where the defendant is not convicted of a crime of violence, the enhanced sentencing provisions of this section are not applicable. People v. Van Patrick, 789 P.2d 199 (Colo. App. 1989).

When the statute defining an offense does not prescribe crime of violence sentencing for the offense, the prosecution must meet the pleading and proof requirements specified in subsections (4) and (5) in order for the defendant to be sentenced for a crime of violence. If the statute defining the offense specifically requires crime of violence sentencing, the prosecution need not allege and prove the elements of a crime of violence, as described in this section. People v. Banks, 9 P.3d 1125 (Colo. 2000).

Where the defendant is sentenced for a crime of violence and the prosecution has not been required to comply with subsections (4) and (5) due to mandatory sentencing provisions in the statute describing the crime, the defendant is not subject to the extraordinary risk sentencing provisions of § 18-1-105 (9.7).

Extraordinary risk sentencing applies only where the defendant is convicted of a crime of violence, as described in this section. This means that the prosecution must have followed the requirements of subsections (4) and (5). People v. Banks, 9 P.3d 1125 (Colo. 2000).

When defendant is convicted of a crime of violence under this section for a crime that also constitutes an extraordinary risk crime, the presumptive range is first increased pursuant to § 18-1-105 (9.7)(a) before it is doubled pursuant to this section. People v. Mata, 56 P.3d 1169 (Colo. App. 2002).

Separate sentence improper. A separate sentence imposed for the crime of violence is improper and must be vacated. People v. Espinoza, 669 P.2d 142 (Colo. App. 1983), aff'd, 712 P.2d 476 (Colo. 1985).

This statute is not ambiguous. It clearly mandates that a defendant's sentences, whatever length they may be, must run consecutively to each other. People v. Lanari, 926 P.2d 116 (Colo. App. 1996).

Sentencing is discretionary act that is not subject to scientific precision. People v. Warren, 200 Colo. 110, 612 P.2d 1124 (1980).

Public interest in safety and deterrence is proper focal point of sentencing decision in crimes of grave personal violence or abuse, particularly when committed by a repeat-offender. People v. Warren, 200 Colo. 110, 612 P.2d 1124 (1980).

Extended sentence must be clearly justified. When a sentence of an extended duration is imposed, the record must establish a clear justification in fact for the trial judge's action. *People v. Warren*, 200 Colo. 110, 612 P.2d 1124 (1980).

Robbery as used in violent offender statute includes both simple robbery (§ 18-4-301) and aggravated robbery (§ 18-4-302). *People v. Eggers*, 196 Colo. 349, 585 P.2d 284 (1978).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. *People v. Darbe*, 62 P.3d 1006 (Colo. App. 2002).

Criminally negligent homicide is not a per se crime of violence and merely alleging use of a deadly weapon as part of the factual basis does not satisfy the requirement of the crime of violence statute. *People v. Vickers*, 168 P.3d 9 (Colo. App. 2007).

Discretionary sentencing of juveniles not affected. The general assembly did not automatically intend to repeal the special provision for discretionary sentencing of juveniles, § 19-1-104, by the enactment of this section. *People v. District Court*, 196 Colo. 249, 585 P.2d 913 (1978).

Accessory may be punished as principal. An accessory to a crime of violence as defined by subsection (2) may be charged, tried and punished as a principal. *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People in Interest of N.D.O.*, 2021 COA 100, 497 P.3d 1070.

Requirement of specific findings by jury. An instruction by the trial court regarding the elements of a crime of violence, combined with a general verdict form does not meet the requirement of this section. Where the statute requires the jury to make specific findings, the court must submit special interrogatories, which elicit the required findings. *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979).

The special finding serves as the basis for the mandatory sentence which must be imposed on the defendant's conviction for the separately charged offense, and does not constitute a separate felony conviction. *People v. Russo*, 713 P.2d 356 (Colo. 1986).

Focus of subsection (5) is on whether the instructions and verdict forms adequately inform the jury that it must find beyond a reasonable doubt that the defendant committed the underlying substantive offense and used, or possessed and threatened to use, a deadly weapon during the commission or attempted commission of the offense. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993).

Requirement of specific findings not applied retroactively. Where defense counsel did not object to the verdict forms and there is no showing of harm from the form of the verdict, the requirement that the court submit special interrogatories to the jury will not be applied retroactively. *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

The holding of *People v. Swanson* that the special interrogatory requirement would not be applied retroactively is extended to the

area of postconviction relief. *Stroup v. People*, 656 P.2d 680 (Colo. 1982).

Unusual and extenuating circumstances warranting sentence reduction found where record showed evidence of defendant's abusive family situation and mental problems, and where defendant had no previous convictions, had been a model prisoner, and with regular medical drug treatment, could lead a normal life. *People v. Byrum*, 784 P.2d 817 (Colo. App. 1989).

Court not required to hold hearing to modify a sentence. This section does not mandate a specific review procedure. *People v. Olivas*, 911 P.2d 675 (Colo. App. 1995).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of the court's decision. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

There are no conditions sufficient for a finding of aggravating circumstances in a criminal sentencing where evidence only shows each element of the crime charged. *People v. Janke*, 720 P.2d 613 (Colo. App. 1986).

When enhancement of sentence is plain error. Where a defendant is convicted of first-degree murder, and the mittimus reads that he was found to have committed a "crime of violence", but the jury was not instructed on the elements of crime of violence nor given a separate verdict form or

interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first-degree murder only, and for imposition of sentence on that crime only. *People v. Thrower*, 670 P.2d 1251 (Colo. App. 1983).

When the trial court properly instructs the jury regarding the required, specific finding of fact under the crime-of-violence statute, but the verdict form fails to contain the mandatory language, the jury's resulting finding is inconclusive and inconsistent, and this incongruity constitutes trial error. Because the verdict form misstated an element of the crime-of-violence offense and there was contested evidence at trial, there is a reasonable possibility that the error in the verdict form contributed to the defendant's sentence. *Lehnert v. People*, 244 P.3d 1180 (Colo. 2010).

Penalty for first degree assault committed in "heat of passion". Where a defendant charged with first degree assault can establish that he acted in the "heat of passion", he cannot constitutionally receive a greater penalty than he would have received had he been convicted of manslaughter. *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979); *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

Defendant waived notice pursuant to subsection (4) when defendant tendered an instruction for a lesser included offense which was a crime of violence.

People v. Williams, 23 P.3d 1229 (Colo. App. 2000).

Verdict of not guilty of "crime of violence" not inconsistent with guilty verdicts on other charges. Guilty verdicts on the charges of first-degree sexual assault, sexual assault on a child and aggravated incest are not inconsistent as a matter of law with a jury finding of not guilty on a charge of "crime of violence". People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

Burden of proof. Like charges under the habitual criminal statute, the people bear the burden of proving the material elements of violent crime beyond a reasonable doubt and a jury should be so instructed. People v. Russo, 677 P.2d 386 (Colo. App. 1983), rev'd on other grounds, 713 P.2d 356 (Colo. 1986).

Mere threatened use of deadly weapon is not sufficient evidence for successful prosecution for violent crime. People v. Janke, 720 P.2d 613 (Colo. App. 1986).

The term "participant", for purposes of subsection (2)(a)(I), refers to a person who culpably engages in the offensive conduct and not to the victim of the criminal act. People v. Chavez, 730 P.2d 321 (Colo. 1986).

Crime of violence may be committed by use of a deadly weapon during the commission of a second-degree assault, and by causing serious bodily injury to another other than the defendant or another participant during the commission or attempted commission of second-degree assault or during the immediate flight

therefrom. People v. Chavez, 730 P.2d 321 (Colo. 1986).

In regard to first degree arson, fire alone is not a "deadly weapon" for the purpose of applying a crime of violence sentence enhancement pursuant to subsections (1)(a), (2)(a)(I)(A), and (2)(a)(II)(G) of this section and § 18-1.3-401 (10)(a) and (10)(b)(XII). Magana v. People, 2022 CO 25, 511 P.3d 585.

Sufficient finding by jury regarding use of deadly weapon to support conviction under violent crime statute. People v. Powell, 716 P.2d 1096 (Colo. 1986).

Conviction for conspiracy to commit aggravated robbery, as defined in § 18-4-302 (1)(b), necessarily requires crime of violence sentencing. People v. Terry, 961 P.2d 500 (Colo. App. 1997), aff'd, 977 P.2d 145 (Colo. 1999).

Fifteen- to 20-year sentence was not excessive for aggravated robbery and a crime of violence. People v. Colasanti, 626 P.2d 1136 (Colo. 1981).

Under § 18-2-201 (4.5), conspiracy to commit a per se crime of violence is itself a crime of violence to which the sentence enhancing provisions of this section apply. Terry v. People, 977 P.2d 145 (Colo. 1999).

Defendant convicted of conspiracy cannot be sentenced pursuant to this section because conspiracy is not specifically included among offenses statutorily defined as crimes of violence. People v. Flores, 757 P.2d 159 (Colo. App. 1988) (decided prior to the enactment of subsection (4.5)).

Attempted first degree murder is not a statutory crime of violence, therefore, without either a guilty verdict on a separate crime of violence pursuant to this section or a finding of statutory aggravating factors pursuant to §§ 18-1-105 (6), 18-1-105 (7), and 18-1-105 (9), the imposition of an aggravated range sentence for the class 2 felony of attempted first degree murder was error. *People v. Webster*, 987 P.2d 836 (Colo. App. 1998).

Using section as a basis for sentencing a defendant convicted of a crime not enumerated in section is error. *People v. Hare*, 782 P.2d 831 (Colo. App. 1989), *aff'd* on other grounds, 800 P.2d 1317 (Colo. 1990).

Where both the violent crimes statute and the habitual criminal statute apply, the sentencing provisions of both statutes apply and a judge must impose the defendant's sentences to run consecutively. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

The consecutive sentencing requirement of subsection (1)(a) does not conflict with the sentencing provisions of the habitual criminal statute, § 18-1.3-801, so the sentencing court must give effect to both by imposing a sentence within the range required by the habitual criminal statute and then requiring that the sentences for two separate crimes of violence arising from the same incident be served consecutively. *People v. Chavez*, 2020 COA 80M, 486 P.3d 377.

Consecutive sentencing requirement in section (1)(a) is not preempted by the

sentencing provisions of the habitual criminal statute, § 18-1.3-801. *People v. Lowe*, 2020 COA 116, 486 P.3d 397.

Attempted second degree murder is not a crime of violence "as defined in" this section, so it is not subject to extraordinary risk sentencing in § 18-1.3-401 (10). The offense does not have an element that meets the definitional criteria in this section. *People v. Baca*, 2015 COA 153, 378 P.3d 780.

If different evidence is required to establish guilt of each of the multiple offenses, they are "separate" crimes for purposes of this statute. *People v. Wilson*, 841 P.2d 337 (Colo. App. 1992).

Where information charged only one crime of violence and did not include a separate crime of violence count for each of the three victims but did inform the defendant that enhanced sentencing was sought and alleged sufficient facts for defendant to prepare an adequate defense, the information was sufficient to support the imposition of three consecutive life sentences. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

Where defendant did not challenge the sufficiency of the information, jury completed only one verdict form finding that defendant did use or possess and threaten the use of a deadly weapon during the commission of the crime of criminal attempt first degree murder or criminal attempt second degree murder, and only one crime of violence count was plead and proven but defendant was convicted of two counts of criminal attempt to commit

first degree extreme indifference murder, defendant waived right to challenge the sufficiency of the language in the information and was not entitled to resentencing. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

The term "incident" in subsection (1) means an occurrence taking place as part of a larger continuum or happening or related group of happenings subordinate to a main plot, including a series of acts committed in close proximity or a chain of events forming a part of a schematic whole. *People v. Beyer*, 768 P.2d 746 (Colo. App. 1988); *People v. Trujillo*, 860 P.2d 542 (Colo. App. 1992).

Remand for resentencing was required where the trial court, which imposed 20-year consecutive sentences for each robbery, failed to determine whether two aggravated robberies were separate incidents. *People v. Trujillo*, 860 P.2d 542 (Colo. App. 1992).

Phrase "at least" in § 16-11-309 (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).

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).

A conviction for a sex offense that requires crime of violence sentencing does not require the prosecution to prove aggravating circumstances to support a bottom-end sentence in the aggravated range. *Hunsaker v. People*, 2015 CO 46, 351 P.3d 388.

The bottom end of an indeterminate sentence for a sex offense that is also a crime of violence is between the midpoint and twice the maximum of the presumptive range. *People v. Hunsaker*, 2013 COA 5, 411 P.3d 36, *aff'd*, 2015 CO 46, 351 P.3d 388.

If the court sentences a defendant above the maximum of the presumptive range for a sex offense that is also a crime of violence, the prosecution does not have to establish aggravating circumstances to support sentencing above the maximum range. *People v. Hunsaker*, 2013 COA 5, 411 P.3d 36, *aff'd*, 2015 CO 46, 351 P.3d 388.

When a defendant is convicted of a sex offense that is also a crime of violence, the defendant must be sentenced to an indeterminate sentence of incarceration with a minimum term in the enhanced sentencing range set forth in subsection (1)(b). *Chavez v. People*, 2015 CO 62, 359 P.3d 1040.

A defendant who is subject to subsection (1)(b) because he or she

committed a crime of violence and a sex offense under the Colorado Sex Offender Lifetime Supervision Act of 1998, is not eligible to have his or her sentence of an indeterminate term of incarceration modified to probation under subsection (1)(a). *People v. Al-Turki*, 2017 COA 39, 454 P.3d 261, *aff'd* by an equally divided court, 2019 CO 77, 449 P.3d 373.

Whether inmate is convicted of any crime enumerated in subsection (2) of this section is determinative as to how inmate is classified for eligibility for referral to community corrections pursuant to § 17-27-106 (4). *McKinney v. Kautzky*, 801 P.2d 508 (Colo. 1990).

Jury finding that burglary and sexual assault were crimes of violence made this section applicable and court imposition of mandatory sentence correct. *People v. Fishback*, 829 P.2d 489 (Colo. App. 1991), *aff'd*, 851 P.2d 884 (Colo. 1993).

Definition of "crime of violence" in § 16-11-309 applies in determining when a convicted person is eligible for parole under § 17-22.5-303.3 (1). *Busch v. Gunter*, 870 P.2d 586 (Colo. App. 1993).

Crimes of violence include attempts of the crimes listed in subsection (2)(a)(II). *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

Even though defendant was not charged with a crime of violence under this section, the trial court found sufficient aggravating factors to support an enhanced, 48-year sentence for second degree

kidnapping. *People v. Smith*, 881 P.2d 385 (Colo. App. 1994).

In bringing a motion for reduction of sentence under this section, defendant is subject to the procedures and time frames set forth in Crim. P. 35. This section alone merely authorizes a court to reduce a mandatory sentence imposed for a crime of violence, but a motion for reduction of sentence is not separately authorized in statute and is therefore subject to the provisions of rule 35. *People v. Williams*, 908 P.2d 1157 (Colo. App. 1995).

Trial court erred in concluding that it was statutorily required to impose consecutive sentences. Defendant's convictions were not supported by identical evidence and arose out of different incidents. Under the circumstances, defendant was subject to concurrent or consecutive sentencing, in the court's discretion. *People v. Wiseman*, 2017 COA 49M, 413 P.3d 233.

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *Watson v. District Court*, 199 Colo. 76, 604 P.2d 1165 (1980); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981);

People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Valencia, 630 P.2d 85 (Colo. 1981); People v. Jones, 631 P.2d 1132 (Colo. 1981); People v. Flowers, 644 P.2d 916 (Colo. 1982); People v. Gallegos, 644 P.2d 920 (Colo. 1982); People v. Constant, 645 P.2d 843 (Colo. 1982); People v. Garries, 645 P.2d 1306 (Colo. 1982); People v. Bookman, 646 P.2d 924 (Colo. 1982); People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Hogan, 649 P.2d 326 (Colo. 1982); People v. Aragon, 653 P.2d 715 (Colo. 1982); People v. Ferguson, 653 P.2d 725 (Colo. 1982); Watkins v. People, 655 P.2d 834 (Colo. 1982); People v. Dillion, 655

P.2d 841 (Colo. 1982); People v. Cooper, 662 P.2d 478 (Colo. 1983); People v. District Court, 663 P.2d 616 (Colo. 1983); People v. Smith, 709 P.2d 4 (Colo. App. 1985); Rocha v. People, 713 P.2d 350 (Colo. 1986); People v. Sanders, 717 P.2d 948 (Colo. 1986); People v. Wiegard, 743 P.2d 977 (Colo. App. 1987); People v. Zapata, 759 P.2d 754 (Colo. App. 1988), *aff'd* on other grounds, 779 P.2d 1307 (Colo. 1989); People v. Guevara, 775 P.2d 74 (Colo. App. 1989); People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010), *aff'd*, 2012 CO 9, 269 P.3d 1233; People v. Herdman, 2012 COA 89, 310 P.3d 170.

18-1.3-407. Sentences - powers and duties of district court - authorization for youthful offender system - system participants - powers and duties of department of corrections - youthful offender system study - report - legislative intent - definitions.

(1) (a) It is the intent of the general assembly that the youthful offender system established pursuant to this section benefit the state by:

(I) Providing a sentencing option in a secure and trauma-informed environment that affirms dignity of self and others for certain juveniles and young adults who have been convicted of a crime;

(II) Increasing public safety by providing evidence-informed rehabilitative treatment to help juveniles and young adults in the youthful offender system's care make lasting behavioral changes to prepare themselves for a successful transition back to the community;

(III) Promoting the physical safety of juveniles, young adults, and staff within the youthful offender system;

(IV) Promoting a seamless continuum of care from the time of incarceration to release from confinement, in which system participants' needs are met in a safe, structured environment with well-trained, caring staff who help system participants identify and address criminogenic risk factors, be accountable, and accept responsibility for the participants' actions;

(V) Enabling participants to develop healthy, supportive relationships with peers, adults, family, and neighborhood and community members; and

(VI) Providing participants with the tools necessary to become law-abiding, contributing members of the community upon release.

(b) (I) It is the further intent of the general assembly in enacting this section that all juveniles and young adults who are eligible for sentencing to the youthful offender system pursuant to section 18-1.3-407.5, 19-2.5-801 (5), or 19-2.5-802 (1)(d)(I)(B) receive equitable treatment, regardless of gender, in sentencing, particularly in regard to the option of being sentenced to the youthful offender system. Accordingly, it is the general assembly's intent that the department establish separate housing for female and male juveniles and young adults who are sentenced to the youthful offender system without compromising equitable treatment.

(II) It is the intent of the general assembly that juveniles and young adults with physical, intellectual, developmental, mental, or behavioral health disabilities or conditions who are eligible for sentencing to the youthful offender system pursuant to section 18-1.3-407.5, 19-2.5-801 (5), or 19-2.5-802 (1)(d)(I)(B) receive equitable treatment in sentencing, particularly in regard to the option of being sentenced to the youthful offender system. Accordingly, it is the general assembly's intent that the department take all reasonable measures to accommodate and promote effective communication with juveniles and young adults with physical, intellectual, developmental, mental, or behavioral health disabilities or conditions who are sentenced to the youthful offender system.

(III) It is the intent of the general assembly that juveniles and young adults sentenced to the youthful offender system be sentenced as adults and be subject to all laws and department rules, regulations, and standards pertaining to adult inmates, except as otherwise provided in this section.

(c) It is the intent of the general assembly that participants sentenced to the youthful offender system be housed and serve their sentences in a facility specifically designed and programmed for the youthful offender system and that participants so sentenced be housed separately from and not brought into daily physical contact with inmates twenty-five years of age or older who are sentenced to the department and who have not been sentenced to the youthful offender system, except as specifically provided pursuant to subsection (5) of this section.

(1.3) (a) For the purposes of this section, unless the context otherwise requires:

(I) "Department" means the department of corrections.

(II) "Executive director" means the executive director of the department of corrections.

(III) "Juvenile" means a person who is under eighteen years of age when the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.

(IV) "System participant" or "participant" means a juvenile or a young adult who has been sentenced to the youthful offender system.

(V) "Trauma-informed" means an approach that involves an understanding of adverse childhood experiences and that responds to symptoms of chronic interpersonal trauma and traumatic stress across the lifespan of an individual.

(VI) "Young adult" means a person who is at least eighteen years of age but under twenty years of age when the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.

(b) As used in this section, "community supervision" does not mean a community corrections program, as defined in section 17-27-102.

(1.5) (a) (I) For the purposes of public safety, academic achievement, rehabilitation, the development of prosocial behavior, or reentry planning for juveniles and young adults, the executive director or the executive director's designee may exercise discretion in the transfer of a juvenile or young adult twenty-four years of age or younger and sentenced to the department into and out of the youthful offender system.

(II) The department shall develop policies and procedures for decision-making regarding the transfer of a juvenile or young adult who is not sentenced to the youthful offender system into the youthful offender system to ensure that the goals of the youthful offender system, as described in this section; the operations of the rehabilitative program within the youthful offender system; and the delivery of services to those juveniles and young adults directly sentenced to the youthful offender system are not compromised in any way by the commingled population.

(III) Notwithstanding any provisions of this section to the contrary, the department shall not initiate any transfers of juveniles or young adults to the youthful offender system until the department has developed the policies and procedures described in subsection (1.5)(a)(II) of this section.

(b) The facility that houses participants sentenced to the youthful offender system is limited to two hundred fifty-six beds.

(c) The department shall include in its annual report to the judiciary committees of the house of representatives and senate, or to any successor committees, pursuant to section 2-7-203, and in any annual youthful offender system report produced by the department, information regarding the policies and procedures developed by the department pursuant to subsection (1.5)(a)(II) of this section, the characteristics of the population of juveniles and young adults transferred pursuant to this subsection (1.5), and the impact, if any, of transferred inmates on youthful offender system programming or department programming. Beginning in January 2027, and in January every year thereafter, the department shall include, as part of its presentation during its "SMART Act" hearing required by section 2-7-203, information concerning how many juveniles and young adults completed a commitment to the division of youth services prior to a

commitment to the youthful offender system, how many juveniles and young adults successfully complete their sentence to the youthful offender system, and how many juveniles and young adults fail to complete a sentence to the youthful offender system program due to the filing of new criminal charges.

(2) (a) (I) A juvenile may be sentenced to the youthful offender system created pursuant to this section under the circumstances set forth in section 19-2.5-801 (5)(a)(II) or 19-2.5-802 (1)(d)(I)(B). A young adult may be sentenced to the youthful offender system created pursuant to this section under the circumstances set forth in section 18-1.3-407.5. In order to sentence a juvenile or young adult to the youthful offender system, the court shall first impose upon the juvenile or young adult a sentence to the department in accordance with section 18-1.3-401. The court shall thereafter suspend the sentence conditioned on completion of a sentence to the youthful offender system, including a period of community supervision. The court shall impose a sentence to the youthful offender system for a determinate period of not fewer than two years nor more than six years; except that a juvenile or young adult convicted of a class 2 felony may be sentenced for a determinate period of up to seven years. In imposing the sentence, the court shall grant authority to the department to place the juvenile or young adult under a period of community supervision for a period of not fewer than six months and up to twelve months any time after the date on which the juvenile or young adult has twelve months remaining to complete the determinate sentence. The court may award a juvenile or young adult sentenced to the youthful offender system credit for presentence confinement; except that such credit does not reduce the juvenile's or young adult's actual time served in the youthful offender system to fewer than two years. The court shall order a presentence investigation conducted before sentencing a juvenile or young adult pursuant to this section. Upon the request of either the prosecution or the defense, the presentence report must include a determination by the warden of the youthful offender system whether the juvenile or young adult is acceptable for sentencing to the youthful offender system. When making a determination, the warden shall consider the nature and circumstances of the crime; the age, circumstances, risk factors and protective factors, treatment needs, and criminal history of the juvenile or young adult; the available bed space in the youthful offender system; and any other appropriate considerations.

(II) Upon the successful completion of the determinate sentence to the youthful offender system, including the mandatory period of community supervision, the suspended sentence pursuant to section 18-1.3-401 is completed. Whenever a juvenile or young adult is returned to the district court for revocation pursuant to subsection (5) of this section, the court shall impose the original sentence following the revocation of the sentence to the youthful offender system, except as otherwise provided in subsection (5)(b) of this section.

(a.5) Repealed.

(b) Article 22.5 of title 17, concerning time credits, applies to any person sentenced to the youthful offender system; except that a system participant whose sentence to the youthful

offender system is revoked pursuant to subsection (5) of this section may receive one day of credit against the suspended sentence imposed by the court following revocation of the sentence to the youthful offender system for each day the participant served in the youthful offender system, excluding any period of time during which the offender was under community supervision but including credit for presentence confinement authorized pursuant to section 18-1.3-405.

(2.1) (a) As originally enacted, this section applied only to offenses committed by juveniles on or after September 13, 1993. For purposes of extending the availability of sentencing options, a juvenile who meets the criteria set forth in section 19-2.5-801 (5)(a)(II) may be sentenced to the youthful offender system pursuant to this section under the following circumstances:

(I) The juvenile is sentenced on or after June 3, 1994, for an offense committed prior to, on, or after September 13, 1993;

(II) The juvenile committed an offense prior to September 13, 1993, and was sentenced for the offense on or after September 13, 1993, but prior to June 3, 1994. Such a juvenile may only be resentenced to the youthful offender system if a court, in its discretion, so orders in response to a motion filed in accordance with rule 35 of the Colorado rules of criminal procedure.

(b) A juvenile who committed an offense prior to September 13, 1993, and who was sentenced prior to September 13, 1993, shall not be eligible to be sentenced to the youthful offender system.

(c) A juvenile described in paragraph (a) of this subsection (2.1) may be sentenced pursuant to this section only if the juvenile meets the age requirement set forth in subparagraph (III) of paragraph (a) of subsection (2) of this section.

(3) The department shall develop and implement a youthful offender system for juveniles and young adults sentenced in accordance with subsection (2) of this section. The youthful offender system is under the direction and control of the executive director. The youthful offender system is based on the following principles:

(a) The system must teach participants self-discipline by providing clear appropriate consequences for designated inappropriate behavior, which may include intermediate sanctions imposed by the department;

(a.5) The system must provide evidence-informed rehabilitative treatment, as indicated through assessment, to help participants make lasting behavioral changes to prepare themselves for successful transition back into the community;

(b) The system must include a daily regimen that involves participants in activities designed to meet their individual needs, which may include therapy, family therapy, or substance use disorder treatment; self-discipline exercises; educational and work programs; and meaningful

interaction, with a component for a tiered system for positive skill development, including life skills programming;

(c) The system must use staff models and mentors to promote within a participant the development of socially accepted attitudes and behaviors;

(d) The system must provide participants with instruction on problem-solving skills and incorporate methods to reinforce the use of cognitive behavior strategies that change participants' orientation toward criminal thinking and behavior;

(e) The system must promote among participants the creation and development of new group cultures that result in a transition to prosocial behavior; and

(f) The system must provide participants the opportunity to gradually reenter the community.

(3.3) The youthful offender system consists of the following components, and the department has the authority described in this subsection (3.3) to administer the components:

(a) An intake, diagnostic, and orientation phase. During the intake, diagnostic, and orientation phase, the department shall facilitate an evaluation process that includes an evaluation of each participant for criminogenic risks or needs and an evaluation of possible physical, intellectual, developmental, and mental and behavioral health needs. Evaluators must be trained to conduct assessments of juveniles and young adults and to identify needs and targeted goals for treatment. The evaluator shall complete a written report documenting recommendations. After receiving the evaluator's written report, the department shall create a plan that must address criminogenic risk or needs, therapeutic needs, education, vocational skills, life skills, and reentry into the community. The plan must be consistent with a participant's individualized education program developed pursuant to section 22-20-108 or plan developed pursuant to section 504 of the federal "Rehabilitation Act of 1973", 29 U.S.C. sec. 701 et seq., if such a plan exists. The department shall assign a case manager to the participant. The case manager shall meet monthly with the participant, ensure that the participant receives the treatment or services necessary to implement the participant's plan, and record the participant's progress throughout the youthful offender system program.

(b) Phase I, during which time a range of core programs, supplementary activities, and educational and prevocational programs and services are provided to each participant. A participant's plan must be reviewed with the participant and a multidisciplinary team on a monthly basis. If the department determines that modifications to the plan for treatment or services are necessary for the participant's successful rehabilitation, then the department shall modify the participant's plan accordingly.

(c) (I) Phase II, which may be administered during the last three to six months of the period of institutional confinement and during which time the department is authorized to transfer a participant to a twenty-four-hour custody residential program that serves participants.

(II) In connection with the component described in subsection (3.3)(c)(I) of this section, the department is authorized to operate or to contract with a prerelease residential program for participants. The department or the contract provider shall provide for twenty-four-hour custody of a participant in phase II.

(d) (I) Phase III, which is to be administered for the period of community supervision that remains after the completion of phase II and during which the participant is monitored during reintegration into society.

(II) After the department determines appropriate phase III placement, the department shall notify, no later than thirty days prior to placement, the local law enforcement agency for the jurisdiction in which the participant is being placed for phase III. The notice must include the participant's name, crime committed, case disposition, and the basis for the placement. If the placement is in a jurisdiction other than the jurisdiction where the participant was convicted, the local law enforcement agency may appeal the placement to the executive director at least fifteen days prior to the placement; except that the local law enforcement agency may not appeal if the placement is in the jurisdiction where the participant was residing at the time the offense was committed. If there is an appeal, after considering the department's basis for placement and the local law enforcement's basis for appeal, the executive director shall make the final determination of the placement.

(3.4) In addition to the powers granted to the department in subsection (3.3) of this section, the department may:

(a) Transfer a system participant to an appropriate facility to further the participant's identified treatment, rehabilitation, or reentry goals, as long as the transfer does not jeopardize the safety and welfare of the participant or isolate the participant because of the participant's disability needs;

(b) Operate an emancipation program and provide additional support or monitoring services and residential placement for a participant in phase II and phase III under the youthful offender system for whom family reintegration poses difficulties. The department shall provide reintegration support services at a level and of a type consistent with the participant's needs.

(c) Contract with any public or private entity, including, but not limited to, a school district, for provision or certification of educational services, including, but not limited to, a general educational development program or a high school diploma pathway. The department or the contracted entity shall determine the number and type of educational credits a participant had earned prior to entering the youthful offender system. A participant receiving educational services or diplomas from a school district under an agreement entered into pursuant to this subsection (3.4)(c) is not included in computing the school district's student performance on statewide assessments pursuant to section 22-7-1006.3, or the school district's levels of attainment of the performance indicators pursuant to article 11 of title 22.

(3.5) (a) The executive director or the executive director's designee has final approval on the hiring and transferring of staff for the youthful offender system. In staffing the youthful offender system, the executive director or the executive director's designee shall select persons who possess knowledge, experience, and a passion for the treatment of juveniles and young adults or will be trained in the treatment of juveniles and young adults; are trained to act as role models and mentors pursuant to subsection (3)(c) of this section; and are best equipped to enable the youthful offender system to meet the principles specified in subsection (3) of this section. All staff members must be trained in the treatment of juveniles and young adults within forty-five days after their first day at the youthful offender system. Prior to receiving this training, a staff member shall not work directly with juveniles and must be supervised by a trained staff member when working with a participant in the youthful offender system. The executive director or the executive director's designee shall make a recommendation to the department of personnel regarding the classification of positions with the youthful offender system, taking into account the level of education and training required for the positions.

(b) To support youthful offender system behavioral health staffing, the director of clinical services at the department may, with the final approval of the executive director or the executive director's designee, hire unlicensed behavioral health professionals or paraprofessionals to supplement, as appropriate, the work of licensed behavioral health providers authorized to provide supervision within the licensed behavioral health providers' scope of practice.

(4) The youthful offender system must provide for community supervision that consists of highly structured supervision, educational programs, and evidence-informed treatment programs that are individually tailored to meet the system participants' needs and goals. Community supervision must be administered by the department, and revocation of a participant's supervision status is subject to the provisions of subsections (2) and (5) of this section.

(4.3) The youthful offender system must provide sex offender treatment services for a participant who is sentenced to the youthful offender system and who has a history of committing a sex offense, as defined in section 16-11.7-102 (3), or who has a history of committing any other offense, the underlying factual basis of which includes a sex offense. The sex offender treatment services provided pursuant to this subsection (4.3) must comply with the sex offender treatment standards adopted by the sex offender management board pursuant to section 16-11.7-103.

(4.5) The consent of the parent, parents, or legal guardian of a juvenile participant who has been sentenced to the youthful offender system pursuant to this section is not necessary in order to authorize hospital, medical, mental health, substance use, dental, emergency health, or emergency surgical care. In addition, neither the department nor any hospital, physician, surgeon, mental or behavioral health-care provider, dentist, trained emergency health-care provider, or agent or employee thereof who, in good faith, relies on a juvenile participant's consent is liable for civil damages for failure to secure the consent of the participant's parent, parents, or legal

guardian prior to rendering the care. The parent, parents, or legal guardian of a juvenile participant described in this subsection (4.5) is not liable to pay the charges for the care provided the participant based on the participant's consent.

(5) (a) Except as otherwise provided by subsection (5)(b) of this section, the department shall implement a procedure for the transfer of a system participant to another facility when the system participant poses a danger to themselves or others. The executive director shall review any transfer determination by the department prior to the actual transfer of a participant, including a transfer back to the district court for revocation of the sentence to the youthful offender system. A transfer pursuant to this subsection (5)(a) is limited to a period not to exceed sixty days, at which time the participant shall be returned to the youthful offender facility to complete the sentence or returned to the district court for revocation of the sentence to the youthful offender system. In no case shall a participant initially sentenced to the youthful offender system be held in isolation or segregation or in an adult facility for longer than sixty consecutive days without action by the sentencing court.

(b) (I) A participant who is determined by a mental health clinician to have a behavioral or mental health condition or an intellectual and developmental disability, as defined by regulation of the department, may be transferred to another facility for a period not to exceed sixty days for diagnostic validation of the condition or disability. At the conclusion of the sixty-day period, the appropriate professionals making the diagnosis shall forward to the executive director their findings, including information about how the participant's condition or disability can be accommodated in the youthful offender system. If the diagnosis determines that the participant is incapable of completing the sentence to the youthful offender system due to a behavioral or mental health condition or an intellectual and developmental disability, the executive director shall forward the determination to the sentencing court. Based on the determination, the sentencing court shall review the participant's sentence to the youthful offender system and may reconsider and reduce the participant's sentence to the department in consideration of the behavioral or mental health condition or intellectual and developmental disability.

(II) A juvenile or young adult who is resentenced pursuant to this subsection (5)(b) shall continue to be treated as an adult for purposes of sentencing and shall not be sentenced pursuant to article 2.5 of title 19.

(III) In no event shall the sentencing court, after reviewing the juvenile's or young adult's sentence to the youthful offender system pursuant to this subsection (5)(b), increase the sentence to the department due to the diagnosis of a behavioral or mental health condition or determination of an intellectual and developmental disability.

(IV) A participant who is diagnosed as having a behavioral or mental health condition or determined to have an intellectual and developmental disability and is therefore incapable of completing their sentence to the youthful offender system may be housed in any department

facility deemed appropriate by the executive director or transferred in accordance with procedures set forth in section 17-23-101 pending action by the sentencing court with regard to the sentence.

(c) The department shall implement a procedure for a returning juvenile or young adult who cannot successfully complete the sentence to the youthful offender system, or who fails to comply with the terms or conditions of the youthful offender system, to the district court. A juvenile or young adult returned to the district court pursuant to subsection (5)(a) of this section or because the juvenile or young adult cannot successfully complete the sentence to the youthful offender system for reasons other than a behavioral or mental health condition or an intellectual and developmental disability, or because the juvenile or young adult fails to comply with the terms or conditions of the youthful offender system, must receive imposition of the original sentence to the department. The department must first make a determination that the failure to comply with the terms or conditions of the youthful offender system did not result from a mental or behavioral health condition or an intellectual and developmental disability or the department's failure to provide reasonable accommodations for a mental or behavioral health condition or an intellectual and developmental disability. After the executive director upholds the department's transfer decision, the participant may be held in any correctional facility deemed appropriate by the executive director; except that a participant who cannot successfully complete the sentence to the youthful offender system for reasons other than a behavioral or mental health condition or an intellectual and developmental disability, or because of a failure to comply with the terms or conditions of the youthful offender system, shall be transferred, within thirty-five days after the executive director upholds the department's decision, to a county jail for holding prior to resentencing. The department shall notify the district attorney of record, and the district attorney of record is responsible for seeking the revocation or review of the participant's sentence and the imposition of the original sentence or modification of the original sentence pursuant to subsection (5)(b)(I) of this section. The district court shall review the participant's sentence within one hundred twenty-six days after notification to the district attorney of record by the department that the participant is not able to complete the sentence to the youthful offender system or fails to comply with the terms or conditions of the youthful offender system.

(d) (I) Except as provided in subsection (5)(d)(II) of this section, the department may house a system participant in a youthful offender facility that also houses inmates twenty-five years of age or older sentenced to the department who are of a lower than close custody level if the inmates are housed in the youthful offender facility for the purpose of participating in a program to mentor system participants that is authorized by the executive director.

(II) The department shall not house a participant in a youthful offender facility that also houses any inmates twenty-five years of age or older sentenced to the department who have been convicted of a sex offense, as described in section 16-11.7-102 (3).

(6) The department shall establish and enforce standards for the youthful offender system consistent with the goals stated in subsection (1) of this section. A participant in the youthful offender system, including a participant under community supervision, is considered an inmate for the purposes of section 17-1-111.

(7) The number of offenders in any program element under the youthful offender system shall be determined by the department within available appropriations.

(8) The department of corrections may and is encouraged to contract with any private or public entity for the provision of services and facilities under the youthful offender system.

(9) On or before November 1, 1993, the department, in conjunction with the division of criminal justice, shall develop and the department shall implement a process for monitoring and evaluating the youthful offender system. In implementing such system, the department may contract with a private agency for assistance.

(10) (a) (Deleted by amendment, L. 2002, p. 881, § 19, effective August 7, 2002.)

(b) The division of criminal justice shall independently monitor and evaluate, or contract with a public or private entity to independently monitor and evaluate, the youthful offender system. Notwithstanding section 24-1-136 (11)(a)(I), on or before November 1, 2002, and on or before November 1 every two years thereafter, the division of criminal justice shall report its findings, or the findings of the contract entity, to the judiciary committees of the senate and the house of representatives. The department of corrections shall cooperate in providing the necessary data to the division of criminal justice or an entity designated by the division of criminal justice to complete the evaluation required in this section.

(11) Repealed.

(11.5) (a) (I) A juvenile or young adult who is sentenced to the youthful offender system must submit to collection and a chemical testing of a biological substance sample from the juvenile or young adult to determine the genetic markers thereof.

(II) Collection of the biological substance sample shall occur as soon as possible after being sentenced to the youthful offender system, and the results thereof shall be filed with and maintained by the Colorado bureau of investigation. The results of such tests shall be furnished to any law enforcement agency upon request.

(b) The department of corrections or its designee or contractor may use reasonable force to obtain biological substance samples in accordance with paragraph (a) of this subsection (11.5).

(c) Repealed.

(d) The Colorado bureau of investigation is directed to conduct the chemical testing of the biological substance samples obtained pursuant to this subsection (11.5).

(12) The general assembly recognizes that the number of violent crimes committed by juveniles and young adults is a problem faced by all the states of this nation. By creating the youthful offender system, Colorado stands at the forefront of the states in creating a new approach to addressing this problem. The general assembly also declares that the cost of implementing and operating the youthful offender system creates a burden on the state's limited resources. However, the general assembly shall appropriate to the department sufficient funds to manage the youthful offender system in a manner consistent with the requirements and principles contained in this section, including the requirements and principles related to the treatment of mental and behavioral health conditions or intellectual and developmental disabilities. To supplement the appropriation, the general assembly directs the department to seek out and accept available federal, state, and local public funds, including project demonstration funds, and private money and private systems for the purpose of conducting the youthful offender system.

(13) Repealed.

(14) The department of corrections shall consult with one or more external experts to conduct a study of the effectiveness of the current youthful offender system, as designed by the enabling statute and as implemented by the department of corrections. The department shall consider all relevant research on effective programming for young adults and alternative management and program models for the youthful offender system. Additionally, the study must assess the potential expansion of the youthful offender system to serve offenders up to the age of twenty-five years who commit felony offenses, including the offenses that currently make a younger offender eligible for youthful offender sentencing by the court, and how that expansion could be implemented. The department shall seek alternative funding sources for this study through gifts, grants, and donations or fund the study through current appropriations. A report of findings must be completed by the external experts, in conjunction with the department, by December 1, 2021, and the report must be made available to the public.

(15) (a) The department shall consult a diverse group of relevant experts to formulate recommendations for integrating a trauma-informed standard of care with current practices to promote the health and safety of participants in the youthful offender system. The relevant experts' views must guide the recommendations on appropriate programming and therapeutic interventions to address symptoms of trauma that system participants exhibit. The recommendations must include, but are not limited to, necessary modifications to youthful offender system programming and procedures, participant treatment, participant housing arrangements, and staff training to reflect a trauma-informed approach to care. Implementation of the recommendations is subject to available appropriations, department capacity, facility infrastructure, and available staffing.

(b) In January 2028, the department shall include, as part of its presentation during its "SMART Act" hearing required by section 2-7-203, information concerning the

recommendations developed pursuant to subsection (15)(a) of this section. The department shall publish the recommendations on the department's website.

Source: L. 2002: Entire article added with relocations, p. 1406, § 2, effective October 1. **L. 2003:** (5)(c) amended, p. 983, § 19, effective April 17. **L. 2004:** (1)(c) amended and (13) repealed, pp. 243, 244, §§ 2, 3, effective April 5; (3.4)(c) amended, p. 1662, § 14, effective June 3. **L. 2006:** IP(5)(b)(I) amended, p. 1399, § 49, effective August 7; (11.5)(a)(I) amended, p. 1690, § 10, effective July 1, 2007. **L. 2008:** (4.3) and (4.5) amended, p. 39, § 1, effective March 13; (1)(b) and (2)(a)(I) amended, p. 1507, § 3, effective May 28. **L. 2009:** (3.4)(c) amended, (SB 09-163), ch. 293, p. 1546, § 55, effective May 21; (1)(b), (1)(c), (1)(d), (2)(a)(I), (2)(a)(II), (2)(a)(III), (2)(a.5), (2)(b), (3.3), (3.4)(a), (3.4)(b), (3.5), IP (5)(b)(I), (5)(c), (11.5)(a)(I), (11.5)(c), and (12) amended, (HB 09-1122), ch. 77, p. 280, § 5, effective October 1. **L. 2010:** (1)(b), (2)(a)(I), and IP(2.1)(a) amended, (HB 10-1413), ch. 264, p. 1205, § 5, effective August 11. **L. 2012:** (5)(c) amended, (SB 12-175), ch. 208, p. 866, § 111, effective July 1. **L. 2015:** (3.4)(c) amended, (HB 15-1323), ch. 204, p. 719, § 16, effective May 20; (1)(c) amended, (SB 15-182), ch. 146, p. 442, § 1, effective August 5. **L. 2017:** IP(5)(b)(I), (5)(b)(I)(B), (5)(b)(III), (5)(b)(IV), and (5)(c) amended, (SB 17-242), ch. 263, p. 1306, § 140, effective May 25; (10)(b) amended, (HB 17-1059), ch. 91, p. 277, § 2, effective August 9. **L. 2021:** (1)(b) and (2)(a)(I) amended, (HB 21-1091), ch. 175, p. 955, § 3, effective May 24; (2)(a.5), (11), and (11.5)(c) repealed, (2)(b), IP(3.3), (3.3)(c)(I), (3.5), and (11.5)(a)(I) amended, and (14) added (SB 21-146), ch. 459, p. 3087, § 12, effective July 6; (4.5) and (11.5)(a)(I) amended and (11.5)(c) repealed, (HB 21-1315), ch. 461, p. 3109, § 9, effective July 6; (1)(c)(I) amended and (5)(d) added, (SB 21-192), ch. 102, p. 407, § 1, effective September 7; (1)(b), (2)(a)(I), IP(2.1)(a), and (5)(b)(II) amended, (SB 21-059), ch. 136, p. 719, § 43, effective October 1; (1)(b) and (2)(a)(I) amended, (HB 21-1091), ch. 175, p. 958, § 6, effective October 1. **L. 2026:** (1), (2)(a), (2)(b), (3), (3.3), (3.4), (3.5), (4), (4.3), (4.5), (5), (6), (11.5)(a)(I), and (12) amended and (1.3), (1.5), and (15) added, (HB 26-1064), ch. 15, p. 62, § 5, effective August 12.

Editor's note: (1) This section is similar to former § 16-11-311 as it existed prior to 2002.

(2) This section was amended in 2002 prior to its relocation on October 1, 2002. For that history, see the source note to § 16-11-311.

(3) Subsections (1)(b) and (2)(a)(I) were amended in HB 21-1091. Those amendments were superseded by the amendments of subsections (1)(b) and (2)(a)(I) in SB 21-059.

(4) (a) Subsections IP(1.3)(a), (1.3)(a)(III), (1.3)(a)(VI), and (1.3)(b) are similar to former subsections IP(2)(a)(III), (2)(a)(III)(A), (2)(a)(III)(B), and (2)(a)(IV), respectively, as they existed prior to 2026.

(b) Subsections (1.5)(a)(I), (1.5)(a)(II), (1.5)(a)(III), (1.5)(b), and (1.5)(c) are similar to former subsections (1)(c)(II), (1)(c)(IV)(A), (1)(c)(IV)(C), (1)(c)(III), and (1)(c)(IV)(B), respectively, as they existed prior to 2026.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017. For the legislative declaration in HB 21-1315, see section 1 of chapter 461, Session Laws of Colorado 2021.

ANNOTATION

Annotator's note. Since § 18-1.3-407 is similar to § 16-11-311 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Although this section no longer specifies the procedural framework governing revocation of a youth offender sentence, minimum due process protections are still required. Due process requires only: (1) Written notice of the claimed violations; (2) disclosure to defendant of the evidence against him or her; (3) a fair opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adversarial witnesses, unless there is good cause to deny such a right; (5) a neutral and detached hearing officer or judge; and (6) a written statement by the fact finder as to the evidence relied on and reasons for the revocation. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997).

Due process not denied because the grounds for revocation were established by

hearsay evidence. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997); *People v. Bostelman*, 141 P.3d 891 (Colo. App. 2005), rev'd on other grounds, 162 P.3d 686 (Colo. 2007).

Plain language of section simply makes clear that youthful offender system (YOS) facilities are to be available for youthful offenders of both genders, and toward that end, it mandates separate housing for male and female offenders, but it does not create an enforceable due process right to have the trial court consider YOS sentencing. *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

Trial courts are vested with the discretion to identify the youthful offenders who should be sentenced to the YOS, and a trial court sentencing a juvenile on a direct-filed charge of a violent crime also retains discretion to impose a sentence to the department of corrections (DOC). *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

The mandate of presentence confinement credit for a defendant who is sentenced to the DOC does not apply to a

defendant who is sentenced through the YOS. Subsection (2)(a)(I) establishes discretion for the court in granting presentence confinement credit to such an offender. *People v. Garcia*, 2016 COA 124, 382 P.3d 1258.

Court's comment to defendant at sentencing did not constitute a blanket policy or an abuse of discretion but was an explanation of the conclusion that despite defendant's young age, in light of the viciousness of his crimes, he was not an appropriate candidate for the YOS. *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

Revocation of a youth offender sentence requires the imposition of the original sentence, and a trial court is without authority to modify the original sentence. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997).

For subsection (5)(a) to apply to an offender's YOS sentence revocation, the offender must exhibit a danger to himself, herself, or others. Additional provisions of subsection (5)(a) referring to "any transfer determination" by the department of corrections are limited to those offenders who pose a danger to themselves or others. *People v. Johnson*, 2022 COA 68, 518 P.3d 781.

Subsection (5)(b)(I) grants the DOC the power and discretion to send an offender for diagnostic validation. It does not grant the district court that authority. *People v. Morris*, 2024 COA 105, 561 P.3d 869.

Subsection (5)(c)'s reference to subsection (5)(a) does not apply

subsection (5)(a)'s procedures to every category of offender identified in subsection (5)(c). Subsection (5)(c) identifies three categories of offenders for whom the district court must reimpose their original sentences to the department of corrections: (1) offenders returned to the district court under subsection (5)(a); (2) offenders who cannot successfully complete a YOS sentence for reasons other than a behavioral or mental health disorder or an intellectual or developmental disability; and (3) offenders who fail to comply with the terms and conditions of their YOS sentences. *People v. Johnson*, 2022 COA 68, 518 P.3d 781.

Subsection (5)(a) does not apply to offender who fell within the third category and was not returned to the district court under subsection (5)(a). *People v. Johnson*, 2022 COA 68, 518 P.3d 781.

The filing of a complaint or other written motion is not the sole procedure for initiating revocation of a youth offender sentence. Although defendant's administrative hearing was not held and the motion to revoke was not filed until after the expected completion date of the youth offender sentence, defendant's arrest and custodial status tolled the completion date pending resolution of the pending charges. As a result, the trial court retained jurisdiction. *People v. Efferson*, 122 P.3d 1038 (Colo. App. 2005).

By violating the conditions of his YOS sentence before the anticipated completion date, defendant did not successfully complete his YOS sentence,

and therefore, his suspended DOC sentence was not complete. Under these circumstances, the district court retained jurisdiction to revoke defendant's YOS sentence and impose the original DOC sentence. *People v. Martinez*, 2015 COA 33, 350 P.3d 986.

The trial court erred in determining that it lacked jurisdiction to revoke defendant's YOS sentence when defendant did not successfully complete such sentence but the DOC mistakenly issued an unconditional discharge of defendant. *People v. Miller*, 25 P.3d 1230 (Colo. 2000); *People v. Valdez*, 68 P.3d 484 (Colo. App. 2002).

Because the DOC did not transport defendant as required by subsection (5)(c) to a county jail after defendant failed to

successfully complete his YOS sentence, the district court retained discretion to fashion a remedy it deemed appropriate for that statutory violation. The court did not abuse its discretion in determining dismissal was the appropriate remedy. *People v. Martinez*, 2015 COA 33, 350 P.3d 986.

Subsection (5) does not divest the court of its jurisdiction to revoke an offender's YOS sentence and allows the court to impose the offender's previously suspended DOC sentence if certain criteria are met, even if the statute's deadlines are missed. The deadlines set forth in subsection (5) are procedural rather than jurisdictional. Accordingly, the court retains jurisdiction over the sentencing proceedings, even if the deadlines pass, and retains discretion to remedy the missed deadlines. *People v. Omar*, 2023 COA 13M, 529 P.3d 626.

18-1.3-407.5. Sentences - young adults - youthful offender system - definitions.

(1) (a) A young adult may be sentenced to the youthful offender system in the department of corrections in accordance with section 18-1.3-407, in the following circumstances:

(I) The young adult is convicted of a felony enumerated as a crime of violence pursuant to section 18-1.3-406;

(II) The young adult is convicted of a felony offense described in part 1 of article 12 of this title 18;

(III) The young adult used, or possessed and threatened the use of, a deadly weapon during the commission of a felony offense against a person, as set forth in article 3 of this title 18;

(IV) The young adult is convicted of vehicular homicide, as described in section 18-3-106; vehicular assault, as described in section 18-3-205; or felonious arson, as described in part 1 of article 4 of this title 18;

(V) The young adult is convicted of a felony offense described in section 18-1.3-401 as a class 3 felony, other than the felonies described in section 18-3-402 (1)(d) and section 18-3-403 (1)(e), as it existed prior to July 1, 2000, and has, within the two previous years, been adjudicated

a juvenile delinquent for a delinquent act that would constitute a felony if committed by an adult;
or

(VI) The young adult is convicted of a felony offense and is determined to have been a "repeat juvenile offender", as described in section 19-2.5-1125.

(b) The offenses described in subsection (1)(a) of this section include the attempt, conspiracy, or solicitation to commit the offenses.

(2) (a) Notwithstanding the circumstances described in subsection (1) of this section, a young adult is ineligible for sentencing to the youthful offender system if the young adult is convicted of any of the following:

(I) A class 1 or class 2 felony;

(II) A sexual offense described in section 18-6-301, section 18-6-302, or part 4 of article 3 of this title 18; or

(III) Any offense, if the young adult has received a sentence to the youthful offender system for a prior conviction.

(b) Notwithstanding subsection (2)(a) of this section, a young adult who is charged with first degree murder as described in section 18-3-102 (1)(b), as it existed prior to September 15, 2021, or murder in the second degree, as described in section 18-3-103 (1)(b), and pleads guilty to a class 2 felony as a result of a plea agreement is eligible for sentencing to the youthful offender system if the young adult would be eligible for sentencing to the youthful offender system for a conviction of the felony underlying the charge of first degree murder as described in section 18-3-102 (1)(b), as it existed prior to September 15, 2021, or murder in the second degree, as described in section 18-3-103 (1)(b).

(3) As used in this section, unless the context otherwise requires, a "young adult" means a person who is at least eighteen years of age but under twenty years of age at the time the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.

Source: **L. 2009:** Entire section added, (HB 09-1122), ch. 77, p. 278, § 1, effective October 1. **L. 2013:** Entire section RC&RE, (SB 13-216), ch. 171, p. 617, § 1, effective May 10. **L. 2021:** (2)(b) amended, (SB 21-124), ch. 58, p. 238, § 5, effective September 15; (1)(a) and (1)(a)(VI) amended, (SB 21-059), ch. 136, p. 720, § 44, effective October 1. **L. 2026:** Entire section amended, (HB 26-1064), ch. 15, p. 75, § 6, effective August 12.

Editor's note: Prior to the recreation and reenactment of this section in 2013, subsection (4) provided for the repeal of this section, effective October 1, 2012. (See L. 2009, p. 278.)

18-1.3-408. Determinate sentence of imprisonment imposed by court.

When a person has been convicted of a felony and a sentence of imprisonment imposed, the court imposing the sentence shall fix a definite term of imprisonment, which shall be not longer than the terms authorized in section 18-1.3-401; except that, for persons convicted on or after November 1, 1998, of a sex offense, as defined in section 18-1.3-1003 (5), the court shall impose an indeterminate sentence as provided in part 10 of this article.

Source: L. 2002: Entire article added with relocations, p. 1413, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-304 as it existed prior to 2002.

ANNOTATION

Law reviews. For note, "Correcting an Erroneous Judgment in a Criminal Case", see 19 Rocky Mt. L. Rev. 295 (1947). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Annotator's note. Since § 18-1.3-408 is similar to § 16-11-304 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-12-1, C.R.S. 1963, § 39-12-1, CRS 53, CSA, C. 48, § 545, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Only the general assembly may define crimes and prescribe punishments. People v. Hinchman, 196 Colo. 526, 589 P.2d 917 (1978).

The sentence is a matter solely within the discretion of the trial judge. Armbeck

v. People, 135 Colo. 568, 313 P.2d 715 (1957).

A trial judge has the authority and the power to impose any sentence that falls within the statutory limitations that have been created by the general assembly as punishment for the particular crime in issue. People v. Jones, 176 Colo. 61, 489 P.2d 596 (1971).

An erroneous judgment is one rendered contrary to law. People ex rel. Best v. District Court, 115 Colo. 240, 171 P.2d 774 (1946).

When a district court has jurisdiction of the person and the subject matter — and that jurisdiction is not challenged — its judgment is not void; it is at most erroneous. Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

Excessive sentence invalid only as to excess. Where a judgment is merely excessive, and the court which pronounces it is one of general jurisdiction, it is not void ab initio because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess. *Martin v. District Court*, 37 Colo. 110, 86 P. 82, 119 Am. St. R. 262 (1906); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

And court retains jurisdiction to correct erroneous judgment. Where a court has jurisdiction of the person and subject matter and has entered an erroneous judgment, it retains jurisdiction to correct, modify, and alter it in accordance with the statute involved, notwithstanding the expiration of the term at which the judgment was pronounced. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

If an illegal sentence has been pronounced, the court has power to substitute a legal sentence, and this power is not impaired by the expiration of the term of court during which the judgment was pronounced. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

Judgment may be corrected by appeal. An excessive sentence is at most voidable,

and may be corrected on appeal. *Martin v. District Court*, 37 Colo. 110, 86 P. 82, 119 Am. St. R. 262 (1906).

An erroneous judgment may be corrected by appeal or other like proceeding in an appellate court. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

Habeas corpus does not lie to obtain release from an erroneous sentence, but does lie to afford relief from a void sentence. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

Petition for habeas corpus treated as one for entry of proper sentence. A defendant seeking habeas corpus without success could, if defendant so elected, have his petition for habeas corpus treated as a petition for entry of a proper sentence. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

No violation of equal protection or double jeopardy where sentence within statutory limits. *People v. Mieyr*, 176 Colo. 90, 489 P.2d 327 (1971).

Applied in *People v. Flowers*, 644 P.2d 916 (Colo. App. 1982); *People v. Chambers*, 749 P.2d 984 (Colo. App. 1987).

18-1.3-409. Concurrent or consecutive sentences - court to clarify sentencing in mittimus.

Before remitting any mittimus to the department of corrections sentencing a defendant to the custody of the department, a court shall confirm that the mittimus properly reflects the sentencing order of the court and includes all necessary information regarding the sentence and

any information as to whether a sentence is to be served concurrent with, or consecutive to, the sentence for any other count or any other case.

Source: L. 2013: Entire section added, (HB 13-1323), ch. 325, p. 1817, § 2, effective May 28.

18-1.3-410. Fentanyl education and treatment program.

(1) Upon conviction of any offense pursuant to part 4 of article 18 of this title 18 for a material, compound, mixture, or preparation that contains any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), the court shall require a substance abuse assessment pursuant to section 18-1.3-209. The substance abuse assessment must include information regarding the person's history of substance use, specifically the use of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof; the person's amenability to treatment; and the level of treatment, if any, necessary to address the person's substance use disorder to be provided during the person's probation or deferred judgment supervision.

(2) If the substance abuse assessment described in subsection (1) of this section recommends community-based treatment, the person shall complete the assessed level of treatment consistent with the provisions of section 18-1.3-209.

(3) (a) If the substance abuse assessment described in subsection (1) of this section recommends as a condition of probation placement in a residential treatment facility for treatment of an addiction that includes fentanyl, carfentanil, benzimidazole opiate, or an analog thereof, the court shall order residential treatment as a condition of probation. The residential treatment facility must be approved by the behavioral health administration in the department of human services and designed for treatment of an addiction that includes fentanyl, carfentanil, benzimidazole opiate, or an analog thereof. Placement in a residential program as a condition of probation is limited to the period of time that the placement is clinically necessary. The residential placement costs must be paid from the correctional treatment cash fund, existing pursuant to section 18-19-103 (4), for a person on probation and who is determined by the court to be indigent, is represented by court-appointed counsel, or is otherwise unable to afford the cost of the placement.

(b) Notwithstanding subsection (3)(a) of this section to the contrary, the court may order non-residential treatment as a condition of probation if the court makes findings on the record that a residential treatment facility does not exist, is not accessible for the person within a reasonable period of time, or non-residential treatment is available to address the person's treatment needs.

(4) A person, regardless of whether the person is receiving treatment in a community-based or residential treatment facility pursuant to subsection (2) or (3) of this section, must complete the fentanyl education program developed by the behavioral health administration pursuant to section 27-80-128. The fentanyl education program must include information regarding the nature and addictive elements of synthetic opiates, their dangers to a person's life and health, access to and administration of opioid antagonists and non-laboratory synthetic opiate detection tests, and laws regarding synthetic opiates, including criminal penalties and immunity for reporting an overdose event pursuant to section 18-1-711. The fentanyl education program costs must be paid from the correctional treatment cash fund, existing pursuant to section 18-19-103 (4), for a person on probation and who is determined by the court to be indigent, is represented by court-appointed counsel, or is otherwise unable to afford the cost of placement.

Source: L. 2022: Entire section added, (HB 22-1326), ch. 225, p. 1633, § 8, effective January 1, 2023. **L. 2024:** (4) amended, (HB 24-1037), ch. 458, p. 3169, § 16, effective June 6.

Cross references: For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

18-1.3-411. Post-conviction relief - sentence reconsideration - offenders sixty years old or older.

(1) An individual serving a sentence in the department of corrections may, on or before three years after August 12, 2026, file a petition with the court where the conviction was obtained requesting post-conviction relief from the terms of the sentence if the petitioner is sixty years old or older at the time of filing the petition and has served at least twenty calendar years incarcerated for the offense resulting in the conviction.

(2) Notwithstanding the provisions of subsection (1) of this section, an individual is not eligible for post-conviction relief pursuant to this section if the individual is in the custody of the department of corrections as the result of conviction for one of the following offenses:

- (a) A sex offense described in section 16-11.7-102 (3);
- (b) Human trafficking for involuntary servitude pursuant to section 18-3-503 or human trafficking for sexual servitude pursuant to section 18-3-504;

(c) An offense that resulted in a sentence to life imprisonment without the possibility of parole;

(d) An offense for which the victim was a child younger than twelve years old; or

(e) An offense against a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of their duties.

(3) (a) The petitioner has a right to counsel for all proceedings arising from a petition filed pursuant to this section. Upon receipt of a pro se petition requesting post-conviction relief, the court shall appoint counsel from the office of state public defender to represent the petitioner. If the office of state public defender notifies the court of a conflict of interest, the court shall appoint the office of alternate defense counsel to represent the petitioner.

(b) The court shall give counsel appointed in accordance with this subsection (3) the opportunity to amend, supplement, or otherwise file documents supporting the petition. Within one hundred eighty days after the appointment, appointed counsel shall, after review of the facts and evidence supporting the petition, advise the court in writing whether the petitioner wishes to proceed to an evidentiary hearing on the petition or withdraw the petition and refile the petition at a later date, subject to the limitation described in subsection (5)(b) of this section.

(4) If the petitioner requests a hearing on a petition for post-conviction relief filed pursuant to this section, the court shall grant the district attorney time to respond in writing to the petition.

(5) (a) After receipt of the district attorney's response filed pursuant to subsection (4) of this section, the court shall, as soon as practicable, set a hearing on the petition.

(b) A defendant is entitled to only one evidentiary hearing on the merits pursuant to this section. After a defendant has had an evidentiary hearing on the merits pursuant to this section, the defendant shall not file a subsequent petition pursuant to this section.

(6) The district attorney shall notify the victim of any offense in accordance with the "Victim Rights Act", part 3 of article 4.1 of title 24, and the court shall provide the victim an opportunity to be heard at the hearing.

(7) At the hearing on the petition, the petitioner has the burden to show, by a preponderance of the evidence, that the petitioner no longer presents a danger to the safety of any person or the community and that there is good cause for the court to modify the petitioner's sentence. The court may accept any stipulation of the parties that the petitioner has met their burden as described in this subsection (7) if the court determines that the stipulation is supported by the evidence as agreed to by the parties.

(8) At the hearing on the petition, the court shall consider the following factors related to the petitioner and the offense that is the subject of the petition and admit any evidence relevant to any of the factors:

(a) The petitioner's age at the time of the offense and the relationship of age to diminished culpability;

(b) The petitioner's age at the time at the hearing and the likelihood of reoffense given the current age of the petitioner;

(c) The nature of the offense, the extent of the petitioner's role in the offense, and whether and to what extent another person was involved in the offense;

(d) The characteristics of the petitioner and the petitioner's history, including any history of trauma, abuse, involvement in the child welfare system, or other mitigating circumstances;

(e) The petitioner's compliance with the rules of the institutions in which the petitioner has been confined, particularly within the prior five years;

(f) The petitioner's participation in educational, vocational, or other programs offered by the department of corrections or other entities;

(g) The history and characteristics of the petitioner at the time of the hearing, including demonstrated maturity, successful rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction;

(h) A statement or other evidence offered by a victim or a victim's representative, including any evidence of a continuing impact of the crime on the victim;

(i) A report of a physical, mental, or behavioral examination of the petitioner conducted by a health professional;

(j) Whether the defendant has complied with criminal or civil protection orders; and

(k) Any other factor the court deems relevant to the court's determination of whether the petitioner has met their burden described in subsection (7) of this section.

(9) (a) If the court finds that the petitioner has not met their burden described in subsection (7) of this section, the court shall deny the petition and set forth the reasons for the finding in its order.

(b) Upon a finding that the petitioner has met their burden described in subsection (7) of this section, the petitioner is permitted to file a motion for reconsideration and reduction of the initial sentence pursuant to rule 35 (b) of the Colorado rules of criminal procedure. The motion is not subject to the time limits contained in rule 35 (b) of the Colorado rules of criminal procedure and may be made orally at the time of the hearing or submitted in writing within ninety-one days after the court's ruling.

(10) (a) At the hearing on the petitioner's motion for reconsideration of the initial sentence pursuant to rule 35 (b) of the Colorado rules of criminal procedure, the court shall determine and

impose the appropriate sentence, which must include, if the petitioner is eligible for resentencing pursuant to subsection (1) of this section and notwithstanding any other provision of law, a sentence to imprisonment that totals at least twenty-five years but no longer than originally imposed by the court, including up to five years of parole; an alternative sentence permitted by law, including a community corrections direct sentence; or a sentence stipulated to by the parties; or

(b) If a petitioner is eligible for resentencing and is serving sentences for multiple offenses, the court has the discretion to modify a sentence to be concurrent with any other sentence imposed on the petitioner, and the modified sentence is not subject to the provisions of section 18-1.3-406.

(11) If a person in the custody of the department of corrections is not eligible for post-conviction relief pursuant to this section, the district attorney's office that prosecuted the offense resulting in the conviction may petition the court requesting that the court grant post-conviction relief to the person. If the district attorney files a petition described in this subsection (11), the provisions of subsections (3) to (10) of this section regarding the appointment of counsel, the burden of proof, the relevant evidentiary factors, the due process granted to the incarcerated person, and the prosecution and any stipulation of the parties, apply. A district attorney who files a petition pursuant to this subsection (11) may file a motion requesting the court appoint counsel for the person.

(12) Upon the request of the petitioner and execution by the petitioner of any necessary confidentiality waivers, the department of corrections shall provide the petitioner or the petitioner's attorney of record with any information in the possession of the department requested for the preparation of the petition for post-conviction relief, including all time computation information available for the petitioner, including all earned time awarded against the petitioner's sentence that would be credited against any new sentence imposed and any risk assessment score pertaining to the petitioner.

(13) Upon the request of a party, the court shall grant reasonable discovery disclosures to the party to effectuate fair preparation and presentation of relevant evidence related to the factors set forth in subsection (8) of this section in order to ensure a fair hearing. The court has the discretion to enter orders to cure or remedy a violation of any deadlines or other discovery requirements.

(14) Beginning in January 2027, and in January every year thereafter, the judicial department shall include, as part of its presentation during its "SMART Act" hearing required by section 2-7-203, subject to the availability of the information, the following:

- (a) The number of petitions filed pursuant to this section;
- (b) The number of hearings set pursuant to subsection (5) of this section;

(c) The number of sentences determined and imposed pursuant to subsection (10) of this section;

(d) The average hourly length of the hearings held pursuant to subsection (5) of this section;

(e) Whether victim input was provided in consideration of each matter filed pursuant to this section; and

(f) For each case in which the court granted a petition pursuant to this section, the underlying offense and the risk level of the petitioner as determined by a risk assessment completed pursuant to subsection (12) of this section, whether victims chose to participate in the evidentiary hearing, whether the prosecutor was able to locate any victims, whether the original sentence was the result of a plea agreement or a jury verdict and court-imposed sentence, and how many months were remaining on the original sentence.

Source: L. 2026: Entire section added, (SB 26-115), ch. 344, p. 2094, § 2, effective August 12.

Editor's note: Section 5(2) of chapter 344 (SB 26-115), Session Laws of Colorado 2026, provides that the act adding this section applies to individuals convicted of an offense before, on, or after August 12, 2026.

Cross references: For the legislative declaration in SB 26-115, see section 1 of chapter 344, Session Laws of Colorado 2026.

PART 5

MISDEMEANOR AND PETTY OFFENSE SENTENCING

18-1.3-501. Misdemeanors classified - drug misdemeanors and drug petty offenses classified - penalties - legislative intent - definitions.

(1) (a) Except as otherwise provided in subsection (1)(d) of this section, for offenses committed prior to March 1, 2022, misdemeanors are divided into three classes that are distinguished from one another by the following penalties that are authorized upon conviction except as provided in subsection (1.5) of this section:

Class	Minimum Sentence	Maximum Sentence

1	Six months imprisonment, or five hundred dollar fine, or both	Eighteen months imprisonment, or five thousand dollar fine, or both
2	Three months imprisonment, or two hundred fifty dollar fine, or both	Three hundred sixty-four days imprisonment, or one thousand dollar fine, or both
3	Fifty dollar fine	Six months imprisonment, or seven hundred fifty dollar fine, or both

(a.5) Except as otherwise provided in subsection (1)(d) of this section, for offenses committed on or after March 1, 2022, misdemeanors are divided into two classes that are distinguished from one another by the following penalties that are authorized upon conviction:

Class	Maximum Sentence
1	364 days imprisonment, not more than a one thousand dollar fine, or both
2	120 days imprisonment, not more than a seven hundred fifty dollar fine, or both

(b) A term of imprisonment for conviction of a misdemeanor shall not be served in a state correctional facility unless served concurrently with a term for conviction of a felony.

(c) A term of imprisonment in a county jail for a conviction of a misdemeanor, petty, or misdemeanor traffic offense shall not be ordered to be served consecutively to a sentence to be served in a state correctional facility; except that if, at the time of sentencing, the court determines, after consideration of all the relevant facts and circumstances, that a concurrent sentence is not warranted, the court may order that the misdemeanor sentence be served prior to the sentence to be served in the state correctional facility and prior to the time the defendant is transported to the state correctional facility to serve all or the remainder of the defendant's state correctional facility sentence.

(c.5) The maximum consecutive sentence to the county jail for misdemeanor crimes charged in a single case is twenty-four months.

(d) Except as provided in subsection (1)(d.5) of this section, for purposes of sentencing a person convicted of a misdemeanor drug offense described in article 18 of this title 18, committed on or after October 1, 2013, drug misdemeanors are divided into two levels that are distinguished from one another by the following penalties that are authorized upon conviction:

Level	Minimum Sentence	Maximum Sentence
DM1	Six months imprisonment, five hundred dollar fine, or both	Eighteen months imprisonment, five thousand dollar fine, or both
DM2	No imprisonment, fifty dollar fine	Three hundred sixty-four days imprisonment, seven hundred fifty dollar fine, or both

(d.5) (I) (A) It is the intention of the general assembly to classify most drug possession on and after March 1, 2020, as a misdemeanor offense with different sentencing options and limited incarceration penalties. The purpose of this sentencing scheme is to provide offenders who are assessed to be in need of treatment or other intervention with probation supervision in conjunction with effective medical and behavioral intervention and treatment. For those drug possessors who are not in need of treatment, sentencing by the courts system should be limited.

This sentencing scheme recognizes that drug use and possession is primarily a health concern and should be treated as such by Colorado courts.

(B) Furthermore, it is the intent of the general assembly that sentencing for crimes that involve fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), even in small quantities, reflect the high risk of addiction and death associated with fentanyl, carfentanil, benzimidazole opiate, or any analog thereof. Therefore, the education and treatment procedures provided in section 18-1.3-510 must be implemented to address this substantial health risk.

(II) Notwithstanding the provisions of subsection (1)(d) of this section, for the purpose of sentencing a person convicted of a level 1 drug misdemeanor committed on or after March 1, 2020, in violation of section 18-18-403.5 or 18-18-406 (4)(b), a court may sentence an offender to probation for up to two years, with the possibility of a total of one hundred eighty days in county jail or, for a third or subsequent offense, a total of up to three hundred sixty-four days in county jail, which may be imposed in whole or in part during the time period of probation as a condition of probation or as a sanction for a violation of probation; or the court may sentence an offender to up to one hundred eighty days in the county jail; except that, for a third or subsequent offense, the court may sentence an offender to up to three hundred sixty-four days in the county jail. In addition to the sentence to probation or to the county jail, the offender may be punished by a fine of not more than one thousand dollars.

(III) Notwithstanding the provisions of subsection (1)(d) of this section, for the purpose of sentencing a person convicted of a level 2 drug misdemeanor committed on or after March 1, 2020, in violation of section 18-18-404, 18-18-406 (4)(c), 18-18-406.1, or 18-18-412, a court may sentence an offender to probation for up to one year, with the possibility of a total of one hundred twenty days in county jail or, for a third or subsequent offense, a total of up to one hundred eighty days in county jail, which may be imposed in whole or in part during the time period of probation as a condition of probation or as a sanction for a violation of probation; or the court may sentence an offender to up to one hundred twenty days in the county jail; except that, for a third or subsequent offense, the court may sentence an offender to up to one hundred eighty days in the county jail. In addition to the sentence to probation or to the county jail, the offender may be punished by a fine of not more than five hundred dollars.

(IV) Nothing in this subsection (1)(d.5) infringes upon the authority and discretion vested with a district attorney to file misdemeanor charges in either district court or county court, which courts, pursuant to section 13-6-106, have concurrent original jurisdiction over violations of state law that constitute misdemeanors. District attorneys are encouraged to file misdemeanor or drug charges in the court where, if there is a conviction, treatment and supervision can most effectively be matched to the defendant's assessed risk and treatment need levels.

(e) For each drug petty offense, the sentencing range is stated in the offense statute.

(1.5) (a) If a defendant is convicted of assault in the third degree under section 18-3-204 and the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties, notwithstanding subsection (1) of this section, the court shall sentence the defendant to a term of imprisonment greater than the maximum sentence but no more than twice the maximum sentence authorized for the same crime when the victim is not a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties. In addition to the term of imprisonment, the court may impose a fine on the defendant under subsection (1) of this section. At any time after sentencing and before the discharge of the defendant's sentence, the victim may request that the defendant participate in restorative justice practices with the victim. If the defendant accepts responsibility for and expresses remorse for his or her actions and is willing to repair the harm caused by his or her actions, an individual responsible for the defendant's supervision shall make the necessary arrangements for the restorative justice practices requested by the victim.

(b) As used in this section, "peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties" means a peace officer as described in section 16-2.5-101, C.R.S., emergency medical service provider as defined in part 1 of article 3.5 of title 25, C.R.S., emergency medical care provider as defined by section 18-3-201 (1), or a firefighter as defined in section 18-3-201 (1.5), who is engaged or acting in or who is present to engage or act in the performance of a duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, emergency medical service provider, emergency medical care provider, or firefighter, whether or not the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is within the territorial limits of his or her jurisdiction, if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward the peace officer, emergency medical service provider, emergency medical care provider, or firefighter knows or reasonably should know that the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter or if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is intentionally assaulted in retaliation for the performance of his or her official duties.

(1.7) (a) If a defendant is convicted of assault in the third degree pursuant to section 18-3-204 or reckless endangerment pursuant to section 18-3-208 and the victim is a mental health professional employed by or under contract with the department of human services engaged in the performance of his or her duties, notwithstanding the provisions of subsection (1) of this section, the court may sentence the defendant to a term of imprisonment greater than the maximum sentence but not more than twice the maximum sentence authorized for the crime when the victim is not a mental health professional employed by or under contract with the department of human services engaged in the performance of his or her duties. In addition to a

term of imprisonment, the court may impose a fine on the defendant pursuant to subsection (1) of this section.

(b) "Mental health professional" means a mental health professional licensed to practice medicine pursuant to article 240 of title 12 or a person licensed as a mental health professional pursuant to article 245 of title 12, a person licensed as a nurse pursuant to article 255 of title 12, a nurse aide certified pursuant to article 255 of title 12, and a psychiatric technician licensed pursuant to article 295 of title 12.

(2) The defendant may be sentenced to perform a certain number of hours of community or useful public service in addition to any other sentence provided by subsection (1) of this section, subject to the conditions and restrictions of section 18-1.3-507. An inmate in county jail acting as a trustee shall not be given concurrent credit for community or useful public service when such service is performed in his or her capacity as trustee. For the purposes of this subsection (2), "community or useful public service" means any work which is beneficial to the public, any public entity, or any bona fide nonprofit private or public organization, which work involves a minimum of direct supervision or other public cost and which work would not, with the exercise of reasonable care, endanger the health or safety of the person required to work.

(3) (a) The general assembly hereby finds that certain misdemeanors committed prior to March 1, 2022, which are listed in subsection (3)(b) of this section, present an extraordinary risk of harm to society and therefore, in the interest of public safety, the maximum sentence for such misdemeanors shall be increased by six months.

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

(I) Assault in the third degree, as defined in section 18-3-204;

(I.5) (A) Sexual assault, as defined in section 18-3-402; or

(B) Sexual assault in the second degree, as defined in section 18-3-403, as it existed prior to July 1, 2000;

(II) (A) Unlawful sexual contact, as defined in section 18-3-404; or

(B) Sexual assault in the third degree, as defined in section 18-3-404, as it existed prior to July 1, 2000;

(III) Child abuse, as defined in section 18-6-401 (7)(a)(V);

(IV) Second and all subsequent violations of a protection order as defined in section 18-6-803.5 (1.5)(a.5);

(V) Misdemeanor failure to register as a sex offender, as described in section 18-3-412.5;

(VI) Misdemeanor invasion of privacy for sexual gratification, as described in section 18-3-405.6; and

(VII) False reporting of an emergency, as described in section 18-8-111.

(4) Notwithstanding any provision of law to the contrary, any person who attempts to commit, conspires to commit, or commits against an elderly person any misdemeanor set forth in part 4 of article 4 of this title, part 1, 2, 3, or 5 of article 5 of this title, or article 5.5 of this title 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 subsection (4), an "elderly person" or "elderly victim" means a person sixty years of age or older.

(5) 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.

(6) For a defendant who is convicted of assault in the third degree, as described in section 18-3-204, the court, in addition to any fine the court may impose, shall sentence the defendant to a term of imprisonment of at least six months, but not longer than the maximum sentence authorized for the offense, as specified in this section, which sentence shall not be suspended in whole or in part, if the court makes the following findings on the record:

- (a) The victim of the offense was pregnant at the time of commission of the offense; and
- (b) The defendant knew or should have known that the victim of the offense was pregnant.
- (c) (Deleted by amendment, L. 2003, p. 2163, § 4, effective July 1, 2003.)

Source: **L. 2002:** Entire article added with relocations, p. 1413, § 2, effective October 1. **L. 2003:** (3)(b)(IV) amended, p. 1014, § 22, effective July 1; (6)(b) and (6)(c) amended, p. 2163, § 4, effective July 1; (1.5)(b) amended, p. 1624, § 44, effective August 6. **L. 2004:** (3)(a) amended, p. 634, § 3, effective August 4. **L. 2005:** (1.7) added, p. 1009, § 1, effective July 1. **L. 2007:** (1) amended, p. 557, § 4, effective April 16. **L. 2008:** (1.7)(b) and (4) amended, p. 1890, § 55, effective August 5. **L. 2009:** (1.5) amended, (HB 09-1120), ch. 305, p. 1650, § 2, effective July 1. **L. 2010:** (1.5)(b) amended, (HB 10-1422), ch. 419, p. 2073, § 32, effective August 11; (3)(b)(IV) and (3)(b)(V) amended and (3)(b)(VI) added, (SB 10-128), ch. 415, p. 2046, § 6, effective July 1, 2012. **L. 2011:** (1.5) amended, (HB 11-1105), ch. 250, p. 1087, § 1, effective August 10. **L. 2012:** (1.5) amended, (HB 12-1059), ch. 271, p. 1434, § 11, effective July 1. **L. 2013:** IP(1)(a) amended and (1)(d) and (1)(e) added, (SB 13-250), ch. 333, p. 1907, § 5, effective

October 1. **L. 2014:** (1)(d) amended, (SB 14-163), ch. 391, p. 1974, § 12, effective June 6; (1.5)(b) amended, (HB 14-1214), ch. 336, p. 1498, § 9, effective August 6. **L. 2015:** (1.5)(b) amended, (SB 15-126), ch. 109, p. 319, § 5, effective July 1; (1.5)(b) amended, (SB 15-067), ch. 337, p. 1367, § 4, effective September 1. **L. 2018:** (3)(b)(V) and (3)(b)(VI) amended and (3)(b)(VII) added, (SB 18-069), ch. 401, p. 2372, § 3, effective July 1. **L. 2019:** (1)(a) and (1)(d) amended, (HB 19-1148), ch. 59, p. 201, § 2, effective August 2; (1.7)(b) amended, (HB 19-1172), ch. 136, p. 1674, § 91, effective October 1; (1)(d) amended and (1)(d.5) added, (HB 19-1263), ch. 291, p. 2679, § 6, effective March 1, 2020. **L. 2020:** (1.7)(b) amended, (HB 20-1183), ch. 157, p. 700, § 51, effective July 1. **L. 2021:** IP(1)(a) and (3)(a) amended and (1)(a.5) and (1)(c.5) added, (SB 21-271), ch. 462, p. 3170, § 186, effective March 1, 2022. **L. 2022:** (1)(d.5)(I) amended, (HB 22-1326), ch. 225, p. 1634, § 9, effective January 1, 2023. **L. 2026:** (1)(c) amended, (HB 26-1297), ch. 123, p. 534, § 2, effective August 12.

Editor's note: (1) This section is similar to former § 18-1-106 as it existed prior to 2002.

(2) Amendments to subsection (1.5)(b) by SB 15-067 and SB 15-126 were harmonized.

(3) Amendments to subsection (1)(d) by HB 19-1148 and HB 19-1263 were harmonized, effective March 1, 2020.

Cross references: For the legislative declaration contained in the 2003 act amending subsections (6)(b) and (6)(c), see section 1 of chapter 340, Session Laws of Colorado 2003. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Law reviews. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Exceeding Presumptive

Maximum Sentences in Colorado", see 44 Colo. Law. 43 (Dec. 2015).

Annotator's note. Since § 18-1.3-501 is similar to § 18-1-106 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Credit required for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense. *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981).

No equal protection violation inherent in mandatory sentencing provision as applicable to a conviction for misdemeanor offense of third degree assault on an on-duty peace officer. Sentence not more severe than that for the felony offense of second degree assault, and four-year sentence to department of corrections with possibility of probation after four months was determined to be more harsh than a sentence of two years and one day in a county jail with possibility of home detention. *People v. Thompson*, 942 P.2d 1242 (Colo. App. 1996).

Establishment of more severe penalty for third degree assault of an on-duty peace officer than for conviction of reckless manslaughter or vehicular assault on a victim who is not a peace officer does not constitute violation of equal protection clause. The former punishes an act that has a greater social impact, which is reasonably related to the sentence. *People v. Thompson*, 942 P.2d 1242 (Colo. App. 1996).

Misdemeanor defined. Since felonies are defined in the constitution to be offenses punishable by death or imprisonment in the penitentiary, it follows that misdemeanors

are violations of the public laws not thus punishable. *City of Greeley v. Hamman*, 12 Colo. 94, 20 P. 1 (1888) (decided under G.S. § 689).

A crime carrying a possible penitentiary sentence is a felony while a crime punishable by fine or imprisonment in county jail is a misdemeanor. *People v. Green*, 734 P.2d 616 (Colo. 1987).

Misdemeanor sentence in conjunction with felony sentence. A court may not sentence an adult offender 21 years of age or older to the department of corrections for a misdemeanor conviction unless such defendant has already been sentenced to the department for a felony and the misdemeanor sentence is made expressly concurrent with the felony sentence. *People v. Green*, 734 P.2d 616 (Colo. 1987).

Any consecutive sentence imposed on such offender for a misdemeanor conviction must be served in the county jail. *People v. Green*, 734 P.2d 616 (Colo. 1987); *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

Because defendant's misdemeanor sentence expired while he was being held by the corrections department on felony conviction, trial court improperly altered judgment and mittimus to require defendant to serve his misdemeanor time consecutively with his felony term. *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

Absent some fault on defendant's part, defendant was entitled to serve his misdemeanor sentence in uninterrupted manner, and mistaken transfer of defendant, by sheriff, to corrections department on

subsequently imposed sentence for felony conviction should not have suspended running of defendant's misdemeanor sentence. *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

In subsection (1)(c), the phrase "to be served" includes a situation where a portion of a prison sentence has already been served but the remainder of the prison sentence is yet "to be served". This interpretation is consistent with the last phrase in the provision, which requires that the defendant serve the consecutive county jail sentence before being transferred to the custody of the department of corrections to serve "all or the remainder of" the prison sentence. *People v. Valadez*, 2016 COA 62, 374 P.3d 529.

In subsection (1)(c), "may" means "shall". The legislative history sufficiently indicates that the general assembly intended the word "may" in the last clause of the provision to mean "must" or "shall". *People v. Valadez*, 2016 COA 62, 374 P.3d 529.

In passing subsection (1)(c), the general assembly intended that, when a district court determines that a concurrent sentence is not warranted for a misdemeanor committed by a prisoner in a state prison facility, the court must toll the prison sentence, order that the county jail

sentence for the misdemeanor be served before the remainder of the prison sentence, and send a mittimus to the department of corrections reflecting its sentence. After fully serving the jail sentence, the prisoner must then be transferred back to the custody of the department of corrections to serve the remainder of his or her prison sentence. *People v. Valadez*, 2016 COA 62, 374 P.3d 529.

To the extent that subsection (1)(c) of this section conflicts with § 17-22.5-402 (1), subsection (1)(c) controls because it is the more specific and more recently enacted statute. *People v. Valadez*, 2016 COA 62, 374 P.3d 529.

Applied in *United States v. Dunn*, 545 F.2d 1281 (10th Cir. 1976); *People v. Storey*, 191 Colo. 546, 554 P.2d 694 (1976); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982); *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Giles*, 662 P.2d 1073 (Colo. 1983); *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

18-1.3-502. Duration of sentences for misdemeanors.

Courts sentencing a person for the commission of a misdemeanor to the custody of the executive director of the department of corrections shall not fix a minimum term but may fix a maximum term less than the maximum provided by law for the offense. A person so sentenced must be imprisoned, released under parole, and discharged as provided by other applicable

statutes. A person sentenced to a correctional facility for the commission of a misdemeanor shall not be subjected to imprisonment for a term exceeding the maximum term provided by the statute fixing the maximum length of the sentence for the crime of which the person was convicted and for which the person was sentenced. A person sentenced to a term of imprisonment for the commission of a misdemeanor is entitled to the same time credits as if the person were sentenced to a term of imprisonment for the commission of a felony. A person committed as a juvenile delinquent shall not be imprisoned for a term exceeding two years, except as otherwise provided for aggravated juvenile offenders in section 19-2.5-1127.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1. **L. 2021:** Entire section amended, (SB 21-059), ch. 136, p. 721, § 45, effective October 1.

Editor's note: This section is similar to former § 16-11-302.5 as it existed prior to 2002.

ANNOTATION

Applied in *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982) (decided prior to 2002 relocation of § 16-11-302.5).

18-1.3-503. Petty offense and civil infraction classified - penalties.

(1) For offenses committed prior to March 1, 2022, a violation of a statute of this state is a petty offense if specifically classified as a class 1 or class 2 petty offense. The penalty for commission of a class 1 petty offense, upon conviction, is a fine of not more than five hundred dollars, or imprisonment for not more than six months other than in state correctional facilities, or both. The penalty for commission of a class 2 petty offense is a fine specified in the section defining the offense. The penalty assessment procedure of section 16-2-201 is available for the payment of fines in class 2 petty offense cases.

(1.5) For offenses committed on or after March 1, 2022, a violation of a statute of this state is a petty offense if specifically classified as a petty offense. The penalty for commission of a petty offense, upon conviction, is a fine of not more than three hundred dollars, imprisonment for not more than ten days in a county jail, or both.

(1.6) (a) For offenses committed on or after March 1, 2022, a violation of a statute of this state is a civil infraction if specifically classified as a civil infraction. The penalty for

commission of a civil infraction, upon conviction, is a fine of not more than one hundred dollars, unless otherwise provided by statute. A civil infraction constitutes a civil matter.

(b) A peace officer may apply the penalty assessment notice procedure in section 16-2.3-102 for the payment of a fine in a civil infraction case.

(2) 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.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1. **L. 2021:** (1) amended and (1.5) and (1.6) added, (SB 21-271), ch. 462, p. 3170, § 187, effective March 1, 2022. **L. 2022:** (1.6) amended, (HB 22-1229), ch. 68, p. 343, § 18, effective March 1.

Editor's note: (1) This section is similar to former § 18-1-107 as it existed prior to 2002.

(2) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (1.6) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

ANNOTATION

Applied in *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980) (decided prior to 2002 relocation of § 18-1-107).

18-1.3-504. Misdemeanors and petty offenses not classified.

(1) Any misdemeanor or petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it.

(2) 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.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-108 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). other grounds, 193 Colo. 53, 561 P.2d 1268 (1977) (decided prior to 2002 relocation of § 18-1-108).

Applied in *People v. Spann*, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on

18-1.3-505. Penalty for misdemeanor not fixed by statute - punishment.

(1) In all cases where an offense is denominated a misdemeanor and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than three hundred sixty-four days in the county jail, or a fine of not more than one thousand dollars, or both imprisonment and fine.

(2) 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.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1. **L. 2019:** (1) amended, (HB 19-1148), ch. 59, p. 202, § 3, effective August 2.

Editor's note: This section is similar to former § 18-1-109 as it existed prior to 2002.

18-1.3-506. Payment and collection of fines for class 1 or 2 misdemeanors, petty offenses, and civil infractions - release from incarceration.

(1) Whenever the court imposes a fine for a nonviolent class 1 or 2 misdemeanor, a petty offense, or civil infraction, if the person who committed the offense is unable to pay the fine at the time of the court hearing or if he or she fails to pay any fine imposed for the commission of such offense, in order to guarantee the payment of such fine, the court may:

(a) Require the person to post sufficient bond or collateral; or

(b) Enter a judgment in favor of the state or political subdivision to whom the fine is owed and enter an order based on such judgment for the garnishment of the person's earnings in accordance with the provisions of either article 54 or 54.5 of title 13, C.R.S., for the purpose of collecting said fine and the costs incurred in collecting said fine; or

(c) Enter a judgment in favor of the state or political subdivision to whom the fine is owed and execute a lien based on such judgment on any chattels, lands, tenements, moneys, and real estate of the person in accordance with article 52 of title 13, C.R.S., for the purpose of collecting said fine and the costs incurred in collecting said fine.

(2) The state or a political subdivision may appear before a court of record in this state and request that the court order the release from a county jail or a correctional facility of a person who has been incarcerated as a result of the failure to pay a fine or the failure to appear in court in connection with the commission of a nonviolent class 1 or 2 misdemeanor or a petty offense upon the condition that the fine and any costs of collection are collected from the person incarcerated by the use of one of the methods set forth in subsection (1) of this section.

(3) For the purposes of this section, "nonviolent class 1 or 2 misdemeanor" means a class 1 or 2 misdemeanor that does not involve cruelty to an animal, as described in section 18-9-202 (1)(a), or the use or threat of physical force on or to a person in the commission of the misdemeanor.

Source: L. 2002: Entire article added with relocations, p. 1417, § 2, effective October 1. **L. 2021:** IP(1), (2), and (3) amended, (SB 21-271), ch. 462, p. 3171, § 188, effective March 1, 2022.

Editor's note: This section is similar to former § 18-1-110 as it existed prior to 2002.

18-1.3-507. Community or useful public service - misdemeanors - definition.

(1) Any sentence imposed pursuant to section 18-1.3-501 (2) is subject to the conditions and restrictions of this section.

(2) (a) A probation department, sentencing court, county sheriff, board of county commissioners, or any other governmental entity, or a private nonprofit or for-profit entity that has a contract with a governmental entity, may establish a community or useful public service program. It is the purpose of the community or useful public service program: To identify and seek the cooperation of governmental entities and political subdivisions thereof, as well as corporations, associations, or charitable trusts, for the purpose of providing community or useful public service jobs; to interview persons who have been ordered by the court to perform community or useful public service and to assign such persons to suitable community or useful public service jobs; and to monitor compliance or noncompliance of such persons in performing community or useful public service assignments within the time established by the court.

(b) Nothing in this subsection (2) limits the authority of an entity that is the recipient of community or useful public service to accept or reject such service, in its sole discretion.

(2.5) The following organizations are eligible to provide community or useful public service jobs established under this article 1.3 or any other provision of law so long as they meet any other requirement related to the provision of those jobs, as established by the entity that is the recipient of community or useful public service:

(a) A charitable trust or other organization that is exempt from taxation under section 501 (c)(3) of the federal "Internal Revenue Code of 1986", as amended;

(b) A civic league or organization that is exempt from taxation under section 501 (c)(4) of the federal "Internal Revenue Code of 1986", as amended, and that also would qualify as a veterans' service organization as defined in section 501 (c)(19) of the federal "Internal Revenue Code of 1986", as amended; and

(c) A veterans' service organization that is exempt from taxation under section 501 (c)(19) of the federal "Internal Revenue Code of 1986", as amended.

(3) Any general public liability insurance policy obtained pursuant to this section shall provide coverage for injuries caused by a person performing services under this section and shall be in a sum of not less than the current limit on government liability under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(4) For the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., public employee, as defined in section 24-10-103, C.R.S., does not include any person who is sentenced to participate in any type of community or useful public service.

(5) No governmental entity or private nonprofit or for-profit entity which has a contract with a governmental entity shall be liable under the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., or under the "Colorado Employment Security Act", articles 70 to 82 of title 8, C.R.S., for any benefits on account of any person who is sentenced to participate in any type of community or useful public service, but nothing in this subsection (5) shall prohibit a governmental entity or private nonprofit or for-profit entity from electing to accept the provisions of the "Workers' Compensation Act of Colorado" by purchasing and keeping in force a policy of workers' compensation insurance covering such person.

(6) (a) (I) The court shall assess a fee, not to exceed one hundred twenty dollars, upon every person required to perform community or useful public service pursuant to section 18-1.3-501 (2), 18-18-432, or 42-4-1301.4. The amount of the fee must be commensurate with the costs of administering the person's community or useful public service program. The court may waive this fee if the court determines the defendant is indigent. In counties where the judicial department operates the local useful public service program, the court shall transfer each such fee to the state treasurer, who shall credit the fee to the fund created in section 18-1.3-507.5. The

court shall not impose the fee described in this subsection (6)(a) on a person under the jurisdiction of the juvenile court, as defined in section 19-1-103, or the person's parent, guardian, or legal custodian. A court shall not assess fees described in this subsection (6)(a) against a juvenile or against the juvenile's parent, guardian, or legal custodian. A court or the state shall not enforce or collect a fee imposed by the court on or after July 6, 2021, that is outstanding against a juvenile or the juvenile's parent, guardian, or legal custodian.

(II) As used in this subsection (6)(a), "juvenile" means a person who is under eighteen years old when the crime is committed.

(b) Money collected as fees pursuant to subsection (6)(a) of this section may be used by the operating agency responsible for overseeing such person's community or useful public service program or by the judicial department, as may be applicable, to pay the cost of administration of the program and the cost of personal services. The proceeds from such amounts may be used by the operating agency only for defraying the cost of personal services and other operating expenses related to the administration of the program, a general liability policy covering such person, and, if such person will be covered by workers' compensation insurance pursuant to subsection (5) of this section or an insurance policy providing such or similar coverage, the cost of purchasing and keeping in force such insurance coverage and may not be used by the operating agency for any other purpose.

Source: **L. 2002:** Entire article added with relocations, p. 1417, § 2, effective October 1. **L. 2004:** (2)(a) amended and (2.5) added, p. 505, § 1, effective August 4. **L. 2017:** (1), (2)(b), and (2.5) amended, (HB 17-1056), ch. 56, p. 177, § 1, effective March 20; (6) amended, (HB 17-1077), ch. 222, p. 858, § 1, effective August 9. **L. 2021:** (6)(a) amended, (HB 21-1315), ch. 461, p. 3114, § 20, effective July 6. **L. 2026:** (6)(a) amended, (HB 26-1232), ch. 98, p. 388, § 3, effective May 4.

Editor's note: This section is similar to former § 16-11-701 as it existed prior to 2002.

Cross references: (1) For community service for juvenile offenders, see § 19-2.5-1106; for useful public service for alcohol- or drug-related traffic offenses, see § 42-4-1301; for community or useful public service for class 1 and class 2 misdemeanor traffic offenders, see § 42-4-1701.

(2) For the legislative declaration in HB 21-1315, see section 1 of chapter 461, Session Laws of Colorado 2021. For the legislative declaration in HB 26-1232, see section 1 of chapter 98, Session Laws of Colorado 2026.

18-1.3-507.5. Useful public service cash fund created.

(1) The useful public service cash fund, referred to within this section as the "fund", is created in the state treasury. The fund consists of money collected as fees and credited to the fund pursuant to subsection (3) of this section and any other money that the general assembly may appropriate or transfer to the fund. Money in the fund is continuously appropriated to the judicial department for the cost of administering useful public service programs and associated costs for personal services; except that the fund is subject to the limitations on uncommitted reserves described in section 24-75-402.

(2) The state treasurer shall credit all interest and income derived from the deposit and investment of money in the fund to the fund. Any unexpended and unencumbered money remaining in the fund at the end of a fiscal year remains in the fund and may not be transferred to the general fund or to another fund.

(3) In counties where the judicial department operates a useful public service program as provided in section 18-1.3-507, 18-18-432, or 42-4-1301.4, the court shall collect any money assessed as fees pursuant to such sections and transfer such money to the state treasurer, who shall credit the money to the fund.

Source: L. 2017: Entire section added, (HB 17-1077), ch. 222, p. 859, § 2, effective August 9.

18-1.3-508. Definite sentence not void.

If, through oversight or otherwise, any person is sentenced or committed to the custody of the executive director of the department of corrections for the commission of a misdemeanor for a definite period of time, the sentence or commitment shall not for that reason be void, but the person so sentenced or committed shall be subject to the liabilities and entitled to the benefits which are applicable to those persons who are properly sentenced.

Source: L. 2002: Entire article added with relocations, p. 1419, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-303 as it existed prior to 2002.

ANNOTATION

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Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

Annotator's note. Since § 18-1.3-508 is similar to § 16-11-303 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

There is no irreconcilable inconsistency between this section and Crim. P. 35(a). This section corrects a specific error committed in sentencing. It changes the erroneous sentence automatically, with the same effect as if the judge had sentenced

correctly. *Smith v. Johns*, 187 Colo. 388, 532 P.2d 49 (1975).

Remand for resentencing. Sentence imposed by trial court which fixed a minimum term, contrary to the requirements of § 16-11-304, was erroneous, but since there is no statute which automatically corrects erroneous sentences of the trial court, the case is remanded to the trial court with directions to vacate that sentence and to resentence the defendant in accordance with law. *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975).

Applied in *People v. Nix*, 44 Colo. App. 195, 610 P.2d 1088 (1980).

18-1.3-509. Credit for time served on misdemeanor sentences.

A person who is confined for a misdemeanor offense prior to the imposition of a sentence for the misdemeanor offense shall be entitled to credit against the term of his or her sentence for the entire period of the confinement. At the time of sentencing, the court shall make a finding of the amount of presentence confinement to which the offender is entitled and shall include the finding in the mittimus. The period of confinement shall be deducted from the offender's sentence by the county jail.

Source: L. 2007: Entire section added, p. 558, § 5, effective April 16.

ANNOTATION

The interpretation of this section should be the same as the interpretation of § 18-1.3-405 regarding presentence confinement credit for time served. Therefore, the provision in § 18-1.3-405 that

precludes presentence confinement credit for time served while on parole also applies to misdemeanors. *People v. Carrillo*, 2013 COA 3, 297 P.3d 1028.

18-1.3-510. Fentanyl education and treatment program.

(1) Upon conviction of any offense pursuant to part 4 of article 18 of this title 18 for a material, compound, mixture, or preparation that contains any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), the court shall require a substance abuse assessment pursuant to section 18-1.3-209. The substance abuse assessment must include information regarding the person's history of substance use, specifically the use of fentanyl, carfentanil, benzimidazole opiate, or any analog thereof; the person's amenability to treatment; and the level of treatment, if any, necessary to address the person's substance use disorder to be provided during the person's probation or deferred judgment supervision.

(2) If the substance abuse assessment described in subsection (1) of this section recommends community-based treatment, the person shall complete the assessed level of treatment consistent with the provisions of section 18-1.3-209.

(3) (a) If the substance abuse assessment described in subsection (1) of this section recommends as a condition of probation placement in a residential treatment facility for treatment of an addiction that includes fentanyl, carfentanil, benzimidazole opiate, or an analog thereof, the court shall order residential treatment as a condition of probation. The residential treatment facility must be approved by the behavioral health administration in the department of human services and designed for treatment of an addiction that includes fentanyl, carfentanil, benzimidazole opiate, or an analog thereof. Placement in a residential program as a condition of probation is limited to the period of time that the placement is clinically necessary. The residential placement costs must be paid from the correctional treatment cash fund, existing pursuant to section 18-19-103 (4), for a person on probation and is determined by the court to be indigent, is represented by court-appointed counsel, or is otherwise unable to afford the cost of the placement.

(b) Notwithstanding subsection (3)(a) of this section to the contrary, the court may order non-residential treatment as a condition of probation if the court makes findings on the record that a residential treatment facility does not exist, is not accessible for the person within a reasonable period of time, or non-residential treatment is available to address the person's treatment needs.

(4) A person, regardless of whether the person is receiving treatment in a community-based or residential treatment facility pursuant to subsection (2) or (3) of this section, must complete the fentanyl education program developed by the behavioral health administration pursuant to section 27-80-128. The fentanyl education program must include information regarding the nature and addictive elements of synthetic opiates, their dangers to a person's life and health, access to and administration of opioid antagonists and non-laboratory synthetic opiate detection tests, and laws regarding synthetic opiates, including criminal penalties and immunity for

reporting an overdose event pursuant to section 18-1-711. The fentanyl education program costs must be paid from the correctional treatment cash fund, existing pursuant to section 18-19-103 (4), for a person on probation and who is determined by the court to be indigent, is represented by court-appointed counsel, or is otherwise unable to afford the cost of placement.

Source: L. 2022: Entire section added, (HB 22-1326), ch. 225, p. 1636, § 11, effective January 1, 2023. **L. 2024:** (4) amended, (HB 24-1037), ch. 458, p. 3170, § 17, effective June 6.

Cross references: For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

PART 6

RESTITUTION

Law reviews: For article, "Restitution in Criminal Cases", see 30 Colo. Law. 125 (Oct. 2001).

18-1.3-601. Legislative declaration.

- (1) The general assembly finds and declares that:
 - (a) Crime victims endure undue suffering and hardship resulting from physical injury, emotional and psychological injury, or loss of property;
 - (b) Persons found guilty of causing such suffering and hardship should be under a moral and legal obligation to make full restitution to those harmed by their misconduct;
 - (c) The payment of restitution by criminal offenders to their victims is a mechanism for the rehabilitation of offenders;
 - (d) Restitution is recognized as a deterrent to future criminality;
 - (e) An effective criminal justice system requires timely restitution to victims of crime and to members of the immediate families of such victims in order to lessen the financial burdens inflicted upon them, to compensate them for their suffering and hardship, and to preserve the individual dignity of victims;

(f) Former procedures for restitution assessment, collection, and distribution have proven to be inadequate and inconsistent from case to case;

(g) The purposes of this part 6 are to facilitate:

(I) The establishment of programs and procedures to provide for and collect full restitution for victims of crime in the most expeditious manner; and

(II) The effective and timely assessment, collection, and distribution of restitution requires the cooperation and collaboration of all criminal justice agencies and departments;

(h) An insurance company, as part of its business operations, compensates a direct victim of a crime due to the contractual relationship between the insurance company and victim whereby the victim pays the insurance company a premium and the insurance company compensates the victim for losses sustained. In these instances, criminal restitution to make direct victims whole must be prioritized, while insurance companies should recover their losses through remedies other than criminal restitution orders. However, an insurance company that is a direct victim of a crime must be made whole through the criminal restitution process, including if the insurance company is a victim of a scheme to defraud the insurance company or when the insurance company's property is damaged or stolen by criminal acts.

(2) It is the intent of the general assembly that restitution be ordered, collected, and disbursed to the victims of crime and their immediate families. Such restitution will aid the offender in reintegration as a productive member of society. This part 6 shall be liberally construed to accomplish all such purposes.

Source: L. 2002: Entire article added with relocations, p. 1419, § 2, effective October 1. **L. 2026:** (1)(h) added, (HB 26-1017), ch. 33, p. 143, § 1, effective August 12.

Editor's note: This section is similar to former § 16-18.5-101 as it existed prior to 2002.

ANNOTATION

Because of the importance of requiring defendants to pay victims restitution, as expressed in this section, the doctrine of abatement ab initio does not apply to civil judgments created by restitution orders. When defendant died after conviction and entry of the order of restitution, but before

determination of the direct appeal, the common law doctrine of abatement ab initio applied to defendant's conviction. Because of the importance of protecting the rights of victims, however, the restitution order, which created a civil judgment under § 18-1.3-603 (4)(a), was not subject to abatement

but could be appealed by defendant's estate. *People v. Daly*, 313 P.3d 571 (Colo. App. 2011), overruled in *People v. Johnson*, 2021 CO 79, 499 P.3d 1045.

When a defendant dies while his criminal conviction is pending on direct

appeal, the doctrine of abatement ab initio extinguishes a restitution order entered as part of his sentence. *People v. Johnson*, 2020 COA 124, 487 P.3d 1262, aff'd, 2021 CO 79, 499 P.3d 1045 (overruling *People v. Daly*, 313 P.3d 571 (Colo. App. 2011)).

18-1.3-602. Definitions.

As used in this part 6, unless the context otherwise requires:

(1) "Collections investigator" means a person employed by the judicial department whose primary responsibility is to administer, enforce, and collect on court orders or judgments entered with respect to fines, fees, restitution, or any other accounts receivable of the court, judicial district, or judicial department.

(2) "Conviction" means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court for a felony, misdemeanor, petty offense, or misdemeanor traffic offense, or adjudication for an offense that would constitute a criminal offense if committed by an adult. "Conviction" also includes having received a deferred judgment and sentence or deferred adjudication; except that a person is not deemed to have been convicted if the person has successfully completed a deferred sentence or deferred adjudication.

(2.2) "Critical stages" means the stages of the criminal justice process as described in section 24-4.1-302 (2).

(2.3) "Money advanced by a governmental agency for a service animal" means costs incurred by a peace officer, law enforcement agency, fire department, fire protection district, or governmental search and rescue agency for the veterinary treatment and disposal of a service animal that was harmed while aiding in official duties and for the training of an animal to become a service animal to replace a service animal that was harmed while aiding in official duties, as applicable.

(2.5) Repealed.

(3) (a) "Restitution" means any pecuniary loss suffered by a victim and includes, but is not limited to, all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses, rewards paid by victims, money advanced by law enforcement agencies, money advanced by a governmental agency for a service animal, adjustment expenses, and other losses or injuries proximately caused by an offender's conduct and that can be reasonably calculated and recompensed in money. "Restitution" does not include losses for which a victim may be compensated through a private insurance policy, damages for physical or mental pain and

suffering, loss of consortium, loss of enjoyment of life, loss of future earnings, or punitive damages.

(a.5) "Restitution" includes, for a person convicted of assault in the first, second, or third degree, as described in section 18-3-202, 18-3-203, or 18-3-204, all or any portion of the financial obligations of medical tests performed on and treatment prescribed for a victim, peace officer, firefighter, emergency medical care provider, or emergency medical service provider.

(b) "Restitution" may also include extraordinary direct public and all private investigative costs.

(c) (I) "Restitution" shall also include all costs incurred by a government agency or private entity to:

(A) Remove, clean up, or remediate a place used to manufacture or attempt to manufacture a controlled substance or which contains a controlled substance or which contains chemicals, supplies, or equipment used or intended to be used in the manufacturing of a controlled substance;

(B) Store, preserve, or test evidence of a controlled substance violation; or

(C) Sell and provide for the care of and provision for an animal disposed of under the animal cruelty laws in accordance with part 2 of article 9 of this title or article 42 of title 35, C.R.S.

(II) Costs under this paragraph (c) shall include, but are not limited to, overtime wages for peace officers or other government employees, the operating expenses for any equipment utilized, and the costs of any property designed for one-time use, such as protective clothing.

(d) "Restitution" also includes costs incurred by a governmental agency or a workers' compensation insurer that provides medical benefits, health benefits, or nonmedical support services directly related to a medical or health condition to a victim for losses or injuries proximately caused by an offender's conduct, including, but not limited to, costs incurred by medicaid, medicare, and other care programs for indigent persons.

(3.5) "Service animal" means any animal, the services of which are used to aid the performance of official duties by a peace officer, law enforcement agency, fire department, fire protection district, or governmental search and rescue agency.

(3.7) "Travel expenses" means expenses incurred by airplane, train, bus, or car travel, including baggage fees incurred by travel expenses; fares for transportation to and from the airport, train station, bus station, or hotel to the court proceeding or secure site; rental car expenses or the cost of operating a personal vehicle equal to the latest published rates from the United States general services administration for government employees, as determined pursuant to 5 U.S.C. 5701 et seq., as amended; and meal and lodging per diem equal to the latest

published rates from the United States general services administration for government employees, as determined pursuant to 5 U.S.C. 5701 et seq., as amended.

(4) (a) "Victim" means any person aggrieved by the conduct of an offender and includes, but is not limited to, the following:

(I) Any person against whom any felony, misdemeanor, petty offense, or misdemeanor traffic offense has been perpetrated or attempted, including an insurance company when the insurance company is a victim of a scheme to defraud the insurance company or when the insurance company's property is damaged or stolen through a criminal act;

(II) Any person harmed by an offender's criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity;

(III) Any person who has suffered losses because of liability pursuant to section 14-6-110 for a person described in subsection (4)(a)(I) or (4)(a)(II) of this section;

(IV) Any victim compensation board that has paid a victim compensation claim;

(V) If any person described in subparagraph (I) or (II) of this paragraph (a) is deceased or incapacitated, the person's spouse, parent, legal guardian, natural or adopted child, child living with the victim, sibling, grandparent, significant other, as defined in section 24-4.1-302 (4), C.R.S., or other lawful representative;

(VI) Any person who had to expend resources for the purposes described in subsection (3)(b), (3)(c), or (3)(d) of this section, except not an insurance company that compensated a victim for a loss, except as provided in subsection (3)(d) of this section.

(b) "Victim" shall not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan as defined under the law of this state or of the United States.

(c) Any "victim" under the age of eighteen is considered incapacitated, unless that person is legally emancipated or the court orders otherwise.

(d) It is the intent of the general assembly that this definition of the term "victim" shall apply to this part 6 and shall not be applied to any other provision of the laws of the state of Colorado that refers to the term "victim".

(e) Notwithstanding any other provision of this section, "victim" includes a person less than eighteen years of age who has been trafficked by an offender, as described in section 18-3-503 or 18-3-504.

Source: **L. 2002:** Entire article added with relocations, p. 1420, § 2, effective October 1. **L. 2003:** (2) and (3)(a) amended and (2.5) added, p. 1049, § 2, effective September 1. **L. 2004:** (2.5) repealed, p. 904, § 27, effective May 21. **L. 2005:** (2.3) and (3.5) added and (3)(a) amended, p. 192, § 1, effective July 1; (3)(c) and (4)(a)(VI) added, p. 1498, §§ 1, 2, effective July 1. **L. 2006:** (3)(c)(I) amended, p. 895, § 4, effective August 7. **L. 2012:** (4)(e) added, (HB 12-1151), ch. 174, p. 626, § 8, effective August 8. **L. 2013:** (3)(d) added and (4)(a)(VI) amended, (SB 13-229), ch. 272, p. 1429, § 7, effective July 1. **L. 2014:** (4)(e) amended, (HB 14-1273), ch. 282, p. 1154, § 16, effective July 1. **L. 2016:** (3)(a.5) added, (HB 16-1393), ch. 304, p. 1225, § 2, effective July 1. **L. 2022:** (2.2) and (3.7) added, (SB 22-043), ch. 263, p. 1926, § 2, effective August 10. **L. 2026:** (2) and (4)(a)(I) amended, (HB 26-1297), ch. 123, p. 534, § 3, effective August 12; (3)(a), (3)(d), (4)(a)(I), (4)(a)(III), and (4)(a)(VI) amended, (HB 26-1017), ch. 33, p. 143, § 2, effective August 12.

Editor's note: (1) This section is similar to former § 16-18.5-102 as it existed prior to 2002.

(2) Amendments to subsection (4)(a)(I) by HB 26-1017 and HB 26-1297 were harmonized.

Cross references: For the legislative declaration in SB 22-043, see section 1 of chapter 263, Session Laws of Colorado 2022.

ANNOTATION

Attorney general not a "collections investigator". The attorney general is not part of the judicial department. *People v. Robb*, 215 P.3d 1253 (Colo. App. 2009).

Because the definition of "restitution" includes "any pecuniary loss suffered by a victim", including "loss of use of money", trial courts are required to include pre-judgment interest in probationary restitution orders. The term "loss of use of money" means not only the amount of money stolen but also the value of the use of the money stolen from the victim from the date the money was stolen to the date of the

restitution award. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006).

Because the definition of restitution includes "any pecuniary loss suffered by a victim" including "other losses or injuries proximately caused by an offender's conduct and that can be reasonably calculated and recompensed in money", the victim was entitled to the fair rental value of stolen equipment even if the victim did not rent replacement equipment. *People v. Suttmiller*, 240 P.3d 504 (Colo. App. 2010).

Used vacation and sick leave are pecuniary losses compensable to a victim

and therefore fit under the definition of restitution. *People v. Perez*, 2017 COA 52M, 413 P.3d 266.

Proximate cause for purposes of restitution has been defined as a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003); *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005); *People v. Steinbeck*, 186 P.3d 54 (Colo. App. 2007).

The standard of review for evaluating a district court's determination of proximate cause for restitution purposes is clear error. Restitution is statutorily required when proximate cause is established; consequently, abuse-of-discretion review is no longer applicable. *Martinez v. People*, 2024 CO 6M, 542 P.3d 675.

Restitution statute only requires that the conduct underlying the basis of defendant's criminal conviction proximately caused the victim's losses. It does not require that a defendant be charged with a specific act to be ordered to pay restitution. *People v. Steinbeck*, 186 P.3d 54 (Colo. App. 2007).

When it comes to restitution for a crime where the level of offense is defined in terms of monetary value, a defendant's restitution exposure is not required to be commensurate with, nor is it capped by, the level of offense that the defendant was charged and convicted under. *People v. Ragsdal*, 2025 COA 9M, __ P.3d __.

Charging a defendant with a lower-level theft offense than the evidence ultimately supports is not a basis for capping a restitution award where the defendant was not charged and acquitted of higher level theft charges and the record establishes that the same criminal conduct underlying the defendant's charge and conviction proximately caused losses in excess of the amount reflected in the level of theft offense charged. *People v. Ragsdal*, 2025 COA 9M, __ P.3d __.

Restitution is not limited to the value of the damaged item. It may include repair costs, even if those costs exceed the damage object's value. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Counseling and mental health costs are considered medical expenses, provided proximate cause is shown. *People v. Rivera*, 250 P.3d 1272 (Colo. App. 2010).

Cost of sexual assault nurse examiner (SANE) examination qualifies for restitution under statute as an "extraordinary" direct public or private investigative cost. *Teague v. People*, 2017 CO 66, 395 P.3d 782.

Cost of burglar alarm system for victim not within definition of "restitution". The trial court's findings do not support any loss by the victim other than a generalized feeling of insecurity. Crime victim's feeling of insecurity could have multiple causes and the solutions they select are subjective and potentially numerous and varied. *People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003).

Cost of installing bars on victim's window does not qualify as restitution.

There was no finding that the expense was the result of a specific, ongoing threat related to defendant's conduct as opposed to a general feeling of insecurity. *People v. Martinez*, 2015 COA 37, 378 P.3d 761.

Court erred by ordering defendant to pay for expenses related to home sale because prosecution did not prove that the expenditures were proximately caused by the juvenile offender's unlawful conduct.

If a victim incurs expenses to avoid or mitigate the consequences of a specific and ongoing threat related to the offender's unlawful conduct, such expenditures qualify as compensable restitution under subsection (3)(a); however, expenditures resulting from a generalized feeling of insecurity are too attenuated from the offender's conduct, and thus do not qualify. *People ex rel. D.W.*, 232 P.3d 182 (Colo. App. 2009).

Prosecution failed to prove by a preponderance of the evidence that defendant proximately caused the damage to the victim's vehicle.

The district court's conclusion was speculative. The purported gap of time, almost a year, between when the car was stolen and when defendant claims to have obtained possession of the car is problematic in determining defendant proximately caused the damage. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

The statutory 50 percent penalty applied against defendant pursuant to § 8-81-101 was not properly included in the amount of restitution owed because the

prosecution did not demonstrate that the amount of the penalty equaled the costs actually incurred by the department of labor and employment in enforcing compliance with the Colorado Employment Security Act. *People v. Welliver*, 2012 COA 44, 317 P.3d 1192; *People v. Russell*, 2013 COA 121, 310 P.3d 284 (decided prior to 2013 amendment to § 8-81-101).

Towing company is a "victim" for purposes of restitution because it sustained a pecuniary loss as a result of defendant's criminal conduct and is therefore a person aggrieved by the offender's conduct. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

After the 2000 amendments, an insurer is still a victim for purposes of restitution. *People v. Martinez*, 2022 COA 28, 511 P.3d 739.

Department of human services not a "victim" when the underlying crime was child abuse. The department is not eligible to recover costs incurred as result of fulfilling its statutorily mandated duty to provide care in cases of child abuse or neglect because the underlying crime of child abuse defines the victim as the child. *People v. Padilla-Lopez*, 2012 CO 49, 279 P.3d 651.

Department of health care policy and financing not a "victim" when the underlying crime was vehicular assault, which defines a "victim" as a human being. Because the legislature did not specifically include the department as a victim in the enumerated examples in this section and because the elements of vehicular assault do not establish the

department as a victim, the department is not eligible for restitution under this section. *People v. McCarthy*, 2012 COA 133, 292 P.3d 1090.

It is not necessary for the "victim" to be specifically named as a party in a criminal indictment or information. A defendant is responsible for restitution if there is sufficient evidence in the record to determine that an individual is directly and immediately aggrieved by the defendant's conduct. *People v. Jones*, 701 P.2d 868 (Colo. App. 1984); *People v. Dubois*, 216 P.3d 27 (Colo. App. 2007), *aff'd* on other grounds, 211 P.3d 41 (Colo. 2009).

Peace officer and law enforcement agency who were indirectly aggrieved by defendant's conduct fall within the meaning of "victim". The restitution statute no longer limits restitution only to persons injured by the conduct alleged as the basis for the defendant's conviction. *Dubois v. People*, 211 P.3d 41 (Colo. 2009).

Peace officers are generally entitled to restitution only when the underlying crime defines a peace officer as the victim or when a peace officer has been specifically included by the legislature. *Dubois v. People*, 211 P.3d 41 (Colo. 2009); *People v. Rogers*, 2014 COA 110, 410 P.3d 544, *rev'd* on other grounds *sub nom. Teague v. People*, 2017 CO 66, 395 P.3d 782.

Police department not a "victim" under former subsection (4)(a) because the underlying sexual assault statute did not encompass the police or any related governmental entity as a primary victim.

People v. Rogers, 2014 COA 110, 410 P.3d 544 (decided under law in effect prior to the 2013 amendment), *rev'd* on other grounds *sub nom. Teague v. People*, 2017 CO 66, 395 P.3d 782.

A law enforcement task force whose function is to investigate drug-related crimes cannot recover as restitution the amount of money spent during an undercover drug deal because the money is neither money advanced by law enforcement agencies for a victim's pecuniary loss nor an extraordinary direct public investigative cost. *People v. Hollis*, 2023 COA 91, 541 P.3d 620, *aff'd*, 2025 CO 54, 576 P.3d 147.

City's risk management department was a "victim", and workers' compensation death benefits were permissible elements of "restitution", where city was a self-insured employer of police officers. The contractual relationship required by subsection (4)(a)(III) was established by circumstantial evidence although the police officer did not have a written contract of insurance directly with the police department; instead, the officer and her surviving dependents were third-party beneficiaries of the contract between the risk management department and the police department. *People v. Oliver*, 2016 COA 180M, 405 P.3d 1165.

Workers' compensation death benefits are not excluded from restitution as "future earnings", although the amount of benefits is determined with reference to the deceased employee's average weekly wage. Such benefits are more properly considered the insurer's "out-of-pocket expenses" and

"anticipated future expenses", both of which are included in the definition of restitution. Moreover, the rights to these benefits are considered rights of the employee's dependents, not of the employee. *People v. Oliver*, 2016 COA 180M, 405 P.3d 1165.

Likewise, workers' compensation permanent partial disability benefits are not excluded from restitution as "future earnings". *People v. Stone*, 2020 COA 24, 471 P.3d 1159.

The department of revenue is a "victim" under this section and entitled to restitution when a defendant is convicted of evading the state's marijuana excise taxes under § 39-21-118 (1). *People v. Le*, 2022 COA 32, 512 P.3d 146.

Restitution is warranted where a peace officer is involved in an accident while responding to a crime in which another peace officer is statutorily defined as the victim. *Dubois v. People*, 211 P.3d 41 (Colo. 2009); *People v. Ortiz*, 2016 COA 58, 381 P.3d 410.

Even though subsection (4)(a)(V) refers to a deceased person's sibling, it is read to include siblings. Section 2-4-102 requires interpreting singular statutes to include the plural and vice versa. There was no error when the court awarded restitution to all three of a victim's siblings. *People v. Lane*, 2014 COA 48, 343 P.3d 1019.

When a victim compensation board pays a victim compensation claim, the board is the victim for purposes of restitution. The person whose claim the board pays need not also meet the statutory

definition of victim. *People v. Stone*, 2020 COA 24, 471 P.3d 1159.

Even though an injured trooper was not deceased or incapacitated, which is a prerequisite under the statute for payment of restitution directly to a family member, the board's payments for the injured trooper's brother's travel expenses and the injured trooper's girlfriend's lost wages were appropriate because the board was the victim for purposes of this statute and the travel expenses and lost wages were proximately caused by the defendant's conduct. *People v. Stone*, 2020 COA 24, 471 P.3d 1159.

Defendant's act of stealing the vehicle was the proximate cause of the towing company's losses because, without it, such losses would not have been sustained. While the police department's failure to impound the vehicle on its own lot and the vehicle owner's failure to retrieve the vehicle earlier may have contributed to the towing company's losses, there is no evidence that these events were not reasonably foreseeable. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

Order of restitution for travel expenses of victim's parents to attend memorial service for victim was not an abuse of trial court's discretion. Parents' attendance at a memorial service was a natural and probable consequence that would not have occurred without defendant's actions, and therefore, defendant's conduct was a proximate cause of their attendance. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005),

overruled on other grounds in *Sullivan v. People*, 2020 CO 58, 465 P.3d 25.

A specific threat that is still outstanding against the victim is sufficient to be considered the "proximate cause" of the victim's monetary loss, and, thus, defendant can be ordered to pay restitution for those losses. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

Company employing defendant was a "victim" for purposes of restitution because it sustained a pecuniary loss as a result of defendant's conduct, and, while "victim" is defined as a "person" in this section, "person" as defined for the Colorado revised statutes in § 2-4-401 does include corporations and other legal entities, and such a reading fits within the context of "victim" in subsection (4) of this section. *People v. Webb-Johnson*, 113 P.3d 1253 (Colo. App. 2005).

Company's claimed medical expenses properly included in the restitution order as anticipated future expenses. *People v. Webb-Johnson*, 113 P.3d 1253 (Colo. App. 2005).

Defendant's conduct proximately caused victim's expenses for cosmetic procedures. *People v. Dyson*, 2021 COA 57, 492 P.3d 1070.

"Lost wages", for purposes of criminal restitution, are wages not received by the

victim from the date the crime was committed to the date restitution is imposed or sooner if the victim is comparably employed prior to that date. "Loss of future earnings" are earnings not expected to be received by the victim after restitution is imposed. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

Juvenile court lacked authority to transfer defendant's restitution obligation from an unrelated juvenile case to defendant's adult case, and district court had no authority to include the juvenile court's restitution order in its community corrections or department of corrections sentence in an unrelated case. *People v. Brooks*, 250 P.3d 771 (Colo. App. 2010).

With regard to a victim compensation board's payment of a victim compensation claim, the definition of "victim" in § 24-4.1-102 (10) prevails over the definition of "victim" in this statute because the definition in § 24-4.1-102 (10) deals only with restitution payments made to a victim compensation board and is, therefore, the more specific statute. *People v. Stone*, 2020 COA 24, 471 P.3d 1159.

Applied in *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002) (decided under former § 16-18.5-102); *People v. Juanda*, 2012 COA 159, 303 P.3d 128.

18-1.3-603. Assessment of restitution - corrective orders.

(1) Every order of conviction of a felony, misdemeanor, petty offense, or misdemeanor traffic offense, except any order of conviction for a state misdemeanor traffic offense issued by a

municipal or county court in which the prosecuting attorney is acting as a special deputy district attorney pursuant to an agreement with the district attorney's office, must include consideration of restitution. Each order must include one or more of the following:

- (a) An order of a specific amount of restitution be paid by the defendant;
- (b) An order that the defendant is obligated to pay restitution, but that the specific amount of restitution is determined within sixty-three days following the prosecuting attorney's submission of restitution information presented to the court as required by subsection (2)(a) of this section, or within the sixty-three days immediately following the order of conviction, whichever is later, unless good cause is shown for extending the time period by which the restitution amount is determined;
- (c) An order, in addition to or in place of a specific amount of restitution, that the defendant pay restitution covering the actual costs of specific future treatment of any victim of the crime; or
- (d) Contain a specific finding that no victim of the crime suffered a pecuniary loss and therefore no order for the payment of restitution is being entered.

(2) (a) The court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the victims. Further, the prosecuting attorney shall present this information to the court prior to the order of conviction or within sixty-three days, if it is not available prior to the order of conviction. The court may extend this date if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution.

(b) In computing restitution pursuant to subsection (2)(a) of this section, the following expenses are allowable if proximately caused by the crime, including but not limited to:

(I) Long-term or ongoing medical expenses as a result of the crime for which the offender was convicted or of any conduct arising out of the case;

(II) Reimbursement for insurance deductibles, including deductibles for medical expenses for physical and mental health issues, property damage or loss, and automobile damage or loss;

(III) Replacement costs for damaged or destroyed property, including locks, windows, and doors;

(IV) Travel expenses to court hearings if the victim travels over one hundred miles one way from the location of the court proceeding or when the victim is away from home longer than one day, requiring an overnight stay. A victim may receive travel expenses for travel to critical stages of the case only for the critical stages described in section 24-4.1-302 (2)(b), (2)(c), (2)(f), (2)(g), and (2)(h).

- (V) Travel expenses to a secure site, if required, to participate virtually in court proceedings;
- (VI) Child care expenses while the victim participates in court proceedings; and
- (VII) Reimbursement for lost wages to attend a critical stage of the case for the critical stages described in section 24-4.1-302 (2)(b), (2)(e), (2)(f), (2)(g), and (2)(h).

(c) The court shall review the travel expenses described in subsections (2)(b)(IV) and (2)(b)(V) of this section to ensure the travel expenses are reasonable. If the court finds the travel expenses are unreasonable, the court may reduce the amount of recoverable travel expenses to a reasonable amount.

(d) Notwithstanding the determination of restitution, an order of conviction is final.

(3) Any order for restitution may be:

(a) Increased if additional victims or additional losses not known to the judge or the prosecutor at the time the order of restitution was entered are later discovered and the final amount of restitution due has not been set by the court; or

(b) Decreased:

(I) With the consent of the prosecuting attorney and the victim or victims to whom the restitution is owed; or

(II) If the defendant has otherwise compensated the victim or victims for the pecuniary losses suffered.

(4) (a) (I) Any order for restitution entered pursuant to this section is a final civil judgment in favor of the state and any victim. Notwithstanding any other civil or criminal statute or rule, any such judgment remains in force until the restitution is paid in full. The provisions of article 18.5 of title 16, C.R.S., apply notwithstanding the termination of a deferred judgment and sentence or a deferred adjudication, the entry of an order of expungement pursuant to section 19-1-306, C.R.S., or an order to seal entered pursuant to part 7 of article 72 of title 24, C.R.S.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), two years after the presentation of the defendant's original death certificate to the clerk of the court or the court collections investigator, the court may terminate the remaining balance of the judgment and order for restitution if, following notice by the clerk of the court or the court collections investigator to the district attorney, the district attorney does not object and there is no evidence of a continuing source of income of the defendant to pay restitution. The termination of a judgment and order pursuant to this subparagraph (II) does not terminate an associated judgment against a defendant who is jointly and severally liable with the deceased defendant.

(b) Any order for restitution made pursuant to this section is also an order that:

(I) Except as provided in subsection (4)(b.5) of this section, the defendant owes simple interest from the date of the entry of the order at the rate of eight percent per annum; and

(II) The defendant owes all reasonable and necessary attorney fees and costs incurred in collecting such order due to the defendant's nonpayment.

(b.5) (I) Interest on an order for restitution does not accrue while:

(A) The defendant is serving a sentence in a correctional facility operated by or under contract with the department of corrections located within the state; or

(B) The defendant is in a juvenile delinquency case and is under twenty-one years of age.

(II) In any case where interest was accruing on an order of restitution at the rate of twelve percent per annum, on and after January 1, 2020, interest accrues at the rate of eight percent per annum.

(c) The entry of an order for restitution under this section creates a lien by operation of law against the defendant's personal property and any interest that the defendant may have in any personal property.

(d) Any order of restitution imposed shall be considered a debt for "willful and malicious" injury for purposes of exceptions to discharge in bankruptcy as provided in 11 U.S.C. sec. 523.

(e) The clerk of the court is authorized to adjust the unpaid balance in the case upon proof that any restitution or related interest amounts have been or will be satisfied outside of the court registry and receipting process regardless of when the restitution order and judgment were entered. The accounting adjustment does not modify a court's order.

(5) If more than one defendant owes restitution to the same victim for the same pecuniary loss, the orders for restitution shall be joint and several obligations of the defendants.

(6) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in any federal or state civil proceeding.

(7) When a person's means of identification or financial information was used without that person's authorization in connection with a conviction for any crime in violation of part 2, 3, or 4 of article 4, part 1, 2, 3, or 7 of article 5, or article 5.5 of this title, the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from any violation of such laws. In addition, the restitution order shall include any costs incurred by the victim related to section 16-5-103, C.R.S.

(8) (a) The court shall order restitution concerning only the portion of the victim's pecuniary loss for which the victim cannot be compensated under a policy of insurance, self-insurance, an

indemnity agreement, or a risk management fund. A court may award a victim restitution for a deductible amount under the victim's policy of insurance.

(b) This section does not prohibit a nonowner driver or passenger in a vehicle from being awarded restitution if the nonowner driver or passenger was not covered by the nonowner driver's or passenger's own medical payments coverage policy.

(c) Notwithstanding any provision of law to the contrary, an insurance company, risk management fund, or public entity is not obligated to defend a defendant in a hearing concerning restitution. A court shall not interpret an indemnity or insurance contract as requiring an insurance company, risk management fund, or public entity to defend a defendant at a restitution hearing absent a specific agreement.

(d) This subsection (8) does not preclude the court, pursuant to article 4.1 of title 24, from ordering restitution to reimburse an expenditure made by a victim compensation fund.

(9) For a conviction for human trafficking for involuntary servitude, as described in section 18-3-503, or for human trafficking for sexual servitude, as described in section 18-3-504, the court shall order restitution, if appropriate, pursuant to this section even if the victim is unavailable to accept payment of restitution.

(10) (a) If, as a result of the defendant's conduct, a crime victim compensation board has provided assistance to or on behalf of a victim pursuant to article 4.1 of title 24, C.R.S., the amount of assistance provided and requested by the crime victim compensation board is presumed to be a direct result of the defendant's criminal conduct and must be considered by the court in determining the amount of restitution ordered.

(b) The amount of assistance provided is established by either:

(I) A list of the amount of money paid to each provider; or

(II) If the identity or location of a provider would pose a threat to the safety or welfare of the victim, summary data reflecting what total payments were made for:

(A) Medical and dental expenses;

(B) Funeral or final disposition expenses;

(C) Mental health counseling;

(D) Wage or support losses; or

(E) Other expenses.

(c) Records of a crime victim compensation board relating to a claimed amount of restitution are subject to the provisions of section 24-4.1-107.5, C.R.S.

(11) Absent an agreement between the defendant and the prosecution at the time the plea is entered, a court may not impose restitution for pecuniary losses proximately caused by conduct exclusively related to dismissed charges.

(12) This part 6 does not prevent an insurance company from filing a civil action or pursuing any other civil remedy against a defendant to recover losses the insurance company suffered.

(13) This part 6 does not limit or abrogate the rights and immunities set forth in the "Colorado Governmental Immunity Act", article 10 of title 24.

Source: **L. 2002:** Entire article added with relocations, p. 1421, § 2, effective October 1. **L. 2003:** (8) added, p. 1048, § 1, effective September 1. **L. 2004:** (8)(c)(I), (8)(c)(II)(B), and (8)(d) amended, p. 904, § 28, effective May 21. **L. 2012:** (1)(b) and (2) amended, (SB 12-175), ch. 208, p. 866, § 112, effective July 1. **L. 2013:** (7) amended, (HB 13-1146), ch. 43, p. 119, § 2, effective March 15. **L. 2014:** (4)(a) amended, (HB 14-1035), ch. 21, p. 152, § 2, effective March 7; (9) added, (HB 14-1273), ch. 282, p. 1150, § 2, effective July 1. **L. 2015:** (10) added, (HB 15-1035), ch. 60, p. 147, § 6, effective March 30. **L. 2016:** (4)(a), IP(4)(b), and (4)(b)(I) amended and (4)(e) added, (SB 16-065), ch. 277, p. 1142, § 1, effective July 1. **L. 2019:** (4)(b)(I) amended and (4)(b.5) added, (HB 19-1310), ch. 303, p. 2778, § 1, effective July 1. **L. 2021:** (10)(b)(II)(B) amended, (SB 21-006), ch. 123, p. 496, § 22, effective September 7; IP(1) amended, (SB 21-271), ch. 462, p. 3171, § 189, effective March 1, 2022. **L. 2022:** IP(1) amended, (HB 22-1229), ch. 68, p. 344, § 19, effective March 1; (2) amended and (11) added, (SB 22-043), ch. 263, p. 1926, § 3, effective August 10. **L. 2025:** IP(1), (1)(b), and (2)(a) amended, (HB 25-1304), ch. 307, p. 1606, § 1, effective May 30. **L. 2026:** IP(1) amended, (HB 26-1297), ch. 123, p. 534, § 4, effective August 12; (8) amended and (12) and (13) added, (HB 26-1017), ch. 33, p. 144, § 3, effective August 12.

Editor's note: (1) This section is similar to former § 16-18.5-103 as it existed prior to 2002.

(2) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending IP(1) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: For the legislative declaration in SB 22-043, see section 1 of chapter 263, Session Laws of Colorado 2022.

ANNOTATION

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Law reviews. For article, "Construing the Restitution Statutes", see 52 Colo. Law. 28 (Mar. 2023).

Defendant's right against double jeopardy is not violated when, having deferred determination of the amount of restitution as permitted under subsection (1), the court ordered restitution after the defendant began to serve his or her sentence. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

Restitution interest statute is not unconstitutionally vague as to the frequency with which interest may be assessed. The allowable enforcement methods do not create a danger of arbitrary and capricious enforcement; thus, they satisfy minimal due process requirements. When the restitution interest statute is considered in the context of the state's restitution scheme as a whole, its standards of enforcement are sufficient to clarify which methods of calculation and assessment are acceptable. Further, it is generally accepted that interest may be calculated monthly, as long as that calculation approximates the specified yearly interest rate. *People in Interest of A.N.*, 2019 COA 67, 486 P.3d 1193.

The federal Controlled Substances Act does not preempt the state's restitution statutes. There is no positive conflict between the two statutes. The restitution statutes do not require a defendant to violate the Controlled Substances Act. Ordering restitution to a licensed marijuana business and thereby acknowledging a state property interest in marijuana does not positively

conflict with the Controlled Substances Act. *People in Interest of D.M.*, 2019 COA 56M, 444 P.3d 834.

A final conviction is a requirement for maintaining an order of restitution and a conviction becomes final only after the court of appeals has issued a mandate. *People v. Johnson*, 2021 CO 79, 499 P.3d 1045.

The 90-day deadline in subsection (2) is not a jurisdictional limit that would prevent the court from reconsidering a motion for restitution. *People v. Harman*, 97 P.3d 290 (Colo. App. 2004).

When a sentencing court enters an order that reserves the determination of the amount of restitution owed, the court may enter a contemporaneous scheduling order requiring the prosecution to identify the requested amount of restitution within a specified period that is less than ninety-one days. *People v. Brassill*, 2024 COA 19, 549 P.3d 242.

A court-ordered deadline for determination of restitution, short of the statutory 90-day period, is not a jurisdictional limit. *People v. McCann*, 122 P.3d 1085 (Colo. App. 2005).

A defendant waives the opportunity to challenge a restitution order if the defendant requests a hearing after the 91-day post-conviction deadline for the court to make the restitution order. *People v. Babcock*, 2023 COA 49, 535 P.3d 981, *aff'd*, 2025 CO 26, 569 P.3d 850.

Defendant's acceptance of a hearing date outside the deadline in subsection (1)(b) constituted a voluntary waiver of a

statutory right where defendant failed to object to a hearing outside the statutory deadline, requested numerous continuances thereafter, and waited until 446 days after sentencing before attempting to assert her statutory right to a restitution order within ninety-one days. *People v. Roberson*, 2025 CO 30, 569 P.3d 811.

The deadline in subsection (1)(b) refers to the court's determination of the restitution amount the defendant must pay, not the prosecution's determination of the proposed amount of restitution. *People v. Weeks*, 2021 CO 75, 498 P.3d 142; *People v. Roddy*, 2021 CO 74, 498 P.3d 136.

The deadline in subsection (1)(b) may be extended only if, before the deadline expires, the court expressly finds good cause to do so. *People v. Weeks*, 2021 CO 75, 498 P.3d 142.

Error in entering a restitution order after the expiration of the statutory ninety-one day period, without an express, timely finding of good cause, cannot be harmless. *People v. Mickey*, 2023 COA 106, 543 P.3d 430.

Noncompliance with subsection (1)(b)'s deadline for determining an amount of restitution does not divest a district court of authority to order that a defendant is liable to pay restitution. *People v. Tennyson*, 2023 COA 2, 528 P.3d 185, *aff'd*, 2025 CO 31, 569 P.3d 815.

"Determination" of restitution under subsection (1)(b) requires the court to order a specific amount of restitution within ninety-one days unless good cause

exists to extend the deadline. *People v. Weeks*, 2020 COA 44, 490 P.3d 672.

Trial court erred in entering restitution order more than eleven months after sentencing without good cause for delaying its ruling. *People v. Weeks*, 2020 COA 44, 490 P.3d 672.

A court may find good cause to extend its ninety-one day deadline to order restitution if the prosecution needs to use most or all of the ninety-one day period under subsection (2) to present the restitution request. However, the court's finding of good cause must rest on the specific facts of the case. *People v. Weeks*, 2020 COA 44, 490 P.3d 672.

The ninety-one-day deadline does not apply to determinations of restitution following an appeal and remand. *People v. Weeks*, 2020 COA 44, 490 P.3d 672.

Subsection (1)(b) requires a court to order a specific amount of restitution within ninety-one days unless good cause is shown for extending the deadline. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

Good cause may be implied; there is no requirement for the court to make a written or oral finding of good cause. Implied good cause must be shown or demonstrated in the record; an appellate court cannot just assume good cause existed because the restitution order was entered after the ninety-one-day deadline. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

The record in this case demonstrates good cause. The restitution order could not be

entered within the ninety-one-day deadline due to a docket scheduling issue. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

An extension of the ninety-one-day deadline does not have to be granted within the original ninety-one-day deadline. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

Extenuating circumstances affecting the prosecutor's ability to calculate the amount of restitution may be a factor in finding good cause for the late determination pursuant to subsection (1)(b). *People v. Harman*, 97 P.3d 290 (Colo. App. 2004).

A trial court errs when it extends a prosecutor's deadline to present restitution information if the prosecutor neither requests an extension of time for submission of information nor demonstrates that the restitution information was unavailable before the sentencing hearing. In this case, the error was harmless because the trial court entered the restitution order within the ninety-one day deadline as specified in subsection (1)(b) and the extension of time did not prejudice the defendant. *People v. Martinez Rubier*, 2024 COA 67, 557 P.3d 355.

When a defendant collaterally challenges the amount of restitution on grounds that the district court did not comply with the procedures outlined in subsection (1)(b) and *People v. Weeks*, 2021 CO 75, 498 P.3d 142, the issue is cognizable as an illegal manner claim under Crim. P. 35(a). *People v. Tennyson*, 2023 COA 2, 528 P.3d 185, *aff'd*, 2025 CO 31, 569 P.3d 815.

Because defendant's post-conviction challenge was to the order determining the amount of restitution, it was time barred because the challenge was filed more than 120 days after sentencing. *People v. Tennyson*, 2023 COA 2, 528 P.3d 185, *aff'd*, 2025 CO 31, 569 P.3d 815.

Vacatur of an order of restitution is required when the trial court did not enter an order under subsection (1) at the sentencing hearing but deferred the order of restitution to a later date without a finding that the victim suffered a pecuniary loss or a timely finding of good cause to extend the ninety-one-day deadline, only to issue an order of restitution 108 days after the sentencing hearing. *Snow v. People*, 2025 CO 32, 569 P.3d 835.

Under the plain language of subsection (1), restitution may be denied only after a finding that the victim has not suffered a pecuniary loss. *People v. Stovall*, 75 P.3d 1165 (Colo. App. 2003).

Pursuant to subsection (2), the prosecution must file the information in support of the restitution, including the amount, before the judgment of conviction or, if that information is not available yet, no later than 91 days after the judgment of conviction. *People v. Weeks*, 2021 CO 75, 498 P.3d 142.

Subsection (2)(a) requires the prosecution to use reasonable diligence to determine the amount of restitution it will claim and present it at or before the sentencing hearing. *People v. Brassill*, 2024 COA 19, 549 P.3d 242.

The prosecution did not use reasonable diligence to determine the amount of restitution prior to the sentencing hearing, as a matter of law, where the prosecution stated at the sentencing hearing that he assumed there was restitution and had no good excuse for not having information about the amount of restitution available at the sentencing hearing, evidence used at the restitution hearing to support the amount of restitution was available before or shortly after the sentencing hearing, and the prosecution provided no information showing that attempts were made to contact the victims for information prior to the sentencing hearing. *People v. Brassill*, 2024 COA 19, 549 P.3d 242.

The court may extend the prosecution's deadline in subsection (2) only if, before the deadline expires, it finds that there are extenuating circumstances affecting the prosecution's ability to determine the proposed amount of restitution. *People v. Weeks*, 2021 CO 75, 498 P.3d 142.

The deadlines under subsection (2)(a) are not jurisdictional and can be waived. Defendant waived his statutory claims under subsections (1)(b) and (2)(a) both explicitly in his plea agreement and implicitly by assenting to the court's order at a providency hearing and requesting a restitution hearing outside the ninety-one-day deadline. *Johnson v. People*, 2025 CO 29, 569 P.3d 844.

Absent a specific finding that the victim did not suffer a pecuniary loss, sentencing is not final until restitution is ordered.

People v. Rosales, 134 P.3d 429 (Colo. App. 2005).

Court rejected defendant's contention that "punitive" provisions of interest and attorney fees in subsection (4) constitute an ex post facto law. The restitution act simply facilitates collection from defendant of the sums he was ordered to pay at the time of his sentencing. *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002) (decided under former § 16-18.5-103).

Restitution interest statute allows the judicial department to compute and assess interest on a monthly basis. *People in Interest of A.N.*, 2019 COA 67, 486 P.3d 1193.

Court could liberally construe statute to authorize interest from the date of the offense instead of limiting the calculation of interest from the date of the entry of the order, since statute merely provides a certain, definite postjudgment interest rate but does not mandate that only postjudgment interest may be imposed. *People v. Roberts*, 114 P.3d 75 (Colo. App. 2005), *aff'd* on other grounds, 130 P.3d 1005 (Colo. 2006).

When a criminal defendant damages or steals property, prejudgment interest begins to accrue on the date on which the victim first incurs out-of-pocket expenses arising from that property damage. *People in Interest of B.H.*, 2021 COA 86, 496 P.3d 454.

Because post-judgment interest on the restitution amount awarded has the statutory purpose to encourage speedy payment of the restitution order, which is

different from the purpose of pre-judgment interest, a trial court must impose both pre-judgment interest and post-judgment interest in probationary restitution orders. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006); *People v. Cardenas*, 262 P.3d 913 (Colo. App. 2011).

A sentence that does not include restitution is illegal, because the consideration of restitution is mandatory. The court was required to correct the mittimus to reflect restitution. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

Restitution component satisfied once ordered, even though specific amount not set until two years after sentence imposed. Once restitution ordered, although not set, judgment of conviction became final and appealable, even though district court retained jurisdiction to determine restitution amount. *Sanoff v. People*, 187 P.3d 576 (Colo. 2008).

An order setting the amount of restitution is itself an appealable order and is subject to time limits for filing an appeal. *People v. Hill*, 296 P.3d 121 (Colo. App. 2011).

Interest rate on orders for restitution entered on and after September 1, 2000, is 12 percent, even though offense was committed prior to the effective date of the section. Section merely codified a discretionary power and sets a uniform interest rate. *People v. Garcia*, 55 P.3d 243 (Colo. App. 2002).

The term "per annum" does not limit the judicial department to collecting

interest payments annually. Instead, the judicial department may collect interest on a monthly basis. *People v. Ray*, 2018 COA 158, 452 P.3d 117.

The state legislature cannot preempt federal bankruptcy law and declare certain debts to be nondischargeable. Subsection (4)(d) cannot preempt federal law. *In re McNabb*, 287 B.R. 820 (Bankr. D. Colo. 2003).

Trial court has broad discretion in determining the terms and conditions of a restitution order, and the court's ruling will not be disturbed unless it abuses its discretion when it misconstrues or misapplies the law. The court misapplied the law in ordering restitution for the cost of installing locks on all interior doors of office that was burglarized. *People v. Reyes*, 166 P.3d 301 (Colo. App. 2007).

In order to receive restitution, the loss must be pecuniary and may be specifically mentioned in statute or the loss or injury must be proximately caused by the offender's conduct that can be reasonably calculated and recompensed in money. Awarding restitution for installing locks on victim's interior doors would put the victim in a better financial position than victim had been in had defendant's conduct not occurred; therefore, installing the locks was not a loss proximately caused by defendant's conduct and did not qualify for a restitution award. *People v. Reyes*, 166 P.3d 301 (Colo. App. 2007).

To receive restitution, a loss must be tied to the unlawful conduct for which a defendant was convicted, including a tie to

the dates on which the conduct allegedly occurred. *People v. Moss*, 2022 COA 92, 520 P.3d 694.

The cost of a hospital sexual assault examination that is initiated by the victim is a pecuniary loss that must be included as part of the restitution order. This is distinct from the situation in which law enforcement initiates the sexual assault examination. In that case, it is a law enforcement expense not subject to restitution. *People v. Montanez*, 2012 COA 101, 300 P.3d 940.

The value of an employee's time constitutes actual pecuniary damages sustained by a company when spent on problems caused by a criminal act, and the value of that time is properly included in a restitution award, regardless of whether the company expends any funds in addition to an employee's regular salary. *People v. Stotz*, 2016 COA 16, 381 P.3d 357.

A specific threat that is still outstanding against the victim is sufficient to be considered the "proximate cause" of the victim's monetary loss, and, thus, defendant can be ordered to pay restitution for those losses. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

"Lost wages", for purposes of criminal restitution, are wages not received by the victim from the date the crime was committed to the date restitution is imposed or sooner if the victim is comparably employed prior to that date. "Loss of future earnings" are earnings not expected to be received by the victim after restitution is imposed. *People v. Bryant*, 122 P.3d 1026

(Colo. App. 2005); *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Although a court may order restitution for lost wages, it may not order restitution for loss of future earnings. *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Subsection (8)(a) allows the court to award restitution to a victim's insurance company in nonfelony traffic cases, but only if the prosecution proves that the insurer cannot be compensated for its loss under a policy of insurance, self-insurance, an indemnity agreement, or a risk management fund. *People v. Lockett*, 2025 COA 1, __ P.3d __.

While defendant is entitled to a setoff against a restitution order to the extent of any money actually paid to a victim for the same damages covered by the order, defendant bears the burden of proof in apportioning the damages. Where victim's parents received an unapportioned settlement from defendant's automobile insurer, defendant bears burden of presenting evidence as basis for allocating the unapportioned settlement to pecuniary losses covered by the restitution order. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005), overruled on other grounds in *Sullivan v. People*, 2020 CO 58, 465 P.3d 25.

Court should hold hearing on how much of settlement proceeds offset a restitution order at which the defendant bears the burden of establishing the offset. When receipt of settlement proceeds from a third party is silent as to what it covers, the court should hold a hearing on

the amount of settlement that relates to the victim's losses covered by the restitution. The defendant bears burden of proof on the amount of the offset. *People v. Stanley*, 2017 COA 121, 405 P.3d 518.

Changing the restitution payee does not constitute a new restitution request. Although the restitution statute does not specifically authorize a change of payee, it does not bar such a change either. Allowing the change of payee serves the statutory purposes of rehabilitation and deterrence. *Johnson v. People*, 2016 CO 59, 379 P.3d 323.

Sentencing court not barred by collateral estoppel and double jeopardy principles from considering acquitted conduct in determining an award of restitution. *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006). But see *Cowen v. People*, 2018 CO 96, 431 P.3d 215 (disapproving restitution for acquitted charges).

Section does not prescribe a maximum restitution amount. Therefore, the rule set forth in *Apprendi* and *Blakely* concerning prescribed statutory maximum sentences does not apply to restitution orders in Colorado. Restitution is not limited by the jury's findings, but rather includes any pecuniary losses suffered by the victim as a proximate cause of the offender's conduct. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Burden of proof for establishing the amount of restitution owed is a preponderance of the evidence. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

The standard of review on an appeal challenging the sufficiency of the evidence of a district court's restitution conclusion is to review de novo whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, establishes by a preponderance of the evidence that the defendant caused that amount of loss. But this standard might not apply in every appeal where the proper amount of restitution is at issue. *People v. Barbre*, 2018 COA 123, 429 P.3d 95.

The prosecution bears the burden of proving that the victim's pecuniary loss (or a portion of it) is not compensable under a policy of insurance, self-insurance, an indemnity agreement, or a risk management fund because this finding is a statutory prerequisite to computing the amount of restitution owed. *People v. Lockett*, 2025 COA 1, __ P.3d __.

The amount of a restitution order is not limited to only the criminal conduct that a defendant is found by a reasonable doubt to have committed. In determining the proper amount of restitution owed, courts may consider both uncharged and acquitted criminal conduct that has been proved by a preponderance of the evidence; courts are not limited to considering only the criminal conduct that a defendant is found beyond a reasonable doubt to have committed. *People v. Stotz*, 2016 COA 16, 381 P.3d 357 (disapproved by supreme court in *Cowen v. People*, 2018 CO 96, 431 P.3d 215).

A trial court may not impose restitution for pecuniary losses caused by acquitted

conduct. Even where a defendant has been convicted of a separate charge, a trial court may not order restitution for losses caused by conduct that formed the basis of a charge of which the defendant has been acquitted. *Cowen v. People*, 2018 CO 96, 431 P.3d 215.

Or conduct for which the defendant was never criminally charged, or where the charge was dismissed. *People v. Sosa*, 2019 COA 182, 487 P.3d 1203.

But dismissed charges in a plea agreement can be the basis for a restitution award. *People v. Rice*, 2020 COA 143, 478 P.3d 1276.

Absent an agreement between the parties, a court may not impose restitution for pecuniary losses proximately caused by conduct exclusively related to dismissed charges. *People v. Roddy*, 2021 CO 74, 498 P.3d 136.

Restitution for an offense is limited to the amount consistent with the jury verdict where a defendant is charged with one level of offense but is convicted of only a lower-level offense. Defendant was charged with criminal mischief as a class 6 felony but based on jury interrogatories was convicted of the offense only as a class 1 misdemeanor. Under the reasoning in *Cowen v. People*, 2018 CO 96, 431 P.3d 215, that trial courts cannot consider acquitted conduct, restitution for the charge is limited to the statutory maximum of \$999.99 set for a class 1 misdemeanor. However, additional restitution may be supported by property and nonproperty losses properly attributed to other offenses

for which the defendant was convicted. *People v. Knapp*, 2020 COA 107, 487 P.3d 1243.

Subsection (10)(a) creates a rebuttable presumption with regard to the amount of restitution owed by an offender. *People v. Henry*, 2018 COA 48M, 439 P.3d 33.

Court may not order restitution without a hearing when prosecution must prove the amount of victim's loss and its causal link to defendant, and when defense counsel is present and prepared to contest those matters. Defendant need not be present for the hearing, but his or her counsel must be given the opportunity to contest the amount of restitution ordered. *People v. Martinez*, 166 P.3d 223 (Colo. App. 2007).

When restitution is reserved at the prosecution's request and the defendant objects to restitution and demands a hearing, an in-person hearing must be granted. At the hearing, the prosecution must carry its burden and the defendant may contest the prosecution's request or otherwise test the prosecution's evidence. *People v. Martinez-Chavez*, 2020 COA 39, 463 P.3d 339.

Defendant's challenge to the amount of restitution that she should be obligated to pay constitutes a claim that her sentence was imposed in an illegal manner. Because her claim was not brought within 120 days of her conviction, the claim was time barred. *People v. Bowerman*, 258 P.3d 314 (Colo. App. 2010).

Sentencing court does not have the power to increase restitution beyond the

previously set amount. Absent a statutorily authorized order reserving a determination of the final amount of restitution due, a judgment of conviction finalizes any specific amount already set. *Meza v. People*, 2018 CO 23, 415 P.3d 303; *People v. Belibi*, 2018 CO 24, 415 P.3d 301.

Court has the authority to decrease a restitution order at any time if it finds that the defendant has compensated the victim. If the defendant meets his or her burden of going forward by showing that a settlement agreement was intended to cover the same categories of losses as the restitution order, the burden shifts to the prosecution to rebut the inference of double recovery. *People v. Gregory*, 2019 COA 184, 469 P.3d 507.

Under § 16-5-401, a plea of guilty to facilitate the disposition of a case constitutes a waiver of the statute of limitations. Defendant waived her right to raise the statute of limitations as a defense to the amount of restitution ordered. *People v. Wilson*, 251 P.3d 507 (Colo. App. 2010).

In declaring an order for restitution to be a final civil judgment in favor of the state and any victim, the general assembly intended that the order of restitution would survive defendant's death just as a civil judgment survives the death of a judgment debtor pursuant to § 13-58-101. *People v. Daly*, 313 P.3d 571 (Colo. App. 2011), overruled in *People v. Johnson*, 2021 CO 79, 499 P.3d 1045.

Thus, the doctrine of abatement ab initio does not apply to civil judgments created by restitution orders. When defendant died after conviction and entry of

the order of restitution, but before determination of the direct appeal, the common law doctrine of abatement ab initio applied to defendant's conviction. Because of the importance of protecting the rights of victims, however, the restitution order, which created a civil judgment under subsection (4), was not subject to abatement but could be appealed by defendant's estate. *People v. Daly*, 313 P.3d 571 (Colo. App. 2011), overruled in *People v. Johnson*, 2021 CO 79, 499 P.3d 1045.

When a defendant dies while his criminal conviction is pending on direct appeal, the doctrine of abatement ab initio extinguishes a restitution order entered as part of his sentence. *People v. Johnson*, 2020 COA 124, 487 P.3d 1262, aff'd, 2021 CO 79, 499 P.3d 1045 (overruling *People v. Daly*, 313 P.3d 571 (Colo. App. 2011)).

Discharge in bankruptcy does not bar a court from ordering restitution even if discharge occurred prior to filing of charges. *People v. Foos*, 2016 COA 139, 409 P.3d 561.

Prosecution's request for supplemental restitution was not barred by the 90-day period prescribed in subsections (1) and (2). The 90-day limitation period only applies to efforts to procure an initial order of restitution. The time period does not apply to efforts to increase a previously entered order of restitution. The determination of supplemental restitution requires the court to consider (1) whether the final amount of restitution due had not been set by the court; and (2) whether any

additional losses were known to the judge or the prosecutor at the time the order of restitution was entered. *People v. Rockne*, 2012 COA 198, 315 P.3d 172.

District court had authority to extend the ninety-one-day deadline based on future losses where the court made a good cause finding in an order entered before the ninety-one-day deadline expired and that order was reiterated in each restitution order thereafter. *People v. Fregosi*, 2024 COA 6, 547 P.3d 402.

The use of the term "known" in subsection (3) is intended to hold the court and the prosecutor to a standard of actual knowledge and not to a standard of constructive knowledge. *People v. Rockne*, 2012 COA 198, 315 P.3d 172.

Despite error in amount requested in prosecution's motion for restitution, restitution order was final and losses were "known" to prosecutor at the time of the order. Losses were included in the presentence investigation report and prosecutor had actual knowledge of the

amount despite her failure to fully digest the information. *People v. McLain*, 2016 COA 74, 411 P.3d 1037.

A district court has the authority to collect restitution after the completion of a deferred sentence and dismissal of the underlying charges. *Pineda-Liberato v. People*, 2017 CO 95, 403 P.3d 160.

Evidence sufficient to support district court's finding that therapy costs paid by the crime victim compensation board (CVCB) were the direct result of the defendant's criminal conduct where the record supported denying defendant's request for disclosure of the victim's treatment provider because such disclosure would pose a risk to the victim; the prosecution did not rely solely on the CVCB summaries to show proximate causation; and defendant offered no evidence to rebut the statutory presumption of causation. *People v. Fregosi*, 2024 COA 6, 547 P.3d 402.

Applied in *People v. Turecek*, 2012 COA 59, 280 P.3d 73.

PART 7

FINES AND COSTS

18-1.3-701. Judgment of costs and fines - definitions.

(1) (a) When any person, association, or corporation is convicted of an offense, the court shall give judgment in favor of the state of Colorado, the appropriate prosecuting attorney, or the appropriate law enforcement agency and against the offender for the amount of the costs of prosecution, the amount of the cost of care, and any fine imposed. When any juvenile is adjudicated a juvenile delinquent for the commission of an act that would have been a criminal offense if committed by an adult, the court may give judgment in favor of the state of Colorado for any fine imposed. The court shall not impose costs of prosecution or cost of care against a

juvenile under the jurisdiction of the juvenile court, as defined in section 19-1-103, or against the person's parent, guardian, or legal custodian, except as required pursuant to title IV of the federal "Social Security Act". No fine shall be imposed for conviction of a felony except as provided in section 18-1.3-401 or 18-7-203 (2)(a). Such judgments are enforceable in the same manner as are civil judgments, and, in addition, sections 16-11-101.6 and 18-1.3-702 apply. A county clerk and recorder may not charge a fee for the recording of a transcript or satisfaction of a judgment entered pursuant to this section.

(b) Except as otherwise provided in paragraph (c) of this subsection (1), on and after July 1, 2010, all judgments collected pursuant to this section for fees and court costs shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(c) Judgments collected pursuant to this section for fees for auxiliary services provided pursuant to section 13-90-204, and reimbursed pursuant to section 13-90-210, shall be remitted to the division for the deaf, hard of hearing, and deafblind cash fund created in section 26-21-107.

(2) The costs assessed pursuant to subsection (1) of this section or section 16-18-101 may only be imposed against a person convicted of a crime committed when the person was eighteen years of age or older and may include:

(a) Any docket fee required by article 32 of title 13, C.R.S., or any other fee or tax required by statute to be paid to the clerk of the court;

(b) The jury fee required by section 13-71-144, C.R.S.;

(c) Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;

(d) Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in the case, including the fees provided for in section 16-18-101 (2), C.R.S., and including the fees for a transcript of any preliminary hearing;

(d.5) The actual costs paid to any expert witness;

(e) (I) The witness fees and mileage paid pursuant to article 33 of title 13, C.R.S., and section 16-9-203, C.R.S.;

(II) For any person required to travel more than fifty miles from the person's place of residence to the place where specified in the subpoena, in addition to the witness fee and mileage specified in subparagraph (I) of this paragraph (e):

(A) Actual lodging expenses incurred; and

(B) Actual rental car, taxi, or other transportation costs incurred;

(e.5) If a person under eighteen years of age is required to appear, the amount that a parent or guardian of the person was paid for transportation and lodging expenses incurred while accompanying the person;

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

(g) Any costs of taking depositions for the perpetuation of testimony, including reporter's fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;

(h) Any statutory fees for service of process or statutory fees for any required publications;

(h.5) Any fees for interpreters required during depositions or during trials;

(i) Any item specifically authorized by statute to be included as part of the costs;

(j) Repealed.

(j.5) On proper motion of the prosecuting attorney and at the discretion of the court, any other reasonable and necessary costs incurred by the prosecuting attorney or law enforcement agency that are directly the result of the successful prosecution of the defendant, including the costs resulting from the collection and analysis of any chemical test upon the defendant pursuant to section 42-4-1301.1, which costs the court shall assess against the defendant, collect from the defendant, and transfer to the prosecuting attorney or law enforcement agency;

(k) Any costs incurred in obtaining a governor's warrant pursuant to section 16-19-108, C.R.S.;

(l) Any costs incurred by the law enforcement agency in photocopying reports, developing film, and purchasing videotape as necessary for use in the case;

(m) Any costs of participation in a diversion program if the offender unsuccessfully participated in a diversion program prior to the conviction.

(3) Where any person, association, or corporation is granted probation, the court shall order the offender to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the offender's spouse, dependent children, or other persons having a legal right to support and maintenance from the estate of the offender. If the court determines that the offender has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender for the cost of care, which amount shall in no event be in excess of the per capita cost of supervising an offender on probation.

(4) Where any person is sentenced to a term of imprisonment, whether to a county jail or the department of corrections, the court shall order such person to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the inmate's spouse, dependent children, or any other persons having a legal right to support and maintenance out of the offender's estate. The court shall also consider the financial needs of the offender for the six-month period immediately following the offender's release, for the purpose of allowing said offender to seek employment. If the court determines that the person has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender, which amount in no event shall be in excess of the per capita cost of maintaining prisoners in the institution or facility in which the offender has been residing prior to sentencing for the purpose of reimbursing the appropriate law enforcement agency and the per capita cost of maintaining prisoners in the department of corrections for the purpose of paying the cost of care after sentencing.

(4.5) Notwithstanding the entry of an order of expungement pursuant to section 19-1-306, the provisions of this part 7 apply.

(5) As used in this section, unless the context otherwise requires:

(a) "Cost of care" means the cost to the department or the local government charged with the custody of an offender for providing room, board, clothing, medical care, and other normal living expenses for an offender confined to a jail or correctional facility, or any costs associated with maintaining an offender in a home detention program contracted for by the department of public safety, as determined by the executive director of the department of corrections or the executive director of the department of public safety, whichever is appropriate, or the cost of supervision of probation when the offender is granted probation, or the cost of supervision of parole when the offender is placed on parole by the state board of parole, as determined by the court.

(b) "Estate" means any tangible or intangible properties, real or personal, belonging to or due to an offender, including income or payments to such person received or earned prior to or during incarceration from salary or wages, bonuses, annuities, pensions, or retirement benefits, or any source whatsoever except federal benefits of any kind. Real property that is held in joint ownership or ownership in common with an offender's spouse, while being used and occupied by the spouse as a place of residence, shall not be considered a part of the estate of the offender for the purposes of this section.

(6) After the set-offs for restitution and for maintenance and support as provided in subsection (4) of this section, any amounts recovered pursuant to this section that are available to reimburse the costs of providing medical care shall be used to reimburse the state for the state's financial participation for medical assistance if medical care is provided for the inmate or an

infant of a female inmate under the "Colorado Medical Assistance Act", articles 4, 5, and 6 of title 25.5, C.R.S.

(7) (a) The costs described in subsection (1) of this section shall not be assessed against a juvenile or the juvenile's parent, guardian, or legal custodian. A court or the state shall not enforce or collect any costs assessed by the court on or after July 6, 2021, that are outstanding against a juvenile or the juvenile's parent, guardian, or legal custodian.

(b) As used in this subsection (7), "juvenile" means a person who is under eighteen years old when the crime is committed.

Source: **L. 2002:** Entire article added with relocations, p. 1422, § 2, effective October 1. **L. 2003:** (1) amended, p. 1693, § 1, effective August 6. **L. 2006:** (1) amended, p. 1091, § 11, effective May 25; (6) amended, p. 2005, § 61, effective July 1. **L. 2007:** (1) amended, p. 1538, § 29, effective May 31. **L. 2008:** (1)(b) amended, p. 2146, § 21, effective June 4. **L. 2011:** (1)(a) amended, (SB 11-085), ch. 257, p. 1129, § 6, effective August 10. **L. 2016:** (2)(j) amended and (2)(j.5) added, (HB 16-1378), ch. 303, p. 1221, § 1, effective August 10. **L. 2017:** IP(2) and (2)(j.5) amended and (2)(j) repealed, (HB 17-1252), ch. 367, p. 1912, § 1, effective August 9; (4.5) added, (HB 17-1204), ch. 206, p. 784, § 4, effective November 1. **L. 2018:** (1)(c) amended, (HB 18-1108), ch. 303, p. 1836, § 8, effective August 8. **L. 2021:** (1)(a), IP(2), and (2)(m) amended, (HB 21-1315), ch. 461, p. 3106, § 3, effective July 6. **L. 2025:** (1)(c) amended, (HB 25-1154), ch. 230, p. 1086, § 23, effective May 22. **L. 2026:** (7) added, (HB 26-1232), ch. 98, p. 388, § 4, effective May 4.

Editor's note: This section is similar to former § 16-11-501 as it existed prior to 2002.

Cross references: (1) For items includable as costs in civil actions, see § 13-16-122.

(2) For the legislative declaration in the 2008 act amending subsection (1)(b), see section 1 of chapter 417, Session Laws of Colorado 2008. For the legislative declaration in the 2011 act amending subsection (1)(a), see section 1 of chapter 257, Session Laws of Colorado 2011. For the legislative declaration in HB 21-1315, see section 1 of chapter 461, Session Laws of Colorado 2021. For the legislative declaration in HB 26-1232, see section 1 of chapter 98, Session Laws of Colorado 2026.

ANNOTATION

Annotator's note. Since § 18-1.3-701 is similar to § 16-11-501 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed laws antecedent to CSA, C. 48, 516, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality. Statutes imposing liability for costs on a convicted defendant have been uniformly held to be constitutional. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

No double jeopardy violation where the imposition of costs is primarily remedial rather than punitive. The reviewing court first considers if the legislature intended a criminal or civil sanction, then determines if the statutory scheme is primarily punitive. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Costs are imposed to reimburse the state for the actual expenses incurred in prosecuting a defendant; costs are not traditionally considered to be punishment; the imposition of costs does not serve the goals of retribution and deterrence. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Sixth amendment inapplicable. The sixth amendment of the constitution compels appointing counsel for indigent defendants but does not speak to whether convicted defendants of limited resources may be charged with the costs of their trial. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Declaration of indigency differs. Whether a presumably innocent defendant is

declared indigent for the purposes of appointing counsel before he is brought to trial involves different considerations than the question of whether a convicted defendant may be charged with the costs expended by the state to secure his conviction. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Judgment for costs must be rendered against defendant upon conviction. *Bransom v. Bd. of Comm'rs*, 5 Colo. App. 231, 37 P. 957 (1894).

This changes the doctrine of the common law. In authorizing a recovery by the people against a convicted defendant of the costs incurred to secure his conviction, it was a departure from the doctrine of the common law. *Bd. of Comm'rs v. Wilson*, 3 Colo. App. 492, 34 P. 265 (1893).

Costs are a matter of statute under this section. *Glavino v. People*, 75 Colo. 94, 224 P. 225 (1924).

And are not to be taxed according to plea agreement. The costs in a criminal case must be taxed according to statutes and not according to any plea agreement. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

There is no restriction or limit to the amount of costs of prosecution, only that the items of cost must necessarily conform to the fee bill, and that the charge for each service shall not exceed the amount allowed. The whole matter has been left to the discretion of the prosecutor and the court. *Parker v. People*, 7 Colo. App. 56, 42 P. 172 (1895).

Prosecution costs are not punitive and are not part of the sentence; therefore, the costs do not need to be imposed before a defendant may file a direct criminal appeal. *People v. Cichuniec*, 2025 COA 33, 569 P.3d 860.

A defendant convicted of fewer than all of the counts in a multi-count indictment or criminal information, or in consolidated cases, can be assessed only those costs of prosecution attributable to the counts for which the defendant is actually convicted, if an allocation is practicable. *People v. Palomo*, 272 P.3d 1106 (Colo. App. 2011); *People v. Trujillo*, 2018 COA 12, 433 P.3d 78.

Extradition expenses fall within subsection (2)(j). *People v. Fogarty*, 126 P.3d 238 (Colo. App. 2005).

And are not subject to a time limitation. The phrase "[w]here any person...is convicted" means nothing more than "under conditions or in circumstances in which a person is convicted of an offense". The prosecution does not have an unlimited time, however, to seek expenses for extradition costs. *People v. Scoggins*, 240 P.3d 331 (Colo. App. 2009), *aff'd* by an equally divided court, 2012 CO 16, 271 P.3d 515.

Cost of sexual assault nurse examiner (SANE) examination qualifies for restitution under statute as an "extraordinary" direct public or private investigative cost. *Teague v. People*, 2017 CO 66, 395 P.3d 782.

"Costs of prosecution" relate to the costs of a formal criminal proceeding. Court erred in awarding police department medical costs associated with defendant's hospital treatment relating to injuries defendant sustained during a resisted arrest and the police's use of a taser on defendant. Arrest does not constitute prosecution under the statute. Medical treatment was provided before defendant was formally charged and before criminal proceedings began. *People v. Sinovicic*, 2013 COA 38, 304 P.3d 1176.

And post-arrest hospital costs are not "costs of care" under the statute. "Custody" refers to custody, following sentencing, in a jail or correctional facility. Defendant had not yet been booked into county jail, nor had he been sentenced, at the time he received medical treatment for injuries resulting from resisting arrest. *People v. Sinovicic*, 2013 COA 38, 304 P.3d 1176.

Judicial discretion. The general rule as to payment of costs may be avoided if the trial judge, in his discretion, determines that the defendant is unable to pay the costs. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Joint defendants are severally liable for costs. Inasmuch as the costs are merely incident to the judgment, joint defendants are severally liable for the costs incurred in procuring their respective convictions, not for the costs of each other, nor for costs made by the people against them respectively. *Murphy v. People*, 3 Colo. 147 (1876).

Judgment rendered against person convicted is a lien on his property. In case of a conviction in a criminal proceeding judgment must be rendered against the defendant for the costs of the prosecution, and when rendered, is a lien upon his property, if he has any, and is collected by execution. *Bransom v. Bd. of Comm'rs*, 5 Colo. App. 231, 37 P. 957 (1894).

Although it becomes the duty of parole board to provide, as a condition of parole, that offender make restitution to the victim or victim's immediate family, it is

error for court to require that defendant pay restitution to the police of cost of extradition. The proper way to effectuate this result is for court to enter judgment in favor of state of Colorado for amount of costs of prosecution under § 16-1-501. *People v. Lemons*, 824 P.2d 56 (Colo. App. 1991).

This section is not applicable to a juvenile who is adjudicated delinquent. *People v. T.R.*, 860 P.2d 559 (Colo. App. 1993).

18-1.3-702. Monetary payments - due process required.

(1) (a) When the court imposes a sentence, enters a judgment, or issues an order that obligates the defendant to pay a monetary amount, the court may direct as follows:

(I) That the defendant pay the entire monetary amount at the time sentence is pronounced;

(II) That the defendant pay the entire monetary amount at some later date;

(III) That the defendant pay as directed by the court or the court's designated official:

(A) At a future date certain in its entirety;

(B) By periodic payments, which may include payments at intervals, referred to in this section as a "payment plan"; or

(C) By other payment arrangement as determined by the court or the court's designated official;

(IV) When the defendant is sentenced to a period of probation as well as payment of a monetary amount, that payment of the monetary amount be made a condition of probation.

(b) A court's designated official shall report to the court on any failure to pay.

(c) As used in this section, "court's designated official" includes, but is not limited to, a "collections investigator" as defined in section 18-1.3-602 (1).

(2) When the court imposes a sentence, enters a judgment, or issues an order that obligates a defendant to pay any monetary amount, the court shall instruct the defendant as follows:

(a) If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount;

(b) If the defendant lacks the present ability to pay the monetary amount due without undue hardship to the defendant or the defendant's dependents, the court shall not jail the defendant for failure to pay; and

(c) If the defendant has the ability to pay the monetary amount as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to the terms of this section.

(3) Incarceration for failure to pay is prohibited absent provision of the following procedural protections:

(a) When a defendant is unable to pay a monetary amount due without undue hardship to himself or herself or his or her dependents, the court shall not imprison the defendant for his or her failure to pay;

(b) Except in the case of a corporation, if the defendant failed to pay a monetary amount due and the record indicates that the defendant has willfully failed to pay that monetary amount, the court, when appropriate, may consider a motion to impose part or all of a suspended sentence, may consider a motion to revoke probation, or may institute proceedings for contempt of court. When instituting contempt of court proceedings, the court, including a municipal court, shall provide all procedural protections mandated in rule 107 of the Colorado rules of civil procedure or rule 407 of the Colorado rules of county court civil procedure.

(c) The court shall not find the defendant in contempt of court, nor impose a suspended sentence, nor revoke probation, nor order the defendant to jail for failure to pay unless the court has made findings on the record, after providing notice to the defendant and a hearing, that the defendant has the ability to comply with the court's order to pay a monetary amount due without undue hardship to the defendant or the defendant's dependents and that the defendant has not made a good-faith effort to comply with the order. If the defendant fails to appear at the hearing referenced in this paragraph (c) after receiving notice, the court may issue a warrant for his or her arrest for failure to appear.

(d) The court shall not accept a defendant's guilty plea for contempt of court for failure to pay or failure to comply with the court's order to pay a monetary amount unless the court has made findings on the record that the defendant has the ability to comply with the court's order to pay a monetary amount due without undue hardship to the defendant or the defendant's dependents and that the defendant has not made a good-faith effort to comply with the order; and

(e) The court shall not issue a warrant for failure to pay money, failure to appear to pay money, or failure to appear at any post-sentencing court appearance wherein the defendant was

required to appear if he or she failed to pay a monetary amount; however, a court may issue an arrest warrant or incarcerate a defendant related to his or her failure to pay a monetary amount only through the procedures described in paragraphs (a) to (d) of this subsection (3).

(4) For purposes of this section, a defendant or a defendant's dependents are considered to suffer undue hardship if he, she, or they would be deprived of money needed for basic living necessities, such as food, shelter, clothing, necessary medical expenses, or child support. In determining whether a defendant is able to comply with an order to pay a monetary amount without undue hardship to the defendant or the defendant's dependents, the court shall consider:

- (a) Whether the defendant is experiencing homelessness;
- (b) The defendant's present employment, income, and expenses;
- (c) The defendant's outstanding debts and liabilities, both secured and unsecured;
- (d) Whether the defendant has qualified for and is receiving any form of public assistance, including food stamps, temporary assistance for needy families, medicaid, or supplemental security income benefits;
- (e) The availability and convertibility, without undue hardship to the defendant or the defendant's dependents, of any real or personal property owned by the defendant;
- (f) Whether the defendant resides in public housing;
- (g) Whether the defendant's family income is less than two hundred percent of the federal poverty line, adjusted for family size; and
- (h) Any other circumstances that would impair the defendant's ability to pay.

(5) If the court finds a defendant in contempt of court for willful failure to pay, the court may direct that the defendant be imprisoned until the monetary payment ordered by the court is made, but the court shall specify a maximum period of imprisonment subject to the following limits:

- (a) When the monetary amount was imposed for a felony, the period shall not exceed one year;
- (b) When the monetary amount was imposed for a misdemeanor, the period shall not exceed one-third of the maximum term of imprisonment authorized for the misdemeanor;
- (c) When the monetary amount was imposed for a petty offense, a traffic violation, or a violation of a municipal ordinance, any of which is punishable by a possible jail sentence, the period shall not exceed fifteen days;
- (d) There shall be no imprisonment in those cases when no imprisonment is provided for in the possible sentence; and

(e) When a sentence of imprisonment and a monetary amount was imposed, the aggregate of the period and the term of the sentence shall not exceed the maximum term of imprisonment authorized for the offense.

(6) This section applies to all courts of record in Colorado, including but not limited to municipal courts.

(7) Nothing in this section prevents the collection of a monetary amount in the same manner as a judgment in a civil action.

Source: L. 2002: Entire article added with relocations, p. 1425, § 2, effective October 1. **L. 2014:** Entire section amended, (HB 14-1061), ch. 164, p. 575, § 1, effective May 9. **L. 2016:** Entire section amended, (HB 16-1311), ch. 343, p. 1394, § 1, effective June 10.

Editor's note: This section is similar to former § 16-11-502 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-702 is similar to § 16-11-502 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, a relevant case construing that provision has been included in the annotations to this section.

It is the purpose of subsection (2) to provide a method of compelling one to pay fine and costs adjudged against him in a criminal case, irrespective of any exemptions. *Enderman v. Alexander*, 68 Colo. 110, 187 P. 729 (1920) (decided under repealed laws antecedent to CSA, C. 48, § 526).

"Any criminal offense", in subsection (6), does not include violations of

municipal ordinances. *People v. District Court*, 198 Colo. 284, 599 P.2d 260 (1979).

When a defendant introduces some evidence of inability to pay restitution, the court must make ability-to-pay findings under subsection (3)(c) before revoking a deferred judgment for failure to pay. The prosecution bears the burden of proving by a preponderance of evidence that the defendant (1) has the ability to comply with the court's order to pay a monetary amount due without undue hardship to the defendant or the defendant's dependents, and (2) has not made a good-faith effort to comply with the order. *Williams v. People*, 2019 CO 101, 454 P.3d 219.

18-1.3-703. Reimbursement of amounts paid following a vacated conviction or amended order for restitution - petition.

(1) The following persons are eligible under this section for a refund of monetary payments actually paid:

(a) A defendant whose court-ordered fines, fees, costs, surcharges, restitution, interest, or other monetary amounts resulting from a criminal conviction in a district or county court of this state have been paid if the amount paid relates solely to a conviction:

(I) That is vacated after postconviction proceedings or is overturned on appeal; and

(II) The charge on which the conviction was based is dismissed or the person is acquitted of the charge after a new trial;

(b) A defendant whose court-ordered restitution and interest resulting from a criminal conviction in a district or county court of this state have been paid and:

(I) The restitution ordered by the court is reversed on appeal; or

(II) The amount of restitution ordered by the court is reversed on appeal and the restitution, including interest, that has been paid is in excess of the amount upheld on appeal.

(2) (a) A defendant may file a written motion in the court in which the conviction was entered for a refund of any monetary amounts described in subsection (1) of this section within one year after the defendant becomes eligible for the refund. The court may only extend the one-year time limit for good cause.

(b) The defendant bears the burden of proving by a preponderance of the evidence that the amount was actually paid and that the defendant is eligible for a refund pursuant to subsection (1) of this section. If the court finds that the defendant has established eligibility for a refund, the court shall issue an order directing the state court administrator to issue a refund for the total monetary amount found to be due.

(3) Nothing in this section requires a victim to repay restitution received as a result of a criminal conviction.

Source: L. 2017: Entire section added, (HB 17-1071), ch. 70, p. 219, § 1, effective September 1.

18-1.3-704. Outstanding balances owed by juveniles - report.

(1) On and after July 6, 2021, the balance of any court-assessed or court-ordered costs imposed pursuant to section 16-11-101.6 (1), 18-1.3-407 (4.5) or (11.5), 18-1.3-507 (6)(a), 18-1.3-701 (1) or (2)(m), 18-21-103 (1.5), 18-25-101 (1), 21-1-103 (3), 24-4.1-119 (1)(a) or (1)(d), 24-4.2-104 (1)(a)(I), or 42-4-1307 (10) against a juvenile, as defined in section 18-1.3-407 (1.3); the parent, guardian, or legal custodian of a juvenile; or other person who is liable for the support of a juvenile are unenforceable and not collectable.

(2) (a) Within six months after July 6, 2021, the court shall vacate the portion of a court order imposing the costs described in subsection (1) of this section.

(b) If the judicial department has referred the outstanding balance of the costs to a private collection agency for collection, the department shall inform the agency that the balance has been vacated and the balance is not collectable.

(c) On or before July 1, 2022, the state court administrator shall report to the house of representatives' judiciary committee and the senate judiciary committee, or their successor committees, the number of orders vacated or partially vacated pursuant to this section in each judicial district and the amount of the balances vacated in each judicial district.

(3) Repealed.

Source: L. 2021: Entire section added, (HB 21-1315), ch. 461, p. 3114, § 22, effective July 6. **L. 2025:** (3) repealed, (HB 25-1294), ch. 292, p. 1498, § 1, effective May 29. **L. 2026:** (1) amended, (HB 26-1064), ch. 15, p. 76, § 7, effective August 12.

Cross references: For the legislative declaration in HB 21-1315, see section 1 of chapter 461, Session Laws of Colorado 2021.

PART 8

SPECIAL PROCEEDINGS - SENTENCING OF HABITUAL CRIMINALS

18-1.3-801. Punishment for habitual criminals.

(1) (a) A person shall be adjudged an habitual criminal and shall be punished by a term in the department of corrections of life imprisonment if the person:

(I) Is convicted of:

- (A) Any class 1 or 2 felony or level 1 drug felony; or
 - (B) Any class 3 felony that is a crime of violence, as defined in section 18-1.3-406 (2); and
 - (II) Has been twice convicted previously for any of the offenses described in subparagraph (I) of this paragraph (a).
- (b) A felony described in subparagraph (I) of paragraph (a) of this subsection (1) is:
- (I) One based upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, in this or any other state; or
 - (II) A crime under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, which, if committed within this state, would be such a felony described in paragraph (a) of this subsection (1).
- (c) No person sentenced pursuant to this subsection (1) shall be eligible for parole until such person has served at least forty calendar years.
- (d) Nothing in this subsection (1) prohibits the governor from issuing a pardon or a clemency order on a case-by-case basis; however, the governor shall submit a report to the general assembly on each such pardon or clemency order in accordance with section 7 of article IV of the state constitution.
- (e) Nothing in this subsection (1) is to be construed to prohibit a person convicted of a class 1 felony from being sentenced pursuant to section 18-1.3-1201 for an offense charged prior to July 1, 2020, or pursuant to section 18-1.3-1302 for an offense charged prior to July 1, 2020, or pursuant to section 18-1.4-102.
- (f) This subsection (1) shall not apply to a person convicted of first or second degree burglary, which person shall be subject to subsections (1.5), (2), and (2.5) of this section and section 18-1.3-804.
- (1.5) Except as otherwise provided in subsection (5) of this section, every person convicted in this state of any class 1, 2, 3, 4, or 5 felony or level 1, 2, or 3 drug felony who, within ten years of the date of the commission of the said offense, has been twice previously convicted upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony shall be adjudged an habitual criminal and shall be punished:
- (a) For the felony offense of which such person is convicted by imprisonment in the department of corrections for a term of three times the maximum of the presumptive range

pursuant to section 18-1.3-401 for the class or level of felony of which such person is convicted;
or

(b) For the level 1 drug felony offense of which such person is convicted by imprisonment in the department of corrections for a term of forty-eight years.

(2) (a) (I) Except as otherwise provided in subsections (2)(b), (2)(c), and (5) of this section, every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished:

(A) For the felony offense of which such person is convicted by imprisonment in the department of corrections for a term of four times the maximum of the presumptive range pursuant to section 18-1.3-401 for the class or level of felony of which such person is convicted;
or

(B) For the level 1 drug felony offense of which such person is convicted by imprisonment in the department of corrections for a term of sixty-four years.

(II) Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 8 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

(b) The provisions of subsection (2)(a) of this section do not apply to a conviction for a level 4 drug felony committed on or after March 1, 2020, pursuant to section 18-18-403.5 (2), or a conviction for a level 4 drug felony committed on or after March 1, 2020, for attempt or conspiracy to commit unlawful possession of a controlled substance, as described in section 18-18-403.5 (2), if the amount of the controlled substance possessed is not more than four grams of any material, compound, mixture, or preparation containing any quantity of gamma hydroxybutyrate, including its salts, isomers, and salts of isomers, or not more than two grams of cathinones or ketamine, or not more than four milligrams of flunitrazepam, even if the person has been previously convicted of three or more qualifying felony convictions.

(c) The provisions of subsection (2)(a) of this section do not apply to a conviction for a level 4 drug felony committed on or after July 1, 2022, pursuant to section 18-18-403.5 (2.5), or a conviction for a level 4 drug felony committed on or after July 1, 2022, for attempt or conspiracy to commit unlawful possession of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof, as described in section 18-18-403.5 (2.5), even if the person has been previously convicted of three or more qualifying felony convictions.

(2.5) Any person who is convicted and sentenced pursuant to subsection (2) of this section, or section 16-13-101 (2), C.R.S., as it existed prior to October 1, 2002, who is thereafter convicted of a felony which is a crime of violence pursuant to section 18-1.3-406, shall be adjudged an habitual criminal and shall be punished by a term in the department of corrections of life imprisonment. No person sentenced pursuant to this subsection (2.5) shall be eligible for parole until such person has served at least forty calendar years.

(3) No drug law conviction shall be counted as a prior felony conviction under this section unless such prior offense would be a felony if committed in this state at the time of the commission of the new offense.

(4) A person who meets the criteria set forth in subsection (1) of this section shall be adjudged an habitual criminal and sentenced only in accordance with that subsection and not pursuant to subsections (1.5), (2), and (2.5) of this section.

(5) A prior conviction for escape, as described in section 18-8-208 (1), (2), or (3), or attempt to escape, as described in section 18-8-208.1 in effect prior to March 6, 2020, with an underlying factual basis that satisfies the elements of unauthorized absence, as described in section 18-8-208.2, or attempt thereof, may not be used for the purpose of adjudicating a person an habitual criminal, as described in subsection (1.5) or subsection (2) of this section, unless the conviction is based on the offender's escape or attempt to escape from a correctional facility, as defined in section 17-1-102, or from physical custody within a county jail; except that, for the purposes of this section, "correctional facility" does not include a community corrections facility, as defined in section 17-27-102 (2.5), or a halfway house, as defined in section 19-2.5-102.

(6) (a) For offenses committed on or after July 1, 2023, a defendant convicted and sentenced as an habitual offender pursuant to this section who has been sentenced to twenty-four years or more in the department of corrections and has served at least ten calendar years of a sentence for a felony offense for which the person was sentenced as an habitual criminal may petition the court for a modification of that sentence or for counsel to assist in filing the petition and any other habitual sentence for which the defendant is imprisoned in the department of corrections. The court shall appoint counsel for the defendant from the office of state public defender and shall serve an order of appointment on the office, which shall represent the defendant or notify the court of a conflict. The court shall allow counsel to supplement the petition.

(b) The court shall set the matter for evidentiary hearing. At the hearing, the defendant has the burden of demonstrating, by a preponderance of the evidence, that:

(I) The statutory eligibility criteria are met;

(II) There are mitigating factors regarding the defendant's circumstances at the time of conviction or substantial mitigating factors regarding the circumstances of the offense or offenses;

(III) The defendant has demonstrated positive, engaged, and productive behavior in the department of corrections; and

(IV) The defendant does not currently present a risk to the community at large.

(c) If the defendant satisfies the burden described in subsection (6)(b) of this section and the court determines, based on the totality of the circumstances, that a modification of sentence is justified, the court may resentence the defendant to a term of at least the midpoint in the aggravated range for the class of felony for which the defendant was convicted, up to a term less than the current sentence.

Source: **L. 2002:** Entire article added with relocations, p. 1426, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1)(e) amended, p. 33, § 28, effective October 1. **L. 2003:** (2.5) amended, p. 978, § 16, effective April 17; IP(1)(a), (1.5), (2), and (2.5) amended, p. 1426, § 5, effective April 29. **L. 2011:** (2) amended, (SB 11-096), ch. 57, p. 151, § 1, effective March 25. **L. 2012:** (1.5) and (2)(a) amended and (5) added, (HB 12-1213), ch. 183, p. 695, § 1, effective May 17. **L. 2013:** (1)(a)(I)(A), (1.5), and (2) amended, (SB 13-250), ch. 333, p. 1927, § 36, effective October 1. **L. 2014:** (2)(b) amended, (SB 14-163), ch. 391, p. 1975, § 13, effective July 1. **L. 2017:** (5) amended, (HB 17-1330), ch. 374, p. 1937, § 1, effective August 9. **L. 2019:** (2)(b) amended, (HB 19-1263), ch. 291, p. 2681, § 8, effective March 1, 2020. **L. 2020:** (5) amended, (HB 20-1019), ch. 9, p. 28, § 11, effective March 6; (1)(e) amended, (SB 20-100), ch. 61, p. 211, § 11, effective March 23. **L. 2021:** (5) amended, (SB 21-146), ch. 459, p. 3086, § 10, effective July 6; (5) amended, (SB 21-059), ch. 136, p. 721, § 46, effective October 1. **L. 2022:** IP(2)(a)(I) amended and (2)(c) added, (HB 22-1326), ch. 225, p. 1652, § 33, effective July 1. **L. 2023:** (6) added, (HB 23-1292), ch. 297, p. 1780, § 2, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-101 as it existed prior to 2002.

(2) Amendments to subsection (2.5) by Senate Bill 03-147 and House Bill 03-1236 were harmonized.

(3) Amendments to subsection (5) by SB 21-146 and SB 21-059 were harmonized.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(e), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session

Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For article, "Prosecution of Habitual Criminals", see 27 Dicta 376 (1950). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For comment on *Smalley v. People* (134 Colo. 360, 304 P.2d 902 (1956)), see 34 Dicta 126 (1957). For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see Colo. Law. 1225 (1982). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with double jeopardy and habitual criminal adjudications, see 61 Den. L.J. 299 (1984). For article, "Colorado Felony Sentencing — an Update", see 14 Colo. Law. 2163 (1985). For article, "Exceeding Presumptive Maximum Sentences in Colorado", see 44 Colo. Law. 43 (Dec. 2015). For article, "The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19", see 98 Denv. L. Rev. 337 (2021).

Annotator's note. Since § 18-1.3-702 is similar to § 16-11-502 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, a relevant case construing that provision has been included in the annotations to this section.

This section must be strictly construed. A law which establishes additional and drastic punishment, under a given state of facts, must be strictly construed. *Smalley v. People*, 96 Colo. 361, 43 P.2d 385 (1935).

This section must be strictly construed, being in derogation of the common law. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947); *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

The habitual criminal statute shall be narrowly construed in favor of the accused. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

And doubtful construction resolved in defendant's favor. If there is any doubt about the constitutional meaning of the word "felony" in the habitual criminal act, the supreme court must, upon construction, give the construction that favors the liberty of the accused. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

The habitual criminal act does not create a new crime. It merely provides that the court, in sentencing a defendant after conviction, must consider former

convictions in imposing sentence. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *Casias v. People*, 148 Colo. 544, 367 P.2d 327 (1961).

This section does not establish a substantive offense, but prescribes circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities. *Casias v. People*, 148 Colo. 544, 367 P.2d 327 (1961).

The habitual criminal statute does not define a substantive offense but relates to sentencing enhancement for the underlying felony. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981); *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

It does not violate the constitution. Section 16 of art. II, Colo. Const., providing that the accused shall be tried by an impartial jury of the county or district in which the offense is alleged to have been committed. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947).

The habitual criminal act is not unconstitutional since it is not a special law affecting unequally those similarly situated; it does not place a defendant in double jeopardy and it does not require a defendant to be a witness against himself. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

This section is not invalid as against the objection that it inflicts a double punishment for the same offense, that it inflicts cruel or unusual punishment, or unreasonable punishment, that it denies an accused a fair and impartial trial, or that it imposes a

penalty on crimes committed outside a jurisdiction. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

The habitual criminal provisions do not violate due process as inflicting cruel or unusual punishment. *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960).

Both the United States supreme court and the Colorado supreme court have ruled unequivocally that habitual criminal statutes are constitutional despite contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishments, due process, equal protection, and privileges and immunities. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The equal protection, due process, and cruel, and unusual punishment provisions of the United States constitution are not breached by this section. *People v. Larson*, 194 Colo. 338, 572 P.2d 815 (1977).

Even though a person sentenced to life in prison may be eligible for parole before a person sentenced for a term of not less than 25 years and not more than 50 years under this statute, it does not violate the equal protection clause because the statutory scheme gives the parole board discretionary power to grant parole on the basis of factors other than the length of a prisoner's sentence and this is reasonably related to a legitimate government interest. *People v. Alexander*, 797 P.2d 1250 (Colo. 1990).

The fact that a judge, and not a jury, finds facts that increase a defendant's sentence beyond that authorized by the jury's verdict

does not make the habitual criminal act unconstitutional. *People v. Carrasco*, 85 P.3d 580 (Colo. App. 2003); *People v. Benzor*, 100 P.3d 542 (Colo. App. 2004).

The constitutionality of this section is well settled in this state. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Since the habitual criminal act only applies after a defendant is convicted following a criminal trial or plea of guilty, the act is not a bill of attainder. *Garcia v. Zavaras*, 960 P.2d 1191 (Colo. 1998).

Nor does this section constitute cruel and unusual punishment within the meaning of the eighth amendment. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977); *People v. Martinez*, 689 P.2d 653 (Colo. App. 1984); *People v. Wandel*, 713 P.2d 398 (Colo. App. 1985); *People v. Herrera*, 728 P.2d 366 (Colo. App. 1986).

The absence of sentencing discretion, even when coupled with a prescribed life sentence, does not render subsection (2) of this section facially invalid as violative of the prohibition of cruel and unusual punishment in § 20 of art. II, Colo. Const. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

The uniquely grave nature of the death penalty is the wellspring from which flows the constitutional requirement that mitigating factors be considered in sentencing notwithstanding the number or seriousness of a defendant's prior offenses.

No such requirement is included within the Colorado Constitution's prohibition of cruel and unusual punishments as applied to the sentencing of habitual criminals. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

Considering the number and severity of offenses, the court of appeals did not err in concluding that petitioner's sentence to life imprisonment with no possibility of parole for 40 years was not cruel and unusual punishment under the eighth amendment. At time of sentencing the petitioner was 48 years old. *Juarez v. People*, 855 P.2d 818 (Colo. 1993).

The double jeopardy clause does not bar a trial court from empaneling a second jury to determine a defendant's habitual criminal status. *People v. Gregg*, 2025 CO 57, 576 P.3d 725.

Constitutional protection against double jeopardy applies to defendant prosecuted as habitual criminal. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled in *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Double jeopardy principles do not prevent the reinstatement of a defendant's habitual criminal counts. The state's double jeopardy law does not apply to noncapital sentencing proceedings, so double jeopardy does not bar trial of a defendant's habitual counts. *People v. Porter*, 2015 CO 34, 348 P.3d 922 (overruling *People v. Quintana*, 634 P.2d 413 (Colo. 1981)).

Use of prior conviction does not constitute double jeopardy. Because the habitual criminal statute does not create new or separate offenses, but rather defines statutes which mandate enhanced or different punishment, the use of a prior conviction as a determinant of status does not constitute double jeopardy. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

Neither does prior adjudication as habitual criminal. A second habitual criminal adjudication which resulted in the imposition of a second life sentence before the first such habitual criminal sentence is satisfied does not constitute double jeopardy. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

No denial of equal protection in selective use. Absent a showing of discrimination based on race or other arbitrary criteria, the selective use of the habitual criminal act does not deny any defendant equal protection of the laws. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Where statistical data does not substantiate completely arbitrary or discriminatory enforcement of this statute based on invidious classifications, defendant's constitutional challenge to the recidivist charge on grounds of equal protection cannot be upheld. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

In prescribing a specific inflexible sentence to life imprisonment for persons

found to be habitual criminals on the basis of three prior felony convictions, while allowing various degrees of flexibility in sentencing other offenders, the legislature has not denied such habitual criminals the equal protection of the laws. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

Nor does this section violate the constitutional prohibition on bills of attainder. *Velarde v. Zavaras*, 960 P.2d 1162 (Colo. 1998).

This section does not violate Apprendi v. New Jersey, 530 U.S. 466 (2000), or Ring v. Arizona, 536 U.S. 584 (2002). *People v. Wilson*, 2012 COA 163M, 411 P.3d 11, rev'd on other grounds, 2015 CO 54M, 351 P.3d 1126.

No sentence is per se constitutional, and habitual criminal statute does not necessarily incorporate proportionality considerations, thus, defendant may have a right to proportionality review in such a case. *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), aff'd, 48 P.3d 520 (Colo. 2002).

Defendant is entitled to a proportionality review of his sentence imposed under this section, even though the 1993 amendments to this section result in sentences that are arguably more proportional. Any increase in proportionality resulting from the amendments is only with regard to the triggering offense. The underlying offenses are not considered by the statute for proportionality purposes. The court recognized, however, that in almost every

case, the abbreviated proportionality review will result in a finding that the sentence is constitutionally proportional, thereby preserving the primacy of the general assembly in crafting sentencing schemes. *People v. Deroulet*, 48 P.3d 520 (Colo. 2002); *People v. Allen*, 111 P.3d 518 (Colo. App. 2004).

An abbreviated proportionality review consists of a comparison of two subparts, the gravity of the offense and the harshness of the penalty, to discern if an inference of disproportionality is raised. *People v. Allen*, 111 P.3d 518 (Colo. App. 2004); *Rutter v. People*, 2015 CO 71, 363 P.3d 183.

While the legislature can change the classification of crimes, courts determine whether offenses are grave or serious for purposes of proportionality review. *Rutter v. People*, 2015 CO 71, 363 P.3d 183.

Filing habitual criminal charges improper after defendant prevails in a Crim. P. 35 motion. Where habitual criminal charges were never brought against defendant, notwithstanding the fact that such charges could have been filed under the original information, the filing of such charges in the event defendant prevailed in his Crim. P. 35 motion would not be the reinstatement of previously dismissed charges, but rather would be the improper filing of new and additional charges in retaliation for defendant's exercise of his right to seek postconviction review. *People v. Ivery*, 44 Colo. App. 511, 615 P.2d 80 (1980).

Filing habitual criminal charges after defendant's successful appeal of

conviction was improper where the factual basis for the charges was known to the prosecution from the outset. If the filing were permitted, a defendant's right to be free from apprehension of retaliation by virtue of his having exercised his constitutional right to appeal would be illusory. *People v. Walters*, 802 P.2d 1155 (Colo. App. 1990).

Section does not violate separation of powers. This section does not delegate to prosecutors the power to define criminal conduct, and thus does not run afoul of the constitutional limitations on separation of powers. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Defendant not entitled to jury trial on habitual criminal charges. *People v. Carrasco*, 85 P.3d 580 (Colo. App. 2003); *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004); *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004); *People v. Benzor*, 100 P.3d 542 (Colo. App. 2004); *People v. Green*, 2012 COA 68M, 296 P.3d 260.

Habitual criminal charges not subject to statutory speedy trial deadline. Habitual charges are not offenses, but rather are sentence enhancers, and thus the statutory speedy trial six-month time limit does not apply. Section 18-1.3-803 specifically requires the court to conduct a hearing on habitual charges as soon as practicable after the trial of the substantive offense, so the specific requirements of this statute control over the general speedy trial statute. *People v. Green*, 2012 COA 68M, 296 P.3d 260.

U.S. supreme court decision in *Solem v. Helm*, 463 U.S. 277 (1983), requires consideration of whether the lack of

violence in convictions supporting a finding of habitual criminality is proportional to the life sentence imposed. *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984); *Alvarez v. People*, 797 P.2d 37 (Colo. 1990).

Proportionality review under *Solem v. Helm* is not required where a defendant is sentenced to multiple, consecutive terms for multiple offenses and the total exceeds the defendant's anticipated life span. *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993), overruled in *Close v. People*, 48 P. 3d 528 (Colo. 2002).

Extended proportionality review not required simply because of the imposition of consecutive sentences. When imposing consecutive sentences the court already exercised its discretion, therefore it may be presumed that such court engaged in a consideration of the nature of the offenses similar to that required by an abbreviated proportionality review. *People v. Cabral*, 878 P.2d 1 (Colo. App. 1993).

Abbreviated proportionality review is required when life sentence is imposed under habitual criminal statute. *Alvarez v. People*, 797 P.2d 37 (Colo. 1990); *People v. Cisneros*, 824 P.2d 16 (Colo. App. 1991).

During sentencing, upon request, a defendant is also entitled to an abbreviated proportionality review of the sentence under this section even if the sentence under review is less than a life term. *People v. McNeely*, 68 P.3d 540 (Colo. App. 2002); *Rutter v. People*, 2015 CO 71, 363 P.3d 183.

Proportionality review is required when a life sentence is imposed under this section even though parole is allowed. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990) (disagreeing with *People v. Herrera* annotated above).

If defendant faced with life sentence without possibility of parole, a more extensive review is required rather than a limited proportionality review to protect the defendant against cruel and unusual punishment. Under such extended proportionality review, the court should be guided by objective criteria including: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *People v. Cisneros*, 824 P.2d 16 (Colo. App. 1991).

Court applied the following *Solem v. Helm* three-prong analysis used to guide courts in proportionality reviews of life sentences under the eighth amendment: (1) The gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *People v. Gaskins*, 923 P.2d 292 (Colo. App. 1996).

Extensive review pursuant to *People v. Cisneros* not required because: (1) Defendant is 48 and although he would be in prison for a minimum of 40 years under this section, there is still a possibility of parole based on mortality tables set out in § 13-25-103, and (2) defendant's criminal record consists of crimes more violent and grave

than those in *Cisneros*. *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

When the sentence mandated by the habitual offender statute gives rise to an inference of gross disproportionality, when compared to the predicate offense and prior convictions, an extended review of the sentence is necessary. Two driving offenses do not amount to grave and serious crimes raising a question of disproportionality. *People v. Patnode*, 126 P.3d 249 (Colo. App. 2005).

An abbreviated proportionality review is sufficient when the crimes supporting a habitual criminal sentence include grave or serious offenses and when the defendant will become eligible for parole. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992); *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

Defendant is not entitled to extended proportionality review because some of his prior felony convictions occurred when he was a juvenile. Enhanced sentences pursuant to recidivist sentencing statutes punish a defendant only for the offense of conviction, not underlying prior offenses. *People v. Porter*, 2019 COA 73, 459 P.3d 710.

An abbreviated proportionality review requires the trial court to conduct a "refined analysis" of the facts and circumstances underlying any previous felony convictions. While an appellate court may conduct a proportionality review, it cannot do so without record evidence of the facts and circumstances underlying the prior

felony convictions. *People v. Hargrove*, 2013 COA 165, 338 P.3d 413.

During an abbreviated proportionality review of a habitual criminal sentence, the court must consider each triggering offense and the predicate offenses together and determine whether, in combination, they are so lacking in gravity or seriousness as to raise an inference that the sentence imposed on that triggering offense is grossly disproportionate. *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191; *Melton v. People*, 2019 CO 89, 451 P.3d 415; *People v. McRae*, 2019 CO 91, 451 P.3d 835.

In determining the gravity or seriousness of the triggering offense and the predicate offenses, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively. *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191; *Melton v. People*, 2019 CO 89, 451 P.3d 415; *People v. McRae*, 2019 CO 91, 451 P.3d 835.

The new rules announced in *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, are procedural, not substantive. Therefore, the holdings in *Wells-Yates* do not apply retroactively to cases on collateral review. *McDonald v. People*, 2024 CO 75, 560 P.3d 412; *Ward v. People*, 2024 CO 76, 560 P.3d 410.

Extended proportionality review is required only where abbreviated review yields an inference of gross proportionality. An abbreviated review can

yield, at most, an inference of gross proportionality, requiring an extended review. *People v. Hargrove*, 2013 COA 165, 338 P.3d 413.

If an abbreviated proportionality review yields no inference of gross proportionality, then the trial court must impose the sentence mandated by the habitual criminal statute. *People v. Hargrove*, 2013 COA 165, 338 P.3d 413.

A district court has discretion to determine what evidence it considers in assessing the facts and circumstances of a predicate offense, and arrest warrant affidavits may serve as one type of evidence. However, the court must be mindful that its purpose is to assess the gravity or seriousness of the offense of conviction. *People v. Wells-Yates*, 2023 COA 120, 545 P.3d 529.

In determining whether the crimes involved in a habitual criminal conviction are grave or serious the offenses are to be reviewed in light of the harm caused or threatened to the victim or society, and the culpability of the offender. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992); *Juarez v. People*, 855 P.2d 818 (Colo. 1993).

Violence is a relevant consideration but not the sole criterion by which to evaluate whether defendant's crimes, when examined in combination, are lacking in gravity or seriousness. Conviction for crimes involving sale and distribution of heroin and other drugs along with prior convictions for felonies of robbery, theft, and attempted criminal mischief justifies imposition of life sentence under this act and

does not violate § 20 of article II of the Colorado Constitution or the eighth amendment to the U.S. Constitution. *People v. Mershon*, 874 P.2d 1025 (Colo. 1994).

Sentence was not disproportionate where one prior felony conviction was for violation of bail bond conditions but the other prior convictions were for serious offenses. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

There is no inference of gross disproportionality when weighing the predicate convictions of attempted aggravated robbery and second degree burglary against the sentence of 48 years. *People v. Reese*, 155 P.3d 477 (Colo. App. 2006).

Attempted aggravated robbery is a grave or serious offense for purposes of proportionality review. *People v. Reese*, 155 P.3d 477 (Colo. App. 2006).

Extreme indifference first degree assault is a per se grave or serious offense for proportionality review purposes. *People v. Duran*, 2025 COA 34, 569 P.3d 899.

Convictions in another state for indecency with a child and failure to register as a sex offender are grave and serious convictions for proportionality review purposes. *People v. Green*, 2012 COA 68M, 296 P.3d 260.

Conviction for possession with intent to distribute — and not simple possession — is a per se grave or serious offense. *People v. Loris*, 2018 COA 101, 434 P.3d 754.

Conviction for conspiracy to distribute a controlled substance is a per se grave or serious offense. People v. Loris, 2018 COA 101, 434 P.3d 754.

Conspiracy to distribute a controlled substance (methamphetamine) is a per se grave or serious offense. People v. Loris, 2018 COA 101, 434 P.3d 754.

Conviction for forgery is not a grave or serious crime. People v. Loris, 2018 COA 101, 434 P.3d 754.

Vehicular assault (reckless driving) is not a per se grave or serious offense. People v. Caime, 2021 COA 134, 503 P.3d 940.

Although first degree criminal trespass may not be a per se grave or serious offense, the circumstances of a particular case can make the conviction a grave and serious offense. The harm caused to the victim in this case made the conviction grave and serious. People v. Green, 2012 COA 68M, 296 P.3d 260.

Because the predicate and triggering offenses were grave and serious, there was no inference of gross disproportionality, and thus the court did not have to conduct an extended proportionality review. People v. Green, 2012 COA 68M, 296 P.3d 260; People v. Loris, 2018 COA 101, 434 P.3d 754.

Defendant's sentence was not grossly disproportionate where the triggering offense was grave and serious. Rutter v. People, 2015 CO 71, 363 P.3d 183.

A court may consider whether a substantial legislative change in penalties during the pendency of the case should be considered in conjunction with a proportionality review. People v. Penrod, 892 P.2d 383 (Colo. App. 1994).

A court may consider events that have occurred after defendant committed the offense at issue that may justify a more severe sentence. People v. Penrod, 892 P.2d 383 (Colo. App. 1994).

In deciding whether to remand a case to the trial court for an abbreviated proportionality review an appellate court is given wide discretion. People v. Gaskins, 825 P.2d 30 (Colo. 1992).

Proportionality review ordinarily should be conducted by trial court in first instance, subject to appellate review. People v. Austin, 799 P.2d 408 (Colo. App. 1990).

But neither this section governing sentencing of habitual criminals, nor former § 18-1-105 (now § 18-1.3-401) governing felony sentencing in general, specifically addresses the issue of what sentence may be imposed after a finding by the trial court that the habitual criminal sentence, big or little, would be disproportionate. Therefore, once a finding of disproportionality has been made, a trial court in resentencing should consider all sentencing options otherwise authorized by statute. People v. Valdez, 56 P.3d 1148 (Colo. App. 2002) (decided under former law).

In absence of a need for a refined analysis inquiring into the details of the

specific offenses or a detailed comparison of sentences imposed, an appellate court is as well positioned as a trial court to conduct a proportionality review, and there is no justification for remand to the trial court. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992).

Court of appeals was as well positioned as trial court to conduct proportionality review. *Juarez v. People*, 855 P.2d 818 (Colo. 1993).

If the appellate court determines that additional evidence is necessary or desirable, the court should remand for an initial proportionality review by the trial court. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992).

However, proportionality review is not required where sentence was an enhanced term of years and not a life sentence with no possibility of parole. *People v. Herrera*, 728 P.2d 366 (Colo. App. 1986), overruled in *Close v. People*, 48 P.3d 528 (Colo. 2002).

Trial court erred in substituting a 22-year sentence for the 36-year sentence mandated under this section based on an abbreviated proportionality review. Legislatively mandated sentencing schemes are to be given great deference by court engaging in proportionality review. Adjusting a sentence by a small number of years in either direction goes beyond a determination of disproportionality and improperly interferes with the general assembly's role of determining sentencing schemes. *People v. Deroulet*, 48 P.3d 520 (Colo. 2002).

Consecutive life sentences not unconstitutional. The exercise of the trial court's discretion that the defendant should serve several of his life sentences consecutively is not an unconstitutional interference with the duties of the parole board. *People v. Montgomery*, 669 P.2d 1387 (Colo. 1983).

Purpose of this section is to punish more severely those who show a propensity toward repeated criminal conduct. *People v. Gimmy*, 44 Colo. App. 352, 620 P.2d 42 (1980), *aff'd*, 645 P.2d 262 (Colo. 1982); *People v. District Court*, 711 P.2d 666 (Colo. 1985).

The policy of the habitual criminal statute is to punish repeat offenders. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

The legislative purpose of this section is to punish more severely those who show a propensity toward repeated criminal conduct without regard to an opportunity between convictions for the defendant to reform. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

An important rationale for the habitual criminal statute is that enhanced punishment is appropriate when an individual has shown a propensity toward repeated criminal acts. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

The deterrent purpose of this section is to put the defendant on notice that future conduct of the same kind will result in more severe penalties. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

A noncustodial escape conviction may not be used as a current conviction for purposes of adjudicating a person a habitual criminal. People v. Jompp, 2018 COA 128, 440 P.3d 1166.

Judgment is necessary predicate for sentence enhancement. A plea of guilty may not be used to enhance punishment, for the reason that the conviction process is incomplete. A judgment is a necessary predicate before a conviction may be used for sentence enhancement purposes. Hafelfinger v. District Court, 674 P.2d 375 (Colo. 1984).

Enhanced penalty should not be imposed until offender has opportunity to reform because of the salutary discipline from the punishment for the first conviction. People v. Nees, 200 Colo. 392, 615 P.2d 690 (1980).

There is no requirement of a series of warnings and opportunities to reform. Gimmy v. People, 645 P.2d 262 (Colo. 1982).

Ten-year limitation applies to previous convictions. The 10-year limitation of this section applies only to convictions previous to the commission of the offense subject to the habitual criminal penalty enhancement. People v. Nees, 200 Colo. 392, 615 P.2d 690 (1980).

Sentencing is matter reserved for trial judge. The jury's function under this section is to determine how many, if any, prior felony convictions have been suffered by the defendant. Once this determination is made the act of sentencing is a matter reserved for

the trial judge acting under applicable statute. Swift v. People, 171 Colo. 178, 465 P.2d 391 (1970).

But this section makes mandatory the imposition of a life sentence upon a person who has been convicted for the fourth time of having committed a felony. Wolff v. People, 123 Colo. 487, 230 P.2d 581 (1951); Farrell v. District Court, 135 Colo. 329, 311 P.2d 410 (1957); Bernard v. Tinsley, 144 Colo. 244, 355 P.2d 1098 (1960).

Once a defendant is adjudged an habitual criminal, the court is required to impose a life sentence. People v. Montoya, 640 P.2d 234 (Colo. App. 1981); People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

Sentencing court has no authority to ignore the penalty provisions of this section and to impose sentences below the statutory minimums set by said section. People v. Montgomery, 737 P.2d 413 (Colo. 1987).

If a defendant is advised that evidence of prior convictions introduced in the substantive trial can be used only for credibility proposes, no additional advice is needed that such evidence cannot be used as evidence to prove the habitual offender charges. People v. Windsor, 876 P.2d 55 (Colo. App. 1993).

The legislature's adoption of procedural safeguards under the Habitual Criminal Act was not intended to modify in any manner the provision of the act which requires imposition of a life sentence where an accused has been found guilty of a felony and the jury also finds that he has been three

times previously convicted of other felonies alleged against him in the indictment or information. *People v. District Court*, 711 P.2d 666 (Colo. 1985).

And a defendant who requested an instruction on a lesser felony offense not included in the offense charged in the information placed himself in the same position as if that offense had originally been included in the charging document, for purposes of sentencing under the Habitual Criminal Act. *People v. District Court*, 711 P.2d 666 (Colo. 1985).

The legislature did not intend to change the effective date of the 1993 amendment to this section in its 1994 amendment, renumbering subsection (1) as subsection (1.5), and intended to maintain the original July 1, 1993, effective date of the renumbered subsection. *People v. Pichon*, 929 P.2d 3 (Colo. App. 1996).

Inasmuch as habitual criminal counts do not constitute "offenses", probable cause need not be established in the preliminary hearing to bind these charges over to the district court. *Maestas v. District Court*, 189 Colo. 443, 541 P.2d 889 (1975).

The required former convictions must be felonies under this section. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

"Felony" defined. The supreme court has expressly recognized § 4 of art. XVIII, Colo. Const., as a definition of the term felony, and that the test by which to determine whether an offense is a felony is by the place of confinement for the prescribed

punishment. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

Class 4 felony qualifies under subsection (1). A class 4 felony may be punished by a sentence of eight years, and, as such, qualifies under § 16-13-101 (1) as a felony for which the maximum penalty prescribed by law exceeds five years. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Class 6 felony is specifically not included in subsection (1.5) and therefore does not fall within the purview of this section. *People v. Cooper*, 205 P.3d 475 (Colo. App. 2008).

"Convicted" means verdict or plea of guilty. Since the definition of "judgment of conviction" in Crim. P. 32(c) was not in existence at the time the general assembly adopted the habitual criminal act, the general assembly, in employing the words "conviction" and "convicted" in the act, intended to use them in their popular sense, i.e., a verdict of guilty or a plea of guilty. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Conviction based upon a plea of nolo contendere is a "conviction" for purposes of enhancing punishment pursuant to this section. *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979); *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

"Conviction" as used in the habitual offender statute, includes a judgment of conviction entered upon a plea of nolo

contendere. People v. Windsor, 876 P.2d 55 (Colo. App. 1993).

"Driving under the influence-bodily injury" conviction under California law is not a "drug law conviction" under this section. Wilczynski v. People, 891 P.2d 998 (Colo. 1995).

"Driving under the influence-bodily injury" conviction under California law does constitute prior felony conviction under this section. Wilczynski v. People, 891 P.2d 998 (Colo. 1995).

Conviction of lesser nonincluded felony. When a guilty verdict to a lesser nonincluded felony is followed by a verdict finding that the defendant has previously been convicted of three prior felonies which were charged against him in separate counts of the information, subsection (2) mandates the imposition of a sentence to life imprisonment. People v. District Court, 711 P.2d 666 (Colo. 1985).

The term "first conviction", as used in this section, means punishment for a first conviction under a felony for which defendant is currently charged and convicted. People v. Thomas, 189 Colo. 490, 542 P.2d 387 (1975).

Whether conviction results from jury determination of guilt or from a guilty plea is immaterial. People v. Gimmy, 44 Colo. App. 352, 620 P.2d 42 (1980), *aff'd*, 645 P.2d 262 (Colo. 1982).

A predicate conviction under this section may result either from a conviction following trial, or upon entry of a guilty

plea. Gimmy v. People, 645 P.2d 262 (Colo. 1982).

Jury verdicts regarding defendant's status as an habitual offender were not unreliable because jury forms failed to require that the jury make findings on all elements of defendant's habitual criminal status for sentencing where defendant did not assert that the jury instructions were incomplete or inaccurate with respect to each of the elements required to be established by this section. People v. Windsor, 876 P.2d 55 (Colo. App. 1993).

Even though the jury had not made appropriate findings on defendant's status under the "little" habitual statute, the trial court erred in not considering the range of sentences for habitual offenders under subsection (1). Jurors are not required to make any special findings with respect to each element specified in this section. People v. Gaskins, 923 P.2d 292 (Colo. App. 1996).

The wording of the information properly put defendant on notice of the essential elements for habitual criminal sentencing so that defendant could adequately defend himself although the words "conviction" and "judgment" do not appear in the information. The information itemized defendant's four prior felonies and recited that the defendant had pled guilty or nolo contendere to and been sentenced for each. People v. Ortega, 899 P.2d 236 (Colo. App. 1994).

Jury instructions were not defective because jury was not instructed to determine whether previous convictions had occurred

within ten years of the commission of the current offense or whether the convictions were for felonies. The dates of the previous offenses were specified in the charges, and the classification of the previous offenses as felonies is a question of law, and not of fact. *People v. Chambers*, 900 P.2d 1249 (Colo. App. 1994).

Prior convictions are considered as aggravating factors for increased punishment. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

What "prior conviction" includes. The general assembly intended the term "prior conviction" to include those judgments of conviction that are on appeal. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

If prior convictions on appeal were not included, many recent felony convictions might be effectively exempted from the operation of this section. This would be clearly inconsistent with the obvious purpose of the statute, which is to punish repeat offenders. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

"Previously convicted" means that the convictions upon which the habitual criminal counts are based must be "previous" to the commission of the present offense. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

Phrase "twice previously convicted" as used in this section refers back to "commission of the said offense". *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

Subsection (2.5) requires life imprisonment for any person who was convicted and sentenced as a habitual criminal and "who [was] thereafter convicted of a felony which is a crime of violence". The plain language unambiguously provides that the sequence of convictions -- not commission of the offenses -- controls. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

Prior convictions need not be committed sequentially. There is no requirement that each of the crimes on which the habitual criminal charges are based be committed sequentially; in other words, that the second of the predicate crimes be committed after commission and conviction of the first crime, the third be committed after commission and conviction of the second, and so on. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

The habitual criminal statute requires that neither the prior felonies nor the resulting judgments of conviction occur in any particular sequence in relation to each other. *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982).

It is the commission of the act which gives rise to the conviction, and not the time when conviction occurs, which controls. *People v. Ramirez*, 652 P.2d 1077 (Colo. App. 1982).

So long as convictions entered prior to commission of pending offense. The determinative consideration is whether judgments of conviction on the prior felonies had been entered prior to the commission of the substantive offense

charged in the pending case. *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982).

The court may use two felony convictions that were later reclassified by the legislature after defendant's convictions as misdemeanors for a habitual offender charge. *People v. Patnode*, 126 P.3d 249 (Colo. App. 2005).

The multiplier in subsection (2)(a) applies to drug felonies. The language used by the legislature would be clearer if it expressly referenced § 18-1.3-401.5, which provides the presumptive ranges for drug felonies. Nevertheless, the legislature has evinced an unmistakable intent to multiply the maximum of the presumptive range for drug felonies by four times in cases where the defendant has three or more prior felonies. *People v. Loris*, 2018 COA 101, 434 P.3d 754.

For a prior drug felony conviction to qualify as a predicate under subsection (3), the prosecution must prove that the prior offense of conviction remained a felony under state law at the time the defendant committed a new offense. *People v. Kadell*, 2017 COA 124, 411 P.3d 281.

If, at the time of the triggering offense, a prior felony conviction was a level 4 drug felony, the prior drug felony no longer qualifies as a predicate offense for sentencing as a habitual criminal. *Thomas v. People*, 2021 CO 84, 500 P.3d 1095.

Effective date of prior conviction is not the time that a plea of guilty is entered by a defendant, nor when a jury's verdict of guilt

is received by the court, nor is it the time a finding of guilt is made by the trial judge in a trial to the court, but rather the time of a prior conviction for the purposes of this section is the date the judgment of conviction is entered in the trial court. *People v. Jacquez*, 196 Colo. 569, 588 P.2d 871 (1979); *People v. Skufca*, 141 P.3d 876 (Colo. App. 2005), rev'd on other grounds, 176 P.3d 83 (Colo. 2008).

Where prior conviction cannot be used for enhancement. Where defendant never admitted his conviction of an earlier offense, and the issue was not submitted to the jury which convicted him of the present substantive offense, that earlier conviction could not be considered by the trial court for purposes of enhancement of sentence under the habitual criminal statute. *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978).

Where defendant who was subject to sentencing act in an earlier conviction was not properly advised of the penalties under such sentencing act prior to pleading guilty, plea could not be basis for enhancement under habitual criminal statute. *People v. Sutka*, 713 P.2d 1326 (Colo. App. 1985).

Defendant's previous convictions cannot be used for enhancement where the record does not establish that defendant understood the true nature of the charges to which he pled guilty. *Lacy v. People*, 775 P.2d 1 (Colo. 1989).

Prior conviction for felonies in another state held to be invalid for enhancing defendant's sentence under habitual offender statute where there was a history of earlier findings of not guilty by reason of

insanity and no subsequent formal finding of sanity. *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), *aff'd in part, rev'd in part*, 817 P.2d 988 (Colo. 1991).

Prior conviction in Colorado by one previously adjudged insane may be valid notwithstanding that he has not been judicially declared to have been restored to sanity. *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), *aff'd in part, rev'd in part*, 817 P.2d 988 (Colo. 1991).

Prior conviction for causing bodily injury while driving under the influence under California statute was not "drug law conviction" under subsection (3) and was counted as prior felony conviction for sentencing purposes under this section. Categorization of driving under the influence as offense in the vehicle code as opposed to offense relating to controlled substances precludes a determination that general assembly intended to consider it a drug law offense. *People v. Wilczynski*, 873 P.2d 10 (Colo. App. 1993).

Prior charges which do not result in convictions are irrelevant, and therefore, should not be admitted in a habitual criminal hearing. *People v. Reed*, 42 Colo. App. 275, 598 P.2d 148 (1979); *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

Admission to documents in a habitual criminal hearing showing prior crimes charged but which did not result in convictions is not reversible error unless prejudice is shown. *People v. Reed*, 42 Colo. App. 275, 598 P.2d 148 (1979); *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

Convictions sustained after subject crime not basis for enhanced penalty. It is improper for the trial court to allow convictions which were sustained after the commission of the subject crime to be the basis for habitual criminal counts. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

The "separately brought" element and the "separately tried" element are distinct elements, and each must be proved beyond a reasonable doubt. *People v. Williams*, 2019 COA 32, 446 P.3d 944.

Convictions on separate charges obtained on the same day. The fact that convictions result from charges separately brought and tried and obtained pursuant to guilty pleas on the same day does not reduce them to one conviction for purposes of this section. *People v. Gimmy*, 44 Colo. App. 352, 620 P.2d 42 (1980), *aff'd*, 645 P.2d 262 (Colo. 1982); *People v. Germany*, 643 P.2d 776 (Colo. App. 1980); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *People v. Hodge*, 644 P.2d 38 (Colo. App. 1981).

Where the charges against the defendants were separately brought and would have been tried separately but for the defendant's decisions to enter guilty pleas, the convictions thereby obtained satisfy the definition of predicate felonies in the habitual criminal statute. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982); *People v. Brooks*, 2017 COA 80, 454 P.3d 270, vacated by and *aff'd* on other grounds, 2019 CO 75M, 448 P.3d 310.

When two charges would have been tried together in one trial but for the defendant's guilty pleas, they cannot be

considered **"separately brought and tried"** for the purposes of this section. People v. Williams, 2019 COA 32, 446 P.3d 944.

When charges are joined for trial, the nature of the joinder does not determine whether charges are "separately brought and tried" for the purposes of this section. The focus is properly on whether the charged offenses would have been tried separately. People v. Williams, 2019 COA 32, 446 P.3d 944.

The trial court erred when it determined that the permissive nature of the joinder, as compared to mandatory joinder, rendered the charges separately brought and tried. People v. Williams, 2019 COA 32, 446 P.3d 944.

To determine whether two convictions entered on the same date as part of a single plea agreement arose "out of separate and distinct criminal episodes", it is necessary to determine whether the convictions arose from a series of acts arising from the same criminal episode, such as physical acts that are committed simultaneously or in close sequence, that occur in the same place or closely related places, and that form part of a schematic whole. People v. Jones, 967 P.2d 166 (Colo. App. 1997); People v. Porter, 2019 COA 73, 459 P.3d 710.

Convictions may be separate even though sentences concurrent. Separate judgments of convictions may result from the separate charges in question, even though the sentences are made concurrent.

People v. Ybarra, 652 P.2d 182 (Colo. App. 1982).

A guilty verdict that has withstood a motion for new trial and for which a defendant has been sentenced can be used as a prior conviction for purposes of bringing an habitual criminal charge against a defendant in conjunction with a later felony charge. People v. District Court, 192 Colo. 351, 559 P.2d 235 (1977).

The error, if any, in admitting a questionable federal conviction was harmless because four other previous felonies were proved. People v. Boehmer, 872 P.2d 1320 (Colo. App. 1993).

This section embraces every felony committed by a defendant here or in a foreign state, and if a felony in the foreign state, it satisfies the statute. The language of this section refutes the contention that all crimes, wherever committed, and regardless of their grade at the situs of the crime must be proven to be felonies if committed within this state. Hahn v. People, 126 Colo. 451, 251 P.2d 316 (1952).

Conviction of a felony in a sister state, even though crime charged is not a felony in Colorado, is sufficient to authorize sentence under this section. A reading of this section admits of no other interpretation. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961); People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979).

It makes no difference for the purposes of enhanced punishment under this section that a previously committed crime is not a felony in Colorado if it is a felony where the

conviction was had. *People v. Renfrow*, 199 Colo. 101, 605 P.2d 915 (1980).

The time as well as the place of commission of a crime should determine its status as a felony under this section. *People v. Renfrow*, 199 Colo. 101, 605 P.2d 915 (1980).

The drug law conviction exception in subsection (3) applies to state drug law convictions. Despite having included language in other parts of this section specifically referencing out-of-state convictions, the legislature has consistently left such language out of subsection (3). Had the legislature intended the subsection to apply to out-of-state crimes, it would have said so. *People v. Kadell*, 2017 COA 124, 411 P.3d 281.

Focus of this section is on "crime", not conduct, occurring in foreign state. Therefore, the inquiry as to whether a foreign predicate misdemeanor conviction would have been a felony in Colorado is limited to a comparison of the statutes, or, where required, to the operative and material allegations of the charging document. Otherwise the defendant could be subjected to a trial of the foreign matter in the habitual criminal phase at a time and place far removed from the site of the crime. *People v. Nguyen*, 899 P.2d 352 (Colo. App. 1995) (decided under statute as it existed prior to 1994 amendment to subsection (1)).

Allegation and proof necessary to sustain imposition of enhanced penalty under this section focus upon the entry of judgment against a defendant, not on the defendant's plea or a verdict of guilt. Where

the prosecutor charged and proved the entry of judgment for three prior convictions, the trial court erred in ruling that the enhanced penalty could not be imposed. *People v. Chavez*, 198 Colo. 309, 599 P.2d 261 (1979).

An authenticated copy of the record of former convictions and judgments is prima facie evidence of the convictions and may be used as evidence in a habitual criminal conviction proceeding. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Discretionary reformatory sentence was conviction of a felony. Conviction of the crime of robbery resulting in a sentence to the reformatory rather than to the penitentiary is nevertheless conviction of a felony within the meaning of this section since sentence could have been to the penitentiary notwithstanding the fact that defendant was under the age of 21 years. *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960). But see *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956); *Villalon v. People*, 145 Colo. 327, 358 P.2d 1018 (1961) (decided under former statute imposing reformatory sentence as a matter of right).

The trial court's ruling that defendant being under 21 years, convicted of a robbery, and subject to sentence to either the reformatory or the penitentiary was guilty of a felony, was correct and within the purview of this section; it does not offend the provisions of § 4 of art. XVIII, Colo. Const. *Sandoval v. People*, 162 Colo. 416, 426 P.2d 968 (1967).

Conviction in county court not felony. Before a defendant can be adjudged an habitual criminal, he must have had two prior convictions of felony, and a conviction of grand larceny in the county court is not conviction of a felony. *Latham v. People*, 136 Colo. 252, 317 P.2d 894 (1957).

The increased punishment under this statute is not arbitrary because it can only be imposed after the proof of the additional facts of prior convictions. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The recidivist statute does not attempt to resentence a defendant for a prior felony. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

Sentences imposed under habitual criminal statute supersede those statutorily mandated for specific crimes. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

Rather than imposing a separate sentence for defendant's status, habitual criminal statutes merely substitute a different and more severe sentencing range than the penalty provided for in the criminal statute or statutes which were violated by defendant and which constitute the underlying offense or offenses. The recidivist statute is aimed at habitual criminals and the punishment is for the new crime only, but is heavier if he is an habitual criminal. *People v. Early*, 692 P.2d 1116 (Colo. App. 1984).

No separate sentence is to be imposed for the habitual criminal adjudication.

People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

The sentence to be imposed under this section relates only to the enhancement of punishment of the felony for which defendant is currently charged and convicted. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

A convicted defendant is not foreclosed from later challenging the enhanced sentence resulting from the habitual criminal charge if, in fact, a prior conviction is reversed. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

In an enhanced sentencing proceeding, the defendant may collaterally attack the constitutional validity of the underlying convictions, but defendant must make a prima facie showing that a prior conviction is invalid in order to challenge the use of that conviction in a later proceeding. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Collateral attacks pursuant to Crim. P. 35(c) on infirmities related to adjudication of habitual criminality under this section should be considered under § 16-5-402 (1), limiting the time within which such attacks must be made. *People v. Hampton*, 876 P.2d 1236 (Colo. 1994); *Hunsaker v. People*, 2021 CO 83, 500 P.3d 1110.

Whether the previous convictions were constitutionally procured is an issue which may properly be raised in an habitual offender proceeding. *People v.*

Gonzales, 38 Colo. App. 522, 565 P.2d 945 (1977).

Prior unconstitutional conviction may not be used. A prior conviction obtained in violation of a constitutional right of the accused cannot be used in a subsequent criminal proceeding to support guilt or to enhance punishment. *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Cisneros*, 665 P.2d 145 (Colo. App. 1983); *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984).

Procedure where prior conviction alleged to have been unconstitutionally obtained. In attacking the constitutional validity of a prior conviction in habitual criminal proceedings, the defendant must make a prima facie showing that the challenged conviction was unconstitutionally obtained. Once a prima facie showing is made, the conviction is not admissible unless the prosecution establishes by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights. *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Wade*, 708 P.2d 1366 (Colo. 1985); *Lacy v. People*, 775 P.2d 1 (Colo. 1989); *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

Procedure applied in *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986).

A mere showing of uncertainty about whether the defendant's constitutional rights were fully protected is not sufficient to support vacating an enhanced penalty which was based on a claim that a guilty plea was

unconstitutionally obtained. *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Collateral estoppel not applicable in context of an habitual criminal proceeding to a trial court ruling which merely excludes evidence concerning defendant's status as an habitual criminal and, thus, district court was not barred from considering validity of a plea advisement that was previously found to be invalid for purpose of sentence enhancement in an habitual criminal proceeding. *Wright v. People*, 690 P.2d 1257 (Colo. 1984).

Prior conviction decreed nullity cannot be reaffirmed by defendant. The defendant cannot "reaffirm" the validity of a prior conviction at an habitual offender hearing when the court of appeals has decreed by final judgment that the prior conviction is a nullity. *People v. Dugger*, 673 P.2d 351 (Colo. 1983).

Proof of habitual criminality through testimonial admissions unconstitutional. Use of defendant's testimonial admissions to prior felony convictions as substantive evidence of his habitual criminality violates due process of law, by unduly burdening defendant's constitutional right to testify in his own defense. *People v. Chavez*, 632 P.2d 574 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

The decision in *People v. Chavez*, is to be given retroactive application. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

If a defendant's guilty plea in a previous conviction was not voluntary and knowing, it was obtained in violation

of due process, and a conviction based thereon cannot be used for the purpose of enhancing the punishment for another offense. *People v. Gonzales*, 38 Colo. App. 522, 565 P.2d 945 (1977).

The admissibility of prior guilty pleas in a habitual criminal hearing turns on whether they meet the constitutional requirements for voluntariness, not whether they satisfy the particular standards of a state's substantive law. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

Prior convictions held to have been obtained constitutionally. *People v. Chavez*, 650 P.2d 1310 (Colo. App. 1982).

Guilty pleas or pleas of nolo contendere which meet the constitutional requirements for voluntariness will be admissible in habitual criminal proceedings even if they do not satisfy more stringent admissibility requirements under another state's substantive law. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

If evidence is insufficient to prove that two of defendant's three convictions were separate and distinct, defendant may be resentenced under subsection (1.5). *People v. Jones*, 967 P.2d 166 (Colo. App. 1997).

When indigent entitled to transcript of prior proceedings. Although an indigent defendant is entitled to a free transcript of prior proceedings when it is necessary for an effective defense in an enhanced sentencing proceeding, the defendant must make a showing that the furnishing of the transcripts would not be just a vain and useless gesture.

People v. Montoya, 640 P.2d 234 (Colo. App. 1981).

Plea of guilty under less severe provisions of section proper. Where a plea of guilty to the substantive charge was made by the defendant with the understanding that the less severe provisions of the habitual criminal act only would be invoked against him, and the trial court approved of such disposition of the case and eliminated from consideration one of the counts of the information, and imposed sentence accordingly, the sentence was valid and a writ of habeas corpus was properly denied. *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960).

Indeterminate commitment under the sex offenders act was in lieu of prisoner's sentence under the habitual criminal act, and, therefore, the trial court erred in sentencing him to concurrent terms under the respective statutes. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Sentence imposed under this section was valid. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958); *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799 (1960).

Where petitioner's sentence under this section cannot be said to be void, he did not seek modification thereof, and there was no showing that he is presently being illegally incarcerated, a petition for a writ of habeas corpus was properly denied. *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961).

Defendant's sentence under habitual criminal statute to a term of 40 to 50 years was not disproportionate to his conduct or

grossly excessive where he had been convicted of burglary and aggravated robbery before his present conviction for first-degree burglary. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

Sentence of 25 years and 4 months is neither cruel or unusual, nor is it disproportionate where defendant was convicted of 3 theft-related felony offenses in 10 years. *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

The requirement in § 16-11-304 for a definite sentence is also a requirement for any increased sentence imposed under § 16-13-101. Thus, it was proper for a trial court to impose a definite sentence. *People v. Chambers*, 749 P.2d 984 (Colo. App. 1987).

Reinstatement of prior felony conviction. Where a prior felony conviction has been dismissed from consideration in habitual criminal proceedings and, without consideration of that conviction, the defendant could not be adjudged an habitual criminal, then it is appropriate that the people be entitled to reinstate that conviction subject to proof of authenticity. *People v. Vigil*, 39 Colo. App. 462, 570 P.2d 13 (1977).

Reinstatement of all charges where defendant was allowed to plead guilty to the wrong habitual criminal charges. Vacating guilty pleas and reinstating all charges, including habitual criminal charges, is appropriate remedy where, as part of a plea agreement to avoid "big" habitual criminal charges, defendant pled guilty to robbery, violent crime, and to two "little"

habitual criminal charges. *People v. Martinez*, 751 P.2d 660 (Colo. App. 1987).

Where defendant was convicted of aggravated robbery and was adjudicated a habitual criminal, a subsequent reversal of the adjudication of habitual criminality negated its sentence enhancing effect and required resentencing for the underlying charge since it was not clear from the record that the robbery sentence was imposed independently from the habitual criminal adjudication. When resentencing the trial court could consider all relevant and material factors, including new evidence incorporated in a supplemental presentence report. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Mittimus listing "habitual criminal" as crime may be corrected. Where the mittimus erroneously states "habitual criminal" as the crime for which sentence was imposed the only relief to which petitioner is entitled is a correction of the mittimus to conform to the judgment finding him guilty of aggravated robbery, not to a writ of habeas corpus. *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960).

Habitual criminal act was validly adopted. *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir. 1963).

Out-of-state felonies may be the basis for a habitual criminal count and the people need not allege or prove that the crimes the defendant committed would have been felonies if they had been committed in this state. *People v. Drake*, 785 P.2d 1257 (Colo. 1990); *People v. Wilczynski*, 873 P.2d 10

(Colo. App. 1993); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

Where both the violent crimes statute and the habitual criminal statute apply, the sentencing provisions of both statutes apply and a judge must impose the defendant's sentences to run consecutively. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

The crime of violence statute's consecutive sentencing requirement, § 18-1.3-406 (1)(a), does not conflict with the sentencing provisions of this section, so the sentencing court must give effect to both by imposing a sentence within the range required by the habitual criminal statute and then requiring that the sentences for two separate crimes of violence arising from the same incident be served consecutively. *People v. Chavez*, 2020 COA 80M, 486 P.3d 377.

Sentencing provisions of this section do not preempt consecutive sentencing requirement for crimes of violence in § 18-1.3-406 (1)(a). *People v. Lowe*, 2020 COA 116, 486 P.3d 397.

The sentencing provisions of this section do not preempt other statutory enhancement provisions. *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

The provisions of § 18-1-105 (9.7)(a) and (9.7)(b)(XI) which provide that the maximum presumptive range for a class 4 felony shall be increased by two years are not preempted by this section. *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

Nothing in this section expressly authorizes trial courts, upon a finding of unusual and extenuating circumstances, to modify crime of violence sentences imposed pursuant to § 18-1-105 (9). *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

If a convicted sex offender is subject to both subsection (1.5) and the provisions of the Colorado Sex Offender Lifetime Supervision Act of 1998, 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).

Where the defendant was convicted of "extraordinary risk of harm" crime and adjudicated as a habitual criminal, trial court properly calculated defendant's sentence by increasing the maximum presumptive range sentence pursuant to § 18-1-105 (9.7) and then multiplying it by three pursuant to subsection (1.5). *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

The preemptive scope of the habitual criminal statute does not extend so far as to preclude the mandatory consecutive sentencing requirement for multiple crimes of violence arising out of the same incident. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

The language "three times the maximum of the presumptive range" as used in subsection (1.5) refers only to sentences of less than life imprisonment and thus trial court erred in imposing three

terms of life imprisonment without parole for a defendant charged with one count of first degree murder for the killing of a single victim. *People v. Holloway*, 973 P.2d 721 (Colo. App. 1998).

Defendant's drug conviction, as both an habitual criminal under this section and as a special drug offender under a prior version of § 18-18-407, should have resulted in a prison sentence determined by the additional aggravating circumstances of the special drug offender section. By using a formula in the special drug offender section that increases the sentence length without reclassifying the offense for which it is imposed, the legislature requires the application of two different sentence enhancing provisions when the special offender is also an habitual criminal, independently mandating sentence enhancement for different aggravating circumstances. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Neither this section nor § 18-18-407 purports to limit the effect of additional aggravation or to place an upper limit on the ultimate sentence for a defendant to whom its provisions apply. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Trial court's failure to consider the application of subsection (3) to defendant's felony conviction was an obvious error, and, because the error resulted in the defendant being sentenced under subsection (2) without sufficient evidence that his prior conviction counted as a prior felony under that provision, the error was substantial. Accordingly, the case was

remanded for resentencing. *People v. Kadell*, 2017 COA 124, 411 P.3d 281.

Statute as basis for jurisdiction. See *Munsell v. People*, 122 Colo. 402, 222 P.2d 615 (1950); *Hackett v. People*, 158 Colo. 304, 406 P.2d 331 (1965); *Silva v. People*, 170 Colo. 152, 459 P.2d 285 (1969); *Mingo v. People*, 171 Colo. 474, 468 P.2d 849 (1970); *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

The presumptive range for a class 6 felony could not be doubled and then the sentence quadrupled because the defendant was also considered an habitual offender. The defendant was convicted of stalking while the defendant was on parole from prison. The stalking offense qualified the defendant as an habitual offender. Stalking is a class 6 felony. Section 18-1-105 requires the doubling of the presumptive range of the conviction for offenses that occur while on parole. Subsection (2) requires the quadrupling of offenses committed by habitual offenders. Subsection (2), however, does not authorize the quadrupling of a sentence that is already increased. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

Court required to apply both § 18-18-405 and this section. A second violation of § 18-18-405 for unlawful distribution and sale of a schedule II controlled substance increases the offense to a class 2 felony. If defendant has been convicted of three previous felonies, subsection (2) requires court to sentence defendant to four times the maximum of the presumptive range for a

class 2 felony. *People v. Cordova*, 199 P.3d 1 (Colo. App. 2007).

Applied in *People v. Enlow*, 135 Colo. 249, 310 P.2d 539 (1957); *Hatch v. Tinsley*, 143 Colo. 170, 352 P.2d 670 (1960); *Jaramillo v. District Court*, 173 Colo. 459, 480 P.2d 841 (1971); *People v. Marquez*, 190 Colo. 255, 546 P.2d 482 (1976); *People v. Keelin*, 39 Colo. App. 124, 565 P.2d 957 (1977); *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980); *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Self*, 200 Colo. 406, 615 P.2d 693 (1980); *People v. McKnight*, 200 Colo. 486, 617 P.2d 1178 (1980); *People v. Cabral*, 629 P.2d 575

(Colo. 1981); *People v. Shaver*, 630 P.2d 600 (Colo. 1981); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Wiedemer*, 641 P.2d 289 (Colo. App. 1981); *Massey v. People*, 649 P.2d 1070 (Colo. 1982); *People v. Hale*, 654 P.2d 849 (Colo. 1982); *People v. Leonard*, 673 P.2d 37 (Colo. 1983); *People ex rel. Faulk v. District Court ex rel. County of Fremont*, 673 P.2d 998 (Colo. 1983); *People v. Akers*, 746 P.2d 1381 (Colo. App. 1987); *People v. Daniels*, 973 P.2d 641 (Colo. App. 1998); *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd* on other grounds, 2 P.3d 1283 (Colo. 2000).

18-1.3-802. Evidence of former convictions - identity.

On any trial under the provisions of this section and sections 18-1.3-801 and 18-1.3-803, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. Identification photographs and fingerprints that are part of the record of such former convictions and judgments, or are part of the records kept at the place of such party's incarceration or by any custodian authorized by the executive director of the department of corrections after sentencing for any of such former convictions and judgments, shall be prima facie evidence of the identity of such party and may be used in evidence against him or her.

Source: L. 2002: Entire article added with relocations, p. 1428, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-102 as it existed prior to 2002.

ANNOTATION

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Law reviews. For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law 215 (1983).

Annotator's note. Since § 18-1.3-802 is similar to § 16-13-102 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-13-2, C.R.S. 1963, § 39-13-2, CRS 53, and CSA, C. 48, § 555(2), relevant cases construing those provisions have been included in the annotations to this section.

An authenticated copy of the record of conviction in a court of record is required under this section to constitute prima facie evidence of a former conviction. Certified copies of the record of former convictions are not sufficient. *Coppinger v. People*, 152 Colo. 9, 380 P.2d 19 (1963).

Certified copies of public records provide proper authentication of former convictions and judgments for purposes of this section. *People v. Frost*, 5 P.3d 317 (Colo. App. 1999).

Authentication requirement satisfied. There is no definition as to what is intended by the term "duly authenticated". However, certified copies of final judgments entered in three separate proceedings in each of which the defendant was convicted and sentenced to the penitentiary of a sister state, each being certified as a full, true, and complete copy of the judgment and sentence of the court and authenticated by the clerk of that court under his signature and the seal thereof, accompanied by the certificate of the judge of the court to the effect that the individual who signed as clerk is the clerk of the court; that he is the custodian of the

records and papers thereof; that the said attestation is in due form and according to law; and then the further certificate by the clerk that the judge who so certified is a duly elected, commissioned, and qualified judge of said circuit court, all of said certifications being impressed with the seal of the court, are amply and properly certified public records and come within all definitions of due authentication. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

In addition to certified copies of the record of former convictions and judgments of a court of record, certificates of authenticity by the judge of the court that the clerk who certified the records is in fact the clerk of the court and is the custodian of the records and papers thereof, and that his attestation is in due form and according to law, and the additional certificate by the clerk that the judge who so certified is the duly elected, commissioned and qualified judge of said court are essential before the documents may be received under the statute. *Coppinger v. People*, 152 Colo. 9, 380 P.2d 19 (1963).

Sufficiency of documents relating to conviction. The habitual criminal statute requires "a duly authenticated copy of the record of former convictions and judgments". Thus, certified copies of public records provide proper authentication under this section. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

Contrary to defendant's contentions, there is no requirement of a reciprocal attestation

of the judge and the clerk on the documents. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Additionally, documents that are admissible under certain rules of evidence, for example, CRE 901 (b)(7), which governs public records, and CRE 902 (1) and (4), which covers self-authenticating documents, may also be used to support a habitual criminal conviction under this section. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998); *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003); *People v. Gregg*, 298 P.3d 983 (Colo. App. 2011).

Nothing in the statute requires that the copies to be introduced come directly and exclusively from the particular courts of record; hence, department of corrections' records of prior convictions, certified by the records' custodian, were properly admitted. *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd* on other grounds, 2 P.3d 1283 (Colo. 2000); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001); *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), *aff'd* in part, *rev'd* in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Nor is there a requirement that each and every signature contained with an otherwise properly authenticated set of public documents be certified or embossed with a seal. *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

Certified court records of convictions, certified department of corrections records, testimony from prosecutor's investigator and detention facility employee, detention

facility records, and testimony from fingerprint expert constituted sufficient evidence to establish a chain of identity proving beyond a reasonable doubt that defendant was the person convicted in the prior cases on which the habitual criminal counts were based. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Evidence in a packet pertaining to one conviction admitted under this section that also is evidence of another separate and distinct conviction is admissible to prove the other separate and distinct conviction for habitual offender purposes. *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

Affirmative waiver of right to counsel in record of prior conviction. Although waiver of the right to counsel may not be presumed from a silent record, when the record of a prior conviction affirmatively reflects such waiver, the defendant must make a *prima facie* showing that the waiver was ineffective before the prosecution must introduce additional evidence to prove the validity of the waiver. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981).

When facing an habitual offender charge, a defendant is entitled to advance notice that admissions of prior felonies may not be used in the habitual offender phase of the trial as substantive evidence. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982); *People v. Turley*, 870 P.2d 503 (Colo. App. 1993).

When an habitual offender count is charged, an advisement is sufficient if it informs the defendant that admissions

concerning prior convictions maybe considered on the issue of credibility and for no other reason. *People v. Clouse*, 859 P.2d 228 (Colo. App. 1992); *People v. Turley*, 870 P.2d 498 (Colo. App. 1993).

Record of defendant's conviction of forgery maintained by the Kansas bureau of investigation was sufficient evidence under this section as to a forgery count where the record contained defendant's

name, physical description, and federal bureau of investigation number. *People v. Deskins*, 904 P.2d 1358 (Colo. App. 1995), *aff'd in part, rev'd in part on other grounds*, 927 P.2d 368 (Colo. 1996).

Applied in *Silva v. People*, 170 Colo. 152, 459 P.2d 285 (1969); *People v. Weber*, 199 Colo. 25, 604 P.2d 30 (1979); *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984).

18-1.3-803. Verdict of jury.

(1) If the allegation of previous convictions of other felony offenses is included in an indictment or information and if a verdict of guilty of the substantive offense with which the defendant is charged is returned, the court shall conduct a separate habitual proceeding for a jury to determine whether or not the defendant has suffered the alleged previous felony convictions, whether the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes. The habitual proceeding must be conducted before the same jury impaneled to try the substantive offense; except that, when necessary and as constitutionally permissible, a new jury may be impaneled. If a new jury is impaneled, the court shall hold the habitual proceeding as soon as practicable. The Colorado rules of evidence and Colorado rules of criminal procedure, including the discovery provisions of Colorado rule of criminal procedure 16, fully apply to habitual proceedings conducted pursuant to this section.

(2) An information or indictment seeking the increased penalties authorized by section 18-1.3-801 shall identify by separate counts each alleged former conviction and shall allege that the defendant on a date and at a place specified was convicted of a specific felony. If any such conviction was had outside this state, the information or indictment shall allege that the offense, if committed in this state, would be a felony.

(3) Upon arraignment of the defendant, such defendant shall be required to admit or deny that such defendant has been previously convicted of the crimes identified in the information or indictment. If the defendant refuses to admit or deny the previous convictions, such refusal shall be treated as a denial by such defendant that the defendant has been convicted as alleged. If the defendant admits to having been convicted as alleged in any count charging a previous conviction, no proof of such previous conviction is required. Such admission shall constitute conclusive proof in determining whether the defendant has been previously convicted of an alleged felony and the court shall sentence the defendant in accordance with section 18-1.3-801.

(4) If the defendant denies that they have been previously convicted as alleged in any count of an information or indictment, a jury shall determine by separate habitual proceeding and verdict whether the defendant has been convicted as alleged, whether the convictions were separately brought and tried, and whether the convictions arose out of separate and distinct criminal episodes. The procedure is as follows:

(a) The jury shall render a verdict upon the issue of the defendant's guilt or innocence of the substantive offense charged;

(b) If the verdict is that the defendant is guilty of the substantive offense charged, a jury shall try the issues of whether the defendant has been previously convicted as alleged. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been previously convicted as alleged, the convictions were separately brought and tried, and the convictions arose out of separate and distinct criminal episodes.

(5) (a) If, upon the trial of the issues upon the substantive offense charged, the defendant testifies in his or her own defense and denies that he or she has been previously convicted as alleged, the prosecuting attorney on rebuttal may present all evidence relevant to the issues of previous convictions for the sole purpose of impeachment of the defendant's credibility, subject to the rules governing admission of evidence at criminal trials.

(b) If, upon the trial of the issues upon the substantive offense charged, the prosecuting attorney presents rebuttal evidence pursuant to subsection (5)(a) of this section or the defendant admits that the defendant has been previously convicted as alleged, the presentation or admission does not relieve the prosecuting attorney of the burden to prove beyond a reasonable doubt that the defendant has been previously convicted as alleged, the convictions were separately brought and tried, and the convictions arose out of separate and distinct criminal episodes. If, during the trial on the substantive offense, the jury has heard the defendant admit a previous conviction, the court shall instruct the jury that it may consider the admission only as it affects the defendant's credibility and that the prosecuting attorney must prove beyond a reasonable doubt the defendant's prior convictions by evidence independent of the admission.

(6) Repealed.

Source: L. 2002: Entire article added with relocations, p. 1428, § 2, effective October 1. **L. 2025:** (1), IP(4), (4)(b), and (5)(b) amended and (6) repealed, (SB 25-189), ch. 344, p. 1866, § 1, effective June 2.

Editor's note: This section is similar to former § 16-13-103 as it existed prior to 2002.

ANNOTATION

I. General Consideration.

II. Procedure and Evidence.

III. Verdict of Jury.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Prosecution of Habitual Criminals", see 27 Dicta 376 (1950). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983).

Annotator's note. Since § 18-1.3-803 is similar to § 16-13-103 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-13-3, C.R.S. 1963, § 39-13-3, CRS 53, CSA, C. 48, § 555(3), and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section does not restrict § 16-11-101. Section 16-11-101 contains no directive requiring that procedures similar to those of this section be followed. The general assembly's decision to enact § 16-11-101 without procedures similar to this section indicates its intent not to conform § 16-11-101 to the requirements of this section even

though it had the right to do so. *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978).

Conviction based upon plea of nolo contendere is "conviction" for purposes of enhancing punishment pursuant to this section. *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979).

Both statutory and decisional law served to nullify the effect of the court of appeals' reversal of the trial court's dismissal of the habitual criminal charge against defendant and remand to retry defendant as a habitual criminal, inasmuch as settled law prohibits a retrial on that charge. *Smith v. People*, 872 P.2d 685 (Colo. 1994).

The three findings for habitual criminal sentencing are not in addition to the "fact" of the prior convictions. Therefore, the court may find that the prior crimes were separately brought and tried, that they arose out of separate and distinct criminal episodes, and that the accused was the person named in each prior conviction without violating the principle in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Nunn*, 148 P.3d 222 (Colo. App. 2006).

Applied in *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

II. PROCEDURE AND EVIDENCE.

Court permission to file an information under the habitual criminal act is not required. *People v. District Court*, 93 Colo. 314, 25 P.2d 738 (1933).

Purpose of bifurcated trial and separate verdict provisions. The bifurcated trial and separate verdict provisions are manifestations of legislative intent to require that an adjudication of habitual criminality be made only in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Because of the special nature of the habitual criminal adjudication process, any waiver of the jury trial guaranteed in habitual criminal adjudications must be governed by the same constitutional principles associated with a waiver of the right to a jury trial on felony criminal charges. *Moore v. People*, 707 P.2d 990 (Colo. 1985).

And purpose of requiring proof of prior conviction beyond reasonable doubt. The statutory requirement of proof beyond a reasonable doubt manifests a deliberate legislative decision to impose on the state, rather than the defendant, the risk of an erroneous decision as to the prior conviction counts. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Statutory procedures mandate bifurcated trial to obviate prejudicial effect of prior convictions on the trial of the substantive offense. *People v. Lucero*, 200 Colo. 335, 615 P.2d 660 (1980).

Burden of proof as to constitutionality of prior conviction. Upon challenging the validity of the prior conviction, the defendant's burden is to make a prima facie showing that the challenged conviction was unconstitutionally obtained; when such showing is made, the conviction is not admissible unless the prosecution establishes, by a preponderance of evidence, that the conviction was obtained in accordance with the defendant's constitutional rights. *People v. Quintana*, 634 P.2d 413 (Colo. 1981), overruled on other grounds in *People v. Porter*, 2015 CO 34, 348 P.3d 922.

Because there is no longer a statutory right to a jury determination of habitual criminal status, and because defendant's admissions to prior felony convictions act as conclusive proof of the prior counts, any error by the trial court in failing to obtain from defendant an explicit personal waiver of rights was harmless beyond a reasonable doubt. *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 520 (Colo. 2002).

The determination of habitual criminality is the sole province of the trial court. *People v. Porter*, 2013 COA 130, 353 P.3d 852, rev'd on other grounds, 2015 CO 34, 348 P.3d 922.

Information alleging previous convictions in foreign state held sufficient. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

Where information fails to allege that out-of-state convictions would be felonies

if committed in Colorado, such failure does not warrant reversal where it causes no prejudice to defendant. *People v. Weighard*, 709 P.2d 81 (Colo. App. 1985); *People v. Drake*, 785 P.2d 1257 (Colo. 1990).

When a defendant is arraigned, he can admit a previous conviction or deny his identity. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

Where defendant enters guilty plea, proof of prior convictions is not required. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

Where it was held that the plea of defendant to the habitual criminal counts of an information was in effect a plea of guilty, it followed that defendant pleaded guilty to every fact averred in the counts, and there was nothing requiring proof of the things admitted by such plea. *Hahn v. People*, 126 Colo. 451, 251 P.2d 316 (1952).

What would or would not constitute competent evidence to establish prima facie proof of former felony convictions under this section is not material where a defendant enters pleas of guilty to charges of such former convictions. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

Likewise, admissions of defendant dispense with need for other proof. In a prosecution under this section prior convictions of felonies, established by the admissions of the accused on the witness stand, relieve the prosecution of the necessity of other proof thereof. *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799 (1960),

overruled, *People v. Chavez*, 621 P.2d 1362 (Colo. 1981).

Use of defendant's admission of prior convictions. The impeachment use of an admission of prior convictions elicited from a defendant who chooses to testify is permissible in the trial of the substantive offense underlying a habitual criminal charge; however, the substantive use of that same evidence to relieve the prosecution of its statutory and constitutional burden of proving the elements of a separate status, habitual criminality, by introducing evidence independent of the defendant's testimony such as duly authenticated records of a defendant's prior convictions, impermissibly burdens the exercise of a defendant's right to testify in his own behalf. *People v. Chavez*, 621 P.2d 1362 (Colo. 1981).

Trial court's ruling that evidence of the defendant's prior convictions elicited during his trial on the substantive charges, would be admissible for substantive purposes in the habitual criminal proceeding was an error which its "bifurcation" of the jury's deliberations failed to remedy. *People v. Chavez*, 621 P.2d 1362 (Colo. 1981).

Retroactive application. The decision in *People v. Chavez* is to be given retroactive application. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

This section addresses the defendant's testimony at the trial phase and the permissible use thereof by acknowledging that, should the defendant choose to testify during trial, the prosecution may confront the defendant for the sole purpose of impeachment of the defendant's credibility,

but by also making clear that a defendant's admissions during the trial phase are not conclusive proof of the existence of prior convictions. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Because prior felony evidence is relevant to habitual criminal proceedings, when a defendant testifies during the sentencing phase, the judge may consider admissions elicited at that time as substantive evidence; while such admissions are not "conclusive proof", they are some evidence that those felonies exist. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Admission of identity as to some previous convictions is not general plea of guilty to all. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

Effect on right to testify. The right of a defendant charged with habitual offender counts to testify is impermissibly burdened by the threat of impeachment by means of prior conviction without procedural protections requiring independent proof of the habitual offender allegations. The defendant is constitutionally entitled to advance notice that the jury would be specifically instructed to consider evidence of his prior convictions only on the issue of his credibility, and that the prosecution would still have the burden of proving his prior convictions by independent evidence at the habitual offender stage of the trial. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

Statute does not explicitly delineate procedures where defendant admits convictions. The habitual criminal statute

does not explicitly delineate the procedures to be followed at trial if the defendant takes the witness stand and admits that he has been convicted previously as alleged. *People v. Chavez*, 621 P.2d 1362 (Colo. 1981).

Duty of state to prove disputed identity. Where defendant denied his identity at arraignment under this section, it was incumbent upon the people to prove his identity and the previous convictions, and it became the statutory duty of the jury to find whether or not he has suffered such previous convictions. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

The state has the burden of proving the prior conviction of accused and establishing his identity as the person previously convicted. *People v. Wolff*, 111 Colo. 46, 137 P.2d 693 (1943); *O'Day v. People*, 114 Colo. 373, 166 P.2d 789 (1946).

And identity must be proved with particularity. This section requires that where the defendant denies his identity as the person previously convicted, such fact is to be proved with particularity. The cases have consistently required strict proof. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Evidence inadequate to establish identity. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Trial court may not preempt defendant's right to jury trial. The trial court is without authority to preempt a defendant's right to a jury trial on the habitual criminal counts solely on the basis of the defendant's testimony given in

defense of the substantive charge. *People v. Mason*, 643 P.2d 745 (Colo. 1982).

Retroactive application of the rule requiring a jury determination of habitual criminal charges was denied because of the adverse impact such application would have on the administration of justice, and because the reliability of the inquiry into the truth of the defendant's convictions would not have been significantly enhanced by submission of the issue to the jury. *People v. Moore*, 707 P.2d 990 (Colo. 1985).

The language contained in paragraph (b) of subsection (5) referencing testimony relates entirely to the defendant's testimony elicited during the trial phase. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Accused's testimony on own behalf merges trial of crime and former convictions. Where a defendant testifies in his own behalf, or where evidence of former convictions is introduced in impeachment, the question of former convictions is thus opened for consideration and resolution, all the facts concerning prior convictions become admissible, and the main charge may then be submitted and disposed of without separation. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958); *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297 (1977).

When a defendant, having denied at arraignment the alleged prior convictions supporting an habitual criminal determination, elects to testify at trial and admits the charged convictions, the habitual criminal allegations may be submitted to the jury along with charges of the substantive

offense. *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297 (1977).

And permits cross-examination of accused on counts of prior convictions. In a criminal prosecution where an information contains counts under the habitual criminal act denied by defendant, and the prosecution offers evidence of the substantive offense only, if then the defendant voluntarily takes the witness stand to testify in his own behalf it is not error to require him upon cross-examination to testify to facts pertinent to the charge of previous felony convictions. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958).

But refusal to take stand bars such proof at trial of crime. Under provisions of the witness statute, it is defendant's right and privilege to refuse to take the witness stand, and in that event a district attorney cannot offer evidence on the issue of previous convictions until the jury has determined the question of his guilt upon the main or substantive offense. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958).

Right of defendant to be advised of consequences of guilty plea sufficiently protected. *Glass v. People*, 127 Colo. 210, 255 P.2d 738 (1953).

Admission of exhibits as evidence of prior conviction held not prejudicial. Where three separate previous felony convictions of the defendant were clearly established by competent evidence and separate verdicts to that effect were returned by the jury, and these verdicts were in addition to one finding that the defendant had been convicted of a felony in Missouri,

sentence of life imprisonment would be mandatory under the three verdicts supported by competent evidence, and defendant was not prejudiced by admitting certain exhibits as evidence of the alleged Missouri conviction. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951).

Admission into evidence of offenses not alleged as basis of habitual criminality during the second phase of a bifurcated trial constituted reversible error. *People v. Lucero*, 200 Colo. 335, 615 P.2d 660 (1980).

Where defendant withdrew pretrial motion for continuance to preserve his speedy trial rights, court did not abuse its discretion in denying post-trial motion for continuance in order to hold a habitual criminal hearing as soon as practicable under subsection (1) even though defense counsel consequently had insufficient time to investigate the validity of the defendant's prior convictions. *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd* on other grounds, 2 P.3d 1283 (Colo. 2000).

Subsection (1) clearly and unambiguously states that the habitual criminal hearing shall be conducted by the judge who presided at the trial, subject to four stated exceptions. Thus, it was reversible error for another judge to handle the habitual criminal hearing when the court merely found that the trial judge was unavailable. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

This section does not allow a prosecutor, for good cause or otherwise, to add known habitual criminal counts after a guilty plea has been accepted.

People v. Rieger, 128 P.3d 295 (Colo. App. 2005).

Trial court misinterpreted plain language of subsection (6) when it allowed prosecutor to file two habitual criminal counts against defendant after defendant had pled guilty, despite prosecutor's prior knowledge of the convictions. *People v. Rieger*, 128 P.3d 295 (Colo. App. 2005).

III. VERDICT OF JURY.

Former statute not facially unconstitutional and can operate within constitutional limits through a two-step procedure. The jury must first determine whether prior convictions were based on charges arising out of separate and distinct criminal episodes. If the jury so finds, then the trial judge should review the jury's findings for sufficiency of the evidence regarding whether the defendant has previously been convicted as alleged. *People v. Gregg*, 2025 CO 57, 576 P.3d 725 (decided under law in effect prior to the 2025 amendment).

A jury should determine whether a defendant's prior convictions were separately brought and tried and whether they arose out of distinct criminal episodes. Because both questions require more than a mere determination of what crime, with what elements, the defendant was convicted of, a jury determination is required. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

Jury determines identity on counts of former convictions, not guilt. Proceedings before the jury on the habitual criminal

counts are not in determination of whether defendant is or is not guilty of the crime, but go only to issues pertaining to identity of the defendant as being the individual named in such count as the one who was previously convicted of a felony. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

Under the habitual criminal act, it is the jury's function to determine whether the defendant has been previously convicted. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Defendant has a limited right to a jury trial to determine identity; all other questions relating to the habitual criminal statute are matters of law for the court. Once the jury found beyond a reasonable doubt that defendant was the person convicted of three prior felonies, the defendant was not entitled to have any other issues determined by the court. *People v. Jones*, 967 P.2d 166 (Colo. App. 1997) (decided under law in effect prior to 1995 amendments).

A defendant does not have the right to a jury determination of habitual criminality under the Colorado Constitution or the sixth amendment, therefore the court's determination of whether the defendant has suffered previous felony convictions is not a violation of a defendant's constitutional rights. *People v. Edwards*, 971 P.2d 1080 (Colo. App. 1998); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

The determination of habitual criminality is covered under the prior conviction exception and is exempt from the constitutional jury requirement.

People v. Felder, 129 P.3d 1072 (Colo. App. 2005).

The issues in the habitual criminal counts are tried by the same jury immediately following the determination of the substantive charge, and they shall forthwith proceed to try those issues without being resworn. This definitely precludes any change in the personnel of the jury. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951); *Smith v. People*, 872 P.2d 685 (Colo. 1994).

No error is committed by a trial court in denying peremptory challenges to jurors made by defendant's counsel after the receipt of verdicts determining the guilt of defendant upon the substantive offenses charged against him and before the presentation of evidence on the habitual criminal counts in the information. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

The habitual criminal act indicates clearly that the same jury must be utilized for both segments of the prosecution. *Quintana v. People*, 169 Colo. 295, 455 P.2d 210 (1969).

Same jury must determine guilt on both substantive and prior offenses. Except when the defendant admits his previous conviction of a crime alleged in the habitual criminal count, the jury which determines his guilt on the substantive offense must forthwith determine that he was the person convicted of the alleged prior crime. *Vigil v. People*, 196 Colo. 522, 587

P.2d 1196 (1978); *Smith v. People*, 872 P.2d 685 (Colo. 1994).

Under plain language of § 16-13-103 (4)(a) and (4)(b), a defendant may not try to court issue of habitual criminal status once jury has convicted defendant of underlying offense. Absent showing of due process violation, jury must decide habitual criminal status. If defendant waives right to jury trial of underlying offense, court determines habitual criminal status of defendant. *People v. Clouse*, 859 P.2d 228 (Colo. App. 1992).

Subsections (1) and (3), by their terms, plainly establish that the jury empaneled to try the substantive offense charged shall decide whether a defendant is adjudicated a habitual criminal, and the same jury which determines a defendant's guilt on the pending substantive offense must also resolve the validity of the habitual criminal charge. *Smith v. People*, 872 P.2d 685 (Colo. 1994).

Same-jury requirement is constitutional. Under the habitual criminal statute, the same jury which returns a guilty verdict on the underlying offense must then decide whether the defendant committed the necessary prior crimes to be adjudged an habitual criminal. Despite this "same-jury" requirement in this section, the defendant can have an impartial jury during the habitual criminal sentencing hearing, as guaranteed by §§ 16 and 25 of art. II, Colo. Const. *People ex rel. Fault v. District Court ex rel. County of Fremont*, 673 P.2d 998 (Colo. 1983).

Prior convictions must be submitted to the jury separately and separate verdicts

must be returned by the jury as to each prior conviction. *Coppinger v. People*, 152 Colo. 9, 380 P.2d 19 (1963).

The jury should not be required to find in one form of verdict that the accused was the same person named in both alleged previous convictions; they should have been required to make a determination separately as to each of the two former convictions, because a negative finding as to one count would have rendered the determination a nullity. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Whether previous convictions were constitutionally procured involves a question of law for the court. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Prior conviction valid despite invalid sentence. Where one of the previous convictions upon which an habitual criminal conviction was predicated had taken place in New Mexico and it appeared that the defendant was represented by counsel at all stages except sentencing in that proceeding, it may be that his constitutional rights were violated by reason of the absence of counsel at sentencing, but any violation would relate only to that sentence, and his remedy would therefore lie in New Mexico. The punishment as an habitual criminal is based upon prior convictions, and the amount or validity of sentence under a valid conviction is immaterial. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Informing jury that penalty is automatically life imprisonment. Where defendant is an habitual criminal and the habitual criminal act is invoked by the

people, the court has discretion to refuse the defendant's attorney permission to inform the jury on voir dire that penalty, if defendant is convicted, is automatically life imprisonment. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

It was not reversible error for same jury to determine identity of all defendants on habitual criminal counts, notwithstanding separation on these issues. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

Verdict forms were adequate to demonstrate that the jury unanimously agreed that defendant was the same person identified in prosecution documents as having been convicted previously of several felonies. *People v. Romero*, 767 P.2d 782 (Colo. App. 1988).

Even where the defense counsel does not object to the court's finding that the defendant was an habitual criminal without a separate sentencing hearing, such a finding is reversed because the waiver of such an additional hearing must be personally made by the defendant and not his attorney. *People v. Killpack*, 793 P.2d 642 (Colo. App. 1990).

Defects in the information and the verdict form concerning the correct file number for the previous conviction were defects of form rather than substance. Such defects do not require reversal where the defendant was not prejudiced by the discrepancy in file numbers. The court found sufficient evidence was presented whereby the jury could find beyond a reasonable doubt that the defendant was

previously convicted of felony theft. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

Also, an inaccuracy or discrepancy in the date of the prior conviction does not mandate dismissal if the defendant was not prejudiced thereby. Because both the incorrect and the correct dates were within ten years prior to commission of the substantive offense and a reasonable jury could find that defendant's identity was established beyond a reasonable doubt as to the prior convictions, the mistake did not affect defendant's substantive rights. *People v. Young*, 923 P.2d 145 (Colo. App. 1995); *People v. Poindexter*, 2013 COA 93, 338 P.3d 352.

A sentencing judge's determination to increase the mandatory minimum sentence for a crime or to impose a sentence that exceeds the statutory maximum sentence, based on facts not submitted to the jury and proven beyond a reasonable doubt, is reviewed for constitutional harmlessness, not structural error. And most constitutional errors, including sixth amendment errors, can be harmless. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

The questions of whether prior convictions were separately brought and tried and arose out of separate and distinct criminal episodes can be definitively established based on the judicial records introduced at the habitual criminal trial. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

There is no reasonable possibility that the trial court's error in failing to try the

separately brought and tried and separate and distinct criminal episode elements to a jury might have contributed to defendant's habitual criminal convictions. Based on the overwhelming evidence presented at trial, any rational jury would have found, beyond a reasonable doubt, that defendant's convictions were separately brought and tried and arose out of distinct criminal episodes. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

For purposes of this section, two prior convictions will only be considered as one conviction if they arose from the same criminal episode. Even though two prior convictions were entered on the same day, they do not count as one conviction because they were the result of separate and distinct criminal episodes. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

Section 18-3-412 specifically incorporates the procedures of this section. *People v. Harper*, 796 P.2d 4 (Colo. App. 1990).

Convictions must be set forth specifically in the complaint or information, and, if the defendant pleads

not guilty to these counts, the validity of the previous convictions must be proven beyond a reasonable doubt. *People v. Harper*, 796 P.2d 4 (Colo. App. 1990).

The habitual criminal statute requires the prosecution to allege and prove a specific prior felony conviction. For purposes of establishing that the defendant is a habitual criminal and subject to enhanced penalties, the prosecution only needs to establish the fact of the prior conviction. *Campbell v. People*, 2020 CO 49, 464 P.3d 759.

Defendant's statutory rights not violated. Although defendant committed the underlying offenses in 1994, the prosecution filed its complaint and information in 2017. In 1995, the legislature amended the statute to allow a court to determine habitual criminal charges as a matter of law for all informations filed on or after July 1, 1995. Therefore, no jury trial was required. Nevertheless, defendant received a jury trial on the issue of identity -- a greater protection than he was entitled to by statute. *People v. Fields*, 2025 COA 84, 581 P.3d 789.

18-1.3-804. Habitual burglary offenders - punishment - legislative declaration.

(1) Every person convicted in this state of first degree burglary, first degree burglary of controlled substances, or second degree burglary of a dwelling who, within ten years of the date of the commission of the said offense, has been previously convicted upon charges separately brought and tried, either in this state or elsewhere, of first degree burglary, first degree burglary of drugs or first degree burglary of controlled substances, or second degree burglary of a dwelling or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a felony which, if committed within this state, would be first degree burglary, first degree burglary of drugs or first degree burglary of controlled substances,

or second degree burglary of a dwelling shall be adjudged a habitual burglary offender and shall be sentenced to the department of corrections for a term of incarceration greater than the maximum in the presumptive range, but not more than twice the maximum term, provided for such offense in section 18-1.3-401 (1)(a).

(2) Every person convicted in this state of first degree burglary, first degree burglary of controlled substances, or second degree burglary of a dwelling who has been previously convicted of two or more felonies shall be subject to the applicable provisions of section 18-1.3-801.

(3) Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information.

(4) In no case shall any person who is subject to the provisions of this section be eligible for suspension of sentence or probation.

(5) Insofar as they may be applicable, sections 18-1.3-802 and 18-1.3-803 shall govern trials which are held as a result of the provisions of this section.

(6) The general assembly hereby finds and declares that the frequency of incidence of the crime of burglary, together with particularly high rates of recidivism among burglary offenders and the extensive economic impact which results from the crime of burglary, requires the special classification and punishment of habitual burglary offenders as provided in this section.

Source: L. 2002: Entire article added with relocations, p. 1430, § 2, effective October 1. **L. 2003:** (1) amended, p. 1427, § 6, effective April 29.

Editor's note: This section is similar to former § 18-4-202.1 as it existed prior to 2002.

Cross references: For limitations on collateral attacks of prior convictions, see § 16-5-402.

PART 9

SENTENCING OF SEX OFFENDERS

18-1.3-901. Short title.

This part 9 shall be known and may be cited as the "Colorado Sex Offenders Act of 1968".

Source: L. 2002: Entire article added with relocations, p. 1430, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-201 as it existed prior to 2002.

18-1.3-902. Applicability of part.

The provisions of this part 9 shall apply to persons sentenced for offenses committed prior to November 1, 1998.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-201.5 as it existed prior to 2002.

18-1.3-903. Definitions.

As used in this part 9, unless the context otherwise requires:

- (1) "Board" means the state board of parole.
- (2) "Conviction" means conviction after trial by court or jury or acceptance of a plea of guilty.
- (3) "Department" means the department of corrections.
- (4) "Sex offender" means a person convicted of a sex offense.
- (5) "Sex offense" means sexual assault, except misdemeanor sexual assault in the third degree, as set forth in section 18-3-404 (2), as it existed prior to July 1, 2000; sexual assault on a child, as defined in section 18-3-405; aggravated incest, as defined in section 18-6-302; and an attempt to commit any of the offenses mentioned in this subsection (5).

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2008:** (5) amended, p. 1890, § 56, effective August 5.

Editor's note: This section is similar to former § 16-13-202 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-903 is similar to § 16-13-202 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

When indeterminate commitment authorized in lieu of imprisonment. When

the requisite proscribed intent accompanying an unauthorized intrusion is that of seeking to accomplish one of the sex offenses enumerated in subsection (5), a district court may order an indeterminate commitment under § 16-13-203, in lieu of imprisonment. *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983).

18-1.3-904. Indeterminate commitment.

The district court having jurisdiction may, subject to the requirements of this part 9, in lieu of the sentence otherwise provided by law, commit a sex offender to the custody of the department for an indeterminate term having a minimum of one day and a maximum of his or her natural life.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-203 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment, "A Constitutional Challenge to the Release Procedures of the Colorado Sex Offenders Act: Is It Just a Matter of Time?", see 58 U. Colo. L. Rev. 313 (1987).

Annotator's note. Since § 18-1.3-904 is similar to § 16-13-203 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-1, C.R.S. 1963, and § 39-19-1, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of act is to protect public. The primary purpose of the Colorado sex offenders act is the protection of members of the public from proven dangerous sex offenders. *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995); *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996).

Sex offenders subject to indeterminate term. Sex offenders within the meaning of this part 2 may be committed to a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

Upon notice and hearing. A defendant who has been convicted of a sexual offense which carries a maximum sentence of 10 years but not sentenced under such provision, may not be sentenced under the sex offenders act for an indeterminate term of from one day to life. *Specht v. Patterson*, 386 U.S. 605 (1967).

Constitutionality. Statutes similar to the sex offenders act have been held not repugnant to the equal protection provision, since it is recognized that the state has the right through its general assembly to classify persons based upon reasonable and natural distinctions, to accomplish the legitimate purposes of its police power in fixing the differing penalties. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

Where classification of sex offenders under this section is based upon reasonable and natural distinctions to accomplish a legitimate purpose under the police power, and the trial court makes a finding of fact to

determine whether a defendant comes with the classification, such findings and classification do not offend against equal protection principles of the constitution. *Vanderhoof v. People*, 152 Colo. 147, 380 P.2d 903 (1963).

The general assembly had a rational basis under the fourteenth amendment to supply different procedural safeguards for civilly committed individuals and individuals punished under the sex offenders act. Individuals punished under this act have been convicted of crimes considered particularly heinous; civilly committed individuals have not been convicted of anything. Indeterminate terms under the act are imposed as punishment; civil commitment is not used as punishment. *Wimberly v. Williams*, 14 F.4th 1140 (10th Cir. 2021) (decided under former § 16-13-203).

This section providing for commitment of one day to life for certain sex offenses is not unconstitutional as imposing cruel and unusual punishment upon one charged and sentenced thereunder. *Specht v. Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963); *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149 (1965).

The Colorado sex offenders act is not unconstitutional as being void for vagueness or violative of due process or equal protection, or as constituting cruel and unusual punishment. *People v. White*, 656 P.2d 690 (Colo. 1983).

Release procedures of the Colorado sex offenders act are not unconstitutional as being violative of due process or equal

protection. *People v. Kibel*, 701 P.2d 37 (Colo. 1985); *People v. Adrian*, 701 P.2d 45 (Colo. 1985).

Convicted sex offenders who were paroled prior to the expiration of the maximum sentences for the underlying offenses had no standing to challenge whether the lack of periodic judicial review under the act could be justified, under equal protection, after the expiration of a period of confinement equal to the maximum sentence for the underlying crimes. *People v. Kibel*, 701 P.2d 37 (Colo. 1985).

Sentencing alternative does not involve constitutional right. From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrist and probation officer's reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975); *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Former provisions of sex offenders act held unconstitutional on due process grounds for lack of procedural safeguards. *Specht v. Patterson*, 386 U.S. 605 (1967).

Sentencing under the Sex Offenders Act is an alternative which may be granted or denied by the trial court in its discretion; however, there is no constitutional or statutory right to be

sentenced under the Act. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

Commitment proceedings, whether denominated civil or criminal, are subject to the equal protection clause of the fourteenth amendment and to the due process clause. *Specht v. Patterson*, 386 U.S. 605 (1967).

The punishment under this section is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm. *Specht v. Patterson*, 386 U.S. 605 (1967).

Trial court's failure to advise defendant of the possibility of being sentenced pursuant to the Sex Offenders Act, §§ 16-13-201 et seq., was not grounds to set aside defendant's guilty plea entered a decade earlier; the failure to so advise was harmless since the defendant was not originally sentenced under the Act. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

This section and § 18-3-408 relating to sexual assault on a child are in pari material and must be interpreted together. *Sutton v. People*, 156 Colo. 201, 397 P.2d 746 (1964).

Section does not confer sentencing power on parole board. This section providing for commitment of not less than one day nor more than life, and § 16-13-216 (2) authorizing the parole board to transfer such persons after commitment to other institutions to effectuate purposes of act, do not confer judicial powers on the parole board or involve the sentencing authority of

the court. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

The provisions of this act vest the trial court with discretion to commit a defendant under an alternate sentence. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975); *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996); *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

The decision to sentence pursuant to this part is strictly discretionary with the trial court. *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981).

By using the term "in lieu of", the general assembly allowed trial courts to impose either a determinate sentence or the indeterminate sentence but not both for the same offense. *Wimberly v. Williams*, 14 F.4th 1140 (10th Cir. 2021) (decided under former § 16-13-203).

When indeterminate commitment authorized in lieu of imprisonment. When the requisite proscribed intent accompanying an unauthorized intrusion is that of seeking to accomplish one of the sex offenses enumerated in § 16-13-202 (5), a district court may order an indeterminate commitment under this section in lieu of imprisonment. *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Defendant cannot be given sentence of commitment and sentence of imprisonment. This section, read together with § 16-13-211 (2), established that the district courts could not give a defendant, who was found to constitute a threat of bodily harm to the public, a sentence of

commitment and a sentence of imprisonment but have the option to either sentence to imprisonment or sentence to commitment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974); *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Only if the court finds that the defendant is a threat to the public has the court the power to commit the defendant for an indeterminate term. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974); *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

If it elects to exercise this option, it must do so "in lieu of the sentence otherwise provided by law". *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Thus, indeterminate commitment under the sex offenders act was in lieu of prisoner's sentence under the habitual criminal act, and, therefore, the trial court erred in sentencing him to concurrent terms under the respective statutes. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Second court found defendant not threat to public contrary to first court's determination. Even though a district court, in prosecution under § 18-3-408, determined that the defendant constituted "a threat of bodily harm to members of the public" under § 16-13-211 (2) and ordered him committed pursuant to this section, a different district court, in a subsequent prosecution of defendant under § 18-3-401, arising out of different acts by the defendant,

was not required under the doctrine of collateral estoppel to accept the first court's determination but could find that defendant was not a threat to the public and could sentence him to imprisonment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974).

Statutory limits of sentence proper question on habeas corpus. A person convicted of crime can resort to habeas corpus as a remedy if there is a question of the court's jurisdiction of the person, or its jurisdiction of the accusation made against the defendant, or where the question arises as to whether the judgment and sentence were within the prescribed statutory limits. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

Remedy for one sentenced under void statute. Since the time when defendant was sentenced under former provisions of the sex offenders act, the United States supreme court has declared the former provisions to be unconstitutional, and a motion under Crim. P. 35(b) to vacate the sentence and impose a proper one may be in order. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

The court did not abuse its discretion when it did not impose indeterminate sentencing. The court reviewed the psychiatric reports and probation report and based on those reports determined the defendant was a significant threat to society and indeterminate sentencing was inappropriate. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Form of commitment valid. A commitment "for a period not exceeding life and not less than one day" was within the limitations of this section providing for commitment of a minimum of one day and a maximum of natural life. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

Person convicted of a sex offense is not entitled to mandatory parole; therefore, the accumulation of good time and earned time credits do not make person eligible for immediate release. *Rather v. Suthers*, 973 P.2d 1264 (Colo. 1999).

Applied in *Carter v. People*, 161 Colo. 10, 419 P.2d 654 (1966); *People v. District Court*, 196 Colo. 249, 585 P.2d 913 (1978).

18-1.3-905. Requirements before acceptance of a plea of guilty.

Before the district court may accept a plea of guilty from any person charged with a sex offense, the court shall, in addition to any other requirement of law, advise the defendant that he or she may be committed to the custody of the department, including any penal institution under the jurisdiction of the department, as provided in section 18-1.3-904.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-204 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-905 is similar to § 16-13-204 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.

Duty where defendant represented by counsel. The trial court only has a duty to advise those who plead guilty to a sex offense of the possibility of sentencing under the act and has no such duty where the defendant pleads guilty and is represented

by counsel. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Failure to expressly advise defendant of possibility of sentence of imprisonment under this section does not invalidate guilty plea. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

Advisement substantially complied with the requirement of this section. *People v. Adrian*, 701 P.2d 45 (Colo. 1985).

Applied in *People v. Wilkerson*, 192 Colo. 386, 559 P.2d 1107 (1977).

18-1.3-906. Commencement of proceedings.

Within twenty-one days after the conviction of a sex offense, upon the motion of the district attorney, the defendant, or the court, the court shall commence proceedings under this part 9 by ordering the district attorney to prepare a notice of the commencement of proceedings and to serve that notice upon the defendant personally.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 867, § 113, effective July 1.

Editor's note: This section is similar to former § 16-13-205 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-906 is similar to § 16-13-205 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.

Conviction as basis for commencing action. This section does not make the commission of a specified crime the basis for sentencing; rather it makes one conviction the basis for commencing another proceeding under the sex offenders act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *Specht v. Patterson*, 386 U.S. 605 (1967) (decided under repealed § 39-19-1, C.R.S. 1963).

Any defendant convicted either by plea or trial by court or jury may request

commencement of proceedings under the act within 20 days following the conviction. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Where trial court failed to meet certain deadlines contained in the statutes, the trial court could not, on its own motion, sentence the defendant under the Sex Offender's Act of 1968. *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996).

Applied in *People v. Lyons*, 196 Colo. 384, 585 P.2d 916 (1978).

18-1.3-907. Defendant to be advised of rights.

(1) Upon the commencement of proceedings, the court shall advise the defendant, orally and in writing, that:

- (a) The defendant is to be examined in accordance with the provisions of section 18-1.3-908;
- (b) The defendant has a right to counsel, and, if the defendant is indigent, counsel will be appointed to represent him or her;
- (c) The defendant has a right to remain silent;
- (d) An evidentiary hearing will be held pursuant to section 18-1.3-911, and the defendant and his or her counsel will be furnished with copies of all reports prepared for the court pursuant to sections 18-1.3-908 and 18-1.3-909 at least fourteen days prior to the evidentiary hearing.

(2) The written advisement of rights may be incorporated into the notice of commencement of proceedings.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2012:** (1)(d) amended, (SB 12-175), ch. 208, p. 867, § 114, effective July 1.

Editor's note: This section is similar to former § 16-13-206 as it existed prior to 2002.

ANNOTATION

Rights of defendant under due process.

Under Colorado's criminal procedure the invocation of the sex offenders act means the making of a new charge leading to criminal punishment. Due process requires that he be present with counsel, have an opportunity to be heard, be confronted with

witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. *Specht v. Patterson*, 386 U.S. 605 (1967) (decided under repealed § 39-19-1, C.R.S. 1963).

18-1.3-908. Psychiatric examination and report.

(1) (a) After advising the defendant of his or her rights, the court shall forthwith commit the defendant to the Colorado mental health institute at Pueblo, the university of Colorado psychiatric hospital, or the county jail.

(b) If committed to the Colorado mental health institute at Pueblo or the university of Colorado psychiatric hospital, the defendant shall be examined by two psychiatrists of the receiving institution.

(c) If committed to the county jail, the defendant shall be examined by two psychiatrists appointed by the court.

(2) (a) The examining psychiatrists shall make independent written reports to the court which shall contain the opinion of the psychiatrist as to whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(b) The written reports shall also contain opinions concerning:

(I) Whether the defendant is mentally deficient;

(II) Whether the defendant could benefit from psychiatric treatment; and

(III) Whether the defendant could be adequately supervised on probation.

(3) The examinations shall be made and the reports filed with the court and the probation department within sixty-three days after the commencement of proceedings, and this time may not be enlarged by the court.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 867, § 115, effective July 1.

Editor's note: This section is similar to former § 16-13-207 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-908 is similar to § 16-13-207 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.

The requirements of this section are:
(1) That there should be a complete psychiatric examination; (2) that there should be a complete written report containing all facts and findings, together with recommendations as to whether the person was treatable under the provisions of the article; (3) and that the report contain a psychiatrist's opinion as to whether the person could be adequately supervised on probation. Ray v. People, 160 Colo. 173,

415 P.2d 328 (1966) (decided under repealed § 39-19-2, C.R.S. 1963).

Order for removal of a defendant to another state for psychiatric examination in connection with proceedings held solely in Colorado issued without statutory authority. People v. District Court, 195 Colo. 14, 575 P.2d 7 (1978).

Where trial court failed to meet certain deadlines contained in the statutes, the trial court could not, on its own motion, sentence the defendant under the Sex Offender's Act of 1968. People v. Wortham, 928 P.2d 771 (Colo. App. 1996).

Applied in People v. White, 656 P.2d 690 (Colo. 1983).

18-1.3-909. Report of probation department.

(1) Upon the commencement of proceedings under this part 9, the court shall order an investigation and report to be made by the probation officer similar to the presentence report provided for in section 16-11-102, C.R.S.

(2) The report shall be filed with the court within seventy-seven days after the commencement of proceedings, and this time may not be enlarged by the court.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1. **L. 2012:** (2) amended, SB 12-175), ch. 208, p. 867, § 116, effective July 1.

Editor's note: This section is similar to former § 16-13-208 as it existed prior to 2002.

ANNOTATION

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983) (decided prior to 2002 relocation of § 16-13-208).

18-1.3-910. Termination of proceedings.

After reviewing the reports of the psychiatrists and the probation officer, the court may terminate proceedings under this part 9 and proceed with sentencing as otherwise provided by law.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-209 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-910 is similar to § 16-13-209 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.

Sentencing alternative does not involve a constitutional right. From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrist's and probation officer's reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

There is no constitutional or statutory right to be sentenced under the sex offenders act. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Termination of proceedings did not violate legislative intent. Where the court did not continue with proceedings under the sex offenders act, including the holding of a hearing, legislative intent was not violated. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

The provisions of this act vest the trial court with discretion to commit a defendant under an alternate sentence. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

Imposition of an indeterminate sentence under the act is totally within the discretion

of the trial court. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Finding not requiring sentencing under act. A finding by the court "that the defendant, if at large, constitutes a threat of

bodily harm to members of the public" does not require a person to be sentenced under the act if the court makes such a finding. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

18-1.3-911. Evidentiary hearing.

(1) (a) The court shall set a hearing date at least fourteen days and no more than twenty-eight days after service upon the defendant and his or her counsel of the reports required by sections 18-1.3-908 and 18-1.3-909.

(b) The court may, in its discretion, upon the motion of the defendant, continue the hearing an additional twenty-one days.

(2) (a) The court shall, upon motion of the district attorney or the defendant, subpoena all witnesses required by the moving party in accordance with the Colorado rules of criminal procedure.

(b) The district attorney shall serve upon the defendant and his or her counsel a list of all witnesses to be called by the district attorney at least fourteen days before the evidentiary hearing.

(3) In the evidentiary hearing, the court shall receive evidence bearing on the issue of whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(4) In the evidentiary hearing, the following procedure shall govern:

(a) The district attorney may call and examine witnesses, and the defendant shall be allowed to cross-examine those witnesses.

(b) The defendant may call and examine witnesses, and the district attorney shall be allowed to cross-examine those witnesses.

(c) The defendant may call and cross-examine as adverse witnesses the psychiatrists and probation officers who have filed reports pursuant to sections 18-1.3-908 and 18-1.3-909.

(5) The reports of the psychiatrists and probation officers filed with the court pursuant to sections 18-1.3-908 and 18-1.3-909 may be received into evidence.

(6) Except as otherwise provided in this section, the laws of this state concerning evidence in criminal trials shall govern in the evidentiary hearing.

Source: L. 2002: Entire article added with relocations, p. 1433, § 2, effective October 1. **L. 2012:** (1) and (2)(b) amended, (SB 12-175), ch. 208, p. 867, § 117, effective July 1.

Editor's note: This section is similar to former § 16-13-210 as it existed prior to 2002.

Cross references: For subpoenas to compel attendance of witnesses, see Crim. P. 17.

ANNOTATION

Annotator's note. Since § 18-1.3-911 is similar to § 16-13-210 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-10, C.R.S. 1963 (1969 Supp.), and §§ 39-19-1 to 39-19-10, C.R.S. 1963, and to §§ 39-19-1 to 39-19-10, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Commitment proceedings, whether denominated civil or criminal, are subject to the equal protection clause of the fourteenth amendment and to the due process clause. *Specht v. Patterson*, 386 U.S. 605 (1967).

Defendant entitled to all safeguards of fair trial. A proceeding under the sex offenders act is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. A defendant is entitled to a full judicial hearing before the magnified sentence is imposed and to the full panoply of relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair

trial, including notice, that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. *Specht v. Patterson*, 386 U.S. 605 (1967); *People v. Harper*, 796 P.2d 4 (Colo. App. 1989).

A psychiatric report is not binding on the trial court, and was not intended to limit or restrict the trial court in the exercise of its judgment relating to sentencing of sex offenders. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961).

The trial court should consider all material matter before it from probation reports and other sources which will aid in the formation of a proper opinion. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961); *Ray v. People*, 160 Colo. 173, 415 P.2d 328 (1966).

This act does not purport to make the findings or opinion of the psychiatrist binding or controlling on the court. It is merely an aid to the court. *Trueblood v. Tinsley*, 316 F.2d 783 (10th Cir. 1963).

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983).

18-1.3-912. Findings of fact and conclusions of law.

(1) After the evidentiary hearing, the court shall, within seven days, make oral or written findings of fact and conclusions of law.

(2) If the court finds beyond a reasonable doubt that the defendant, if at large, constitutes a threat of bodily harm to members of the public, the court shall commit the defendant pursuant to section 18-1.3-904.

(3) If the court does not find as provided in subsection (2) of this section, it shall terminate proceedings under this part 9 and proceed with sentencing as otherwise provided by law.

(4) If the findings and conclusions are oral, they shall be reduced to writing and filed within fourteen days, and the defendant shall not be committed to the custody of the department pursuant to section 18-1.3-904 until the findings and conclusions are filed.

Source: L. 2002: Entire article added with relocations, p. 1433, § 2, effective October 1. **L. 2012:** (1) and (4) amended, (SB 12-175), ch. 208, p. 868, § 118, effective July 1.

Editor's note: This section is similar to former § 16-13-211 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-912 is similar to § 16-13-211 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-1, C.R.S. 1963, and § 39-19-1, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality of classification and findings. Where classification of sex offenders under § 16-13-203 is based upon reasonable and natural distinctions to accomplish a legitimate purpose under the

police power, and where the trial court makes a finding of fact to determine whether a defendant comes within the classification, such findings and classification do not offend against equal protection principles of the constitution. *Vanderhoof v. People*, 152 Colo. 147, 380 P.2d 903 (1963).

Power to sentence vested in court. The court is vested with power, after the psychiatric examination has been made and the report thereof filed, to determine whether sentence should be imposed under

this part 2. Trueblood v. Tinsley, 316 F.2d 783 (10th Cir. 1963).

The trial court is the one imposing sentence and not the psychiatrist. After being apprised of the information it is the trial court which finally makes the determination whether a person, if at large, would constitute a threat of bodily harm to a member of the public. Ray v. People, 160 Colo. 173, 415 P.2d 328 (1966).

Section limits discretion of court. The trial court is empowered only to impose sentence under and in accord with the statute. In so doing the court performs a ministerial function with discretion confined to the limits permitted by this section. Trueblood v. Tinsley, 148 Colo. 503, 366 P.2d 655 (1961).

Proceeding requires new finding of fact. This section does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under this act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offense charged. Specht v. Patterson, 386 U.S. 605 (1967).

And due process requires that there be findings adequate to make meaningful any appeal that is allowed. Specht v. Patterson, 386 U.S. 605 (1967).

Procedure did not abuse trial court's discretion. Jordan v. People, 161 Colo. 54, 419 P.2d 656 (1966).

Finding of threat to public not automatic right to commitment. The effect the general assembly has given to a finding of a threat to the public under subsection (2) is not an automatic right to commitment. People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974).

A finding by the court "that the defendant, if at large, constitutes a threat of bodily harm to members of the public" does not require a person to be sentenced under the act if the court makes such a finding. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

The general assembly permits the court to terminate proceedings, irrespective of this finding. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

Defendant cannot be given sentence of commitment and sentence of imprisonment. Section 16-13-203, read together with subsection (2), established that the district courts could not give a defendant, who was found to constitute a threat of bodily harm to the public, a sentence of commitment and a sentence of imprisonment but have the option to either sentence to imprisonment or sentence to commitment. People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974).

Only if the court finds that the defendant is a threat to the public has the court the power to commit the defendant for an indeterminate term. People v. Sanchez, 184 Colo. 379, 520 P.2d 751 (1974).

If it elects to exercise this option, it must do so "in lieu of the sentence otherwise provided by law". People v. Sanchez, 184 Colo. 379, 520 P.2d 751 (1974).

Second court found defendant not threat to public contrary to first court's determination. Even though a district court, in prosecution under § 18-3-408, determined that the defendant constituted "a threat of bodily harm to members of the public" under subsection (2) and ordered him

committed pursuant to § 16-13-203, a different district court, in a subsequent prosecution of defendant under § 18-3-401, arising out of different acts by the defendant, was not required under the doctrine of collateral estoppel to accept the first court's determination but could find that defendant was not a threat to the public and could sentence him to imprisonment. People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974).

Applied in People v. White, 656 P.2d 690 (Colo. 1983).

18-1.3-913. Appeal.

The defendant may appeal an adverse finding made pursuant to section 18-1.3-912 in the same manner as is provided by law for other criminal appeals.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-212 as it existed prior to 2002.

18-1.3-914. Time allowed on sentence.

If the proceedings under this part 9 are terminated by the court, as provided in section 18-1.3-910 or 18-1.3-912 (3), the court shall deduct the time from the commencement of proceedings to the termination of proceedings from the minimum sentence of the defendant.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-213 as it existed prior to 2002.

18-1.3-915. Costs.

The costs of the maintenance of the prisoner during the pendency of proceedings under this part 9 and the costs of the psychiatric examinations and reports shall be paid by the state of Colorado.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-214 as it existed prior to 2002.

18-1.3-916. Diagnostic center as receiving center.

The diagnostic center, as defined in section 17-40-101 (1.5), C.R.S., shall be the receiving center for all persons committed pursuant to section 18-1.3-904.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-215 as it existed prior to 2002.

PART 10

LIFETIME SUPERVISION OF SEX OFFENDERS

Law reviews: For article, "Felony Sex Offender Sentencing", see 33 Colo. Law. 11 (Dec. 2004).

18-1.3-1001. Legislative declaration.

The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision. The general assembly also finds that keeping all sex offenders in lifetime incarceration imposes an unacceptably high cost in both state dollars and loss of human potential. The general assembly further finds that some sex offenders respond well to treatment and can function as safe, responsible, and contributing members of society, so long as they receive treatment and supervision. The general assembly therefore declares that a

program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health, and welfare of the state.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-801 as it existed prior to 2002.

ANNOTATION

Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA) adheres to the state constitution's single-subject title requirement and does not violate the constitution's clear expression requirement. The matters of sentencing, parole, and probation are all means of accomplishing SOLSA's single objective of lifetime supervision of convicted sex

offenders. All three mechanisms are forms of supervision because they restrict the liberty of convicted sex offenders and limit the danger these individuals pose to the public. SOLSA is not unconstitutional merely because the terms "sentencing", "parole", and "probation" are not mentioned in its title. *People v. Montgomery*, 2014 COA 166, 342 P.3d 593.

18-1.3-1002. Short title.

This part 10 shall be known and may be cited as the "Colorado Sex Offender Lifetime Supervision Act of 1998".

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-802 as it existed prior to 2002.

18-1.3-1003. Definitions.

As used in this part 10, unless the context otherwise requires:

- (1) "Department" means the department of corrections.

(2) "Management board" means the sex offender management board created in section 16-11.7-103, C.R.S.

(3) "Parole board" means the state board of parole created in section 17-2-201, C.R.S.

(4) "Sex offender" means a person who is convicted of or pleads guilty or nolo contendere to a sex offense.

(5) (a) "Sex offense" means any of the following offenses:

(I) (A) Sexual assault, as described in section 18-3-402; or

(B) Sexual assault in the first degree, as described in section 18-3-402 as it existed prior to July 1, 2000;

(II) Sexual assault in the second degree, as described in section 18-3-403 as it existed prior to July 1, 2000;

(III) (A) Felony unlawful sexual contact, as described in section 18-3-404 (2); or

(B) Felony sexual assault in the third degree, as described in section 18-3-404 (2) as it existed prior to July 1, 2000;

(IV) Sexual assault on a child, as described in section 18-3-405;

(V) Sexual assault on a child by one in a position of trust, as described in section 18-3-405.3;

(VI) Aggravated sexual assault on a client by a psychotherapist, as described in section 18-3-405.5 (1);

(VII) Enticement of a child, as described in section 18-3-305;

(VIII) Incest, as described in section 18-6-301;

(IX) Aggravated incest, as described in section 18-6-302;

(X) Engaging in commercial sexual activity with a child, as described in section 18-7-406; or patronizing a prostituted child, as described in section 18-7-406, as it existed prior to July 1, 2026;

(XI) Class 3 and class 4 felony internet luring of a child, in violation of section 18-3-306 (3);

(XII) Internet sexual exploitation of a child, in violation of section 18-3-405.4; or

(XIII) Class 3 felony unlawful sexual conduct by a peace officer, in violation of section 18-3-405.7.

(b) "Sex offense" also includes criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in paragraph (a) of this subsection (5) if such criminal attempt, conspiracy, or solicitation would constitute a class 2, 3, or 4 felony.

Source: **L. 2002:** Entire article added with relocations, p. 1434, § 2, effective October 1. **L. 2005:** (5)(b) amended, p. 765, § 26, effective June 1. **L. 2006:** (5)(a)(XI) and (5)(a)(XII) added, p. 2055, § 3, effective July 1. **L. 2012:** (4) amended, (HB 12-1310), ch. 268, p. 1402, § 23, effective June 7. **L. 2019:** (5)(a)(XI) and (5)(a)(XII) amended and (5)(a)(XIII) added, (HB 19-1250), ch. 287, p. 2664, § 4, effective July 1. **L. 2026:** (5)(a)(X) and (5)(a)(XI) amended, (SB 26-015), ch. 335, p. 2039, § 19, effective July 1.

Editor's note: This section is similar to former § 16-13-803 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Adult Parole in Colorado: An Overview", see 44 Colo. Law. 37 (May 2015).

Conviction of any offense listed in subsection (5) must result in a mandatory indeterminate sentence under § 18-1.3-

1004. People v. Harrison, 165 P.3d 859 (Colo. App. 2007).

Criminal attempt to commit a sexual assault is considered a sex offense if the attempt constitutes a class 2, 3, or 4 felony. People v. King, 151 P.3d 594 (Colo. App. 2006).

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) and HIV infection, and the infectious agent of the HIV infection was in fact transmitted, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(e) (I) Notwithstanding any other provision of law, the district court shall sentence a sex offender to the custody of the department for an indeterminate term as specified in subparagraph (II) of this paragraph (e) if the sex offender:

(A) Committed a class 2, class 3, or class 4 sex offense in violation of section 18-3-402, 18-3-405, or 18-3-405.3 when the act includes sexual intrusion as defined in section 18-3-401 (5) or sexual penetration as defined in section 18-3-401 (6);

(B) Committed the act against a child who was under twelve years of age at the time of the offense; and

(C) Was at least eighteen years of age and at least ten years older than the child.

(II) The district court shall sentence a sex offender to the department of corrections for an indeterminate term of incarceration of:

(A) At least ten to sixteen years for a class 4 felony to a maximum of the person's natural life, as provided in this subsection (1), if he or she committed a crime as described in subparagraph (I) of this paragraph (e);

(B) At least eighteen to thirty-two years for a class 3 felony to a maximum of the person's natural life, as provided in this subsection (1), if he or she committed a crime as described in subparagraph (I) of this paragraph (e); and

(C) At least twenty-four to forty-eight years for a class 2 felony, to a maximum of the person's natural life, as provided in this subsection (1), if he or she committed a crime as described in subparagraph (I) of this paragraph (e).

(III) If the defendant is placed on parole, the parole board shall order the defendant to wear electronic monitoring for the duration of his or her period of parole.

(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, or a sex offense requiring sentencing pursuant to paragraph (e) of subsection (1) of this section, 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) Repealed.

(5) (a) Any sex offender sentenced pursuant to subsection (1) 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. **L. 2012:** (4) repealed and (5)(a) amended, (HB 12-1310), ch. 268, pp. 1397, 1402, § 14, 24, effective June 7. **L. 2014:** (1)(e) added and (2)(a) amended, (HB 14-1260), ch. 345, p. 1538, § 2, effective July 1. **L. 2016:** (1)(d) amended, (SB 16-146), ch. 230, p. 915, § 8, effective July 1.

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

Cross references: For the legislative declaration in HB 14-1260, see section 1 of chapter 345, Session Laws of Colorado 2014.

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. Streaan*, 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. Streaan*, 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).

The enhanced sentencing requirements of subsection (1)(b) apply to both defined and per se crimes of violence. *Chavez v. People*, 2015 CO 62, 359 P.3d 1040.

A defendant who is subject to § 18-1.3-406 (1)(b) because he or she committed a crime of violence and a sex offense under the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), is not eligible to have his or her sentence of an indeterminate term of incarceration modified to probation under § 18-1.3-406 (1)(a). *People v. Al-Turki*, 2017 COA 39, 454 P.3d 261, *aff'd* by an equally divided court, 2019 CO 77, 449 P.3d 373.

Subsection (5)(a) of this section does not create an exception to the general rule found in § 18-1-408 (3) that a court must impose concurrent sentences for counts based on identical evidence. *People v. Torrez*, 2013 COA 37M, 316 P.3d 25.

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).

When a defendant is convicted of a sex offense that is also a crime of violence, the defendant must be sentenced to an indeterminate sentence of incarceration with a minimum term in the enhanced sentencing range set forth in subsection (1)(b). *Chavez v. People*, 2015 CO 62, 359 P.3d 1040.

Discretionary indeterminate sentencing permits the court to sentence an offender to indeterminate term only if: (1) He or she is convicted of an economic sex crime and (2) an assessment of that offender determines that he or she is likely to commit a sexually violent predator (SVP) offense against a stranger or a groomed victim. *People v. Walker*, 321 P.3d 528 (Colo. App. 2011), *aff'd* on other grounds, 2014 CO 6, 318 P.3d 479.

A mental health sex offender specific evaluation satisfies the assessment prong. The assessment was sufficient to determine defendant was likely to commit an SVP offense in the future against a groomed victim. The assessment's use of the term "significant risk to commit" was the same as "likely to commit". *People v. Walker*, 321 P.3d 528 (Colo. App. 2011), *aff'd* on other grounds, 2014 CO 6, 318 P.3d 479.

Indeterminate sentencing is discretionary and appropriate but only under certain circumstances, including the need for an SVP 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).

To calculate the maximum permissible minimum end of the indeterminate sentence for a defendant sentenced as a habitual sex offender against children, a trial court must triple the maximum of the presumptive range for the offense and then may double the resulting figure if the court finds aggravating circumstances under § 18-3-401 (6). *Isom v. People*, 2017 CO 110, 407 P.3d 559.

A defendant sentenced pursuant to § 18-3-412 (2) and subsection (1)(c) of this section must be sentenced to an indeterminate prison sentence with a lower term of three times the maximum of the presumptive range, unless the court finds extraordinary aggravating circumstances under § 18-1.3-401, then the lower term can be up to six times the maximum of the presumptive range. *People v. Isom*, 2015 COA 89, 410 P.3d 561, *aff'd*, 2017 CO 110, 407 P.3d 559.

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).

SOLSA 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 SOLSA 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 SVP 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. Oglethorpe, 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).

Court not required to impose consecutive sentences pursuant to subsection (5)(a). The two crimes did not arise out of the same incident because the communication between undercover officer posing as mother and defendant took place over a period of 10 days. People v. Douglas, 2012 COA 57, 296 P.3d 234.

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).

The period of supervision that a sex offender spends under an unsuccessful deferred judgment does not count toward the offender's probation sentence. People v. Anderson, 2015 COA 12, 348 P.3d 491.

Persons sentenced under SOLSA are not held to the same standard set forth by the supreme court in Allman v. People, 2019 CO 78, 451 P.3d 826, that a court may not sentence a defendant to both prison and probation in a multicount case. Here, because the sentencing of defendant was based on SOLSA, it was proper to sentence defendant to prison with consecutive probation. People v. Ehlebracht, 2020 COA 132, 480 P.3d 727.

Although the general sentencing statutes reflect the legislature's disapproval of consecutive prison-probation sentences, SOLSA reflects the legislature's approval of such sentencing in cases including a sentence for a non-sex offense and a sentence for a sex offense. Therefore, the Allman sentencing prohibition for consecutive prison-probation sentences does not apply in cases where a defendant receives a prison sentence for a non-sex offense and a consecutive probation sentence for sex offender intensive supervision probation. People v. Manaois, 2021 CO 49, 488 P.3d 1099.

The Allman sentencing prohibitions do not apply when sentencing a defendant in a multi-count case that involves a non-sex offense and a sex-related offense (as opposed to a sex offense, as was the case in People v. Manaois annotated above). So long as the probation portion of the prison-probation sentence in the scenario falls within the confines of SOLSA, Allman's sentencing restriction is inapplicable. People v. Keen, 2021 CO 50, 488 P.3d 1127.

Nor do the Allman sentencing prohibitions apply when a defendant receives a prison sentence for a sex-related offense and a consecutive sex offender intensive supervision probation sex offense. *People v. Lowe*, 2021 CO 51, 488 P.3d 1122.

Nor when a defendant receives a prison sentence for a non-sex offense and a consecutive probation sentence for an offense that does not qualify as a "sex offense" but that nevertheless falls within SOLSA's scope and requires participation in sex offender intensive supervision probation. *People v. Coleman*, 2021 CO 52, 488 P.3d 1086; *People v. Rainey*, 2021 CO 53, 488 P.3d 1081.

Plain language of SOLSA does not prohibit consideration of factors or circumstances beyond the three enumerated in § 18-1.3-1006 (1)(a), and permits a parole board to consider additional factors, such as maturity and rehabilitation, when determining whether to parole a sex offender. SOLSA does not require parole boards to consider demonstrated maturity, although it is permitted. However, SOLSA's three enumerated factors require parole boards to consider rehabilitation. *Godinez v. Williams*, 2024 CO 14, 544 P.3d 1233.

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

18-1.3-1005. Parole - intensive supervision program.

(1) The department shall establish an intensive supervision parole program for sex offenders sentenced to incarceration and subsequently released on parole pursuant to this part 10. In addition, the parole board may require a person, as a condition of parole, to participate in the intensive supervision parole program established pursuant to this section if the person is convicted of:

- (a) Indecent exposure, as described in section 18-7-302;
- (b) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in section 18-1.3-1003 (5)(a), which attempt, conspiracy, or solicitation would constitute a class 5 felony; or
- (c) Any of the offenses specified in section 16-22-102 (9)(j), (9)(k), (9)(l), (9)(n), (9)(o), (9)(p), (9)(q), (9)(r), or (9)(s), C.R.S.

(1.5) In addition to the persons specified in subsection (1) of this section, the parole board shall require, as a condition of parole, any person convicted of felony failure to register as a sex offender, as described in section 18-3-412.5, who is sentenced to incarceration and subsequently released on parole, to participate in the intensive supervision parole program established pursuant to this section.

(2) The department shall require that sex offenders and any other persons in the intensive supervision parole program established pursuant to this section receive the highest level of supervision that is provided to parolees. The intensive supervision parole program may include, but is not limited to, severely restricted activities, daily contact between the sex offender or other person and the community parole officer, monitored curfew, home visitation, employment visitation and monitoring, drug and alcohol screening, treatment referrals and monitoring, including physiological monitoring, and payment of restitution. In addition, the intensive supervision parole program shall be designed to minimize the risk to the public to the greatest extent possible.

(3) The executive director of the department shall establish and enforce standards and criteria for administration of the intensive supervision parole program created pursuant to this section.

Source: L. 2002: Entire article added with relocations, p. 1438, § 2, effective October 1. **L. 2008:** (2) amended, p. 659, § 13, effective April 25. **L. 2012:** (1)(c) amended, (HB 12-1310), ch. 268, p. 1402, § 25, effective June 7.

Editor's note: This section is similar to former § 16-13-805 as it existed prior to 2002.

18-1.3-1006. Release from incarceration - parole - conditions.

(1) (a) On completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited to the sex offender pursuant to section 17-22.5-405, C.R.S., the parole board shall schedule a hearing to determine whether the sex offender may be released on parole. In determining whether to release the sex offender on parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if released under appropriate treatment and monitoring requirements and whether there is a strong and reasonable probability that the person will not thereafter violate the law. The department shall make recommendations to the parole board concerning whether the sex offender should be released on parole and the level of treatment and monitoring that should be imposed as a condition of parole. The recommendation shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) If a sex offender is released on parole pursuant to this section, the sex offender's sentence to incarceration shall continue and shall not be deemed discharged until such time as the parole board may discharge the sex offender from parole pursuant to subsection (3) of this section. The period of parole for any sex offender convicted of a class 4 felony shall be an indeterminate term

of at least ten years and a maximum of the remainder of the sex offender's natural life. The period of parole for any sex offender convicted of a class 2 or 3 felony shall be an indeterminate term of at least twenty years and a maximum of the remainder of the sex offender's natural life.

(c) If the parole board does not release the sex offender on parole pursuant to paragraph (a) of this subsection (1), the parole board shall review such denial pursuant to the time periods set forth in section 17-2-201 (4)(a), C.R.S. At each review, the department shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be released on parole.

(2) (a) As a condition of release on parole pursuant to this section, a sex offender shall participate in the intensive supervision parole program created by the department pursuant to section 18-1.3-1005. Participation in the intensive supervision parole program shall continue until the sex offender can demonstrate that he or she has successfully progressed in treatment and would not pose an undue threat to the community if paroled to a lower level of supervision, at which time the sex offender's community parole officer may petition the parole board for a reduction in the sex offender's level of supervision. The sex offender's community parole officer and treatment provider shall make recommendations to the parole board concerning whether the sex offender has met the requirements specified in this subsection (2) such that the level of parole supervision should be reduced. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) Following reduction in a sex offender's level of parole supervision pursuant to paragraph (a) of this subsection (2), the sex offender's community parole officer may return the sex offender to the intensive supervision parole program if the community parole officer determines that an increased level of supervision is necessary to protect the public safety. The community parole officer shall notify the parole board as soon as possible after returning the sex offender to the intensive supervision parole program. To subsequently reduce the sex offender's level of supervision, the community parole officer may petition the parole board as provided in paragraph (a) of this subsection (2).

(3) (a) On completion of twenty years on parole for any sex offender convicted of a class 2 or 3 felony or on completion of ten years of parole for any sex offender convicted of a class 4 felony, the parole board shall schedule a hearing to determine whether the sex offender may be discharged from parole. In determining whether to discharge the sex offender from parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community without treatment or supervision. The sex offender's community parole officer and treatment provider shall make recommendations to the parole board concerning whether the sex offender has met the requirements specified in this subsection (3) such that the sex offender should be discharged from parole. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) If the parole board does not discharge the sex offender from parole pursuant to paragraph (a) of this subsection (3), the parole board shall review such denial at least once every three years until it determines that the sex offender meets the criteria for discharge specified in paragraph (a) of this subsection (3). At each review, the sex offender's community parole officer and treatment provider shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be discharged.

(4) In determining whether to release a sex offender on parole, reduce the level of supervision, or discharge a sex offender from parole pursuant to this section, the parole board shall consider the recommendations of the department and the sex offender's community parole officer and treatment provider. If the parole board chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

Source: **L. 2002:** Entire article added with relocations, p. 1438, § 2, effective October 1. **L. 2003:** (1)(a) amended, p. 975, § 11, effective April 17. **L. 2008:** (2), (3), and (4) amended, p. 660, §14, effective April 25. **L. 2015:** (1)(c) amended, (HB 15-1122), ch. 37, p. 91, § 6, effective March 20.

Editor's note: This section is similar to former § 16-13-806 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 15-1122, see section 1 of chapter 37, Session Laws of Colorado 2015.

ANNOTATION

Law reviews. For article, "Adult Parole in Colorado: An Overview", see 44 Colo. Law. 37 (May 2015).

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).

Plain language of SOLSA does not prohibit consideration of factors or circumstances beyond the three enumerated in subsection (1)(a), and permits a parole board to consider additional factors, such as maturity and rehabilitation, when determining whether to parole a sex offender. SOLSA does not

require parole boards to consider demonstrated maturity, although it is permitted. However, SOLSA's three

enumerated factors require parole boards to consider rehabilitation. *Godinez v. Williams*, 2024 CO 14, 544 P.3d 1233.

18-1.3-1007. Probation - intensive supervision program.

(1) (a) The judicial department shall establish an intensive supervision probation program for sex offenders sentenced to probation pursuant to this part 10. In addition, the court shall require a person, as a condition of probation, to participate in the intensive supervision probation program established pursuant to this section if the person is convicted of one of the following offenses and sentenced to probation:

(I) Indecent exposure, as described in section 18-7-302 (4);

(II) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in section 18-1.3-1003 (5)(a), which attempt, conspiracy, or solicitation would constitute a class 5 felony;

(III) Any of the offenses specified in section 16-22-102 (9)(j), (9)(k), (9)(l), (9)(n), (9)(o), (9)(p), (9)(q), (9)(r), (9)(s), or (9)(dd);

(IV) Any felony offense that involves unlawful sexual behavior or any felony offense with an underlying factual basis, as determined by the court, resulting in a conviction or plea of guilty or nolo contendere on or after July 1, 2001;

(V) Sexual assault in the third degree, in violation of section 18-3-404 (2), as it existed prior to July 1, 2000.

(b) The judicial department may establish the intensive supervision probation program in any judicial district or combination of judicial districts.

(1.5) In addition to the persons specified in subsection (1) of this section, the court may require any person convicted of felony failure to register as a sex offender, as described in section 18-3-412.5, and sentenced to probation to participate, as a condition of probation and until further order of the court, in the intensive supervision probation program established pursuant to this section.

(2) The judicial department shall require that sex offenders and any other persons participating in the intensive supervision probation program created pursuant to this section receive the highest level of supervision that is provided to probationers. The intensive supervision probation program may include but not be limited to severely restricted activities, daily contact between the sex offender or other person and the probation officer, monitored curfew, home visitation, employment visitation and monitoring, drug and alcohol screening,

treatment referrals and monitoring, including physiological monitoring, and payment of restitution. In addition, the intensive supervision probation program shall be designed to minimize the risk to the public to the greatest extent possible.

(3) The judicial department shall establish and enforce standards and criteria for administration of the intensive supervision probation program created pursuant to this section.

(4) For the purposes of this section, "convicted" means having entered a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a plea of no contest, accepted by the court, or having received a verdict of guilty by a judge or jury.

Source: **L. 2002:** (1.5) amended, p. 1184, § 17, effective July 1; entire article added with relocations, p. 1440, § 2, effective October 1. **L. 2011:** (1.5) amended, (HB 11-1278), ch. 224, p. 965, § 9, effective May 27. **L. 2012:** (1)(a)(III) amended, (HB 12-1310), ch. 268, p. 1402, § 26, effective June 7. **L. 2019:** (1)(a)(III) amended, (HB 19-1250), ch. 287, p. 2664, § 5, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-807 as it existed prior to 2002.

(2) Subsection (1.5) was numbered as § 16-13-807 (1.5) in SB 02-010 (see L. 2002, p. 1184). That provision was harmonized with and relocated to subsection (1.5) of this section as it appears in HB 02-1046.

ANNOTATION

This section and § 18-1.3-1008 allow the court to exercise its discretion in determining whether and on what conditions a sex offender may be released from sex offender intensified supervision probation, so long as it takes steps to minimize risk to the public. People v. Valenzuela, 98 P.3d 951 (Colo. App. 2004).

Trial court had authority to direct that defendant's sex offender intensive supervision program would commence consecutively at the end of his incarceration on another conviction.

People v. Trujillo, 261 P.3d 485 (Colo. App. 2010).

The court's order restricting defendant's access to the internet and social media as a part of the defendant's sentence to sex offender intensive supervision probation was reasonably related to the defendant's rehabilitation and the purposes of probation. In determining whether the conditions are reasonably related to the defendant's rehabilitation and purposes of probation, the court must consider (1) whether the

conditions are reasonably related to the underlying offense; (2) whether the conditions are punitive to the point of being unrelated to rehabilitation; (3) whether the conditions are unduly severe and restrictive; (4) whether the defendant may petition the court to lift the conditions temporarily when necessary; and (5) whether less restrictive means are available. Since the defendant's victim was a child, it was reasonable to limit access to the internet and social media since those mediums provide easy means to contact other children. The defendant has the opportunity to earn access to those mediums during the probation sentence. *People v. Landis*, 2021 COA 92, 497 P.3d 39.

Imposition of a broad probation condition that is continuous, all-encompassing monitoring of all electronic media surpasses "reasonable grounds to search" based on a "reasonable suspicion". The reasonable suspicion standard does not contemplate unfettered, continuous searching of all of a probationer's property, electronic or otherwise. Additionally, the probation condition must be the least restrictive means available to accomplish the probation's legitimate purpose. Because the district court failed to consider other, less restrictive alternatives, its order was reversed. *People v. Silvanic*, 2023 COA 16, 529 P.3d 1240.

18-1.3-1008. Probation - conditions - release.

(1) If the court sentences a sex offender to probation, in addition to any conditions imposed pursuant to section 18-1.3-204, the court shall require as a condition of probation that the sex offender participate until further order of the court in the intensive supervision probation program created pursuant to section 18-1.3-1007.

(1.5) If the court as a condition of probation sentences a sex offender to a residential community corrections program, following completion of the minimum period of sentence specified by the court, the community corrections program shall notify the judicial department when it determines that the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community while continuing on intensive supervision probation. The community corrections program shall base its determination on the criteria established by the management board pursuant to section 18-1.3-1009. The judicial department shall file the recommendations of the community corrections program with the court. Upon order of the court, the sex offender shall be released from the community corrections program, and the court shall order the sex offender, as a condition of probation, to participate in the intensive supervision program created in section 18-1.3-1007. The sex offender shall participate in such program until further order of the court.

(2) On completion of twenty years of probation for any sex offender convicted of a class 2 or 3 felony or on completion of ten years of probation for any sex offender convicted of a class 4 felony, the court shall schedule a review hearing to determine whether the sex offender should be

discharged from probation. In making its determination, the court shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community without treatment or supervision. The sex offender's probation officer and treatment provider shall make recommendations to the court concerning whether the sex offender has met the requirements of this section such that he or she should be discharged from probation.

(3) (a) In determining whether to discharge a sex offender from probation pursuant to this section, the court shall consider the recommendations of the sex offender's probation officer and treatment provider. The recommendations of the probation officer and the treatment provider shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the court chooses not to follow the recommendations made, the court shall make findings on the record in support of its decision.

(b) If the court does not discharge the sex offender from probation pursuant to paragraph (a) of this subsection (3), the court shall review such denial at least once every three years until it determines that the sex offender meets the criteria for discharge as specified in paragraph (a) of this subsection (3). At each review, the sex offender's probation officer and treatment provider shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be discharged.

Source: L. 2002: Entire article added with relocations, p. 1441, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-808 as it existed prior to 2002.

ANNOTATION

A defendant's removal from sex offender intensified supervision probation is not dependent upon completion of a treatment program. People v. Valenzuela, 98 P.3d 951 (Colo. App. 2004).

The court has no discretion to terminate a sex offender's indeterminate probation prior to the offender's completion of the statutory minimum

period of probation. People v. Dinkel, 2013 COA 19, 321 P.3d 569.

The period of supervision that a sex offender spends under an unsuccessful deferred judgment does not count toward the offender's probation sentence. Only the time served on probation counts toward a sex offender's eligibility for discharge of his or her probation sentence. People v. Anderson, 2015 COA 12, 348 P.3d 491.

18-1.3-1009. Criteria for release from incarceration, reduction in supervision, and discharge.

(1) On or before July 1, 1999, the management board, in collaboration with the department of corrections, the judicial department, and the parole board, shall establish:

(a) The criteria by and the manner in which a sex offender may demonstrate that he or she would not pose an undue threat to the community if released on parole or to a lower level of supervision while on parole or probation or if discharged from parole or probation. The court and the parole board may use the criteria to assist in making decisions concerning release of a sex offender, reduction of the level of supervision for a sex offender, and discharge of a sex offender.

(b) The methods of determining whether a sex offender has successfully progressed in treatment; and

(c) Standards for community entities that provide supervision and treatment specifically designed for sex offenders who have developmental disabilities. At a minimum, the standards shall determine whether an entity would provide adequate support and supervision to minimize any threat that the sex offender may pose to the community.

Source: L. 2002: Entire article added with relocations, p. 1442, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-809 as it existed prior to 2002.

18-1.3-1010. Arrest of parolee or probationer - revocation.

(1) (a) A sex offender paroled pursuant to section 18-1.3-1006 is subject to arrest and revocation of parole as provided in sections 17-2-103 and 17-2-103.5, C.R.S. At any revocation proceeding, the sex offender's community parole officer and the treatment provider shall submit written recommendations concerning the level of treatment and monitoring that should be imposed as a condition of parole if parole is not revoked or whether the sex offender poses a sufficient threat to the community that parole should be revoked. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the parole board revokes the sex offender's parole, the sex offender shall continue to be subject to the provisions of this part 10.

(b) At a revocation hearing held pursuant to this subsection (1), the parole board shall consider the recommendations of the community parole officer and the treatment provider, in

addition to evidence concerning any of the grounds for revocation of parole specified in sections 17-2-103 and 17-2-103.5, C.R.S. If the parole board chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

(2) (a) A sex offender sentenced to probation pursuant to section 18-1.3-1004 (2) is subject to arrest and revocation of probation as provided in sections 16-11-205 and 16-11-206, C.R.S. At any revocation proceeding, the sex offender's probation officer and the sex offender's treatment provider shall submit recommendations concerning the level of treatment and monitoring that should be imposed as a condition of probation if probation is not revoked or whether the sex offender poses a sufficient threat to the community that probation should be revoked. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the court revokes the sex offender's probation, the court shall sentence the sex offender as provided in section 18-1.3-1004, and the sex offender shall be subject to the provisions of this part 10.

(b) At a revocation hearing held pursuant to this subsection (2), the court shall consider the recommendations of the probation officer and the treatment provider, in addition to evidence concerning any of the grounds for revocation of probation specified in sections 16-11-205 and 16-11-206, C.R.S. If the court chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

Source: L. 2002: Entire article added with relocations, p. 1442, § 2, effective October 1. **L. 2008:** (1) amended, p. 661, § 15, effective April 25.

Editor's note: This section is similar to former § 16-13-810 as it existed prior to 2002.

ANNOTATION

District court revoked defendant's probation without obtaining and considering treatment and monitoring recommendations pursuant to subsection

(2). The error was plain and substantial and thus requires reversal of the revocation of probation. *People v. Helms*, 2016 COA 90, 396 P.3d 1133.

18-1.3-1011. Annual report.

(1) Notwithstanding section 24-1-136 (11)(a)(I), on or before November 1, 2000, and on or before each November 1 thereafter, the department of corrections, the department of public safety, and the judicial department shall submit a report to the judiciary committees of the house

of representatives and the senate, or any successor committees, and to the joint budget committee of the general assembly specifying, at a minimum:

(a) The impact on the prison population, the parole population, and the probation population in the state due to the extended length of incarceration and supervision provided for in sections 18-1.3-1004, 18-1.3-1006, and 18-1.3-1008;

(b) The number of offenders placed in the intensive supervision parole program and the intensive supervision probation program and the length of supervision of offenders in said programs;

(c) The number of sex offenders sentenced pursuant to this part 10 who received parole release hearings and the number released on parole during the preceding twelve months, if any;

(d) The number of sex offenders sentenced pursuant to this part 10 who received parole or probation discharge hearings and the number discharged from parole or probation during the preceding twelve months, if any;

(e) The number of sex offenders sentenced pursuant to this part 10 who received parole or probation revocation hearings and the number whose parole or probation was revoked during the preceding twelve months, if any;

(f) A summary of the evaluation instruments developed by the management board and use of the evaluation instruments in evaluating sex offenders pursuant to this part 10;

(g) The availability of sex offender treatment providers throughout the state, including location of the treatment providers, the services provided, and the amount paid by offenders and by the state for the services provided, and the manner of regulation and review of the services provided by sex offender treatment providers;

(h) The average number of sex offenders sentenced pursuant to this part 10 that participated in phase I and phase II of the department's sex offender treatment and monitoring program during each month of the preceding twelve months;

(i) The number of sex offenders sentenced pursuant to this part 10 who were denied admission to treatment in phase I and phase II of the department's sex offender treatment and monitoring program for reasons other than length of remaining sentence during each month of the preceding twelve months;

(j) The number of sex offenders sentenced pursuant to this part 10 who were terminated from phase I and phase II of the department's sex offender treatment and monitoring program during the preceding twelve months and the reason for termination in each case;

(k) The average length of participation by sex offenders sentenced pursuant to this part 10 in phase I and phase II of the department's sex offender treatment and monitoring program during the preceding twelve months;

(l) The number of sex offenders sentenced pursuant to this part 10 who were denied readmission to phase I and phase II of the department's sex offender treatment and monitoring program after having previously been terminated from the program during the preceding twelve months;

(m) The number of sex offenders sentenced pursuant to this part 10 who were recommended by the department's sex offender treatment and monitoring program to the parole board for release on parole during the preceding twelve months and whether the recommendation was followed in each case; and

(n) The number of sex offenders sentenced pursuant to this part 10 who were recommended by the department's sex offender treatment and monitoring program for placement in community corrections during the preceding twelve months and whether the recommendation was followed in each case.

Source: L. 2002: Entire article added with relocations, p. 1443, § 2, effective October 1. **L. 2007:** IP(1) and (1)(f) amended and (1)(h) to (1)(n) added, p. 1543, § 1, effective May 31. **L. 2017:** IP(1) amended, (SB 17-241), ch. 171, p. 624, § 6, effective April 28; IP(1) amended, (HB 17-1059), ch. 91, p. 278, § 3, effective August 9; IP(1) amended, (SB 17-031), ch. 92, p. 282, § 9, effective August 9.

Editor's note: This section is similar to former § 16-13-811 as it existed prior to 2002.

18-1.3-1012. Applicability of part.

The provisions of this part 10 shall apply to any person who commits a sex offense on or after November 1, 1998.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-812 as it existed prior to 2002.

PART 11

SPECIAL PROCEEDINGS - PRETRIAL MOTIONS IN CLASS 1 FELONY CASES ALLEGING THAT A DEFENDANT IS A MENTALLY RETARDED DEFENDANT

18-1.3-1101. Definitions.

As used in this part 11:

- (1) "Defendant" means any person charged with a class 1 felony.
- (2) "Mentally retarded defendant or defendant with an intellectual and developmental disability" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1. L. 2018: (2) amended, (SB 18-096), ch. 44, p. 469, § 2, effective August 8.

Editor's note: This section is similar to former § 16-9-401 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-092, see section 1 of chapter 44, Session Laws of Colorado 2018.

18-1.3-1102. Pretrial motion by defendant in class 1 felony case - determination whether defendant is mentally retarded or has an intellectual and developmental disability - procedure.

- (1) Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant or a defendant with an intellectual and developmental disability. The motion must be filed at least ninety-one days prior to trial.
- (2) The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding the motion no later than fourteen days prior to trial. At such hearing, the defendant must be permitted to present evidence with regard to the motion and the prosecution must be permitted to offer evidence in rebuttal. The defendant has

the burden of proof to show by clear and convincing evidence that he or she is mentally retarded or has an intellectual and developmental disability.

(3) The court shall enter specific findings of fact and conclusions of law regarding whether or not the defendant is a mentally retarded defendant or a defendant with an intellectual and developmental disability, as defined in section 18-1.3-1101.

Source: **L. 2002:** Entire article added with relocations, p. 1444, § 2, effective October 1. **L. 2012:** (1) and (2) amended, (SB 12-175), ch. 208, p. 868, § 119, effective July 1. **L. 2018:** Entire section amended, (SB 18-096), ch. 44, p. 469, § 3, effective August 8.

Editor's note: This section is similar to former § 16-9-402 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

ANNOTATION

The allocation by this section of the burden of proof to the defendant is constitutionally permissible. People v. Vasquez, 84 P.3d 1019 (Colo. 2004).

The clear and convincing standard of proof placed upon the defendant by this section is constitutionally adequate. People v. Vasquez, 84 P.3d 1019 (Colo. 2004).

18-1.3-1103. Mentally retarded defendant or defendant with an intellectual and developmental disability - death penalty not imposed.

A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant or a defendant with an intellectual and developmental disability pursuant to section 18-1.3-1102. If any person who is determined to be a mentally retarded defendant or a defendant with an intellectual and developmental disability is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

Source: **L. 2002:** Entire article added with relocations, p. 1444, § 2, effective October 1. **L. 2018:** Entire section amended, (SB 18-096), ch. 44, p. 470, § 4, effective August 8.

Editor's note: This section is similar to former § 16-9-403 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

18-1.3-1104. Evaluation and report.

(1) When the defendant files a motion alleging that the defendant is a mentally retarded defendant or a defendant with an intellectual and developmental disability, the court shall order one or more evaluations of the defendant with regard to such motion.

(2) In ordering an evaluation of the defendant pursuant to subsection (1) of this section, the court shall specify the place where the evaluation is to be conducted and the period of time allocated for the evaluation. In determining the place where the evaluation is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the evaluation requires designation of a different location. The court shall direct one or more psychologists who are recommended by the executive director of the department of health care policy and financing pursuant to section 25.5-10-239, C.R.S., or his or her designee, to evaluate the defendant. For good cause shown, upon motion of the prosecution or the defendant or upon the court's own motion, the court may order such further or other evaluation as it deems necessary. Nothing in this section shall abridge the right of the defendant to procure an evaluation as provided in section 18-1.3-1105.

(3) The defendant has a privilege against self-incrimination that may be invoked prior to or during the course of an evaluation pursuant to this section. A defendant's failure to cooperate with the evaluators or other personnel conducting the evaluation may be admissible in the defendant's hearing concerning mental retardation or the presence of an intellectual and developmental disability.

(4) To aid in the formation of an opinion as to mental retardation or the presence of an intellectual and developmental disability, it is permissible in the course of an evaluation conducted pursuant to this section to use statements made by the defendant and any other evidence, including but not limited to the circumstances surrounding the commission of the offense as well as the defendant's medical and social history, in evaluating the defendant.

(5) A written report of the evaluation shall be prepared in triplicate and delivered to the appropriate clerk of the court. The clerk shall furnish a copy of the report to both the prosecuting attorney and the counsel for the defendant.

- (6) The report of evaluation must include, but is not limited to:
 - (a) The name of each expert who evaluated the defendant;
 - (b) A description of the nature, content, extent, and results of the evaluation and any tests conducted; and
 - (c) Diagnosis and an opinion as to whether the defendant is mentally retarded or has an intellectual and developmental disability.
- (7) Nothing in this section shall be construed to preclude the application of section 16-8-109, C.R.S.

Source: **L. 2002:** Entire article added with relocations, p. 1445, § 2, effective October 1. **L. 2013:** (2) amended, (HB 13-1314), ch. 323, p. 1804, § 29, effective March 1, 2014. **L. 2018:** (1), (3), (4), IP(6), and (6)(c) amended, (SB 18-096), ch. 44, p. 470, § 5, effective August 8.

Editor's note: This section is similar to former § 16-9-404 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

18-1.3-1105. Evaluation at insistence of defendant.

(1) If the defendant wishes to be evaluated by an expert of the defendant's choice in mental retardation or intellectual and developmental disabilities in connection with the mental retardation or intellectual and developmental disability hearing pursuant to this part 11, the court, upon timely motion, shall order that the evaluator chosen by the defendant be given reasonable opportunity to conduct the evaluation.

(2) Whenever an expert is endorsed as a witness by the defendant, a copy of any report of an evaluation of the defendant shall be furnished to the prosecution within a reasonable time but not less than thirty-five days prior to the mental retardation or intellectual and developmental disability hearing.

Source: L. 2002: Entire article added with relocations, p. 1445, § 2, effective October 1. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 868, § 120, effective July 1. **L. 2018:** Entire section amended, (SB 18-096), ch. 44, p. 471, § 6, effective August 8.

Editor's note: This section is similar to former § 16-9-405 as it existed prior to 2002.

Cross references: For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

PART 12

SPECIAL PROCEEDINGS - SENTENCING IN CLASS 1 FELONIES

18-1.3-1201. Imposition of sentence in class 1 felonies - appellate review - applicability.

(1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense or unless the defendant has been determined to be a mentally retarded defendant or a defendant with an intellectual and developmental disability pursuant to part 11 of this article 1.3, in either of which cases, the defendant must be sentenced to life imprisonment. The trial judge shall conduct the hearing before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and must remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors must sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace each juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.

(a.5) and (a.7) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters

relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence, including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302 (6), C.R.S., which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. The jury shall be instructed that life imprisonment means imprisonment for life without the possibility of parole.

(c) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it unanimously finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(2.5) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and sentencing hearing.

(3) (a) The provisions of this subsection (3) shall apply only in a class 1 felony case in which the prosecuting attorney has filed a statement of intent to seek the death penalty pursuant to rule 32.1 (b) of the Colorado rules of criminal procedure.

(b) The prosecuting attorney shall provide the defendant with the following information and materials not later than twenty-one days after the prosecution files its written intention to seek the death penalty or within such other time frame as the supreme court may establish by rule; except that any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the prosecuting attorney intends to call as a witness at the sentencing hearing shall be provided to the defense as soon as practicable but not later than sixty-three days before trial:

(I) A list of all aggravating factors that are known to the prosecuting attorney at that time and that the prosecuting attorney intends to prove at the sentencing hearing;

(II) A list of all witnesses whom the prosecuting attorney may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(III) The written and recorded statements, including any notes of those statements, for each witness whom the prosecuting attorney may call at the sentencing hearing;

(IV) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(V) A list of books, papers, documents, photographs, or tangible objects that the prosecuting attorney may introduce at the sentencing hearing; and

(VI) All material or information that tends to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.

(b.5) Upon receipt of the information required to be disclosed by the defendant pursuant to paragraph (c) of this subsection (3), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(c) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:

(I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing; and

(III) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(IV) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

(c.5) (I) Any material subject to this subsection (3) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.

(II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (c.5) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(d) (I) Except as otherwise provided in subparagraph (II) of this paragraph (d), if the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (d) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(e) If the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

(f) There is a continuing duty on the part of the prosecuting attorney and the defendant to disclose the information and materials specified in this subsection (3). If, after complying with the duty to disclose the information and materials described in this subsection (3), either party discovers or obtains any additional information and materials that are subject to disclosure under this subsection (3), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.

(g) The trial court, upon a showing of extraordinary circumstances that could not have been foreseen and prevented, may grant an extension of time to comply with the requirements of this subsection (3).

(h) If it is brought to the attention of the court that either the prosecuting attorney or the defendant has failed to comply with the provisions of this subsection (3) or with an order issued pursuant to this subsection (3), the court may enter any order against such party that the court deems just under the circumstances, including but not limited to an order to permit the discovery or inspection of information and materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials not disclosed, or to impose sanctions against the offending party.

(4) For purposes of this section, mitigating factors shall be the following factors:

(a) The age of the defendant at the time of the crime; or

(b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or

(f) The emotional state of the defendant at the time the crime was committed; or

(g) The absence of any significant prior conviction; or

(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or

(i) The influence of drugs or alcohol; or

(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or

(k) The defendant is not a continuing threat to society; or

(l) Any other evidence which in the court's opinion bears on the question of mitigation.

(5) For purposes of this section, the following are aggravating factors:

(a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or

(b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while the person was engaged in the course of the performance of the person's official duties, and the defendant knew or reasonably should have known that the victim was a person engaged in the performance of the person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

(I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or

(II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or

(II.5) An emergency medical service provider, as defined in section 18-3-201 (1.3); or

(III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in

this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.

(IV) An elected state, county, or municipal official; or

(V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or

(d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or

(e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or

(f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon. As used in this paragraph (f), "explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives; or

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

(i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(l) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode; or

(m) The defendant intentionally killed a child who has not yet attained twelve years of age; or

(n) The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin; or

(o) The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States; or

(p) The defendant intentionally killed more than one person in more than one criminal episode; or

(q) The victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) If any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute for class 1 felonies, but severance of such provisions would, through operation of the remaining provisions of this section, maintain this section as a valid and operative death penalty statute for class 1 felonies, it is the intent of the general assembly that those remaining provisions are severable and are to have full force and effect.

(b) If any death sentence is imposed upon a defendant pursuant to the provisions of this section and, on appellate review including consideration pursuant to subsection (8) of this section, the imposition of such death sentence upon such defendant is held invalid for reasons other than unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, the case shall be remanded to the trial court to set a new sentencing hearing before a newly impaneled jury or, if the defendant pled guilty or waived the right to jury sentencing, before the trial judge; except that, if the prosecutor informs the trial court that, in the opinion of

the prosecutor, capital punishment would no longer be in the interest of justice, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment. If a death sentence imposed pursuant to this section is held invalid based on unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:

(a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or

(b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or

(c) If the supreme court finds the sentencing body's consideration of an aggravating factor was improper because the aggravating factor was not given a constitutionally narrow construction, determining whether, beyond a reasonable doubt, the sentencing body would have returned a verdict of death had the aggravating factor been properly narrowed; or

(d) Employing any other constitutionally permissible method of review.

(9) This section applies only to offenses charged prior to July 1, 2020.

Source: **L. 2002:** Entire article added with relocations, p. 1446, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1), (2), (3), and (7) amended and (2.5) and (8) added, p. 7, § 2, effective July 12. **L. 2003:** IP(5)(f) amended and (5)(p) added, p. 1443, § 1, effective April 29; (5)(q) added, p. 2163, § 5, effective July 1; (5)(c)(I) amended, p. 1614, § 10, effective August 6. **L. 2012:** IP(3)(b), IP(3)(c), and (3)(c.5)(I) amended, (SB 12-175), ch. 208, p. 868, § 121, effective July 1. **L. 2014:** IP(5) and IP(5)(c) amended and (5)(c)(II.5) added, (HB 14-1214), ch. 336, p. 1494, § 2, effective August 6. **L. 2018:** (5)(c)(II.5) amended, (HB 18-1375), ch. 274, p. 1701, § 23, effective May 29; (1)(a) amended, (SB 18-096), ch. 44, p. 471, § 7, effective August 8. **L. 2020:** (9) added, (SB 20-100), ch. 61, p. 211, § 12, effective March 23.

Editor's note: (1) This section is similar to former § 16-11-103 as it existed prior to 2002.

(2) Language of an Arizona statute requiring a judge instead of a jury to determine the presence or absence of certain enumerated circumstances for imposition of the death penalty,

which was similar to the language found in subsection (2) as it existed prior to July 12, 2002, was held unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002).

Cross references: (1) For provisions relating to the applicability of procedures in class 1 felony cases for crimes committed on or after July 1, 1988, and prior to September 20, 1991, see part 13 of this article 1.3.

(2) For the legislative declaration contained in the 2002 act amending subsections (1), (2), (3), and (7) and enacting subsections (2.5) and (8), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2003 act enacting subsection (5)(q), see section 1 of chapter 340, Session Laws of Colorado 2003. For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

ANNOTATION

I. General Consideration.

II. Evidence.

III. Sentencing and Punishment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For article, "The 'Biased but Unbiased Juror,' What Are the States' Legitimate Interests?", see 65 Den. U. L. Rev. 1 (1988). For comment, "The Process of Death: Reflections on Capital Punishment Issues in the Tenth Circuit Court of Appeals", see 66 Den. U. L. Rev. 563 (1989). For comment, "No More Tears: Anti-Sympathy Jury Instructions Attempt to Disallow Impulsive Emotion", see 66 Den. U. L. Rev. 645 (1989). For comment, "And Then There Were Three: Colorado's New Death Penalty Sentencing Statute", see 68 U. Colo. L. Rev. 189 (1997).

For comment, "Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing", see 73 U. Colo. L. Rev. 227 (2002). For article, "Race, Gender, Region and Death Sentencing in Colorado", see 77 U. Colo. L. Rev. 549 (2006). For article, "Death Eligibility in Colorado: Many are Called, Few are Chosen", see 84 U. Colo. L. Rev. 1069 (2013). For article, "Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century", see 92 Denv. U.L. Rev. 431 (2015). For article, "Effectuating Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial", see 93 Denv. L. Rev. 577 (2016). For article, "The 'Evil' Defendant and the 'Holdout' Juror: Unpacking the Myths of the Aurora Theater Shooting Case as We Ponder the Future of Capital Punishment in Colorado", see 93 Denv. L. Rev. 595 (2016). For article, "Lies, Damn Lies, and Anti-

Death Penalty Research", see 93 Denv. L. Rev. 635 (2016). For article, "The Truth Hurts: A Response to George Brauchler and Rich Orman", see 94 Denv. L. Rev. 363 (2017). For article, "'Finding' a Way to Complete the Ring of Capital Jury Sentencing", see 95 Denv. L. Rev. 674 (2018).

Annotator's note. Since § 18-1.3-1201 is similar to § 16-11-103 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed §§ 39-7-8 and 40-2-3, C.R.S. 1963, CSA, C. 48, §§ 32 and 482, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Former provisions of this section unconstitutional. People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978) (decided prior to 1979 amendment).

Three-judge panel for death penalty sentencing unconstitutional. A three-judge panel is required to engage in a three-step fact-finding process to determine if the defendant is eligible for the death penalty. The U.S. supreme court in Ring v. Arizona determined death penalty eligibility fact-finding belongs solely to the jury under the sixth amendment, thus Colorado's three-judge panel is unconstitutional. Woldt v. People, 64 P.3d 256 (Colo. 2003) (decided under law in effect prior to the 2002 amendment).

Section largely procedural. This section, allowing for a bifurcated trial when a first-degree murder verdict is returned, is, if not

wholly procedural, largely so. People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975).

The people may not seek the death penalty under pre-1988 statute, it was not revived when the 1988 amendment was found unconstitutional. People v. Aguayo, 840 P.2d 336 (Colo. 1992).

Defendant's right to waive jury trial. Subsection (1)(a), which governs the imposition of sentence in class 1 felonies, implies that a trial by jury may be waived. People v. Cisneros, 720 P.2d 982 (Colo. App. 1986).

A defendant has a common law right to waive a trial by jury, which right extends to first degree felonies. The exercise of such right is conditioned upon the consent of the prosecution. People v. Davis, 794 P.2d 159 (Colo. 1990).

No statute requires the district attorney to give notice of intent to seek the death penalty but sufficient notice must be given to satisfy the requirements of due process. People v. District Court, 825 P.2d 1000 (Colo. 1992).

The purpose of the sentencing inquiry is to reveal aggravation or mitigation of the offense for the guidance of the court in the imposition of sentence. Champion v. People, 124 Colo. 253, 236 P.2d 127 (1951); Hawkins v. People, 131 Colo. 281, 281 P.2d 156 (1955).

The only necessity for the taking of evidence after a plea of guilty is to enable the court to determine whether aggravating or mitigating circumstances are present to guide a court in exercising discretion as to

the minimum and maximum sentence to be imposed. *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

The purpose of this section relating to the taking of testimony on a plea of guilty when the court has discretion as to the penalty is to show aggravation or mitigation. *Stilley v. People*, 160 Colo. 329, 417 P.2d 494 (1966).

When court exercises its independent review of a death sentence under the public interest provision in subsection (6), it must determine whether the proceedings were fundamentally fair. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

Fundamental fairness dictates that appropriate questions on voir dire be asked of the jury concerning capital punishment. *People v. District Court*, 190 Colo. 342, 546 P.2d 1268 (1976).

"Age" means age in years. "Age" as used in the provisions of this section means age in years and not mental age, and that no person shall suffer the death penalty who, at the time of conviction, was under the age of 18 years. *Sullivan v. People*, 111 Colo. 205, 139 P.2d 876 (1943).

The term "convicted" means convicted upon trial. *People v. District Court*, 191 Colo. 558, 554 P.2d 1105 (1976).

The term "convicted" as used in this section, defining aggravating circumstances, means a judgment of conviction in the trial court, not a final determination of conviction after appeal. *People v. District Court*, 191 Colo. 558, 554 P.2d 1105 (1976).

Defendant should have been granted bifurcated trial. Where the effective date of this section was prior to the date of trial, and the defendant requested a bifurcated trial and preserved that request and his objections to the denial of the request at every possible moment throughout the trial, the defendant should have been granted a bifurcated trial. *People v. Loger*, 188 Colo. 291, 535 P.2d 210 (1975).

Applied in *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983); *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

II. EVIDENCE.

Any evidence relevant to punishment is admissible. Guilt and punishment are so definitely integrants of a verdict in a first degree murder case that courts should admit in evidence any material relevant to the question of punishment, i.e., matters in aggravation and mitigation, whether it applies to the issue of guilt or has relation only to the degree of culpability. *Jones v. People*, 155 Colo. 148, 393 P.2d 366 (1964).

Polygraph evidence is per se inadmissible in a criminal trial in Colorado. Thus, the defendant's right to present all relevant mitigating evidence does not include the right to present evidence concerning polygraph results. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

However, the mere reference to such testing does not require a mistrial. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App.

2002); *People v. Kerber*, 64 P.3d 930 (Colo. App. 2002).

Admissibility before the court. Following the entry of a plea of guilty, the evidence proper for the consideration of the court is not limited to that which would be admissible upon a trial following a plea of not guilty. *Champion v. People*, 124 Colo. 253, 236 P.2d 127 (1951).

Before a jury. Any and all evidence relating to the series of events of which the act charged in the information is a part was proper for the consideration of the jury. Anything admissible in a trial in which the accused enters a plea of not guilty is proper for the consideration of the jury which is called upon to fix a penalty if the evidence bears upon circumstances showing aggravation or mitigation of the offense. *Monge v. People*, 158 Colo. 224, 406 P.2d 674 (1965).

Duty of jury to weigh all evidence in choosing mode of punishment. Where a homicide is committed in the perpetration of a robbery, proof of specific intent is not a prerequisite to a conviction of first degree murder, but in the exercise of its discretion in choosing between the two modes of punishment for that crime prescribed by this section, it is the duty of the jury to weigh and consider all the evidence in the case. *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

Subjects pertinent to aggravation or mitigation of offense. The character of the defendant, his habits, his social standing, his intelligence, and his motive for the commission of the offense are all subjects

pertinent to the inquiry concerning aggravation or mitigation of the offense. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

Aggravation is defined to be any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

Although subsection (6) provides that a previous felony conviction is an aggravating factor, there is no statutory provision expressly permitting the admission of underlying factual circumstances of prior felonies. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Evidence concerning the impact of the defendant's prior crimes on the victims of those crimes is not admissible, because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. The facts of the prior crimes, however, may be properly admitted. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

The trial court inappropriately allowed the jury to consider during steps one

through three of the process evidence introduced by the prosecution for the purpose of rebutting mitigating factors that the defense had not raised. The error was harmless, however, due to the limiting instructions given the jury by the trial court. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

However, the jury may consider any aggravating evidence submitted by the prosecution, regardless of whether it is related to the rebuttal of mitigating factors, after the jury has found the defendant, under steps one through three, to be eligible for the death penalty. The admissibility of evidence rebutting mitigation at the point at which the jury determines whether to select the defendant to receive the death penalty is constrained only by the standard evidentiary principles concerning the relevance of the evidence and the potential for the evidence to inflame the passion or prejudice of the jury. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

The standard for determining the sufficiency of the evidence of death penalty aggravators is the same as that for determining the sufficiency of the evidence of guilt: Whether the relevant evidence, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable juror that the aggravating factor has been proven. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

The prosecution introduced sufficient evidence to convince the jury beyond a reasonable doubt that the defendant

killed his victims to avoid arrest, including evidence that the defendant did not use a disguise in carrying out the robbery and murders and that the defendant had previously worked with the victims and therefore knew they could identify him. The fact that the defendant may have had additional motives for the murders does not prevent application of the "killing to avoid arrest" aggravator. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

Former provisions of this section prohibited death penalty where conviction was based entirely on circumstantial evidence. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970).

It required direct evidence on any element of crime. This section as it read prior to the 1974 amendment could reasonably have been read to mean that any direct evidence on any element of the crime was sufficient to submit the question of life imprisonment or death to the jury. *Scheer v. Patterson*, 429 F.2d 907 (10th Cir. 1970).

For cases discussing circumstantial evidence, see *Covington v. People*, 36 Colo. 183, 85 P. 832 (1906); *Ives v. People*, 86 Colo. 141, 278 P. 792 (1929); *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930); *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950); *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961); *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961); *Mitchell v. People*, 173 Colo. 217, 476 P.2d 1000 (1970).

Introduction of confession was nonprejudicial. Under this section after a plea of guilty to murder, a hearing is held

solely for the purpose of determining whether the accused is guilty of murder in the first or second degree. Petitioner was found guilty of murder in the second degree, despite the introduction of his confession. He thus received the most favorable possible verdict under the statute and the introduction of the confession into evidence was nonprejudicial. *Melton v. Patterson*, 313 F. Supp. 1287 (D. Colo. 1970), *aff'd*, 445 F.2d 410 (10th Cir. 1971).

III. SENTENCING AND PUNISHMENT.

Unconstitutionality. Imposition of death penalty when aggravating and mitigating factors weigh equally for defendants convicted of first degree murder violates fundamental requirements of certainty and reliability under the cruel and unusual punishment and due process clauses of the Colorado constitution. *People v. Young*, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

This section establishes a four-step process in the sentencing procedure. The jury first determines if at least one statutory aggravating factor exists. If the jury unanimously finds the state has proven at least one aggravating factor beyond a reasonable doubt, it must next determine whether any mitigating factors exist. Third, the jury must determine whether "sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist." If the jury finds that mitigating factors do not outweigh any aggravating factors then it must go on to the fourth step. The fourth step requires the jury to decide "whether the

defendant should be sentenced to death or life imprisonment." *People v. O'Neill*, 803 P.2d 164 (Colo. 1990) (decided under law in effect prior to 1988 amendment); *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Jury sentencing is constitutional. For a state to permit a jury to fix the penalty in a first degree murder case, when in all other instances the penalty is imposed by a judge after presentencing hearings, is not an unreasonable or arbitrary classification. *People ex rel. McKevitt v. District Court*, 167 Colo. 221, 447 P.2d 205 (1968).

Colorado's system of jury sentencing is not a denial of equal protection of the laws because it is used only in capital cases. This legislative classification is neither arbitrary, unreasonable, nor discriminatory against capital offenders. Capital offenses are in a distinct class; thus, the limitation of jury sentencing in this manner and for this purpose is not discriminatory. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968).

Colorado's jury sentencing procedure does not deprive the petitioner of his right against self-incrimination. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968).

No constitutional infirmity in capital sentencing scheme. By requiring that the jury find both that a statutory aggravator has been proven beyond a reasonable doubt and that mitigation does not outweigh aggravation before a defendant is even eligible to receive the death penalty, Colorado's sentencing scheme is sufficiently

reliable to pass constitutional muster. *People v. Dunlap*, 173 P.3d 1054 (Colo. 2007).

Requirement that defendant waive his or her sixth amendment right to a jury trial on all facts essential to a death penalty eligibility determination jointly with a guilty plea to the underlying capital crime violates the sixth amendment. The right to have a jury trial on sentencing facts is independent of the right to a jury trial on the underlying offense. By coupling the waiver of the jury hearing on a death sentence with the guilty plea to the underlying charge, there is no opportunity for an independent, knowing, voluntary, and intelligent waiver, rather the waiver is automatic. Without such a waiver, the provision is unconstitutional. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

To cure the constitutional defect, the court excised the offending provision. After severing the language, the result is to remand the case back to the trial court for sentencing hearing with a jury unless the defendant waives the sentencing hearing with a jury. This remedy is consistent with the intent of the general assembly to maintain a valid and operative death penalty. The other remedy, requiring a life sentence when pleading guilty to a capital crime, would subject a defendant to the death penalty only when he or she chooses a jury trial, such a result would create an unconstitutional burden on the defendant's sixth amendment right. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

The existence of one Blakely-exempt fact does not alone make a defendant death

penalty eligible. Defendant has the right to have the jury weigh all mitigating factors against aggravating factors. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

As to discretion of jury prior to 1974 amendment to determine whether the penalty should be life imprisonment or death, see *Jones v. People*, 155 Colo. 148, 393 P.2d 366 (1964); *Monge v. People*, 158 Colo. 224, 406 P.2d 674 (1965); *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

For instructions trial court should give to the jury at the conclusion of evidentiary stage of capital sentencing hearing, see *People v. Durre*, 690 P.2d 165 (Colo. 1984).

Belief against capital punishment does not disqualify juror. Belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Jury must make separate determination that death is the appropriate penalty beyond a reasonable

doubt when aggravating and mitigating factors are in equipoise. People v. Young, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

Jury must be convinced beyond a reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors before sentencing defendant to death. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

In order to ensure reliability in process, "beyond reasonable doubt" standard is properly applied to determination of relevant weight of aggravating and mitigating factors during penalty stage of death penalty trial. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Trial court improperly instructed jury that, in order to impose a death penalty, they must be convinced beyond a reasonable doubt that the proven statutory aggravating factors outweigh the mitigating factors as said instruction is contrary to subsection (2)(a)(II). People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Jury was properly instructed that, after weighing mitigating and aggravating factors, a death verdict could be returned only if the jurors unanimously agreed that death is the appropriate punishment beyond a reasonable doubt and the jury should be instructed that the outcome of such weighing process does not govern the final determination as to whether a death verdict is appropriate.

People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Requirement that jury must be convinced beyond reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors creates to some extent a presumption that mitigating factors do outweigh aggravating factors and a presumption in favor of life imprisonment sentences; however, the use of the term "presumption of life imprisonment" in jury instructions should be discouraged. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Beyond a reasonable doubt" language with respect to third and fourth steps of the sentencing process do not impose a burden of proof, such language is intended to impose a standard on juries as to the high degree of certainty which is required in order to ensure the reliability and certainty of their decisions. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Trial court erred by instructing jury that they must consider certain statements of purported fact to be mitigating factors as such instruction assumed facts not supported by the record. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Proportionality" review not mandated by state constitution. That a reviewing court conduct an inquiry into whether the sentence in a particular case is proportional when compared with the sentences in all

similar cases in Colorado is not required by either the due process or cruel and unusual punishment clauses of the state constitution. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

The defendant's age should not be considered in determining whether to conduct an abbreviated or an extended proportionality review. *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993); *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Sentence of life imprisonment with no possibility of parole for 40 years for a juvenile offender under the automatic sentencing provisions mandated by this section for first degree murder was not disproportionate in violation of the eighth amendment. *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993).

Sentence of life imprisonment with no possibility of parole for a juvenile offender under the automatic sentencing provisions mandated by this section for first-degree murder was not disproportionate to offense. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Discretion afforded to the prosecutor, who determines against whom to seek a death sentence, to the jury, which determines who is to receive a sentence of death, and to the governor, who determines who shall be granted clemency, violates neither the constitutional guarantee of due process nor the constitutional prohibition against cruel and unusual punishment. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Mitigating factors not unconstitutionally vague. Mitigators established under subsection (5) meet the requirement of certainty and clarity required by due process clause and provide the jury with sufficiently precise guidelines to determine whether or not to impose the death penalty. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Two-prong test in determining constitutionality of death penalty aggravator: (1) Whether the aggravator establishes "rational criteria" for narrowing a jury's discretion in considering whether death is appropriate; and (2) whether the aggravator identifies special indicia of blameworthiness or dangerousness capable of objective determination. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

The purpose of a statutory aggravator generally is to provide a rational criteria in order to narrow the class of persons eligible for the death penalty. The United States supreme court has held that this is one of the requirements for a capital sentencing scheme to pass constitutional muster. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

"Grave risk of death" aggravator is not unconstitutionally vague. Alleging that a victim whom the defendant had attempted to kill was a victim "in addition to" the victims of the class 1 felonies committed by the defendant was proper under this aggravating factor. By shooting and wounding a person, the defendant created a grave risk of death to a person other than the victims of his class 1

felonies. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

"Lying in wait or from ambush" aggravator is not unconstitutionally vague. The terms "lying in wait" and "ambush" are terms that an average juror should be capable of understanding. Thus, the aggravator is not unconstitutionally vague. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

"Avoiding or preventing a lawful arrest or prosecution" aggravator is appropriate if the evidence indicates that a defendant has murdered the victim of a contemporaneously or recently perpetrated offense and the reason for the murder was to prevent the victim from becoming a witness. *People v. Davis*, 794 P.2d 159 (Colo. 1990); *Davis v. Exec. Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

The statutory aggravator sufficiently narrows the class of defendants to whom it applies; therefore, it is constitutional. *Davis v. Exec. Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Aggravator established under subsection (6)(j) held unconstitutionally vague. The words "especially heinous, atrocious, or depraved" do not inherently restrain the arbitrary and capricious infliction of the death sentence. *People v. Davis*, 794 P.2d 159 (Colo. 1990) (decided prior to 1989 amendment defining the words heinous, atrocious, and depraved).

Submission of the unconstitutionally vague "heinousness" aggravator to the jury did not have a substantial and injurious

effect or influence in determining the jury's verdict. *Davis v. Exec. Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Invalidation on appeal of an aggravator does not require automatic reversal of sentence. The invalidation of an aggravator considered by a jury in passing sentence does not demand reversal of such sentence if the reviewing court determines, beyond a reasonable doubt, that consideration by the jury of the aggravator was harmless error. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Construction given death penalty aggravators. "Under sentence of imprisonment" within context of aggravator established by subsection (6)(a) includes period of parole. *People v. Davis*, 794 P.2d 159 (Colo. 1990) (decided prior to 1988 amendment adding the phrase "including the period of parole or probation").

"Party to an agreement" within context of aggravator established under subsection (6)(e) does not refer exclusively to agreements involving contract murders or murders for pecuniary gain. *People v. Davis*, 794 P.2d 159 (Colo. 1990); *Davis v. Exec. Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

"Kidnapped" within context of aggravator established under subsection (6)(d) is not restricted to a kidnap-for-ransom situation. Aggravator applies to both first and second-degree kidnapping. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

"Avoiding or preventing lawful arrest" within context of aggravator established under subsection (6)(k) is not limited to the

following situations: (1) The murder of a witness in an attempt to thwart the investigation or prosecution of a previous separate offense; or (2) the murder of a law enforcement officer while attempting to effect an arrest. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Trial court did not err in excluding evidence addressing the issue of guilt or innocence at the sentencing phase. A trial court's decision to exclude will not be reversed absent an abuse of discretion. No such abuse exists where the trial court accepted defendant's guilty plea and heard extensive evidence concerning mistreatment of prisoners as defendant desired. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

"Doubling up" of aggravators permissible. The submission to the jury of both the "kidnapping" aggravator and the "felony-murder" aggravator under circumstances where kidnapping formed the basis for the "felony-murder" aggravator did not constitute plain error. *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Since the jury instructions were sufficient to advise the jury that the weighing of mitigating and aggravating factors rests not on the number of each, but on a qualitative determination of whether the aggregate weight of any mitigating factors outweighs the aggregate weight of any aggravating factors, it was not error to allow the prosecution to submit to the jury multiple aggravating factors based on the same underlying factual circumstances. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

Trial court did not sua sponte introduce aggravators not alleged by the prosecution. Although the prosecution listed the statutory aggravators of prior felony conviction and knowingly creating a grave risk of death to another only once as opposed to once for each of the murder victims, the disclosure was sufficient to put defendant on notice that the prosecution intended to allege and introduce evidence of the two aggravators. *People v. Dunlap*, 173 P.3d 1054 (Colo. 2007).

Submission to the jury of both the felony murder and the kidnapping aggravators addressing the same basic conduct did not have a substantial and injurious effect or influence on the jury verdict. *Davis v. Exec. Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Previous convictions incorporates convictions existing at the time the sentencing hearing is conducted pursuant to this section, regardless of the date on which the offense underlying the "previous conviction" occurred. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute); *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007).

Consideration of defendant's acts occurring a day after the acts that caused the death of another as contributory to a finding of the "especially heinous" aggravator improper and contrary to the statutory scheme. It was error for a court to consider under subsection (6)(j) the method in which a body was disposed as aggravating the defendant's actions which resulted in the death of another person.

People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

For options available to a reviewing court where jury has improperly considered an aggravator in determining whether death is the appropriate sentence, see People v. Davis, 794 P.2d 159 (Colo. 1990); People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Application of "harmless error" analysis. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

In the context of capital punishment, the state constitution does not provide broader protection than the federal constitution. People v. Davis, 794 P.2d 159 (Colo. 1990); People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

In the death penalty phase of the trial, it is proper for the jury to consider the circumstances of the offense itself. In order to do so, it is germane for the jury to make the assessment from the viewpoint of the victim. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

Statements made by the prosecutor concerning the victim's inability to celebrate another birthday or write letters were made in response to defense counsel's arguments regarding the severity of life imprisonment, and compared the victim's fate with that of the defendant and were permissible comment for the sentence of death. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

Statements made by the prosecutor concerning whether the defendant would pose a continuing threat to society and whether rehabilitation was likely were proper statements. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

A statement by the prosecutor that the case before them was one of the worst he had ever seen was irrelevant and had the possibility of being unfairly prejudicial but by itself did not rise to the level of reversible error. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

A statement by the prosecutor that it is cheaper to execute a defendant than to keep him in prison for the rest of his life had no support in the record and was not a legitimate factor for the jury to consider. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

Unanimity is not required for the finding of mitigating factors. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

But inability to impose death penalty in proper case is disqualifying. Disqualification of a juror for inability to join in a verdict imposing the death penalty in a proper case is not error where the jury has the duty to determine the defendant's guilt or innocence and his punishment if he is found guilty. Such a person is disqualified to act as a juror for the reason that his attitude on the subject of capital punishment would prevent him from performing his duty. He would not carry into effect the whole law, and therefore would not stand indifferent between the state and the

accused. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Exclusion for cause of all prospective jurors who are unable to impose the death penalty is permissible. *People v. Drake*, 748 P.2d 1237 (Colo. 1988); *People v. Davis*, 794 P.2d 159 (Colo. 1990).

Defendant has the right to allocution before sentence is imposed and denial of the right of allocution requires resentencing. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Since complicity is a theory that necessitates holding one person legally accountable for the behavior of another, a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Inconsistent verdicts between the parts of a capital murder trial which determine guilt or innocence and which determine the penalty do not invalidate the guilty verdict. *People v. Rodriguez*, 786 P.2d 472 (Colo. App. 1989).

During sentencing phase of trial for a class 1 felony, trial court must allow prosecution to introduce evidence of defendant's prior felony convictions, whether or not any prior felonies constitute statutory aggravating factors, since the evidence is relevant to show lack of

statutory mitigating circumstances. *People v. Saathoff*, 790 P.2d 804 (Colo. 1990).

Reciprocal discovery provisions of subsection (3.5) are constitutional. Requiring disclosure of identities of persons defense intends to call at the sentencing phase and witness statements for such persons does not violate the fifth, sixth, or fourteenth amendments, nor does it violate the work product privilege. *People v. Martinez*, 970 P.2d 469 (Colo. 1998).

Reciprocal discovery extends to persons the defense "intends" to call at the sentencing phase, not to all prospective witnesses. Such discovery extends only to statements that relate to the subject matter of the intended testimony and comprise only substantial recitation of witness statements, and not the mental impressions, conclusions, opinions, or legal theories of the defense. *People v. Martinez*, 970 P.2d 469 (Colo. 1998).

Subsection (2), as it existed in 1993, and Crim. P. 35(b) together direct that a trial court may only order post-conviction relief pursuant to the rule from a jury's death sentence if the circumstances delineated in subsection (2) are met. Thus, trial court's specific finding that the evidence supported the death sentence circumscribed the limits of the court's authority to overturn that sentence under subsection (2) or to reduce it under Crim. P. 35(b). *People v. Dunlap*, 36 P.3d 778 (Colo. 2001).

18-1.3-1202. Death penalty inflicted by lethal injection.

The manner of inflicting the punishment of death shall be by the administration of a lethal injection within the time prescribed in this part 12, unless for good cause the court or governor may prolong the time. For the purposes of this part 12, "lethal injection" means a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death. The manner of inflicting the punishment of death shall, in all circumstances, be by the administration of a lethal injection regardless of the date of the commission of the offense or offenses for which the death penalty is imposed.

Source: L. 2002: Entire article added with relocations, p. 1452, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-401 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For comment, "And Then There Were Three: Colorado's New Death Penalty Sentencing Statute", see 68 U. Colo. L. Rev. 189 (1997).

18-1.3-1203. Genetic testing prior to execution.

Prior to the execution of the death penalty pursuant to this part 12, the judicial department shall obtain the chemical testing of a biological substance sample from the convicted offender to determine the genetic markers thereof.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-401.5 as it existed prior to 2002.

18-1.3-1204. Implements - sentence executed by executive director.

The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within

the walls of the correctional facilities at Cañon City and therein at all times have in preparation all necessary implements requisite for carrying into execution the death penalty by means of the administration of a lethal injection. The execution shall be performed in the room or place by a person selected by the executive director and trained to administer intravenous injections. Death shall be pronounced by a licensed physician or a coroner according to accepted medical standards.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-402 as it existed prior to 2002.

ANNOTATION

The regulations concerning the implementation of a death sentence are not subject to the provisions of § 24-4-103 of the State Administrative Procedure Act (APA). Section 17-1-111 precludes the application of certain provisions of the APA

to rules of the executive director. Although that section refers to the provisions of title 17 only, it applies to this section because this section is part of the executive director's duties as described in § 17-1-103. *Dunlap v. Dept. of Corr.*, 2013 COA 63, 303 P.3d 572.

18-1.3-1205. Week of execution - warrant.

When a person is convicted of a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not fewer than ninety-one days nor more than one hundred twenty-six days from the day of passing the sentence. Said warrant shall be directed to the executive director of the department of corrections or the executive director's designee commanding said executive director or designee to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the correctional facilities at Cañon City and deliver the convicted person, together with the warrant, to said executive director or designee, who shall keep the convict in confinement until execution of the death penalty. Persons shall be permitted access to the inmate pursuant to prison rules. Such rules shall provide, at a minimum, for the inmate's attendants, counsel, and physician, a spiritual adviser selected by the inmate, and members of the inmate's family to have access to the inmate.

Source: **L. 2002:** Entire article added with relocations, p. 1453, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** Entire section amended, p. 14, § 4, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 869, § 122, effective July 1.

Editor's note: This section is similar to former § 16-11-403 as it existed prior to 2002.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Annotator's note. Since § 18-1.3-1205 is similar to § 16-11-403 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-11-3, C.R.S. 1963, CSA, C. 48, § 538, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date

of execution in cases of affirmance, where the execution has been stayed upon appeal or supersedeas. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968).

Procedure of delivery of prisoner by sheriff held not improper. *Agnes v. People*, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in *Medley, Petitioner*, 134 U.S. 160 (1890).

18-1.3-1206. Execution - witnesses.

The particular day and hour of the execution of said sentence within the week specified in said warrant shall be fixed by the executive director of the department of corrections or the executive director's designee, and the executive director shall be present thereat or shall appoint some other representative among the officials or officers of the correctional facilities at Cañon City to be present in his or her place and stead. There shall also be present a physician and such guards, attendants, and other persons as the executive director or the executive director's designee in his or her discretion deems necessary to conduct the execution. In addition, there may be present such witnesses as the executive director or the executive director's designee in his or her discretion deems desirable, not to exceed eighteen persons. The executive director or the executive director's designee shall notify the governor of the day and hour for the execution as soon as it has been fixed.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-404 as it existed prior to 2002.

18-1.3-1207. Record and certificate of execution.

The executive director of the department of corrections or his or her designee shall keep a book of record, to be known as record of executions, in which shall be entered the reports specified in this section. Immediately after the execution, a postmortem examination of the body of the convict shall be made by the attending physician, who shall enter in said book of record the nature and extent of the examination and sign and certify to the same. The executive director or his or her designee shall also immediately make and enter in said book a report, setting forth the time of such execution and that the convict (naming him or her) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him or her directed and in accordance with the provisions of this part 12, and shall insert in said report the names of all the persons who were present and witnessed the execution, and shall procure each of such persons to sign said report with his or her full name and place of residence before leaving the place of execution. The executive director or his or her designee shall thereupon attach his or her certificate to said report, certifying to the truth and correctness thereof, and shall immediately deliver a certified transcript of the record entry to the court which sentenced the convict.

Source: L. 2002: Entire article added with relocations, p. 1454, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-405 as it existed prior to 2002.

PART 13

SPECIAL PROCEEDINGS - APPLICABILITY OF PROCEDURE IN CLASS 1 FELONY CASES FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1988, AND PRIOR TO SEPTEMBER 20, 1991

18-1.3-1301. Applicability of procedure for the imposition of sentences in class 1 felony cases.

(1) It is the expressed intention of the general assembly that there be no hiatus in the imposition of the death penalty as a sentence for the commission of a class 1 felony in the state of Colorado as a result of the holding of the Colorado supreme court in *People v. Young*, 814 P.2d 834 (Colo. 1991). Toward that end, the provisions of former section 16-11-103, C.R.S., as it existed prior to the enactment of senate bill 78, enacted at the second regular session of the fifty-sixth general assembly, and as it currently exists as section 18-1.3-1201, to the extent such provisions were not automatically revitalized by the operation of law, are reenacted as section 18-1.3-1302 and are hereby made applicable to offenses committed on or after July 1, 1988, and prior to September 20, 1991.

(2) It is the intent of the general assembly that this part 13 is independent from former section 16-11-103, C.R.S., now section 18-1.3-1201, and that if any provision of this part 13 or the application thereof to any person or circumstance is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the application of section 18-1.3-1201 to any offense committed on or after September 20, 1991.

Source: L. 2002: Entire article added with relocations, p. 1454, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-801 as it existed prior to 2002.

ANNOTATION

Applying §§ 16-11-801 and 16-11-802 retroactively violates proscription against ex post facto laws where, as a result of the

decision in *People v. Young*, there was no valid death penalty sentencing statute in effect at the time the offenses were

committed. People v. Aguayo, 840 P.2d 336 relocation of § 16-11-801).
(Colo. 1992) (decided prior to 2002)

18-1.3-1302. Imposition of sentences in class 1 felonies for crimes committed on or after July 1, 1988, and prior to September 20, 1991 - appellate review - applicability.

(1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense, in which case the defendant shall be sentenced to life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace such juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, and any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section may be presented. Any such evidence which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. For offenses committed before July 1, 1985, the jury shall be instructed that life imprisonment means life without the possibility of parole for twenty calendar years. For offenses committed on or after July 1, 1985, the jury shall be instructed that life imprisonment means life without the possibility of parole for forty calendar years.

(c) Both the prosecuting attorney and the defense shall notify each other of the names and addresses of any witnesses to be called in the sentencing hearing and the subject matter of such testimony. Such discovery shall be provided within a reasonable amount of time as determined by order of the court and shall be provided not less than twenty-four hours prior to the commencement of the sentencing hearing. Unless good cause is shown, noncompliance with this paragraph (c) shall result in the exclusion of such evidence without further sanction.

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(3) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and the sentencing hearing.

(4) For purposes of this section, mitigating factors shall be the following factors:

(a) The age of the defendant at the time of the crime; or

(b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or

(f) The emotional state of the defendant at the time the crime was committed; or

(g) The absence of any significant prior conviction; or

(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or

(i) The influence of drugs or alcohol; or

(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or

(k) The defendant is not a continuing threat to society; or

(l) Any other evidence which in the court's opinion bears on the question of mitigation.

(5) For purposes of this section, aggravating factors shall be the following factors:

(a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or

(b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance

of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

- (I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or
- (II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or
- (III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.
- (IV) An elected state, county, or municipal official; or
- (V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or
- (d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or
- (e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or
- (f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), "explosive or incendiary device" means:
 - (I) Dynamite and all other forms of high explosives; or
 - (II) Any explosive bomb, grenade, missile, or similar device; or
 - (III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.
- (g) The defendant committed or attempted to commit a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or
- (h) The class 1 felony was committed for pecuniary gain; or
- (i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or
- (j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) If any provision of this section or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this section, which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this section are declared to be severable.

(b) If any death sentence imposed upon a defendant pursuant to the provisions of this section and the imposition of such death sentence upon such defendant is held invalid or unconstitutional, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) This section applies only to offenses charged prior to July 1, 2020.

Source: L. 2002: Entire article added with relocations, p. 1455, § 2, effective October 1. L. 2004: (5)(c)(I) amended, p. 1198, § 50, effective August 4. L. 2020: (8) added, (SB 20-100), ch. 61, p. 212, § 13, effective March 23.

Editor's note: This section is similar to former § 16-11-802 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-1302 is similar to § 16-11-802 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.

No statute requires the district attorney to give notice of intent to seek the death penalty but sufficient notice must be given to satisfy the requirements of due process. *People v. District Court*, 825 P.2d 1000 (Colo. 1992).

The fact that the legislature excluded the definitions in subsection (6.5) of § 16-11-103 does not mean that there has been a detrimental change that violates the ex post facto clause. *People v. District Court*, 834 P.2d 181 (Colo. 1992).

The reinstatement in this section of the fourth step in the sentencing procedure that was formerly in § 16-11-103 does not violate the ex post facto clause because the defendant was subject to the death penalty provision in § 16-11-103 when he allegedly committed the acts. *People v. District Court*, 834 P.2d 181 (Colo. 1992).

A charge that counsel was overzealous in his or her defense was not sufficient to establish a charge by defendant that he had ineffective assistance of counsel. Defendant claimed that had his counsel not been so zealous he would have been charged under statute (§ 16-11-103) that did not involve the

death penalty. *People v. District Court*, 834 P.2d 181 (Colo. 1992).

Applying §§ 16-11-801 and 16-11-802 retroactively violates proscription against ex post facto laws where, as a result of the decision in *People v. Young*, there was no valid death penalty sentencing statute in effect at the time the offenses were committed. *People v. Aguayo*, 840 P.2d 336 (Colo. 1992).

Since § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) has a later effective date, was later enacted, and operates in an ameliorative manner for criminal defendants, it controls and that portion of § 18-1-105(4) (now § 18-1.3-401 (4)) which provides for no possibility of parole for persons sentenced to life imprisonment following conviction for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991, is abrogated by this later enactment. Thus, § 16-11-103 (1)(b) (now § 18-1.3-1201 (1)(b)), as amended by House Bill 91S-1001, controls parole eligibility for convictions and sentences to life imprisonment based on class 1 felony offenses occurring on or after September 20, 1991, and § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) controls parole eligibility for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991. *People v. District Court*, 834 P.2d 236 (Colo. 1992).

PART 14

COMPETENCY OF PERSONS TO BE EXECUTED

18-1.3-1401. Definitions.

As used in this part 14, unless the context otherwise requires:

- (1) "Colorado mental health institute" means the Colorado mental health institute at Pueblo.
- (2) "Mentally incompetent to be executed" means that, due to a mental disease or defect, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that crime is death.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-301 as it existed prior to 2002.

18-1.3-1402. Mental competency to be executed - presumptions.

- (1) A person who is sentenced to death shall not be executed so long as the person is mentally incompetent to be executed.
- (2) Any convicted person who is sentenced to death is presumed mentally competent to be executed. A convicted person may be found mentally incompetent to be executed only on clear and convincing evidence of such condition. The party asserting that the convicted person is mentally incompetent to be executed bears the burden of proof regarding such condition and the burden of producing evidence of such condition.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-302 as it existed prior to 2002.

18-1.3-1403. Mental incompetency to be executed - filing of motion.

- (1) (a) If, after a sentence of death is imposed, the executive director of the department of corrections, the convicted person's attorney, or an attorney for the state has a good faith reason to

believe that the convicted person may be mentally incompetent to be executed, the executive director, the convicted person's attorney, or the state attorney may file a motion raising the issue of whether the convicted person is mentally incompetent to be executed. The motion shall be filed in the district court in the judicial district in which the convicted person was sentenced and shall be directed to the judge who presided over the convicted person's sentencing hearing. If that judge is unavailable, the chief judge of the same judicial district shall decide the motion. The motion shall be filed in both the district court clerk's office and the office of the judge who will hear the motion. On the same day the motion and accompanying materials are filed with the court, the motion and all accompanying materials shall be served upon the office of the prosecuting attorney who tried the case and the attorney general's office.

(b) If the judge who presided at the sentencing hearing has a good faith reason to believe that the convicted person may be mentally incompetent to be executed, the judge shall so advise the convicted person's attorney or shall appoint an attorney to investigate the issue and file any motions the attorney deems appropriate under this part 14.

(2) (a) A motion filed pursuant to subsection (1) of this section shall set forth the facts relating to the convicted person's conviction and sentence and the facts giving rise to the belief that the convicted person may be mentally incompetent to be executed and shall request the district court to order that the convicted person be examined for mental incompetency to be executed. The motion shall be accompanied by the names and addresses of any mental health experts who have examined the convicted person with respect to the issue of whether the convicted person is mentally incompetent to be executed and the results of those examinations, as well as any records of any other mental health examinations, treatment, or reports that are not privileged and are available to the moving party or in the moving party's possession. If the moving party has any question regarding whether any such report is privileged, the report shall be submitted to the court ex parte and the court shall make a determination as to release of the report. If the moving party is the convicted person's attorney, the convicted person shall be deemed to have waived any claim of confidentiality or privilege as to communications made by the convicted person to any physician, psychiatrist, or psychologist in the course of examination or treatment for any mental health condition for which the convicted person has received treatment, and the moving party shall include any records of any other mental health examinations, treatment, or reports.

(b) On receipt of a motion raising the issue of whether a convicted person is mentally incompetent to be executed, the clerk of the district court shall transmit copies of the motion to the supreme court. The clerk of the district court shall transmit copies of all subsequent filings to the supreme court as they are received.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-303 as it existed prior to 2002.

18-1.3-1404. Mental incompetency to be executed - examination.

(1) (a) On receipt of a motion filed pursuant to section 18-1.3-1403, the district court shall determine whether the motion is timely, as prescribed by section 18-1.3-1405, and whether it presents reasonable grounds for ordering an examination. Prior to making any determinations, the district court shall ensure that the prosecution has an opportunity to respond to the motion and to submit any additional information for consideration. The district court shall also provide an opportunity for the executive director of the department of corrections, the convicted person's attorney, or an attorney for the state to respond to the motion and to submit additional information for consideration. All responses and additional submissions shall be filed with the court within three days following the filing of the motion. Within seven days following the filing of the motion, the district court shall determine whether there are reasonable grounds for ordering the examination, based on the motion and any supporting information, any information submitted by the prosecuting attorney or any other responding party, and the record in the case, including transcripts of previous hearings and orders.

(b) The district court shall issue a stay of execution upon a showing of reasonable grounds for granting the stay. A stay of execution may be requested only by the convicted person's attorney, the executive director of the department of corrections, or an attorney for the state.

(2) (a) If the court finds there are no reasonable grounds for the requested examination, the court shall dismiss the motion. If the court finds the motion is timely and there are reasonable grounds for ordering an examination, the court may order the convicted person to submit to physical, neurological, psychiatric, psychological, or other examinations or evaluations that are reasonably necessary to adequately determine whether the convicted person is mentally incompetent to be executed.

(b) The Colorado mental health institute shall create and maintain a list of licensed, qualified psychiatrists and psychologists who shall be available to perform the examinations required pursuant to this part 14.

(c) If the court determines an examination is necessary, the court shall appoint one or more licensed psychiatrists to observe and examine the convicted person. In making such appointment, the court may select one or more licensed psychiatrists from the list prepared by the Colorado mental health institute pursuant to paragraph (b) of this subsection (2) or appoint another qualified, licensed psychiatrist. If requested in the motion for competency examination or by motion of the executive director of the department of corrections, the prosecution, or the attorney for the convicted person or by request of the appointed psychiatrist, and for good cause shown,

the court may order further examinations, including the services of licensed psychologists, licensed physicians, or psychiatrists. All examinations shall be completed and reports filed with the court within thirty-five days following the court's initial appointment of experts.

(3) (a) Any examination ordered pursuant to this section shall be conducted at a department of corrections facility.

(b) At the time of appointment of experts, the parties shall disclose to the appointed experts and to each other the names and addresses of any other previously undisclosed mental health experts who have examined the convicted person and the results of the examinations, as well as any and all records of any other previously undisclosed mental health examinations, treatment, or reports that are not privileged. If the party has any question regarding whether any such records are privileged, the records shall be submitted to the court ex parte and the court shall make a determination as to release of the record. The appointed experts shall make copies of their reports available to all of the parties at the time of filing the reports with the court. The experts' reports shall indicate whether the convicted person has a mental disease or defect which renders the convicted person mentally incompetent to be executed.

(4) The convicted person shall submit to and cooperate in all examinations or evaluations ordered by the court, regardless of which party selects the examining mental health expert. The district court shall consider any relevant evidence concerning the issue of the convicted person's competency to be executed, including but not limited to the convicted person's refusal to be examined or evaluated.

(5) (a) After the examinations are completed and reports are filed, the court shall conduct a hearing within seven days following the court's receipt of all reports from appointed experts. The hearing shall be limited to the sole issue of whether the convicted person is mentally incompetent to be executed. At the hearing, all parties may present evidence, cross-examine witnesses, and present argument or, by stipulation, may submit the matter for the court's determination on the basis of the experts' reports or other evidence.

(b) The Colorado rules of evidence shall apply to each hearing held pursuant to this section. The transcript of the hearing shall be forwarded to the Colorado supreme court within three days following the conclusion of the hearing.

(6) (a) Within three days following the conclusion of the hearing held pursuant to subsection (5) of this section, the district court, either on the record or by written ruling, shall specifically state its findings on the motion raising the issue of whether the convicted person is mentally incompetent to be executed. If the ruling is in written form, it shall be transmitted by facsimile or electronic mail to all parties and the Colorado supreme court on the same day of its issuance.

(b) If the court finds the convicted person is not mentally incompetent to be executed, the court shall immediately remand the convicted person to the custody of the executive director of

the department of corrections who shall execute the judgment as specified in the warrant issued pursuant to section 18-1.3-1205. If the week specified in the warrant has passed, the district court shall issue a new warrant designating a week of time within which the sentence shall be executed.

(c) If the court finds the convicted person is mentally incompetent to be executed, the court shall stay the execution and shall immediately transmit a copy of its order to the Colorado supreme court.

(7) The time frames specified in this section shall apply only if the motion filed pursuant to section 18-1.3-1403 is filed within one hundred nineteen days prior to the convicted person's execution date. In all other cases, the court shall establish time frames for filing of responses and additional submissions and for completion of the examinations and shall hear and rule on the motion as expeditiously as possible.

Source: L. 2002: Entire article added with relocations, p. 1460, § 2, effective October 1. **L. 2012:** (1)(a), (2)(c), (5)(a), and (7) amended, (SB 12-175), ch. 208, p. 869, § 123, effective July 1.

Editor's note: This section is similar to former § 16-8-304 as it existed prior to 2002.

18-1.3-1405. Mentally incompetent to be executed - untimely or successive motions.

(1) A motion raising the issue of whether a convicted person is mentally incompetent to be executed that is filed pursuant to section 18-1.3-1404 fewer than thirty-five days before the scheduled execution is untimely and shall not be considered by the court unless it is accompanied by both of the following:

(a) At least one affidavit from a licensed physician, licensed psychiatrist, or licensed psychologist who has examined the convicted person that states the physician's, psychiatrist's, or psychologist's opinion that the convicted person is mentally incompetent to be executed; and

(b) A statement that establishes good cause for the failure to file the motion in a timely manner.

(2) (a) Except as provided in paragraph (b) of this subsection (2), if the court has determined, pursuant to section 18-1.3-1404 or 18-1.3-1406 (3), that a convicted person is not mentally incompetent to be executed, no further consideration of the convicted person's mental incompetence to be executed may be granted by the court.

(b) A successive motion raising the issue of whether a convicted person is mentally incompetent to be executed may be filed only if the successive motion is accompanied by an affidavit from a licensed physician, licensed psychiatrist, or licensed psychologist who has examined the convicted person that shows a substantial change of circumstances since the previous motion was denied or the prior determination of restoration to competency to be executed was made and the showing is sufficient to raise a significant question regarding whether the convicted person is mentally incompetent to be executed.

Source: L. 2002: Entire article added with relocations, p. 1462, § 2, effective October 1. **L. 2012:** IP(1) amended, (SB 12-175), ch. 208, p. 870, § 124, effective July 1.

Editor's note: This section is similar to former § 16-8-305 as it existed prior to 2002.

18-1.3-1406. Persons mentally incompetent to be executed - restoration to competency.

(1) The court may order a restoration hearing at any time on its own motion, on motion of an attorney for the state, or on motion of the convicted person's attorney. The court shall order a hearing if the executive director of the department of corrections files a report that the convicted person is no longer mentally incompetent to be executed.

(2) At the hearing, if the question is contested, the burden of submitting evidence and the burden of proof by clear and convincing evidence shall be upon the party asserting that the convicted person is mentally competent to be executed.

(3) At the hearing, the court shall determine whether the convicted person is mentally competent to be executed and, if so, shall order that the execution be conducted according to the original warrant issued pursuant to section 18-1.3-1205, if unexpired, or shall issue a new warrant appointing a time for execution of the judgment.

Source: L. 2002: Entire article added with relocations, p. 1463, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-306 as it existed prior to 2002.

18-1.3-1407. Appeal of determination of mental incompetency to be executed.

(1) Within seven days after the district court rules on a motion raising the issue of whether a convicted person is mentally incompetent to be executed filed pursuant to this part 14, a party may file with the Colorado supreme court a petition to obtain a review of the district court's decision and requesting a stay of execution pending the review.

(2) The supreme court shall expedite its review of the district court's decision and, if the designated week of execution in an existing warrant of conviction has not passed, shall not take more than seven days to render its decision.

Source: L. 2002: Entire article added with relocations, p. 1463, § 2, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 871, § 125, effective July 1.

Editor's note: This section is similar to former § 16-8-307 as it existed prior to 2002.

18-1.4 ARTICLE 1.4

Class 1 Felonies Committed - July 1, 1995, through July 12, 2002

18-1.4-101.	Applicability of procedure for the imposition of sentences in class 1 felony cases.	committed on or after July 1, 1995, and prior to July 12, 2002 - appellate review.
18-1.4-102.	Imposition of sentence in class 1 felonies for crimes	

18-1.4-101. Applicability of procedure for the imposition of sentences in class 1 felony cases.

(1) It is the expressed intention of the general assembly that there be no hiatus in the imposition of the death penalty as a sentence for the commission of a class 1 felony in the state of Colorado as a result of the holding of the United States supreme court in *Ring v. Arizona*, 536 U.S. 584 (2002). Toward that end, the provisions of section 16-11-103, C.R.S., as it existed prior to the passage of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, are reenacted as section 18-1.4-102, and are hereby made applicable to offenses committed on or after July 1, 1995, and prior to July 12, 2002.

(2) It is the expressed intention of the general assembly that the adoption of section 18-1.4-102 shall not be construed by any court as a legislative statement that the provisions of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, are unconstitutional in any way or that any death sentence obtained pursuant to the provisions of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, is invalid in any way.

(3) It is the expressed intention of the general assembly that this article is independent from section 16-11-103, C.R.S., as it existed prior to October 1, 2002, and section 18-1.3-1201 and that, if any provision of this article or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the application of section 16-11-103, C.R.S., as it existed prior to October 1, 2002, and section 18-1.3-1201 to any offense committed on or after the effective date of amendments to said sections enacted at the third extraordinary session of the sixty-third general assembly.

Source: L. 2002, 3rd Ex. Sess.: Entire article added, p. 16, § 12, effective July 12. L. 2005: (1) amended, p. 766, § 27, effective June 1.

Cross references: For the legislative declaration contained in the 2002 act enacting this article, see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

18-1.4-102. Imposition of sentence in class 1 felonies for crimes committed on or after July 1, 1995, and prior to July 12, 2002 - appellate review.

(1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense, or unless the defendant has been determined to be a mentally retarded defendant or a defendant with an intellectual and developmental disability pursuant to part 4 of article 9 of title 16, as it existed prior to October 1, 2002, in either of which cases, the defendant shall be sentenced to life imprisonment. The trial judge shall conduct the hearing before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and must remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace such juror

or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty, that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence, including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302 (6), C.R.S., which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. The jury shall be instructed that life imprisonment means imprisonment for life without the possibility of parole.

(c) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 24, § 14, effective July 12, 2002.)

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(e) If, as of July 12, 2002, the prosecution has announced it will be seeking the death sentence as the punishment for a conviction of a class 1 felony and a defendant has been convicted at trial of a class 1 felony or has pled guilty to a class 1 felony, but a sentencing hearing to determine whether that defendant shall be sentenced to death or life imprisonment has not yet been held, a jury shall be impaneled to determine the sentence at the sentencing hearing pursuant to the procedures set forth in this section or, if the defendant pled guilty or waived the right to jury sentencing, the sentence shall be determined by the trial judge.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(3) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and the sentencing hearing.

(3.5) (a) The provisions of this subsection (3.5) shall apply only in a class 1 felony case in which the prosecuting attorney has filed a statement of intent to seek the death penalty pursuant to rule 32.1 (b) of the Colorado rules of criminal procedure.

(b) The prosecuting attorney shall provide the defendant with the following information and materials not later than twenty-one days after the prosecution files its written intention to seek the death penalty or within such other time frame as the supreme court may establish by rule; except that any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the prosecuting attorney intends to call as a witness at the sentencing hearing shall be provided to the defense as soon as practicable but not later than sixty-three days before trial:

(I) A list of all aggravating factors that are known to the prosecuting attorney at that time and that the prosecuting attorney intends to prove at the sentencing hearing;

(II) A list of all witnesses whom the prosecuting attorney may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(III) The written and recorded statements, including any notes of those statements, for each witness whom the prosecuting attorney may call at the sentencing hearing;

(IV) A list of books, papers, documents, photographs, or tangible objects that the prosecuting attorney may introduce at the sentencing hearing; and

(V) All material or information that tends to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.

(c) Upon receipt of the information required to be disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(d) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:

(I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing; and

(III) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

(e) (I) Any material subject to this subsection (3.5) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.

(II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (e) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(f) (I) Except as otherwise provided in subparagraph (II) of this paragraph (f), if the witnesses disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (f) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(g) If the witnesses disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5) include witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

(h) There is a continuing duty on the part of the prosecuting attorney and the defendant to disclose the information and materials specified in this subsection (3.5). If, after complying with the duty to disclose the information and materials described in this subsection (3.5), either party discovers or obtains any additional information and materials that are subject to disclosure under this subsection (3.5), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.

(i) The trial court, upon a showing of extraordinary circumstances that could not have been foreseen and prevented, may grant an extension of time to comply with the requirements of this subsection (3.5).

(j) If it is brought to the attention of the court that either the prosecuting attorney or the defendant has failed to comply with the provisions of this subsection (3.5) or with an order issued pursuant to this subsection (3.5), the court may enter any order against such party that the court deems just under the circumstances, including but not limited to an order to permit the discovery or inspection of information and materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials not disclosed, or to impose sanctions against the offending party.

(4) For purposes of this section, mitigating factors shall be the following factors:

- (a) The age of the defendant at the time of the crime; or
 - (b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
 - (c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
 - (d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or
 - (e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or
 - (f) The emotional state of the defendant at the time the crime was committed; or
 - (g) The absence of any significant prior conviction; or
 - (h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or
 - (i) The influence of drugs or alcohol; or
 - (j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or
 - (k) The defendant is not a continuing threat to society; or
 - (l) Any other evidence which in the court's opinion bears on the question of mitigation.
- (5) For purposes of this section, aggravating factors shall be the following factors:
- (a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or
 - (b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 16-11-309, C.R.S., as it existed prior to October 1, 2002, or section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 16-11-309, C.R.S., as it existed prior to October 1, 2002, or section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

(I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or

(II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or

(III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.

(IV) An elected state, county, or municipal official; or

(V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or

(d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or

(e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or

(f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), "explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives; or

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

(i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner;
or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(l) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode; or

(m) The defendant intentionally killed a child who has not yet attained twelve years of age;
or

(n) (I) The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin.

(II) The provisions of this paragraph (n) shall apply to offenses committed on or after July 1, 1998.

(o) (I) The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States.

(II) The provisions of this paragraph (o) shall apply to offenses committed on or after August 2, 2000.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) It is the expressed intent of the general assembly that there be in place a valid and operative procedure for the imposition of a sentence of death concerning class 1 felonies committed on or after July 1, 1995, and prior to July 12, 2002. Towards that end, if any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not

constitute a valid and operative death penalty statute concerning such class 1 felonies, but severance of such provisions would, through operation of the remaining provisions of this section, maintain this section as a valid and operative death penalty statute concerning such class 1 felonies, it is the intent of the general assembly that those remaining provisions are severable and are to have full force and effect. If, instead, any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute concerning such class 1 felonies, and severance of such provisions would not, through operation of the remaining provisions of this section, render this section a valid and operative death penalty statute concerning such offenses, it is the intent of the general assembly that this entire article be void and inoperative.

(b) If any death sentence is imposed upon a defendant pursuant to the provisions of this section and, on appellate review including consideration pursuant to subsection (9) of this section, the imposition of such death sentence upon such defendant is held invalid for reasons other than unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, the case shall be remanded to the trial court to set a new sentencing hearing before a newly impaneled jury or, if the defendant pled guilty or waived the right to jury sentencing, before the trial judge; except that, if the prosecutor informs the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment. If a death sentence imposed pursuant to this section is held invalid based on unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) When reviewing a sentence of death imposed by a three-judge panel, if the Colorado supreme court concludes that any one or more of the determinations made by the three-judge panel were constitutionally required to have been made by a jury, the supreme court may:

(a) Examine the record and the jury's verdicts or the defendant's guilty pleas at the guilt phase of the trial and determine whether any of the aggravating factors found to exist by the three-judge panel were also fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas; and

(b) (I) If the supreme court determines that one or more aggravating factors were fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas, the supreme court shall determine whether the sentence of death should be affirmed on appeal by proceeding in accordance with the provisions of paragraphs (a) to (d) of subsection (9) of this section; or

(II) If the supreme court determines there were no aggravating factors fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas, the supreme

court shall remand the case to the trial court for a sentencing hearing before a newly impaneled jury.

(9) If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:

(a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or

(b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or

(c) If the supreme court finds the sentencing body's consideration of an aggravating factor was improper because the aggravating factor was not given a constitutionally narrow construction, determining whether, beyond a reasonable doubt, the sentencing body would have returned a verdict of death had the aggravating factor been properly narrowed; or

(d) Employing any other constitutionally permissible method of review.

Source: **L. 2002, 3rd Ex. Sess.:** Entire article added and (1)(a), (1)(b), (1)(c), (5)(m), (6)(a), and (7) amended and (1)(e), (3.5), (5)(n), (5)(o), (8), and (9) added, pp. 16, 22, 24, 28, §§ 12, 13, 14, 15, effective July 12. **L. 2003:** (5)(c)(I) amended, p. 1615, § 11, effective August 6. **L. 2012:** IP(3.5)(b), IP(3.5)(d), and (3.5)(e)(I) amended, (SB 12-175), ch. 208, p. 871, § 126, effective July 1. **L. 2018:** (1)(a) amended, (SB 18-096), ch. 44, p. 471, § 8, effective August 8.

Cross references: For the legislative declaration contained in the 2002 act enacting this article and amending subsections (1)(a), (1)(b), (1)(c), (5)(m), (6)(a), and (7) and enacting subsections (1)(e), (3.5), (5)(n), (5)(o), (8), and (9), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

ANNOTATION

When a statute addresses an enumerated provision from the special legislation prohibition, a court must answer the threshold question of whether the classification adopted by the

legislature is a real or potential class or logically and factually limited to a class of one and thus illusory. The provision in subsection (1)(e) comes within two of the enumerated provisions in the special

legislation prohibition. *People v. Canister*, 110 P.3d 380 (Colo. 2005); *People v. Hagos*, 110 P. 3d 1290 (Colo. 2005).

The special legislation provision prohibits an illusionary class. The general assembly creates an illusionary class when it defines the class so that it will never have any other members other than those targeted by the legislation. The provision in subsection (1)(e) was "conceived, cut, and tailored" to apply to only two defendants, and the time limitation in the provision ensured it would only apply to two defendants. The legislation, therefore, is unconstitutional special legislation. *People v. Canister*, 110 P.3d 380 (Colo. 2005); *People v. Hagos*, 110 P. 3d 1290 (Colo. 2005).

Subsections (8) and (9) conflict with § 18-1.3-401 (5). Section 18-1.3-401 (5) requires the court to impose a life sentence on a defendant sentenced to death under an unconstitutional death penalty scheme. In contrast, subsections (8) and (9) of this section allow the supreme court to review the death sentence or remand for a new

sentencing hearing. Section 18-1.3-401 (5) is a mandatory provision and therefore it applies over the discretionary provision. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Subsections (8) and (9) are unconstitutional. Allowing the supreme court to determine if the jury implicitly found one or more aggravating factors that the three-judge panel found in their written findings violates the U.S. supreme court's decision in *Ring v. Arizona*. The supreme court would engage in the type of fact-finding declared unconstitutional in *Ring*. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Allowing the supreme court to remand the cases back for new penalty proceedings violates the ex post facto clause. Subjecting a defendant, sentenced under an unconstitutional death penalty statute, to a new penalty hearing in front of a jury is ex post facto because of the statutory dictate of a life sentence in § 18-1.3-401 (5) and because the defendants in these cases were identifiable targets of the legislation. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

18-1.5 ARTICLE 1.5

Criminal Justice Commission

18-1.5-101 to 18-1.5-105. (Repealed)

Editor's note: (1) This article was added in 1989. For amendments to this article prior to its repeal in 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 18-1.5-105 provided for the repeal of this article, effective March 15, 1994. (See L. 89, p. 833.)

18-1.7 ARTICLE 1.7

Treatment of Persons with Mental Illness Involved in the Criminal Justice System

18-1.7-101 to 18-1.7-106. (Repealed)

Editor's note: (1) This article was added in 2000 and was not amended prior to its repeal in 2003. For the text of this article prior to 2003, consult the 2002 Colorado Revised Statutes.

(2) Section 18-1.7-106 provided for the repeal of this article, effective July 1, 2003. (See L. 2000, p. 1567.)

18-1.8 ARTICLE 1.8

Interagency Task Force on Trafficking in Persons

18-1.8-101. (Repealed)

Source: L. 2012: Entire article repealed, (HB 12-1151), ch. 174, p. 621, § 1, effective August 8.

Editor's note: This article was added in 2005 and consisted of only § 18-1.8-101 and was not amended prior to its repeal in 2012. For the text of this article prior to 2012, consult the 2011 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

18-1.9 ARTICLE 1.9

Continuing Examination of the Treatment of Persons with Behavioral Health Disorders Who are Involved in the Criminal and Juvenile Justice Systems

18-1.9-101. Legislative declaration. 18-1.9-102. Definitions.

18-1.9-103.	Legislative oversight committee concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems - creation - duties - repeal.	18-1.9-105.	Task force funding - staff support.
18-1.9-104.	Task force concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice	18-1.9-106.	Treatment of persons with behavioral health disorders in the criminal and juvenile justice systems fund.
		18-1.9-107.	Repeal of article.

18-1.9-101. Legislative declaration.

(1) The general assembly finds that:

(a) The United States is in a public health crisis in which persons with behavioral health needs are neglected, stigmatized, or inadequately supported, which greatly increases the risk of such persons becoming involved with or continuing to be involved with the criminal or juvenile justice system;

(b) Persons with behavioral health disorders are disproportionately represented in the criminal and juvenile justice systems. The prevalence rates nationally of such individuals entering jail are three times greater than that of the general population. Bureau of justice statistics data from 2011 through 2012 indicate that half of the people incarcerated in prisons, and two-thirds of those in jail, have either a current serious psychological distress or a history of behavioral health concerns.

(c) The department of corrections' data indicate that one out of every three men and four out of every five women imprisoned in Colorado have a moderate to severe behavioral health disorder;

(d) The division of youth services' data indicate that fifty-nine percent of newly committed youth require behavioral health intervention or services, and nationally, juvenile institutions are ill-equipped to provide a comprehensive array of such services to meet the needs; and

(e) Large numbers of people with behavioral health disorders are being sent to secure justice settings instead of receiving community treatment. As a result, the criminal justice system has become the stopgap provider to address chronic and acute behavioral health needs in our state.

(2) The general assembly further finds that:

(a) Actions focused on persons who are at risk of entry into the system due to behavioral health disorders, and actions to help reduce and prevent recidivism once such individuals are in the system, are critical in addressing the problem;

(b) Research demonstrates a need to divert persons with behavioral health disorders to treatment programs and to provide wraparound services, such as housing and continued medical and behavioral health treatment upon release; and

(c) Prevention and intervention needs range from, but are not limited to, school-based behavioral health services; law enforcement directed diversion; community screening, assessment, and treatment; secure settings within correction facilities; and supportive reentry services that are critical components of dignity, safety, and recovery.

(3) In addition, the general assembly finds that the results of a report requested by the joint budget committee in 1999 recommended cross-system collaboration and communication as a method for reducing the number of persons with mental health disorders who are involved in the criminal and juvenile justice systems. The committee and task force created by this article 1.9 shall consider the broader continuum of behavioral health disorders to better account for the needs of the at-risk population being studied.

(4) Therefore, the general assembly declares that, despite the impact and reach of the previous work of the legislative oversight committee and task force, a significant need remains for ongoing innovation to address these and related issues. The general assembly therefore determines that it is necessary to continue the legislative oversight committee and task force to examine the identification, diagnosis, and treatment of persons with behavioral health disorders who are at risk of involvement or continued involvement with the criminal or juvenile justice systems and to develop strategies to address the issues such people face.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3437, § 1, effective June 8.

18-1.9-102. Definitions.

As used in this article 1.9, unless the context otherwise requires:

(1) "Behavioral health" refers to an individual's mental and emotional well-being and actions that affect an individual's overall wellness. Behavioral health problems and disorders include substance use disorders, serious psychological distress, suicide, depression, and other mental health disorders. Problems ranging from unhealthy stress or subclinical conditions to diagnosable and treatable diseases are included in the term "behavioral health". The term "behavioral health"

is also used to describe service systems that encompass prevention and promotion of emotional health, prevention and treatment services for mental health and substance use disorders, and recovery support.

(2) "Co-occurring disorder" means a disorder that commonly coincides with mental health disorders and may include, but is not limited to, substance abuse and substance use disorders, behavioral health disorders, intellectual and developmental disabilities, fetal alcohol syndrome, and traumatic brain injury.

(3) "Legislative oversight committee" or "committee" means the legislative oversight committee concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems established pursuant to section 18-1.9-103.

(4) "Previous task force" means the task force concerning the treatment of persons with mental health disorders in the criminal and juvenile justice systems that existed prior to July 1, 2022.

(5) "Task force" means the task force concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems established pursuant to section 18-1.9-104.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3439, § 1, effective June 8.

18-1.9-103. Legislative oversight committee concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems - creation - duties - repeal.

(1) Creation.

(a) There is created a legislative oversight committee concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems.

(b) The committee consists of six members as follows:

(I) The president of the senate shall appoint two senators to serve on the committee, and the minority leader of the senate shall appoint one senator to serve on the committee; and

(II) The speaker of the house of representatives shall appoint three representatives to serve on the committee, no more than two of whom are members of the same political party.

(c) The terms of the members who are serving on the legislative oversight committee concerning the treatment of persons with mental health disorders in the criminal and juvenile justice systems as of June 8, 2022, are extended to the convening date of the first regular session

of the seventy-fourth general assembly. As soon as practicable after such convening date, but no later than the end of the legislative session, the speaker, the president, and the minority leader of the senate shall each appoint or reappoint members in the same manner as provided in subsection (1)(b) of this section. Thereafter, the terms of members appointed or reappointed by the speaker, the president, and the minority leader of the senate expire on the convening date of the first regular session of the next general assembly, and all subsequent appointments and reappointments by the speaker, the president, and the minority leader of the senate must be made as soon as practicable after the convening date, but no later than the end of the legislative session.

(d) The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members appointed or reappointed serve at the pleasure of the appointing authority and continue in office until the member's successor is appointed.

(e) The president of the senate shall select the first chair of the committee, and the speaker of the house of representatives shall select the first vice-chair. The chair and vice-chair shall alternate annually thereafter between the two houses.

(f) The chair and vice-chair of the committee may establish organizational and procedural rules as are necessary for the operation of the committee and, in collaboration with the task force, guidelines and expectations for ongoing collaboration with the task force.

(g) (I) Members of the committee may receive payment of per diem and reimbursement for actual and necessary expenses authorized pursuant to section 2-2-307.

(II) The director of research of the legislative council and the director of the office of legislative legal services shall supply staff assistance to the committee as they deem appropriate, within existing appropriations.

(2) Duties.

(a) (I) The committee shall meet at least three times each year and at such other times as it deems necessary.

(II) Each committee member shall annually either attend or call into at least one regular task force meeting. Committee members are encouraged to attend separate meetings and inform the rest of the committee about the current work of the task force.

(III) (A) Notwithstanding subsection (2)(a)(II) of this section, committee members are not required to attend or call into a regular task force meeting during the 2026 interim. A member who attends a regular task force meeting during the 2026 interim is not entitled to per diem or expenses.

(B) This subsection (2)(a)(III) is repealed, effective July 1, 2027.

(IV) (A) Notwithstanding subsection (2)(a)(I) of this section, the committee shall not meet during the 2026 interim.

(B) This subsection (2)(a)(IV) is repealed, effective July 1, 2027.

(b) The committee is responsible for the oversight of the task force and shall submit annual reports pursuant to subsection (2)(c) of this section to the general assembly regarding the task force's findings and recommendations. In addition, the committee may recommend legislative changes that are treated as bills recommended by an interim legislative committee for purposes of any introduction deadlines or bill limitations imposed by the joint rules of the general assembly.

(c) (I) On or before January 15 of each year, the committee is required to submit a report to the general assembly and make such report publicly available on its website; however, during any interim in which the general assembly has suspended interim committee activities, the committee is not required to submit such a report. The annual report must briefly summarize the study issues, recommendations considered, and any actions taken by the committee and the task force during the previous year.

(II) The report must comply with the provisions of section 24-1-136 (9). Notwithstanding section 24-1-136 (11)(a)(I), the requirement in this section to report to the general assembly continues indefinitely.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3439, § 1, effective June 8. **L. 2026:** (2)(a)(III) and (2)(a)(IV) added, (HB 26-1331), ch. 329, p. 1919, § 11, effective June 2.

18-1.9-104. Task force concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems - creation - membership - duties - repeal.

(1) **Creation.** There is created a task force concerning the treatment of persons with behavioral health disorders in the criminal and juvenile justice systems. The task force consists of thirty-one members appointed as provided in subsection (2) of this section and any staff support as provided for in section 18-1.9-105.

(2) **Membership - terms.**

(a) The chief justice of the Colorado supreme court shall appoint two members who represent the judicial department, one of whom represents the division of probation within the department. Nothing in this section prohibits the chief justice from appointing members who served on the previous task force.

(b) The following executive branch agencies, divisions, and offices shall appoint or reappoint from the previous task force twelve members. Nothing in this section prohibits the executive branch agencies listed from appointing members who served on the previous task force. The following executive branch agencies shall appoint a representative on or before August 1, 2022:

(I) The director of the division of criminal justice in the department of public safety shall appoint one member to represent the division;

(II) The director of the department of corrections shall appoint one member to represent the department;

(III) The department of human services shall appoint four members as follows:

(A) The director of the Colorado mental health institute at Pueblo, or the director's designee;

(B) The commissioner of the behavioral health administration, or the commissioner's designee;

(C) The director of the division of youth services shall appoint one member to represent the division; and

(D) The director of the unit within the department of human services that is responsible for child welfare services shall appoint one member to represent the unit;

(IV) The executive director of the department of education shall appoint one member to represent the department;

(V) The attorney general shall appoint one member to represent the attorney general's office;

(VI) The executive director of the department of health care policy and financing shall appoint one member to represent the department;

(VII) The executive director of the department of labor and employment shall appoint one member to represent the department;

(VIII) The director of the office of the child's representative shall appoint one member to represent the office; and

(IX) The director of the office of the alternate defense counsel shall appoint one member to represent the office.

(c) The chair and vice-chair of the legislative oversight committee shall appoint or reappoint from the previous task force seventeen additional members. Committee staff is responsible for publicly announcing vacancies for the following positions, and requesting candidates submit a letter of interest for the specific position, so that the letters of interest are due no later than one week after June 8, 2022. The legislative oversight committee, by majority vote, shall approve the appointments for these positions. Nothing in this section prohibits the legislative oversight

committee from appointing members who served on the previous task force. The task force members to be appointed pursuant to this subsection (2)(c) include:

(I) Two members who represent local law enforcement agencies, one of whom is in active service as a police officer in the state, and the other is in active service as a sheriff in the state;

(II) Two members from county departments of human or social services, one of whom represents a rural Colorado perspective;

(III) One member who represents district attorneys within the state;

(IV) One member who represents public defenders within the state;

(V) Two members who represent the criminal defense bar within the state, one of whom has experience representing juveniles in the juvenile justice system;

(VI) Two members who are licensed mental health professionals practicing within the state, one of whom has experience treating juveniles;

(VII) One member who is from a community mental health center within the state;

(VIII) One member who has knowledge of public benefits and public housing within the state;

(IX) One member who is a mental health professional practicing in forensic environments;

(X) Three members of the public as follows:

(A) One member who is living with a behavioral health disorder and has been involved in the criminal or juvenile justice system in the state;

(B) One member who has an adult family member who has a behavioral health disorder and who is or was involved in the criminal justice system in the state; and

(C) One member who is the parent of a child who has a behavioral health disorder and who is or was involved in the juvenile justice system in the state; and

(XI) One member who represents a nonprofit organization that works on statewide legislation and organizing Coloradans to promote behavioral, mental, and physical health needs.

(d) Beginning on June 8, 2022, members appointed to the task force pursuant to subsection (2)(c) of this section shall serve no more than three consecutive two-year terms, with the appointing authority's approval for each specific term. With the appointing authority's approval, a member of the task force who is serving on the task force as of June 8, 2022, is considered to be beginning the member's first two-year term.

(e) (I) A vacancy occurring in a position appointed by the chief justice of the Colorado supreme court pursuant to subsection (2)(a) of this section must be filled as soon as possible by

the chief justice of the Colorado supreme court in accordance with the limitations specified in subsection (2)(a) of this section. In addition, the chief justice of the Colorado supreme court may remove and replace any appointment to the task force made pursuant to subsection (2)(a) of this section.

(II) A vacancy occurring in a position that is appointed by an executive branch agency pursuant to subsection (2)(b) of this section must be filled as soon as possible by the initial appointing executive branch agency. In addition, the initial appointing executive branch agency may remove and replace any appointment it made to the task force made pursuant to subsection (2)(b) of this section.

(III) A vacancy occurring in a position filled by the chair and vice-chair of the committee pursuant to subsection (2)(c) of this section must be filled as soon as possible by the chair and vice-chair of the committee in accordance with the limitations specified in subsection (2)(c) of this section. In addition, the chair and vice-chair of the committee may remove and replace any appointment to the task force made pursuant to subsection (2)(c) of this section.

(f) In making appointments to the task force, the appointing authorities shall ensure that the membership of the task force includes persons who have experience with or interest in the study areas of the task force as set forth in subsection (3) of this section; persons who reflect the ethnic, cultural, and gender diversity of the state; representation of all areas of the state; and, to the extent practicable, persons with disabilities.

(g) (I) All task force members are expected to seek input from the various networks or organizational structures of the body they represent, if any. Every executive branch agency is encouraged to nominate a representative who can participate in making task force subject matter expert recommendations, yet still appropriately represent the executive branch agency's constituency.

(II) In order to advance the work of the task force, task force members are encouraged to participate in decision-making, with the understanding that individual votes on task force issues are based on subject matter expertise and do not commit representative agencies or organizations to any position or action. Task force members shall adhere to any agreed-upon procedural rules and guidelines.

(h) (I) Members of the task force serve without compensation. However, members of the task force appointed pursuant to subsection (2)(c) of this section may receive reimbursement for actual and necessary expenses associated with their duties on the task force.

(II) (A) Notwithstanding subsection (2)(h)(I) of this section, members of the task force appointed pursuant to subsection (2)(c) of this section shall not receive reimbursement for actual and necessary expenses associated with their duties on the task force during the 2026 interim.

(B) This subsection (2)(h)(II) is repealed, effective July 1, 2027.

(3) Issues for study.

(a) The task force shall study behavioral health issues within its scope for persons involved with the criminal and juvenile justice systems, as annually defined in writing by the committee every year on or before January 30, and shall develop and propose policy modifications for committee consideration.

(b) The requirements set forth in this subsection (3) do not prohibit the task force, at any time during its existence, from requesting permission from the committee to study, present findings, and make recommendations on any issue related to the scope of the task force and oversight committee.

(c) The task force shall study best and promising practices to promote positive social and emotional outcomes for individuals with behavioral health disorders who are involved or at risk of involvement or continued involvement in the criminal or juvenile justice systems, with the focus on better understanding and addressing necessary resources and actions for implementation to prevent initial or continued involvement with the criminal or juvenile justice systems.

(d) In evaluating the issues set forth in subsection (3)(a) of this section, the task force shall specifically consider the following related issues, including:

(I) Early identification of and intervention strategies for individuals who are at a higher risk of continued involvement with the criminal or juvenile justice system due to established or developing behavioral health concerns;

(II) The promotion of resilience and health for persons already experiencing involvement or who are at risk of continuing involvement with the criminal or juvenile justice system due to behavioral health concerns;

(III) The intersection of behavioral health disorders and the involvement or risk of continued involvement in the juvenile or criminal justice systems, with a specific focus on diverting persons with mental health, substance use, or co-occurring disorders away from the risk of continued juvenile or criminal justice involvement; and

(IV) Issues relating to persons with behavioral health disorders who are already involved in the criminal or juvenile justice system, utilizing safe and effective interventions with a focus on preventing further involvement, promoting good health outcomes upon release, and enhancing recovery success.

(4) Additional duties of the task force. The task force shall annually deliver policy and legislative recommendations to the committee pursuant to this section. In addition, the task force shall:

(a) On or before August 1 of each year, select a chair and vice-chair from among its members;

- (b) Meet at least six times each year, or more often as directed by the chair of the committee;
- (c) Establish organizational and procedural rules for the operation of the task force and for collaboration with the committee;
- (d) Designate specific task force members responsible for collaborating with and obtaining input from other groups, task forces, or statewide initiatives that complement or relate to the task force's identified areas of study;
- (e) Create subcommittees as needed to carry out the duties of the task force. The subcommittees may consist, in part, of persons who are not members of the task force. Such persons may vote on issues before the subcommittee but are not entitled to a vote at task force meetings.
- (f) Study the implementation of committee legislation passed by the general assembly;
- (g) Upon request by a committee member, provide evidence-based feedback on the potential benefits or consequences of a legislative or other policy proposal not directly affiliated with or generated by the task force. The feedback must be delivered within two weeks to the entire committee and remain as concise as possible while capturing any available evidence. If the task force cannot identify evidence to effectively inform a response, the feedback will indicate a lack of evidence and report on any actions taken.
- (h) (I) On or before August 1 of each year, prepare and submit to the committee, a report that, at a minimum, includes:
 - (A) Issues studied by the task force, as well as findings for legislative or other recommendations;
 - (B) Legislative or policy proposals of the task force that identify the policy issues involved, the agencies responsible for the implementation of the changes, and the funding sources required for implementation;
 - (C) A summary of task force meeting activities and discussions;
 - (D) Any evidence-based feedback provided to the committee pursuant to subsection (4)(g) of this section; and
 - (E) A summary of efforts made to communicate, collaborate, or coordinate with other groups, task forces, or state initiatives.
- (II) The task force may post the report on the committee's website.
- (5) **Coordination.** The task force may work with other groups, task forces, or statewide initiatives that are pursuing issues and policy initiatives similar to those addressed in subsection

(3) of this section. The task force may develop relationships with other task forces, committees, and organizations to leverage efficient policy-making opportunities through collaborative efforts.

(6) Notwithstanding any provision of this section, the task force is not required to meet, submit annual policy and legislative recommendations, or submit an annual report to the committee during any interim in which the general assembly has suspended interim committee activities.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3441, § 1, effective June 8. **L. 2023:** IP(2)(b) amended, (HB 23-1301), ch. 303, p. 1821, § 22, effective August 7. **L. 2026:** (2)(h) amended, (HB 26-1331), ch. 329, p. 1919, § 12, effective June 2.

Editor's note: Subsection (1)(c)(IV)(A) was amended in HB 22-1278, effective July 1, 2022. However, those amendments were superseded by the repeal and reenactment of this section by SB 22-021, effective June 8, 2022.

18-1.9-105. Task force funding - staff support.

(1) The legislative council staff shall supply staff assistance, within existing appropriations, to the task force as the committee deems appropriate. If existing appropriations are not adequate to supply staff assistance through the legislative council staff, the director of legislative council staff shall request additional necessary funding in its annual budget request.

(2) The division of criminal justice in the department of public safety, the behavioral health administration in the department of human services, and any state department or agency with an active representative on the task force are authorized to receive and expend gifts, grants, and donations, including donations of in-kind services for staff support, from any public or private entity for any direct or indirect costs associated with the duties of the task force.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3447, § 1, effective June 8; (2) amended as R&RE by SB 22-021, (HB 22-1278), ch. 222, p. 1601, § 252, effective July 1.

Editor's note: This section was amended in HB 22-1278, effective July 1, 2022. However, those amendments were superseded by the repeal and reenactment of this section by SB 22-021, effective June 8, 2022.

18-1.9-106. Treatment of persons with behavioral health disorders in the criminal and juvenile justice systems fund.

(1) The treatment of persons with behavioral health disorders in the criminal and juvenile justice systems fund, referred to in this section as the "fund", is created in the state treasury. The fund consists of money appropriated or transferred to the fund by the general assembly and any private and public funds received through gifts, grants, or donations for the purpose of implementing the provisions of this article 1.9. Money in the fund is subject to annual appropriation by the general assembly for the direct and indirect costs associated with the implementation of this article 1.9. Money in the fund not expended for the purpose of implementing this article 1.9 may be invested by the state treasurer as provided by law. The state treasurer shall credit all interest and income derived from the deposit and investment of money in the fund to the fund. The state treasurer shall transfer all unexpended and unencumbered money remaining in the fund as of July 1, 2025, to the general fund.

(2) The chair of the executive committee of the legislative council shall approve any compensation provided for in sections 18-1.9-103 (1)(g), 18-1.9-104 (2)(h), and 18-1.9-105 for members of the general assembly, specified members of the task force, and staff assistance to the committee and task force, as provided by the director of research of the legislative council and the director of the office of legislative legal services. Compensation must be paid by vouchers and warrants drawn as provided by law from money appropriated for such purpose and allocated to the executive committee of the legislative council from the fund.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3447, § 1, effective June 8.

18-1.9-107. Repeal of article.

This article 1.9 is repealed, effective July 1, 2027.

Source: L. 2022: Entire article R&RE, (SB 22-021), ch. 471, p. 3447, § 1, effective June 8.

ARTICLE 2

Inchoate Offenses

PART 1 ATTEMPTS		18-2-205.	Incapacity, irresponsibility, or immunity of party to conspiracy.
18-2-101.	Criminal attempt.		
PART 2 CRIMINAL CONSPIRACY		18-2-206.	Penalties for criminal conspiracy - when convictions barred.
18-2-201.	Conspiracy.		
18-2-202.	Joinder and venue in conspiracy prosecutions.		PART 3 CRIMINAL SOLICITATION
18-2-203.	Renunciation of criminal purpose.	18-2-301.	Criminal solicitation.
			PART 4 RENUNCIATION AND ABANDONMENT
18-2-204.	Duration of conspiracy.	18-2-401.	Nonavailability of defenses.

PART 1 ATTEMPTS

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 or class 2 misdemeanor is a class 2 misdemeanor.

(7) Repealed.

(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.

Source: **L. 71:** R&RE, p. 414, § 1. **C.R.S. 1963:** § 40-2-101. **L. 75:** (4) to (7) amended and (8) added, p. 617, § 3, effective July 21. **L. 76, Ex. Sess.:** (9) added, p. 10, § 2, effective September 18. **L. 77:** (1) amended, p. 960, § 4, effective July 1. **L. 89, 1st Ex. Sess.:** (4) and (5) amended, p. 21, § 11, effective July 1. **L. 95:** (3.5) added, p. 1250, § 4, effective July 1. **L. 2002:** (3.5) amended, p. 1511, § 182, effective October 1. **L. 2013:** (10) added, (SB 13-250), ch. 333, p. 1942, § 66, effective October 1. **L. 2014:** (10) amended, (SB 14-163), ch. 391, p. 1975, § 14, effective July 1. **L. 2021:** (6) amended, (SB 21-271), ch. 462, p. 3172, § 190, effective March 1, 2022; (7)(b) added by revision, (SB 21-271), ch. 462, pp. 3172, 3331, §§ 190, 803.

Editor's note: Subsection (7)(b) provided for the repeal of subsection (7), effective March 1, 2022. (See L. 2021, pp. 3172, 3331.)

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) For the legislative declaration contained in the 2002 act amending subsection (3.5), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Attempt, Reckless Homicide, and the Design of Criminal Law", see 78 U. Colo. L. Rev. 879 (2007).

Annotator's note. Since § 18-2-101 is similar to former § 40-25-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The attempt provision was drawn from proposed federal criminal code. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

"Criminal attempt" construed. Criminal attempt is a crime in which the defendant's purpose is to effect a criminal result. *People v. Derrera*, 667 P.2d 1363 (Colo. 1983).

Criminal attempt is not readily understandable to a person of ordinary

intelligence in a guilty plea hearing without some further explanation by the court. *People v. Leonard*, 673 P.2d 37 (Colo. 1983).

"Purpose" equivalent of "intent". The word "purpose", as used in this section, is the equivalent of the common meaning of the word "intent". *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

An attempt merely requires some overt act beyond mere preparation. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

An attempt means an effort to commit a crime, and a direct, ineffectual act done towards its commission. *Lewis v. People*, 124 Colo. 62, 235 P.2d 348 (1951); *Martin v. People*, 179 Colo. 237, 499 P.2d 606 (1972).

This section provides that criminal attempt requires that the defendant has the intent to perform any act, and to obtain any result which, if accomplished, would constitute such crime, plus some step toward the commission of the crime which would result in its commission, except for the extraneous intervention of another person or

factor. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Such overt act need not be the last proximate act necessary. *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

A transaction, if complete, must constitute offense. Where a transaction, had it proceeded to its contemplated conclusion, would not have been a completed crime, the incompleted transaction does not rise to the dignity of an attempt to commit such offense. *Martin v. People*, 179 Colo. 237, 499 P.2d 606 (1972).

Culpability and conduct required for criminal attempt. In order to be guilty of criminal attempt, an actor must act with the kind of culpability otherwise required for commission of the underlying offense and must engage in conduct which constitutes a substantial step, with the further intent to perform acts which, if completed, would constitute the underlying offense. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Because the jury instructions taken as a whole failed to instruct the jury that the defendant must intend to complete the crime intended, the judgment of conviction of attempted theft is reversed. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Commission of a criminal attempt requires the intent to commit a specific crime. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Specific criminal attempt provision prevails over the general criminal attempt

statute. There was no violation of equal protection in defendant's conviction under a specific attempt provision of the second degree assault statute, despite defendant's contention that this section proscribes the same conduct. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

First degree murder statutes contain rationally different elements than first degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Attempted second degree murder requires a substantial step toward causing death, while attempted first degree assault-extreme indifference requires only a substantial step toward causing serious bodily injury, and thus the statutes do not proscribe the same conduct and a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Ornelas-Licano*, 2020 COA 62, 490 P.3d 714.

Attempted patronizing a prostituted child and attempted inducement of child prostitution are both class 4 felonies, but attempted patronizing carries a harsher penalty than attempted inducement, so a conviction for both violates a defendant's right to equal protection under the law. *People v. Dominguez*, 2024 COA 32, 551 P.3d 1205.

Attempt to commit aggravated robbery requires same culpability, plus substantial step. Criminal attempt to commit aggravated robbery requires that the offender act with

the kind of culpability otherwise required for aggravated robbery and engage in a substantial step toward the commission of aggravated robbery. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Conviction of attempted aggravated robbery does not require a showing of specific intent to commit the underlying crime. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Information reciting elements of attempt, and referring to provision defining ulterior crime, adequate. Where the information recited the elements of the inchoate crime of attempt in the language of this section and included a reference to the section defining the burglary allegedly attempted, and where the defendant claimed no surprise or prejudice resulting from the absence of an allegation specifying the ulterior crime to be relied upon by the prosecution in its proof of the elements of burglary, the information adequately described the offense of attempt. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

This section and § 18-1-504 may be harmonized and do not conflict. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Subsection (1) and § 18-3-203 (1)(b) do not proscribe the same conduct, and disparity in applicable punishment does not violate equal protection guarantees. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Legislative intent in amending subsection (5). It is immaterial that the offense of attempted possession of a narcotic drug is not proscribed by part 3 of article 22 of title 12; the general assembly's manifest intent was to broaden the crime of criminal attempt to include felonies other than those defined in the criminal code when it amended subsection (5) of this section. *People v. Maciel*, 39 Colo. App. 149, 568 P.2d 68 (1977).

No defense of impossibility available in attempt prosecution. The general assembly intended that the defense of factual or legal impossibility not be available in an attempt prosecution. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

A person who only thinks he is violating law may not be prosecuted. Exclusion of the defense of impossibility is not intended to permit prosecuting the person who thinks he is violating a law when in fact no such law exists. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Attempted criminally negligent homicide logical and legal impossibility. Where the trial court joined criminally negligent homicide and attempt and charged the jury on attempted criminally negligent homicide, the charge was a logical and legal impossibility. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Defendant may raise defense of general mistake of fact. A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft, but may

raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

The fact that the items were not in fact stolen does not provide a defense to attempted theft where the defendant believed they were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Intoxication not defense in criminal attempt action. The legislative intent in amending this section in 1977 was to preclude a defendant from utilizing intoxication as a defense to his ability to form the intent required for criminal attempt. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

Proper instructions on affirmative defense must be given. Where an issue of renunciation and abandonment is before a jury, proper instructions on this affirmative defense must be given. *People v. Traubert*, 625 P.2d 991 (Colo. 1981).

Effect of voluntary renunciation of criminal intent. Even though the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, the affirmative defense of abandonment is present if he thereafter voluntarily renounces his criminal intent. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

Defense of abandonment may apply at various stages, early and late, in the commission of attempted crimes; however,

the abandonment defense does not provide immunity where the actor has put in motion forces that the actor is powerless to stop, because the attempt is deemed to have been completed and cannot be abandoned. *People v. Gandiaga*, 70 P.3d 523 (Colo. App. 2002).

Defense of abandonment was not available where defendant knew of his accomplice's intent to rob someone, went with the accomplice to the crime scene, waited across the street until the crime was committed, fled with the accomplice, and later returned to conceal or remove evidence. *People v. Nicholas*, 950 P.2d 634 (Colo. App. 1997), *rev'd on other grounds*, 973 P.2d 1213 (Colo. 1999).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

Culpable state of knowledge sufficient to support criminal attempt liability. A knowing attempt to attain a proscribed result is sufficient culpable mental state to justify imposition by the legislature of attempt liability. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

For conviction under subsection (1) of this section or § 18-4-410 (1), relating to theft by receiving, it is irrelevant whether the goods are recovered stolen goods or have never been stolen. The intent and acts of the defendant, not the surrounding circumstances, are the crucial elements of the attempt offense. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

The portion of subsection (1) which provides that impossibility "is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be" in effect substitutes "believing" the goods to be stolen, the element of culpability required in attempted theft by receiving, for "knowing" the goods to be stolen, the element of culpability for a completed theft by receiving. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Where the defendant did every act within his power to commit the offense of theft by receiving and would have committed the completed offense had the jewelry been stolen as he believed it to be, these acts evidenced an intent to commit the offense, and the defendant comes within the letter of this section. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Proof of intent insufficient. Where testimony of complaining parties negates any intent on the part of defendant to commit attempted theft and sole evidence of intent comes from defendant, requisite independent corroborative evidence of corpus delicti is lacking. *Martin v. People*, 179 Colo. 237, 499 P.2d 606 (1972).

Where a defendant engages in only one assaultive act, he or she cannot simultaneously have a specific intent to harm a particular person and universal malice that is not directed at a particular person. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Attempt to commit rape is crime. The contention that there is no crime of attempt to commit rape under this section in view of the existence of the crime of assault with intent to commit rape under § 18-3-202 is without merit, for these are separate and distinct offenses. *Clark v. People*, 176 Colo. 48, 488 P.2d 1097 (1971).

For attempt to commit an assault with a deadly weapon, see *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Attempt to commit sexual assault on child is offense under Colorado law. *People v. Martinez*, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Person is guilty of attempted second degree kidnapping if he knowingly engaged in conduct which is strongly corroborative of the firmness of his purpose to knowingly seize or carry another person from one place to another without his consent and without lawful justification. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980); *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Intent required for attempted first degree murder. Intent required for attempted first degree murder is the intent to commit the underlying offense of first degree murder. Defendant must have acted

after deliberation, and must have intended to cause the death of another person. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991).

Attempted first degree murder is a lesser included offense of first degree murder. The elements of attempted first degree murder are a subset of first degree murder. When the defendant in this case aimed at and shot the victim, he intended and attempted to kill the victim, even if he mistakenly believed the victim was someone else. Therefore the particular attempted first degree murder in this case is a lesser included offense of the particular first degree murder in this case, and the defendant cannot be convicted of both. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

Double jeopardy prohibits convictions for both first degree murder and attempted first degree murder for the same act. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

Attempted reckless manslaughter is a cognizable crime in Colorado. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

When one engages in conduct that involves a risk of death that is both substantial and unjustified and is conscious of the nature and extent of the risk, the actor demonstrates such a disregard for the likelihood that another will die as to evince a degree of dangerousness hardly less threatening to society than if the actor had chosen to cause death and, as such, justifies the conclusion that attempt liability may be founded on the substantive offense of

reckless manslaughter. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Intent required for attempted reckless manslaughter is the intent to commit the underlying offense of reckless manslaughter, that is, the intent to engage in and complete the risk-producing act or conduct. It does not include an intent that death occur even though the underlying crime, reckless manslaughter, has death as an essential element. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

The crime of attempted reckless manslaughter also requires that the risk-producing act or conduct be commenced and sufficiently pursued to constitute a substantial step toward the commission of the offense. That is, the act or conduct must proceed far enough to be strongly corroborative of the firmness of the actor's purpose to complete those acts that will produce a substantial and unjustifiable risk of death to another. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Finally, in order to be guilty of attempted reckless manslaughter, the actor must engage in the requisite acts or conduct with the kind of culpability otherwise required for the commission of the underlying offense, that is, with a conscious disregard of a substantial and unjustifiable risk that the acts or conduct will cause the death of another person. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Court's response to jury inquiry on attempted reckless manslaughter, although a comment on the evidence and not a proper instruction on the law, did

not constitute plain error. Hypothetical given by the court, when considered in the context of the jury instructions as a whole, neither misled the jury nor cast serious doubt on the verdict. *People v. Allen*, 43 P.3d 689 (Colo. App. 2001).

Colorado does not recognize the offense of attempted felony murder. Because criminal attempt requires a defendant to possess the culpable mental state for the attempted offense and felony murder does not require a mental state, it is impossible to convict a person of attempting to commit an act that the person was not intending. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

Third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. While unlawful entry upon the premises is a necessary element of the completed offense of third degree criminal trespass, it is not a necessary element of attempted first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of criminal attempt to commit escape under this section. *People v. Lobato*, 703 P.2d 623 (Colo. App. 1985).

Attempted extreme indifference murder is a grave and serious crime. *People v. Terry*, 2019 COA 9, 488 P.3d 459.

Substantial step required for conviction of attempted extreme indifference murder is conduct which poses a real and proximate

risk of death to the victim. *People v. Castro*, 657 P.2d 932 (Colo. 1983).

In applying this test, the court should consider the nature of the defendant's conduct as well as the extent of the victim's injuries. *People v. Ramos*, 708 P.2d 1347 (Colo. 1985).

Substantial step. Evidence was sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendants engaged in conduct which constituted a substantial step toward the underlying offense of first degree murder. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991).

Evidence sufficiently demonstrated that defendant, by seizing and carrying the victim from the kitchen to the bedroom and unsuccessfully attempting to have sexual relations despite the victim's protests and resistance, engaged in a substantial step toward the commission of sexual assault. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Submission of attempt and lesser included offenses to jury. Where it was possible for the jury to entertain a reasonable doubt as to defendant's guilt of attempted robbery, and at the same time to be convinced by reason of defendant's admissions that he was guilty of making an assault upon the complaining witness, the evidence justified the giving of an instruction on simple assault as requested in order to submit the lesser included offense to a jury. *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972).

A defendant could commit the crime of attempted theft without having first committed the crime of joyriding or attempted joyriding, which are not lesser included offenses of theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference when the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

The question of whether felony menacing is a lesser included offense of attempted second degree murder is an issue of first impression in Colorado. *People v. Torres*, 224 P.3d 267 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony menacing. Attempted second degree murder requires a defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the elements of menacing. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Elements constituting the crime of theft must be explained to the jury when that is the ulterior crime in a case alleging a burglary offense. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

Jury instruction that erroneously omitted element for attempted first degree murder was not plain error because jury instructions read as a whole sufficiently communicated to the jury the culpability elements required to convict the defendant of attempted first degree murder. *People v. Key*, 851 P.2d 228 (Colo. App. 1992).

Jury instruction on attempted first degree murder that omitted the required element of "after deliberation", when taken together with first degree murder jury instruction that expressly mentioned "after deliberation", adequately advised the jury of the required mens rea for attempted first degree murder. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004); *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Jury instruction that erroneously omitted specific intent element for attempted first degree assault was not plain error. The jury instructions in this case, when read and considered together, clearly instructed the jury regarding the required mens rea for attempted first degree assault. *People v. Procasky*, 2019 COA 181, 467 P.3d 1252.

Crimes of violence include attempts of crimes listed in § 18-1.3-406 (2)(a)(II). *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

The general rule applies that abandonment is not available for completed crimes where the general assembly specifically limited the affirmative defense of abandonment to "a charge under

this section" and no other legislative enactment makes abandonment an affirmative defense for tampering with a witness. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation.

Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Attempted robbery as defined in Colorado law is a crime of violence for purposes of § 4B1.2(a) of the United States sentencing guidelines. *United States v. Mendez*, 924 F.3d 1122 (10th Cir. 2019).

Applied in *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978); *Hudson v. People*, 196 Colo. 211, 585 P.2d 580 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Honey*, 198 Colo. 64, 596 P.2d 751 (1979);

People v. Elkhatib, 198 Colo. 287, 599 P.2d 897 (1979); *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Elkhatib*, 632 P.2d 275 (Colo. 1981); *People v. Walters*, 632 P.2d 566 (Colo. 1981); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Franklin*, 640 P.2d 226 (Colo. 1982); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Madonna*, 651 P.2d 378 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People v. Freiman*, 657 P.2d 452 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Tate*, 657 P.2d 955 (Colo. 1983); *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983); *United States v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014); *People v. Richardson*, 2018 COA 120, 486 P.3d 282, *aff'd* on other grounds, 2020 CO 46, 481 P.3d 1.

PART 2

CRIMINAL CONSPIRACY

18-2-201. Conspiracy.

(1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he

agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.

(2) No person may be convicted of conspiracy to commit a crime, unless an overt act in pursuance of that conspiracy is proved to have been done by him or by a person with whom he conspired.

(3) If a person knows that one with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit a crime with the other person or persons, whether or not he knows their identity.

(4) If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode.

(4.5) Conspiracy 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.

(5) If a person conspires to commit a felony which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, the person commits a class 6 felony. If a person conspires to commit a misdemeanor which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, the person commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 415, § 1. C.R.S. 1963: § 40-2-201. L. 74: (5) added, p. 250, § 1, effective February 13. L. 89, 1st Ex. Sess.: (5) amended, p. 21, § 12, effective July 1. L. 95: (4.5) added, p. 1250, § 5, effective July 1. L. 2002: (4.5) amended, p. 1512, § 183, effective October 1. L. 2021: (5) amended, (SB 21-271), ch. 462, p. 3172, § 191, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4.5), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

I. General Consideration.

II. Essential Elements of Crime.

IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with conspiracy, see 62 Den. U. L. Rev. 125 (1985).

Annotator's note. Since § 18-2-201 is similar to former § 40-7-35, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

Conspiracy and commission of contemplated crime are different and distinct offenses. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

The charge of conspiracy to commit confidence game and the charge of confidence game are separate and distinct offenses, and proof of one does not hinge upon proof of the other. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

The crime of conspiracy to commit burglary and burglary are distinct and separate offenses. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The commission of a substantive offense and a conspiracy to commit the same crime are separate and distinct offenses, since the proof of the substantive offense rests on separate facts and does not hinge upon the proof of the conspiracy. *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971); *People v. Steele*, 193 Colo. 187, 563 P.2d 6 (1977).

Conspiracy and crime which is the object of the conspiracy are different and distinct offenses. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972); *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy is a substantive offense, separate from the underlying charge itself, which punishes an agreement intentionally entered into for the purpose of promoting criminal acts. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

One can be convicted of a conspiracy and not of the offense which is the object of the conspiracy, if the evidence implicates the defendant in a conspiracy separate and apart from the evidence offered to prove the substantive offense. *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982).

However, conviction of conspiracy cannot stand absent conviction of the substantive offense. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

This state adopts a unilateral approach to conspiracy. The defendant must agree with another person to commit a prohibited act; the second party can feign agreement. The fact that the second party was an undercover police officer and not a true co-conspirator does not, as a matter of law, preclude defendant's conviction for conspiracy. *People v. Vecellio*, 2012 COA 40, 292 P.3d 1004.

Complicity distinguished. Under the complicity statute, a defendant is held accountable for a criminal offense committed by another if the defendant participates in the criminal act, i.e., intentionally aids, abets, or advises the other person in planning or committing the offense. In contrast, the essence of the crime of conspiracy is an illegal agreement or combination, plus an overt act in furtherance

of that agreement. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Solicitation distinguished. A conspiracy may be committed without the inducement required for the crime of solicitation, and solicitation may be committed without the parties ever reaching an agreement or without any overt act taken to complete the object of the solicitation. Therefore, neither crime is included in the other and the two crimes do not merge. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Verdict acquitting defendant of conspiracy not inconsistent with verdict convicting the defendant of distribution of a controlled substance. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Consistency of verdicts is not required. The court of appeals erred in holding that the defendant could attack his conviction for distribution of a controlled substance on the ground that it is inconsistent with his acquittal on the conspiracy offense. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Section proscribes a conspiracy to commit any conduct which constitutes a crime, and not merely those acts designated as criminal in this title. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

It is not a violation of double jeopardy to be convicted of both aggravated robbery and conspiracy to commit robbery. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Defendant charged with assault with a deadly weapon and conspiracy to assault with deadly weapon was not subjected to double jeopardy by conspiracy instruction in

combination with accessory instruction. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy to commit reckless manslaughter is not a crime in Colorado. *Palmer v. People*, 964 P.2d 524 (Colo. 1998).

Where the underlying substantive criminal offense is of no effect, the conspiracy to commit it is likewise void. *People v. Larkin*, 183 Colo. 363, 517 P.2d 389 (1973).

Conviction on a charge of conspiracy to commit assault to rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Acquittal of substantive offense forecloses conviction of conspiracy to commit that offense, if the identical evidence relied upon to establish the conspiracy is the same evidence which proved insufficient to establish the substantive offense. *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978).

When conspiracy terminates. Although a conspiracy need not necessarily terminate with the completion of its targeted crime, nor even the arrest of a conspirator, when it does terminate depends upon the "particular facts and purposes of such conspiracy". *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Actions which establish continuing conspiracy. It is the actions taken in concert by the conspirators which alone can

establish that the conspiracy was to continue beyond the completion of the substantive crime. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The mere recognition that a desire to conceal participation in a crime is generally present does not constitute sufficient basis to conclude that each and every criminal conspiracy survives the completion of the crime at which it was directed. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

A conspiracy to commit theft does not continue, per se, until the proceeds are returned. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Without evidence to support the contention that the defendants cooperated to effect the concealment of the crime, conspiracy ended upon the division of the proceeds of the robbery. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Whether single set of facts constitutes one criminal episode. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

A single criminal episode exists where the defendant discussed supplying two types of drugs in the same telephone call mere seconds apart, the conspirators were the same, there was only one overt act, the defendant played the same role with respect to both drugs, and the evidence for both charges was essentially the same. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

A single criminal episode exists where the defendant discussed supplying three types of drugs in two phone calls on the

same day, there was a single delivery, the conspirators were the same and the defendant's role was the same with respect to all three drugs, and the evidence for all three charges substantially overlapped. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Case remanded to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for conspiracy could be made. *People v. Nygren*, 696 P.2d 270 (Colo. 1985).

Conspiracy to commit second degree burglary is not a violent felony for purposes of the federal Armed Career Criminal Act. The ordinary Colorado case of conspiracy to commit second burglary does not present a risk of violent confrontation comparable to the risk inherent in a completed burglary. Accordingly, defendant's Colorado conviction is not a violent felony as that term is defined in 18 U.S.C. § 924(e)(2)(B), and it should not have been used as a basis for the imposition of the armed career criminal enhancement. *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007).

Applied in *Powers v. People*, 53 Colo. 43, 123 P. 642 (1912); *West v. People*, 60 Colo. 488, 156 P. 137 (1915); *Bunch v. People*, 87 Colo. 84, 284 P. 766 (1930); *Vigil v. People*, 150 Colo. 582, 375 P.2d 103 (1962); *People v. Mojo*, 173 Colo. 422, 480 P.2d 571 (1971); *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *People v. Talarico*, 192 Colo. 445, 560 P.2d 90

(1977); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People ex rel. Brown v. District Court*, 196 Colo. 359, 585 P.2d 593 (1978); *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979); *People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *People v. Myers*, 43 Colo. App. 256, 609 P.2d 1104 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980); *People v. Hearty*, 644 P.2d 302 (Colo. 1982); *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People in Interest of R.M.S.*, 651 P.2d 377 (Colo. 1982); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *People v. Luciano*, 662 P.2d 480 (Colo. 1983); *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Rivera*, 56 P.3d 1155 (Colo. App. 2002).

II. ESSENTIAL ELEMENTS OF CRIME.

Crime of conspiracy is a crime of specific intent. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

A different specific intent is required for accessory offenses than for the crime of conspiracy; one cannot commit both by

performing the same act. *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Charge of conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983); *People v. Finnessey*, 747 P.2d 673 (Colo. 1987).

In proving that a "wheel and hub" conspiracy is a single conspiracy rather than multiple conspiracies, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown. *People v. Serrano*, 804 P.2d 253 (Colo. App. 1990).

The unlawful agreement is the gist of the crime of conspiracy. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900); *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

The gravamen of the crime of conspiracy is the illicit agreement to commit a felony. *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971).

Essence of the crime of conspiracy is the illegal agreement or combination. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

The relationship between coconspirators is part and parcel of the first element of conspiracy, which involves an agreement, combination, or confederation between two or more persons. *People v. Johnson*, 189 Colo. 28, 536 P.2d 44 (1975).

There must be a combination of two or more persons; one person cannot conspire

with himself. *Archuleta v. People*, 149 Colo. 206, 368 P.2d 422 (1962).

This state adopts a unilateral approach to conspiracy. The defendant must agree with another person to commit a prohibited act; the second party can feign agreement. The fact that the second party was an undercover police officer and not a true co-conspirator does not, as a matter of law, preclude defendant's conviction for conspiracy. *People v. Vecellio*, 2012 COA 40, 292 P.3d 1004.

The essential elements of conspiracy are: (1) An agreement; (2) a common design between two or more persons; and (3) an unlawful purpose to be accomplished, which purpose amounts to a crime in Colorado. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

To constitute the crime of conspiracy there must be a combination of two or more persons, the existence of an unlawful purpose to be accomplished, which in Colorado must amount to a crime, and a real agreement, combination, or confederation with a common design; mere passive cognizance of the crime to be committed or mere negative acquiescence is not sufficient. *Salazar v. People*, 166 Colo. 508, 445 P.2d 60 (1968); *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971); *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

The three elements necessary to prove a conspiracy are: (1) A real agreement, combination, or confederation, (2) with a common design between two or more persons, (3) to accomplish an unlawful purpose amounting to a crime. *Digiallonardo*

v. People, 175 Colo. 560, 488 P.2d 1109 (1971); *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

The three elements necessary to prove a conspiracy are: (1) An agreement, combination, or confederation, (2) between two or more persons, (3) to accomplish an unlawful purpose which must amount to a crime. *People v. Dowell*, 182 Colo. 11, 510 P.2d 436 (1973).

The elements of a conspiracy are: (1) An agreement, (2) between two or more persons, (3) to commit a crime. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

An agreement with common design between defendant and his coconspirator to engage in conduct which constitutes a crime or to aid in the planning or commission of the crime must be proven to establish a conspiracy. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

For a conspiracy to commit theft, the prosecution is not required to prove an agreement to take goods valued at a particular amount of money. It is required to prove only that there was an agreement to commit theft. For purposes of classifying the level of the crime, the prosecution is required to plead and prove the value of the goods taken. *People v. Samson*, 2012 COA 167, 302 P.3d 311.

Intent to promote or facilitate commission of a crime is a necessary element of the crime of conspiracy. *People*

v. Wilkinson, 38 Colo. App. 365, 561 P.2d 347 (1976).

To establish conspiracy there need only be circumstantial evidence that indicates that the conspirators, by their acts, pursued the same objective, with a view toward attainment of the same objective. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to convict the defendant on the conspiracy counts. There was evidence that the defendant and his gang agreed to kill two people and that he and others tried to kill those people. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

These elements must be proven beyond a reasonable doubt. To convict anyone of conspiracy, the state must prove beyond a reasonable doubt that there was a real agreement, combination, or federation with a common design between two or more persons to accomplish an unlawful purpose, which must amount to a crime. *People v. Armijo*, 176 Colo. 547, 491 P.2d 1384 (1971); *Feltes v. People*, 178 Colo. 409, 498 P.2d 1128 (1972); *Bates v. People*, 179 Colo. 81, 498 P.2d 1136 (1972).

Where the evidence showed that defendant approached the money bag on two occasions, looked into the cars surrounding the drop site, and pointed out a car containing the officers to the man who eventually attempted to retrieve the money, a jury could reasonably conclude that each material element of conspiracy to commit criminal extortion had been proven beyond a reasonable doubt. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

None of the elements of conspiracy require the use of physical force. Self-defense is therefore not an affirmative defense to conspiracy. *People v. Tardif*, 2017 COA 136, 433 P.3d 60.

Concerted commission of crime is not necessarily conspiracy. If people act in concert in the commission of a crime, it does not follow that they must have had a conspiracy as that term is defined in the statutes. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

As to when crime requires two persons to participate. An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. Conspiracy charges may be filed when more or different people participate in the conspiracy than are necessary to commit the substantive offense. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

The "Wharton" rule states generally that one may not be convicted of conspiracy when the principal crime charged is one that must necessarily be committed by two or more persons agreeing among themselves, such as adultery or common-law bribery, and the agreement did not exist between parties other than those committing the underlying crime. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

An exception to the "Wharton" rule permits conspiracy charges to be filed when more or different people participate in the conspiracy than are necessary to commit the

substantive offense. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Success or failure of object of conspiracy does not determine guilt or innocence of conspirators. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

When conspirators agree to engage in conduct that would result in crime if facts were as conspirators believe them to be, and take step towards completion, danger is manifest and conspiracy is consummated. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

Coconspirator need not be specifically named. Where information named an alleged coconspirator, but evidence created the possibility that defendant had conspired with another person or persons and jury instruction did not name any specific person, there was no reasonable probability that defendant was convicted of an offense for which she was not charged. *People v. Kurz*, 847 P.2d 194 (Colo. App. 1992).

Although a criminal attempt is not readily understandable to a person of ordinary intelligence without some further explanation by the court, the trial court's failure to instruct on "attempt" was harmless error, as the jury specifically found defendant guilty of first-degree murder after deliberation. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

III. TRIAL AND PUNISHMENT.

A. In General.

B. Evidence.

C. Instructions and Jury.

D. Verdict and Sentence.

A. In General.

Crime is not readily understandable.

The crime of conspiracy to commit burglary is not the type of offense readily understandable from a mere reading of the information at a guilty plea hearing without further explanation of its elements. *People v. Leonard*, 673 P.2d 37 (Colo. 1983).

One conspiracy does not become several because it may involve the violation of several statutes. The principle that no one shall be twice put in jeopardy is guaranteed and prohibits double punishment for the same crime. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969).

One conspiracy may be formed to commit a number of offenses. The conspiracy is one offense and a single offense, no matter how many repeated violations of the law may have been the object of the conspiracy. *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965).

Although there may have been several unlawful objects of the conspiracy, there is only one conspiracy. *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which this section punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

People v. Brown, 185 Colo. 272, 523 P.2d 986 (1974), overruled in Villafranca v. People, 573 P.2d 540 (1978).

Conspiracy constitutes a single offense even though the agreement upon which the charge is founded contemplates the performance of several criminal acts. People v. Forbes, 185 Colo. 410, 524 P.2d 1377 (1974); People v. Morgan, 189 Colo. 256, 539 P.2d 130 (1975).

A single conspiracy may have more than one crime as its object. People v. Leonard, 644 P.2d 85 (Colo. App. 1982).

One who is not a conspirator is not of necessity precluded from being an accessory. Jacobs v. People, 174 Colo. 403, 484 P.2d 107 (1971).

A husband and wife may conspire to commit a criminal offense. Dalton v. People, 68 Colo. 44, 189 P. 37 (1920).

Indictment must contain every element necessary to constitute crime. In an indictment for conspiracy to commit a crime under this section, the indictment must contain every element necessary to constitute that crime, as fully as if the indictment was for its perpetration. Lipschitz v. People, 25 Colo. 261, 53 P. 1111 (1898).

A district attorney need not inform against other conspirators. Bradley v. People, 157 Colo. 530, 403 P.2d 876 (1965).

Dismissal before trial is same as not filing charges. Where there was no judgment of acquittal or dismissal against the conspirators other than defendant, but a dismissal before trial, it is as though no

charge of conspiracy had ever been filed against any of the conspirators other than defendant. Bradley v. People, 157 Colo. 530, 403 P.2d 876 (1965).

A person may be convicted of conspiracy without others being tried for the same crime, as in the case where the count of conspiracy has been dismissed against the other codefendants. Salazar v. People, 166 Colo. 508, 445 P.2d 60 (1968).

A failure to charge coconspirators or the dismissal of conspiracy charges before trial against coconspirators does not require dismissal of conspiracy charges against the remaining coconspirators or render invalid a verdict of guilty against the remaining coconspirators. Hughes v. People, 175 Colo. 351, 487 P.2d 810 (1971).

Coconspirators may be alleged to be unknown in a conspiracy count. People v. Holter, 185 Colo. 47, 521 P.2d 765 (1974).

Variance in burglary charge fatal to conspiracy charge. Where defendant was not guilty of burglary as charged in the information because the locale was not a building, it necessarily follows that he was not guilty of conspiracy to commit burglary. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

Defendant's involvement as a conspirator and as a complicitor was tied to separate and distinct crimes, and the doctrine of merger did not apply. People v. Shannon, 189 Colo. 287, 539 P.2d 480 (1975).

Conspiracy punishable even if underlying crime not contained in

criminal code. The general assembly intended that the conspiracy to commit a crime be punishable even if the underlying crime is proscribed by some section other than one contained in this title. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

Explicit mention of conspiracy in narcotics violation's provision carries out legislative intent. The explicit mention of conspiracy in § 12-22-322 (1)(h), setting out the penalties for a narcotics violation, was necessary to carry out the general assembly's intent to punish narcotics conspiracies as severely as the underlying offenses. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

Obscenity provisions cannot support injunction or criminal charge. The Colorado obscenity statute, § 18-7-101 et seq., cannot be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Procuring agent defense requires that defendant act as exclusive agent for the buyer. As such, the defendant becomes a principal, or a conspirator, in the purchase rather than in the sale of the narcotics and, therefore, he cannot be convicted of sale or conspiracy to sell. *People v. Smith*, 623 P.2d 404 (Colo. 1981).

B. Evidence.

In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. *People v. Broncucia*, 189 Colo. 334, 540 P.2d 1101 (1975).

A conspiracy need not be proved directly, but may be inferred by the jury from the facts proved. *Gomez v. People*, 152 Colo. 309, 381 P.2d 816 (1963).

Conspiracy is generally covert and consequently must be established in most cases by circumstantial evidence. *Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963); *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979).

The evidence in proof of a conspiracy will generally be circumstantial. *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965).

Direct testimony that the parties charged with conspiracy entered into a specific agreement to commit the crime is not necessary. It is sufficient if there is evidence in the record from which the jury can infer such an agreement or meeting of the minds. *Griffin v. People*, 157 Colo. 72, 400 P.2d 928 (1965); *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968); *Salazar v. People*, 16 Colo. 508, 445 P.2d 60 (1968).

The proof necessary to support a conviction for conspiracy is necessarily not direct or clear. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

The existence of the agreement or assent of minds necessary to constitute a conspiracy need not be proved directly, but

may be inferred from the facts provided. *People v. Johnson*, 189 Colo. 28, 536 P.2d 44 (1975).

Although elements of a conspiracy must be proven beyond a reasonable doubt, they may be proven by circumstantial evidence. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Conspiracies by their very nature are often covert and surreptitious in nature, and for that reason, conspiracies may be established by circumstantial evidence alone. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Because of the nature of conspiracy, it often may only be proven by circumstantial evidence of involvement, which gives rise to the inference that an agreement to promote or facilitate the commission of the underlying crime was present. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Proof in a conspiracy case will necessarily be mostly circumstantial due to the covert and secretive nature of the offense. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Since most conspiracies are covert, agreement frequently must be proven by circumstantial evidence. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

In a prosecution for conspiracy, proof of an agreement may be shown by circumstantial evidence which indicates that the conspirators, by their acts, pursued the same objective, with a view toward

obtaining a common goal. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

The circumstances necessary to support a conviction for conspiracy are those which show that the alleged conspirators pursued by their acts the same objective, one performing one part, and the other another part, with a view to completing the acts and attaining the common objective. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Proof of common design. A common design is the essence of a conspiracy and must be proved, and such proof may be fashioned from evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of an offense. If it be shown that the defendants pursued by their acts the same object, often by the same means, one performing one part and another part of the same so as to complete it, the question of the existence of a conspiracy is presented and may be inferred by the jury. *Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963); *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965); *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965); *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970); *Husar v. People*, 178 Colo. 300, 496 P.2d 1035 (1972).

A criminal conspiracy need not be proved by direct evidence, and a common purpose or plan may be inferred from the development or the combination of circumstances. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Although the facts as shown do not reflect an expressed agreement, this is not required if the evidence portrays facts from which clear inferences can be drawn that a plan to rob the victim was the subject of at least a tacit or implied understanding or agreement between them. *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968).

Prosecution showed an agreement, a common design between the defendants, and an unlawful purpose and the evidence was sufficient to sustain a conviction of conspiracy to commit theft. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Evidence of the consummation of the conspiracy is admissible as a circumstance tending to prove, and as throwing light upon it. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900); *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Acts and declarations of coconspirator admissible upon proof of conspiracy. The declarations of a defendant are not admissible in evidence against his codefendants under a charge of conspiracy until there be prima facie proof of the existence of the alleged conspiracy. A concert of action between the defendants in the unlawful enterprise as charged being shown to the satisfaction of the trial court, the acts and declarations of each conspirator in furtherance of the unlawful object may be given in evidence against all the coconspirators. *Rollins v. Bd. of Comm'rs*, 15 Colo. 103, 25 P. 319 (1890); *Smith v. People*, 38 Colo. 509, 88 P. 453 (1906).

In a prosecution for conspiracy when the fact of a conspiracy is shown, the acts and

declarations of the conspirators, or of any of them, in furtherance of the conspiracy, are admissible in evidence not only against the persons who originally conspired together, but also against any person who joined with them in the consummation or attempt at consummation of the conspiracy. *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903).

Where in a prosecution for larceny a conspiracy between defendant and another party to steal had been shown by the admissions of defendant to the witness, it was not error to permit the witness to testify to admissions made by the coconspirator relative to the transaction, made when the defendant was not present, but previous to the consummation of the crime. *Porter v. People*, 31 Colo. 508, 74 P. 879 (1903).

The decisions of the court of appeals for the tenth circuit adhere to the conservative requirements of a subsisting conspiracy and statements in furtherance of it before admitting the declarations of a coconspirator. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged coconspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The acts and utterances of one conspirator become the acts and utterances of all conspirators if such are done during the existence and the furtherance of the

conspiracy. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973).

Evidence tended to show a continuing plan, scheme, design, and intent on the part of the coconspirators to deal in illicit drugs with an undercover agent over a period of time which extended from January 1973, to the date of the defendant's arrest. Given these facts, the testimony of conversations and transactions between the principals was properly admitted, and a limiting instruction was not necessary after the testimony was offered and received in evidence. *People v. Geller*, 189 Colo. 338, 540 P.2d 334 (1975).

The declarations of an alleged conspirator are admissible against an alleged coconspirator only when the existence of the conspiracy is shown by independent evidence. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

To be admissible under the coconspirator exception to the hearsay rule, the coconspirator's out-of-court statement must be made during the course and in furtherance of the conspiracy. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Likewise, exhibits admissible in trial of accomplices to common plan. Defendant and his codefendant jointly participated in the criminal venture which resulted in the homicide. They acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice. Admitting in evidence as against defendant the articles found in the possession of his codefendant was not error where they were a part of the people's case against both

defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685 (1960).

The exhibits were admissible to establish the guilt of the principal and therefore relevant to the trial of defendant as an accessory and coconspirator. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Admission of postconspiracy statements was reversible error. When the conspiracy ends the theory that the participants are agents for each other has no further validity, and statements thereafter made are not admissible against the others. Such statements are then no different from any other hearsay. After the conspiracy has come to an end, as when defendants had been arrested and jailed, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

Acts or declarations made by one of the conspirators outside of the presence of other conspirators after the consummation of the conspiracy are inadmissible against other conspirators jointly charged. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

Statements of coconspirators admissible where conspiracy was continuing. The acts and statements after the completion of the offense were admissible and in furtherance of a going conspiracy because: (1) There is ample evidence that the defendants were continuing to act in concert after the robbery and prior to their arrest, in that they attempted to conceal a joint buying spree,

they acted on behalf of one another and maintained communications; (2) the utterances were made in close proximity in time and space; and, (3) the utterances were circumstantial and spontaneous rather than testimonial or narrative. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

Evidence must establish particular conspiracy charged. To sustain a verdict on an information charging one particular conspiracy, the evidence must establish the conspiracy charged; evidence that establishes another conspiracy or several other conspiracies will not sustain a verdict. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence of conspiracy is not inadmissible because of failure of crime. Evidence of conspiracy to commit aggravated robbery is not inadmissible and is not meaningless and to be ignored merely because plans to commit robbery were frustrated and ended with commission of second-degree assault. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Properly instructed, a jury may convict upon the uncorroborated testimony of an accomplice. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility of hearsay. Although the court may, in its discretion, allow hearsay to be introduced, the independent proof requirement must be met before the jury may consider hearsay statements of the alleged coconspirator against the defendant. If sufficient independent proof is not shown,

then the jury must be instructed to disregard the testimony. Although the proof of the existence of the conspiracy may be circumstantial, it must be independent of the hearsay statements. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

If the court, in its discretion, admits the hearsay first, and independent evidence is not later introduced to support the initial determination by the court that the conspiracy continued, the jury must be instructed to disregard the testimony. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility is question for judge. While the issue of whether the conspiracy had ended at the time of the declaration may properly be submitted to the jury, the issue of admissibility of the testimony initially presented a question of law to be decided by the trial judge. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The alleged unreliability of a coconspirator's testimony involved a determination by the jury of the weight to be given this testimony. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283 (1976).

The criminal record and admitted prior perjury of a coconspirator do not go to the admissibility of his testimony but rather to the weight to be given it, which was properly left for the jury's determination. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283 (1976).

Coconspirator's mental state not relevant. Only the defendant's mental state is relevant in proving a charge of conspiracy.

Accordingly, it is no defense that the person with whom the defendant acted is legally not responsible for the crime. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Mere presence does not amount to sufficient independent evidence to support the existence of the conspiracy to sell narcotics. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The same circumstantial evidence may provide the basis for a conviction of both the substantive crime and conspiracy. *People v. O'Neill*, 185 Colo. 202, 523 P.2d 123 (1974).

An acquittal of a substantive offense forecloses conviction on a conspiracy if, and only if, the only evidence relied on to prove the existence of the conspiracy was also the only evidence used to prove the substantive offense. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Evidence sufficient to uphold conviction. Evidence showed that informant set up a drug deal between two people, the two people showed up at the drug deal with the drugs, and there were scales in the car. Based on that evidence the jury could infer an agreement to sell drugs and the overt act of traveling to the location. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

C. Instructions and Jury.

Instruction on elements of conspiracy held sufficient. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972).

An instruction that to find defendant guilty of conspiracy the jury must find beyond a reasonable doubt that there was a common design or purpose to commit an unlawful act by concert of action, although not a model of preciseness, does set forth the essential elements of the offense charged in understandable language. The law does not require more. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Instruction on conspiracy to commit a misdemeanor properly refused. *Goddard v. People*, 172 Colo. 498, 474 P.2d 210 (1970).

Erroneous instruction on intent requires reversal. A verdict of guilty cannot stand where the element of specific intent is material as to one count of the information or indictment which is related to and joined with a count on conspiracy, when the court's instructions on intent covering either count are erroneous. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Finding of jury conclusive. Where the question of the existence of a conspiracy is clearly presented by the evidence and is properly submitted to the jury, the finding of the jury is conclusive. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

Failure to instruct the jury in meaning of "overt act" harmless error since the plain meaning of "overt act" is not so abstruse as to be incomprehensible to the

average juror. *People v. Schruder*, 735 P.2d 905 (Colo. App. 1986).

D. Verdict and Sentence.

Conspiracy and object crime are separately punishable. Since the substantive offense and the conspiracy are separate and distinct crimes, the doctrine of merger does not apply and the crimes are separately punishable. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971).

Conspiracy is a separate and distinct offense from that which is the object of the conspiracy, and as such may be punishable by a consecutive sentence. *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975); *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Accused may be convicted of both crimes. Accused who participates in a crime as a principal may be convicted of both the substantive offense and conspiracy to commit such substantive offense. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Where conspiracy verdict failed to specify the crime which was the subject of the conspiracy, it is a nullity. *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973).

An acquittal of all conspirators but one renders verdict of guilty invalid as to him since he cannot conspire with himself. *Bradley v. People*, 157 Colo. 530, 403 P.2d 876 (1965).

Where defendant and others were jointly charged with conspiracy to commit larceny

from the person, and others were found not guilty of conspiring with defendant or with each other, a conviction of defendant of such offense was without sanction in law or fact. *Archuleta v. People*, 149 Colo. 206, 368 P.2d 422 (1962).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Summary judgment inappropriate. Even where it is extremely doubtful that a genuine issue of fact exists as to whether all defendants joined in a conspiracy to libel, even assuming that libel can be proven, summary judgment is not appropriate. *Abrahamsen v. Mtn. States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Conviction on a charge of conspiracy to commit assault to rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

An erroneous conspiracy conviction must be reversed regardless of the fact that concurrent sentences were imposed for the conspiracy and for the underlying

substantive crime. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Under subsection (4.5), conspiracy to commit a per se crime of violence is itself a crime of violence to which the sentence enhancing provisions of § 16-11-309 apply. *Terry v. People*, 977 P.2d 145 (Colo. 1999).

IV. ILLUSTRATIVE CASES.

Agreement not established. When there is no evidence to suggest an agreement to commit a crime other than that the defendants wanted to get some money, the evidence does not rise to the dignity of agreeing to commit a crime. *People v. Armijo*, 176 Colo. 547, 491 P.2d 1384 (1971).

Proof of conspiracy to bribe. Where jury does not find defendant guilty of bribery but does find that defendant had agreed with other person to bribe a judge, defendant's conviction of conspiracy to commit bribery of a judge is proper. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

Conspiracy to commit perjury. Although defendant contends that there was a fatal variance between the charge contained in the indictment and the proof, and that although one conspiracy, involving all the alleged perjurers, was charged, the prosecution proved at least four conspiracies, only one of which involved the defendant where there was a single overall plan with a common object, and the success or failure of the conspiracy depended upon the successful linkage of each member's testimony, and the perjury of one person was

not and could not have been an end in itself, the testimony was sufficient to establish circumstantially a single conspiracy to commit perjury involving all the defendants. *People v. Quintana*, 189 Colo. 330, 540 P.2d 1097 (1975).

Conspiracy to commit burglary. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conspiracy to commit third degree arson. The main object of a conspiracy to commit third degree arson is not the burning of a building, but the collection of insurance proceeds. *People v. Peltz*, 701 P.2d 98 (Colo. App. 1984).

Conviction did not deny due process. The evidence of conspiracy between the two defendants to possess narcotics is very weak but not totally nonexistent. Appellants were each in possession of the same prohibited drug and each in possession of crude but common instruments associated with the use and possession of narcotics. Federal due process is denied when conviction results without any evidence of guilt, but not otherwise. *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968).

Evidence sufficient for submission to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

The evidence shown that the four who took part in the robbery entered the store simultaneously, that each performed a given task toward the accomplishment of the robbery, and that they all fled together was sufficient to submit the charge of conspiracy to the jury. *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965).

Evidence did not present jury question.

There was some evidence of conspiracy to buy or receive stolen property, but that was not the charge. The evidence of conspiracy to commit the larceny was insufficient as a matter of law to submit that issue to the jury, particularly since the district attorney absolved those to whom the evidence pointed as being coconspirators. *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968).

Where the evidence was not sufficient to establish, either directly or by legitimate inference, a real agreement, combination, or confederation between the defendant and his alleged conspirator with the common purpose of embezzling the grain of a third person stored in an elevator, as charged, the question was not one for the jury's determination, and the defendant's motion for judgment of acquittal should have been sustained. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence sufficient to establish conspiracy. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971); *Husar v. People*, 178 Colo. 300, 496 P.2d 1035 (1972); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972); *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973); *People v. Vandiver*, 191 Colo. 263, 552 P.2d 6 (1976).

Even though the defendants may have offered their help to the victim separately, as claimed, they then cooperated with each other in carrying the drunk victim out of the club and they both participated in assaulting

him. This constitutes sufficient and independent evidence of conspiracy to rob. *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968).

Where defendant's fingerprints were found on the inside of the entry door and on an envelope normally kept in a desk drawer in the victim's bedroom, and where defendants theorize that the prints could have been made at a time other than during the commission of the crime, but did not testify nor present other testimony to buttress the theory, the evidence was sufficient for conviction of robbery. *People v. Hannaman*, 181 Colo. 82, 507 P.2d 466 (1973).

Evidence held insufficient to establish conspiracy. *Ziatz v. People*, 171 Colo. 58, 465 P.2d 406 (1970).

Evidence that defendant has physical makeup fitting witnesses' general physical description of one of the robbers, without witness's statement to police linking defendant to robbery or testimony being offered at trial, is insufficient to support defendant's conviction for robbery and conspiracy to commit robbery. *Velarde v. People*, 179 Colo. 207, 500 P.2d 125 (1972).

Subsection (5) did not lower the classification of the offense of the defendant. The defendant pled guilty to a conspiracy to commit the class 4 felony of distribution and sale of marijuana and thus was convicted of a class 5 felony. *People v. Hartkemeyer*, 843 P.2d 92 (Colo. App. 1992).

18-2-202. Joinder and venue in conspiracy prosecutions.

(1) Subject to the provisions of subsection (2) of this section, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

- (a) They are charged with conspiring with one another; or
- (b) They are charged with being involved in conspiracies that are so related as to constitute different aspects of a scheme of organized criminal conduct. In such case it is immaterial that the persons charged are not parties to the same conspiracy.

(2) In any joint prosecution under subsection (1) of this section:

- (a) No defendant shall be charged with a conspiracy in any judicial district other than one in which he entered into the conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and
- (b) Neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by this joinder; and
- (c) The court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence.

Source: L. 71: R&RE, p. 415, § 1. C.R.S. 1963: § 40-2-202.

18-2-203. Renunciation of criminal purpose.

It is an affirmative defense to a charge of conspiracy that the offender, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-203.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-2-204. Duration of conspiracy.

(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.

(2) Abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he gives timely notice to those with whom he conspired of his abandonment and the notice is evidenced by circumstances corroborating the giving of the same, or he informs the law enforcement authorities, having jurisdiction, of the existence of the conspiracy and of his participation therein.

Source: L. 71: R&RE, p. 416, § 1. **C.R.S. 1963: § 40-2-204.**

ANNOTATION

Completion of the object of the conspiracy completes the conspiracy.

United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

The ending of a conspiracy depends upon the particular facts and purposes of such conspiracy. The conspiracy does not come to an abrupt and automatic end simultaneously with the completion of the offense nor even the arrest of a conspirator. United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

A conspiracy to commit a crime of stealth for material gain usually has a

minimum routine development from plan, to commission, to division of fruits, if any, among the conspirators. United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967).

District court has proper jurisdiction over conspiracy charge that began when defendant was a juvenile but continued after defendant became an adult. People v. McGlotten, 166 P.3d 182 (Colo. App. 2007).

Applied in Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

18-2-205. Incapacity, irresponsibility, or immunity of party to conspiracy.

(1) It is immaterial to the liability of a person who conspires with another to commit a crime that:

(a) He or the person with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of the crime, if he believes that one of them does; or

(b) The person with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-205.

18-2-206. Penalties for criminal conspiracy - when convictions barred.

(1) Conspiracy to commit a class 1 felony is a class 2 felony; conspiracy to commit a class 2 felony is a class 3 felony; conspiracy to commit a class 3 felony is a class 4 felony; conspiracy to commit a class 4 felony is a class 5 felony; conspiracy to commit a class 5 or 6 felony is a class 6 felony.

(2) A person may not be convicted of conspiracy to commit an offense if he is acquitted of the offense which is the object of the conspiracy where the sole evidence of conspiracy is the evidence establishing the commission of the offense which is the object of the conspiracy.

(3) If the particular conduct charged to constitute a criminal conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither that conduct nor the offender presents a public danger warranting the grading of the offense under this section, the court may enter judgment and impose sentence for a crime of a lesser class or, in extreme cases, may dismiss the prosecution.

(4) Conspiracy to commit a class 1 misdemeanor or class 2 misdemeanor is a class 2 misdemeanor.

(5) Repealed.

(6) Conspiracy to commit a petty offense is a crime of the same class as the offense itself.

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

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

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-206. L. 75: (1) amended and (4) to (6) added, p. 617, § 4, effective July 21. L. 89, 1st Ex. Sess.: (1) amended, p. 22, § 13, effective July 1. L. 2013: (7) added, (SB 13-250), ch. 333, p. 1942, § 67, effective October 1. L. 2014: (7)(a) amended, (SB 14-163), ch. 391, p. 1975, § 15, effective July 1. L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3172, § 192, effective March 1, 2022; (5)(b) added by revision, (SB 21-271), ch. 462, pp. 3172, 3331, §§ 192, 803.

Editor's note: Subsection (5)(b) provided for the repeal of subsection (5), effective March 1, 2022. (See L. 2021, pp. 3172, 3331.)

ANNOTATION

Annotator's note. Since § 18-2-206 is similar to former § 40-7-35, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Acquittal of crime and conviction of conspiracy inconsistent where evidence same as to both. Where the very same evidence which the jury apparently did not believe was sufficient to prove that the defendant participated in the robbery was the only evidence which could prove him guilty of conspiracy, the conspiracy verdict of guilty cannot stand. *Robles v. People*, 160 Colo. 297, 417 P.2d 232 (1966); *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968); *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968); *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

The jury may not convict a defendant of conspiracy to commit a crime when under the same evidence they acquitted him of the substantive crime when the only evidence of the conspiracy was the evidence of the robbery itself. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The only evidence of conspiracy was that two people were acting in concert for a common cause. Since the jury found that defendant was not guilty of robbery and since the only evidence of conspiracy was that he participated in the robbery, the verdict on the charge of conspiracy cannot stand. *Carter v. People*, 169 Colo. 531, 458 P.2d 236 (1969).

If only one fund of evidence is utilized to prove both the substantive offense and conspiracy charge, and a jury disbelieves this evidence or has a reasonable doubt that

it is sufficient to prove the substantive offense, it logically follows that it is likewise unbelievable or insufficient to support a verdict of guilty to the conspiracy charge. *Armijo v. People*, 170 Colo. 411, 462 P.2d 500 (1969).

Where one of the defendants asserted that because the jury found him not guilty of possession of a narcotic drug, the guilty verdict of conspiracy to possess was inconsistent and his conviction should be reversed, it was held that since there was no evidence of conspiracy apart from that introduced in support of the substantive crime of possession as to the defendant, and the jury found the evidence was insufficient to establish the defendant's guilt as to the possession charge, it followed that the conviction on the conspiracy count must fall as well. *Fagin v. People*, 174 Colo. 540, 484 P.2d 1216 (1971).

The jury cannot be permitted to believe testimony for the purposes of the conspiracy and disbelieve the same testimony for purposes of the substantive crime. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

An acquittal of a substantive offense forecloses conviction on a conspiracy charge if, and only if, the only evidence relied upon to prove the existence of the conspiracy was also the only evidence used to prove the substantive offense. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973); *People v. Samora*, 188 Colo. 74, 532 P.2d 946 (1975).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated

robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

Jury may be so instructed. If counsel for the people insist upon submitting to the jury a count of conspiracy as well as a count of robbery where the evidence which would convict upon either charge is exactly the same, the jury should be instructed that it cannot convict on one count and acquit on the other. *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968).

Different rule applies where evidence different. The basic reason for the rule in *Robles v. People* (160 Colo. 297, 417 P.2d 232 (1966)) disappears when the evidence can be segmented or is different as to both offenses. *Armijo v. People*, 170 Colo. 411, 462 P.2d 500 (1969).

Where there is different evidence relating to the conspiracy and the substantive crime, the jury may return different verdicts as to the two charges. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

When a defendant is acquitted of a substantive offense, he can still be convicted of conspiracy to commit the offense if in addition to the evidence offered to prove the substantive offense, there exists evidence to prove the conspiracy. *Bates v. People*, 179 Colo. 81, 498 P.2d 1136 (1972).

Where there is different evidence relating to the conspiracy, separate and independent from that of participation in the substantive offense, the jury may properly return a verdict of guilty to the conspiracy charge and not guilty to the substantive charge.

People v. Coca, 185 Colo. 10, 521 P.2d 781 (1974).

Jury verdicts acquitting a defendant of burglary and finding guilt as to a conspiracy to commit burglary are not inconsistent so long as there is independent evidence in the record implicating the defendant in a conspiracy separate and apart from the evidence offered to prove the substantive offense. People v. In Interest of A.G., 43 Colo. App. 514, 605 P.2d 487 (1979).

Where the defendant was seen checking the drop site for money and the police testified he was seen talking to both the man identified as placing the extortion call and the man that attempted to pick of the money, there was sufficient independent proof of conspiracy to sustain the conspiracy, despite the acquittal on the extortion charge. People v. Williams, 707 P.2d 1023 (Colo. App. 1985).

Where sufficient independent evidence exists, including testimony of accomplice, defendant may be convicted of conspiracy even if acquitted on the substantive charge of arson. People v. Harrison, 746 P.2d 66 (Colo. App. 1987); People v. Hood, 878 P.2d 89 (Colo. App. 1994).

Defendant may be convicted of conspiracy to commit attempted murder even though acquitted of attempted murder charge. Evidence of attempted murder is not sole evidence for conspiracy charge, conspiracy charge was supported by additional evidence of an agreement to kill a person. People v. McGlotten, 166 P.3d 182 (Colo. App. 2007).

Subsection (2) codifies the rule of Robles v. People. People v. Frye, 898 P.2d 559 (Colo. 1995).

Robles rule should be strictly limited to the terms of subsection (2). People v. Frye, 898 P.2d 559 (Colo. 1995).

Subsection (2) not applicable and defendant not acquitted where jury was deadlocked on the first degree arson charge and the prosecution dismissed such charge and the court accepted the unanimous verdict on the conspiracy charge. People v. Espinoza, 989 P.2d 178 (Colo. App. 1999).

The offense classification for conspiring to sell or distribute a controlled substance is controlled by § 18-18-405, despite subsection (7)(a) of this section that classifies conspiracy to commit a level 1 drug felony as a level 2 drug felony with an exception as otherwise provided by law. The sections do not conflict. People v. Bice, 2023 COA 98, 542 P.3d 709.

Vague evidence insufficient to support conspiracy after acquittal of substantive crime. Where the so-called independent evidence from which it might be inferred that the defendant was a participant in a conspiracy was vague and inconclusive, such evidence is totally insufficient to support the defendant's conviction on the conspiracy charge after his acquittal on the substantive charge. People v. Samora, 188 Colo. 74, 532 P.2d 946 (1975).

Jury may not believe evidence for conspiracy and disbelieve for substantive crime. A jury will not be permitted to believe the evidence for the purpose of a

conspiracy count and disbelieve the evidence for the purpose of the substantive crime count. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Court erred in prohibiting defendant, on hearsay grounds, from eliciting evidence of what he and an alleged coconspirator said to one another. Nonhearsay verbal act evidence is admissible on the issue of whether a

conspiratorial agreement existed because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it. *People v. Scarce*, 87 P.3d 228 (Colo. App. 2003).

Applied in *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

PART 3

CRIMINAL SOLICITATION

18-2-301. Criminal solicitation.

(1) Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if he or she commands, induces, entreats, or otherwise attempts to persuade another person, or offers his or her services or another's services to a third person, to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.

(2) It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be the sole victim of the offense or the offense is so defined that his conduct would be inevitably incident to its commission or he otherwise would not be guilty under the statute defining the offense or under section 18-1-603 dealing with complicity.

(3) It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility or culpability, or other incapacity.

(4) It is an affirmative defense to a prosecution under this section that the defendant, after soliciting another person to commit a felony, persuaded him not to do so or otherwise prevented the commission of the felony, under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal intent.

(5) Criminal solicitation is subject to the penalties provided for criminal attempt in section 18-2-101.

Source: L. 71: R&RE, p. 417, § 1. C.R.S. 1963: § 40-2-301. L. 98: (1) amended, p. 1443, § 29, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

This section is constitutional. People v. Latsis, 195 Colo. 411, 578 P.2d 1055 (1978).

Section is constitutional even though it fails to expressly require a close temporal proximity between the "strongly corroborative" circumstances and this particular act of solicitation. People v. Aalbu, 696 P.2d 796 (Colo. 1985).

Section distinguished from complicity statute. Although encouragement of a criminal offense is prohibited under both this section and § 18-1-603, this statute concerns incomplete acts, while the complicity statute covers consummated criminal offenses. Because the provisions proscribe distinguishable behavior, there is no violation of equal protection. Alonzi v. People, 198 Colo. 160, 597 P.2d 560 (1979).

Section distinguished from attempt statute. Degree of "preparation" involved, while relevant to crime of attempt, is not

relevant to crime of solicitation. People v. Washington, 865 P.2d 145 (Colo. 1994).

The unit of prosecution for criminal solicitation under subsection (1) is based on each person solicited, not the number of victims targeted. People v. Manzanares, 2020 COA 140M, 490 P.3d 919.

Identity or motive of the person solicited is irrelevant. Where defendant was charged with soliciting an undercover police officer for the purchase of drugs, fact that officer was already "passing himself off as a drug dealer" did not affect question of whether probable cause existed for defendant's arrest. People v. Washington, 865 P.2d 145 (Colo. 1994).

Conspiracy distinguished. A conspiracy may be committed without the inducement required for the crime of solicitation, and solicitation may be committed without the parties ever reaching an agreement or without any overt act taken to complete the object of the solicitation. Therefore, neither crime is included in the other and the two crimes do not merge. People v. Hood, 878 P.2d 89 (Colo. App. 1994).

The statutory elements of the general inchoate offense of solicitation do not

apply to the separate substantive offense of soliciting for child prostitution. The offense of soliciting for child prostitution is an offense in and of itself with its own designated penalty level. People v. Jacobs, 91 P.3d 438 (Colo. App. 2003).

Solicitation for deviate sexual intercourse is no longer prohibited. People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974).

PART 4

RENUNCIATION AND ABANDONMENT

18-2-401. Nonavailability of defenses.

(1) Renunciation and abandonment are not voluntary and complete so as to be a defense to prosecution under this article if they are motivated in whole or in part by:

(a) A belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another or which makes more difficult the consummation of the crime; or

(b) A decision to postpone the crime until another time or to substitute another victim or another but similar objective.

Source: L. 71: R&RE, p. 417, § 1. C.R.S. 1963: § 40-2-401.

ANNOTATION

Where defense of abandonment available in attempt cases. Even though the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, the affirmative defense of abandonment is present if he thereafter voluntarily renounces his criminal intent. People v. Johnson, 41 Colo. App. 220, 585 P.2d 306 (1978).

A defendant cannot abandon and renounce the crimes charged after they are completed. People v. Mason, 642 P.2d 8

(Colo. 1982); People v. Jacobs, 91 P.3d 438 (Colo. App. 2003).

Abandonment is no defense to completed crime of criminal mischief. People v. Johnson, 41 Colo. App. 220, 585 P.2d 306 (1978).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the

defense of abandonment is not available
once defendant has injured the victim.

O'Shaughnessy v. People, 2012 CO 9, 269
P.3d 1233.

ARTICLE 3

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PART 1

HOMICIDE AND RELATED OFFENSES

18-3-101. Definition of terms.

As used in this part 1, unless the context otherwise requires:

- (1) "Homicide" means the killing of a person by another.
- (2) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.
- (2.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.
- (3) The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act.

An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

Source: **L. 71:** R&RE, p. 417, § 1. **C.R.S. 1963:** § 40-3-101. **L. 74:** (1)(c) R&RE, p. 251, § 1, effective January 1, 1975. **L. 95:** (2.5) added, p. 1221, § 1, effective July 1.

Cross references: For the statutory provision that declares that the withholding or withdrawal of life-sustaining procedures does not constitute suicide or homicide, see § 15-18-111; for the effect of homicide on probate matters, see § 15-11-803.

ANNOTATION

Meaningful distinction between first and second degree murder intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

Killing may be perpetrated by any means by which death may be occasioned. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. *May v. People*, 8 Colo. 210, 6 P. 816 (1885).

"Person" does not include a fetus, even if the child is born following the injury which ultimately results in its death. "Born and was alive at the time of the homicidal act" is clear and unambiguous in its temporal limitation. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Court incorrectly applied in pari materia doctrine by concluding temporal

limitation within this section's definition of "person" could be inferred into other statutory definitions of "person" outside of this part 1. Statutory language here places an explicit limitation on the application of the definitions contained in this section. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981).

Instruction given in prosecution for murder in the first degree erroneously defined "after deliberation" as an interval sufficient for one thought to follow another, but although of constitutional dimension, such error was harmless beyond a reasonable doubt where the erroneous language in the challenged instruction did not so distort the definition in another distinction that the prosecution was relieved of its burden of proving the mental culpability requirement beyond a reasonable doubt and where evidence on the issue of

deliberation was overwhelming. *Key v. People*, 715 P.2d 319 (Colo. 1986); *People v. Tyler*, 728 P.2d 314 (Colo. 1986); *Martinez v. People*, 2015 CO 16, 344 P.3d 862.

Evidence supports the element of deliberation. Evidence that defendant shot at the victim three times, twice from behind, is sufficient to support the element of deliberation. *People v. Cisneros*, 720 P.2d 982 (Colo. App. 1986).

The term "after deliberation" means "not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act." *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996).

"After deliberation" is part of the specific intent element of first degree

murder. *People v. Harlan*, 8 P.3d 448 (Colo. 2000) (disapproving *People v. Orona*, 907 P.2d 659 (Colo. App. 1995)).

Prosecution's closing arguments that exercising judgment and reflection to decide whether to drive through a yellow light could occur as "fast" as "[a] second" distorted a key element of attempted first degree murder. *People v. McBride*, 228 P.3d 216 (Colo. App. 2009).

Applied in *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

18-3-102. Murder in the first degree.

(1) A person commits the crime of murder in the first degree if:

(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Repealed.

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another; or

(e) He or she commits unlawful distribution, dispensation, or sale of a controlled substance to a person under the age of eighteen years on school grounds as provided in section 18-18-407 (2), or 18-18-407 (1)(g)(I) for offenses committed on or after October 1, 2013, and the death of such person is caused by the use of such controlled substance; or

(f) The person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the victim.

(2) Repealed.

(3) Murder in the first degree is a class 1 felony.

(4) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for the crime of murder in the first degree as described in paragraph (f) of subsection (1) of this section.

Source: **L. 71:** R&RE, p. 418, § 1. **C.R.S. 1963:** § 40-3-102. **L. 74:** (1)(a) amended, p. 251, § 2, effective January 1, 1975. **L. 75:** (1)(b) amended, p. 632, § 5, effective July 1; (1)(b) amended, p. 617, § 5, effective July 21. **L. 77:** (1)(d) amended, p. 960, § 5, effective July 1. **L. 81:** (1)(d) amended, p. 973, § 4, effective July 1. **L. 88:** (1)(b) amended, p. 712, § 16, effective July 1. **L. 90:** (1)(e) added, p. 1006, § 2, effective July 1. **L. 92:** (1)(e) amended, p. 392, § 20, effective July 1. **L. 95:** (1)(f) and (4) added, pp. 1221, 1222, §§ 2, 3, effective July 1. **L. 97:** (1)(e) amended, p. 1543, § 11, effective July 1. **L. 2000:** (1)(b) amended, p. 703, § 28, effective July 1. **L. 2019:** (1)(e) amended, (SB 19-241), ch. 390, p. 3465, § 12, effective August 2. **L. 2021:** (1)(b) and (2) repealed, (SB 21-124), ch. 58, p. 235, § 1, effective September 15.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for the statutory privilege between patient and physician and between husband and wife, see § 13-90-107.

ANNOTATION

I. General Consideration.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Should Ralph Fleagle Hang?", see 7 Dicta 10 (Nov. 1929); 7 Dicta 17 (Jan. 1930). For comment on Reppin v. People (95 Colo. 192, 34 P.2d 71 (1934)), see 7 Rocky Mt. L. Rev. 209 (1935). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For

article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on Bizup v. People (150 Colo. 214, 371 P.2d 786 (1962)), see 35 U. Colo. L. Rev. 435 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For note,

"Extreme-Indifference Murder: The Impact of People v. Marcy", see 54 U. Colo. L. Rev. 83 (1982).

Annotator's note. Since § 18-3-102 is similar to former §§ 40-2-1 and 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section constitutional. Since there is a rational difference expressed by the general assembly between first degree murder and second degree murder, the first degree murder statute is constitutional. People v. Sneed, 183 Colo. 96, 514 P.2d 776 (1973).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. People v. Prieto, 124 P.3d 842 (Colo. App. 2005).

This section defines murder. Sawyer v. People, 173 Colo. 351, 478 P.2d 672 (1970).

Murder after deliberation and felony murder are not separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted. People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. Brown, 731 P.2d 763 (Colo. App. 1986).

Election of theories not required. The prosecution should be allowed to charge multiple theories of first degree murder in

separate counts, and it may, but should not be required to, elect among theories after the evidence is closed. People v. Freeman, 668 P.2d 1371 (Colo. 1983).

Defendant can be convicted only of one first degree murder for one killing, as two convictions for one killing would result in enhanced collateral punishment. People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. Ragland, 747 P.2d 4 (Colo. App. 1987); People v. Fincham, 799 P.2d 419 (Colo. App. 1990).

The rule of lenity prohibits the entry of dual convictions and sentences for felony murder and murder after deliberation when the convictions and sentences are predicated upon the killing of a single victim. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

Dual convictions and sentences may not be entered on the murder after deliberation and felony murder counts with respect to a single killing. People v. Freeman, 668 P.2d 1371 (Colo. 1983).

A defendant may not be convicted of both first degree felony murder and first degree murder after deliberation for a single homicide nor may a defendant be convicted of both first degree and second degree murder for the killing of one person. People v. Hickam, 684 P.2d 228 (Colo. 1984).

Double jeopardy prohibits simultaneous convictions for first and second degree murder. A court cannot impose cumulative punishments for the same offense unless the legislature authorizes it to do so. The legislature intended to permit a defendant to suffer only

one conviction of murder for the killing of a single victim. *Wood v. Milyard*, 721 F.3d 1190 (10th Cir. 2013).

The doctrine of transferred intent does not apply to first degree murder. The statutory definition of first degree murder encompasses unintended victims and renders the transferred intent doctrine unnecessary. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

General assembly was competent to adopt the definition of murder under this section. *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960).

The purpose of distinctions in degrees of murder is to fix the punishment which shall be inflicted according to the circumstances in which the murder was committed. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

The general assembly intended that there be two grades of murder. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973).

Meaningful distinction intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

The distinctions between this section and § 18-3-103 are not inconsequential and satisfy due process requirements and the informational requirements of § 16 of art. II, Colo. Const. *People v. Mendoza*, 195 Colo. 19, 575 P.2d 403 (1978).

Second degree murder is lesser included offense. The difference in

substance between first degree murder and second degree murder is that first degree murder requires the additional element of premeditation. Since proof of first degree murder necessarily establishes every element of second degree murder, the latter is necessarily a lesser included offense of the former. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference where the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

First degree murder and manslaughter impose different standards of care. As to the distinction between first degree murder and manslaughter, the two statutes impose different standards of care in that the manslaughter statute requires that the cause of death be recklessly done, while in comparison an extreme indifference to human life in the first degree murder statute is clearly a more culpable standard of conduct, especially where necessarily coupled with the additional requirement that there be created a grave risk of death. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

Nothing in the language of § 18-1.3-401(8)(g) or § 18-3-106 suggests a legislative intent to preempt the felony murder statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

The statutory language in this section and §§ 18-3-104 and 18-3-105 creates distinguishable standards which can be

fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

Failure to instruct on less serious offense did not deny due process. Failure to instruct on an even less serious offense than second degree murder, in light of the jury's verdict for the most serious possible offense, first degree murder, does not comport with an inference of prejudice and did not deny the defendant a fair trial. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

No standing to attack constitutionality. In view of the fact that the jury did not convict the defendant under this statute, arguments attacking the constitutionality of this section cannot be properly considered on appeal. *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975).

Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of reckless manslaughter conviction. *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999).

Applied in *In re Tyson*, 13 Colo. 482, 22 P. 810 (1889); *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893); *Schneider v. People*, 118 Colo. 543, 199 P.2d 873 (1948); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145

(1978); *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (1978); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. District Court*, 198 Colo. 70, 595 P.2d 1045 (1979); *Gonzales v. District Court*, 198 Colo. 505, 602 P.2d 857 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Lee*, 630 P.2d 583 (Colo. 1981); *People v. Small*, 631 P.2d 148 (Colo. 1981); *Conston v. People*, 633 P.2d 470 (Colo. 1981); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People v. Fetty*, 650 P.2d 541 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People ex rel. Gallagher v. District Court*, 656 P.2d 1287 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Fish*, 660 P.2d 505 (Colo. 1983); *People v. McCall*, 662 P.2d 178 (Colo. 1983); *People v. Moore*, 701 P.2d 1249 (Colo. App. 1985); *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987).

II. ELEMENTS OF OFFENSE.

A. In General.

B. Premeditation.

C. Felony Murder.

D. Extreme Indifference to Life.

A. In General.

Degrees of murder distinguished. The distinguishing feature between murder in the first degree and murder in the second degree is that to constitute murder in the first degree the jury must find "premeditation", but if said fact is not found, it is murder in the second degree. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885); *Carlson v. People*, 91 Colo. 418, 15 P.2d 625 (1932).

Proof of killing alone is not murder. Proof of the mere abstract fact that the accused killed the deceased will not sustain a guilty verdict of first or second degree murder based on instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

First degree murder is the deliberate and premeditated killing of a human being. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965).

Murder in the first degree, other than in the commission of a felony, is the deliberate and premeditated killing of a human being. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969).

To constitute murder under a statute, it is necessary that the killing be done in the mode described by the statute. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

First degree murder is a specific intent crime; the prosecution must establish not only that the defendant intended to cause the death of another person, but that he acted after deliberation. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

First degree murder statutes contain rationally different elements than first degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Culpability cannot be determined on basis of presumption. The essential culpability for first degree murder cannot be determined on the basis of a presumption of law; rather, the requisite culpability must be proven as a matter of fact. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Attempted first degree murder is a lesser included offense of first degree murder. The elements of attempted first degree murder are a subset of first degree murder. When the defendant in this case aimed at and shot the victim, he intended and attempted to kill the victim, even if he mistakenly believed the victim was someone else. Therefore the particular attempted first degree murder in this case is a lesser included offense of the particular first degree murder in this case, and the defendant cannot be convicted of both. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

Double jeopardy prohibits convictions for both first degree murder and attempted first degree murder for the same act. *People v. Jackson*, 2020 CO 75, 472 P.3d 553.

Generally, the crimes of second degree murder and attempted second degree murder are, respectively, lesser included offenses of first degree murder or attempted

first degree murder under any theory and second degree murder is a lesser included offense of first degree murder by extreme indifference. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Illegal discharge of a firearm is not a lesser included offense of attempted first degree murder after deliberation. Discharge of a firearm is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

When the additional factors set forth in § 18-6-401 (7)(a)(I) are met, a defendant commits child abuse murder, not child abuse resulting in death. Child abuse resulting in death is a lesser included offense of child abuse murder. *Friend v. People*, 2018 CO 90, 429 P.3d 1191.

Second degree murder is a lesser included offense of first degree murder as well as the associated attempt offenses. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

It is not necessary to prove a motive as an essential element in the crime of murder. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Proof of motive is not an essential part of the state's case in a murder prosecution. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on other grounds in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Death in course of unjustified arrest by private person. A private person who, without any excuse or justification, in order to accomplish the arrest of another not shown to have been guilty of any crime, shoots, merely intending to wound, is guilty of murder if the shot takes fatal effect. *Demato v. People*, 49 Colo. 147, 111 P. 703 (1910).

Defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities. *Hamrick v. People*, 624 P.2d 1320 (Colo. 1981).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second

person are not necessarily inconsistent. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Guilty verdicts for both attempted after deliberation first degree murder and attempted extreme indifference first degree murder did not require inconsistent findings of fact; therefore, the sentences were not illegal. The information alleged different victims for the different charges, so it is not inconsistent to conclude that defendant had the specific intent to take the life of the specific targets and also showed an extreme indifference to life in general as to the other persons. *People v. Stovall*, 2012 COA 7M, 284 P.3d 151.

B. Premeditation.

Law reviews. For note, "The Role of Mental Disorder in Showing the Absence of Premeditation and Deliberation in Murder Trials", see 29 Rocky Mt. L. Rev. 396 (1957).

Annotator's note. Most of the cases cited below were decided prior to the 1974 amendment of this section, which substituted "After deliberation and with the intent" for "with premeditated intent" in paragraph (a) of subsection (1).

Premeditation required. Prior to the 1975 amendment, to be guilty of murder of the first degree a person had to not only be sane, but in killing he had to have acted with premeditation. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

In order to make out first degree murder under this section, other than in the commission of a felony, there was the

requirement of a premeditated killing. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

To be convicted of murder, the state must prove deliberation and intent to cause death. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Premeditation directed against one other than victim sufficed. If a shot was fired, without justification, and a killing resulted, the homicide was first degree murder, although the premeditation was directed against one other than the person actually killed. *Ryan v. People*, 50 Colo. 99, 114 P. 306 (1911).

"Premeditated intent" and "intentionally, but without premeditation" are sufficiently different elements to be a constitutionally acceptable basis for defining two distinct crimes. *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

Words such as "deliberate" and "premeditated" refer to the intention of the accused at the time of the killing. *Hill v. People*, 1 Colo. 436 (1872).

They are matters of inference and presumption. Premeditation and deliberation are matters of inference and presumption to be drawn by the jury from the facts and circumstances leading up to, surrounding, and explanatory of the homicide. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895); *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

The element of deliberation, like intent, can rarely be proven other than through

circumstantial or indirect evidence. *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. District Court*, 779 P.2d 385 (Colo. 1989); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Thus, intent may be inferred from act. Premeditation does not require positive proof of an intent prior to the commission of the act, as such prior intent may be inferred from the act. *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

Intent, like deliberation, can be proven through means other than direct evidence. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991); *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991), *aff'd*, 856 P.2d 805 (Colo. 1993).

The fact finder may infer an intent to cause the natural and probable consequences of unlawful voluntary acts. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Where there is close temporal and spatial relationship between a killing and a subsequent felony, defendant's intent to commit the underlying felony may be inferred from the circumstances. *People v. Phillips*, 219 P.3d 798 (Colo. App. 2009).

Malice, premeditation, and deliberation may be inferred from use of a deadly weapon. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970); *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971).

Intent to kill and premeditation may be inferred from the intentional use of a deadly weapon in a deadly manner. *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961).

Where evidence established that defendant approached the deceased brandishing a gun after having threatened deceased's friends, and that a shot was fired killing deceased, the jury could have found premeditation or lack of considerable provocation for killing. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962).

Evidence of the manner in which the weapon is used may furnish some proof of the requisite culpability for first degree murder. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981).

The use of a deadly weapon, while not giving rise to a legal presumption of deliberation, may nevertheless be considered, along with other circumstances attending the killing, in determining whether sufficient evidence exists for submission of the issue of deliberation to the jury. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Not from mere blow by hand or fist. A conviction for first degree murder will not stand when the blow was struck on being aroused from sleep, probably in anger, but certainly without plan, deliberation, or premeditation. A blow with a fist and a fortiori with the open hand is not calculated to cause death to a person in good health and of mature age; death is not the natural consequence of such a blow. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Flight is not evidence of premeditation and deliberation. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Shortness of time between purpose and act immaterial. If one actually forms the purpose to kill another, premeditates upon it before performing the act, and then performs it, he is guilty of murder in the first degree no matter how short the time may have been between the purpose and its execution. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907); *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991).

Time is not essential if there was a design and determination to kill formed in the mind of the defendant previous to or at the time the mortal wound was given. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895).

The element of deliberation requires that the decision to commit the act is made after the exercise of reflection and judgment concerning the act; however, the length of time required for deliberation need not be long. *People v. District Court*, 779 P.2d 385 (Colo. 1989).

Premeditation requires time for one thought to follow another. No particular time need pass in order to establish deliberation and premeditation. The important thing is that there must be at least enough time to permit one thought to follow another. An impulsive killing cannot be first degree murder. The law does not demand that a defendant shall have premeditated for any period of time, but that the defendant shall have committed the act deliberately and with premeditation. *Hammil v. People*, 145 Colo. 577, 361 P.2d 117 (1961);

Bradney v. People, 162 Colo. 403, 426 P.2d 765 (1967).

The deliberation and formed design need not have existed at the inception of the transaction which finally resulted in the homicide. It matters not how short the interval between the formation of the design and the death if it included the time necessary for one thought to follow another. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

The elements of deliberation and premeditation are established by proof of the formed design to kill, and length of time is not a determinative factor. The only time requirement for deliberation and premeditation within the meaning of the first degree murder statute is an interval sufficient for one thought to follow another. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969).

Appreciable length of time required. Premeditation required that the design to kill precede the killing by an appreciable length of time; but the time need not be long. *People v. Duran*, 40 Colo. App. 302, 577 P.2d 307 (1978).

The circumstances surrounding a victim's death may permit the reasonable inference that the defendant had adequate time for the exercise of reflection and judgment concerning the fatal act. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Intoxication cannot negate "after deliberation" element of first degree

murder. "After deliberation" is not part of the culpable mental state required for first degree murder, therefore voluntary intoxication cannot negate this element. *People v. Orona*, 907 P.2d 659 (Colo. App. 1995) (disapproved in *People v. Harlan*, 8 P.3d 448 (Colo. 2000)).

For requirement of malice under former statute, see *May v. People*, 8 Colo. 210, 6 P. 816 (1885); *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1886); *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *McAndrews v. People*, 71 Colo. 542, 208 P. 486 (1922); *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933); *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Kukuljan v. People*, 129 Colo. 116, 267 P.2d 1017 (1954); *Beckstead v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Lutz v. People*, 133 Colo. 229, 293 P.2d 646 (1956); *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959); *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960); *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on other grounds in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971); *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969); *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969); *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970); *Moya v. People*, 174 Colo. 435, 484 P.2d 788 (1971); *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971); *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971); *People v.*

Morant, 179 Colo. 287, 499 P.2d 1173 (1972).

C. Felony Murder.

Law reviews. For article, "Stretching Liability Too Far: Colorado's Felony Murder Statute in Light of *Auman*", see 83 Den. U.L. Rev. 639 (2005).

Self-defense is not available as an affirmative defense for felony murder. *People v. Burns*, 686 P.2d 1360 (Colo. App. 1983).

Provision does not violate equal protection. Failure to require proof of a culpable mental state for a conviction of felony murder does not violate equal protection. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Definition of felony murder does not deny due process. Defining felony murder as being of the grade of first degree and as precluding a verdict of second degree does not violate substantive due process. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

This section is not unconstitutional in that it defines murder committed in the perpetration of a robbery as murder in the first degree. *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960).

Or right to jury trial. The claim that this section which classifies murder committed in the perpetration of certain crimes as first degree murder is unconstitutional in that it deprived the accused of his right to a jury trial with respect to the essential element of intent, and is thus in violation of the

fourteenth amendment of the constitution of the United States and § 23 of art. II, Colo. Const., is without merit. *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960).

Or substitute presumption for proof.

This section defining murder committed in the perpetration of a robbery as murder in the first degree is a substantive definition of murder and is not unconstitutional as substituting a presumption of malice for proof thereof. *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960).

The general assembly may provide that a murder committed during the perpetration of robbery is murder in the first degree, and this in no way establishes a presumption as a substitute for proof of a culpable mental state, as the prosecution still has to prove the homicide and all elements of the underlying felony beyond a reasonable doubt. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

First degree felony murder is clearly and precisely defined in this section. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

The purpose of the felony murder provision was to make every homicide committed in the perpetration or attempt to perpetrate certain felonies murder, which may be punished by death, if the jury so determines, without regard to premeditation. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

The underlying purpose of the felony murder statute is to imply the element of

deliberation where the commission of certain crimes of violence result in a death. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

The purpose of the felony murder statute is to hold a participating robber accountable for a nonparticipant's death, even though unintended, as long as death is caused by an act committed in the course of or in furtherance of the robbery or in the course of immediate flight therefrom. *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Felony murder occurs when a murder is committed in the commission of certain designated felonies. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

There can be no exact measure of time or distance which is dispositive of whether felony murder exists. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

Defendant's liability for felony murder not terminated upon defendant's arrest. Phrase "immediate flight therefrom" is set off by commas and is not restricted to defendant's own immediate flight. Jury may look to the totality of the circumstances to determine when felony murder liability terminates. Murder committed shortly after defendant's arrest may be a natural and probable consequence of defendant's actions. *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), *rev'd on other grounds*, 109 P.3d 647 (Colo. 2005).

All that is necessary to sustain a charge of felony murder is that a life be taken during the course of a felony in which the

defendant was engaged. *People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974).

Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Defendant may be guilty of felony murder where the death of a security guard occurred while the defendant was in immediate flight from a robbery and where the shooting of the guard was intended to facilitate his flight and enhance his chance of escape, and shots fired by the guard were not an intervening event which caused the guard's death to be outside of the scope of the felony. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

"Acting either alone or with one or more persons" does not define an element of the offense of felony murder, but merely makes clear that guilt results in either case. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Specific intent not an element of felony murder. In felony murder, specific intent to take a human life with malice is not an element of the crime. *People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974).

Defendant may be convicted of first degree felony murder where only showing of mental culpability is for the underlying general intent felony. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

Participation in felony substituted for mens rea. The felony murder statute substitutes participation in the underlying felony for the mens rea otherwise required

to support a murder charge. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

Proof beyond reasonable doubt required of homicide, felony, and connection of both. The prosecution is required to prove the homicide beyond a reasonable doubt and is also required to establish to the same degree of proof the commission of the named felony and the commission of the homicide in the perpetration of the said felony. *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960); *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

A robbery and killing which followed were all part of same transaction where they were so closely connected in point of time, place, and continuity of action as to be one continuous transaction. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963); *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

The perpetration of a robbery does not come to an end the split second the victim surrenders his money to the gunman, and most certainly the robbery continues where the robbers are trying to avoid arrest by police officers who are in extremely hot pursuit, and cause the death of an innocent motorist. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

If defendant was an accessory to aggravated robbery which resulted in murder, it follows that he was guilty of murder. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Defendant may not be simultaneously convicted of felony murder and the felony on which the felony murder conviction rests. Where a defendant is convicted of multiple felonies, all of which are alleged as the legal predicates for the commission of felony murder, only that felony that most directly contributes to the death of the victim should be vacated. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Aggravated robbery is merged in the offense of felony murder and the constitutional protection against double jeopardy precludes conviction for both offenses. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983); *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Retrial for felony murder did not violate double jeopardy. In the first trial, defendant was acquitted of aggravated robbery. In the second trial, the people relied on robbery and attempted robbery as the predicate offenses for felony murder. The acquittal verdict in the first trial did not preclude using robbery or attempted robbery for the predicate offense in the second felony murder trial. *People v. Beller*, 2016 COA 184, 411 P.3d 1145.

Felony murder based on robbery precludes conviction for robbery. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the robbery victim, precludes his simultaneous conviction of the lesser included offense of robbery. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

There is no logic or reason to preclude a felony murder charge from being based upon a burglary charge that, in turn, is based upon either an intent to assault or an intent to murder inasmuch as both murder and assault are crimes which may underlie a felony burglary. *People v. Lewis*, 791 P.2d 1152 (Colo. App. 1989); *People v. Medina*, 260 P.3d 42 (Colo. App. 2010).

Sequence of events is irrelevant as long as sufficient evidence is produced to show that a felony was committed by defendant and that a death occurred during the commission of that felony. *People v. Braxton*, 807 P.2d 1214 (Colo. App. 1990).

Or for aggravated robbery. Where the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of § 18-1-408 (5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983); *People v. Guffie*, 749 P.2d 976 (Colo. App. 1987).

Subsection (1)(b) is not so limited as to allow conviction only if there is a finding that defendant was committing or attempting to commit the crime at the time he caused the death. A death caused in the furtherance of a robbery or a death caused in the immediate flight from a robbery falls squarely within the edict of this section. *People v. Kittrell*, 786 P.2d 467 (Colo. App. 1989).

Or for rape. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the

sexual assault victim, precludes his simultaneous conviction of the lesser included offense of first degree sexual assault. *People v. Horton*, 683 P.2d 358 (Colo. App. 1984).

Felony murder can be predicated upon an assault directed at the person who was killed. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996); *People v. Medina*, 260 P.3d 42 (Colo. App. 2010).

Robbery conviction is not precluded by conviction for murder of another after deliberation. Although a separate judgment of conviction for robbery may not simultaneously exist with a judgment of conviction for first degree murder predicated upon the killing of the robbery victim, there is no such impediment to the entry of both a judgment of conviction for first degree murder based upon the killing of another after deliberation and a separate judgment of conviction for the robbery of the same victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Premeditation not an element of felony murder. When the proof is undisputed that the homicide was committed in an attempt to perpetrate robbery which the defendants had conspired to commit, it is not necessary to prove any facts from which malice, deliberation, or premeditation could be inferred. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

A particular or specific intent to kill is not an ingredient of murder committed in the perpetration of a robbery. This section makes the taking of human life in an attempt

to perpetrate a robbery murder in the first degree without regard to the questions of intent, premeditation, or deliberation. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

To establish that a defendant has committed or attempted to commit a predicate offense to support a felony murder conviction, the prosecution must prove beyond a reasonable doubt all elements of the predicate offense, including the inapplicability of any properly asserted affirmative defense. *Doubleday v. People*, 2016 CO 3, 364 P.3d 193.

Attempted robbery is a predicate felony for felony murder. *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996).

The turpitude of the felonious act supplies the element of deliberation and design to effect death, and, therefore, no express or implied design to effect death is essential; the murder is still of first degree though casual and unintentional. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

Murder to facilitate escape. Escape from the scene of the underlying felony is part of the res gestae of a crime so that a murder committed to facilitate the flight can be felony murder. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

All forms of escape under § 18-8-208 are predicate offenses for first degree felony murder. The clear and unambiguous language of the statute contemplates an escape penalized as a petty offense as a predicate offense for first degree felony

murder. *People v. Stovall*, 2012 COA 7M, 284 P.3d 151.

All members of a conspiracy to rob are guilty of first degree murder. Where two or more persons conspired to commit a robbery and went to the place where the robbery was to have been committed, armed with deadly weapons, and in an attempt to perpetrate the robbery one of them committed murder, all are guilty of murder of the first degree, whether or not they intended to commit murder. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

If a homicide is committed by one of defendant's associates while engaged in a robbery in furtherance of a common purpose, defendant is guilty of murder in the first degree. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

If a defendant and an accomplice were participating in a robbery during the commission of which the accomplice killed the deceased, the defendant is guilty as a principal. If there is direct evidence of the crime, he is subject to the death penalty. *Mitchell v. People*, 173 Colo. 217, 476 P.2d 1000 (1970).

Colorado does not recognize the offense of attempted felony murder. Because criminal attempt requires a defendant to possess the culpable mental state for the attempted offense and felony murder does not require a mental state, it is impossible to convict a person of attempting to commit an act that the person was not intending. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

When aider and abettor not guilty of murder. One cannot be held guilty of murder as an aider and abettor if he has acted without knowledge or malice on his part and was ignorant of the malicious motives and felonious intent on the part of the actual slayer. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Complicitor included in felony murder statute. A complicitor, being a principal, is included in the felony murder statute as one who commits or attempts to commit the underlying felony. *People v. Saiz*, 42 Colo. App. 469, 600 P.2d 97 (1979).

A complicitor, being a principal, is included in the felony murder statute as one who "commits or attempts to commit [the underlying felony]", whether he is near the scene of the underlying felony or not. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

A defendant who acts as a complicitor in the underlying felony may be held criminally liable for felony murder. It is not legally nor logically impossible to be a complicitor to felony murder. *People v. Fisher*, 9 P.3d 1189 (Colo. App. 2000).

Court did not err in giving a special interrogatory to the jury before the jury announced its decision. The special interrogatory was necessary to ensure the validity of the verdict on the felony murder charge and was not a post-verdict statement under CRE 606(b). *People v. Doubleday*, 2012 COA 141M, 369 P.3d 595, rev'd on other grounds, 2016 CO 3, 364 P.3d 193.

D. Extreme Indifference to Life.

Subsection (1)(d) (as it existed prior to the 1977 amendment that substituted "knowingly" for "intentionally") was not constitutionally void for vagueness. People v. District Court, 185 Colo. 78, 521 P.2d 1254 (1974).

Conviction under subsection (1)(d) (as it existed prior to the 1977 amendment that substituted "knowingly" for "intentionally") did not deny equal protection. The standards of culpability in subsection (1)(d) and § 18-3-105 (1)(a) are distinct enough to be intelligently understood and applied, and therefore, the defendant was not denied equal protection of the law by virtue of his conviction under subsection (1)(d) of this section. People v. Jones, 193 Colo. 250, 565 P.2d 1333 (1977).

Statutory definition of extreme indifference murder (as it existed prior to the 1981 amendment) violated equal protection of the laws under § 25 of art. II, Colo. Const., because that crime was not sufficiently distinguishable from second degree murder to warrant the substantial differential in penalty authorized by the statutory scheme. People v. Curtis, 627 P.2d 734 (Colo. 1981); Crespín v. People, 721 P.2d 688 (Colo. 1986).

The statutory prohibition of extreme indifference murder violated equal protection of the laws because it could not reasonably be distinguished from the lesser offense of second degree murder as defined in § 18-3-103 (1)(a). People v. Marcy, 628 P.2d 69 (Colo. 1981); People v. Roark, 643 P.2d 756 (Colo. 1982).

The statutory definition of extreme indifference murder violated equal protection of the laws under the Colorado constitution because it was not sufficiently distinguishable from second degree murder to warrant the substantial differential in penalty authorized by the statutory scheme. People v. Gurule, 628 P.2d 99 (Colo. 1981).

Statutory definition of extreme indifference murder in 1981 amendment is not violative of equal protection of the laws under § 25 of art. II, Colo. Const., because it is sufficiently distinguishable from second degree murder to warrant difference in penalty. People v. Jefferson, 748 P.2d 1223 (Colo. 1988).

Defendant's due process rights not to be charged with a multiplicitous information were not violated when defendant was charged and convicted of two counts of attempted extreme indifference murder for firing multiple shots at a door and injuring one victim and shooting towards, but not injuring, another victim. People v. Ellis, 30 P.3d 774 (Colo. App. 2001).

Both first degree murder by extreme indifference and second degree murder are committed "knowingly" and are thus general intent crimes. People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994).

If perpetrator possesses the specific intent under subsection (1)(a) to kill the individual whose death occurs as a result of the perpetrator's actions, the perpetrator cannot also be convicted for extreme indifference murder under subsection (1)(d). People v. Atkins, 844 P.2d 1196 (Colo. App.

1992); *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Where defendant knew the victim and his conduct was directed toward that particular person, evidence of the element of universal malice under subsection (1)(d) was lacking. *People v. Perez*, 972 P.2d 1072 (Colo. App. 1998).

There is no logical inconsistency with a perpetrator having both the specific intent under subsection (1)(a) to kill an individual and exhibiting an extreme indifference to murder under subsection (1)(d). There are situations in which a perpetrator can have both the specific intent to kill an individual and also show an extreme indifference to the lives around the individual targeted for death. *Candelaria v. People*, 148 P.3d 178 (Colo. 2006) (disagreeing with *People v. Atkins* cited above).

Unlike intentional first degree murder after deliberation, crime of extreme indifference first degree murder does not require proof that defendant intended to cause the death of another. Instead, it requires proof that defendant knowingly engaged in conduct that created a grave risk of death to one or more persons and demonstrated extreme indifference to the value of human life generally. *Candelaria v. People*, 148 P.3d 178 (Colo. 2006); *People v. Reynolds*, 252 P.3d 1128 (Colo. App. 2010).

For purposes of subsection (1)(d), "knowingly" applies only to the action and outcome elements, not the circumstances element. The circumstances element is described in the independent

introductory clause, and only after that clause is completed does the word "knowingly" make its appearance, where it then modifies the action and outcome elements. *People v. Grudzske*, 2023 COA 36, 533 P.3d 579.

Extreme indifference murder is evinced by acts that are calculated to put the lives of many persons in danger, without being aimed at anyone in particular. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

An action that actually endangers only one person may be considered extreme indifference murder. Extreme indifference murder requires that the killing conduct be engaged in under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, not whether the conduct in question actually endangers more than a single targeted person, or even whether the actor subjectively intends to or is aware that his or her conduct may ultimately take life indiscriminately. *People v. Anderson*, 2019 CO 34, 442 P.3d 76.

Defendant firing at a group of persons running out doorway of bar was sufficient evidence to prove universal malice element of extreme indifference murder. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

A defendant may be charged with and convicted of multiple counts of attempted extreme indifference murder where his or her conduct endangers several people. Accordingly, defendant was properly convicted of multiple counts of attempted extreme indifference murder for shooting

into a car with multiple passengers. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

"Knowingly" requirement is satisfied in an attempted extreme indifference murder case by proving that defendant's conduct in fact created a grave risk of death. Defendant need not have known that his or her conduct was practically certain to cause death. *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Despite fact that defendant was angry with victims, defendant's act of firing at closed door upon leaving house and admitting that he was not directing his fire at any particular individual displayed the requisite universal malice and that he knowingly engaged in conduct creating a grave risk of death to others required for the crime of extreme indifference murder. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Second degree murder is a lesser included offense of extreme indifference murder. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

Menacing is not a lesser included offense of attempted extreme indifference murder. *People v. Portillo*, 251 P.3d 483 (Colo. App. 2010).

There is a significant difference between the elements of extreme indifference murder and reckless manslaughter. Extreme indifference murder requires proof of circumstances showing an attitude of universal malice with extreme indifference to the value of human life generally. Reckless manslaughter lacks this

element. *People v. Alvarado-Juarez*, 252 P.3d 1135 (Colo. App. 2010).

Charge and conviction for both extreme indifference first degree murder and vehicular homicide (DUI) and prosecution for attempt of both offenses does not violate right of equal protection of the laws. The statutes for the two offenses do not describe identical conduct. Unlike vehicular homicide (DUI), which is a strict liability offense, extreme indifference murder requires proof that a defendant, under circumstances demonstrating an attitude of universal malice manifesting extreme indifference to the value of human life generally, knowingly engaged in conduct that created a grave risk of death to others. *People v. Grudznske*, 2023 COA 36, 533 P.3d 579.

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference where the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Defendant firing at a moving vehicle with passengers where path of bullet endangered both passengers of vehicle and people near defendants house was sufficient evidence to prove universal malice element of extreme indifference murder. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

Voluntary intoxication not to be considered as a defense or mitigating factor to the crime of extreme indifference murder. Voluntary intoxication only a defense to specific intent crimes such as

homicide with deliberation. Extreme indifference murder requires only that defendant have the general intent to act "knowingly". *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

Self-defense is not available as a defense for extreme indifference murder. For certain actions to constitute self-defense, defendant must have acted in a reasonable manner. Finding a defendant guilty of extreme indifference murder necessarily precludes a finding that his actions were reasonable, as the "universal malice" element of the offense requires the jury to conclude that the defendant acted with aggravated recklessness. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

The affirmative defense of self-defense is not consistent with charges of first degree extreme indifference murder and attempted first degree extreme indifference murder. Thus, as it relates to those charges, any evidence reflective of an apprehension of imminent danger is immaterial. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Jury's consideration not limited to evidence of blows inflicted upon the victim immediately before the victim's death. Jury could have concluded that defendant had indiscriminately shoved, hit, kicked, and threatened one or more other persons without provocation near the time of the victim's death, thus indicating excessively reckless conduct. Testimony that the defendant had worked himself into a frenzy and that he did not know the victim or any of the other people he hit, kicked, or

shoved, tended to establish extreme indifference to the value of human life. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

This section does not include every act dangerous to life of person killed. This section does not include in its definition of murder in the first degree every act that is dangerous to the life of the person killed. Every act that results in the death of a person is greatly dangerous to the life of such person, but the section intended that there should be an act which shows the accused to have had a depraved mind, regardless of human life, and is intended to include those cases where a person has no deliberate intention to kill any particular individual. *Longinotti v. People*, 46 Colo. 173, 102 P. 165 (1909).

It is inapplicable to homicide resulting from direct assault. The provision relating to acts gravely dangerous to life cannot, without violence to the intention of the general assembly as evinced by the language, be applied to the case of homicide resulting from a direct assault by one person upon another. *Longinotti v. People*, 46 Colo. 173, 102 P. 165 (1909).

Felony child abuse not inconsistent with acquittal of extreme indifference murder. A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Death or great bodily harm must be the reasonable or probable consequence of the

act to constitute murder. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Element addresses itself to human life generally. The element of "extreme indifference to human life", by definition, does not address itself to the life of the victim, but to human life generally. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

No requirement that knowing conduct directed against person actually killed. There is no requirement that the knowing conduct essential to extreme indifference murder and second degree murder be directed against the person actually killed. On the contrary, both offenses are general intent crimes, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Defendant's intent may vary in committing crimes against separate victims. The jury could have found that the shots other than the one hitting the intended victim were not specifically intended to harm any of the other victims, but instead were fired generally in their direction. While the defendant did not have the specific intent to harm any of the other victims, the jury could have properly determined that the defendant was guilty of extreme indifference murder and attempted extreme indifference murder as to those victims. *People v. Lee*, 914 P.2d 441 (Colo. App. 1995).

Standard of conduct more culpable than that involved in manslaughter. The term "under circumstances ... manifesting extreme indifference to the value of human life" connotes a heightened awareness and disregard of a fatal risk and is clearly a more culpable standard of conduct than the reckless conduct involved in manslaughter. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

For the definition of "intentionally", which was replaced by "knowingly" by the 1977 amendment, see *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

Evidence was sufficient for jury to find that defendant acted with universal malice for the purposes of subsection (1)(d). Even though defendant argued heatedly with victim shortly before victim was shot by the defendant, evidence sufficiently showed that the defendant knew the rifle he shot was dangerous and that more than one person could be struck with each bullet fired, that the defendant shot the rifle toward a moving pickup with a number of passengers, and that the path of the bullet fired from the rifle endangered numerous lives of persons in the pickup and standing in the area in which the rifle was shot. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

The element of universal of malice required for extreme indifference murder, defined as aggravated or extremely reckless conduct, was present where defendant, in a knowing effort to scare the crowd, fired shots with his right hand, although he was left-handed, while his head was placed

between his knees. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Voluntary intoxication is not available as a defense for extreme indifference murder. Voluntary intoxication is available only for specific intent crimes. The term "universal malice" under subsection (1)(d), does not make murder under section a specific intent crime. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1992).

III. TRIAL AND PROSECUTION.

A. In General.

B. Indictment or Information.

C. Evidence.

D. Jury.

E. Instructions.

F. Affirmative Defense.

A. In General.

In order for an accessory to be convicted of murder where the principal is found not guilty by reason of insanity, it must be shown beyond a reasonable doubt that, except for the insanity, the principal committed a murder. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

The burden of proof rests upon the state to prove to the satisfaction of the jury, beyond a reasonable doubt, the existence of all the material elements necessary to constitute the crime of murder as defined by this section. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

It is the people's burden to make out a case that would have sustained a verdict of

guilty of first or second degree murder before the prosecution is entitled to instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Before a jury can convict a defendant on any one of the counts of homicide, it must be satisfied that each and every material allegation of that count has been proven beyond a reasonable doubt. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

An arrest without warrant is not a defense to a charge of first degree murder. *Moore v. Tinsley*, 142 Colo. 516, 351 P.2d 456 (1960).

Cross-examination. In a murder case a wide latitude should be permitted on cross-examination of prosecution witnesses. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

It is not unconstitutional to try the felony murder and first degree kidnapping charges together under the current statutory scheme. *People v. Cunningham*, 194 Colo. 198, 570 P.2d 1086 (1977).

Defendant's federal prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO) and subsequent state conviction for first degree murder for the same incident do not constitute double jeopardy, as the RICO conviction required proof of facts not necessary for the state murder conviction, and the two laws seek to prohibit substantially different evils. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

B. Indictment or Information.

Notice of the specific charge is a matter of procedural due process. Bizup v. Tinsley, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963).

Indictment which simply charged that defendant murdered the victim was upheld as constitutional. Bizup v. Tinsley, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963).

Indictment or information in the words of the statute is sufficient. In an indictment for murder, it is not necessary to state more than the statute provides in order to sustain a conviction of murder in the first degree. Andrews v. People, 33 Colo. 193, 79 P. 1031 (1905).

Information charging felony murder was substantively sufficient and therefore conferred jurisdiction on the trial court as it specifically named the underlying offense, burglary, and otherwise tracked the felony murder statute. People v. Palmer, 87 P.3d 137 (Colo. App. 2003).

As information charging murder includes all degrees of criminal homicide. Campbell v. People, 55 Colo. 302, 133 P. 1043 (1913).

Where an information charged murder in the first degree, it included all the lower grades of criminal homicide. Henwood v. People, 54 Colo. 188, 129 P. 1010 (1913).

Indictment charging murder supports verdict of felony murder. A prosecution on an information charging that on a certain date defendant did feloniously, willfully, and

of his premeditated malice aforethought, kill and murder a named person, and defendant was convicted of felony murder. Where the information contained every essential element demanded by the Colorado statutes and demanded also by generally approved principles of criminal pleading, and apprised the defendant of the nature of the charge, the date and place, described the victim, and further alleged that the killing was with malice aforethought, but failed to pinpoint the allegation that the homicide occurred incident to a known felony, due process was not violated. Bizup v. Tinsley, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963).

Defective charge not cured by verdict. When one is tried as on a charge of murder in the first degree, but the jury finds a verdict of murder in the second degree, the error is not cured if the indictment fails to describe the higher grade of the crime. Redus v. People, 10 Colo. 208, 14 P. 323 (1887).

Words "malice aforethought" are coextensive with deliberation and premeditation. The words "malice aforethought" in the indictment are coextensive in meaning with the words "deliberate" and "premeditated", and a charge that a homicide was committed with malice aforethought comprehends a case of deliberate and premeditated killing. Hill v. People, 1 Colo. 436 (1872).

An indictment charging that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant

a verdict finding that the homicide was committed with deliberation and premeditation within the terms of this section. *Redus v. People*, 10 Colo. 208, 14 P. 323 (1887).

C. Evidence.

Conviction of a crime may be based on circumstantial evidence, and a conviction for first degree murder will be affirmed where review of the record indicates that the people's circumstantial case fully excluded all reasonable hypotheses of innocence. *Moore v. People*, 174 Colo. 286, 483 P.2d 1340 (1971).

Wholly circumstantial evidence is sufficient to prove guilt beyond a reasonable doubt in prosecution for felony murder. *People v. Sanchez*, 184 Colo. 25, 518 P.2d 818 (1974).

As may instructions on crimes. Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Test for evidence on appeal. The critical inquiry on appeal is whether the evidence, when reviewed in a light most favorable to the prosecution, is substantial and sufficient to permit a reasonable person to conclude beyond a reasonable doubt that the defendant intentionally caused the victim's death and that the decision to kill was made after the exercise of reflection and judgment. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Proof must establish premeditation to support verdict of murder in the first degree. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895).

The elements of deliberation, premeditation, and express malice must be manifested by external circumstances capable of proof to justify submitting the charge of first degree murder to the jury. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

Presumption of intent will not support conviction of first degree murder. *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

The ultimate point which the evidence must extend to and establish is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done. *Hill v. People*, 1 Colo. 436 (1872).

Intent must be determined from all circumstances. Where pertinent, the question of intent of a defendant in a criminal case must be determined from all the circumstances connected with the perpetration of the offense with which he is charged. *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

Evidence supporting first degree conviction supports second degree conviction. It is illogical to say that the evidence is sufficient to support a conviction of first degree murder but insufficient to support the lesser included offense of second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Proof of motive will not be excluded merely because it may be prejudicial to the defendant so long as it is relevant and material. People v. Miller, 187 Colo. 239, 529 P.2d 648 (1974).

In a homicide case, it is proper to show an antecedent grudge borne by the accused against the deceased to establish a motive for the alleged homicide. People v. Miller, 187 Colo. 239, 529 P.2d 648 (1974).

Also, evidence of a prior argument was clearly admissible to show a possible motive, and the fact that the argument occurred approximately two months before the shooting affected only the weight of the evidence, not its admissibility. People v. Miller, 187 Colo. 239, 529 P.2d 648 (1974).

Insanity resulting from voluntary intoxication mitigates first degree murder. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

If defendant is voluntarily under the influence of an intoxicant so as to be unable to form the intent required for a conviction, he cannot be guilty. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

Evidence of intoxication admissible only to determine if accused was capable of premeditation and deliberation. Brennan v. People, 37 Colo. 256, 86 P. 79 (1906); Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965).

It is only because of the specific intent required for first degree murder that voluntary drunkenness is an excuse even for that crime. Watkins v. People, 158 Colo. 485, 408 P.2d 425 (1965).

Drunkenness is not an excuse for crime, but when a particular intent forms the gist of the offense, as distinguished from general criminal intent, and is made to depend on the state and condition of the mind of the accused at the time, drunkenness as a fact affecting the control of the mind is proper for the consideration of the jury in determining whether the accused was capable of entertaining the positive and particular intent requisite to make out the offense. Martinez v. People, 172 Colo. 82, 470 P.2d 26 (1970).

Likewise, mental deficiency admissible as to intent. A defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency as bearing upon his capacity to form the specific intent essential to first degree murder. Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).

For evidence of insanity, see Beckstead v. People, 133 Colo. 72, 292 P.2d 189 (1956); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).

Evidence of general depravity is not admissible to prove guilt of one charged with a crime. While a defendant who takes the stand may be impeached in this state by showing former convictions of a felony, the rule does not extend to admission of acts or occurrences which show bad character on the part of the defendant. Romero v. People, 170 Colo. 234, 460 P.2d 784 (1969).

Acts prior to crime admissible to show intent. In order to show intent, it is not error to permit third parties to testify as to fighting and stabbing by defendants just prior to

defendant's fatal attack on deceased. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Evidence of any crime committed by a defendant prior to the acts charged must not be considered for any purpose except that of determining the intent with which the acts charged in the information is done. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

In marital homicide cases, any fact or circumstance relating to ill-feeling, ill-treatment, jealousy, prior assaults, personal violence, threats, or any similar conduct of attitude by the husband toward the wife are relevant to show motive and malice in such crimes and are not evidence of mere general depravity which is not admissible. *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969).

Prior abusive conduct is not itself sufficient to be admissible as proof of conduct that defendant was aware the conduct was practically certain to cause death for a conviction for murder in the first degree under subsection (1)(f) when prior abusive conduct did not also result in serious bodily injury or death to a child and did not tend to demonstrate defendant was aware his conduct was practically certain to cause a child's death. The prior abusive conduct and the conduct resulting in death must be substantially similar in order to be admissible under CRE 404(b). *People v. Casias*, 2012 COA 117, 312 P.3d 208.

Nor is it admissible to prove absence of mistake. *People v. Casias*, 2012 COA 117, 312 P.3d 208.

But defendant failed to demonstrate a reasonable probability that the error in admitting the evidence contributed to his conviction. *People v. Casias*, 2012 COA 117, 312 P.3d 208.

Admissibility of other connected crimes. In the trial of a homicide case, evidence of other crimes which were indivisibly connected with, incidental to, and in furtherance of the plan of defendant to rob a bank and flee, and which are a part of a single transaction, is admissible. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

Other offenses may be offered in evidence where so interwoven with principal transaction that it is necessary to show them in order to give a fair and true understanding of offense charged, particularly where the other transactions were so connected in point of time with the offense under investigation, and so similar in character, that the same motive could be imputed as to all of them. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Evidence presented at trial established conduct that was so closely connected to the main criminal transaction that evidence of it was necessary to complete the story of the crime. Without that evidence, the murder might not be properly understood as the jury would have no basis upon which it could determine the reasons behind defendant's conduct. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

Actions subsequent to crime admissible to show guilt. The fact that the defendant buried the body, repeatedly lied concerning

the disappearance of his wife, went under an assumed name, and, while awaiting trial, escaped from jail, was properly submitted to the jury as evidence of guilt and consciousness of guilt, but the same does not serve to supply the missing element of malice. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

The flight of a person immediately after the commission of a crime is a circumstance establishing his guilt. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Ballistic test conditions must be substantially similar to the conditions when the shooting occurred in order to be admissible. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Admission of real evidence. In order to be material and relevant, real evidence must only be connected with the perpetrator, the victim, or the crime. The clothing worn by the victim the night of the crime meets these tests and is properly admitted. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Pictures can be admitted to show anything a witness would be allowed to testify about. Certainly a doctor could testify to the location of the wounds and the cause of death. The fact that the defendant admitted the killing, relying on self-defense, does not prevent the state from showing the circumstances surrounding it, and the pictures were properly admitted. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Unless there is an abuse of discretion, the trial court's decision as to admissibility of a

large color photograph of the deceased will not be disturbed on review. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Articles and statements of codefendants admissible. Defendant and his codefendant jointly participated in the criminal venture which resulted in the homicide. They acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice. Admitting in evidence as against defendant the articles found in the possession of his codefendant was not error where they were a part of the people's case against both defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685 (1960).

Error in admitting testimony as to admissions made by codefendant who under prosecution theory was principal perpetrator of robbery and murder where defendant was charged as an accessory, which indicated that another person was present and the admission of which allegedly violated defendant's sixth amendment right of confrontation, was harmless where additional evidence consisting of testimony of three eyewitnesses also established that the robbery was committed by two men. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Statements and physical evidence constitute direct evidence. Where a defendant and his codefendant plan the death of defendant's wife and both participate in the execution of the plan, it is immaterial which of them actually strangled the deceased, and where each of them make signed statements and the defendant makes verbal statements to a police officer, such

statements, together with the physical evidence in the case, constitute sufficient direct evidence to sustain the death penalty. *Leick v. People*, 136 Colo. 535, 322 P.2d 674 (1958).

Confession held involuntary and invalid. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo.), *aff'd*, 400 F.2d 392 (10th Cir. 1968).

Statements taken in violation of Miranda's procedural safeguards are admissible for impeachment purposes. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971) (overruling *Velarde v. People*, 171 Colo. 261, 466 P.2d 919 (1970)).

Admission of hearsay referring to defendant's prior act of homicide held reversible error. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Evidence sufficient to show expressed malice. Where all the evidence is strongly indicative of the fact that the defendant aimed the vehicle at the victim and struck him, and did not apply brakes nor stop immediately after striking the victim, the evidence is sufficient to show express malice. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Circumstantial evidence held sufficient. *Morse v. People*, 168 Colo. 494, 452 P.2d 3 (1969).

While there is no direct evidence of defendant's intent, there is enough circumstantial evidence from which the jury can infer that defendant intended to commit either burglary or robbery prior

to or concurrent with the shooting. *People v. Phillips*, 219 P.3d 798 (Colo. App. 2009).

Colorado supreme court will refuse to give an advisory opinion on the interpretation of subsection (1)(d), as it relates to the evidence presented in the case, as it would serve little purpose and would have no significant precedential value. *People v. Lyle*, 200 Colo. 236, 613 P.2d 896 (1980).

Evidence held sufficient to support conviction of first degree murder. *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930); *Fraday v. People*, 96 Colo. 43, 40 P.2d 606 (1934); *Sullivan v. People*, 111 Colo. 205, 139 P.2d 876 (1943); *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

Where the circumstances shown by the evidence were such that the jury could well have been satisfied beyond a reasonable doubt that defendant fired the shot resulting in the death of deceased, it was sufficient to sustain a conviction. *Atencio v. People*, 147 Colo. 566, 364 P.2d 575 (1961).

Evidence sufficient to show victim was killed during robbery. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Evidence sufficient to convict defendant of felony murder. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

Evidence sufficient to establish deliberation. Where a witness testified that the defendant left the room for a moment and returned carrying a wooden stick, that when the victim saw the stick, he asked the defendant, "Where did you get that?" and to this question the defendant replied, "In the

bedroom" and began hitting the victim, this evidence was sufficient to establish that the defendant acted after deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to induce a person of ordinary prudence to entertain a reasonable belief that defendant committed murder in the first degree where testimony indicated defendant was fighting with victim, threatened to kill victim, obtained a butcher knife, waved the knife at victim, and stabbed victim not once, but twice in the abdominal area, and where circumstances, such as the length of the struggle between defendant and victim permitted the reasonable inference that defendant had adequate time for the exercise of reflection and judgment concerning the fatal act. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

D. Jury.

The right of the prosecution to qualify the jury has consistently been upheld. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The trial judge's questioning of prospective jurors as to their views regarding capital punishment is relevant and proper in prosecution for first degree murder. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Juror who would refuse to inflict death penalty is properly excused. A juror who

declares that, notwithstanding evidence and instructions, he would under no circumstances vote to inflict the death penalty is properly excused. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Trial court properly sustained the challenge for cause of jurors who stated upon voir dire that under no circumstances would they vote to impose the death penalty, as a juror with such convictions would exclude from his consideration one of the penalties prescribed by law. *Gallegos v. People*, 116 Colo. 129, 179 P.2d 272 (1947).

The test for qualifying the jury for imposition of the death penalty is whether, regardless of his personal beliefs or convictions, a venireman could impose the death penalty. If he cannot set aside those convictions and impose sentence in accord with his oath as a juror, it is not error to exclude him, not because of his beliefs and convictions, but because of his inability to perform his oath as a juror. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Such exclusion does not deny trial by jury. A constitutional right to a trial by a jury of his peers is not denied a defendant because 29.3 percent of the jury panel were excluded on challenge for cause because of their unwillingness to consider under any circumstances the imposition of the death penalty. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Trial by jury may be waived. Since under the statutes, there are no mandatory requirements for the jury to determine the degree of murder or to determine the class of felony and because the criminal defendant

has a substantive right to waive a jury trial, defendant could properly waive his right to a jury trial even though he was convicted of a class 1 felony. *People v. Cisneros*, 720 P.2d 982 (Colo. App. 1986).

Juror who merely opposes capital punishment not excludable for cause. A death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. This decision does not govern where the jury recommended a sentence of life imprisonment. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Voir dire on death penalty proper. Where charge was murder in the first degree, it was not improper to permit prosecuting attorney to qualify jurors to return the death penalty, where evidence to be presented was wholly circumstantial, since at the time of examination of jurors it was possible that witness would be found to give direct evidence, or that defendant, upon direct or cross-examination, might incriminate himself to the extent that death penalty could be sought. *Atencio v. People*, 147 Colo. 566, 364 P.2d 575 (1961).

Court may not invade province of jury. A person charged with murder is tried by a jury; they alone must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts, and thus invade the province of a jury. The question of the weight of testimony and the credibility of the witnesses is to be

determined by the jury, properly instructed as to the law. Unless this course is followed, a defendant is deprived of his constitutional right of a trial by jury. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Jury sequestration. Trial of a first degree murder charge is a "capital case" for purposes of jury sequestration under Crim. P. 24(f) (as it existed prior to the 1983 amendment) even though the district attorney does not intend to qualify the jury for consideration of the death penalty or to seek the imposition of the death penalty in the event of a conviction. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Intention is question to be submitted to jury. Whether intention is shown by evidence of antecedent menaces, former grudges, the means employed to effect the homicide, or any other circumstances which may give assurance of it, it is to be submitted to the jury to find the fact under the direction of the law. *Hill v. People*, 1 Colo. 436 (1872).

If there was evidence relevant to the issue of manslaughter, its credibility and force were for the jury to consider in determining the facts, and not as a matter of law for the decision of the court. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Whether defendant acted with premeditation is for the jury to determine after a consideration of all the facts and circumstances in evidence, including those affecting his mental condition at the time. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Where from this evidence the jury could have found that defendant had formed a premeditated design to take the life of the deceased or that there was no considerable provocation for the killing, it was not for the trial court to determine as a matter of law, but for the jury under proper instructions to resolve as a matter of fact, the question of whether premeditation existed. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on another point in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Express malice is a question of fact to be determined by the jury on all the evidence in the case. *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971).

Facts other than killing must exist to submit charge of murder. It is only when, in addition to the killing, facts and circumstances attending or surrounding the homicide are laid before the jury that the necessary inferences of fact to complete the crime of murder can be rightfully drawn. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

There being no evidence of malice, premeditation, deliberation, intention to kill, or killing showing an abandoned and malignant heart, it was error to submit to the jury instructions defining murder and forms of verdict whereby they could find the defendant guilty of murder. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Intoxication is question for jury. Where there was evidence tending to prove drunkenness, it was for the jury to determine whether the defendant was so intoxicated as to be unable to form the deliberate intent

necessary. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Whether injuries inflicted began chain of events causing death is question for jury. Where the defendant attacked an epileptic who had consumed a considerable amount of whiskey and had failed to take his prescribed medication, the question for the jury's determination was whether the injuries inflicted by the defendant began a chain of events which in their natural and probable consequences caused the victim's death. *Hamrick v. People*, 624 P.2d 1320 (Colo. 1981).

E. Instructions.

Courts should excise irrelevant portions of a murder instruction to conform to the evidence in the case. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Use of word "homicide" is preferred to term "murder". A homicide is the killing of a human being by another. It is the unlawful commission of homicide that renders the perpetrator guilty of a crime, and consequently in court instructions to a jury concerning the law as to this offense the use of the word "homicide" is proper and to be preferred to the term "murder". *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

"After deliberation" needs no elaboration, unless requested. The phrase "after deliberation" is neither so unusual nor so unfamiliar as to require elaboration, although a trial court should give an instruction on the meaning of this statutory

phrase if requested by a defendant. *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981).

A court must instruct the jury on the definitions of words and phrases with complex or technical meanings. The term "universal malice" is considered a complex legal term. The trial court erred by failing to define "universal malice" as defined by the state supreme court in *Candelaria v. People*, 148 P.3d 178 (Colo. 2006). *People v. Draper*, 2021 COA 120, 501 P.3d 262.

"Acting either alone or with one or more persons" does not define an element of the offense, but merely makes clear that guilt results in either case. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Instruction on first degree murder and felony murder held proper. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction on elements of felony murder proper. Instruction that if homicide was committed in perpetrating robbery, premeditation and intent are not necessary elements of the crime charged and need not be proved, is held proper in view of this section. *Fraday v. People*, 96 Colo. 43, 40 P.2d 606 (1934).

Instruction on circumstantial evidence. In the trial of any murder case, where the prosecution relies in whole or in part on circumstantial evidence, if defendant's counsel desires an instruction on such evidence, it is his duty to prepare and tender such, and its refusal may constitute error. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Instruction on intent. Upon the trial of an information for homicide, the accused is entitled to an instruction that the intent of the prisoner is for the jury, and that the presumption of innocence attends the prisoner throughout the trial and must be overcome by evidence excluding reasonable doubt. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

Defendant's failure at trial to object to the lack of a "specific intent" definition instruction and a voluntary intoxication instruction makes constitutional harmless error review inapplicable. Under plain error review, trial court's failure to properly instruct the jury that "after deliberation" is an element of first degree murder that is negated by voluntary intoxication did not constitute plain error. *People v. Miller*, 113 P.3d 743 (Colo. 2005).

Instructions adequately advised jury on premeditation and presumption of innocence. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Where instruction refers to crimes proscribed by section, general verdict form not error. Where the trial court's instruction on the charge of first degree murder stated clearly that the jury was entitled to find the defendant guilty of that crime if it determined that he had committed the crime proscribed by (1)(a) or the crime proscribed by subsection (1)(b), the use of a general verdict form referring to the crime "as charged in count one of the indictment" was not error. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Instructions on flight. Robbins v. People, 142 Colo. 254, 350 P.2d 818 (1960); Stafford v. People, 154 Colo. 113, 388 P.2d 774 (1964); People v. Miller, 187 Colo. 239, 529 P.2d 648 (1974).

No jury instruction explaining or defining "immediate flight" is necessary. These are words of common meaning, not a legal term of art. People v. Auman, 67 P.3d 741 (Colo. App. 2002), rev'd on other grounds, 109 P.3d 647 (Colo. 2005).

Trial court did not abuse its discretion by declining to further instruct the jury on universal malice because the phrase in subsection (1)(d) that was reflected in the instructions, "universal malice manifesting extreme indifference to the value of human life generally", conveys this meaning in ordinary terms that do not require a definitional instruction. People v. Garcia, 2021 COA 80, 495 P.3d 362, aff'd, 2023 CO 30, 531 P.3d 1031.

Reversal of second degree burglary conviction because of erroneous theft instruction required reversal of felony murder conviction. Auman v. People, 109 P.3d 647 (Colo. 2005).

Instruction based on statutory presumptions of intoxication not applicable to issue of first degree murder. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction held not to express court's belief in guilt of accused. An instruction declared that "deliberately" does not mean brooded over, or reflected upon, for a week, day or hour, "but an intent to kill executed

by the defendant" in cold blood. The use of the definite article in referring to the accused was held not to be taken as the court's expression of a belief in his guilt. King v. People, 54 Colo. 122, 129 P. 235 (1912).

Court is not required to instruct as to grade unsupported by evidence. In a homicide case, the court is not required to instruct on second degree murder where there is no evidence upon which to base such an instruction. Jones v. People, 93 Colo. 282, 26 P.2d 103 (1933); Reppin v. People, 95 Colo. 192, 34 P.2d 71 (1934).

In a prosecution for murder where there is no evidence from which a jury would be justified in finding the defendant guilty of manslaughter, a trial judge is not required to instruct upon that grade of homicide. Crawford v. People, 12 Colo. 290, 20 P. 769 (1888); Mow v. People, 31 Colo. 351, 72 P. 1069 (1903); Carpenter v. People, 31 Colo. 284, 72 P. 1072 (1903); Demato v. People, 49 Colo. 147, 111 P. 703 (1910).

In a case of felonious homicide, if the evidence shows the killing to have been deliberate and intentional, there is no question of manslaughter presented, and therefore no reason for submitting that question to the jury. Armijo v. People, 134 Colo. 344, 304 P.2d 633 (1956).

Murder in the second degree is not an issue where there are no facts in the record justifying submission of instructions and a verdict defining second degree murder. Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).

An instruction on second degree murder is improper where, by the evidence, the crime was perpetrated in the commission of one of the felonies named, for in such circumstances the verdict must be first degree murder or acquittal. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

But prerogative should be exercised with caution. Where there is an affray and where self-defense is relied on, the court exercises an exceedingly dangerous prerogative in refusing to charge upon the minor as well as the graver offenses covered by the indictment. He should be absolutely certain that there is an entire absence of evidence bearing upon the particular grade or grades omitted. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910); *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Instruction on manslaughter held properly refused. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Where the evidence reveals that defendant participated in a brutal and heartless assault and robbery committed on the person of the deceased, no other verdict than that of first degree murder would have been justified, and it was not error to omit instruction on the lesser degrees of homicide. *Ceja v. People*, 142 Colo. 447, 351 P.2d 271 (1960).

Failure of trial court to give instruction relating to fists as a deadly weapon was not error where the evidence presented did not justify the giving of such instruction. *People v. Duran*, 185 Colo. 359, 524 P.2d 296 (1974).

Error not to instruct on manslaughter.

When there is competent evidence which could conceivably reduce a homicide to manslaughter, the defendant is entitled to an instruction thereon, as where homicides occur during an affray and are unintentional, accidental, a result of misadventure, or in self-defense. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

When there is any evidence, however improbable, unreasonable, or slight, which tends to reduce a homicide to the grade of manslaughter, a defendant is entitled to an instruction thereon upon the hypothesis that the same is true, and that it is for the jury, under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed, and a court's refusal to instruct thereon is reversible error. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (1979).

Refusal to instruct on a lesser included offense in a homicide case is reversible error as long as there is some evidence, however slight, tending to establish the lesser included offense. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

If there is evidence tending to establish a statutory grade of homicide, the court's refusal to instruct thereon is error. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Where during the trial for first degree murder defendant presented a plausible case for self-defense, which even if the jury deemed it to be an overreaction, nevertheless would negate the elements of

murder, the trial court should have instructed the jury on the lesser offense of manslaughter, as defendant requested. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Jury may be instructed that there is no evidence of manslaughter. If there was no evidence upon which a verdict of manslaughter could be based, then the trial court was justified in instructing the jury to that effect. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

In a murder trial an erroneous instruction taking from the jury the consideration of all degrees of murder, excepting the first, is not grounds for reversing a conviction in the first degree and a sentence of life imprisonment, where the entire evidence, including that of the accused, excludes the idea of manslaughter and fully warrants the conviction and the infliction of the death penalty. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

Refusal to instruct that there can be no conviction for less than first degree murder may be error. Where upon the trial of an indictment for murder, the evidence shows that the crime was deliberate, and no fact is shown leading to a contrary inference, there should be no conviction of the crime in any less degree. The refusal of the court below to instruct accordingly on request of the prisoner is prejudicial error. *Dickens v. People*, 67 Colo. 409, 186 P. 277 (1919).

Or that only issue for determination is whether punishment shall be death or life imprisonment. Where, in a homicide case, it is admitted that the killing was done in the

perpetration of a robbery and in no other way, the offense being murder of the first degree, the trial court properly instructed the jury that the only issue for them to determine was whether the punishment to be inflicted should be death or imprisonment for life. *Reppin v. People*, 95 Colo. 192, 34 P.2d 71 (1934).

No error in failing to instruct jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

When court must instruct jury on second degree murder. Trial court does not have to instruct jury on the lesser included offense when there is no evidence to support the instruction. *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), *rev'd*, 711 P.2d 1270 (Colo. 1986).

Error to submit nonfelony murder to jury. Where a petitioner's acts from the time he took money from the victim until he shot the victim were one continuous integrated attempt to successfully complete his crime and escape detection, and the escape with ill-gotten gains was as important to the execution of the robbery as gaining possession of the property, robbery and homicide were not distinct transactions, and, therefore, submission of a nonfelony murder to jury would not have been justified. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Where the charge is first degree murder occurring during the commission of a felony, lesser included offenses need not be submitted to the jury. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Felony murder conviction based upon crime of simple robbery sustained without jury finding existence of aggravation even though jury instruction included allegation of aggravation. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Where jury was instructed that if it found the people had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

Defendant is not entitled to an instruction on the affirmative defense of disengagement from the crime for a charge of felony murder where the defendant failed to present evidence of each of the elements listed in subsection (2). *People v. Lucas*, 992 P.2d 619 (Colo. App. 1999).

Defendant is not entitled to an instruction on self-defense in trial for extreme indifference murder. For certain actions to constitute self-defense, defendant must have acted in a reasonable manner. Finding a defendant guilty of extreme indifference murder necessarily precludes a

finding that his actions were reasonable, as the "universal malice" element of the offense requires the jury to conclude that the defendant acted with aggravated recklessness. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Defendant not entitled to instruction that jury must reach unanimous decision as to whether defendant committed first degree murder after deliberation either as a complicitor or as principal. Those alternative legal theories are two means of committing a single offense, and are not an impermissible distinction requiring a unanimity instruction. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

F. Affirmative Defense.

Self-defense may be available as an affirmative defense to a predicate felony but not as to the resulting death. *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996).

Self-defense does not apply to felony murder. Trial court merged the second degree murder charge into the felony murder charge, thus, the only murder charge remaining was felony murder. As a result, any error in the self-defense instruction as given was harmless. *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

IV. VERDICT AND SENTENCE.

It was error to grant a motion for a directed verdict in a murder prosecution on the ground that there was no evidence of premeditation based on fact that there was no acquaintanceship between defendant and deceased and no evidence of animosity between them, since malice is not

synonymous with motive, and motive is not essential in murder prosecution. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on other grounds in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

No verdict other than first degree murder possible where the evidence overwhelmingly establishes the guilt of the defendant in a brutal and heartless assault and robbery committed upon the person of the deceased, and the defendant had a fair trial, one that was conducted in all respects pursuant to law. *Ceja v. People*, 142 Colo. 447, 351 P.2d 271 (1960).

Where murder is committed in the perpetration or attempt to perpetrate one of the felonies specified in this section, there is only one degree of murder, namely, murder of the first degree. If the uncontradicted evidence is to the effect that murder was committed in one of the ways specified above, and in no other way, the question of second degree murder is not in the case, and the defendant should be found guilty of murder of the first degree or acquitted; there is no middle course. *Jones v. People*, 93 Colo. 282, 26 P.2d 103 (1933); *Early v. People*, 142 Colo. 462, 352 P.2d 112 (1960).

In a capital case the punishment to be inflicted rests with the jury, and refusal of the trial court to accept a plea of guilty of second degree murder on recommendation of the district attorney was upheld. *Fradv v. People*, 96 Colo. 43, 40 P.2d 606 (1934).

One of the appointed functions of jurors is to fix the penalty in first degree murder

cases. *Fleagle v. People*, 87 Colo. 532, 289 P. 1078 (1930).

The particular manner in which a murder is committed does not govern the penalty when a verdict in the first degree is returned, but the penalty to be imposed is a matter solely for the jury to fix, either at imprisonment for life, or death. *Henwood v. People*, 57 Colo. 544, 143 P. 373 (1914).

Term of imprisonment is within discretion of court. The term of imprisonment within the limits prescribed is wholly within the discretion of the court. *Arrano v. People*, 24 Colo. 233, 49 P. 271 (1897).

Life imprisonment is minimum sentence for first degree murder. *People v. Pacheco*, 41 Colo. App. 188, 581 P.2d 741 (1978).

Error in enhancement of sentence for crime of violence. Where a defendant is convicted of first degree murder, and the mittimus reads that he was found to have committed a "crime of violence", but the jury was not instructed on the elements of crime of violence nor given a separate verdict form or interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first degree murder only, and for imposition of sentence on that crime only. *People v. Thrower*, 670 P.2d 1251 (Colo. App. 1983).

Although defendant could not be convicted for felony-murder and murder

after deliberation based on killing of single victim, sufficient evidence existed to sustain defendant's conviction for first degree murder, and thus judgment of conviction for first degree murder after deliberation and sentence imposed thereon would be affirmed while judgment of conviction and sentence for felony-murder would be vacated. *People v. Brown*, 731 P.2d 763 (Colo. App. 1986).

Although a finding of specific intent to kill a particular victim precludes a simultaneous finding of extreme indifference to the value of human life generally, it is permissible nonetheless for the people to charge on two different theories of first degree murder. After the close of evidence, the people may, but are not required to, elect between the theories charged. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Defendant's remedy was not a new trial where jury returned guilty verdicts on the theory of first degree murder and attempted first degree murder by extreme indifference and on the lesser included offenses, under either theory of first degree murder, of second degree murder and attempted second degree murder; rather, the remedy is to merge the lesser offense of second degree murder into the greater. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

A verdict of guilt on second degree murder, as a lesser included offense to a charge of first degree murder after deliberation is not legally inconsistent with a verdict of guilt on a charge of first degree murder by extreme indifference. No simultaneous acceptance and rejection

by the jury of evidence relied upon for these convictions occurred since the jury's determination that defendant did not act with deliberation did not require rejection of evidence that he acted knowingly and with universal malice. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994); *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Jury's province to determine degree of murder evidence justifies. Assuming the sufficiency of the evidence to support first degree murder, it is strictly within the province of the jury to evaluate the evidence and say by its verdict whether the evidence justifies a verdict of first or second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Sentences concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Defective sentence may be amended to supply minimum. *Smith v. Best*, 115 Colo. 494, 176 P.2d 686 (1946).

Trial court may correct sentence where punishment only reversed. In a first degree murder case when the United States supreme court affirms the guilt verdict, and invalidates the punishment portion of the verdict only because the jury was not constitutionally qualified to fix the death penalty, and the sole alternative under the statute as to punishment available to the jury

is life imprisonment, the entry by the trial court of such a judgment is a mere ministerial act within the power and authority of the trial judge under the terms and within the contemplation of Crim. P. 35. *Segura v. District Court*, 179 Colo. 20, 498 P.2d 926 (1972).

Sentence of life imprisonment with no possibility of parole for a juvenile offender was not disproportionate to offense under this section. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

18-3-103. Murder in the second degree - definitions.

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

(a) The person knowingly causes the death of a person; or

(b) Acting either alone or with one or more persons, he or she commits or attempts to commit felony arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), or the felony crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.

(1.5) It is an affirmative defense to a charge of violating subsection (1)(b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon; and

(d) Did not engage himself or herself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury.

(2) Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree.

(2.5) (Deleted by amendment, L. 96, p. 1844, § 12, effective July 1, 1996.)

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), murder in the second degree is a class 2 felony.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (3), murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the defendant sufficiently to excite an irresistible passion in a reasonable person; but, if between the provocation and the killing there is an interval sufficient for the voice of reason and humanity to be heard, the killing is a class 2 felony.

(c) For purposes of determining sudden heat of passion pursuant to subsection (3)(b) 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.

(4) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) As used in this section, unless the context otherwise requires:

(a) "Gender identity" and "gender expression" have the same meaning as in section 18-1-901 (3)(h.5).

(b) "Intimate relationship" has the same meaning as in section 18-6-800.3.

(c) "Sexual orientation" has the same meaning as in section 18-9-121 (5)(b).

Source: L. 71: R&RE, p. 418, § 1. C.R.S. 1963: § 40-3-103. L. 75: (1)(a) amended, p. 622, § 1, effective March 19. L. 77: (1)(a) amended and (1)(b) repealed, pp. 960, 971, §§ 6, 67, effective July 1. L. 86: (4) added, p. 776, § 1, effective July 1. L. 95: IP(1) amended and (2.5) added, p. 1222, § 5, effective July 1. L. 96: Entire section amended, p. 1844, § 12, effective July 1. L. 2002: (4) amended, p. 1512, § 184, effective October 1. L. 2020: (3)(c) and (5) added, (SB 20-221), ch. 279, p. 1368, § 6, effective July 13. L. 2021: (1) amended and (1.5) added, (SB 21-124), ch. 58, p. 236, § 2, effective September 15.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For note, "Extreme-Indifference Murder: The Impact of People v. Marcy", see 54 U. Colo. L. Rev. 83 (1982).

Annotator's note. Since § 18-3-103 is similar to former § 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally overbroad. People v. Gladney, 194 Colo. 68, 570 P.2d 231 (1977).

Subsection (2) is not violative of the due process clause of the Colorado Constitution. People v. Campisi, 649 P.2d 1053 (Colo. 1982).

This section does not violate due process rights by rendering irrelevant evidence concerning an impaired mental condition due to voluntary intoxication. People v. Loscutoff, 661 P.2d 274 (Colo. 1983).

Distinction between second degree murder and manslaughter constitutional. The difference between the mental states required for second degree murder (knowingly) and manslaughter (recklessly) mirrors the distinction between practically

certain of result on the one hand, and probability or contingency of result on the other, and this difference is sufficient to avoid an equal protection violation. People v. Padilla, 638 P.2d 15 (Colo. 1981).

Section constitutionally distinguishable from manslaughter statute, § 18-3-104 (1)(a), because the two statutes require different mens rea elements for conviction. People v. DelGuidice, 199 Colo. 41, 606 P.2d 840 (1979); People v. Padilla, 638 P.2d 15 (Colo. 1981). See People v. White, 199 Colo. 82, 606 P.2d 847 (1980).

Statutory prohibition of extreme indifference murder in § 18-3-102 (1)(d) (as it existed prior to the 1983 amendment) violated equal protection of the laws because it could not reasonably be distinguished from the lesser offense of second degree murder as defined in this section. People v. Marcy, 628 P.2d 69 (Colo. 1981); Crespín v. People, 721 P.2d 688 (Colo. 1986).

This section does not proscribe conduct identical to § 18-3-202 (1)(c) and therefore does not violate equal protection because § 18-3-202 (1)(c) requires only a substantial step toward causing serious bodily harm and this section requires a substantial step toward causing death. People v. Ornelas-Licano, 2020 COA 62,490 P.3d 714.

By enacting the vehicular homicide statute, the general assembly did not intend to bar murder prosecutions of drivers who cause the death of another while behind the wheel. People v. Tarr, 2022 COA 23, 511 P.3d 672, rev'd on other grounds, 2024 CO 37, 549 P.3d 966.

As applied to defendant driver, this statute and the vehicular homicide (DUI) statute do not criminalize the same conduct. There are two key differences between the offenses of second degree murder and vehicular homicide (DUI). First, the offenses involve different levels of intent. To be convicted of second degree murder, a defendant must have acted "knowingly". To act knowingly, a person must be aware that his conduct is practically certain to cause the result. In contrast, vehicular homicide (DUI) is a strict liability offense, requiring only voluntary conduct. Second, unlike the second degree murder statute, to obtain a conviction under the vehicular homicide (DUI) statute, the prosecution must demonstrate that the defendant drove or operated a motor vehicle and that the defendant was legally intoxicated. *People v. Tarr*, 2022 COA 23, 511 P.3d 672, rev'd on other grounds, 2024 CO 37, 549 P.3d 966.

Double jeopardy prohibits simultaneous convictions for first and second degree murder. A court cannot impose cumulative punishments for the same offense unless the legislature authorizes it to do so. The legislature intended to permit a defendant to suffer only one conviction of murder for the killing of a single victim. *Wood v. Milyard*, 721 F.3d 1190 (10th Cir. 2013).

Both first degree murder by extreme indifference and second degree murder are committed "knowingly" and are thus general intent crimes. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

The general assembly intended that there be two grades of murder. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973).

Distinction intended to be meaningful. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

The distinctions between § 18-3-102 and this section are not inconsequential and satisfy due process requirements and the informational requirements of § 16 of art. II, Colo. Const. *People v. Mendoza*, 195 Colo. 19, 575 P.2d 403 (1978).

Lesser included offense of first degree murder. The difference in substance between first degree murder and second degree murder is that first degree murder requires the additional element of premeditation. Since proof of first degree murder necessarily establishes every element of second degree murder, the latter is necessarily a lesser included offense of the former. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference when the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Felony menacing is not a lesser included offense of attempted second degree murder. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony

menacing. Attempted second degree murder requires a defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the elements of menacing. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Second degree murder as defined in this section is "conceptually distinguishable" from intentional manslaughter. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977).

Applied in *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976); *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145 (1978); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978); *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978); *People v. Parsons*, 199 Colo. 421, 610 P.2d 93 (1980); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Lee*, 630 P.2d 583 (Colo. 1981); *Coston v. People*, 633 P.2d 470 (Colo. 1981); *People v. Harris*, 633 P.2d 1095 (Colo. App. 1981); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People ex rel. Gallagher v. District Court*, 656 P.2d 1287 (Colo. 1983); *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Fisher*, 759 P.2d 33 (Colo. 1988).

II. ELEMENTS OF OFFENSE.

Annotator's note. For cases concerning felony murder, see the annotations under § 18-3-102.

Term "knowingly" describes the requisite culpability for second degree murder. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

No requirement that knowing conduct be directed against person actually killed. There is no requirement that the knowing conduct essential to second degree murder be directed against the person actually killed. On the contrary, the offense is a general intent crime, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Elements of murder in second degree concerning defendant's state of mind are: (1) That the death was more than merely a probable result of the defendant's actions; and (2) that the defendant was aware of the circumstances which made death practically certain. The first is an objective standard; the second, a subjective standard. *People v. Mingo*, 196 Colo. 315, 584 P.2d 632 (1978); *People v. District Court*, 198 Colo. 70, 595 P.2d 1045 (1979).

The express statutory definition of second degree murder does not include malice as an element. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977).

For discussion of element of implied malice required by former statute, see *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971); *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972); *People v. Gallegos*, 180 Colo. 238, 504 P.2d 343

(1972); *People v. Tapia*, 183 Colo. 141, 515 P.2d 453 (1973); *People v. Garcia*, 186 Colo. 167, 526 P.2d 292 (1974).

Application of specific intent as element. Specific intent as an element of second degree murder applies whenever the events giving rise to a second degree murder charge occurred after the 1973 amendments. *People v. Stitt*, 40 Colo. App. 355, 575 P.2d 446 (1978).

Second degree murder is general intent crime which entails being aware that one's actions are practically certain to result in another's death. *People v. Mingo*, 196 Colo. 315, 584 P.2d 632 (1978).

Second degree murder consists of an unlawful killing without premeditation and deliberation. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965).

Conviction requires proof that death natural consequence of unlawful act. A conviction for criminal homicide requires proof beyond a reasonable doubt that the death was a natural and probable consequence of the defendant's unlawful act. *People v. Fite*, 627 P.2d 761 (Colo. 1981).

Unlawful infliction of wound which develops into fatal infection renders offender criminally responsible for the consequential death. *People v. Fite*, 627 P.2d 761 (Colo. 1981).

For "premeditated intent" and "intentionally, but without premeditation" as different elements, prior to the 1975 amendment of § 18-3-102, see *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

There is no crime of second degree felony murder in the state of Colorado. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

Subsection (3) sets forth the elements of provocation, which is a mitigating factor and not a separate crime or a lesser included offense of murder in the second degree. If proven, provocation is a statutory mitigating factor that will reduce a defendant's sentence for second degree murder, but it is not an element of a separate offense. Further, to secure a conviction of second degree murder, the prosecution must prove a lack of provocation beyond a reasonable doubt. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

The general assembly intended to eliminate the offense of heat of passion manslaughter and create a single crime of second degree murder with two different felony levels by making provocation, or acting in the heat of passion, a factor in mitigation of second degree murder. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Second degree murder is a lesser included offense of first degree murder as well as the associated attempt offenses. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

III. TRIAL AND PROSECUTION.

A. Evidence.

B. Defenses.

C. Instructions.

A. Evidence.

It is the people's burden to make out a case that would have sustained a verdict of guilty of first or second degree murder before the prosecution is entitled to instructions thereto. Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962).

Subsection (2) does not create any presumption of culpability, conclusive or otherwise, and the prosecution retains the burden of establishing the defendant's guilt as to all elements of the crime beyond a reasonable doubt. People v. Morgan, 637 P.2d 338 (Colo. 1981).

Prosecution's burden of proving "knowingly". Subsection (2) does not lessen the prosecution's constitutional burden to prove the requisite culpability of "knowingly" for a second-degree murder. People v. Gallegos, 628 P.2d 999 (Colo. 1981).

Where the trial court admits evidence as to the defendant's diminished mental capacity and such evidence is considered as to the charge of murder in the second degree, subsection (2) does not unconstitutionally restrict the defense in contesting the culpability element of the charge nor does it lessen the prosecution's burden of proving guilt beyond a reasonable doubt. People v. Gallegos, 628 P.2d 999 (Colo. 1981).

Proof of killing alone is not murder. Proof of the mere abstract fact that the

accused killed the deceased will not sustain a verdict of guilty of first or second degree murder based on instructions thereto. Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962).

Presumption of intent to kill may be presumed or implied as inference of fact from act itself with regard to second degree murder. People v. Morant, 179 Colo. 287, 499 P.2d 1173 (1972).

The use of a deadly weapon is sufficient to support finding of second degree murder. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

Use of a deadly weapon is not in itself sufficient to show deliberation. People v. Hamrick, 624 P.2d 1333 (Colo. App. 1979), aff'd, 624 P.2d 1320 (Colo. 1981).

Evidence sustaining first degree verdict sustains verdict in second degree. When evidence viewed in its most favorable light was sufficient to sustain a verdict of first degree murder, that evidence must perforce sustain a finding of second degree murder. People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974).

Jury's province to determine degree evidence justifies. Assuming the sufficiency of the evidence to support first degree murder, it is strictly within the province of the jury to evaluate the evidence and say by its verdict whether the evidence justifies a verdict of first or second degree murder. People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974).

First and second degree murder properly submitted to jury. Where there

was sufficient evidence to support the contention of the prosecution that the offense of murder in the first degree had been committed, but a jury could find from the evidence that because defendant had been the victim of a robbery at the hands of decedent he was seeking revenge, it was within the province of the jury to determine whether the evidence established beyond a reasonable doubt that there was no justification or considerable provocation in the circumstances of the homicide; hence, an instruction and form of verdict on second degree murder was proper. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Court properly excluded defendant's expert heat of passion testimony because the heat of passion mitigator does not apply when a person seeks out the highly provoking act in question, as defendant did here. Therefore, trial court properly excluded the testimony since it would not have been helpful to the jury. *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

After properly refusing to allow defendant's expert heat of passion testimony, trial court erred by instructing the jury on the heat of passion mitigator. *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

The perpetrator may testify to his state of mind at the time of the homicide, but the jury is not bound by this statement and may consider the attendant circumstances in resolving the matter. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965).

Evidence sufficient to establish deliberation. Where a witness testified that the defendant left the room for a moment and returned carrying a wooden stick, that when the victim saw the stick he asked the defendant, "Where did you get that?" and to this question the defendant replied, "In the bedroom", and began hitting the victim, this evidence was sufficient to establish that the defendant acted after deliberation. *People v.*

Hamrick, 624 P.2d 1333 (Colo. App. 1979),
aff'd, 624 P.2d 1320 (Colo. 1981).

Jury had sufficient evidence to determine that defendant was aware his conduct was practically certain to result in victim's death. People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

Sufficient evidence to support a jury finding that defendant knew his conduct was practically certain to cause death. Evidence of the size differential between the defendant and victim, the way the defendant struck the victim, and the defendant's effort to conceal the crime afterwards was sufficient to support a jury finding that defendant knew his actions would cause death. Mata-Medina v. People, 71 P.3d 973 (Colo. 2003).

Evidence sufficient for conviction of second degree murder. People v. Naranjo, 181 Colo. 273, 509 P.2d 1235 (1973); People v. Garcia, 186 Colo. 167, 526 P.2d 292 (1974); Crespin v. People, 721 P.2d 688 (Colo. 1986); People v. Sepulveda, 65 P.3d 1002 (Colo. 2003); People v. Gonzalez-Quezada, 2023 COA 124M, 546 P.3d 142.

B. Defenses.

Gross negligence constitutes defense. Gross negligence, not being reasonably foreseeable, constitutes a defense to criminal homicide under those circumstances where, but for the gross negligence, death would not have resulted. People v. Fite, 627 P.2d 761 (Colo. 1981).

A defendant need not admit the predicate felony to raise the affirmative

defense to felony murder. The affirmative defense to felony murder is not inextricably intertwined with the commission of the predicate offense and nothing in the plain language of the affirmative defense to felony murder requires the defendant to admit the commission of the underlying felony. People v. Gallegos, 2025 CO 41M, 572 P.3d 136.

Intoxication does not negative the necessary capacity to be guilty of second degree murder. Watkins v. People, 158 Colo. 485, 408 P.2d 425 (1965).

Even if lack of deliberation and premeditation because of intoxication is shown, second degree murder can be proved. Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965).

An instruction limiting voluntary intoxication as an affirmative defense to second degree murder does not constitute a violation of due process by reducing the people's burden of proving every element of the crime beyond a reasonable doubt. People v. DelGuidice, 199 Colo. 41, 606 P.2d 840 (1979); see People v. White, 199 Colo. 82, 606 P.2d 847 (1980); People v. Lee, 199 Colo. 301, 607 P.2d 998 (1980).

Subsection (2) prohibits admission of evidence of voluntary intoxication to contest the general intent required for second degree murder. People v. Gallegos, 628 P.2d 999 (Colo. 1981); People v. Vasquez, 148 P.3d 326 (Colo. App. 2006).

For voluntary intoxication as an affirmative defense prior to the 1977 amendment of this section, see People v.

Cornelison, 192 Colo. 337, 559 P.2d 1102 (1977).

Killing in self-defense justified. A general fight ensued under circumstances which could lead only to the conclusion on the part of defendant that he was being set upon by at least three assailants. Defendant made his way out of the booth and was obviously trying to get out of the tavern. There was scuffling outside and defendant fired a second shot which fatally wounded deceased. Under the law and the circumstances, defendant had the right to defend himself against the threatened assault of those whose lawlessness and utter disregard of his right resulted in the justifiable killing of one of their number. The conviction of second degree murder is reversed and defendant discharged. *Maes v. People*, 166 Colo. 15, 441 P.2d 1 (1968).

Intentional death not result of mutual combat. A defendant cannot avoid the consequences of a deliberate, intentional act of murder on grounds of mutual combat or hot state of blood when the person killed was not a party to the mutual combat nor a bystander accidentally and unintentionally slain. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Attack by policeman was murder. A policeman who, without justification, strikes a citizen with his billy, in a manner calculated to produce death, but without deliberation or premeditation, is guilty of murder in the second degree if death ensues. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

The refusal of a marriage proposal and the request or demand to leave one's home cannot under any circumstances rise to the level of provocation that would justify a reasonable person to use violence. Thus, there was not sufficient evidence to support the heat of passion mitigator. *People v. Ramirez*, 56 P.3d 89 (Colo. App. 2002).

C. Instructions.

Error to charge conviction of second degree murder required if killing was without deliberation. It is error to charge the jury that, if they believe the killing was without any deliberation or premeditation whatever, they should convict of murder of the second degree; and such charge must be considered erroneous, even when the conviction is murder of the first degree. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

Error to instruct upon higher degree of homicide when evidence will not support such instructions. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Error in instruction on higher degree of crime not prejudicial to one convicted of lesser crime. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

The accused cannot complain of an error in instructing the jury as to the higher degree of the crime charged where the jury is properly instructed as to the lower degree and returns a verdict of guilty of the lower degree, especially with respect to charges upon the different grades and degrees of

culpable homicide. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956); *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

The court must instruct the jury (1) on what constitutes heat of passion provocation and (2) that the prosecution bears the burden of proving the absence of heat of passion provocation beyond a reasonable doubt. *People v. Tardif*, 2017 COA 136, 433 P.3d 60.

Error to instruct that the prosecution was required to prove the elements of provocation beyond a reasonable doubt. Since provocation is a mitigating factor, not a separate offense, the prosecution must prove a lack of provocation in order to secure a conviction of second degree murder. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

The trial court erred when it did not instruct the jury that the prosecution had to prove the absence of heat of passion provocation beyond a reasonable doubt. *People v. Tardif*, 2017 COA 136, 433 P.3d 60.

A provocation instruction is warranted whenever a defendant shows some supporting evidence—regardless of how incredible, unreasonable, improbable, or slight it may be—to establish each factor described in subsection (3)(b). *Cassels v. People*, 92 P.3d 951 (Colo. 2004).

Instruction on involuntary manslaughter should have been granted. Where one of the defense theories was that

the grade of the crime, if there was a crime, was at most involuntary manslaughter because the shooting of the victim was unintentional according to some of the defense evidence presented to the jury, the defendant's request for an instruction on involuntary manslaughter should have been granted in prosecution for second degree murder. *People v. Travis*, 183 Colo. 255, 516 P.2d 121 (1973).

Refusal of trial court to instruct on the lesser included offense not in error when there is no evidence to support the instruction. *Jones v. People*, 711 P.2d 1270 (Colo. 1986).

Where jury was instructed that if it found the people had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

Failure to give instruction on lesser included offense of criminally negligent homicide was harmless, even if assumed to be erroneous, where jury convicted defendant of second degree murder and rejected charge of reckless manslaughter because criminally negligent homicide is a lesser included offense of reckless manslaughter. Jury's selection of the highest available grade of offense was a rejection of the next lower included offense and of all

lesser offenses included in the latter. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), *aff'd*, 71 P.3d 973 (Colo. 2003).

IV. VERDICT AND SENTENCE.

Trial court retains jurisdiction to correct erroneous sentence. Where the court has jurisdiction of the person and subject matter and has entered an erroneous judgment, it retains jurisdiction to correct, modify, and alter it in accordance with the statute. This rule is applicable to the judgment of a district court erroneously sentencing one guilty of second degree murder to life imprisonment, where defendant applied for rendition of a valid judgment after serving several years of the erroneous sentence. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

One can be guilty of first degree assault but not attempted second degree murder. A jury's verdict of guilty of first degree assault under § 18-3-202 (1)(e) is not irreconcilable and inconsistent with its verdict of not guilty on the charge of attempted second degree murder under this section. These crimes require different elements of proof, and the jury can find from the very same evidence that an element of one crime is present while an element of another charged crime is absent. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

One is guilty of attempted second degree murder when it is established that the person acted with an awareness that death is certain to result, and proceeds to engage in conduct constituting a substantial step toward causing the death of a person.

Because these are not the same elements of first degree assault, attempted second degree murder is not a lesser-included offense to first degree assault. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Conviction for first degree assault is not inconsistent with conviction for attempted second degree murder. A defendant can engage in conduct with the intent to cause serious bodily injury while knowing but not caring that the conduct is practically certain to result in death. In such circumstances, the defendant may be found guilty of attempted second degree murder, even though lacking the specific intent to cause death. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

Felony child abuse not inconsistent with acquittal of second degree murder. A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Overtured first degree murder conviction resulting in conviction and resentence for second degree murder. Prosecution has discretion to decide whether case with conviction overturned, because of trial court's submission of extreme indifference murder, should be retried on other theories of first degree murder that were originally charged or whether defendant should be convicted and resentenced for second degree murder. *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

Where conviction was overturned because of jury instruction regarding "after deliberation" element of first degree murder, prosecution has discretion to decide whether case should be retried or whether defendant should be convicted and resentenced for second degree murder. *People v. Sepulveda*, 65 P.3d 1002 (Colo. 2003).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. Heat of passion is a sentence mitigating factor rather than a separate offense. *People v. Darbe*, 62 P.3d 1006 (Colo. App. 2002).

Second degree murder satisfies the Wells-Yates v. People standard, 2019 CO

90M, 454 P.3d 191, and is therefore a per se grave or serious offense. *People v. Crawley*, 2024 COA 49, 553 P.3d 1284.

Sentence of life imprisonment without the possibility of parole is not grossly disproportionate to the crime of felony murder, despite the 2021 statutory amendment lowering the sentencing range for felony murder, because felony murder is still a per se grave or serious offense and life in prison without the possibility of parole is not grossly disproportionate to the offense even if it is potentially substantially longer than the maximum under the amended statute. *People v. Sellers*, 2022 COA 102, 521 P.3d 1066, aff'd, 2024 CO 64, 560 P.3d 954.

18-3-104. Manslaughter.

(1) A person commits the crime of manslaughter if:

- (a) Such person recklessly causes the death of another person; or
- (b) Such person intentionally causes or aids another person to commit suicide.
- (c) (Deleted by amendment, L. 96, p. 1844, § 13, effective July 1, 1996.)

(2) Manslaughter is a class 4 felony.

(3) This section shall not apply to a person, including a proxy decision-maker as such person is described in section 15-18.5-103, C.R.S., who complies with any advance medical directive in accordance with the provisions of title 15, C.R.S., including a medical durable power of attorney, a living will, or a cardiopulmonary resuscitation (CPR) directive.

(4) (a) This section shall not apply to a medical caregiver with prescriptive authority or authority to administer medication who prescribes or administers medication for palliative care to a terminally ill patient with the consent of the terminally ill patient or his or her agent.

(b) For purposes of this subsection (4):

(I) "Agent" means a person appointed to represent the interests of the terminally ill patient by a medical power of attorney, power of attorney, health-care proxy, or any other similar statutory or regular procedure used for designation of such person.

(II) "Medical caregiver" means a physician, registered nurse, nurse practitioner, physician assistant, or anesthesiologist assistant licensed by this state.

(III) "Palliative care" means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his or her life.

(c) Paragraph (a) of this subsection (4) shall not be interpreted to permit a medical caregiver to assist in the suicide of the patient.

Source: L. 71: R&RE, p. 419, § 1. C.R.S. 1963: § 40-3-104. L. 75: (1)(c) amended, p. 623, § 1, effective March 19; (1)(c) amended, p. 618, § 6, effective July 21. L. 79: (1)(c) amended, p. 726, § 3, effective July 1. L. 86: (1)(c) amended, p. 770, § 4, effective July 1. L. 93: Entire section amended, p. 1986, § 13, effective July 1. L. 94: (3) added, p. 1059, § 3, effective May 4. L. 96: (1)(b), (1)(c), and (2) amended, p. 1844, § 13, effective July 1. L. 2006: (4) added, p. 313, § 1, effective July 1. L. 2012: (4)(b)(II) amended, (HB 12-1332), ch. 238, p. 1059, § 15, effective August 8.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L.J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "How to Reconcile Advance Care Directives With Attempted Suicide", see 42 Colo. Law. 97 (July 2013).

Annotator's note. Since § 18-3-104 is similar to former § 40-2-4 to 40-2-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section is a valid, religiously neutral, and generally applicable criminal statute that prohibits conduct a state is free to regulate, and was not a violation of petitioners rights under the free exercise clause of the first amendment to the United States Constitution. Sanderson v. People, 12 P.3d 851 (Colo. 2000).

As to the distinction between first degree murder and manslaughter, the two statutes impose different standards of care in that the manslaughter statute requires that the cause of death be recklessly done, while in comparison, an extreme indifference to human life in the first degree murder statute is clearly a more culpable standard of conduct, especially where necessarily coupled with the additional requirement that there be created a grave risk of death. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

The term "under circumstances ... manifesting extreme indifference to the value of human life", contained in § 18-3-102, connotes a heightened awareness and disregard of a fatal risk and is clearly a more culpable standard of conduct than the reckless conduct involved in manslaughter. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Second degree murder as defined in § 18-3-103 is "conceptually distinguishable" from intentional manslaughter. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977).

Distinction between manslaughter and second degree murder constitutional. The difference between the mental states required for second degree murder (knowingly) and manslaughter (recklessly) mirrors the distinction between practically certain of result on the one hand, and probability or contingency of result on the other and this difference is sufficient to avoid an equal protection violation. *People v. Padilla*, 638 P.2d 15 (Colo. 1981).

Section constitutionally distinguishable from second degree murder statute, § 18-3-103 (1)(a), because the two statutes require different mens rea elements for conviction. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. Padilla*, 638 P.2d 15 (Colo. 1981).

Convictions for felony child abuse and reckless manslaughter not inconsistent. There is no logical inconsistency between the guilty verdicts for the crimes of felony child abuse and reckless manslaughter. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

The statutory language in this section and §§ 18-3-102 and 18-3-105 creates distinguishable standards which can be fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

Prior to the 1975 amendment to § 18-1-501, subsection (1)(a) was unconstitutional. Subsection (1)(a) is unconstitutional, in that the requirement to sustain a conviction under that statute (recklessness) is indistinguishable from the requirement to sustain a conviction for criminally negligent homicide (criminal negligence). *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975); *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975); *Till v. People*, 196 Colo. 126, 581 P.2d 299 (1978).

Jury could not distinguish between manslaughter and criminally negligent homicide. Where the court submitted instructions to the jury on second-degree murder and on the lesser included offenses of manslaughter and criminally negligent homicide, the jury could not rationally distinguish between the crimes of

manslaughter and criminally negligent homicide, the lesser included offenses on which it was instructed. *People v. Horrocks*, 190 Colo. 501, 549 P.2d 400 (1976).

Reckless manslaughter and heat of passion manslaughter are of equal grade and neither is included within the other nor is reckless manslaughter included in criminally negligent homicide. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Reckless manslaughter and criminally negligent homicide distinguished. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

Conviction of criminally negligent homicide held constitutional. Where defendant was charged with manslaughter and convicted of criminally negligent homicide as an included offense, the conviction was constitutional. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

There is a significant difference between the elements of extreme indifference murder and reckless manslaughter. Extreme indifference murder requires proof of circumstances showing an attitude of universal malice with extreme indifference to the value of human life generally. Reckless manslaughter lacks this element. *People v. Alvarado-Juarez*, 252 P.3d 1135 (Colo. App. 2010).

Reckless manslaughter and careless driving resulting in death pursuant to § 42-4-1402 are both lesser included offenses of reckless vehicular homicide pursuant to § 18-3-106. *People v. Kirby*, 2024 COA 20, 549 P.3d 1055.

Where penalty for first degree assault limited. A person charged with first degree assault, who can establish that he acted in "heat of passion", is constitutionally protected against receiving a greater penalty than he could have received had he caused the death of his victim. *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978).

Selection by jury of highest available grade of offense constitutes rejection of next lower included offense and all lesser offenses included within latter. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Trial court did not abuse its discretion in excluding psychiatrist from testifying as an expert witness to explain to the jury the meaning of the terms "heat of passion" and "irresistible impulse". Such issues were of an understandable nature to the jury without expert testimony. *People v. Lanari*, 811 P.2d 399 (Colo. App. 1989), *aff'd*, 827 P.2d 495 (Colo. 1992).

Vacating jury's finding that defendant recklessly caused the victim's death did not violate the defendant's right to a trial by jury. Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of reckless manslaughter conviction. *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999).

Manslaughter is not a crime of violence for purposes of the United States sentencing guidelines. Because this state's

version of manslaughter involves only reckless conduct, not intentional or purposeful behavior as required under the guidelines, it is not a crime of violence. *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011).

Applied in *May v. People*, 8 Colo. 210, 6 P. 816 (1885); *St. Louis v. People*, 120 Colo. 345, 209 P.2d 538 (1949); *Hardy v. People*, 133 Colo. 201, 292 P.2d 973 (1956); *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Edwards v. People*, 160 Colo. 395, 418 P.2d 174 (1966); *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Lee*, 630 P.2d 583 (Colo. 1981); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Bookman*, 646 P.2d 924 (Colo. 1982); *People v. Sanchez*, 644 P.2d 95 (Colo. App. 1982); *People v. Police*, 651 P.2d 430 (Colo. App. 1982); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

II. ELEMENTS OF OFFENSE.

Common law rule of provocation. At common law, words of reproach, however grievous, were not provocation sufficient to free the killing party from the guilt of murder, nor were indecent, provoking actions and gestures, expressive of contempt or reproach, without an assault on the person. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

The provisions of this section do not recognize provocation less in degree than that recognized as sufficient at common law. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

This provision is a recognition of the frailty of human nature, the purpose of which is to reduce a homicide committed in the circumstances therein contemplated to the grade of manslaughter. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Manslaughter defined. This section states that in order to be manslaughter, the killing must be the result of a sudden, violent impulse of passion. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

Element of deliberation lacking. A distinguishing feature between murder of either the first or second degree and manslaughter are the ingredients of premeditation and deliberation required in the former which are absent in the latter. *Beckstead v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Bertalotto v. People*, 175 Colo. 557, 488 P.2d 1100 (1971).

Attempted reckless manslaughter is a legally cognizable offense. *People v. Thomas*, 729 P.2d 972 (Colo. 1986); *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd in part, rev'd in part on other grounds*, 964 P.2d 524 (Colo. 1998).

Provocation need not immediately precede act. The provocation or the injury inflicted on the killer by the victim, whether real or threatened, need not immediately precede the act. *Ferrin v. People*, 164 Colo.

130, 433 P.2d 108 (1967); *Coston v. People*, 633 P.2d 470 (Colo. 1981).

Where manslaughter is charged, while there is no strict requirement that the act constituting the provocation occur immediately before the killing, if there is evidence of a sufficient interval between the provocation and the killing for reason to prevail, the killing is murder and not manslaughter. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Three-week interval sufficient to allow voice of reason. The record revealed no evidence which would support a verdict of manslaughter where the acts of provocation by the victim and his threats against the defendant all occurred no later than three weeks before the time of the shooting, which interval was sufficient for the voice of reason and humanity to be heard, and, this being so, the killing must be attributed to deliberate revenge punishable as murder. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The term "another person" is not superfluous language, and the term is not satisfied by alleging the victim to be "any and all members of the public in [defendant's] vicinity". There was no evidence from which a reasonable jury could find that defendant's driving jeopardized or threatened any oncoming traffic or individuals. *People v. Griego*, 2015 COA 31, 411 P.3d 135, *aff'd*, 2018 CO 5, 409 P.3d 338.

The phrase "aids another to commit suicide" evidences a clear and unambiguous intent to apply only to persons who provide

indirect types of aid or assistance to others who then kill themselves and not to persons who actively participate in the death of a suicidal person. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

The term "reasonable person" as it refers to subsection (1)(c) refers to an objectively reasonable person. Therefore, even if a particular defendant was provoked to kill in a sudden heat of passion, the evidence must also establish that an objectively reasonable person would have similarly suffered an irresistible passion to kill. *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to the 1996 repeal of subsection (1)(c)).

Discussion of element of implied malice required by former statute. *People v. Hosier*, 186 Colo. 116, 525 P.2d 1161 (1974).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

B. Evidence.

C. Defenses.

D. Instructions.

A. Indictment and Information.

Manslaughter is sufficiently charged in indictment for murder. Manslaughter has always been recognized as an included offense in the crime and charge of murder, and to be sufficiently charged and covered by a good indictment for murder. *Packer v. People*, 8 Colo. 361, 8 P. 564 (1885).

An information charging murder in the first degree includes all the lower grades of criminal homicide. *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945).

B. Evidence.

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Sufficient evidence of provocation. *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971).

The term "reasonable person" as it refers to subsection (1)(c) refers to an objectively reasonable person. Therefore, even if a particular defendant was provoked to kill in a sudden heat of passion, the evidence must also establish that an objectively reasonable person would have similarly suffered an irresistible passion to kill. *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to 1996 repeal of subsection (1)(c)).

Question of provocation is for jury. The jury are the judges of the sufficiency of the provocation and passion that reduce a homicide to the grade of manslaughter. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

Whether certain circumstances amounted to the statutory provocation or caused the passion which the section denominates irresistible was not for the court to determine, but is properly a question for the jury. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Likewise, credibility and force of evidence as to manslaughter. On the trial of a person indicted for murder, although the evidence may overwhelmingly show that the killing was in fact murder and not manslaughter, or an act performed in self-defense, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

If there is evidence relative to manslaughter offered by either the people or the defendant charged with first degree murder, its credibility and weight is for the jury to consider in determining the facts, and proper instructions upon manslaughter should be given. *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

A person charged with murder is triable by a jury. They alone must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts,

and thus invade the province of a jury. Where there is testimony tending to prove manslaughter, whether or not it is sufficient to justify a verdict of manslaughter is for the jury to determine, and not the court. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970).

Accused cannot complain where evidence warranted conviction of higher degree. The evidence warranting a conviction for murder in the second degree, the accused has no ground to complain of a conviction of manslaughter. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

"Cooling time" not precisely defined. No precise formulation may be offered to define what "cooling time" constitutes a sufficient interval to allow a person to function rationally after having been seriously provoked. This judgment depends upon human nature as it is generally understood, the particular emotional state of the offender, and, especially, upon the surrounding circumstances of the case. *Coston v. People*, 633 P.2d 470 (Colo. 1981).

"Cooling time" is a question of law for the court, and not a question for the jury. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

The question of whether there has been a sufficient cooling off period is one of law for the court. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The question of whether there is sufficient evidence of a cooling off period between

provocation and killing is initially one of law for the court. *Coston v. People*, 633 P.2d 470 (Colo. 1981).

C. Defenses.

Mutual combat no excuse for murder of nonparticipant. A defendant cannot avoid the consequences of a deliberate, intentional act of murder on grounds of "mutual combat" or "hot state of blood" when the person killed was not a party to the mutual combat nor a bystander accidentally and unintentionally slain. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Self-defense may be asserted as a defense to attempted heat of passion manslaughter. *Thomas v. People*, 820 P.2d 656 (Colo. 1991).

For a crime requiring recklessness, criminal negligence, or extreme indifference, like reckless manslaughter, self-defense is not an affirmative defense; rather, it is an element-negating traverse. The prosecution bears no burden in disproving self-defense when self-defense is not an affirmative defense. The court did not err in instructing the jury that the prosecution did not bear the burden of disproving self-defense in relation to the reckless manslaughter charge. *People v. Pickering*, 276 P.3d 553 (Colo. 2011) (overruling *People v. Lara*, 224 P.3d 388 (Colo. App. 2009) and *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009)); *People v. Lane*, 2014 COA 48, 343 P.3d 1019.

No defense to manslaughter indictment that evidence shows homicide was murder. It is no defense to an indictment for

manslaughter that the homicide therein alleged appears by the evidence to have been murder. In re Garvey, 7 Colo. 384, 3 P. 903 (1884); Murphy v. People, 9 Colo. 435, 13 P. 528 (1887).

D. Instructions.

Defendant entitled to jury instruction on lesser included offense where jury could reasonably doubt defendant's guilt of greater offense but be persuaded beyond a reasonable doubt of defendant's guilt of lesser included offense. People v. Gordon, 765 P.2d 633 (Colo. App. 1988).

The very essence of the manslaughter instruction is that the killing must be preceded by a serious and highly provocative injury inflicted upon the person committing the homicide. Ferrin v. People, 164 Colo. 130, 433 P.2d 108 (1967).

Evidence of provocation should not be omitted from instructions. People v. Morant, 179 Colo. 287, 499 P.2d 1173 (1972).

Defense of accidental or excusable killing does not waive the question of manslaughter, and did not make unnecessary the giving of instructions thereon. Baker v. People, 114 Colo. 50, 160 P.2d 983 (1945); Vigil v. People, 143 Colo. 328, 353 P.2d 82 (1960).

Where homicides occurring during an affray are unintentional, accidental, a result of misadventure, or in self-defense, it is error not to instruct as to manslaughter. Armijo v. People, 134 Colo. 344, 304 P.2d 633 (1956).

Under a variety of fact situations in a homicide case, the self-defense evidence could conceivably also be a basis for a manslaughter instruction. English v. People, 178 Colo. 325, 497 P.2d 691 (1972).

When defendant entitled to manslaughter instruction. To be entitled to a manslaughter instruction, the defendant must be able to point to some evidence presented at trial which would permit a jury to find, in addition to concluding that the defendant intentionally killed the victim, that all the elements listed in subsection (1)(c) existed at the time the offense was committed. Coston v. People, 633 P.2d 470 (Colo. 1981); People v. Garcia, 826 P.2d 1259 (Colo. 1992).

Evidence held to support instruction on manslaughter. Abila v. People, 80 Colo. 169, 249 P. 649 (1926).

Error for court to take question of manslaughter from the jury, as there was not an entire absence of evidence tending to establish manslaughter. Henwood v. People, 54 Colo. 188, 129 P. 1010 (1913).

If the evidence tends to prove a case of manslaughter, or if, upon the evidence, there is any doubt whatever as to the grade of the crime, the question of manslaughter ought to be submitted to the jury. Jones v. People, 93 Colo. 282, 26 P.2d 103 (1933).

When there is competent evidence which could conceivably reduce a homicide to manslaughter, the defendant is entitled to an instruction thereon. Armijo v. People, 134 Colo. 344, 304 P.2d 633 (1956).

When there is any evidence, however improbable, unreasonable, or slight, which tends to reduce a homicide to the grade of manslaughter, a defendant is entitled to an instruction thereon upon the hypothesis that the same is true, and that it is for the jury, under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed; and a court's refusal to instruct thereon is reversible error. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (Colo. 1979); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).

A defendant in a homicide case is entitled to an instruction on lesser included offenses when there is evidence, however manifested, whether presented by the people, or by the defense, to indicate the commission of the lesser offense. *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970); *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Only in those cases where there is evidence — even though it be slight — that there was a serious and highly provoking act by the victim against the accused which could possibly excite an irresistible passion is a manslaughter instruction required when requested. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

Refusal to instruct on lesser offense is reversible error. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Defendant was not entitled to an instruction on reckless manslaughter where the evidence showed that the defendant did not intend to kill her husband when she picked up the axe, but that something "just snapped" and she hit him. The court found that there was no evidence that, when the defendant hit her husband with the axe, she was conscious of the risk of death. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd* on other grounds, 28 P.3d 340 (Colo. 2001).

Trial court not required to give a lesser offense instruction requested by a defendant unless there is some evidence tending to establish the lesser offense and a rational basis upon which the jury may acquit the defendant of the greater offense but convict him or her of the lesser. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

Defendant not entitled to jury instruction on aiding suicide manslaughter where the trial court found no evidence to support defendant's request because the aiding suicide manslaughter instruction applies only to a defendant who furnishes a person with a means of committing suicide, but instead of passively or indirectly participating in the suicidal person's death, defendant actively participated in causing the death of the victim. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

There is no right to a jury instruction on a lesser included offense if the element that distinguishes the greater from the lesser is uncontested. Where it is undisputed that death occurred as a result of defendant's conduct, there is no right to an

instruction on reckless endangerment in a reckless manslaughter case. *People v. Hall*, 59 P.3d 298 (Colo. App. 2002).

Where jury was instructed that if it found the people had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991); *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Where defense did not contemporaneously object, prosecutor's statement in closing arguments that he had not proved heat of passion manslaughter beyond a reasonable doubt was not plain error. Prosecutor also reminded the jury that he had the burden of proving all elements of an offense and the court found that in light of the evidence presented at trial, the prosecutor's comment did not cast doubt on the reliability of the conviction. *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Where court's heat of passion manslaughter instruction was based on language of § 18-3-104 and terms used were susceptible to general understanding, defendant's tendered instruction which contained definitions of terms used in the "heat of passion manslaughter" instruction was not necessary.

People v. Ferrero, 874 P.2d 468 (Colo. App. 1993).

Defendant's tendered instruction defining "cooling time" was not necessary where the court's instruction was based on the language of § 18-3-104 and words used were understandable to person of common intelligence. *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Jury instruction on a lesser included offense on attempted heat of passion manslaughter is not required to be given unless the defendant requests it. Where no request was made, it was presumed that the defendant elected to take his or her chances on an outright acquittal on an attempted second degree murder charge. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

Heat of passion manslaughter was a specific, lesser, nonincluded offense of second degree murder rather than a statutory mitigating factor. *Walker v. People*, 932 P.2d 303 (Colo. 1997) (decided under law in effect prior to deletion by amendment of subsection (1)(c)).

Court may exclude question of manslaughter when no evidence thereof. Notwithstanding the provisions of this section, the court may exclude from the jury the question of manslaughter where there is no evidence of that degree of the crime or the defense is upon a theory having no relation thereto. *Sevilla v. People*, 65 Colo. 437, 177 P. 135 (1918).

Failure to charge on manslaughter held no error. Under the evidence where there is no element of manslaughter involved, there

is no error in the failure of the court to submit that question to the jury. *Edwards v. People*, 73 Colo. 377, 215 P. 855 (1923).

Under facts of this case, instruction on manslaughter was not necessary. *Williams v. People*, 114 Colo. 207, 158 P.2d 447 (1945).

Evidence failed to warrant submission of instruction to jury on manslaughter. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Where no instruction on manslaughter was tendered or requested, even if such an instruction was proper, mere nondirection would not constitute error. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Where the evidence only shows the killing to have been deliberate and intentional, there is no question of manslaughter present and no reason to submit it to the jury. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

If there be a total absence of evidence relating to the particular grade of homicide disregarded, the charge to the jury cannot be successfully challenged on the ground of such omission. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Where the record is devoid of any evidence which would have supported a verdict of guilty of manslaughter, the court was not obliged to instruct thereon. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970).

No error in failing to give self-defense instruction. When an element of the crime charged is that the defendant acted in a

reckless or criminally negligent manner, and the trial court properly instructs the jury as to each element, no error results from the court's failure to give a self-defense instruction. *People v. Fink*, 194 Colo. 516, 574 P.2d 81 (1978).

To entitle a defendant to a heat of passion instruction, the supporting evidence must tend to establish the four elements of subsection (1)(c). *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to the 1996 repeal of subsection (1)(c)).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Error in charge on first-degree murder not prejudicial to one convicted of lower degree of murder or manslaughter. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Court's response to jury inquiry on attempted reckless manslaughter, although a comment on the evidence and not a proper instruction on the law, did not constitute plain error. Hypothetical given by the court, when considered in the context of the jury instructions as a whole, neither misled the jury nor cast serious doubt on the verdict. *People v. Allen*, 43 P.3d 689 (Colo. App. 2001).

Instruction on elements of manslaughter under previous statute held erroneous. People v. Morant, 179 Colo. 287, 499 P.2d 1173 (1972).

Instructions held proper. Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965).

18-3-105. Criminally negligent homicide.

(1) (a) A person who causes the death of another person with criminal negligence commits criminally negligent homicide.

(b) If a person operates or drives a motor vehicle with criminal negligence and the conduct is the proximate cause of the death of another person, the person commits criminally negligent homicide.

(2) Criminally negligent homicide is a class 5 felony.

Source: L. 71: R&RE, p. 419, § 1. **C.R.S. 1963:** § 40-3-105. **L. 77:** (1)(b) amended, p. 960, § 7, effective July 1. **L. 81:** Entire section R&RE, p. 973, § 5, effective July 1. **L. 85:** Entire section amended, p. 665, § 1, effective July 1. **L. 2026:** Entire section amended, (SB 26-072), ch. 200, p. 1143, § 1, effective September 1.

Editor's note: Section 8(2) of chapter 200 (SB 26-072), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after September 1, 2026.

ANNOTATION

Law reviews. For note, "Correcting an Erroneous Judgment in a Criminal Case", see 19 Rocky Mt. L. Rev. 295 (1947). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979).

Annotator's note. Since § 18-3-105 is similar to former § 40-2-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Classification of first-degree assault as more serious than negligent homicide constitutional. The culpable mental state required for first-degree assault is sufficiently distinguishable from that

required for criminally negligent homicide to justify a harsher sentence for the former. *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985).

To be guilty of criminally negligent homicide, the defendant must fail to perceive a substantial and unjustifiable risk that a certain result will occur, and the risk must be of such a nature that the defendant's failure to perceive it constitutes a gross deviation from a reasonable person's standard of care. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

The defendant's guilt in criminally negligent homicide stems from his culpable failure to perceive the risk. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

Criminally negligent homicide is an unintentional killing caused by the actor's failure to perceive a substantial and unjustifiable risk that a certain result will occur. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Criminal negligence, as applied to homicide, means a failure to perceive, through a gross deviation from the standard of reasonable care, a substantial and unjustifiable risk that death will result from certain conduct. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

Attempted criminally negligent homicide logical and legal impossibility. Where the trial court joined criminally negligent homicide and attempt and charged the jury on attempted criminally negligent homicide, the charge was a logical and legal

impossibility. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Defendant cannot avoid his conviction on the ground that he did not intend death to result from his act. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

In this section and § 18-3-106 there is a crucial difference in that the vehicular homicide statute requires for conviction that the prosecution prove the additional element of a death caused through the use of a motor vehicle. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

More severe penalty for vehicular homicide does not deny equal protection. It cannot be said that the legislature's decision to provide a more severe penalty for vehicular homicide than for criminal negligent homicide is arbitrary or unreasonable. The state has a legitimate interest in discouraging a specific evil which it believes to be of greater societal consequence. This choice does not offend equal protection. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

Classification of child abuse as more serious than negligent homicide constitutional. The legislative classification of child abuse as a crime more serious in penalty than the offense of criminally negligent homicide is neither arbitrary nor unreasonable and does not violate equal protection of the laws. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Sections 18-6-401 and 18-3-405 do not proscribe identical conduct. The proscriptions of § 18-6-401 encompass

conduct that is particularly abusive to children, that is directed specifically against a child, and that results in injury to that child. Criminally negligent homicide, on the other hand, proscribes in general terms a gross carelessness that causes death to anyone, adult or child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Equal protection violated by provisions setting forth same conduct with different sanctions. It is only where the same acts or conduct are set forth in two sections with different criminal sanctions or to which different defenses are available that equal protection guarantees are violated. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

Divergent penalties in former versions of criminally negligent homicide and first degree assault violated equal protection because both statutes proscribed similar conduct and intent. *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979).

The statutory language in this section and §§ 18-3-102 and 18-3-104 creates distinguishable standards which can be fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

The standards of culpability in this section and § 18-3-102 (1)(d) are distinct enough to be intelligently understood and applied, and therefore, the defendant was not denied equal protection of the law by virtue of his conviction under subsection (1)(d) of § 18-3-102. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

Liability due to mechanical failure of motor vehicles and appurtenances is not

conclusive of negligence, criminal or otherwise, where the failure occurred under circumstances beyond one's control. Where acts or circumstances are attributable to either an innocent or a criminal cause, the innocent hypothesis will be adopted. *Bennett v. People*, 155 Colo. 101, 392 P.2d 657 (1964).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Theory of accidental killing should be submitted to jury. In a prosecution for

murder where defendant testified that he did not think the gun used in the killing was loaded, and that he was merely waving it around to scare the deceased away when it was discharged accidentally, refusal to instruct the jury on this theory was error, as the drawing of the weapon could be considered by the jury as a proper and lawful act. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Because this section contains all of the elements of the crime in § 18-3-104 (1)(a) and is a lesser included offense, the same abundance of competent evidence supports conviction of criminal negligence. *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975).

Failure to give instruction on criminally negligent homicide was harmless, even if assumed to be erroneous, where jury convicted defendant of second degree murder and rejected charge of reckless manslaughter because criminally negligent homicide is a lesser included offense of reckless manslaughter. Jury's selection of the highest available grade of offense was a rejection of the next lower included offense and of all lesser offenses included in the latter. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), *aff'd*, 71 P.3d 973 (Colo. 2003).

Conviction held constitutional. Where defendant was charged with manslaughter and convicted of criminally negligent homicide as an included offense, the conviction was constitutional. *People v. Palumbo*, 192 Colo. 17, 555 P.2d 521 (1976).

Conviction not inconsistent with acquittal on charge of vehicular homicide.

A conviction on a charge of criminally negligent homicide is not inconsistent with an acquittal on a charge of vehicular homicide. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

Where defendant is charged with reckless manslaughter and criminally negligent homicide, no error occurred where the trial court allowed defendant to present evidence of self-defense at trial and properly instructed the jury on the elements of crimes charged. Under these circumstances the trial court is not required to submit defendant's tendered self-defense instruction to the jury. *Case v. People*, 774 P.2d 866 (Colo. 1989).

However, a defendant may present evidence that he was acting in self-defense and such evidence may be considered by the jury in its determination of whether the defendant was acting recklessly or in a criminally negligent manner. When such evidence is presented, the jury should be informed of the right of a defendant to put himself in a position of reasonably defending himself. *People v. Roberts*, 983 P.2d 11 (Colo. App. 1998).

Criminally negligent homicide is not a lesser included offense of vehicular homicide. *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

Criminally negligent homicide is not an enumerated offense for purposes of the direct file statute. The offense is not a *per se* crime of violence and merely alleging use of deadly weapon as part of the factual basis

does not satisfy the requirement of the crime of violence statute. In addition, the elements of the crime do not include the use, possession, or threatened use of a deadly weapon. *People v. Vickers*, 168 P.3d 9 (Colo. App. 2007).

Reckless manslaughter and criminally negligent homicide distinguished. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

The actions of a defendant convicted under this section may be the same as a person convicted of § 42-4-1402 (2), careless driving resulting in death. The enactment by the general assembly of a specific criminal statute does not preclude prosecution under a general criminal statute unless a legislative intent to limit prosecution to the specific statute is shown. Here no such intent is found. *People v. Tow*, 992 P.2d 665 (Colo. App. 1999).

Elements supported by credible evidence. *People v. Palumbo*, 192 Colo. 17, 555 P.2d 521 (1976).

Conviction as bar to prosecution for assault on another. A conviction of former crime of involuntary manslaughter for fatally wounding one person while shooting at another bars a prosecution upon a charge of assault to kill and murder the person at whom defendant shot. *Carson v. People*, 4 Colo. App. 463, 36 P. 551 (1894).

Applied in *People in Interest of M.A.L.*, 37 Colo. App. 307, 592 P.2d 415 (1976); *People v. District Court*, 196 Colo. 116, 581 P.2d 300 (1978); *People v. District Court*, 198 Colo. 70, 595 P.2d 1045 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Lee*, 630 P.2d 583 (Colo. 1981). *People v. Mumaugh*, 644 P.2d 299 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982).

18-3-106. Vehicular homicide.

(1) (a) If a person operates or drives a motor vehicle in a reckless manner, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide.

(b) (I) If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.

(I.5) If a person operates or drives a motor vehicle while the person's ability is impaired by alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, the person commits the crime of vehicular homicide.

(II) For the purposes of this subsection (1), one or more drugs means any drug, as defined in section 27-80-203 (13), C.R.S., any controlled substance, as defined in section 18-18-102 (5), and any inhaled glue, aerosol, or other toxic vapor or vapors, as defined in section 18-18-412.

(III) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(IV) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(V) "Driving while ability impaired" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol or one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a motor vehicle or vehicle.

(c) Vehicular homicide, in violation of subsection (1)(b)(I.5) of this section, is a class 4 felony. Vehicular homicide, in violation of subsection (1)(a) of this section, is a class 4 felony. Vehicular homicide, in violation of subsection (1)(b)(I) of this section, is a class 3 felony.

(2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was not under the influence of alcohol.

(b) If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of

breath, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.

(d) If at such time the driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the defendant's blood, such fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs.

(3) The limitations of subsection (2) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(4) (a) If a law enforcement officer has probable cause to believe that any person was driving a motor vehicle in violation of paragraph (b) of subsection (1) of this section, the person, upon the request of the law enforcement officer, shall take, and complete, and cooperate in the completing of any test or tests of the person's blood, breath, saliva, or urine for the purpose of determining the alcoholic or drug content within his or her system. The type of test or tests shall be determined by the law enforcement officer requiring the test or tests. If the person refuses to take, or to complete, or to cooperate in the completing of any test or tests, the test or tests may be performed at the direction of a law enforcement officer having probable cause, without the person's authorization or consent. If any person refuses to take or complete, or cooperate in the taking or completing of any test or tests required by this paragraph (a), the person shall be subject to license revocation pursuant to the provisions of section 42-2-126 (3), C.R.S. When the test or tests show that the amount of alcohol in a person's blood was in violation of the limits provided for in section 42-2-126 (3)(a), (3)(b), (3)(d), or (3)(e), C.R.S., the person shall be subject to license revocation pursuant to the provisions of section 42-2-126, C.R.S.

(b) Any person who is required to submit to testing shall cooperate with the person authorized to obtain specimens of his blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing.

(c) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person committed a violation of subparagraph (I) of paragraph (b) of subsection (1) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of such testing. Strict compliance with such rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly

comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results. It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(d) No person except a physician, a registered nurse, an emergency medical service provider certified or licensed under part 2 of article 3.5 of title 25 who is authorized within his or her scope of practice to draw blood, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse may withdraw blood for the purpose of determining the alcohol or drug content of the blood for purposes of this section. In a trial for a violation of subsection (1)(b) of this section, testimony of a law enforcement officer that the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was authorized to withdraw blood specimens is sufficient evidence that the person was authorized, and testimony from the person who obtained the blood specimens concerning the person's authorization to obtain blood specimens is not a prerequisite to the admissibility of test results concerning the blood specimens obtained. Civil liability does not attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which the specimens are obtained pursuant to this subsection (4) as a result of the act of obtaining the specimens from a person if the specimens were obtained according to the rules prescribed by the state board of health; except that this subsection (4)(d) does not relieve the person from liability for negligence in obtaining any specimen sample.

(e) Any person who is dead or unconscious must be tested to determine the alcohol or drug content of the person's blood or any drug content of the person's system as provided in this subsection (4). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency must be allowed to test any blood, urine, or saliva which was obtained and not utilized by a health-care provider and must have access to that portion of the analysis and results of any tests administered by such provider which shows the alcohol or drug content of the person's blood or any drug content within the person's system. Such test results are not considered privileged communications and the provisions of section 13-90-107 relating to the physician-patient privilege do not apply. Any person who is dead, in addition to the tests prescribed, must also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained must be made a part of the crash report.

(f) If a person refuses to take, or to complete, or to cooperate in the completing of any test or tests as provided in this subsection (4) and such person subsequently stands trial for a violation of subsection (1)(b) of this section, the refusal to take or to complete, or to cooperate with the completing of any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to the admission of his refusal to take, or to complete, or to cooperate with the completing of any test or tests.

(g) Notwithstanding any provision in section 42-4-1301.1, C.R.S., concerning requirements which relate to the manner in which tests are administered, the test or tests taken pursuant to the provisions of this section may be used for the purposes of driver's license revocation proceedings under section 42-2-126, C.R.S., and for the purposes of prosecutions for violations of section 42-4-1301 (1) or (2), C.R.S.

(5) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine his alcohol or drug level. This subsection (5) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (5) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Source: **L. 71:** R&RE, p. 419, § 1. **C.R.S. 1963:** § 40-3-106. **L. 75:** Entire section amended, p. 624, § 1, effective June 26. **L. 77:** (1) R&RE, p. 960, § 8, effective July 1. **L. 81:** (1)(b) amended, p. 1992, § 4, effective June 19. **L. 83:** (4) added, p. 1648, § 17, effective July 1. **L. 88:** IP(2) amended, p. 1365, § 5, effective July 1. **L. 89:** (1)(b), (2), and (3) amended, (4) R&RE, and (5) added, pp. 893, 894, §§ 1, 2, effective July 1. **L. 93:** (1) amended, p. 1986, § 14, effective July 1; (1)(b)(II) amended, p. 1731, § 13, effective July 1. **L. 94:** (4)(c), (4)(e), and (5) amended, p. 2733, § 356, effective July 1; (4)(a) and (4)(g) amended, p. 2551, § 40, effective January 1, 1995. **L. 97:** (4)(a) amended, p. 1470, § 18, effective July 1. **L. 2002:** (4)(g) amended, p. 1915, § 4, effective July 1. **L. 2004:** (2)(b) and (2)(c) amended, p. 781, § 3, effective July 1. **L. 2008:** (4)(a) amended, p. 243, § 3, effective July 1. **L. 2012:** (1)(b)(II) amended, (HB 12-1311), ch. 281, p. 1618, § 38, effective July 1; (4)(d) amended, (HB 12-1059), ch. 271, p. 1434, § 12, effective July 1. **L. 2013:** (1)(b)(II), IP(2), and (2)(c) amended and (2)(d) added, (HB 13-1325), ch. 331, p. 1878, § 2, effective May 28. **L. 2019:** (4)(d) amended, (SB 19-242), ch. 396, p. 3526, § 10, effective May 31. **L. 2021:** (1)(b)(I.5) and (1)(b)(V) added and (1)(c) amended, (SB 21-271), ch. 462, p. 3172, § 193, effective March 1, 2022. **L. 2026:** (4)(e) amended, (HB 26-1237), ch. 117, p. 464, § 8, effective August 12.

Editor's note: Amendments to subsection (1) in House Bill 93-1302 and House Bill 93-1088 were harmonized.

Cross references: (1) For penalties for driving under the influence of intoxicating liquor, see § 42-4-1301.

(2) For the legislative declaration contained in the 1994 act amending subsections (4)(c), (4)(e), and (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Body Fluid Tests for Intoxication", see 22 Rocky Mt. L. Rev. 91 (1949). For comment on Kallnbach v. People (125 Colo. 144, 242 P.2d 222 (1952)), see 24 Rocky Mt. L. Rev. 391 (1952). For comment on Goodell v. People (137 Colo. 507, 327 P.2d 279 (1958)), see 31 Rocky Mt. L. Rev. 104 (1958). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For comment on Espinosa v. People (142 Colo. 96, 349 P.2d 689 (1960)), see 33 Rocky Mt. L. Rev. 425 (1961). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Drinking and Driving: An Update on the 1989 Legislation", see 18 Colo. Law. 1943 (1989).

Annotator's note. Since § 18-3-106 is similar to former § 40-2-10, C.R.S. 1963, and laws antecedent thereto, relevant cases

construing those provisions have been included in the annotations to this section.

Purpose of section. The offense of driving an automobile in a careless and reckless manner and at an excessive rate of speed, especially when under the influence of intoxicating liquor, was created for the very purpose of preventing collisions and consequent injury to others who may be on the highway. Daniels v. People, 159 Colo. 190, 411 P.2d 316 (1966).

Constitutionality. The requirement of proof of proximate cause in this section is sufficiently intelligible to satisfy both federal and state constitutional standards of due process of law. People v. Rostad, 669 P.2d 126 (Colo. 1983); People v. Baca, 668 P.2d 1370 (Colo. 1983); People v. Ray, 678 P.2d 1019 (Colo. 1984); People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984); People v. Deadmond, 683 P.2d 763 (Colo. 1984); People v. Sutherland, 683 P.2d 1192 (Colo. 1984).

This section is not unconstitutional on the grounds that it denies the accused the opportunity to rebut the presumption raised

by his or her blood alcohol content. *People v. Rostad*, 669 P.2d 126 (Colo. 1983); *People v. Ray*, 678 P.2d 1019 (Colo. 1984).

Subsection (1) does not violate equal protection rights or due process even though paragraph (c) calls for disparate sentences for violations outlined in paragraphs (a) and (b). *People v. Loeser*, 981 P.2d 197 (Colo. App. 1998).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

Charge and conviction for both extreme indifference first degree murder and vehicular homicide (DUI), and prosecution for attempt of both offenses, does not violate right of equal protection. The statutes for the two offenses do not describe identical conduct. Unlike vehicular homicide (DUI), which is a strict liability offense, extreme indifference murder requires proof that a defendant, under circumstances demonstrating an attitude of universal malice manifesting extreme indifference to the value of human life generally, knowingly engaged in conduct that created a grave risk of death to others. *People v. Grudzniske*, 2023 COA 36, 533 P.3d 579.

The vehicular homicide and assault statutes do not supplant the general

homicide and assault statutes. *People v. Grudzniske*, 2023 COA 36, 533 P.3d 579.

Nothing in the language of this section or § 18-1.3-401(8)(g) suggests a legislative intent to preempt the felony murder statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

The gravamen of both this section and vehicular assault, § 18-3-205, is the "reckless" operation or driving of a motor vehicle, which results in the death of or serious bodily injury to another. *People v. Sexton*, 192 Colo. 81, 555 P.2d 1151 (1976).

Reckless operation of a motor vehicle and driving under the influence (DUI) are not separate and independent offenses, but alternatives by which criminal liability for vehicular homicide or vehicular assault may be charged and proven. Therefore a defendant may not be convicted under subsection (1)(a) and (1)(b) for the same actions. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999); *People v. Barry*, 2015 COA 4, 349 P.3d 1139.

This section creates a single offense of vehicular homicide, and subsections (1)(a) and (1)(b)(I) merely provide for alternative ways of committing the same offense. *People v. Barry*, 2015 COA 4, 349 P.3d 1139.

In this section and § 18-3-105 there is a crucial difference in that the vehicular homicide statute requires for conviction that the prosecution prove the additional element of a death caused through the use of a motor vehicle. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

Offenses of vehicular homicide and DUI proscribe dissimilar conduct.

Because the death of another is an essential element of vehicular homicide, but not of driving DUI, the offenses proscribe dissimilar conduct and a person prosecuted under this section is not situated similarly to a person charged with DUI. *People v. Duemig*, 620 P.2d 240 (Colo. 1980).

DUI is a lesser included offense of vehicular homicide-DUI. *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

DUI is a lesser included offense of vehicular homicide. *People v. Grassi*, 192 P.3d 496 (Colo. App. 2008), *aff'd* on other grounds, 2014 CO 12, 320 P.3d 332.

Statutory right to refuse blood test not extended to this offense. The general assembly need not extend the legislative grace of a right to refuse a blood test, a test which is constitutionally permissible, to those charged with vehicular homicide or vehicular assault. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly may legitimately decline to extend the privilege to refuse a blood test granted by § 42-4-1202 to persons accused of vehicular homicide. *People v. Duemig*, 620 P.2d 240 (Colo. 1980).

Consent is not a prerequisite to the performance of a chemical test to determine the alcohol content of a defendant's blood when the defendant is charged with this offense. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

Consent is not constitutionally required. Equal protection is not violated by

the failure of this section and § 18-3-205 to afford an accused the right to refuse a blood test afforded by § 42-4-1202. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly's decision to permit one charged with the less grievous offense of driving under the influence to refuse a blood test while not likewise permitting one charged with felonious vehicular homicide or felonious vehicular assault to refuse the test is not arbitrary or unreasonable. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

Blood test may precede formal arrest of defendant. The formal arrest of a defendant is not a prerequisite to obtaining a blood sample under this section as long as probable cause exists for such arrest. *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984); *People v. MacCallum*, 925 P.2d 758 (Colo. 1996).

Regulations promulgated pursuant to implied consent statute apply to offenses charged under it and not to felonies charged under this section. *People v. Acosta*, 620 P.2d 55 (Colo. App. 1980); *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

More severe penalty for vehicular homicide does not deny equal protection. It cannot be said that the legislature's decision to provide a more severe penalty for vehicular homicide than for criminal negligent homicide is arbitrary or unreasonable. The state has a legitimate interest in discouraging a specific evil which it believes to be of greater societal consequence. This choice does not offend

equal protection. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

By enacting this statute, the general assembly did not intend to bar murder prosecutions of drivers who cause the death of another while behind the wheel. *People v. Tarr*, 2022 COA 23, 511 P.3d 672, rev'd on other grounds, 2024 CO 37, 549 P.3d 966.

As applied to defendant driver, the second degree murder statute and vehicular homicide (DUI) under this section do not criminalize the same conduct. There are two key differences between the offenses of second degree murder and vehicular homicide (DUI). First, the offenses involve different levels of intent. To be convicted of second degree murder, a defendant must have acted "knowingly". To act knowingly, a person must be aware that his conduct is practically certain to cause the result. In contrast, vehicular homicide (DUI) is a strict liability offense, requiring only voluntary conduct. Second, unlike the second degree murder statute, to obtain a conviction under the vehicular homicide (DUI) statute, the prosecution must demonstrate that the defendant drove or operated a motor vehicle and that the defendant was legally intoxicated. *People v. Tarr*, 2022 COA 23, 511 P.3d 672, rev'd on other grounds, 2024 CO 37, 549 P.3d 966.

Vehicular homicide while driving under the influence is not grave and serious per se for purposes of a proportionality review. *People v. Kennedy*, 2023 COA 83M, 541 P.3d 11, aff'd, 2025 CO 63, 580 P.3d 1167

(overruling in part *People v. Strock*, 252 P.3d 1148 (Colo. App. 2010), annotated below).

Vehicular homicide while driving under the influence is grave and serious per se for purposes of a proportionality review because of the grave harm caused, the death of a person, and the culpability of the defendant's conduct, to drive while intoxicated. *People v. Strock*, 252 P.3d 1148 (Colo. App. 2010), overruled in part in *People v. Kennedy*, 2025 CO 63, 580 P.3d 1167.

Acquittal not inconsistent with conviction for criminally negligent homicide. A conviction on a charge of criminally negligent homicide is not inconsistent with an acquittal on a charge of vehicular homicide. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

When driver is "intoxicated". When a driver is so under the influence of intoxicating liquor that his capacity to operate an automobile is impaired, he is "intoxicated" within the meaning of that term as used in this section. *Stevens v. People*, 97 Colo. 559, 51 P.2d 1022 (1935).

"Intoxication" probably covers every condition from slight inebriation to complete paralysis. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Former offense of involuntary manslaughter was not a lesser included offense in a charge based on this section. *Daniels v. People*, 159 Colo. 190, 411 P.2d 316 (1966).

Criminally negligent homicide is not a lesser included offense of vehicular homicide. People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984).

Reckless driving is not a lesser included offense of vehicular homicide or vehicular assault. People v. Clary, 950 P.2d 654 (Colo. App. 1997).

Reckless manslaughter pursuant to § 18-3-104 and careless driving resulting in death pursuant to § 42-4-1402 are both lesser included offenses of reckless vehicular homicide. People v. Kirby, 2024 COA 20, 549 P.3d 1055.

Vehicular homicide is not a lesser included offense of aggravated motor vehicle theft under the strict elements test even if its proof might satisfy an element of aggravated motor vehicle theft under the facts of a particular case. People v. Marquez, 107 P.3d 993 (Colo. App. 2004).

For former distinction between causing death and causing injury, see People v. Olona, 180 Colo. 299, 505 P.2d 372 (1973).

Both subsection (2) and § 42-4-1202 (2) permit a jury to infer that a defendant was under the influence of alcohol if it finds that the amount of alcohol in his blood at the time of the commission of the alleged offense "or within a reasonable time thereafter," as shown by chemical analysis of the defendant's blood, is 0.10 percent or more. People v. Emery, 812 P.2d 665 (Colo. App. 1990).

The delay in obtaining samples did not affect the validity or reliability of the test nor did it affect the admissibility of the

test results. The "reasonable time" limitation is to ensure that the request for the test is made close enough in time to the alleged offense that the results will be relevant in the determination of defendant's sobriety at the time of the incident. People v. Emery, 812 P.2d 665 (Colo. App. 1990).

While the timeliness of the blood test may affect its accuracy, evidence which relates to the accuracy of a chemical test affects the weight to be accorded the evidence, rather than its admissibility. People v. Emery, 812 P.2d 665 (Colo. App. 1990).

Former "percent by weight" language of subsection (2)(c) intended to mean a "weight per volume" measure and 1989 amendment of statute was clarification of meaning. Rickstrew v. People, 822 P.2d 505 (Colo. 1991) (decided under law in effect prior to 1989 amendment).

Since former "percent by weight" language of subsection (2)(c) establishes sufficient standard by which to measure blood alcohol levels, such language is not vague and does not violate due process. Rickstrew v. People, 822 P.2d 505 (Colo. 1991) (decided under law in effect prior to 1989 amendment).

Applied in St. Louis v. People, 120 Colo. 345, 209 P.2d 538 (1949); Jones v. People, 149 Colo. 338, 369 P.2d 65 (1962); People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971); People v. Dunhill, 40 Colo. App. 137, 570 P.2d 1097 (1977); People v. District Court, 195 Colo. 14, 580 P.2d 388 (1978); Riboni v. District Court, 196 Colo. 272, 586 P.2d 9 (1978); People v. Beltran, 634 P.2d 1003

(Colo. App. 1981); *People v. Perez*, 644 P.2d 40 (Colo. App. 1981).

II. ELEMENTS OF OFFENSE.

The use of the disjunctive "or" in this section cannot be ignored, nor can it be construed to mean "and". *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Section sets forth more than one means of causing death. In adopting this section, the general assembly intended to set forth more than one means by which the offense of causing a death while operating an automobile could be committed. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Only one offense, with one punishment, is described in this section, although the offense can be committed in either one of the two ways detailed. *People v. Viduya*, 703 P.2d 1281 (Colo. 1985).

Death occasioned by specified acts constitutes felony. Neither of the offenses of driving under the influence of alcohol, nor reckless driving, nor causing an accident while under the influence of alcohol or by reckless driving, constitutes felonious acts. Only when these events caused a death or injury to another person does this section specifically provide that a felony had been committed. *Penn Mut. Life Ins. Co. v. Gibson*, 160 Colo. 462, 418 P.2d 50 (1966).

Elements of offense. To sustain a charge of causing a death while driving under the influence of intoxicating liquor, it must be established that an accident occurred, that there is evidence that a defendant was intoxicated, that a death resulted, and that the acts or conduct of the defendant were the

sole proximate cause of the accident. *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958).

More than one proximate cause may exist. The function of the concept of proximate cause, to establish a causal connection between conduct and injury, is the same in both civil law and criminal law. In civil tort law there can be more than one proximate cause. Thus, in criminal law there can be more than one proximate cause of death, and defendant's conduct does not have to be the only, nearest, or last cause of death, so long as it is a cause but for which the death would not have occurred. *People v. Lopez*, 97 P.3d 277 (Colo. App. 2004), *aff'd* on other grounds, 113 P.3d 713 (Colo. 2005).

Elements to be proven. In order to obtain a conviction under this statute, the prosecution must prove that the defendant voluntarily drove while intoxicated and that his driving resulted in the victim's death. *People v. Garner*, 781 P.2d 87 (Colo. 1989).

Unlawful conduct which is broken by independent intervening cause cannot be proximate cause of death of another. *People v. Gentry*, 738 P.2d 1188 (Colo. 1987).

Negligence plus intoxication constitute offense. A death caused by simple negligence committed by a driver while under the influence of liquor is an offense within the contemplation of this section. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

A prosecution under this section may be predicated on only negligent or careless

driving, i.e., ordinary or simple negligence, as opposed to gross or criminal negligence. *Daniels v. People*, 159 Colo. 190, 411 P.2d 316 (1966).

Change should be alleged in the conjunctive. To validate an information based upon a statute such as this under which the several means by which a crime may be committed are set forth in the disjunctive, the charge should be alleged in the conjunctive. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Defendant's fatigue could not be considered an independent intervening cause which would relieve the defendant from liability under the vehicular homicide statute. *People v. Chopra*, 782 P.2d 879 (Colo. App. 1989).

Failure of victim to employ a seatbelt not an intervening cause that would shield or partially shield the defendant from liability for a collision that resulted in a charge of vehicular homicide. *People v. Lopez*, 97 P.3d 277 (Colo. App. 2004), *aff'd* on other grounds, 113 P.3d 713 (Colo. 2005).

Victim's truck accelerating and entering intersection was not an independent intervening cause when several different expert witnesses testified defendant's car was traveling between 22 and 52 miles per hour over the posted speed limit when it collided with victim's truck, and the jury made a specific finding that defendant was traveling at least 25 miles per hour over the speed limit. *People v. Claycomb*, 2025 COA 36, 569 P.3d 1233.

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

B. Evidence.

C. Jury.

D. Instructions.

A. Indictment and Information.

Judicial notice of fact that information was based on section. The supreme court will take judicial notice of the fact that an information on which a defendant was tried and found guilty by a jury is based on this section. *Hart v. Best*, 119 Colo. 569, 205 P.2d 787 (1949).

B. Evidence.

Burden of proof. It is incumbent upon the people to establish beyond a reasonable doubt that the defendant violated the provisions of this section. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

In a prosecution for causing a death while driving under the influence of intoxicating liquor, proof of guilt must be established beyond a reasonable doubt, and where the evidence is such that a jury can only speculate as to the proximate cause of the accident, it is insufficient to support a conviction. *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958).

Since vehicular homicide is a strict liability crime, the contributory negligence of the victim is not a defense. *People v. Maire*, 705 P.2d 1023 (Colo. App. 1985).

Testimony concerning defendant's drinking admissible as a factor for

consideration by the jury in determining the issue of defendant's recklessness. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Subsection (3) pertains to admissibility of evidence of intoxication other than blood test, not the evidentiary significance the jury should accord such evidence. *People v. Duemig*, 620 P.2d 240 (Colo. 1980).

Evidence of blood analysis admissible. The evidence of a registered medical technologist concerning a blood analysis of a defendant being prosecuted under this section is competent. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

Admission of blood analysis is not violative of § 18 of art. II, Colo. Const. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952); *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968); *Gibbons v. People*, 167 Colo. 83, 445 P.2d 408 (1968).

A driver can revoke statutory consent to a breath or blood test that is used to determine alcohol levels pursuant to § 42-4-1301.1. If a driver revokes consent to a breath or blood test, a warrant must be obtained. Otherwise, the breath or blood test violates the fourth amendment's prohibition against unreasonable searches or seizures, and evidence obtained is inadmissible in court unless one of the exceptions to the exclusionary rule applies. *Tarr v. People*, 2024 CO 37, 549 P.3d 966.

Method of driving near scene admissible. A drunken man's method of driving half a mile from where he collided

with another machine is admissible as evidence of negligence, recklessness, or want of care at the time of the collision. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Officer permitted to express opinion of speed. In view of his training, experience, and on-the-scene investigation of the physical facts involved in the accident, the trial court did not abuse its discretion in permitting a police officer to express his opinion concerning the speed of the vehicle at the time of the accident. The weight to be accorded his opinion was solely a question for the jury. *Meador v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

Death certificate admissible. Where the death certificate showed the cause of death to be cerebral hemorrhage due to compound skull fractures due to or as a consequence of crushing beneath car, it would have been better to have deleted the phrase "crushing beneath car" from the death certificate before it was admitted into evidence, but since no request on the part of the defendant was made to do so, and the record shows no issue was raised by the defendant as to the cause of death, and it is clear that the victim was a passenger in the vehicle from which he was thrown, and as a consequence was killed, there was no prejudicial error. *Meador v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

It was not error to admit photographs taken of automobile involved in the accident after it had been removed from a creek and towed to a nearby filling station, where a proper foundation was laid showing

that the automobile was in the same condition at the filling station as it was when resting upside down in the middle of the creek, and the photographs were used to depict facts which are relevant to the issue of recklessness. *Meador v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

Automobile scraps near scene of collision one week thereafter were properly rejected when offered as evidence of the place and manner in which the collision occurred, where shortly thereafter highway patrolmen picked up and threw aside, without regard to direction, practically all such debris left by the accident. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Weight of toxicologist's testimony for trier of fact. The weight of a toxicologist's testimony for purposes of establishing whether the defendant was under the influence of intoxicating liquor in prosecution for vehicular homicide is for the trier of fact. *People v. Mascarenas*, 181 Colo. 268, 509 P.2d 303 (1973).

Evidence sufficient to sustain conviction. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946); *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971); *People v. McCollum*, 38 Colo. App. 283, 555 P.2d 184 (1976); *People v. Rodriguez*, 645 P.2d 857 (Colo. App. 1982).

When the toxicologist's testimony is considered together with the testimony of the two investigating officers concerning the alcoholic odor about the defendant immediately after the accident, and the testimony that defendant was driving on the wrong side of the road, the evidence of

defendant being under the influence of intoxicating liquor is abundant and sustains the verdict of guilty of vehicular homicide. *People v. Mascarenas*, 181 Colo. 268, 509 P.2d 303 (1973).

Insufficient evidence to show occupant of automobile was accessory. Where two men were charged with operating a car in a reckless manner while intoxicated, and the only evidence supporting the charge that defendant was an accessory was that he was in the car, and was under the influence of intoxicating liquor at the time of the accident, it was held that it could not be successfully contended from the evidence that defendant in any way aided and abetted in that regard. *Quintana v. People*, 106 Colo. 174, 102 P.2d 486 (1940).

Evidence did not support jury instructions in lesser nonincluded offenses of either careless driving or improper left turn. *People v. Sisneros*, 738 P.2d 1196 (Colo. App. 1987).

Admission of blood test results does not limit any efforts by the defendant to challenge the accuracy the results, or the weight they are to be given. Nor does it prohibit the jury from considering any other competent evidence regarding the inference of intoxication. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

The blood alcohol test results are statutorily deemed to relate back to the alleged offense for purposes of applying the statutory inferences. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

Jury could infer that the defendant was under the influence at the time of the offense where the prosecution presented evidence that approximately three hours after the accident, defendant's blood alcohol level was above the statutory percentage. Because the circumstances at issue permitted the jury to make such inference, the extrapolation evidence offered to establish a still higher blood alcohol level was neither necessary nor relevant and the admission thereof was harmless error. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

C. Jury.

Connection of injuries to death a jury question. Where defendant struck decedent who was lying injured on street as a result of a prior accident, the question of which accident resulted in decedent's death should be determined by jury, and they should consider not whether injuries inflicted by defendant were the proximate cause of death, but whether they hastened or contributed to death. *People v. Cox*, 123 Colo. 179, 228 P.2d 163 (1951).

D. Instructions.

Approved instructions. In a prosecution for causing the death of another by driving a motor vehicle while under the influence of intoxicating liquor, a given instruction that a person is intoxicated within the meaning of the law when he is so under the influence of intoxicating liquor that his capacity to operate the automobile is impaired, approved. *Rinehart v. People*, 105 Colo. 123, 95 P.2d 10 (1939); *Block v. People*, 125

Colo. 36, 240 P.2d 512 (1951); *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

Court properly rejected a tendered instruction that provided that a person was not under the influence or impaired by the ingestion of alcohol or drugs unless such influence or impairment is caused by the psychoactive properties of the substance ingested. Prosecution argued that use of cocaine the day before caused defendant to fall asleep. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

Failure to instruct on DUI and DWAI as lesser included offenses, if error, was harmless. Section creates strict liability crimes. When fact of collision and death are undisputed, the only issue was whether defendant was intoxicated or impaired. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

A trial court must provide a definition of "proximate cause" if the jury asks for the definition during its deliberations. The trial court committed harmless error when it referred the jury back to the jury instructions that used "proximate cause" several times but did not define the term. *People v. Claycomb*, 2025 COA 36, 569 P.3d 1233.

The court of appeals declined to judicially legislate a modification of this section and require an instruction on the elements of the offense of vehicular homicide to include a finding of unsafe or negligent driving. *People v. McCollum*, 38 Colo. App. 283, 555 P.2d 184 (1976).

Instructions on elements of offense insufficient. *Goodell v. People*, 137 Colo.

507, 327 P.2d 279 (1958); *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

For discussion of appropriate jury instructions, see *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

18-3-107. First degree murder of a peace officer, firefighter, or emergency medical service provider - legislative declaration.

(1) A person who commits murder in the first degree, as defined in section 18-3-102, and the victim is a peace officer, firefighter, or emergency medical service provider, engaged in the performance of his or her duties, commits the felony crime of first degree murder of a peace officer, firefighter, or emergency medical service provider.

(2) As used in this section, "peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties" means a peace officer, as described in section 16-2.5-101, a firefighter, as defined in section 18-3-201 (1.5), or an emergency medical service provider, as defined in section 18-3-201 (1.3), who is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, firefighter, or emergency medical service provider, whether or not the peace officer, firefighter, or emergency medical service provider is within the territorial limits of his or her jurisdiction, if the peace officer, firefighter, or emergency medical service provider is in uniform or the person committing an assault upon or offense against or otherwise acting toward the peace officer, firefighter, or emergency medical service provider knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider.

(3) A person convicted of first degree murder of a peace officer, firefighter, or emergency medical service provider shall be punished by life imprisonment without the possibility of parole for the rest of his or her natural life, unless the offense was charged prior to July 1, 2020, and 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 the person shall be sentenced to death. Nothing in this subsection (3) is construed as limiting the power of the governor to grant reprieves, commutations, and pardons pursuant to section 7 of article IV of the Colorado constitution.

(4) 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 first degree murder of a peace officer, firefighter, or emergency medical service provider under subsection (1) of this section shall be punished by life imprisonment without the possibility of parole. In such circumstance, the court which previously sentenced a person to death shall cause the person to be brought before the court, and the court shall sentence the person to life imprisonment without the possibility of parole.

(5) The general assembly recognizes that protection of peace officers, firefighters, and emergency medical service providers from crime is a major concern of our state because society depends on peace officers, firefighters, and emergency medical service providers for protection against crime and other dangers and because peace officers, firefighters, and emergency medical service providers are disproportionately damaged by crime because their duty to protect society often places them in dangerous circumstances. Society as a whole benefits from affording special protection to peace officers, firefighters, and emergency medical service providers because the protection deters crimes against them and allows them to better serve and protect our state. The general assembly therefore finds that the penalties for first degree murder of a peace officer, firefighter, or emergency medical service provider should be more severe than the penalty for first degree murder of other members of society.

Source: **L. 88:** Entire section added, p. 718, § 5, effective July 1. **L. 95:** (3) amended, p. 1294, § 4, effective July 1. **L. 97:** Entire section amended, p. 1010, § 13, effective August 6. **L. 2002:** (3) amended, p. 1512, § 185, effective October 1. **L. 2002, 3rd Ex. Sess.:** (3) amended, p. 15, §§ 9, 10, effective July 12. **L. 2003:** (2) amended, p. 1624, § 45, effective August 6. **L. 2014:** Entire section amended, (HB 14-1214), ch. 336, p. 1495, § 3, effective August 6. **L. 2018:** (2) amended, (HB 18-1375), ch. 274, p. 1702, § 25, effective May 29. **L. 2020:** (3) amended, (SB 20-100), ch. 61, p. 212, § 14, effective March 23.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (3), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

PART 2

ASSAULTS

18-3-201. Definitions.

As used in sections 18-3-201 to 18-3-204, unless the context otherwise requires:

(1) "Emergency medical care provider" means a doctor, intern, nurse, nurse's aide, physician's assistant, ambulance attendant or operator, air ambulance pilot, paramedic, or any other member of a hospital or health-care facility staff or security force who is involved in providing emergency medical care at a hospital or health-care facility, or in an air ambulance or ambulance as defined in section 25-3.5-103 (1) and (1.5), C.R.S.

(1.3) "Emergency medical service provider" has the same meaning as set forth in section 25-3.5-103 (8), C.R.S. The term refers to both paid and volunteer emergency medical service providers.

(1.5) "Firefighter" means an officer or member of a fire department or fire protection or fire-fighting agency of the state, or any municipal or quasi-municipal corporation in this state, whether that person is a volunteer or receives compensation for services rendered as such firefighter.

(1.6) "Gender identity" and "gender expression" have the same meaning as in section 18-1-901 (3)(h.5).

(1.7) "Intimate relationship" has the same meaning as in section 18-6-800.3.

(2) "Peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties" means a peace officer, as described in section 16-2.5-101, C.R.S., a firefighter, or an emergency medical service provider, who is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, firefighter, or emergency medical service provider, whether or not the peace officer, firefighter, or emergency medical service provider is within the territorial limits of his or her jurisdiction, if the peace officer, firefighter, or emergency medical service provider is in uniform or the person committing an assault upon or offense against or otherwise acting toward the peace officer, firefighter, or emergency medical service provider knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider. For the purposes of this subsection (2) and this part 2, the term "peace officer" includes county enforcement personnel designated pursuant to section 29-7-101 (3), C.R.S.

(3) "Sexual orientation" has the same meaning as in section 18-9-121 (5)(b).

Source: **L. 71:** R&RE, p. 419, § 1. **C.R.S. 1963:** § 40-3-201. **L. 96:** (2) amended, p. 588, § 2, effective May 1. **L. 97:** Entire section amended, p. 1011, § 14, effective August 6. **L. 2003:** (2) amended, p. 1628, § 62, effective August 6. **L. 2014:** Entire section amended, (HB 14-1214), ch. 336, p. 1496, § 4, effective August 6. **L. 2015:** (1) amended and (1.3) added, (SB 15-126), ch. 109, p. 319, § 4, effective July 1; IP amended, (SB 15-067), ch. 337, p. 1366, § 1, effective September 1. **L. 2020:** (1.6), (1.7), and (3) added, (SB 20-221), ch. 279, p. 1368, § 7, effective July 13.

Cross references: For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

Off-duty peace officer included. An off-duty peace officer may be a "peace officer or fireman engaged in the performance of his duties" as defined in this section. *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979).

Paramedic employed by the fire department included. Definition of "peace officer or firefighter engaged in the

performance of his or her duties" includes a paramedic employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

Applied in *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

18-3-202. Assault in the first degree.

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

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

(b) With intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of his body, he causes such an injury to any person; or

(c) Under circumstances manifesting extreme indifference to the value of human life, he knowingly engages in conduct which creates a grave risk of death to another person, and thereby causes serious bodily injury to any person; or

(d) Repealed.

(e) With intent to cause serious bodily injury upon the person of a peace officer, firefighter, or emergency medical service provider, he or she threatens with a deadly weapon a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider acting in the performance of his or her duties; or

(e.5) With intent to cause serious bodily injury upon the person of a judge of a court of competent jurisdiction or an officer of said court, he threatens with a deadly weapon a judge of a court of competent jurisdiction or an officer of said court, and the offender knows or reasonably should know that the victim is a judge of a court of competent jurisdiction or an officer of said court; or

(f) 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 and with intent to cause serious bodily injury to a person employed by or under contract with a detention facility, as defined in section 18-8-203 (3), or to a person 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, he or she threatens with a deadly weapon such a person engaged in the performance of his or her duties and the offender knows or reasonably should know that the victim is such 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. 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 shall be deemed to be in custody.

(g) With the intent to cause serious 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 serious bodily injury.

(2) (a) If assault in the first 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 5 felony.

(b) If assault in the first degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 3 felony.

(c) If a defendant is convicted of assault in the first degree pursuant to subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(d) Repealed.

(e) 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.

Source: **L. 71:** R&RE, p. 420, § 1. **C.R.S. 1963:** § 40-3-202. **L. 75:** (1)(d) amended, p. 632, § 6, effective July 1; (1)(a) amended, p. 618, § 7, effective July 21. **L. 76, Ex. Sess.:** (1)(f) added, p. 8, § 1, effective September 18. **L. 77:** (1)(c) amended, p. 961, § 9, effective July 1. **L. 79:** (2) R&RE, p. 732, § 1, effective May 18. **L. 81:** (1)(d) R&RE, p. 973, § 6, effective July 1. **L. 86:** (1)(d) amended, p. 770, § 5, effective July 1; (1)(f) amended, p. 789, § 1, effective July 1; (2)(c) and (2)(d) added, p. 776, § 2, effective July 1. **L. 90:** (1)(f) amended, p. 991, § 1, effective April 5; (1)(e.5) added and (2)(c) amended, p. 986, §§ 7, 8, effective April 24. **L. 94:** (1)(f) amended, p. 2655, § 137, effective July 1. **L. 95:** (1)(d) and (2)(d) repealed, p. 1250, § 6, effective July 1. **L. 97:** (2)(a) amended, p. 1544, § 13, effective July 1; (1)(e) amended, p. 1011, § 15, effective August 6. **L. 98:** (2)(c) amended, p. 1441, § 25, effective July 1. **L. 2002:** (2)(c) amended, p. 1512, § 186, effective October 1. **L. 2003:** (1)(f) amended, p. 1430, § 16, effective April 29. **L. 2014:** (1)(e) amended, (HB 14-1214), ch. 336, p. 1496, § 5, effective August 6. **L. 2015:** (3) added, (SB 15-005), ch. 108, p. 314, § 1, effective July 1; (3)(d) repealed, (SB 15-126), ch. 109, p. 318, § 3, effective July 1. **L. 2016:** (1)(g) added, (HB 16-1080), ch. 327, p. 1327, § 1, effective July 1; (3) repealed, (HB 16-1393), ch. 304, p. 1226, § 3, effective July 1. **L. 2020:** (2)(e) added, (SB 20-221), ch. 279, p. 1369, § 8, effective July 13.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

(1957). For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

I. GENERAL CONSIDERATION.

Law reviews. For article, "Joinder of Criminal Charges, Election, Duplicitous", see 30 Dicta 117 (1953). For article, "One Year Review of Criminal Law", see 34 Dicta 98

Annotator's note. Since § 18-3-202 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1)(b) is unconstitutional as violative of a person's right to equal protection of the laws. *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977).

Subsection (1)(b) is unconstitutional because it imposes a higher penalty for essentially the same conduct proscribed in § 18-3-203(1)(a). *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977).

Subsection (1)(e) is not unconstitutionally vague. *People v. Jackson*, 194 Colo. 93, 570 P.2d 527 (1977).

There is a sufficient pragmatic difference between the first degree assault statute and the second degree assault statute so as not to violate the defendant's constitutional guarantee of equal protection. *People v. Jackson*, 194 Colo. 93, 570 P.2d 527 (1977).

Divergent penalties in former versions of criminally negligent homicide and first degree assault violated equal protection because both statutes proscribed similar conduct and intent. *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979).

Different mental states required for first degree assault and criminally negligent homicide justify different penalties, and thus harsher penalty for first degree assault does not violate equal protection. *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985).

This section does not proscribe conduct identical to § 18-3-203 and therefore does not violate equal protection. *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979); *People v. Montoya*, 709 P.2d 58 (Colo. App.

1985), rev'd on other grounds, 736 P.2d 1208 (Colo. 1987); *People v. Johnson*, 923 P.2d 342 (Colo. App. 1996).

This section does not proscribe conduct identical to § 18-3-103 and therefore does not violate equal protection because § 18-3-103 requires a substantial step toward causing death and this statute requires only a substantial step toward causing serious bodily harm. *People v. Ornelas-Licano*, 2020 COA 62, 490 P.3d 714.

Requirement for proof of "extreme indifference to human life" is a sufficient differentiation between first and second degree assault and the statutes do not violate the equal protection clause. *People v. Johnson*, 923 P.2d 342 (Colo. App. 1996).

The extreme indifference first degree assault statute contains no requirement that universal malice be proved. Therefore, a conviction for extreme indifference first degree assault may be upheld where defendant's conduct is directed at a single individual. Unlike the first degree extreme indifference murder statute, which requires proof of universal malice against human life generally, the assault statute contains no similar language. *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Special protection of peace officers reasonable. The general assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable. *People v.*

Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Assault on off-duty peace officer who is attempting to perform a law enforcement function violates this section. *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979).

Scope of police duties for purposes of assault statutes. A law enforcement officer is "engaged in the performance of his duties" while making in good faith an arrest or stop which may be later adjudged to be invalid, unless he is on a personal frolic or resorts to unreasonable or excessive force. *People v. Johnson*, 677 P.2d 424 (Colo. App. 1983).

Every attempt to do personal injury involves an assault. Every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Subsection (1) refers to multiple ways to commit the assault in the first degree offense, not distinct offenses to be charged separately. The same defendant cannot be charged with multiple offenses under subsection (1) as a result of the same physical action. *People v. Anderson*, 2016 COA 47, 465 P.3d 54, rev'd on other grounds, 2019 CO 34, 442 P.3d 76.

Section applies to murder in either of the degrees. In a prosecution under this section it is not required that in order to sustain a conviction an attempt to commit murder in the first degree should be shown. This section applies to murder in either of

the degrees. *Dillulo v. People*, 56 Colo. 339, 138 P. 33 (1914).

A simple assault is necessarily included as a part of aggravated assault. *Lane v. People*, 102 Colo. 83, 77 P.2d 121 (1938).

Reason for distinction among degrees of assault. This statutory scheme distinguishes between the degrees of assault based upon whether the injury was inflicted by means of a deadly weapon and whether the victim's injuries were so severe as to constitute "serious bodily injury" under the statutory definition. *Stroup v. People*, 656 P.2d 680 (Colo. 1982); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

Under subsection (2), heat of passion is not an affirmative defense to first degree assault. If found by the jury, it merely results in a reduction of penalty. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Under subsection (1)(d), because defendant could not be convicted of first degree assault without proof that he committed a class 3 felony sexual assault, the latter offense was a lesser included offense of the first degree assault charge and he could not, therefore, be convicted of both offenses. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

By enacting subsection (2)(a), the general assembly maintained the offense of first degree assault, while providing for a lesser sentence if the additional mitigating factor of heat of passion was present. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

If first degree assault is committed under heat of passion, it is still a crime of

violence and defendant must be sentenced in accordance with § 16-11-309. People v. Farbes, 973 P.2d 704 (Colo. App. 1998); People v. Ferguson, 43 P.3d 705 (Colo. App. 2001).

The general assembly did not intend for heat of passion to be an affirmative defense to the offense of first degree assault. Rowe v. People, 856 P.2d 486 (Colo. 1993).

The predicate offenses for "felony" first degree assault under this section fit the statutory test for a lesser included offense. As such, the conviction of the predicate offense must merge into the conviction for "felony" first degree assault, even though the predicate offense is a more serious offense and carries a greater punishment. People v. Halstead, 881 P.2d 401 (Colo. App. 1994).

Second degree assault is a lesser included offense of first degree assault. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

Assault with intent to rob is lesser included offense of aggravated robbery. Therefore, since assault with intent to rob is a lesser included offense of aggravated robbery, it was error for the court to permit both verdicts to stand. Thus, the conviction on the lesser included offense must be set aside. People v. Stephens, 188 Colo. 8, 532 P.2d 728 (1975).

Doctrine of merger required convictions for attempted aggravated robbery to be vacated where separately charged crime of attempted aggravated

robbery of each victim was lesser included offense of crime of first degree assault on each victim. People v. Griffin, 867 P.2d 27 (Colo. App. 1993); People v. Fisher, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

Felony menacing and attempted first degree assault do not merge. People v. Procasky, 2019 COA 181, 467 P.3d 1252.

There is no offense of attempt to commit an assault with a deadly weapon in Colorado. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

There is no crime of attempted assault in Colorado. People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972).

There is a crime of attempt to commit rape under § 18-2-101 despite the existence of the crime of assault with intent to commit rape under this section for these are separate and distinct offenses. Clark v. People, 176 Colo. 48, 488 P.2d 1097 (1971).

A deadly weapon is one which is likely to produce death or great bodily injury from the manner in which it is used. Armijo v. People, 134 Colo. 344, 304 P.2d 633 (1956).

The offense of assault and battery is a matter of mixed state and local concern. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

"Unreasonable but good faith belief" defense not available. The general assembly excluded in this section the defense of "unreasonable but good faith belief", inasmuch as a conviction is required

if the jury should find that the defendant should reasonably have known that the police officers were acting within their lawful duties. *People v. Estrada*, 198 Colo. 188, 601 P.2d 619 (1979).

Applied in *Zeiler v. People*, 157 Colo. 332, 403 P.2d 439 (1965); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966); *Hammond v. People*, 161 Colo. 532, 423 P.2d 331 (1967); *People in Interest of D.G.P.*, 194 Colo. 238, 570 P.2d 1293 (1977); *Jones v. District Court*, 196 Colo. 261, 584 P.2d 81 (1978); *People v. Watkins*, 196 Colo. 377, 586 P.2d 43 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979); *People v. Hoehl*, 629 P.2d 1083 (Colo. 1980); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Walker*, 634 P.2d 1026 (Colo. App. 1981); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *People v. Cole*, 654 P.2d 830 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Martinez*, 660 P.2d 1292 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v. Reed*, 695 P.2d 806 (Colo. App. 1984).

II. ELEMENTS OF OFFENSE.

Assault under this section is in part a specific-intent crime, requiring the prosecution to prove that the defendant had the conscious objective to cause serious bodily injury. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

First degree murder statutes (§§ 18-2-101 and 18-3-102) contain rationally different elements than this first degree assault statute, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Proof of actual ability to inflict injury not necessarily essential. The crime of assault with intent to rob under this section may be committed by intimidation as well as by actual force, and the intimidation may be as effectually accomplished by apparent as by actual ability to inflict the injury, hence, proof of actual ability to inflict the injury in the manner threatened is not necessarily essential. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Assault to commit murder requires evidence of defendant's present ability to commit an assault on the victim and specific intent to murder. *People v. Baca*, 179 Colo. 166, 503 P.2d 348 (1972).

Conviction under this section is not inconsistent with conviction for attempted second degree murder. A defendant can engage in conduct with the intent to cause serious bodily injury while knowing but not caring that the conduct is practically certain to result in death. In such circumstances, the defendant may be found guilty of attempted second degree murder, even though lacking the specific intent to cause death. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

However, attempted second degree murder is not a lesser-included offense of first degree assault. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Intent to cause serious bodily injury is not necessarily an intent to cause only serious bodily injury. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

Present ability must be construed in the light of the particular situation. In construing the criminal assault statute, therefore, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971); *People v. Gordon*, 178 Colo. 406, 498 P.2d 341 (1972).

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent

injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

The absence of heat of passion provocation is neither an element nor a sentencing enhancer of first degree assault. *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Specific intent is element of offense. Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952).

"Specific", as applied to intent to do great bodily harm is an adjective which distinguishes the intent to do great bodily harm from other intentions in the defendant's mind at the time of the commission of the crime, and to require that intention to be in actual existence in defendant's mind at the time of the commission of the alleged crime. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Moyer v. People*, 165 Colo. 583, 440 P.2d 783 (1968).

The elements of assault and specific intent on the part of the assaulter must coexist in order to constitute the crime. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954); *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

The specific intent to commit bodily injury upon the person of another is a necessary and essential element of assault with a deadly weapon. *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Specific intent is an essential element of the crime of assault with a deadly weapon. *Duran v. People*, 156 Colo. 385, 399 P.2d 412 (1965).

Intent to rob requires knowing, deliberate action. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

The specific intent to do bodily injury to another person is an essential element of the offense of assault with a deadly weapon. *People v. Garcia*, 186 Colo. 167, 526 P.2d 292 (1974).

Where a defendant engages in only one assaultive act, he or she cannot simultaneously have a specific intent to harm a particular person and universal malice that is not directed at a particular person. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

"Serious bodily injury" is an element of first degree assault, which the people must prove beyond a reasonable doubt. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

"Serious bodily injury" is defined as bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

"Serious bodily injury" and "bodily injury" constitutionally distinguishable. Sections 18-3-202 (1)(a) and 18-3-203 (1)(a), thus, do not proscribe identical conduct and therefore do not violate equal protection. *People v. Elam*, 198 Colo. 170, 597 P.2d 571 (1979).

The basic element in both first and second degree assault is injury to a person's body, the difference being one of the degree of the injury. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

If the prosecution proves that a defendant intended to cause, and did cause, serious bodily injury to another person, the prosecution has necessarily proved that the person intended to cause, and did cause, the lesser degree of bodily injury as well. *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

Because second degree assault is a lesser included offense of first degree assault, and the same evidence applied to the first and second degree assault charges, the convictions must merge into one conviction for first degree assault. *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

First degree assault and burglary each require proving additional fact. First degree assault and first degree burglary each require proof of an additional fact not necessary in proof of the other. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

In order to prove first degree assault and crime of violence instead of second degree assault and crime of violence, an additional element must be proven — that the use of the deadly weapon actually caused the serious bodily injury. *People v. Mozee*, 723 P.2d 117 (Colo. 1986).

The elements of assault with intent to commit rape are: (1) The assault; (2) the intent to commit rape; and (3) the purpose to effect such intent. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Unnecessary to show witness in fact resisted. If defendant made the assault with the specific intent to commit rape and to overcome resistance with force, it is

unnecessary in a prosecution under this section to establish that the prosecuting witness in fact resisted, or that she failed to resist because of threats of bodily harm. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954).

The prosecution must prove a threat by use of a deadly weapon in order to convict for first degree assault of a peace officer. *People v. Denhartog*, 2019 COA 23, 452 P.3d 148.

The prosecution did not prove that defendant expressed a purpose or intent to cause injury or harm to the peace officer or the peace officer's property. *People v. Denhartog*, 2019 COA 23, 452 P.3d 148.

Conditional threat of death will suffice to establish assault against a jail guard even though no attempt was made to commit a battery on the guard. *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

Wounds resulting in disfigurement of leg. Pictures of wounds as exhibited to the jury justified the reasonable inference that the wounds resulted in disfigurement of the leg, a necessary element of proof under this section. *People v. Strohm*, 185 Colo. 260, 523 P.2d 973 (1974).

Requirement of knowledge that victim of assault was peace officer is not constitutionally required and the general assembly could have made the commission of the act as such a crime without regard to the knowledge of the doer that the victim was a peace officer. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Defendant committed first degree extreme indifference assault when he fired into a closed door upon leaving house and admitted that he was not directing his fire at any particular individual, despite fact that he knew some of the victims inside the house. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

III. TRIAL AND PROSECUTION.

A. In General.

B. Indictment or Information.

C. Evidence.

D. Jury.

E. Instructions.

A. In General.

Proof beyond reasonable doubt required. In order to find one guilty of a violation of this section, it is incumbent upon the people to prove beyond a reasonable doubt that the defendant violated the statute with a specific intent so to do. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

A showing of actual knowledge that the one assaulted was a peace officer engaged in his official duties or proof of the probability of such knowledge beyond a reasonable doubt must precede conviction of assault of a peace officer. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

It is no defense to show that specific intent to do bodily harm was directed at someone else other than victim. *Medina v. People*, 133 Colo. 67, 291 P.2d 1061 (1956);

People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Failure to advise pleading defendant of specific intent element not "fundamental defect". The sentencing court's failure explicitly to advise the defendant of the element of specific intent in the crime of aggravated assault was not such a "fundamental defect" that would result in a "complete miscarriage of justice" upon the defendant's plea of guilty. *Martinez v. Ricketts*, 498 F. Supp. 893 (D. Colo. 1980).

Elements of first degree assault are readily understandable to persons of ordinary intelligence and pleading defendant was properly advised of the critical elements through the reading of the information by the district court. *People v. Cabral*, 698 P.2d 234 (Colo. 1985).

Conviction for both first degree assault and first degree burglary does not violate constitutional guarantee against double jeopardy. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

Under subsection (1)(d) when there are separate victims for each crime an underlying conviction of sexual assault on a child does not merge into a conviction of first degree assault while committing a crime. *People v. Moore*, 877 P.2d 840 (Colo. 1994).

Prosecution need not prove, and the jury need not be instructed about, the absence of heat of passion provocation as a sentence enhancer under Apprendi. *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005).

B. Indictment or Information.

Several counts may be united. It is proper to unite in one information counts charging an assault, an assault with a deadly weapon with intent to do bodily injury, and an assault with intent to commit murder, where all refer to the same transaction. *Rice v. People*, 55 Colo. 506, 136 P. 74 (1913).

Allegation that defendant "did make an assault" sufficient. An indictment for assault with intent to rob under this section, which alleges, as to the assault, that the defendant "did make an assault", without stating all of the particulars comprehended by the statutory definition of that term is sufficient. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Indictment for assault with intent to murder, where word "feloniously" is unnecessarily used, is good. *Gile v. People*, 1 Colo. 60 (1867).

Information held sufficient. *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

C. Evidence.

Specific intent not presumed from act. Proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

Intent may be inferred from all circumstances. Intent is usually manifested by circumstances and proof thereof necessarily is by circumstantial evidence,

and, of course, such intent is ordinarily inferable from the facts. *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956); *Moyer v. People*, 165 Colo. 583, 440 P.2d 783 (1968).

Proof of specific intent is necessarily circumstantial and inferable from all the facts and circumstances surrounding the doing of the act. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

On a charge of assault with a deadly weapon, while the mere commission of the act does not necessarily mean that the defendant had the requisite specific intent to harm, this intent may nonetheless be found from the defendant's actions and the reasonable inferences which may be drawn from the circumstances of the case. *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Specific intent to do great bodily harm may be supplied by inferences drawn from the circumstances of the case. *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972).

It is clear that specific intent may be inferred from the facts and circumstances surrounding the commission of an assault. *People v. Edwards*, 184 Colo. 440, 520 P.2d 1041 (1974).

While specific intent must be established beyond a reasonable doubt, it may be proven by circumstantial evidence. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975).

Intent shown by direct or circumstantial evidence. Under this section general criminal intent is insufficient and there must be a showing of specific intent by

direct or circumstantial evidence. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956); *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

On a charge of assault with a deadly weapon, specific intent to do bodily harm need not be proved by direct substantive evidence. *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Intent to cause serious bodily injury may be proven by circumstantial evidence. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence which tends to establish motive or intent is not rendered inadmissible merely because it may tend to show commission by the accused of a crime different from the one with which he is charged. *Swift v. People*, 171 Colo. 178, 465 P.2d 391 (1970).

Evidence of uncommunicated threats by deceased shortly before the killing, together with acts and conduct indicating an intention to put the threats into execution, may be admissible as part of the *res gestae*. This does not mean, however, that all uncommunicated threats are admissible, for they have to be offered for a proper purpose. *Sowards v. People*, 158 Colo. 557, 408 P.2d 441 (1965).

A defendant's character, temperament, and status, as well as his reason for acting as he did, are important to enable the jury to arrive at a proper verdict. *Sowards v. People*, 158 Colo. 557, 408 P.2d 441 (1965).

Section requires sufficient evidence of force. All that is necessary to sustain a verdict of assault with intent to commit rape is that there should be sufficient evidence of force from which the jury can justly find that the defendant intended to overcome the resistance of the woman by the necessary force. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954).

Complaint of rape victim corroborates her testimony. In criminal trials for rape, where rape was attempted but not consummated, it may be shown by the testimony of the prosecuting witness or that of other witnesses that the alleged victim made complaint of the outrage soon after its commission for the purpose of corroborating her testimony. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

Evidence of the failure of the person assaulted to make complaint soon after the commission of the outrage is a circumstance which tends to discredit her testimony. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

It is not independent evidence of the offense charged. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

Evidence sufficient to submit to jury issue of intent. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence sufficient to show specific intent. *Swift v. People*, 171 Colo. 178, 465 P.2d 391 (1970); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971); *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972); *People*

v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972).

Eyewitness testimony established use of weapon. Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the assault. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Impeachment of victim's reputation and credibility. When the reputation and credibility of the victim of an assault is sought to be impeached, the general rule is that evidence as to such reputation must be confined to the community in which the person, whose reputation is sought to be shown, lives, and limited to some reasonable time previous to the time of the present criminal act. However, the general rule does not apply if the defendant contends that he acted in self-defense, and at the time of the criminal act the defendant was aware of the victim's prior acts of violence upon a third person. *People v. Burress*, 183 Colo. 146, 515 P.2d 460 (1973).

Sufficiency of present ability and intent. When a defendant who threatens to kill a police officer places both hands on the officer's revolver in an attempt to remove it, the evidence of defendant's present ability to commit assault with a deadly weapon as

well as possession and control of the weapon by defendant is sufficient to sustain a conviction. *People v. Gordon*, 178 Colo. 406, 498 P.2d 341 (1972).

When there is no evidence of any nature that a defendant possessed a gun or had the present ability to inflict the victim's injury, and there is no evidence whatsoever from which the jury could draw an inference that the defendant had the specific intent to murder the victim, defendant cannot be convicted of assault to commit murder. *People v. Baca*, 180 Colo. 166, 503 P.2d 348 (1972).

Evidence of act giving rise to self-defense. Before the defendant, whose defense to an assault is self-defense, can impeach the credibility of the victim by a prior specific violent act, the defendant must lay a proper foundation, and the trial court is justified in excluding the specific act evidence until such time as the defendant establishes that he was aware that the specific violent act took place, and that either the act occurred, or the defendant became aware of its occurrence within a reasonable time of his use of force in self-defense. *People v. Burress*, 183 Colo. 146, 515 P.2d 460 (1973).

Photographs as evidence. In a child abuse prosecution, the trial court did not err in admitting into evidence photographs of the body of the deceased child. The photographs accurately depicted the burns and the bruises, contusions and abrasions on the child's body. They were relevant and had probative value concerning the nature and permanency of the injuries inflicted upon the

child. *People v. Strohm*, 185 Colo. 260, 523 P.2d 973 (1974).

Testimony of emergency room physician related to substantial risk of permanent injury based upon points of bullet entry and exit, taking into account the structures and vessels in or near the path to the extent that such path could be determined, held proper. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001), overruled in *People v. Vigil*, 2021 CO 46, 488 P.3d 1150.

The trial court erred in allowing an emergency room physician to testify that a gunshot wound to the thigh generally involves substantial risk of death as a result of damage to vital structures. The phrase "substantial risk of death" under subsection (3)(p) refers to the facts of the actual injury, not the dangers that are typically associated with the action or injury in question. *People v. Vigil*, 2021 CO 46, 488 P.3d 1150 (overruling *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001)).

Granting motion for judgment of acquittal was error. Where evidence in prosecution for first degree assault was held sufficient to support jury verdict of guilty, the granting of motion for judgment of acquittal by the trial judge was error. *People v. Martinez*, 191 Colo. 428, 553 P.2d 774 (1976).

Evidence sufficient to support conviction. Where defendant said that he was going home to get a gun and would be

back, and afterwards returned with a gun and stated to complaining witness, "I told you I would do it", the evidence was sufficient to support a verdict of guilty of assault with a deadly weapon. *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956).

Testimony of an eyewitness in which she spontaneously and unequivocally identified the defendant as the culprit, the testimony of the police officers as to apprehension of the defendant almost immediately after the commission of the offense in the vicinity of the victim's home, and the condition of the defendant's clothing, was sufficient evidence to support the verdict of the jury of guilty of assault with a deadly weapon. *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971).

Evidence that defendant drove recklessly and with extreme indifference through business and residential areas was sufficient to uphold defendant's conviction for first degree assault. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

D. Jury.

Whether fight was by consent is jury question. A fight by consent is a fight had upon a mutual agreement to fight together. As a proof of such agreement may be direct or circumstantial, it is ordinarily a proper question to be submitted to the jury. *Carpenter v. People*, 31 Colo. 284, 72 P. 1072 (1903).

As is issue of specific intent. The question of whether there was sufficient evidence to sustain an allegation as to

specific intent under this section is not a question of law but a question of fact which rests entirely within the competency of the trier of fact, whether it be a jury or a court, and was thus not reviewable by the supreme court. *People v. Archer*, 173 Colo. 299, 477 P.2d 791 (1970), overruled on other grounds in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Knowledge that victim was officer. The question of whether one knew or should have known another to be a peace officer is a purely factual issue and it is the jury's duty to resolve the conflict in evidence on this question. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Likewise, credibility and weight of testimony. Where a genuine issue as to facts exists, the jury as trier of the facts must be the judge of the credibility of the witnesses and the weight to be accorded their testimony. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Whether defendant established heat of passion claim was issue for jury to determine. *Thompson v. Ricketts*, 500 F. Supp. 688 (D. Colo. 1980).

Determination of issue by jury is not vague guide. The fact that a penal statute is framed in a way such as to require a jury to determine a question of reasonableness does not make it too vague to afford a practical guide to acceptable behavior. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Jury verdict not defective, where record reflects verdict form allowed jury, if it found

the defendant guilty of first or second degree assault, to assign the mitigator of heat of passion. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Record supported jury's determination that defendant was guilty beyond a reasonable doubt of first degree assault where defendant was a complicitor in the robbery of the victim, and in the course of or in furtherance of that crime, the victim was seriously injured by one of the individuals involved in the robbery. *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

E. Instructions.

Instruction which fails to define all necessary elements of crime is deficient. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

The failure to give an instruction which informed the jury that an essential ingredient of the crime was the specific intent to commit bodily injury upon the person of another and that it was incumbent upon the people to prove, beyond a reasonable doubt, such specific intent was reversible error. *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

Inadequate instruction on specific intent. Instruction on specific intent in prosecution for assault with intent to commit murder which read, "Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. In such cases, mere general intent is insufficient, and the

requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence", was too general and failed to advise the jury as to what the requisite specific intent was. *People v. Nace*, 182 Colo. 127, 511 P.2d 501 (1973).

Instruction on possession of knife erroneous. It was error to instruct the jury that it was unlawful to possess or carry a pocket knife, the blade of which can be opened by mechanical contrivance, where the information charged the defendant with an alleged assault with a deadly weapon, and not with violating such statute. *Watts v. People*, 159 Colo. 347, 411 P.2d 335 (1966).

Where evidence justifies it, simple assault may be submitted as lesser included offense of an aggravated assault such as assault with a deadly weapon, and an instruction thereon is proper. However, in those cases where the defendant must either be guilty of the offense charged or not guilty of any offense, it is error to submit to the jury an instruction on simple assault as a lesser included offense. *Sims v. People*, 177 Colo. 279, 493 P.2d 365 (1972).

Where the elements of assault are common in both offenses, the jury should have been instructed on the crime of simple assault as a lesser included offense to the crime of assault with intent to rape and a verdict on simple assault should have been submitted. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Where defendant was charged with an alleged assault with a deadly weapon, it was not error to refuse to submit an instruction on the lesser included offense of simple

assault where there was nothing in the evidence warranting the submission to the jury of that question. *Watts v. People*, 159 Colo. 347, 411 P.2d 335 (1966).

The court need not invariably submit lesser included assault to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Where the trial judge submitted to the jury not only the offense of assault with a deadly weapon, but also simple assault as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple assault, and it was also necessary for the court to instruct on specific intent for the charge of assault with a deadly weapon. *Arellano v. People*, 174 Colo. 456, 484 P.2d 801 (1971).

Failure to give instruction without request not error. Failure of court to instruct on assault with intent to commit rape as a lesser included offense of forcible rape, where defendant does not request such an instruction or raise this point in motion for new trial, does not constitute reversible error and absent a showing of plain error it will not be considered on appeal. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Instruction based on information count proper. Where defendant who was charged duplicitously in one and the same count with

assault with intent to murder and assault with a deadly weapon failed to object before trial, it was not error to instruct jury on crime of assault with a deadly weapon. *Russell v. People*, 155 Colo. 422, 395 P.2d 16 (1964).

Defendant charged with assault with a deadly weapon and conspiracy to assault with deadly weapon was not subjected to double jeopardy by conspiracy instruction in combination with accessory instruction. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Instructions taken as whole adequate. In a prosecution for assault with intent to murder, an instruction is not erroneous because omitting the element of defendant's ability to carry his intention into effect at the time, where such element was specifically called to the jury's attention by a subsequent instruction, as the instructions must be considered as a whole. *Warford v. People*, 43 Colo. 107, 96 P. 556 (1908).

In prosecution for assault on peace officer, trial court did not err in rejecting defendant's tendered instruction on lesser degree of assault, in refusing to limit instruction on general intent to lesser degree of assault, and in dealing with legal effect of intoxication on element of specific intent, where instructions considered as a whole adequately covered law and advised jury as to specific intent and where there was no evidence on lesser degree of assault. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Jury was properly instructed to consider whether defendant acted in the heat of

passion only after deciding whether defendant committed first degree assault. Under subsection (2)(a), heat of passion is not an affirmative defense, but merely results in the decrease of penalty. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

No error in instructions directing jury to consider whether the people had proven the elements of first degree assault before considering heat of passion and provocation, where the general assembly has not chosen to classify heat of passion as an affirmative defense that exonerates offenders from the offense of first degree assault, but rather, reduces the penalty if an assault occurs in the heat of passion. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

No error in refusal of trial court to deliver an instruction stating that the definition of serious bodily injury focuses on the injury which the victim actually suffered and the damage actually caused rather than the risk to the victim and the damages that might have occurred. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Heat of passion instruction. A defendant charged with assault is entitled to a special interrogatory on heat of passion if the evidence supports it. *People v. Rowe*, 837 P.2d 260 (Colo. App. 1992), rev'd on other grounds, 856 P.2d 486 (Colo. 1993).

Since defendant did not request an instruction or a special interrogatory on sudden heat of passion, no plain error occurred when the trial court did not sua sponte instruct the jury on that theory of the

defense. *People v. Lee*, 18 P.3d 192 (Colo. App. 2000).

The trial court erred when it did not instruct the jury that the prosecution had to prove the absence of heat of passion provocation beyond a reasonable doubt. *People v. Tardif*, 2017 COA 136, 433 P.3d 60.

Since the general assembly did not intend to create a new offense of first degree assault committed under heat of passion when it enacted subsection (2)(a), there is no chargeable offense of first degree assault committed under heat of passion nor a separate offense to classify as a "lesser included offense" or a "lesser nonincluded offense" of first degree assault; rather, there is only one single crime of first degree assault, albeit one that may have different sentences depending on whether the mitigating factor of heat of passion has been established. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

The district court erroneously instructed the jury that first degree assault committed under heat of passion was a lesser included offense of first degree assault. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

Court did not err in failing to include jury instructions on the meaning of "extreme indifference" and "grave risk of death". The terms are not so technical or mysterious that a reasonable person of common intelligence would not know what they mean. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

IV. VERDICT AND SENTENCE.

Defendant did not receive aggravated sentence for first degree assault crime, therefore, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply. First degree assault is a class 3 felony that is a per se crime of violence and an extraordinary risk crime that triggers a special legislatively created penalty range, not a judicially imposed aggravated sentence. Since defendant was sentenced within special penalty range created by the legislature, there was no *Apprendi* violation. *People v. Trujillo*, 169 P.3d 235 (Colo. App. 2007).

Consecutive sentences for burglary and assault upheld. Conviction and sentences for two distinct offenses did not put appellees twice in jeopardy as the Colorado statutes separately define the offenses of burglary and assault with intent to rob. The imposition of two consecutive sentences did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967); *Trujillo v. People*, 178 Colo. 136, 496 P.2d 1026 (1972).

The offense of assault with intent to murder requires proof of a specific intent to kill, a fact not necessary to sustain a charge of aggravated robbery. On the other hand, aggravated robbery requires proof of a robbery, a fact not necessary for assault. Therefore, punishment for both of these offenses committed during one course of conduct does not violate the constitutional prohibition against double jeopardy for the

same offense. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

Evidence determines if acquittal of lesser offense necessary upon acquittal of greater. It is the character of the evidence which must control in determining whether the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Where penalty for conviction limited. A person charged with first degree assault, who can establish that he acted in "heat of passion", is constitutionally protected against receiving a greater penalty than he could have received had he caused the death of his victim. *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978).

Maximum sentence where defendant claims self-defense. A defendant who raises the affirmative defense of self-defense and who was convicted of first degree assault should receive no greater sentence than he could have received if he had been convicted of the criminally negligent homicide statute in effect prior to July 1, 1977. *People v. Estrada*, 198 Colo. 188, 601 P.2d 619 (1979).

One can be guilty of first degree assault but not attempted second degree murder. A jury's verdict of guilty of first degree assault under this section is not irreconcilable and inconsistent with its verdict of not guilty on the charge of attempted second degree murder under § 18-3-103. These crimes require different elements of proof, and the jury can find from the very same evidence that an element

of one crime is present while an element of another charged crime is absent. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

If first degree assault is committed under heat of passion, it is still a crime of violence and defendant must be sentenced in accordance with § 16-11-309. *People v. Farbes*, 973 P.2d 704 (Colo. App. 1998); *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001).

Convictions for both first degree assault and first degree assault extreme indifference cannot be upheld if there is only one victim and one criminal act. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

First degree assault with intent to cause serious bodily injury and first degree assault-extreme indifference are alternative means of committing the same offense; therefore, one of the first degree assault convictions must be vacated. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

First degree assault is a per se grave or serious offense. *People v. Gee*, 2015 COA 151, 371 P.3d 714; *People v. Ramirez-Armas*, 2026 COA 1, 586 P.3d 209.

First degree assault with intent to cause serious bodily injury remains a per se grave or serious offense after *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191. The statutory elements necessarily involve grave or serious conduct, regardless of the facts and circumstances involved. *People v. Lopez*, 2025 COA 73, 579 P.3d 90.

Extreme indifference first degree assault is a per se grave or serious offense for proportionality review purposes.

People v. Duran, 2025 COA 34, 569 P.3d 899.

18-3-203. Assault in the second degree.

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

(a) Repealed.

(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 the person knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, the person intentionally causes bodily injury to another person; or

(c.5) With intent to prevent one whom the person knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, the person intentionally causes serious bodily injury to another 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, an actor with intent to infect, injure, or harm 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.

(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 subsection (2)(b.5) of this section, 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 subsection (1)(b), (1)(c.5), (1)(d), or (1)(g) of this section, the court shall sentence the defendant 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.

(III) When a defendant is convicted of assault in the second degree pursuant to subsection (1)(i) of this section and has been previously convicted of charges, which were separately brought and tried prior to the commission of the present act, for assault in the second degree pursuant to subsection (1)(i) of this section, a court shall sentence the defendant in accordance with section 18-1.3-406. A previous conviction must be set forth in the complaint, indictment, or information for the present act.

(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.

Source: **L. 71:** R&RE, p. 420, § 1. **C.R.S. 1963:** § 40-3-203. **L. 76, Ex. Sess.:** (1)(f) amended, p. 8, § 2, effective September 18. **L. 79:** (2) R&RE, p. 732, § 2, effective May 18. **L. 81:** (1)(f) amended and (1)(g) added, p. 973, § 7, effective July 1. **L. 86:** (1)(f) amended, p. 789, § 2, effective July 1; (2)(c) added, p. 777, § 3, effective July 1. **L. 88:** (2)(c) amended, p. 717, § 4, effective July 1. **L. 90:** (1)(f) amended, p. 992, § 2, effective April 5; (1)(f) amended, p. 986, § 9, effective April 24. **L. 91:** (2)(a) and (2)(c) amended, p. 405, § 9, effective June 6. **L. 94:** (1)(a) repealed, p. 1717, § 8, effective July 1; (1)(f) amended, p. 2655, § 138, effective July 1. **L. 95:** (1)(b) and (2)(c) amended and (2)(b.5) added, p. 1250, § 7, effective July 1. **L. 97:** (1)(f.5) added, p. 1591, § 1, effective July 1; (2)(a) amended, p. 1544, § 14, effective July 1; (1)(c) and (1)(f) amended, p. 1011, § 16, effective August 6. **L. 98:** (2)(c) amended, p. 1441, § 26, effective July 1. **L. 2000:** (1)(f) amended, p. 693, § 3, effective July 1. **L. 2002:** (2)(b.5) and (2)(c) amended, p. 757, § 2, effective July 1; (2)(c) amended, p. 1512, § 187, effective October 1. **L. 2003:** (1)(f) amended, p. 1430, § 17, effective April 29. **L. 2014:** (1)(c) and (1)(f) amended, (HB 14-1214), ch. 336, p. 1497, § 6, effective August 6. **L. 2015:** (1)(f.5)(II) repealed and (3) added, (SB 15-126), ch. 109, p. 316, § 1, effective July 1; (1)(c) and (1)(g) amended and (1)(h) added, (SB 15-067), ch. 337, p. 1366, § 2, effective September 1; (1)(c.5) added and (2)(c) amended, (HB 15-1303), ch. 211, p. 771, § 1, effective September 1. **L. 2016:** (1)(h) amended and (1)(i) added, (HB 16-1080), ch. 327, p. 1327, § 2, effective July 1; (2)(c) amended, (SB 16-102), ch. 181, p. 620, § 1, effective July 1; (3) repealed, (HB 16-1393), ch. 304, p. 1226, § 4, effective July 1. **L. 2020:** (2)(d) added, (SB 20-221), ch. 279, p. 1369, § 9, effective July 13. **L. 2023:** (1)(f.5)(I) and (2)(c) amended, (HB 23-1293), ch. 298, p. 1783, § 5, effective October 1. **L. 2026:** (1)(c) and (1)(c.5) amended and (2)(c)(III) added, (HB 26-1290), ch. 162, p. 969, § 1, effective September 1.

Editor's note: (1) Amendments to subsection (1)(f) in Senate Bill 90-58 and House Bill 90-1255 were harmonized. Amendments to subsection (2)(c) in House Bill 02-1046 and House Bill 02-1225 were harmonized.

(2) In *People v. Slaughter*, 2019 COA 27, 439 P.3d 80, the Colorado Court of Appeals found that, where the prosecution seeks to charge a defendant with strangulation under subsection (1)(i)

of this section together with the crime of violence sentence enhancer under § 18-1.3-406 (2)(a)(I)(A), such charging would cause a violation of the defendant's right to equal protection of the laws, and thus would be unconstitutional.

(3) Section 2(2) of chapter 162 (HB 26-1290), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after September 1, 2026.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For comment, "Colorado's First Degree Assault Statute", see 65 U. Colo. L. Rev. 975 (1994).

Annotator's note. Since § 18-3-203 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

It is an equal protection violation to charge a defendant with strangulation under subsection (1)(i) of this section along with the crime-of-violence sentence enhancer in § 18-1.3-406 (2)(a)(I)(A). That charging combination creates a constitutional violation because the resulting penalty would be more significant than if the defendant was charged under subsection

(1)(b). In both cases, the prosecution would have to prove the strangulation involved the use of a deadly weapon, in this case the defendant's hands, so there is no meaningful distinction in the criminal conduct. But there is a significant difference in the possible penalty: A defendant charged under subsection (1)(b) could be sentenced to probation while a defendant charged under subsection (1)(i) with the crime-of-violence sentence enhancer would receive a minimum five-year prison sentence. *People v. Slaughter*, 2019 COA 27, 439 P.3d 80.

A defendant may not be charged with second degree assault for the same strangulation conduct under both subsections (1)(b) and (1)(i). These subsections carry different maximum penalties, so charging a defendant under both subsections would violate equal protection. Legislative history reveals the general assembly's intent that all manual strangulations resulting in bodily injury be

charged under subsection (1)(i). *People v. Lee*, 2019 COA 130, 477 P.3d 732, *aff'd*, 2020 CO 81, 476 P.3d 351.

Second degree assault is a lesser included offense of first degree assault. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

But second degree assault is not a lesser included offense of second degree murder because the mens rea for the two crimes is different. *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

When the pertinent provisions of the first and second degree assault statutes are placed parallel to one another, it is obvious that the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

The basic element in both first and second degree assault is injury to a person's body, the difference being one of the degree of the injury. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

The means of committing the injury under second degree assault subsection (1)(b) is identical to first degree assault. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

The only difference in first and second degree assault under subsection (1)(a) of each section is that in first degree assault the serious bodily injury must be "by means of a deadly weapon", whereas under second degree assault the cause of serious bodily injury may be by any means. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

Harassment is not a lesser included offense of either second or third degree assault. Harassment contains a culpable mental state element -- intent to harass, annoy, or alarm -- that is not required by the elements of either second degree assault (intent to cause bodily injury) or third degree assault (knowingly or recklessly or with criminal negligence). *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

The mental state "knowingly" is implied by the statute and is required for a conviction of second degree assault on a police officer under subsection (1)(f). *People v. Hart*, 658 P.2d 857 (Colo. 1983).

Application of physical force, rather than a mere attempt to apply force, is required. *People v. Schoondermark*, 699 P.2d 411 (Colo. 1985).

Subsection (1)(f) creates a separate and distinct offense which turns on substantial differences which have a reasonable relationship to the persons involved and the public purposes to be achieved. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

The term "serious bodily injury" is not facially unconstitutionally vague. Defendant's challenge that "serious bodily

injury" included subjective undefined terms making it constitutionally infirm did not show the term was so vague that a person of ordinary intelligence must guess at its meaning and may differ as to its application. The term was also constitutional as applied to the defendant. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd in part, rev'd in part on other grounds*, 132 P.3d 320 (Colo. 2006).

The terms "serious bodily injury" and "bodily injury" do not suffer from an equal protection problem, because they only overlap if serious bodily injury is given an unreasonably broad interpretation. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd in part, rev'd in part on other grounds*, 132 P.3d 320 (Colo. 2006).

"Serious bodily injury" and "bodily injury" constitutionally distinguishable. Section 18-3-202 (1)(a) and subsection (1)(a) of this section, thus, do not proscribe identical conduct and therefore do not violate equal protection. *People v. Elam*, 198 Colo. 170, 597 P.2d 571 (1979).

Any break or fracture is sufficient to establish "serious bodily injury". The term "of the second or third degree" refers only to burns and not to breaks or fractures. *People v. Daniels*, 240 P.3d 409 (Colo. App. 2009).

"Violently applies physical force". The phrase "violently applies physical force", in subsection (1)(f), does not connote a specific intent to inflict serious bodily injury. *People v. Walker*, 634 P.2d 1026 (Colo. App. 1981).

In subsection (1)(f), the mental state of "knowingly" also applies to the element of violently applying physical force. *People v. Saiz*, 660 P.2d 2 (Colo. App. 1982).

There is a sufficient pragmatic difference between subsection (1)(e) of the first degree assault statute and the second degree assault statute so as not to violate the defendant's constitutional guarantee of equal protection. *People v. Jackson*, 194 Colo. 93, 570 P.2d 527 (1977).

Equal protection not violated by general criminal attempt statute. There was no violation of equal protection in defendant's conviction under the specific attempt provision of second degree assault statute, despite defendant's contention that the general criminal attempt statute, § 18-2-101, proscribes the same conduct. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

This section does not proscribe conduct identical to § 18-3-202 and therefore does not violate equal protection. *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979).

Subsection (1)(b) and § 18-2-101 (1) do not proscribe the same conduct, and disparity in applicable punishment does not violate equal protection guarantees. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

But the sentencing scheme established in subsection (2)(c) did not meet the requirements of equal protection as applied to defendant's sentences because it mandated the imposition of a greater punishment for an attempt to cause bodily injury than for an attempt to cause serious

bodily injury. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Subsection (1)(c) does not violate equal protection by punishing a person who assaults a firefighter acting as a paramedic more severely than a person who assaults a non-firefighter paramedic. The more serious class of assault created by subsection (1)(c) is based on differences that are real and reasonably related to the purposes of the statute. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

Second degree assault on a peace officer is distinguishable from both third degree assault, as described in § 18-3-204, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection. This section requires that the defendant act intentionally, whereas both third degree assault and resisting arrest require only that the defendant act knowingly. Further, this section requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction for third degree assault. And finally, this section requires the defendant to intend to cause bodily harm, while resisting arrest requires only that the defendant use or threaten to use physical force. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Second degree assault described under subsection (1)(d) of this section is distinguishable from vehicular assault, described in § 18-3-205, and therefore these sections do not violate equal protection. The statutes differ in three

primary ways. Second degree assault applies to a range of unspecified conduct, while vehicular assault applies narrowly to driving or operating a motor vehicle. Second degree assault can apply to acts of omission, while vehicular assault requires acts of commission. Second degree assault applies to any deadly weapon, which may include a motor vehicle, while vehicular assault requires the defendant's reckless driving or operation of a motor vehicle to have proximately caused the serious bodily injury. *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

The general assembly is free to prescribe different punishments for conduct prescribed to result in varying degrees of social consequences, and the distinction between this section and § 18-8-103 is not arbitrary or inadvertent. Therefore this section is not unconstitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Conviction not reversed when first degree assault statute declared unconstitutional. A conviction on second degree assault where defendant was charged with both first degree and second degree assault is not an inconsistent verdict requiring reversal when the first degree assault statute is later declared unconstitutional by reason of not being distinguishable from the second degree assault statute because the implicit acquittal of first degree assault is not a verdict with which the conviction can be inconsistent. *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979).

Constitutionality of 1976 amendment. Because the call of the governor generally concerned protection of police officers and others while carrying out their duties, the 1976 amendment adding the words "or in custody" to the statute governing assaults upon police officers definitely fell within the subject matter of the call and was therefore constitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Subsection (1)(b) violates equal protection guarantees, because a more severe sentence is imposed for an attempt to commit bodily injury than an attempt to commit serious bodily injury. *People v. Duc Nguyen*, 900 P.2d 37 (Colo. 1995); *People v. Gallegos*, 904 P.2d 486 (Colo. 1995); *People v. Mitchell*, 904 P.2d 486 (Colo. 1995); *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd in part, rev'd in part on other grounds*, 964 P.2d 524 (Colo. 1998).

The only distinction between conduct proscribed under subsection (1)(a) and under subsection (1)(g) is that subsection (1)(a) requires the intent to cause serious bodily injury whereas subsection (1)(g) requires the intent to cause only bodily injury. Subsection (2)(c), however, mandates the imposition of a more severe sentence for a crime under subsection (1)(g) than for one under subsection (1)(a). When an offender who acts with a less culpable intent may receive a greater penalty than the offender who acts with a greater culpable intent, such a statutory scheme is unreasonably structured and does not meet the requirements of equal protection, even though the two offenses result in the same

harm. *Smith v. People*, 852 P.2d 420 (Colo. 1993); *People v. Blizzard*, 852 P.2d 418 (Colo. 1993) (decided under law in effect prior to 1991 amendment).

Fists may be a deadly weapon, for purposes of subsection (1)(b), if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury. *People v. Ross*, 831 P.2d 1310 (Colo. 1992).

Under subsection (1)(d), any object, including a foot, may be a deadly weapon when used to start an unbroken, foreseeable chain of events that results in serious bodily injury. The object does not have to be the direct cause of the injury. Where defendant kicked the victim in the back, causing her to fall down a flight of stairs, it was irrelevant that her injuries were caused by the stairs rather than the defendant's foot. The defendant's foot qualified as a deadly weapon because he used it to set in motion a sequence of events causing a serious bodily injury. *People v. Saleh*, 45 P.3d 1272 (Colo. 2002).

Subsection (1)(f) applies to field arrest situation. The first clause of (1)(f) which makes no reference to a detention facility employee and uses the disjunctive "or", in addition to a court of appeal's case holding that "confined" has a meaning different from and more restrictive than "custody", makes it plain that (1)(f) applies to field arrest situations as well as to detention facilities. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986); *Wieder v. People*, 722 P.2d 396 (Colo. 1986).

An arrest precedes "in custody" for purposes of subsection (1)(f). What constitutes an arrest and what constitutes in custody turn on the same standard, and it is for the trier of fact to determine whether, under the totality of the circumstances, the defendant was under arrest and thus may be guilty of second degree assault. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

When defendant was charged with both resisting arrest and second degree assault, one of the factors in determining whether the defendant is guilty of one or both of the charges shall be whether the actions of the defendant, which caused injury to the officers, were continuous, stemming from his efforts to resist arrest, or whether there was a break between his actions to thwart the officers' efforts to arrest him and the actions which lead to the injury of the officers. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

Once an arrest is made, a person in custody who uses violence against a peace officer commits second degree assault under subsection (1)(f). *People v. Stanley*, 56 P.3d 1241 (Colo. App. 2002).

The unlawfulness of a detention does not absolve a person of liability for criminal conduct committed during that detention. *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Subsection (1)(f) is not unconstitutionally vague, in violation of the due process clauses of the state and federal constitutions. *People v. Schoondermark*, 699 P.2d 411 (Colo. 1985).

Constitution proscribes retrial when conviction impliedly acquits defendant. The double jeopardy clause proscribes retrial when a felony menacing conviction impliedly acquits the defendant of a second degree assault charge. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

The specific intent required for second degree assault is sufficiently distinguishable from the less culpable mental state required for third degree assault to justify a harsher penalty for the former. *People v. Sparks*, 914 P.2d 544 (Colo. App. 1996).

Third degree assault is lesser included offense of second degree assault. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one, it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded instruction as to count two. *People v. Castro*, 952 P.2d 762 (Colo. App. 1998).

Third degree assault held to be lesser included offense. The offense of assault in the third degree is a lesser included offense of assault in the second degree upon a peace officer. *People v. Annan*, 665 P.2d 629 (Colo. App. 1983).

Only difference between second and third degree assault is degree of injury.

People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975).

Resisting arrest is a lesser included offense of second degree assault on a peace officer under the strict elements test. People v. Snider, 2021 COA 19, 491 P.3d 423.

Assault is lesser included offense of robbery. Since simple assault contains no elements not contained within attempted aggravated robbery, while the latter contains more elements than the former, the former is included within the latter as a lesser offense. People v. Velasquez, 178 Colo. 264, 497 P.2d 12 (1972).

Assault with a deadly weapon is a lesser included offense of aggravated robbery and since the jury convicted the defendant of aggravated robbery, his conviction for the included offense of assault with a deadly weapon must be set aside. People v. Bugarin, 181 Colo. 62, 507 P.2d 875 (1973).

It is possible to commit an aggravated robbery without contemporaneously perpetrating a second degree assault. People v. Grant, 40 Colo. App. 46, 571 P.2d 1111 (1977); People v. Toomer, 43 Colo. App. 182, 604 P.2d 1180 (1979).

There is no offense of attempt to commit an assault with a deadly weapon in Colorado. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

Offense of assault and battery is a matter of mixed state and local concern. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

In determining whether to accept a plea of nolo contendere, the court must inquire of the defendant as to whether he understands the nature of the charge and its elements, and this is of utmost importance in connection with a felony assault charge with a specific intent to prevent a police officer from performing his lawful duty and to cause bodily injury. People v. Kelly, 189 Colo. 31, 536 P.2d 39 (1975).

Statement of elements of the charge of second degree assault did not give pleading defendant notice of the true nature of the charge when, by way of further explanation, the court misstated the deadly weapon element as mere possession. People v. Cabral, 698 P.2d 234 (Colo. 1985).

Case remanded to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for second degree assault charges could be made. People v. Nygren, 696 P.2d 270 (Colo. 1985).

The word "confined" in subsection (1)(f) connotes detention in an institution. People v. Olinger, 39 Colo. App. 491, 566 P.2d 1367 (1977) (decided under former law).

Applied in People v. Trujillo, 190 Colo. 45, 543 P.2d 523 (1975); Miller v. District Court, 193 Colo. 404, 566 P.2d 1063 (1977); People v. Conner, 195 Colo. 525, 579 P.2d 1160 (1978); Brutcher v. District Court, 195 Colo. 579, 580 P.2d 396 (1978); People v. Kreiser, 41 Colo. App. 210, 585 P.2d 301 (1978); People v. Thompson, 197 Colo. 299, 592 P.2d 803 (1979); People v. Waggoner,

196 Colo. 578, 595 P.2d 217 (1979); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *People v. Parsons*, 199 Colo. 421, 610 P.2d 93 (1980); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981); *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Hamilton*, 662 P.2d 177 (Colo. 1983); *People v. Reedy*, 705 P.2d 1032 (Colo. App. 1985).

II. ELEMENTS OF OFFENSE.

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

"Reasonable person" means an objectively reasonable individual and not a subjectively reasonable one possessing the individual defendant's personality traits or defects. Under the circumstances, the defendant did not act as a reasonable person would in the same situation. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

Defendant was unreasonable in believing that police officer was not performing lawful duty and intended to commit crime of kidnapping when officer, in full police uniform, explained purpose of warrantless entry to check on safety of an

infant at the mother's request. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

A paramedic employed by the fire department is included as a "firefighter" for purposes of subsection (1)(c). The statute is not limited to firefighters performing fire suppression functions. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

An attempt only requires some overt act beyond mere preparation. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

And it need not be the last proximate act necessary to consummate a battery. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976).

Certain weapons are by their very design and make lethal in nature and a trial court should rule as a matter of law that they are deadly weapons. Other instruments or things, including shoes, though perhaps not deadly weapons per se, are within the meaning of our assault with a deadly weapon statute, depending upon the nature of the instrument and the manner in which the instrument or thing is used in accomplishing the assault. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

In order to prove first degree assault and crime of violence instead of second degree assault and crime of violence, an additional element must be proven — that the use of the deadly weapon actually caused the serious bodily injury. *People v. Mozee*, 723 P.2d 117 (Colo. 1986).

Specific intent to do bodily injury can be inferred from the circumstances of the case where testimony showed that the defendant stabbed victim with a hunting knife. *People v. Borrego*, 187 Colo. 217, 529 P.2d 639 (1974).

Requisite intent to sustain a conviction under this section may be inferred from the circumstances of the case. *People v. Borrego*, 187 Colo. 217, 529 P.2d 639 (1974).

Specific intent to cause bodily injury may be found from the defendant's actions and the reasonable inferences which may be drawn from the circumstances of the case. *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Where the defendant was screaming and yelling at the victim and the victim's injuries showed he was struck with a powerful force directly in the face, the evidence was sufficient to establish specific intent to cause bodily injury. *People v. Ross*, 819 P.2d 507 (Colo. App. 1991).

Defendant's conscious objective to cause father physical pain can be inferred from the defendant's conduct and the overall circumstances of the case where defendant had medical training and recognized that father's condition was worsening, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Present ability must be construed in the light of the particular situation when a person is charged with an assault. In construing the criminal assault statute, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Specific intent is an essential element of the proof of assault to be established beyond a reasonable doubt, but this requisite specific intent may be drawn from the circumstances of the case. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Trial court did not err in declining defendant's proffered instruction where the jury instruction given accurately informed the jury of the governing law and defendant was not impeded in his ability to convey to the jury his theory of defense. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

The mental state "intentionally" applies to each element of the offense. For jury instructions, the best practice is to offset the mental state requirement so that it applies to all elements. Failure to do so does not constitute plain error. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

"Attempted to cause" should not be included in the jury instruction for second degree assault. However, error was not plain error since the defendant did not contest that element at trial. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

Conviction for "second degree assault with intent to cause bodily injury" not legally sufficient. Where the jury finds the accused guilty of "second degree assault with intent to cause bodily injury" and the verdict omits the word "serious", it is not clear from the language of the verdict whether the jury concluded that the accused, in committing the assault, had the intent to cause serious bodily injury, and, thus, is guilty of second degree assault or whether he intended to cause only bodily injury and, thus, is guilty of third degree assault; therefore, the verdict is too uncertain to be legally sufficient. *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979).

Subsection (1)(d) requires that a defendant consciously disregard a substantial and unjustifiable risk that a result will occur (or that a circumstance exists), not that a defendant disregard the result that ultimately does occur. Therefore, the people did not have to prove that defendant had knowledge of the existence of the specific deadly weapon held by the victim of the assault. *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Elements of subsection (1)(f). One of the elements of assault in the second degree is that the person committing the offense knows or reasonably should know that the victim is a person engaged in the performance of duties while employed by or under contract with a detention facility. *People v. Akers*, 712 P.2d 1058 (Colo. App. 1985).

Because the statute includes the phrase "lawfully confined or in custody," it is not

necessary that defendant be incarcerated at the time of the assault, but may merely be in the lawful custody of a peace officer. *People v. Marquez-Lopez*, 952 P.2d 788 (Colo. App. 1997).

Detention of a suspect for further investigation rather than arrest is sufficient to establish custody under subsection (1)(f). *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994); *People v. Marquez-Lopez*, 952 P.2d 788 (Colo. App. 1997).

Formal arrest not required by subsection (1)(f); peace officer need only apply a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. *People v. Rawson*, 97 P.3d 315 (Colo. App. 2004).

Subsection (1)(f.5) applies to an individual lawfully confined in a vehicle who is lawfully held in custody and whose victim is a law enforcement officer. Although the language "in custody" contained in subsection (1)(f) is not included in subsection (1)(f.5), the legislature intended that the statute would apply to individuals under arrest and confined to a patrol vehicle. *People v. Miller*, 97 P.3d 171 (Colo. App. 2003); *People v. Luna*, 2013 COA 67, 410 P.3d 471.

"Harm" as used in subsections (1)(f.5)(I) and (1)(h) encompasses more than just physical harm. Psychological harm can suffice. *Plemmons v. People*, 2022 CO 45, 517 P.3d 1210.

The legislature, in using the term "harm", intended those subsections to criminalize as second degree assault prolonged

psychological or emotional harm that stems from the possibility that an officer has been infected by or could become a vector for disease. *Plemmons v. People*, 2022 CO 45, 517 P.3d 1210.

Felony menacing is not a lesser included offense of second degree assault. The offense of second degree assault does not establish every essential element of felony menacing and, therefore, the merger doctrine does not apply. *People v. Truesdale*, 804 P.2d 287 (Colo. App. 1990).

Obstruction of a peace officer under § 18-8-104 is a lesser included offense of second degree assault under subsection (1)(c) and (1)(f) since all of the elements contained in the definition of obstruction of a peace officer would be necessarily established by the proof of the elements of second degree assault. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(c) was error requiring a new trial where defendant acknowledged the officers sustained bodily injury but there was no admission that he intended to act in a manner that would cause the injury. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(f) was error requiring a new trial where defendant testified that the only action he volitionally took after the first

officer entered the cell was to raise his arms. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Crime of second degree assault requires the intent to cause bodily injury to another person and causing such injury to any person by means of a deadly weapon. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Second degree assault requires intentional causation of serious bodily harm, meeting the standard for violent force and making it a crime of violence under the United States sentencing guidelines. *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017).

Second degree assault requires the use of physical force, making it a crime of violence under the United States sentencing guidelines. *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017).

The minimum physical force required for a second degree assault conviction is violent force. The phrase "physical force" means violent force, that is, force capable of causing physical pain or injury to another person. *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017).

The term "another person" is not superfluous language, and the term is not satisfied by alleging the victim to be "any and all members of the public in [defendant's] vicinity". There was no evidence from which a reasonable jury could find that defendant's driving jeopardized or threatened any oncoming traffic or individuals. *People v. Griego*, 2015 COA 31,

411 P.3d 135, *aff'd*, 2018 CO 5, 409 P.3d 338.

Trial court's instruction to jury that second degree assault involved force or violence as a matter of law was proper for conviction under statute prohibiting possession of weapons by previous offenders notwithstanding fact that second degree assault could involve injury to another resulting from the administration of a drug or other substance. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

Equal protection principles are violated by § 18-3-209 (3), which provides that persons charged with third degree assault against the elderly commit a greater classification of crime and may not raise the issue of provocation, while provocation may be raised by a person charged with second degree assault, which is classified as a lower class crime than third degree assault. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993) (decided under law in effect prior to 1991 amendment).

Provocation as used in this section is neither a culpable mental state nor part of a culpable mental state. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

In addition, this section does not require that the actor know the age of the victim. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

The provocation language in subsection (2)(b) is a sentence mitigating factor that does not involve an element of the offense, give rise to an affirmative defense, or

create a separate offense. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

The provocation language in subsection (2)(b) is not a sentence enhancer requiring an Apprendi jury finding. An Apprendi jury finding is only necessary when the determination of a fact increases the punishment beyond the range the defendant is already subject to. In the case of second degree assault, before the jury can consider the issue of provocation, they have to find the defendant guilty of second degree assault — subjecting the defendant to a class 4 felony. At that point, the jury may consider provocation, and if they find provocation the defendant is subject to a class 6 felony. So, the factual issue of provocation decreases the punishment range making Apprendi inapplicable. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

A fist is not a deadly weapon for the purposes of subsection (1)(b). *People v. Ross*, 819 P.2d 507 (Colo. App. 1991).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

It is no defense to show that specific intent was directed at someone else other than the victim. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

The department of corrections cannot be the "intended victim", within the meaning of subsection (2)(a), and therefore a trial court's refusal to allow defendant to present a provocation defense was not error.

People v. Akers, 712 P.2d 1058 (Colo. App. 1985).

Under subsection (2)(a), the class of the felony may be reduced even though the person committing the assault has still engaged in the same conduct with the same mental culpability required for conviction of second degree assault. People v. Duran, 991 P.2d 313 (Colo. App. 1999).

Extent of wound does not negate intent. The extent of the resulting wound from stabbing by defendant does not negate the defendant's intent necessary for conviction under this section. People v. Borrego, 187 Colo. 217, 529 P.2d 639 (1974).

Requirement of custody or confinement. When assaults on police officers occurred, the defendant's arrest was complete and he was not free to leave the presence of the officers, and thus he was in custody for purposes of the statute. People v. Weider, 693 P.2d 1006 (Colo. App. 1984), aff'd, 722 P.2d 396 (Colo. 1986).

A formal arrest is not always required before a person may be deemed to be in custody. What is required is that the peace officer have applied a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. People v. Ortega, 899 P.2d 236 (Colo. App. 1994); People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006).

Evidence sufficient to show specific intent. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Because one of the powers exercised by defendant under father's power of

attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit. People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Evidence insufficient to support conviction for second degree assault. There was no evidence that defendant used his car as a deadly weapon, specifically there was no evidence that defendant used his vehicle with assaultive conduct specifically directed toward the other driver. The evidence, in fact, was to the contrary that defendant attempted to avoid the other driver. People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

If the prosecution proves that a defendant intended to cause, and did cause, serious bodily injury to another person, the prosecution has necessarily proved that the person intended to cause, and did cause, the lesser degree of bodily injury as well. *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

Because second degree assault is a lesser included offense of first degree assault, and the same evidence applied to the first and second degree assault charges, the convictions must merge into one conviction for first degree assault. *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

III. TRIAL AND PROSECUTION.

A. Evidence.

B. Jury.

C. Instructions.

A. Evidence.

Eyewitness testimony established use of weapon. Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the assault. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Evidence sufficient to sustain convictions. *People v. White*, 191 Colo.

353, 553 P.2d 68 (1976); *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

Sufficient evidence that defendant intended to cause bodily injury where officers present during altercation testified that during the struggle defendant was kicking at all of the officers and continued to kick during efforts to subdue him. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Evidence sufficient to establish specific intent to cause injury. The evidence presented at trial, considered in the light most favorable to the people, showed the defendant was oriented and had control over his body and speech. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

B. Jury.

Whether defendant established heat of passion claim is issue for jury to determine. *Thompson v. Ricketts*, 500 F. Supp. 688 (D. Colo. 1980).

When lesser offense submitted to jury. Where there is no evidence of the specific intent required to determine the defendant guilty of the precise offense charged in the information, or where the evidence might be insufficient to remove the reasonable doubt which might be in the minds of the jury as to the intent, under the same evidence the defendant might be found guilty of simple assault. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Trial by jury of less than twelve. A person who is charged with second degree assault, which is a class 4 felony, may elect to be tried by a jury of fewer than 12, but not

less than six persons. *People v. Byerley*, 635 P.2d 542 (Colo. 1981).

C. Instructions.

Where it was possible for the jury to entertain a reasonable doubt as to defendant's guilt of attempted robbery, and at the same time to be convinced by reason of defendant's admissions that he was guilty of making an assault upon the complaining witness, the evidence justified the giving of an instruction on simple assault as requested in order to submit the lesser included offense to a jury. *People v. Velasquez*, 177 Colo. 264, 497 P.2d 12 (1972).

Where the jury is unable to unanimously find all the elements of a particular offense, the trial court should instruct the jury to return a guilty verdict on the lesser offense so long as the jurors agree that the defendant is guilty of each element of the lesser offense. *People v. Brighi*, 755 P.2d 1218 (Colo. 1988).

An optimal instruction would state that attempt requires some substantial step, or some overt act beyond mere preparation. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

But court is not required to give the definition of attempt found in the general criminal attempt statute, § 18-2-101. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

No plain error found when court failed to instruct on the mental state needed to commit second degree assault. *People v. Wells*, 734 P.2d 655 (Colo. App. 1986).

When there is no doubt on intent, court should deny third degree assault instruction. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

Where there was no evidence that the defendant's assault with a deadly weapon was made with anything less than a conscious disregard to the risk to the victim, the court did not err in refusing to instruct the jury on the lesser included offense of third degree assault. *People v. Workman*, 885 P.2d 298 (Colo. App. 1994).

Plain error found when court failed to instruct the jury on the mental state needed for the act of "violently apply[ing] physical force". *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Court's use of a repealed version of the second degree assault statute in defendant's self-defense instruction was plain error. The instruction lessened the prosecution's burden of disproving defendant's claim of self-defense. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Instruction on deadly weapons proper. The trial court did not err in generally instructing the jury that a shoe was not in and of itself a deadly or dangerous weapon and that in determining whether an instrument, not inherently deadly or dangerous, assumes the characteristics of a deadly weapon the jury should consider the nature of the instrument or thing, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

A defendant's learning of an injury to a close relative may create a jury question as to provocation in assault cases. No requirement, however, exists under this section for the fact finder to determine whether a sufficient interval has passed for the "voice of reason and humanity to be heard". Although, as a matter of law, the court may find a sufficient "cooling off" period has occurred. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

Trial court had no duty to provide an instruction regarding the elements of lesser, non-included offense of obstructing a peace officer. The evidence was undisputed that defendant was in custody. There was no rational basis on which the jury could have acquitted defendant of second degree assault and convicted him of obstructing a police officer. *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994).

Jury instruction on third degree assault as a lesser included offense of second degree assault not required because jury could not have acquitted defendant of second degree assault but convicted him of third degree assault. Highly relevant to the determination of whether the knife defendant used was a deadly weapon was uncontroverted testimony that the knife was four to five inches long. Even if the knife blade was dull, because of its size, the jury could have reasonably concluded that it was capable of producing serious bodily injury. And because a reasonable jury could not have concluded that the knife was anything other than a deadly weapon, it could not have rationally acquitted defendant of second degree assault and convicted him of

third degree assault. *People v. Buell*, 2017 COA 148, 442 P.3d 961, *aff'd* on other grounds, 2019 CO 27, 439 P.3d 857.

IV. VERDICT AND SENTENCE.

Subsection (2)(c) requires mandatory sentencing under the provisions of § 16-11-309. The intent of the legislature was to mandate sentencing under § 16-11-309 irrespective of any allegation of a violent crime and irrespective of a specific finding by the trial court that a violent crime has been committed. *People v. Terry*, 791 P.2d 374 (Colo. 1990).

Thus, trial court's enhanced sentence for second degree assault with a deadly weapon was not error even though jury did not specifically find that defendant had committed a crime of violence. An offense committed under subsection (1)(b) is a *per se* crime of violence under subsection (2)(c) and requires enhanced sentencing under § 16-11-309 without the necessity of pleading or proving a separate crime of violence. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Subsection (1)(b), which includes attempted assault, combined with the sentencing requirements of subsection (2)(c) violates equal protection requirements because attempted second degree assault, when treated as a crime of violence, would carry a presumptive penalty of five to sixteen years imprisonment and attempted first degree assault would carry a presumptive penalty of two to eight years imprisonment. *People v. Nguyen*, 900 P.2d 37 (Colo. 1995) (decided under former

subsection (1)(b) as it existed prior to amendment in 1995).

The appropriate cure for the constitutional infirmity of subsection (1)(b), consistent with legislative intent, is to strike the crime of violence sentencing as it applies to attempted second degree assault. *People v. Nguyen*, 900 P.2d 37 (Colo. 1995) (decided under former subsection (1)(b) as it existed prior to amendment in 1995).

A defendant who is convicted of second degree assault on a police officer is subject to the mandatory sentencing range specified for crimes of violence in § 16-11-309, due to the mandatory language of subsection (2)(c). However, the defendant is not subject to sentencing for an extraordinary risk crime under § 18-1-105 (9.7) unless the prosecution has alleged and proved the elements of a crime of violence, as described in § 16-11-309. In sentencing the defendant, the trial court stated that it was sentencing him to a minimum mandatory sentence of five years. Since this sentence presumes application of the sentence enhancing provisions for extraordinary risk crimes, the sentence was imposed in error and the case was remanded for resentencing. *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Trial court did not erroneously apply the general sentence enhancer in § 18-1.3-401 (8)(a)(IV) to defendant's assault conviction under subsection (1)(f.5) of this section. Application of the sentence enhancement provisions of § 18-1.3-401 did not have the effect of raising the class of felony for which defendant was convicted.

Plus, the elemental statute under which defendant was charged did not contain specific sentencing requirements that would have superseded the provisions of the sentencing statute. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

The specific aggravator in subsection (1)(f) applies as opposed to any general aggravator found in § 18-1.3-401. Subsection (1)(f) refers to the second degree assault on a correctional officer and contains its own aggravator. Therefore, the specific aggravator applies, not a general one. *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002).

The consecutive sentencing provision in subsection (1)(f) does not apply to juveniles who are adjudicated delinquent and sentenced to the department of human services. *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Section requires consecutive sentences even when in custody only as a result of being charged with a crime. *People v. Benavidez*, 222 P.3d 391 (Colo. App. 2009).

Subsection (1)(f) requires a consecutive sentence if, at the time of sentencing, the defendant is serving any other sentence. *People v. Diaz*, 2015 CO 28, 347 P.3d 621.

When a defendant is serving multiple consecutive sentences, those sentences must be treated as one single sentence, such that they are both "being served" for the purposes of a later sentence imposed under subsection (1)(f). *People v. Plotner*, 2024 COA 77, 558 P.3d 691.

Third degree assault is a lesser included offense of second degree assault. The third degree assault conviction merges into the conviction for second degree assault. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

Defendant's right to be free from double jeopardy violated when court entered convictions for subsections (1)(b) and (1)(c). Both convictions arose out of the same action. *People v. Denhartog*, 2019 COA 23, 452 P.3d 148.

Defendant's convictions for two separate charges of second degree assault and one charge for third degree assault were not mutually exclusive. Convictions are mutually exclusive only when the existence of an element of one of the crimes negates the existence of an element of the other crime. Here, the three charges each required a different culpable mental state —

intentionally, recklessly, and with criminal negligence. Since the jury found the defendant guilty of the charge requiring the intentional mental state, the prosecution then necessarily proved the lower mental states of recklessly and with criminal negligence. Even if there is a logical inconsistency between any of the culpable mental states, no legal inconsistency exists, and guilty verdicts that are legally consistent are not mutually exclusive. *People v. Rigsby*, 2020 CO 74, 471 P.3d 1068.

Defendant's convictions for two separate charges for second degree assault were multiplicitous. Two convictions for second degree assault based on the same conduct but different charges violates a defendant's double jeopardy rights. *People v. Rigsby*, 2020 CO 74, 471 P.3d 1068.

18-3-204. Assault in the third degree.

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

(a) The person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon; or

(b) The person, with intent to harass, annoy, threaten, or alarm another person whom the actor knows or reasonably should know to be a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider, causes the other person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or toxic, caustic, or hazardous material by any means, including throwing, tossing, or expelling the fluid or material.

(2) Repealed.

(3) Assault in the third degree is a class 1 misdemeanor.

(4) Repealed.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-204. **L. 77:** Entire section amended, p. 961, § 10, effective July 1. **L. 2004:** Entire section amended, p. 635, § 4, effective August 4. **L. 2009:** Entire section amended, (HB 09-1120), ch. 305, p. 1649, § 1, effective July 1. **L. 2011:** (1)(b) amended and (4) added, (HB 11-1105), ch. 250, p. 1088, § 2, effective August 10. **L. 2012:** (1)(b) amended, (HB 12-1059), ch. 271, p. 1435, § 13, effective July 1. **L. 2015:** (2) R&RE and (4) repealed, (SB 15-126), ch. 109, p. 317, § 2, effective July 1; (1)(b) amended and (4) repealed, (SB 15-067), ch. 337, p. 1367, § 3, effective September 1. **L. 2016:** (2) repealed, (HB 16-1393), ch. 304, p. 1226, § 5, effective July 1. **L. 2022:** (3) amended, (HB 22-1229), ch. 68, p. 344, § 20, effective March 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (3) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

ANNOTATION

Annotator's note. Since § 18-3-204 is similar to former § 40-2-35, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another. *Sims v. People*, 177 Colo. 229, 493 P.2d 365 (1972).

Conduct which creates substantial risk of serious bodily injury not element of offense. The establishment of every element of third degree assault would not necessarily include proving conduct which creates a

substantial risk of serious bodily injury, an element of reckless endangerment. Third degree assault requires proof of bodily injury but not proof of a substantial risk of serious bodily injury. Therefore reckless endangerment is not a lesser included offense of third degree assault. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Separate blows in single criminal transaction are single offense. Where two blows were delivered to the same person within a short period of time as part of a continuous harangue to extract information, these two blows were not separate transactions but were part of a single criminal transaction arising from a single impulse. Therefore it was error to charge and convict defendant twice for the same transaction. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Offense of assault and battery is a matter of mixed state and local concern. *City of Aurora v. Martin*, 181 Colo. 72, 507 P.2d 868 (1973).

It is no defense to show that the specific intent was directed at someone else other than the victim. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Mental impairment evidence admissible to negate mens rea. Opinion evidence of a mental impairment due to a mental disease or defect may be admitted to negate the mens rea for a nonspecific intent crime such as assault in the third degree. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982).

Evidence sufficient to show specific intent. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Bodily injury need not be of a crippling or otherwise incapacitating nature to be within the statutory prohibition. *People v. Lobato*, 187 Colo. 285, 530 P.2d 493 (1975).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

BB gun can be a deadly weapon. Testimony that if a person hit with a BB in a vulnerable area of the body, such as the eyes, the BB could cause serious bodily injury was sufficient to prove that the BB gun was a deadly weapon. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

The issue in evaluating whether a device is a deadly weapon is whether, in the manner it was used, the device could have caused death or serious bodily injury. The fact that in this particular case death or serious bodily injury did not occur is irrelevant. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

Third degree assault is a lesser included offense of second degree assault. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983); *People v. Brown*, 677 P.2d 406 (Colo. App. 1983); *People v. Smith*, 682 P.2d 493 (Colo. App. 1983); *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

The third degree assault conviction merges into the conviction for second degree assault. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

And only difference between second and third degree assault is degree of injury. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975); *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Defendant's convictions for two separate charges of second degree assault and one charge for third degree assault were not mutually exclusive. Convictions are mutually exclusive only when the existence of an element of one of the crimes negates the existence of an element of the other crime. Here, the three charges each required a different culpable mental state - intentionally, recklessly, and with criminal negligence. Since the jury found the defendant guilty of the charge requiring the

intentional mental state, the prosecution then necessarily proved the lower mental states of recklessly and with criminal negligence. Even if there is a logical inconsistency between any of the culpable mental states, no legal inconsistency exists, and guilty verdicts that are legally consistent are not mutually exclusive. *People v. Rigsby*, 2020 CO 74, 471 P.3d 1068.

Defendant's convictions for second degree assault and third degree assault were multiplicitious because third degree assault is a lesser included offense of second degree assault and the offenses stemmed from the same conduct. The appropriate remedy is to merge all the convictions into a single conviction for second degree assault. *People v. Rigsby*, 2020 CO 74, 471 P.3d 1068.

Third degree assault is distinguishable from second degree assault on a peace officer, as described in § 18-3-203, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection. This section and § 18-8-103 require that the defendant act knowingly, whereas § 18-3-203 requires that the defendant act intentionally. Further, § 18-3-203 requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction under this section. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Harassment is not a lesser included offense of either second or third degree assault. Harassment contains a culpable mental state element -- intent to harass,

annoy, or alarm -- that is not required by the elements of either second degree assault (intent to cause bodily injury) or third degree assault (knowingly or recklessly or with criminal negligence). *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

Under the rule of lenity, defendant's felony convictions for bodily injury against an at-risk adult, under § 18-6.5-103 (3)(c), and third degree assault against an at-risk person must nevertheless merge even if bodily injury against an at-risk adult is not a lesser included offense of third degree assault under § 18-1-408 (5)(a). *Thomas v. People*, 2021 CO 84, 500 P.3d 1095.

Proper to submit different degrees of assault to jury. Where the trial judge submitted to the jury not only the offense of assault with a deadly weapon, but also simple assault as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple assault, and it was also necessary for the court to instruct on specific intent for the charge of assault with a deadly weapon. *Arellano v. People*, 174 Colo. 456, 484 P.2d 801 (1971).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one, it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded

instruction as to count two. *People v. Castro*, 952 P.2d 762 (Colo. App. 1998).

Defendant's prior conviction of assault did not bar his subsequent conviction of sexual assault, as offenses had distinct elements that were not subsumed by each other. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

When there is no doubt on intent, court should deny third degree assault instruction. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

When court instructed jury on third degree assault relating to intentional conduct on lesser-included offense of second degree assault, but refused to instruct on third degree assault relating to criminal negligence, see *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Jury instruction on third degree assault as a lesser included offense of second degree assault not required because jury could not have acquitted defendant of second degree assault but convicted him of third degree assault. Highly relevant to the determination of whether the knife defendant used was a deadly weapon was uncontroverted testimony that the knife was four to five inches long. Even if the knife blade was dull, because of its size, the jury could have reasonably concluded that it was capable of producing serious bodily injury. And because a reasonable jury could not have concluded that the knife was anything other than a deadly weapon, it could not have rationally acquitted defendant of second degree assault and convicted him of third degree assault. *People v. Buell*, 2017

COA 148, 442 P.3d 961, *aff'd* on other grounds, 2019 CO 27, 439 P.3d 857.

Third degree assault not included in robbery. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery, and therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

A misdemeanor conviction under this section for third degree assault involves a crime of violence for purposes of § 4B1.2(a)(2) of the United States sentencing guidelines. *United States v. Krejcarek*, 453 F.3d 1290 (10th Cir. 2006).

Evidence insufficient to support conviction for second degree assault. There was no evidence that defendant used his car as a deadly weapon, specifically there was no evidence that defendant used his vehicle with assaultive conduct specifically directed toward the other driver. The evidence, in fact, was to the contrary that defendant attempted to avoid the other driver. *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

Applied in *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People v. Kreiser*, 41 Colo. App. 210, 585 P.2d 301 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979); *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D.

Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Noble, 635 P.2d 203 (Colo. 1981); People v. Sanchez,

644 P.2d 95 (Colo. App. 1982); People v. Dement, 661 P.2d 675 (Colo. 1983); People v. Gouker, 665 P.2d 113 (Colo. 1983); People v. Reedy, 705 P.2d 1032 (Colo. App. 1985).

18-3-205. Vehicular assault.

(1) (a) If a person operates or drives a motor vehicle in a reckless manner, and this conduct is the proximate cause of serious bodily injury to another, such person commits vehicular assault.

(b) (I) If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and this conduct is the proximate cause of a serious bodily injury to another, such person commits vehicular assault. This is a strict liability crime.

(I.5) If a person operates or drives a motor vehicle while the person's ability is impaired by alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the serious bodily injury of another, the person commits the crime of vehicular assault.

(II) For the purposes of this subsection (1), one or more drugs means any drug, as defined in section 27-80-203 (13), C.R.S., any controlled substance, as defined in section 18-18-102 (5), and any inhaled glue, aerosol, or other toxic vapor or vapors, as defined in section 18-18-412.

(III) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(IV) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(V) "Driving while ability impaired" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a motor vehicle or vehicle.

(c) Vehicular assault, in violation of subsection (1)(b)(I.5) of this section, is a class 5 felony. Vehicular assault, in violation of subsection (1)(a) of this section, is a class 5 felony. Vehicular assault, in violation of subsection (1)(b)(I) of this section, is a class 4 felony.

(2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was not under the influence of alcohol.

(b) If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.

(d) If at such time the driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the defendant's blood, such fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs.

(3) The limitations of subsection (2) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(4) (a) If a law enforcement officer has probable cause to believe that any person was driving a motor vehicle in violation of paragraph (b) of subsection (1) of this section, the person, upon the request of the law enforcement officer, shall take, and complete, and cooperate in the completing of any test or tests of the person's blood, breath, saliva, or urine for the purpose of determining the alcoholic or drug content within his or her system. The type of test or tests shall be determined by the law enforcement officer requiring the test or tests. If the person refuses to take, or to complete, or to cooperate in the completing of any test or tests, the test or tests may be performed at the direction of a law enforcement officer having probable cause, without the person's authorization or consent. If any person refuses to take, or to complete, or to cooperate in the taking or completing of any test or tests required by this paragraph (a), the person shall be

subject to license revocation pursuant to the provisions of section 42-2-126 (3), C.R.S. When the test or tests show that the amount of alcohol in a person's blood was in violation of the limits provided for in section 42-2-126 (3)(a), (3)(b), (3)(d), or (3)(e), C.R.S., the person shall be subject to license revocation pursuant to the provisions of section 42-2-126, C.R.S.

(b) Any person who is required to submit to testing shall cooperate with the person authorized to obtain specimens of his blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing.

(c) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person committed a violation of subparagraph (I) of paragraph (b) of subsection (1) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of such testing. Strict compliance with such rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results. It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(d) No person except a physician, a registered nurse, an emergency medical service provider certified or licensed under part 2 of article 3.5 of title 25 who is authorized within his or her scope of practice to draw blood, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse may withdraw blood to determine the alcohol or drug content of the blood for purposes of this section. In a trial for a violation of subsection (1)(b) of this section, testimony of a law enforcement officer that the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was authorized to withdraw blood specimens is sufficient evidence that the person was authorized, and testimony from the person who obtained the blood specimens concerning the person's authorization to obtain blood specimens is not a prerequisite to the admissibility of test results concerning the blood specimens obtained. Civil liability does not attach to a person

authorized to obtain blood, breath, saliva, or urine specimens or to a hospital, clinic, or association in or for which the specimens are obtained in accordance with this subsection (4) as a result of the act of obtaining the specimens from any person if the specimens were obtained according to the rules prescribed by the state board of health; except that this subsection (4)(d) does not relieve the person from liability for negligence in obtaining the specimen sample.

(e) Any person who is dead or unconscious must be tested to determine the alcohol or drug content of the person's blood or any drug content of the person's system as provided in this subsection (4). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency must be allowed to test any blood, urine, or saliva which was obtained and not utilized by a health-care provider and must have access to that portion of the analysis and results of any tests administered by such provider which shows the alcohol or drug content of the person's blood or any drug content within the person's system. Such test results are not considered privileged communications, and the provisions of section 13-90-107 relating to the physician-patient privilege do not apply. Any person who is dead, in addition to the tests prescribed, must also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained must be made a part of the crash report.

(f) If a person refuses to take, or to complete, or to cooperate in the completing of any test or tests as provided in this subsection (4) and such person subsequently stands trial for a violation of subsection (1)(b) of this section, the refusal to take, or to complete, or to cooperate with the completing of any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to the admission of his refusal to take, or to complete, or to cooperate with the completing of any test or tests.

(g) Notwithstanding any provision in section 42-4-1301.1, C.R.S., concerning requirements which relate to the manner in which tests are administered, the test or tests taken pursuant to the provisions of this section may be used for the purposes of driver's license revocation proceedings under section 42-2-126, C.R.S., and for the purposes of prosecutions for violations of section 42-4-1301 (1) or (2), C.R.S.

(5) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine his alcohol or drug level. This subsection (5) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (5) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-205. **L. 75:** Entire section amended, p. 625, § 2, effective June 26. **L. 77:** (1) R&RE, p. 961, § 11, effective July 1. **L. 81:** (1)(b) amended, p. 1992, § 5, effective June 19. **L. 83:** (4) added, p. 1648, § 18, effective July 1. **L. 88:** IP(2) amended, p. 1365, § 6, effective July 1. **L. 89:** (1)(b), (2), and (3) amended, (4) R&RE, and (5) added, pp.896, 898, §§ 3, 4, effective July 1. **L. 93:** (1) amended, p. 1987, § 15, effective July 1; (1)(b)(II) amended, p. 1731, § 14, effective July 1. **L. 94:** (4)(c), (4)(e), and (5) amended, p. 2734, § 357, effective July 1; (4)(a) and (4)(g) amended, p. 2552, § 41, effective January 1, 1995. **L. 97:** (4)(a) amended, p. 1471, § 19, effective July 1. **L. 2002:** (4)(g) amended, p. 1915, § 5, effective July 1. **L. 2004:** (2)(b) and (2)(c) amended, p. 781, § 4, effective July 1. **L. 2008:** (4)(a) amended, p. 244, § 4, effective July 1; (4)(g) amended, p. 1890, § 57, effective August 5. **L. 2012:** (1)(b)(II) amended, (HB 12-1311), ch. 281, p.1618, § 39, effective July 1; (4)(d) amended, (HB 12-1059), ch. 271, p. 1435, § 14, effective July 1. **L. 2013:** (1)(b)(II), IP(2), and (2)(c) amended and (2)(d) added, (HB 13-1325), ch. 331, p. 1879, § 3, effective May 28. **L. 2019:** (4)(d) amended, (SB 19-242), ch. 396, p. 3527, § 11, effective May 31. **L. 2021:** (1)(b)(I.5) and (1)(b)(V) added and (1)(c) amended, (SB 21-271), ch. 462, p. 3173, § 194, effective March 1, 2022. **L. 2026:** (4)(e) amended, (HB 26-1237), ch. 117, p. 464, § 9, effective August 12.

Editor's note: Amendments to subsection (1) in House Bill 93-1302 and House Bill 93-1088 were harmonized.

Cross references: (1) For penalties for driving under the influence of alcohol, see § 42-4-1301.

(2) For the legislative declaration contained in the 1994 act amending subsections (4)(c), (4)(e), and (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, "Drinking and Driving: An Update on the 1989 Legislation", see 18 Colo. Law. 1943 (1989). For article, "Drunk Drivers and Blood Draws in Colorado", see 43 Colo. Law. 27 (Feb. 2014).

Annotator's note. Since § 18-3-205 is similar to former § 40-2-11, C.R.S. 1963,

relevant cases construing that provision have been included in the annotations to this section.

Constitutionality. This section is not unconstitutional on the grounds that it denies the accused the opportunity to rebut the presumption raised by his or her blood alcohol content. *People v. Rostad*, 669 P.2d

126 (Colo. 1983); *People v. Ray*, 678 P.2d 1019 (Colo. 1984); *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984).

Legislative concern is for result of reckless driving. This statute is not concerned with drunk driving or reckless driving, as such. Rather, this statute evidences a legislative concern for the result which flows from the reckless operation of a motor vehicle by one who is under the influence of intoxicating liquor, the result being the injury of a human being. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Reckless driving is not a lesser included offense of vehicular homicide or vehicular assault. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

Driving under the influence is a lesser included offense of vehicular assault. If a person is guilty of vehicular assault by virtue of driving under the influence, driving under the influence is a lesser included offense prohibited by the double jeopardy clause. *People v. Cruthers*, 124 P.3d 887 (Colo. App. 2005); *People v. Smoots*, 2013 COA 152, 396 P.3d 53, *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

Careless driving is not a lesser included offense of vehicular assault (reckless). *People v. Zwegardt*, 2012 COA 119, 298 P.3d 1018.

The gravamen of both vehicular homicide, § 18-3-106, and this section is the "reckless" operation or driving of a motor vehicle, which results in the death of

or serious bodily injury to another. *People v. Sexton*, 192 Colo. 81, 555 P.2d 1151 (1976).

Vehicular assault is distinguishable from second degree assault described in § 18-3-203 (1)(d), and therefore these sections do not violate equal protection. The statutes differ in three primary ways. Second degree assault applies to a range of unspecified conduct, while vehicular assault applies narrowly to driving or operating a motor vehicle. Second degree assault can apply to acts of omission, while vehicular assault requires acts of commission. Second degree assault applies to any deadly weapon, which may include a motor vehicle, while vehicular assault requires the defendant's reckless driving or operation of a motor vehicle to have proximately caused the serious bodily injury. *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

Elements of offense. This statute requires proof of two elements for conviction in addition to that of driving while under the influence: First, driving in a reckless manner; and second, the infliction of bodily injury while so doing. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Finding of knowing or wilful conduct is sufficient to establish recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. 1981).

Offense requires injury. Neither offenses of driving under the influence of alcohol, nor reckless driving, nor causing an accident while under the influence of alcohol or by reckless driving, constitute felonious acts. Only when these events caused a death or injury to another person does the statute specifically provide that an offense has been

committed. Penn Mut. Life Ins. Co. v. Gibson, 160 Colo. 462, 418 P.2d 50 (1966).

Vehicular assault while driving under the influence is a strict liability crime, and jury was properly instructed on obligation to prove proximate cause beyond a reasonable doubt. People v. Hall, 722 P.2d 447 (Colo. App. 1986).

Complicitor liability can extend to the strict liability crime of vehicular assault (DUI). People v. Childress, 2015 CO 65M, 363 P.3d 155.

Vehicular assault (reckless driving) is not a per se grave or serious offense. People v. Caime, 2021 COA 134, 503 P.3d 940.

"Person", as used in this section to describe a victim of vehicular assault, includes a fetus that is injured while in the womb, is subsequently born and lived outside the womb, and then dies from the injuries sustained. While Colorado has no provisions criminalizing the injuring or killing of a fetus, the state common law "born alive" doctrine permits a criminal prosecution of the perpetrator when a child is born alive and then dies of the prenatal injuries, and civil law in the state has held that such a victim is a person within Colorado's wrongful death statute. People v. Lage, 232 P.3d 138 (Colo. App. 2009), overruled in People v. Jones, 2020 CO 45, 464 P.3d 735.

Subsections (1)(a) and (1)(b) set forth two alternative ways of committing the singular crime of vehicular assault; they do not create two separate crimes. People v.

Acosta, 860 P.2d 1376 (Colo. App. 1993); People v. Lucero, 985 P.2d 87 (Colo. App. 1999).

Defendant must be operating or driving the motor vehicle. Britto v. People, 178 Colo. 216, 497 P.2d 325 (1972).

There was substantial evidence that defendant's actions caused defendant's injuries, so there was no err in failing to instruct the jury that acts of omission cannot constitute vehicular assault. People v. Smith, 121 P.3d 243 (Colo. App. 2005).

Misdemeanor offenses under § 42-4-1202 are not the same as felony offenses under this section. People v. Smith, 182 Colo. 228, 512 P.2d 269 (1973).

Driving under the influence of intoxicating liquor and driving while ability is impaired are not lesser included offenses of the felony charge of inflicting bodily injury while under the influence of intoxicating liquor by driving an automobile in a reckless manner. People v. Smith, 182 Colo. 228, 512 P.2d 269 (1973); People v. Lucero, 985 P.2d 87 (Colo. App. 1999).

Prosecution not barred under this section. The court's dismissal of a misdemeanor count under § 42-4-1202, which placed the defendant in jeopardy as to that count, did not bar prosecution on felony count under this section. People v. Smith, 182 Colo. 228, 512 P.2d 269 (1973).

Right to refuse to submit to blood alcohol test does not apply. The right of refusal to submit to a blood alcohol test under the Colorado implied consent law applied only to the misdemeanor offense of

driving under the influence of intoxicating liquor and not to the felony offense of causing an injury while driving under the influence of intoxicating liquor. *People v. Blandon*, 194 Colo. 102, 568 P.2d 1171 (1977).

The general assembly need not extend the legislative grace of a right to refuse a blood test, a test which is constitutionally permissible, to those charged with vehicular homicide or vehicular assault. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

Equal protection is not violated by the failure of § 18-3-106 and this section to afford an accused the right to refuse a blood test afforded by § 42-4-1202. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly's decision to permit one charged with the less grievous offense of driving under the influence to refuse a blood test while not likewise permitting one charged with felonious vehicular homicide or felonious vehicular assault to refuse the test is not arbitrary or unreasonable. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

In order for an officer to require a test under this section, the motorist must first be given the opportunity to refuse consent to the test. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

Failure of an officer to obtain consent prior to subjecting a motorist to a test under this section does not require suppression of the test result or dismissal of the case. Court has broad discretion to suppress evidence or dismiss the case as a

sanction for improper police conduct. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

Where officer made no attempt to comply with the requirements of the statute and there were no circumstances that would have prevented compliance, trial court did not abuse its discretion by suppressing results of blood test. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

As long as a detective has sufficient probable cause to arrest a defendant for one of the crimes enumerated in § 42-4-1301.1 (3), a nonconsensual blood draw is statutorily authorized. *People v. Barry*, 2015 COA 4, 349 P.3d 1139.

Regulations promulgated pursuant to implied consent statute apply to offenses charged under it and not to felonies charged under this section. *People v. Acosta*, 620 P.2d 55 (Colo. App. 1980).

Failure of police to obtain test from unconscious victim pursuant to subsection (4)(e) does not entitle defendant to a dismissal of the charges under this section when the defendant cannot show that the failure was in bad faith. *People v. Kearns*, 988 P.2d 189 (Colo. App. 1999).

Sentence of three years plus two years probation for class 4 felony conviction under subsection (1)(b) was not disproportionate. *People v. Kearns*, 988 P.2d 189 (Colo. App. 1999).

Performance and consent to breathalyzer test. *People v. Sanchez*, 173 Colo. 188, 476 P.2d 980 (1970).

Evidence sufficient to sustain conviction. People v. Rodriguez, 645 P.2d 857 (Colo. App. 1982).

As to former element of intent, see Britto v. People, 178 Colo. 216, 497 P.2d 325 (1972).

Violation of reckless vehicular assault statute is a predicate crime of violence for purposes of the United States sentencing

guidelines. Subsection (1)(a) creates a categorical crime of violence because it reaches only conduct involving the use of force as required under the sentencing guidelines. United States v. Grajeda-Ramirez, 348 F.3d 1123 (9th Cir. 2003).

Applied in People v. Beltran, 634 P.2d 1003 (Colo. App. 1981); People v. Roybal, 655 P.2d 410 (Colo. 1982).

18-3-206. Menacing.

A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 1 misdemeanor, but it is a class 5 felony if committed by the use of a firearm, knife, or bludgeon or a simulated firearm, knife, or bludgeon.

Source: L. 71: R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-206. **L. 77:** Entire section amended, p. 961, § 12, effective July 1. **L. 2000:** Entire section amended, p. 694, § 5, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3173, § 195, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

Annotator's note. The following annotations include cases decided under law in effect prior to the 2021 amendment.

Statute did not unconstitutionally violate the defendant's equal protection rights, despite the defendant's claim that the conduct proscribed by this section, a class 5 felony, was indistinguishable from the conduct proscribed in § 18-9-106 (1)(f)

(disorderly conduct with a deadly weapon), a class 2 misdemeanor, in which the actus reus is less specific than the actus reus in this section. People v. Ibarra, 849 P.2d 33 (Colo. 1993).

It is only when the same conduct is proscribed in two statutes and different criminal sanctions apply, that problems arise under equal protection. People v. Ibarra, 849 P.2d 33 (Colo. 1993).

Felony menacing is a specific intent crime. People v. Lundborg, 39 Colo. App. 498, 570 P.2d 1303 (1977).

Felony menacing is not a lesser included offense of second-degree assault. The offense of second-degree assault does not establish every essential element of felony menacing and, therefore, the merger doctrine does not apply. *People v. Truesdale*, 804 P.2d 287 (Colo. App. 1990).

Menacing is not a lesser included offense of attempted extreme indifference murder. *People v. Portillo*, 251 P.3d 483 (Colo. App. 2010).

The actus reus of felony menacing is "placing another person in fear of imminent serious bodily injury by the use of a deadly weapon", an act more specific than the actus reus of disorderly conduct with a deadly weapon, which is displaying a deadly weapon in an alarming manner in a public place. Therefore, it does not violate the equal protection clause of article II, section 25, of the Colorado constitution to subject defendants to potential criminal liability under both statutes. *People v. Torres*, 848 P.2d 911 (Colo. 1993).

A physical act supporting an assault conviction without any additional physical action or verbal threat is sufficient to support a menacing conviction. *People v. Margerum*, 2018 COA 52, 457 P.3d 675, *aff'd*, 2019 CO 100, 454 P.3d 236.

Court did not err in denying motion for acquittal when defendant charged with felony menacing and evidence showed the victims believed themselves to be in danger of imminent serious bodily harm. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Failure to instruct jury on "imminent" element was harmless error where prosecutor argued fear was imminent and defense did not challenge whether fear was imminent. Evidence clearly showed fear was imminent. *People v. Geisendorfer*, 991 P.2d 308 (Colo. App. 1999).

The definition of "knife" in § 18-12-101 does not define what a knife is for purposes of this section. That definition is expressly limited to the word as it is used in article 12 of this title. *People v. Romero*, 2025 COA 91, 583 P.3d 449.

The phrase "use of a deadly weapon" is broad enough to include the act of holding a weapon in the presence of another in a manner that causes the other person to fear for his safety, even if the weapon is not pointed at the other person. *People v. Hines*, 780 P.2d 556 (Colo. 1989); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Felony menacing requires use of deadly weapon. The elements of misdemeanor menacing and felony menacing are identical but for the added requirement of the use of a deadly weapon. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Under the felony provision of this section unloaded firearm is a deadly weapon. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980) (decided prior to 1981 amendment to § 18-1-901 (3)(e)).

An unloaded firearm is a deadly weapon. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Defendant "used" his or her purported HIV status in a manner that could cause the victim to fear for his or her safety where the evidence showed that the defendant stated he or she was HIV positive, pinched and scratched the victim, and attempted to bite him or her. *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004).

Felony menacing distinguished from first degree burglary. It is possible to commit a first degree burglary without also perpetrating felony menacing. The merger doctrine does not apply because there is no requirement in the first degree burglary statute that a victim be placed in fear of imminent serious bodily injury by a deadly weapon as there is in the felony menacing statute. *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980); *People v. Sauser*, 2020 COA 174, 490 P.3d 1018.

And from aggravated robbery. The offense of aggravated robbery may be committed without also committing felony menacing. No merger occurs because the requirement in the felony menacing statute that the actor knowingly places a victim in fear of "serious bodily injury" is distinguishable from the requirement that the robber knowingly places a victim in fear of "bodily injury". *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

And from attempted first degree assault. Felony menacing and attempted first degree assault do not merge. *People v. Procasky*, 2019 COA 181, 467 P.3d 1252.

Voluntary intoxication is not a defense to felony menacing, which is a general intent crime. *People v. Breland*, 728 P.2d

763 (Colo. App. 1986); *People v. Esparza*, 757 P.2d 1164 (Colo. App. 1988).

An essential element of the offense is a specific intent to cause fear. *People v. Stout*, 193 Colo. 466, 568 P.2d 52 (1977).

The specific intent of the defendant to cause fear is the gravamen of the offense of felony menacing. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

No reversible error committed when court refused to instruct the jury that if it found the affirmative defense of self-defense applied to any one defendant it applied to them all. Court not persuaded of real possibility that jury could convict the defendant, finding that he acted reasonably toward one victim but not another. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Reversible error where defendant entitled to raise transferred intent self-defense as an affirmative defense and court rejected defendant's self-defense jury instructions. *People v. Koper*, 2018 COA 137, 488 P.3d 409.

Court erroneously submitted instruction to jury which included "specific intent" element for "general intent" crime of felony menacing. *People v. Crump*, 769 P.2d 496 (Colo. 1989).

Menacing is a general intent crime requiring only that the defendant be aware that the defendant's conduct is practically certain to cause the result. *People v. Zieg*, 841 P.2d 342 (Colo. App. 1992); *People v. Segura*, 923 P.2d 266 (Colo. App. 1995); *People v. District Ct.*, 17th Jud. Dist., 926

P.2d 567 (Colo. 1996); *People v. Saltray*, 969 P.2d 729 (Colo. App. 1998); *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004).

It is unnecessary for the victim actually to hear or to be cognizant of any threat from defendant; instead, if there is evidence from which the jury could reasonably find that the defendant knew his actions, if discovered, would place the victim in fear of imminent serious bodily injury by use of a deadly weapon, then the intent element of the offense may be established. *People v. Saltray*, 969 P.2d 729 (Colo. App. 1998).

The jury instruction which did not specify a particular victim, coupled with the comments of the prosecutor, invited the jury to convict without regard to the identity of the victim, making it impossible to determine whether the jury unanimously convicted defendant on the basis of menacing the same victim. *People v. Simmons*, 973 P.2d 627 (Colo. App. 1998).

Where the evidence of defendant's guilt was overwhelming and the issue of whether the defendant acted knowingly was not contested at trial, the trial court's error in instructing the jury on the meaning of "knowingly" is not plain error in defendant's conviction for menacing. *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

The trial court's omission of the definition of "serious bodily injury" from the jury instructions, although erroneous, did not rise to the level of plain error because the issue of the degree of bodily injury the victim feared from the defendant

was not contested at trial. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Intent to inflict injury not gist of crime. Whether the defendant had the intent or ability to inflict injury is not the gist of felony menacing. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980) (decided prior to 1981 amendment to § 18-1-901 (3)(e)).

Conditional or contingent threat satisfies the "threat" element of felony menacing. *People v. Hines*, 780 P.2d 556 (Colo. 1989); *People v. Segura*, 923 P.2d 266 (Colo. App. 1995).

The term "use" is broad enough to include the act of holding a weapon in the presence of another in a manner that causes the other person to fear for his safety. *People v. Hines*, 780 P.2d 556 (Colo. 1989).

The term "use" necessarily includes the physical possession of a deadly weapon at the time of the crime. *People v. Adams*, 867 P.2d 54 (Colo. App. 1993).

The term "use" is broad enough to allow the jury to convict the defendant of felony menacing for defendant's act of returning to the victim at the location where the defendant previously sexually assaulted the victim while holding a gun to the victim's head, even though the victim did not see the gun upon the defendant's return. The jury and victim could reasonably believe the defendant still had the gun after the sexual assault and could use it to cause fear in the victim. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

Jury verdict convicting defendant of felony menacing is not inconsistent with the

jury's verdict acquitting defendant of first degree sexual assault. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

A reasonable juror could find that the particular weapon defendant used, a hatchet, constituted a knife in the context of this section. *People v. Romero*, 2025 COA 91, 583 P.3d 449.

The weapon was not meaningfully different from any other sharp-edged blade used for cutting and fitted with a handle even if a hatchet does not fall within the literal meaning of the word "knife". *People v. Romero*, 2025 COA 91, 583 P.3d 449.

Actual subjective fear on the part of the victim is not a necessary element of this crime. *People v. Stout*, 193 Colo. 466, 568 P.2d 52 (1977); *People v. Williams*, 827 P.2d 612 (Colo. App. 1992); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Nonetheless, what the victim saw or heard, and his reactions thereto, are relevant considerations in determining whether the defendant had the requisite intent to place him in fear. *People v. Gagnon*, 703 P.2d 661 (Colo. App. 1985).

Rather, it is only necessary that the defendant be aware that his conduct is practically certain to cause fear. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996); *United States v. Blackwell*, 323 F.3d 1256 (10th Cir. 2003).

When there is one count of felony menacing it is not necessary to prove each of the named victims was placed in fear of imminent serious bodily injury. It is

sufficient to prove that the defendant committed the offense against the same listed persons. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

The crime of menacing does not require proof of the intent to rob. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976).

Intoxication as defense. If at the time of the incident in question, felony menacing was a specific intent crime, intoxication is available as a defense to negate the requisite specific intent. *People v. Sandoval*, 42 Colo. App. 503, 596 P.2d 1225 (1979).

Evidence held sufficient to bind police officer over for trial. *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977).

Evidence sufficient to indicate that felony prosecution under this section was proper. *Biddle v. District Court*, 183 Colo. 281, 516 P.2d 645 (1973); *People v. Stout*, 193 Colo. 466, 568 P.2d 52 (1977); *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

Where evidence supports felony conviction, improper misdemeanor instruction does not affect misdemeanor conviction. Where the evidence supported a conviction for felony menacing, the fact that the trial court improperly submitted an instruction on misdemeanor menacing to the jury did not affect the defendant's conviction for the lesser included offense, misdemeanor menacing. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Felony menacing is not a lesser included offense of attempted second degree murder. People v. Torres, 224 P.3d 268 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony menacing. Attempted second degree murder requires a defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the elements of menacing. People v. Torres, 224 P.3d 268 (Colo. App. 2009).

Misdemeanor menacing is not a lesser included offense of use of a stun gun. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

Constitution proscribes retrial when conviction impliedly acquits defendant. The double jeopardy clause proscribes retrial when a felony menacing conviction impliedly acquits the defendant of a second-degree assault charge. Ortiz v. District Court, 626 P.2d 642 (Colo. 1981).

Trial court abused discretion in refusing to grant a continuance to allow stabbing victim's prior felony drug convictions to become final so that defendant could cross-examine victim concerning the convictions for impeachment purposes. People v. Gagnon, 703 P.2d 661 (Colo. App. 1985).

But no abuse of discretion when court denied defendant's motion for a

continuance on the morning of trial to search for new evidence that may not exist, particularly where the potential evidence would not materially impact the prosecution's ability to disprove an affirmative defense. People v. Sauser, 2020 COA 174, 490 P.3d 1018.

No error where court excluded evidence of actions of victim after menacing occurred, since, in determining the issue of reasonable belief of imminent injury, it is the actions and demeanor of the believed assailant which first occurred that are relevant. People v. Beckett, 782 P.2d 812 (Colo. App. 1989), aff'd, 800 P.2d 74 (Colo. 1990).

Defendant's act of touching a knife to the officer's person was not sufficient to establish the elements of assault-during-escape. To hold, under the present criminal code, that a threat with a deadly weapon constitutes an assault with intent to commit bodily injury would eliminate any distinction between the crimes of menacing and assault with intent to commit bodily injury. People v. Wilson, 791 P.2d 1247 (Colo. App. 1990).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to induce a person of ordinary prudence to entertain a reasonable belief that defendant committed the crime of felony menacing where evidence indicated that defendant, while holding the knife that mortally wounded victim, threatened to kill other person if that person did not leave his residence. People v. District Ct., 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

A violation of this section qualifies as a violent felony under the federal Armed Career Criminals Act, 18 U.S.C. § 924(e). *United States v. Herron*, 432 F.3d 1127 (10th Cir. 2005).

Felony menacing is a crime of violence for purposes of the United States sentencing guidelines. *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011), overruled in *United States v. Taylor*, 596 U.S. 845 (2022).

Felony menacing can no longer be considered categorically a crime of violence for purposes of the sentencing guidelines. Actual communication to, or cognition by, the victim of the threat is not required under this section. So long as the defendant's conduct, if discovered, would place the victim in fear of imminent serious bodily injury, the crime has been committed. This is broader than the United States supreme court's interpretation of the threatened use of force in *Taylor*, in which the court held that the threatened use of force requires some form of communication by the defendant. A defendant's uncommunicated threat would satisfy this section under *People v. Saltray*, 969 P.2d 729 (Colo. App. 1998) (annotated above); it would not satisfy § 4B1.2(a)(1) of the sentencing guidelines after *Taylor*. *United States v. Venjohn*, 104 F.4th 179 (10th Cir. 2024).

Conspiracy to commit felony menacing with a firearm is a crime of violence as defined in commentary to § 2K2.1 and for

purposes of the 2018 United States sentencing guidelines. *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023).

A conviction for violation of this section is a conviction of a crime of violence as defined by 18 U.S.C. § 16, and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), making alien removable under 8 U.S.C. § 1227(a)(2)(A)(iii). *Damaso-Mendoza v. Holder*, 653 F.3d 1245 (10th Cir. 2011).

Applied in *Miller v. District Court*, 1931 Colo. 404, 566 P.2d 1063 (1977); *Jones v. District Court*, 196 Colo. 1, 584 P.2d 81 (1978); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Brassfield*, 652 P.2d 588 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Shearer*, 650 P.2d 1293 (Colo. App. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. Jones*, 140 P.3d 325 (Colo. App. 2006); *Derosier v. Balltrip*, 149 F. Supp. 3d 1286 (D. Colo. 2016); *Estate of Burnett v. City of Colo. Springs*, 616 F. Supp. 3d 1111 (D. Colo. 2022).

18-3-207. Criminal extortion - aggravated extortion.

(1) A person commits criminal extortion if:

(a) The person, without legal authority and with the intent to induce another person against that other person's will to perform an act or to refrain from performing a lawful act, makes a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person; and

(b) The person threatens to cause the results described in paragraph (a) of this subsection (1) by:

(I) Performing or causing an unlawful act to be performed; or

(II) Invoking action by a third party, including, but not limited to, the state or any of its political subdivisions, whose interests are not substantially related to the interests pursued by the person making the threat.

(1.5) A person commits criminal extortion if the person, with the intent to induce another person against that other person's will to give the person money or another item of value, or with the intent to induce another person against that other person's will to perform an act or to refrain from performing a lawful act, threatens to report to law enforcement officials the immigration status of the threatened person or another person.

(2) A person commits aggravated criminal extortion if, in addition to the acts described in subsection (1) of this section, the person threatens to cause the results described in paragraph (a) of subsection (1) of this section by means of chemical, biological, or harmful radioactive agents, weapons, or poison.

(3) For the purposes of this section, "substantial threat" means a threat that is reasonably likely to induce a belief that the threat will be carried out and is one that threatens that significant confinement, restraint, injury, or damage will occur.

(4) Criminal extortion, as described in subsections (1) and (1.5) of this section, is a class 4 felony. Aggravated criminal extortion, as described in subsection (2) of this section, is a class 3 felony.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-207. **L. 75:** Entire section amended, p. 618, § 8, effective July 21. **L. 81:** Entire section amended, p. 981, § 4, effective May 13; entire section amended, p. 974, § 8, effective July 1. **L. 82:** (2) amended, p. 623, § 17, effective April 2. **L. 94:** Entire section R&RE, p. 1619, § 1, effective May 31. **L. 2006, 1st Ex. Sess.:** (1.5) added and (4) amended, p. 11, § 1, effective July 31. **L. 2021:** (1.5) amended, (HB 21-1057), ch. 158, p. 903, § 1, effective July 1.

Editor's note: Amendments to this section by House Bill 81-1167 and Senate Bill 81-183 were harmonized.

ANNOTATION

Law reviews. For article, "Criminal Law", which discusses a Tenth Circuit decision dealing with extortion, see 62 Den. U. L. Rev. 153 (1985). For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (Oct. 2006).

This section is applicable to efforts to collect a legally enforceable debt. *People v. Rosenberg*, 194 Colo. 423, 572 P.2d 1211 (1978).

This section and § 18-9-111, which classifies harassment as a misdemeanor, address separate and distinct crimes and the classification of such offenses have a rational basis in fact and are reasonably related to legitimate government interests. *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990).

Statute is facially overbroad because it sweeps within its reach both protected and unprotected speech. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

Statute is facially overbroad because it also covers constitutionally protected threats of collective action in support of group demands. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

A specific intent requirement does not eliminate overbreadth concerns when the effect associated with the intent provision, here, to induce another to act against his or her will, encompasses a substantial amount of protected activity. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

The trial court must vacate defendant's conviction and sentence for criminal extortion where the statute requires extensive revision to comply with constitutional requirements and rewriting the statute is more appropriately left to the general assembly rather than to the court. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

Subsection (1) does not include within its reach protected speech, and therefore, it is not unconstitutionally overbroad. The legislature repealed and reenacted this section in 1994 with substantial modifications. Thus, the types of protected speech found to be criminalized under the prior statute are no longer included within the definition of extortion. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

This section gives sufficient notice of the proscribed conduct and is not unconstitutionally vague. A person of

reasonable intelligence could conclude that phone calls made with the intent to threaten the victim is prohibited. *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990).

Indictment did not adequately allege a violation of the threat to confine or restrain element of the criminal extortion charge where it did not allege that sheriff made a substantial threat to confine or restrain an inmate who was already confined as an inmate. The indictment and the bill of particulars alleged only that sheriff threatened to transfer the inmate to another jail if inmate did not agree to work on sheriff's home. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Even if evidence of threatened loss of good time would otherwise have been sufficient to establish a violation of the extortion statute, it cannot cure the absence of such a factual allegation in the indictment or bill of particulars. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

The threat of litigation does not constitute criminal extortion. To prove criminal extortion under subsections (1)(a) and (1)(b)(I), a defendant must have made a threat to commit an unlawful act. *People v. Knox*, 2019 COA 152, 467 P.3d 1218.

Applied in *People v. Hearty*, 644 P.2d 302 (Colo. 1982).

18-3-208. Reckless endangerment.

A person who recklessly engages in conduct that creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-208. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3173, § 196, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "The Legal Risks of AIDS: Moving Beyond Discrimination", see 18 Colo. Law. 606 (1989).

Offense not lesser included offense of third degree assault. The establishment of every element of third degree assault would not necessarily include proving conduct

which creates a substantial risk of serious bodily injury, an element of reckless endangerment. Third degree assault requires proof of bodily injury but not proof of a substantial risk of serious bodily injury. Therefore reckless endangerment is not a lesser included offense of third degree assault. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Trial court did not err by refusing to instruct the jury on the lesser nonincluded offense of reckless endangerment, because there was no rational basis upon which the jury could have convicted defendant of that offense and acquitted him of child abuse resulting in death. *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001).

There is no right to a jury instruction on a lesser included offense if the element that distinguishes the greater from the

lesser is uncontested. Where it is undisputed that death occurred as a result of defendant's conduct, there is no right to an instruction on reckless endangerment in a reckless manslaughter case. *People v. Hall*, 59 P.3d 298 (Colo. App. 2002).

Applied in *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

18-3-209. Assault on the elderly or persons with disabilities - legislative declaration.
(Repealed)

Source: **L. 84:** Entire section added, p. 542, § 2, effective April 12. **L. 86:** (2) amended, p. 777, § 4, effective July 1. **L. 93:** Entire section amended, p. 1634, § 18, effective July 1. **L. 95:** Entire section repealed, p. 1251, § 8, effective July 1.

18-3-210. Unlawfully aiming a laser device at an aircraft - definitions.

(1) A person who knowingly points, focuses, or aims the beam of a laser device at an aircraft in flight or on the ground while occupied, and the incident is reported by the pilot or a crew member of the impacted aircraft to a law enforcement officer or law enforcement agency, commits the offense of unlawfully aiming a laser device at an aircraft, which is a class 6 felony.

(2) The offense described in subsection (1) of this section does not apply if the person:

(a) Is an authorized individual conducting research and development or flight test operations for an aircraft manufacturer or the federal aviation administration, or any other person authorized by the federal aviation administration to conduct research and development or flight test operations;

(b) Is a member of the United States department of defense or the United States department of homeland security acting in an official capacity for the purpose of research, development, operations, testing, or training; or

(c) Uses a laser device with the intent of sending an emergency distress signal.

(3) As used in this section, unless the context otherwise requires:

(a) "Aircraft" means a device manned by a person that is used or intended to be used for flight in the air.

(b) "Laser device" means any device designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam in the ultraviolet, visible, or infrared region of the spectrum.

Source: L. 2023: Entire section added, (SB 23-095), ch. 29, p. 99, § 1, effective July 1.

PART 3

KIDNAPPING

18-3-301. First degree kidnapping.

(1) Any person who does any of the following acts with the intent thereby to force the victim or any other person to make any concession or give up anything of value in order to secure a release of a person under the offender's actual or apparent control commits first degree kidnapping:

(a) Forcibly seizes and carries any person from one place to another; or

(b) Entices or persuades any person to go from one place to another; or

(c) Imprisons or forcibly secretes any person.

(2) Whoever commits first degree kidnapping is guilty of a class 1 felony if the person kidnapped shall have suffered bodily injury; but no person convicted of first degree kidnapping shall suffer the death penalty if the person kidnapped was liberated alive prior to the conviction of the kidnapper.

(3) Whoever commits first degree kidnapping commits a class 2 felony if, prior to his conviction, the person kidnapped was liberated unharmed.

Source: L. 71: R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-301.

ANNOTATION

Annotator's note. Since § 18-3-301 is similar to former § 40-2-44, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For a discussion of the legislative history of first-degree kidnapping, see *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Section not vague. The kidnapping statutes, by using words such as "seize" and "imprison" to define the offenses, are not so vague that men of common intelligence and understanding are required to guess as to their application. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Essential elements of the crime of kidnapping are: (1) Wilfulness or intent to do the act; (2) the act must be done without lawful authority; (3) there must be a seizing, or imprisoning; and (4) the act must be done against the victim's will, by means of force or otherwise. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

All elements of crime of kidnapping must be present or the crime is not committed. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Prosecution must prove movement and intent to force victim to make concession. For first degree kidnapping, the prosecution must prove, in addition to movement, that the intent of the defendant is to force the victim to make a concession or give up a thing of value in order to secure release. *People v. Bridges*, 199 Colo. 520, 612 P.2d

1110 (1980); *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

In order to prove "forcibly seizes and carries" element, prosecution is required to show that defendant used, or threatened to use, power, violence, or pressure against a victim to seize and carry the victim, and that defendant did so against opposition or resistance. *People v. Pratarelli*, 2020 COA 33, 471 P.3d 1177.

Movement which is more than incidental to the commission of an underlying crime is circumstantial evidence of specific intent to kidnap, and a jury could be so instructed. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Evidence of intent to sustain conviction derived from examining movement surrounding underlying crime. Circumstantial evidence of intent sufficient to sustain a conviction for first degree kidnapping may be derived from an examination of the amount and character of the movement surrounding an underlying crime, taking into account, for example, the time of detention, the distance, any changed environmental factors, whether the commission of the underlying crime and the movement were simultaneous, and the consistency of the defendant's actions with an independent intent to kidnap. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (Colo. 1980); *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

Section imposes only a single intent requirement: Namely an intent "to force the victim or any other person to make any concession or give up anything of value in

order to secure a release". First degree kidnapping does not require proof that the kidnapper intended to release the victim upon obtaining the concession sought. *People v. Weare*, 155 P.3d 527 (Colo. App. 2006).

"Any concession" includes sexual assault. The phrase "any concession" is sufficiently broad to encompass submission to a sexual assault as a basis for a verdict of guilty. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

Submission to sexual assault not sufficient per se. Proof of the victim's submission to a sexual assault is not sufficient per se to establish the concession required for first degree kidnapping. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Assault is not a necessary element of the crime of kidnapping. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Multiple punishment is not permitted where one act of forcible abduction results in kidnapping of two victims. *People v. Duran*, 183 Colo. 180, 515 P.2d 1117 (1973).

Venue in a kidnapping case may be either in the county in which the offense was committed or in any county through which the person kidnapped was taken or kept while under confinement or restraint. *Claxton v. People*, 164 Colo. 283, 434 P.2d 407 (1967).

Information charging kidnapping held sufficient. *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

Evidence sufficient to support conviction. *Tomsak v. People*, 166 Colo. 226, 442 P.2d 825 (1968); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *Chatfield v. Ricketts*, 673 F.2d 330 (10th Cir. 1982).

Where an individual was pursued, her car rammed, and the road blocked by defendant who got into her car, shoved her to the passenger side, and then drove away until the victim was able to break from defendant's grasp and jump from the moving car, the crime of kidnapping was clearly established. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Where the assault by the defendant was a crime of physical force or violence, the victim had no choice in the matter, and the assault ended when the police arrived, the evidence was insufficient to support a first degree kidnapping charge but was sufficient to sustain a conviction for second degree kidnapping. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

The evidence is insufficient to sustain a conviction on a first degree kidnapping charge where the victim of a first degree sexual assault is forced to submit without having any choice in the matter, there existing no "concession" or intent to obtain a concession within the meaning of the first degree kidnapping statute. *People v. Nunez*, 673 P.2d 53 (Colo. App. 1983).

Evidence did not require instruction on false imprisonment. When both the victim and the defendant's accomplice testify that the defendant committed acts which constitute kidnapping, the only theory of defense is alibi, and the defendant denies the

commission of any act which could lead to the conviction of either false imprisonment or kidnapping and no evidence is presented from which the jury might find that the defendant is only guilty of false imprisonment, the defendant is either guilty of kidnapping or nothing at all and is not entitled to an instruction on false imprisonment even though it is a lesser included offense of kidnapping. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

This section is sufficiently definite to give reasonable notice of the proscribed conduct to one who would avoid its penalties, to guide the trial judge in its application, and to guide counsel in defending one charged with its violation. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Because this section does not proscribe the same criminal conduct as § 18-3-302, it does not violate the requirements of equal protection. This section requires the kidnapper to force the victim or any other person to make any concession or give up anything of value in order to secure a release, an element not required for second degree kidnapping. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Inclusion of the terms "entices" and "decoys" in § 18-3-302 (2) does not mean that the word "takes" necessarily prohibits only forcible seizures therefore prohibiting the same conduct defined in subsection (1)(a) of this section. A taking could occur without force, with the intent to keep or conceal the child from his or her parent or

guardian or with intent to sell, trade, or barter the child for consideration, but without the child's being enticed or decoyed away. The terms "entices" and "decoys", therefore, are not rendered meaningless by an interpretation of "takes" that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The obvious distinction between subsection (1)(a) of this section and § 18-3-302 (2) is that § 18-3-302 (2) applies only to children. Subsection (1)(a) of this section and § 18-3-302 (2) do not prohibit exactly the same criminal conduct while imposing disparate penalties. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The different penalties provided for in subsections (2) and (3) of this section do not violate the equal protection clause because subsection (2) requires a finding of bodily injury, an additional element of proof which justifies the imposition of different penalties. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

It is not unconstitutional to try the felony murder and first degree kidnapping charges together under the current statutory scheme. *People v. Cunningham*, 194 Colo. 198, 570 P.2d 1086 (1977).

Prohibition against double punishment for same criminal act is not violated where a defendant is found guilty of first degree kidnapping and first degree sexual assault for same criminal episode. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

To convict an individual of first degree kidnapping, the movement of the victim must be more than incidental to the commission of some other underlying offense. Although the defendant forced the victim into the manager's office at knifepoint and ordered the manager to retrieve cash from the safe to secure the victim's release, the movement of the victim had no purpose or effect beyond robbery. *People v. Owens*, 97 P.3d 227 (Colo. App. 2004).

Forcible sexual acts which cause extreme physical pain and a subsequent kidney infection clearly satisfy the statutory definition of bodily injury under this section. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Case remanded to correct excessive sentence. *Abeyta v. People*, 112 Colo. 49, 145 P.2d 884 (1944); *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under this section and §§ 18-3-402 and 18-4-301 (1). *People v. Bridges*, 199 Colo. 520, 612 P.2d 110 (1980).

If victim is injured, section applies even though victim is later liberated. *Miller v. District Court*, 197 Colo. 485, 593 P.2d 1379 (1979).

If the victim is forced to submit to sexual assault without having a choice in the matter, there generally is no concession within the meaning of this section. *People v. San Emerterio*, 819 P.2d 516 (Colo. App.

1991), rev'd on other grounds, 839 P.2d 1161 (Colo. 1992).

The term "concession" as used in this section need not apply only to things with objective value but is broad enough to include a promise that has sufficient subjective value to a kidnapper to be exchanged for release. *People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992).

The term "concession" is not so restrictive as to impose a control requirement to make a promise sufficiently valuable. *People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992).

All of the elements of first degree kidnapping are present if a defendant forcibly seizes a victim and carries her away with the intent to force her to make a promise to complete a future act in order to secure her release. Such circumstances are sufficient to constitute a "concession" within the meaning of this section. *People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992).

Asportation element of second degree kidnapping not satisfied where defendant forced victim to sit next to a tree, which did not increase her risk of harm, did not make someone seeing her more difficult, and did not make her less able to escape. *People v. Bondsteel*, 2015 COA 165, 442 P.3d 880, aff'd on other grounds, 2019 CO 26, 439 P.3d 847.

Applied in *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149 (1965); *People v. McGill*, 190 Colo. 443, 548 P.2d 600 (1976); *People v. Glenn*, 200 Colo. 416, 615 P.2d

700 (Colo. 1980); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Reynolds*, 638 P.2d 43 (Colo. 1981); *People*

v. Gonzales, 631 P.2d 1170 (Colo. App. 1981); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

18-3-302. Second degree kidnapping.

(1) A person who knowingly seizes and carries a person from one place to another, without the person's consent and without lawful justification, and such movement increases the risk of harm to the person, commits second degree kidnapping.

(2) Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian or with intent to sell, trade, or barter such child for consideration commits second degree kidnapping.

(3) Second degree kidnapping is a class 2 felony if any of the following circumstances exist:

(a) The person kidnapped is a victim of a sexual offense pursuant to part 4 of this article 3;

(b) The person kidnapped is a victim of a robbery; or

(c) The kidnapping was a violation of subsection (2) of this section.

(4) (a) Unless it is a class 2 felony under subsection (3) of this section, second degree kidnapping is a class 3 felony if any of the following circumstances exist:

(I) The kidnapping is accomplished with intent to sell, trade, or barter the victim for consideration; or

(II) The kidnapping is accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(III) The kidnapping is accomplished by the perpetrator representing verbally or otherwise that he or she is armed with a deadly weapon.

(b) A defendant convicted of second degree kidnapping committed under any of the circumstances set forth in this subsection (4) shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) Second degree kidnapping is a class 4 felony, except as provided in subsections (3) and (4) of this section.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-302. L. 77: Entire section R&RE, p. 961, § 13, effective July 1. L. 81: Entire section R&RE, p. 983, § 1, effective July 1. L. 86: (4) amended, p. 777, § 5, effective July 1. L. 87: (1) amended, p. 615, § 4, effective July 1. L. 89: (2) and (4) amended, p. 902, §§ 1, 2, effective July 1. L. 2000: (4) amended, p. 694, § 6, effective July 1. L. 2001: (3), (4), and (5) amended, p. 857, § 2, effective July 1. L. 2002: (4)(b) amended, p. 1512, § 188, effective October 1. L. 2003: (3)(a) amended, p. 1432, § 20, effective April 29. L. 2007: (4) amended, p. 1687, § 5, effective July 1. L. 2023: (1) and (3) amended, (HB 23-1293), ch. 298, p. 1784, § 6, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983). For article, "Missing Children", see 13 Colo. Law. 1005 (1984).

Annotator's note. Since § 18-3-302 is similar to former § 40-2-44, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Second degree kidnapping statute criminalizing "knowingly, forcibly, or otherwise" seizing and carrying any person from one place to another is unconstitutionally vague. However, the phrase "forcibly or otherwise" is severable from the constitutional sections of the statute, leaving the remainder complete and in accord with legislative intent. *People v. Powell*, 716 P.2d 1096 (Colo. 1986) (decided prior to 1987 amendment).

No equal protection violation where general assembly chose to punish with the same severity all cases where kidnapping was accompanied by sexual assault, making no distinction between misdemeanor and felony sexual assault. *People v. Williams*, 89 P.3d 492 (Colo. App. 2003).

Because this section does not proscribe the same criminal conduct as § 18-3-301, it does not violate the requirements of equal protection. Inclusion of the terms "entices" and "decoys" in subsection (2) of this section does not mean that the word "takes" necessarily prohibits only forcible seizures therefore prohibiting the same conduct defined in § 18-3-301 (1)(a). A taking could occur without force, with the intent to keep or conceal the child from his or her parent or guardian or with intent to sell, trade, or barter the child for consideration, but without the child's being enticed or decoyed away. The terms "entices" and "decoys", therefore, are not rendered meaningless by an interpretation of

"takes" that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The obvious distinction between § 18-3-301 (1)(a) and subsection (2) of this section is that subsection (2) of this section applies only to children. Section 18-3-301 (1)(a) and subsection (2) of this section do not prohibit exactly the same criminal conduct while imposing disparate penalties. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

Term "seize" does not imply the use of force. Where defendant conceded that evidence was sufficient to show he "took" his daughter from her custodial parent, conviction under subsection (1) was proper although taking was not by force. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Taking a person through the use of deceit falls within the term "seize" because it is a taking without the consent of the victim. Consent obtained through deceit is invalid. *People v. Maass*, 981 P.2d 177 (Colo. App. 1988).

Forcing customer of movie theater to accompany defendant at gunpoint to theater manager's office with threats of retribution if he called the police satisfies "seize and carry" requirement for purposes of second degree kidnapping. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

The court did not commit plain error in instructing the jury that "seized and carried" means any movement, however short in distance. The court's instruction accurately states the law. Further, it was

appropriate for the court to instruct the jury on the phrase "seized and carried" since it has special meaning in the context of kidnapping and is a statutory term of art. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008), overruled in *Garcia v. People*, 2022 CO 6, 503 P.3d 135, annotated below.

The court committed an error with a jury instruction that defined "seizes and carries" as "any movement, however short in distance". The instruction is misleading because it is a partial definition and eliminates the seizure requirement and suffers from a significant grammatical error. *Garcia v. People*, 2022 CO 6, 503 P.3d 135 (overruling *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008), annotated above).

Phrase "without lawful justification" is not a term of art, nor does it connote some additional legal purpose ulterior to the act of seizing and transporting a nonconsenting victim. Instructing jury to give phrase "the common meaning that the words imply" was not plain error. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Conviction for second degree kidnapping that involves sexual assault requires proof of sexual assault beyond reasonable doubt. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

A defendant convicted of sexual assault and second degree kidnapping under subsection (3) is not subjected to unconstitutional "double punishment" in the sense of being convicted of two substantive offenses for the same conduct. The sexual assault factor under subsection (3) is a sentence enhancement factor, and, where, as

here, the intent of the legislature clearly authorizes a conviction of second degree kidnapping as a class 2 felony on the basis of a related conviction for sexual assault, the kidnapping conviction must be upheld. *People v. Powell*, 716 P.2d 1096 (Colo. 1986); *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

Analysis is identical for purposes of double jeopardy and merger doctrines. Sexual assault is not a lesser included offense of second degree kidnapping where the fact that sexual assault occurred in conjunction with kidnapping is used to raise the kidnapping from a class 4 to a class 2 felony. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Aguilar-Ramos*, 224 P.3d 402 (Colo. App. 2009); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Distinction between sentence-enhancement factor and element of separate offense. Subsection (3)(a) of this section does not create a separate and definable offense from that created in subsection (1) or (2); it simply relates to what felony level the offense entails. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Sexual assault is not a lesser included offense of, and therefore not merged into, second degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo.

1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005); *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007); *Lewis v. People*, 261 P.3d 480 (Colo. 2011); *People v. Herdman*, 2012 COA 89, 310 P.3d 170.

Section not vague. The kidnapping statutes, by using words such as "seize" and "imprison" to define the offenses, are not so vague that men of common intelligence and understanding are required to guess as to their application. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Essential elements of the crime of kidnapping are: (1) Willfulness or intent to do the act; (2) the act must be done without lawful authority; (3) there must be a seizing, or imprisoning; and (4) the act must be done against the victim's will, by means of force or otherwise. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

A material element of the crime of kidnapping is that a person must be held against his or her will. *People v. Johnson*, 183 Colo. 219, 516 P.2d 116 (1973).

Person is guilty of attempted second degree kidnapping if he knowingly engaged in conduct which is strongly corroborative of the firmness of his purpose to knowingly seize or carry another person from one place to another without his consent and without lawful justification. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

To sustain a conviction, prosecution must prove victim was seized and

transported without consent, but it is not necessary to show that the involuntariness exists from the beginning of the transaction if subsequently the victim is forcibly detained. *People v. Brown*, 622 P.2d 109 (Colo. App. 1980).

Robbery is not a lesser included offense to second degree kidnapping even though a robbery in conjunction with the second degree kidnapping may lead to an enhanced penalty for that crime. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

Movement for a "substantial" distance is not required as an element of second degree kidnapping. *People v. Apodaca*, 668 P.2d 941 (Colo. App. 1982), *aff'd in part, rev'd in part on other grounds*, 712 P.2d 467 (Colo. 1985).

Insubstantial movement of the victim is sufficient to satisfy the element of second degree kidnapping that the victim be carried from one place to another if the insubstantial movement causes increased risk of harm to the victim. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

The evidence, viewed in a light most favorable to the prosecution, satisfied the asportation element of second degree kidnapping. Even though moving the victim from the living room to the bedroom and then hallway was an insubstantial seizure and carrying, the movement did increase the risk of harm to the victim, thus satisfying the asportation element. Defendant increased the risk of harm to the victim by moving the victim to an area of the residence where an escape was less likely, and to an area where he was less

likely to be detected since there were no windows. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008).

Where it is unclear whether movement was substantial, jury should be instructed on relevance of increased risk of harm. *People v. Owens*, 97 P.3d 227 (Colo. App. 2004).

The element of this offense which requires that a person be moved "from one place to another" is not met where the victim is forced to move from his living room to his bedroom at gunpoint. *People v. Bell*, 809 P.2d 1026 (Colo. App. 1990).

"Significant movement" of the victim is not required as an element of kidnapping, but merely some movement which substantially increases the risk of harm to the victim. *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983); *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

The asportation element of second degree kidnapping is the movement by the defendant of the victim from one place to another. Evidence that the defendant's actions substantially increased a risk of harm to the victim may be relevant to whether asportation was proved in some cases, but creating such a risk is not an essential element of the offense. *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

The term "without lawful justification" in subsection (1) means acting in a manner not authorized or permitted by law and does not connote some additional illegal purpose ulterior to the act of seizing and transporting a nonconsenting victim from one place to

another. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Trial court did not commit plain error by failing to provide the jury with a clarifying definition of "without lawful justification". *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Although the jury was instructed as to first degree kidnapping and not second degree kidnapping, where the jury found all of the elements necessary to prove second degree kidnapping beyond a reasonable doubt, the judgment of conviction for second degree kidnapping should be entered upon remand to the trial court. *People v. San Emerterio*, 819 P.2d 516 (Colo. App. 1991), rev'd on other grounds, 839 P.2d 1161 (Colo. 1992).

All elements of crime of kidnapping must be present or the crime is not committed. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

The element contained in second degree kidnapping and not contained in false imprisonment, a lesser included offense, is that of transportation of the victim. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

False imprisonment is not a lesser included offense of attempted second degree kidnapping. Thus, a prosecutor can prove attempted second degree kidnapping without showing that the victim was actually seized or falsely imprisoned. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Prosecution must prove every material element of kidnapping including consent.

People v. Rutt, 179 Colo. 180, 500 P.2d 362 (1972).

Specific intent need not be proved by direct evidence but may be inferred from the circumstances surrounding the commission of the offense. *People v. McGill*, 190 Colo. 443, 548 P.2d 600 (1976).

Assault is not necessary element of the crime of kidnapping. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Subsection (2) prohibits unauthorized interference with parents' custodial right to their children. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Conduct constituting child kidnapping. Keeping a child in physical seclusion or keeping accurate information regarding the child's location from her parents, making it more difficult for the child's parents to discover her location, constitutes child kidnapping. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Subsection (2) does not require proof that a child be taken for any particular duration to show the actor's intent. Evidence proving that defendant violently took the child from the victim without telling her where he was going is sufficient to sustain the jury's guilty verdict. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

The offense of second degree kidnapping of a child in violation of subsection (2) does not impliedly require proof that the perpetrator took the child without the consent of a parent. Nothing in the language of this section suggests that the parent or guardian must be aware of the

defendant's intent at the time the child is taken. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

False imprisonment is a lesser nonincluded offense of second degree kidnapping committed in violation of subsection (2). Nothing in the language of subsection (2) suggests that the parent or guardian must be aware of the defendant's intent at the time the child is taken. Therefore, the absence of consent is not an implied element of second degree kidnapping committed in violation of subsection (2). *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

Both parents share an equal right to the custody of a child in the absence of a court order granting legal or physical custody to one parent or the other for purpose of application of this section. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986); *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

Therefore, even though the defendant father took his child from the mother, the prosecution was unable to prove the essential element of consent in the absence of a court order granting legal or physical custody of the child to the mother. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986).

The "taking" of a child under subsection (2) could occur without force with the intent to keep or conceal the child from his or her parent or guardian. The terms "entices" or "decoys" are not rendered meaningless by an interpretation of "takes" that encompasses nonforcible seizures.

People v. Kendall, 174 P.3d 791 (Colo. App. 2007).

Failure to include element of "knowingly" in instruction is error. The trial court's failure to include the element of "knowingly" in a second degree kidnapping instruction is plain error. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

Justification is not affirmative defense, but rather the state must prove unlawful justification as an essential element of the offense of second degree kidnapping. *People v. Rex*, 636 P.2d 1282 (Colo. App. 1981).

Voluntary intoxication not defense. The mental culpability requirement of both second degree kidnapping and first degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

Evidence sufficient to sustain conviction. *Yescas v. People*, 197 Colo. 379, 593 P.2d 358 (1979); *People v. Nunez*, 673 P.2d 53 (Colo. App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Where the assault by the defendant was a crime of physical force or violence, the victim had no choice in the matter, and the assault ended when the police arrived, the evidence was insufficient to support a first degree kidnapping charge but was sufficient to sustain a conviction for second degree kidnapping. *People v. Naranjo*, 612 P.2d 1099 (Colo. 1980).

Jury instruction held proper. People v. Johnson, 183 Colo. 219, 516 P.2d 116 (1973).

Applied in People v. Wilkerson, 192 Colo. 386, 559 P.2d 1107 (1977); Goodwin v. District Court, 197 Colo. 6, 588 P.2d 874 (1979); People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979); People v. Goodwin,

197 Colo. 47, 593 P.2d 326 (1979); People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Morgan, 637 P.2d 338 (Colo. 1981); People v. Swanson, 638 P.2d 45 (Colo. 1981); People v. Sharpless, 635 P.2d 896 (Colo. App. 1981); People v. Sanchez, 649 P.2d 1049 (Colo. 1982); People v. Gouker, 665 P.2d 113 (Colo. 1983).

18-3-303. False imprisonment.

(1) Any person who knowingly confines or detains another without the other's consent and without proper legal authority commits false imprisonment. This section does not apply to a peace officer acting in good faith within the scope of his or her duties.

(2) False imprisonment is a class 2 misdemeanor; except that false imprisonment is a class 5 felony if:

(a) (I) The person uses force or threat of force to confine or detain the other person; and

(II) The person confines or detains the other person for twelve hours or longer; or

(b) (I) The person confines or detains another person less than eighteen years of age in a locked or barricaded room under circumstances that cause bodily injury or serious emotional distress; and

(II) Such confinement or detention was part of a continued pattern of cruel punishment or unreasonable isolation or confinement of the child; or

(c) The person confines or detains another person less than eighteen years of age by means of tying, caging, chaining, or otherwise using similar physical restraints to restrict that person's freedom of movement under circumstances that cause bodily injury or serious emotional distress.

(3) Notwithstanding section 13-90-107 or any other provision of law, the statutory privilege between a patient and a physician or between an individual and his or her spouse is not available for the purpose of excluding or refusing testimony in any prosecution for a violation of this section where the conditions described in subsection (2)(b) or (2)(c) of this section are alleged.

(4) Nothing in this section limits the ability of a person to assert the affirmative defense described in section 18-1-703.

Source: L. 71: R&RE, p. 422, § 1. **C.R.S. 1963:** § 40-3-303. **L. 77:** Entire section amended, p. 961, § 14, effective July 1. **L. 2002:** Entire section amended, p. 1579, § 3, effective July 1. **L. 2018:** Entire section amended, (SB 18-119), ch. 299, p. 1821, § 1, effective August 8.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

The element contained in second degree kidnapping and not contained in false imprisonment, a lesser included offense, is that of transportation of the victim. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

False imprisonment is not a lesser included offense of attempted second degree kidnapping. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Probable cause for arrest prevents liability for false imprisonment. Where police officer had both probable cause to believe that an offense had been committed and that the plaintiff was the person who had committed it, he was not civilly liable for

false arrest and false imprisonment. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Acquittal not determinative of lawfulness of arrest. Acquittal of the plaintiff of the charge for which he was arrested and imprisoned is not determinative of the lawfulness of the arrest, as the officer's right to make an arrest is dependent upon the facts and circumstances in existence at the time of the arrest and not dependent upon the outcome of a subsequent trial. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Applied in *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

18-3-304. Violation of custody order or order relating to parental responsibilities.

(1) Except as otherwise provided in subsection (2.5) of this section, any person, including a natural or foster parent, who, knowing that he or she has no privilege to do so or heedless in that regard, takes or entices any child under the age of eighteen years from the custody or care of the child's parents, guardian, or other lawful custodian or person with parental responsibilities with respect to the child commits a class 5 felony.

(2) Except as otherwise provided in subsection (2.5) of this section, any parent or other person who violates an order of any district or juvenile court of this state, granting the custody of a child or parental responsibilities with respect to a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian or person with

parental responsibilities of the custody or care of a child under the age of eighteen years, commits a class 5 felony.

(2.5) Any person who, in the course of committing the offenses described in subsections (1) and (2) of this section, removes a child under the age of eighteen years from this country commits a class 4 felony.

(3) It shall be an affirmative defense either that the offender reasonably believed that his conduct was necessary to preserve the child from danger to his welfare, or that the child, being at the time more than fourteen years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child.

(4) Any criminal action charged pursuant to this section may be tried in either the county where the act is committed or in which the court issuing the orders granting custody or allocating parental responsibilities is located, if such court is within this state.

(5) Repealed.

Source: L. 71: R&RE, p. 422, § 1. C.R.S. 1963: § 40-3-304. L. 85: (4) amended, p. 618, § 11, effective July 1. L. 86: (5) added, p. 779, § 1, effective April 3. L. 98: (1) and (2) amended and (2.5) added, p. 1442, § 27, effective July 1; (1), (2), and (4) amended, p. 1403, § 56, effective February 1, 1999.

Editor's note: (1) Subsection (5)(c) provided for the repeal of subsection (5), effective December 2, 1986. (See L. 86, p. 779.)

(2) Amendments made to subsections (1) and (2) by House Bill 98-1160 and House Bill 98-1183 were harmonized, effective February 1, 1999.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983).

Defendant failed to carry his burden of proving this section unconstitutional by being so vague and overbroad that it failed to give fair notice of the criminal activity proscribed and therefore denied due process.

People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

This section is not unconstitutionally overbroad because a statute preventing the taking of a child in violation of a court order regarding custody is a legitimate exercise of police power. People v. Tippet, 733 P.2d 1183 (Colo. 1987).

Use of the word "custody" in subsection (2) is not unconstitutionally vague. People v. Tippet, 733 P.2d 1183 (Colo. 1987).

Use of the words "an order . . . granting custody . . ." in subsection (2), is not limited or qualified by type and court will not read into statute an exception, limitation, or qualifier that its plain language does not suggest, warrant, or mandate; subsection (2) penalizes violations of temporary and permanent custody orders alike and the rule of lenity does not apply. People v. Sorrendino, 37 P.3d 501 (Colo. App. 2001).

Temporary "care and control" provisions of restraining orders issued pursuant to §§ 14-4-102 and 14-10-108 qualify as an order granting custody within the meaning of subsection (2). People v. Sorrendino, 37 P.3d 501 (Colo. App. 2001).

A person awarded permanent custody becomes for all practical purposes "a parent". The legal custodian has a duty to care for a child, providing the basic necessities of life. The legal custodian has such rights to the exclusion of the natural parent. In addition, the general assembly has strengthened the position of a custodian through criminal sanctions for violation of a

custody order. A natural parent may be charged criminally for violating a custody order if there is intent to deprive the custodian of custody of a child. U.S. v. Al-Ahmad, 996 F. Supp. 1055 (D. Colo. 1998) (decided prior to the 1998 amendment).

"[T]he intent to deprive" can be committed by taking a child or by refusing to surrender a child. People v. Wilson, 2025 COA 94, 585 P.3d 248.

Violation of custody is a separate and distinct offense from second degree kidnapping. People v. Tippet, 733 P.2d 1183 (Colo. 1987); People v. Metcalf, 926 P.2d 133 (Colo. App. 1996).

Unit of prosecution for violation of a child custody order is the number of children affected, not the number of custody orders violated. The language of subsection (2) is unambiguous, and a reading of the statutory scheme as a whole suggests that the legislature did not intend to require a unique custody order for each individual child. People v. Wilson, 2025 COA 94, 585 P.3d 248.

Culpable mental state required by subsection (2) is the intent to deprive the lawful custodian of custody. No "knowing" mental state with respect to the custodial order itself is implied or needs be proven. People v. Metcalf, 926 P.2d 133 (Colo. App. 1996).

Jury instructions adequately encompassed defendant's theory of affirmative defense based on subsection (3). People v. Tippet, 733 P.2d 1183 (Colo. 1987).

Effect of habeas corpus on custody decree. Where the original custody award of a child and a subsequent habeas corpus proceeding are in the same state, but in different courts, although the habeas corpus court would not have jurisdiction to test the wisdom of or to modify the custody decree, it can and should make the writ permanent to enforce the decree and should order the child returned to the one lawfully entitled to custody. *Wood v. District Court*, 181 Colo. 95, 508 P.2d 134 (1973).

Evidence in support of affirmative defense to violation of custody may be limited to defendant's state of mind at or shortly before the time he took his daughter. *People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

The determination of temporal limitations upon the admission of affirmative defense evidence is within the sound discretion of the trial court. *People v. Beilke*, 232 P.3d 146 (Colo. App. 2009).

Exclusion of evidence of defendant's state of mind led to the incorrect denial of defendant's request for an affirmative defense instruction. *People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

Evidence held sufficient. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Applied in *People v. Coyle*, 654 P.2d 815 (Colo. 1982).

18-3-305. Enticement of a child.

(1) A person commits the crime of enticement of a child if he or she invites or persuades, or attempts to invite or persuade, a child under the age of fifteen years to enter any vehicle, building, room, or secluded place with the intent to commit sexual assault or unlawful sexual contact upon said child. It is not necessary to a prosecution for attempt under this subsection (1) that the child have perceived the defendant's act of enticement.

(2) Enticement of a child is a class 4 felony. It is a class 3 felony if the defendant has a previous conviction for enticement of a child or sexual assault on a child or for conspiracy to commit or the attempted commission of either offense, or if the enticement of a child results in bodily injury to that child.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: **L. 85:** Entire section added, p. 715, § 2, June 7. **L. 87:** (2) amended, p. 606, § 12, effective July 1. **L. 90:** (3) added, p. 1025, § 5, effective July 1. **L. 2000:** (1) amended, p. 711, § 48, effective July 1; (3) amended, p. 1846, § 30, effective August 2.

ANNOTATION

Attempted sexual assault of any degree sufficient. This statute requires proof only that the defendant acted with the intent to cause the result of a sexual assault of some degree upon a victim younger than fifteen years of age. Failure to complete sexual assault of particular degree is irrelevant. *People v. Black*, 759 P.2d 746 (Colo. App. 1988).

This section does not preclude a presentence remedy such as a deferred sentence under § 18-1.3-102. Until defendant is sentenced, the Lifetime Supervision Act does not apply. *People v. Loveall*, 203 P.3d 540 (Colo. App. 2008), *aff'd*, 231 P.3d 408 (Colo. 2010).

Communication with an adult intermediary is sufficient to prove the "invite or persuade" element. Statute does

not require evidence of direct communication between the defendant and a child. *People v. Douglas*, 2012 COA 57, 296 P.3d 234.

Defendant's invitation to child to sit on the couch satisfies the element of "inviting or persuading the child to enter a room". Invitation necessarily invited the child to enter a particular room in the home where the couch was located. *People v. Douglas*, 2012 COA 57, 296 P.3d 234.

The court defined the term "attempt" in accordance with its plain and ordinary meaning: "to make an effort" to invite or persuade. Under this definition, there was sufficient evidence to support defendant's conviction for enticement of a child under subsection (1). *People v. Johnson*, 2024 CO 32, 549 P.3d 957.

18-3-306. Internet luring of a child.

(1) An actor commits internet luring of a child if the actor knowingly communicates over a computer or computer network, telephone network, or data network or by a text message or instant message to a person who the actor knows or believes to be under fifteen years of age and, in that communication or in any subsequent communication by computer, computer network, telephone network, data network, text message, or instant message, describes explicit sexual conduct as defined in section 18-6-403 (2)(e), and, in connection with that description, makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be.

(2) It shall not be a defense to this section that a meeting did not occur.

(a) and (b) (Deleted by amendment, L. 2007, p. 1688, § 8, effective July 1, 2007.)

(3) Internet luring of a child is a class 5 felony; except that:

(a) Internet luring of a child is a class 4 felony if committed with the intent to meet for the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401; and

(b) Internet luring of a child is a class 3 felony if committed with the intent to meet for the purpose of engaging in commercial sexual activity with a child, as defined in section 18-3-502 (3). The court shall sentence a person convicted of internet luring of a child as described in this subsection (3)(b) to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

(4) For purposes of this section, "in connection with" means communications that further, advance, promote, or have a continuity of purpose and may occur before, during, or after the invitation to meet.

Source: **L. 2006:** Entire section added, p. 2055, § 4, effective July 1. **L. 2007:** (1) and (2) amended, p. 1688, § 8, effective July 1. **L. 2009:** (1) amended, (HB 09-1132), ch. 341, p. 1792, § 2, effective July 1. **L. 2026:** (3) amended, (SB 26-015), ch. 335, p. 2034, § 10, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

The statute is not unconstitutionally overbroad. The statute does not suppress a large amount of speech subject to constitutional protection. *People v. Boles*, 280 P.3d 55 (Colo. App. 2011).

The statute is not unconstitutionally vague. A person of common intelligence can determine what is prohibited by the statute.

People v. Boles, 280 P.3d 55 (Colo. App. 2011).

The statute does not violate the dormant commerce clause. Since the statute regulates conduct by adults who send sexually explicit messages that endanger the welfare of minors, there is no legitimate commerce that would be limited by the

statute. People v. Boles, 280 P.3d 55 (Colo. App. 2011).

The statute as applied to defendant was not unconstitutional. The record contains numerous sexually explicit messages from the defendant that were obscene in nature. People v. Boles, 280 P.3d 55 (Colo. App. 2011).

Convictions for internet luring of a child and internet sexual exploitation of a child under a complicity theory vacated because prosecution failed to prove that defendant committed the crimes or that defendant acted as an accomplice to a principal who committed the crimes. People v. Douglas, 2012 COA 57, 296 P.3d 234.

PART 4

UNLAWFUL SEXUAL BEHAVIOR

Editor's note: This title was repealed and reenacted in 1971, and this part 4 was subsequently repealed and reenacted in 1975, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 4 prior to 1975, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading. Former C.R.S. section numbers prior to 1975 are shown in editor's notes following those sections that were relocated.

Cross references: For introduction of evidence of similar acts or transactions by a defendant prosecuted pursuant to this part 4, see § 16-10-301.

18-3-401. Definitions.

As used in this part 4, unless the context otherwise requires:

(1) "Actor" means the person accused of a sexual offense pursuant to this part 4.

(1.5) "Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4.

(1.7) "Diagnostic test" means a human immunodeficiency virus (HIV) screening test followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) "Intimate parts" means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

(2.4) "Medical-reporting victim" means a victim who seeks medical treatment services following a sexual assault but who elects not to participate in the criminal justice system at the time the victim receives medical services.

(2.5) "Pattern of sexual abuse" means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

(3) "Physically helpless" means unconscious, asleep, or otherwise unable to indicate willingness to act.

(3.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

(4) "Sexual contact" means:

(a) The knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse;

(b) The knowing emission or ejaculation of seminal fluid onto any body part of the victim or the clothing covering any body part of the victim; or

(c) Knowingly causing semen, blood, urine, feces, or a bodily substance to contact any body part of the victim or the clothing covering any body part of the victim if that contact with semen, blood, urine, feces, or a bodily substance is for the purpose of sexual arousal, gratification, or abuse.

(5) "Sexual intrusion" means any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(6) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anilingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime.

(7) "Victim" means the person alleging to have been subjected to a criminal sexual assault.

Source: **L. 75:** Entire part R&RE, p. 627, § 1, effective July 1. **L. 83:** (4) amended, p. 697, § 1, effective March 3; (3.5) added, p. 693, § 1, effective June 15. **L. 86:** (3.5) amended, p. 770, § 6 effective July 1. **L. 88:** (2) amended, p. 712, § 17, effective July 1. **L. 89:** (2.5) added, p. 903, § 1, effective June 1. **L. 90:** (3.5) amended, p. 1028, § 15, effective July 1. **L. 92:** (1.5) added, p. 322, § 3, effective July 1. **L. 93:** (2) and (4) amended, p. 1731, § 15, effective July 1. **L. 2000:** (1.7) added, p. 452, § 5, effective April 24. **L. 2003:** (1) amended, p. 1432, § 22, effective April 29. **L. 2013:** (2.4) added, (HB 13-1163), ch. 215, p. 895, § 1, effective May 13. **L. 2019:** (4) amended, (HB 19-1155), ch. 76, p. 279, § 1, effective July 1.

Editor's note: This section is similar to former § 18-3-409 as it existed prior to 1975.

ANNOTATION

Law reviews. For note discussing changes in terminology and classification of offenses of part 4 of this article, and constitutional issues raised thereunder, see 53 Den. L.J. 349 (1976).

Statute not void for vagueness due to definition of "position of trust", since a person of ordinary intelligence could readily understand its meaning and application. *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

Defendant charged under former section where conduct occurred prior to effective time of amendatory section. Where the criminal conduct charged in a prosecution for rape occurred prior to 3:50 p.m., July 1, 1975, the time the governor signed the bill amending this section and

therefore the effective time of the amendment, the defendant was properly charged with rape under former § 18-3-401. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to commit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

Scientific evidence to support the victim's testimony is not a legal prerequisite to a jury's finding that the defendant is guilty of

unlawful sexual behavior. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983).

Definition of "sexual contact" construed. *People v. Myers*, 714 P.2d 513 (Colo. App. 1985); *People v. West*, 724 P.2d 623 (Colo. 1986); *People in Interest of J.A.*, 733 P.2d 1197 (Colo. 1987).

Definition of the term "sexual contact" is not unconstitutionally vague. *People v. West*, 724 P.2d 623 (Colo. 1986); *People in the Interest of J.A.*, 733 P.2d 1197 (Colo. 1987); *People v. Jensen*, 747 P.2d 1247 (Colo. 1987).

"[A]ny sexual contact" is as an unlimited, nonrestrictive phrase that generally encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

Whether a juvenile acted for the purpose of sexual gratification is a separate element of the definition of "sexual contact" and must be determined on a case-by-case basis. The trier of fact must consider all relevant circumstances, including the juvenile's age and maturity, before inferring the requisite intent. *People in Interest of J.O.*, 2022 COA 65M, 517 P.3d 1259.

It may not, and often will not, be appropriate for the fact finder to ascribe the same intent to a juvenile's act of "sexual contact" that one could reasonably ascribe to the same act of "sexual contact" if performed by an adult. Although a juvenile is capable of acting for the purpose of sexual gratification, there must be other evidence of

the juvenile's sexual purpose beyond the sexual contact itself. *People in Interest of J.O.*, 2022 COA 65M, 517 P.3d 1259.

"Sexual" in subsection (4) modifies not only "arousal" but also "abuse". *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

Sexual abuse encompasses both physical and emotional pain, injury, or significant discomfort. *People v. Espinosa*, 2020 COA 63, 465 P.3d 114.

There is no requirement that there be sexual motivation or lewdness when proving sexual abuse, instead the intent must be to cause pain, injury, or discomfort to an intimate part. It is the nature of the act that makes the abuse sexual, not the motivation of the perpetrator. *People v. Lovato*, 2014 COA 113, 357 P.3d 212.

But the perpetrator's motivation is still relevant to the determination. While the perpetrator need not be motivated by passion, lust, lasciviousness, or lewdness, the perpetrator must act for the purpose of causing sexual humiliation, sexual degradation, or other physical or emotional discomfort of a sexual nature. *People v. Espinosa*, 2020 COA 63, 465 P.3d 114.

The distinction of numerous "intimate parts" merely demarcates different intimate parts of the human anatomy and has no effect on the scope of conduct the general assembly sought to criminalize. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

Semen does not constitute an "intimate part" for purposes of establishing "sexual contact". *People v. Ramirez*, 2018 COA 129, 488 P.3d 382.

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing "sexual contact". People v. Vinson, 42 P.3d 86 (Colo. App. 2002).

Striking a person's intimate parts with an implement or object, rather than with a part of the actor's own body, can constitute "touching" for purposes of subsection (4)(a). Whipping the victim with a belt on her buttocks for the purpose of sexual arousal, gratification, or abuse can constitute unlawful sexual contact. People v. Abdulla, 2020 COA 109M, 486 P.3d 380.

"Consent" and the affirmative defense of consent discussed in People v. Williams, 899 P.2d 306 (Colo. App. 1995).

Jury instruction on "consent" properly provided to jury. The instruction substantially tracked the language of this section. The slight variance from the statute was only to clarify properly that the definition was applicable to first degree sexual assault. The definition was important to explain to the jury the specialized meaning of "consent" in the context of sexual assault. People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

The term "pattern of sexual abuse" is clearly and unambiguously defined in this section and, therefore, the sentencing enhancement provision of § 18-3-405 (2)(c) which incorporates that term is not unconstitutionally vague. People v. Longoria, 862 P.2d 266 (Colo. 1993).

The phrase "two or more incidents of sexual contact" in the definition of

"pattern of sexual abuse" means that the sexual contacts must occur during distinct episodes of sexual assault and be separated by time or an intervening event. People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

The term "victim" means "intended victim" in the context of a conviction for attempted sexual assault. People v. Buerge, 240 P.3d 363 (Colo. App. 2009).

A defendant can be charged with one pattern count for each underlying substantive count. People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

Evidence sufficient to establish victim was "physically helpless". Record demonstrated that there was sufficient evidence from which the jury could find that the victim was unable to indicate a willingness to act and therefore "physically helpless" within the statutory definition of that term. There was testimony that the victim was virtually unable to converse and required total care; that she needed assistance in everything she did; that while she could at times respond to a simple yes-or-no question, her answers could be nonsensical or inaccurate; that she was physically incapable of protecting herself against any attack; that she was in a locked facility for her own protection, because she would otherwise wander away; and that the Alzheimer's disease affected her both mentally and physically. People v. Klausner, 74 P.3d 421 (Colo. App. 2003).

Trial court committed reversible error by refusing defendants' request to

instruct the jury on the affirmative defense of consent where the evidence bearing on the possible existence of consent, while not strong, at least satisfied the "scintilla" standard required for an instruction on an affirmative defense. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

Because the alleged victim's alleged consent would have "negative[d] an element of the [sexual assault] offense", the trial court was required to instruct the jury on the affirmative defense of consent. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

A stepparent is in a position of trust for purposes of this section. *People v. Brown*, 749 P.2d 436 (Colo. App. 1987); *People v. Brown*, 761 P.2d 261 (Colo. App. 1988).

Jury could conclude that defendant was "in a position of trust" relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999) (decided prior to 1990 amendment).

Upon taking the victim to defendant's home where the two of them were to be alone, defendant assumed responsibility for the welfare and supervision of the child both

en route and in the home. *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

Defendant in "position of trust" even though he was not performing a specific supervisory duty at the time of the unlawful act. Where victim was pastor's daughter and defendant previously taught victim in Sunday school, defendant and his wife babysat for victim and her sister on several occasions, defendant joined victim's family often for dinner, defendant helped victim and her sisters with their school work, defendant chaperoned church trip for victim, and victim's parents allowed victim to go to defendant's house by herself to ride horses, defendant assumed a position of trust through an ongoing and continuous supervisory relationship with victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

A "position of trust" for purposes of § 18-3-405.3 and subsection (3.5) of this section may be a supervisory position that exists for a "brief" period—a matter of hours or days—or it may extend over a long relationship. Defendant's discrete acts of supervision were the product of the general position of trust that defendant assumed in relation to victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

Court did not decide whether definition of "sexual penetration" requires penetration during cunnilingus. However, court found that victim's testimony that defendant "kissed her on her vagina" was sufficient to show penetration, however slight, for purposes of sexual assault offense.

People v. Morales, 2014 COA 129, 356 P.3d 972.

Any deficiency in instructions with respect to definition of sexual contact was harmless error when evidence concerning defendant's touching of victim could not reasonably be construed as being for any purpose other than sexual arousal, gratification, or abuse. People in Interest of B.D.S., 739 P.2d 902 (Colo. App. 1987).

Trial court properly refused to instruct jury concerning consent as an affirmative defense in sexual assault case. Affirmative defense not warranted where one victim

testified that she did not resist or cry out when defendant assaulted her and another testified that her failure to resist or cry out was motivated by fear and that her submission was induced by fear, People v. Braley, 879 P.2d 410 (Colo. App. 1993).

Applied in People v. Osborn, 42 Colo. App. 376, 599 P.2d 937 (1979); People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980); People v. Opson, 632 P.2d 602 (Colo. App. 1980); People v. Reynolds, 638 P.2d 43 (Colo. 1981); People v. Mack, 638 P.2d 257 (Colo. 1981); People v. Thatcher, 638 P.2d 760 (Colo. 1981); People v. Salazar, 648 P.2d 157 (Colo. App. 1981).

18-3-402. Sexual assault.

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes sexual intrusion or sexual penetration knowing the victim does not consent; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

(2) Sexual assault is a class 4 felony, except as provided in subsections (3), (3.5), (4), and (5) of this section.

(3) If committed under the circumstances of subsection (1)(e) of this section, sexual assault is a class 6 felony. Notwithstanding any other provision of law, a person convicted of subsection (1)(e) of this section is eligible to petition for removal from the registry in accordance with section 16-22-113 (1)(b).

(3.5) Sexual assault is a class 3 felony if committed under the circumstances described in paragraph (h) of subsection (1) of this section.

(4) Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence; or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain.

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission.

(e) (Deleted by amendment, L. 2002, p. 1578, § 2, effective July 1, 2002.)

(5) (a) Sexual assault is a class 2 felony if any one or more of the following circumstances exist:

(I) In the commission of the sexual assault, the actor is physically aided or abetted by one or more other persons; or

(II) The victim suffers serious bodily injury; or

(III) The actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim.

(b) (I) If a defendant is convicted of sexual assault pursuant to this subsection (5), the court shall sentence the defendant in accordance with section 18-1.3-401 (8)(e). A person convicted solely of sexual assault pursuant to this subsection (5) shall not be sentenced under the crime of violence provisions of section 18-1.3-406 (2). Any sentence for a conviction under this subsection (5) shall be consecutive to any sentence for a conviction for a crime of violence under section 18-1.3-406.

(II) The provisions of this paragraph (b) shall apply to offenses committed prior to November 1, 1998.

(6) Any person convicted of felony sexual assault committed on or after November 1, 1998, under any of the circumstances described in this section shall be sentenced in accordance with the provisions of part 10 of article 1.3 of this title.

(7) A person who is convicted on or after July 1, 2013, of a sexual assault under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

Source: **L. 75:** Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** (1) amended, p. 962, § 15, effective July 1. **L. 83:** IP(1) amended, p. 698, § 1, effective July 1. **L. 85:** (2) R&RE and (3) and (4) amended, pp. 666, 667, §§ 1, 2, effective July 1. **L. 95:** (4) amended, p. 1252, § 9, effective July 1. **L. 98:** (4) amended, p. 1293, § 13, effective November 1. **L. 2000:** Entire section R&RE, p. 698, § 18, effective July 1. **L. 2002:** (1)(g), (2), and (4)(e) amended and (1)(h) and (3.5) added, p. 1578, §§ 1, 2, effective July 1; (5)(b)(I) and (6) amended, p. 1512, § 189, effective October 1. **L. 2004:** (3) and (6) amended, p. 635, § 5, effective August 4. **L. 2013:** (7) added, (SB 13-227), ch. 353, p. 2060, § 6, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3174, § 197, effective March 1, 2022. **L. 2022:** (1)(a) amended, (HB 22-1169), ch. 41, p. 214, § 1, effective July 1.

Editor's note: This section is similar to former § 18-3-401 as it existed prior to 1975.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5)(b)(I) and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminality of Voluntary Sexual Acts in Colorado", see 40 U. Colo. L. Rev. 268 (1968). For article, "Reform Rape Legislation: A New Standard of Sexual Responsibility", see 49 U. Colo. L. Rev. 185 (1978). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

Annotator's note. Since § 18-3-402 is similar to § 18-3-402 as it existed prior to its 2000 repeal and reenactment, and former § 18-3-402 is similar to former § 18-3-401, as it existed prior to the 1975 revision of this part, and § 40-2-25, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally vague where it sets out the act, the requisite

mental state, and the content of the threat used to force the victim's submission, and each of these elements is defined. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

The "sufficient consequence" language in subsection (1)(a) is not unconstitutionally vague. *People v. Komar*, 2015 COA 171M, 411 P.3d 978.

This section does not violate equal protection. Putting a victim of sexual assault in fear — and in danger — of losing life and limb is a graver and more morally reprehensible act than subjecting the victim to lesser threats. The two kinds of threats are constitutionally distinguishable. Statutes proscribing acts based on this distinction do not violate equal protection. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Prohibition against double punishment for same criminal act is not violated where a defendant is found guilty of first degree kidnapping and first degree sexual assault for the same criminal episode. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

Application of 2008 Colorado sex offender management board handbook not ex post facto violation in regard to pre-

2008 misdemeanor sexual assault because sexually violent predator statute, not the handbook, applied to defendant's case. Said statute clearly covered defendant's misdemeanor sexual assault for the time the crime was committed. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

It is clear that the general assembly intended to impose a more severe punishment in situations in which more than one person commits the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Rape and incest were separate and distinct crimes with certain different elements essential to their proof; either or both of these crimes may be charged in an appropriate factual situation. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Before July 1, 1977, "knowingly" was not statutory element of first degree sexual assault, and it was not necessary, therefore, to include that factor in the definition of the crime, so long as the general intent factor was covered elsewhere in the instruction. *People v. Mattas*, 44 Colo. App. 139, 618 P.2d 675 (1980), *aff'd*, 645 P.2d 254 (Colo. 1982).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under § 18-3-301 (1)(a), this section, and § 18-4-301 (1). *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Attempted sexual assault and sexual assault convictions merge, so the attempted sexual assault conviction must be vacated. *People v. Marko*, 2015 COA 139, 434 P.3d 618, *aff'd*, 2018 CO 97, 432 P.3d 607.

For lesser included offense of crime of rape, see *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959); *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976); *People v. Hansen*, 191 Colo. 175, 551 P.2d 710 (1976).

Section 18-3-409 and this section are severable so that even if the former were invalidated, the latter would still be capable of enforcement. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Individuals convicted of misdemeanor sexual assaults in violation of subsection (1)(e) should not be excluded from designation as sexually violent predators. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

Because sexually violent predator statute, § 18-3-414.5, plainly covers misdemeanor sexual assault, court need not consider any agency publications. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

Even if the defendant's 18-year-old wife could not be prosecuted for having sex with a 15-year-old girl, the defendant could still be prosecuted for photographing his wife with the girl pursuant to § 18-6-403. *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

Victim's submission to assault insufficient concession for first degree

kidnapping. Proof of the victim's submission to a sexual assault is not sufficient per se to establish the concession required for first degree kidnapping. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Voluntary intoxication not defense. The mental culpability requirement of both second degree kidnapping and first degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

For constitutionality of former statute relating to deviate sexual intercourse by force or its equivalent, see *People v. Beaver*, 190 Colo. 554, 549 P.2d 1315 (1976).

For lesser included offense of former crime of deviate sexual intercourse by force or its equivalent, see *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976).

For cases construing former statute relating to deviate sexual intercourse by force or its equivalent, see *Martin v. People*, 114 Colo. 120, 162 P.2d 597 (1945); *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969); *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

The offenses of first and second degree sexual assault are mutually exclusive. Second degree sexual assault is not a lesser included offense of the crime of first degree sexual assault. *People v. Shields*, 822 P.2d

15 (Colo. 1991) (overruling *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990)).

There is no merger between what was formerly first degree sexual assault and second degree assault even if both involved the proof of serious bodily injury. Although the infliction of serious bodily injury for purposes of the sexual assault statute raised the class of felony for which one could be convicted, it was not an element of the offense itself. *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

The aggravators found in subsection (4) apply to attempted sexual assaults in addition to completed sexual assaults. *People v. King*, 151 P.3d 594 (Colo. App. 2006).

Each unit of prosecution for sexual assault by means of penetration requires evidence of sexual penetration that transpired in a factually distinct act or incident. In the definition of "sexual penetration", the legislature intended to describe alternative means of committing the element of sexual penetration in a single assault, rather than to create separate offenses for each type of sexual penetration. *People v. Morales*, 2014 COA 129, 356 P.3d 972.

A conviction under subsection (1)(e) is not a "crime of violence" under § 4B1.2 of the United States sentencing guidelines. *United States v. Wray*, 776 F.3d 1182 (10th Cir. 2015).

Applied in *People ex rel. VanMeveren v. District Court*, 195 Colo. 1, 575 P.2d 405 (1978); *People v. Reynolds*, 195 Colo. 386,

578 P.2d 647 (1978); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Jacobs*, 198 Colo. 75, 596 P.2d 1187 (1979); *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979); *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. DeLeon*, 44 Colo. App. 126, 613 P.2d 639 (1980); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Evans*, 630 P.2d 94 (Colo. App. 1981); *People v. Crespín*, 631 P.2d 1144 (Colo. App. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. District Court*, 663 P.2d 616 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

II. ELEMENTS OF OFFENSE.

Victim must show resistance or that resistance was overcome by fear. To constitute the crime of rape there must be the utmost reluctance and resistance on the part of the female complainant, or her will must be overcome by fear and terror so

extreme as to preclude resistance. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

This section recognizes the offense even though there is no actual resistance where the female person is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Acts and circumstances may obviate the necessity of proof of physical resistance, as where they show fear making it impossible, or conditions making it useless. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Proof of sexual intrusion is sufficient to support a conviction for first degree sexual assault. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

Sexual intercourse for the purposes of sexual assault does not include simulated intercourse. *People v. Jurado*, 30 P.3d 769 (Colo. App. 2001).

Where the jury is properly instructed as to the elements of the offense and the term "knowingly," the jury should properly focus on whether the defendant knowingly caused submission of the victim through the application of physical force or violence. The defendant's awareness of the victim's nonconsent is neither an element of the offense nor a topic for argument to the jury. *People v. Dunton*, 881 P.2d 390 (Colo. App. 1994).

An offense under subsection (1)(e) is a strict liability offense. *United States v. Wray*, 776 F.3d 1182 (10th Cir. 2015).

Nothing in the plain language of subsection (1)(b) suggests that the section is limited to cases involving victims who suffer from a mental infirmity. *People v. Platt*, 170 P.3d 802 (Colo. App. 2007), *aff'd*, 201 P.3d 545 (Colo. 2009).

The coexistence of subsections (1)(b) and (1)(h) represents a reasoned legislative determination that, depending on the facts of a particular case, a victim who is partially asleep and incapable of appraising the nature of his or her own conduct may not necessarily be physically "unable to indicate willingness to act." *People v. Platt*, 170 P.3d 802 (Colo. App. 2007), *aff'd*, 201 P.3d 545 (Colo. 2009).

Proof of defendant's awareness of nonconsent is not necessary under this section, except under the circumstances described in subsection (1)(e) (now (1)(h)). In all other circumstances, the prohibited conduct by its very nature negates the existence of the victim's consent. *Dunton v. People*, 898 P.2d 571 (Colo. 1995); *Platt v. People*, 201 P.3d 545 (Colo. 2009).

And it is not error for trial court to refuse jury instruction on the affirmative defense of consent where the statute equates the victim's nonconsent with proof that defendant had caused the victim's submission by means "of sufficient consequence reasonably calculated to cause submission against the victim's will". In such case, the jury can only convict a defendant after concluding that the prosecution has proved the victim's lack of consent beyond a reasonable doubt. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Submission induced by fear of great bodily harm does not constitute consent, especially where the threats are accompanied by a demonstration of actual force. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Principles of complicity apply to sexual assault in the first degree such that, if the actor or an accomplice is armed with and uses a deadly weapon, then both may be found to have committed a class 2 felony. *People v. Walford*, 716 P.2d 137 (Colo. App. 1985).

Sexual assault is not a lesser included offense of, and therefore not merged into, second-degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

For first degree assault to be elevated from a class 3 felony to a class 2 felony, there must be more than one person involved in the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Evidence insufficient to support jury's determination that defendant physically aided or abetted in the commission of the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

The term "extreme pain" is one of ordinary and not technical usage. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Extreme pain measure of criminal conduct. The term "extreme pain" as used in

subsection (1)(b) of this section is a measure of criminal conduct and a gauge for determining whether the threat was the cause for the victim's submission; it is not so vague or overbroad as to render the section unconstitutional. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Evidence that defendant's body weight caused victim to submit against his or her will is sufficient to establish probable cause to believe that defendant applied the physical force required under subsection (4)(a). Physical force means force applied to the body and physical violence means unjust or unwarranted exercise of physical force. These definitions do not require an extra application of force other than any force applied to the body, but the physical force or physical violence must cause the victim to submit to sexual intrusion or sexual penetration. *People v. Keene*, 226 P.3d 1140 (Colo. App. 2009).

Element of submission through actual application of physical force or physical violence is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Although both victims were ultimately able to escape, the evidence still showed defendant used physical force to effectuate submission to his illegal sexual contacts. *People v. Bryant*, 2013 COA 28, 316 P.3d 18.

Term "attended" in subsection (3) is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Threats of future retaliation not made until after the assault were insufficient to

establish the class 3 felony aggravator under subsection (4)(c). *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010), overruled in *Page v. People*, 2017 CO 88, 402 P.3d 468, as annotated below.

Unlawful sexual contact is a lesser included offense of sexual assault. When a defendant is convicted of both offenses based on the same conduct, the conviction for unlawful sexual contact merges into the conviction for sexual assault. Establishing the elements of sexual assault by means of penetration necessarily establishes the elements of unlawful sexual contact. The elements of unlawful sexual contact are a subset of the elements of sexual assault by means of penetration. *Page v. People*, 2017 CO 88, 402 P.3d 468 (overruling *Loyas v. People*, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise).

The sentence enhancer in subsection (4)(a) does not require proof of a mens rea. *Garcia v. People*, 2019 CO 64, 445 P.3d 1065.

III. TRIAL AND PROSECUTION.

A. In General.

B. Indictment or Information.

C. Evidence.

D. Jury.

E. Instructions.

A. In General.

Where acts were continuous people may be compelled to rely on certain act.

Where in a prosecution under this section of a male for having carnal knowledge of an unmarried female, it appearing that the illicit intercourse was continuous, the people may on motion be compelled to select the occasion upon which they will demand a conviction, and this selection must be made before the accused is required to proceed to his defense. The prosecutor is not required to select any specific date, but must individualize a certain act upon which he will rely. *Laycock v. People*, 66 Colo. 441, 182 P. 880 (1919).

Where there was evidence of several different acts committed at different times, it was error to refuse to require the prosecuting attorney to elect upon which offense he would rely for a conviction. *Schuette v. People*, 33 Colo. 325, 80 P. 890 (1905).

On the trial of a statutory rape case, election of the district attorney to rely upon a particular offense committed on or about a certain date, at the conclusion of the state's case and before the beginning of the case for the defense, held not to violate the rule in *Laycock v. People* (66 Colo. 441, 182 P. 880 (1919)). *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Leading questions addressed to prosecuting witness 14 years of age on direct examination may be permitted in the discretion of the trial court, and the supreme court will not reverse an action on such ground unless it clearly appears that defendant was denied a fair trial. *Ewing v. People*, 87 Colo. 6, 284 P. 341 (1930).

Discretionary power of court to permit district attorney to reopen case.

Permission to the district attorney in a prosecution for rape to reopen his case for the purpose of showing the age of defendant is properly granted by the court as within its discretionary powers. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

B. Indictment or Information.

Information need not follow exact language of section. It is sufficient that the offense be charged in language from which the nature of it may be readily understood by the accused and the jury. *Tracy v. People*, 65 Colo. 226, 176 P. 280 (1918); *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

One count may contain different ways crime committed. It is proper in one count of an information to charge in all ways in which a crime may be committed by the use of the word "and" even where the statute uses "or". *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Information which contained substantially same language as this section not defective as description of charges permitted defendant to adequately defend himself and ensured defendant would not be prosecuted again for same offense.

People v. Mogul, 812 P.2d 705 (Colo. App. 1991).

C. Evidence.

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990).

Evidence necessary to prove act. Though it is true that the law does not require the female's statement of actual penetration, nevertheless, some evidence other than an inference is essential to prove the act. Generally, it is held that uncorroborated evidence by the prosecution must be clear and convincing or that it should be scrutinized carefully. Martinez v. People, 160 Colo. 534, 422 P.2d 44 (1966).

When the evidence of defendant's guilt was overwhelming and the issue of whether the defendant acted knowingly was not contested at trial, the trial court's error in instructing the jury on the meaning of "knowingly" is not plain error in defendant's conviction for sexual assault in the first degree. Espinoza v. People, 712 P.2d 476 (Colo. 1985).

Circumstances tending to discredit prosecutrix. The failure of the prosecutrix to avail herself of assistance when at hand, to report the assault at the earliest possible moment, and to call immediate attention to the injuries received and afterwards complained of, are circumstances tending to discredit the testimony of the party alleged

to have been outraged. Bueno v. People, 1 Colo. App. 232, 28 P. 248 (1891).

For complaint of prosecutrix as evidence, see Donaldson v. People, 33 Colo. 333, 80 P. 906 (1905).

Corroborative testimony of prompt complaint by an alleged victim is properly admitted in a rape case, but even that exception is restricted to the mere fact of complaint, and the details of the occurrence as related to an investigating officer by a prosecutrix and his opinions as to the seriousness of the charge and the difficulties of prosecution as told to the prosecutrix are never admissible in evidence. People v. Montague, 181 Colo. 143, 508 P.2d 388 (1973).

A complaint about a sexual assault, made soon after its occurrence, can constitute corroboration of the victim's testimony. People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

In sexual assault cases, testimony tending to prove the promptness of the victim's complaint to the police is admissible corroboration evidence. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

An 11-year-old victim's complaint to her nine-year-old sister on the day immediately following a sexual assault by their father was sufficient to corroborate the victim's testimony to the effect that sexual penetration had occurred during the assault. People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

Evidence that the victim of a sexual assault failed to make a complaint soon after

the crime is admissible as a circumstance which tends to discredit that person's testimony. *People v. Oliver*, 665 P.2d 152 (Colo. App. 1983).

Testimony of officer as to victim's credibility improper. When a police officer who investigates a rape complaint made by a prosecutrix, is permitted to testify as to statements he made to her about his opinions on the seriousness and difficulties experienced by a prosecutrix in rape prosecutions, there is error because the testimony improperly lends credibility to the testimony of the prosecuting witness. *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

Permissible police testimony is restricted to the mere fact of the victim's complaint and may not encompass the details related to the investigating officer. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Testimony of prosecutrix' physical handicap is admissible on issue of her ability to resist forcible attack, notwithstanding contention that such testimony is offered solely to invoke sympathy. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence as to day of offense. Under an information charging the crime of rape to have been committed on a certain day, evidence is admissible of any rape committed by defendant on the prosecuting witness prior to the filing of the information and within the statute of limitations. *Schuetz v. People*, 33 Colo. 325, 80 P. 890 (1905).

Approximate date sufficient where there is evidence of several offenses. In a prosecution for rape, there being evidence of the commission of several offenses, the district attorney is not required to fix a definite date of the occurrence upon which he relies for a conviction, the time being alleged as "on or about" a certain date. The approximate date is sufficient, the specific occasion being definitely identified. *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Birth of child is sufficient to establish sexual intercourse. In a prosecution for rape, the fact that prosecutrix gave birth to a child was sufficient evidence to establish sexual intercourse. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

Evidence of abortion not error. Where defendant convicted of statutory rape contends admission of doctor's testimony to prosecutrix' therapeutic abortion is error, court will not consider such for first time on appeal. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence of intercourse insufficient. It cannot be inferred in law that because defendant intended to rape his victim or that her clothes were torn that an act of sexual intercourse took place or that there was any penetration. The latter is mere conjecture and does not rise to the dignity of legal proof. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

Evidence sufficient to support jury's conclusion that defendant used deadly weapon to force victim to submit to first-degree sexual assault. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Other crimes related to force and were properly admitted. Where evidence of kidnapping, assault, and the forced commission of another sexual act tended to prove the res gestae and the force element of rape, it was not error to admit such evidence of other crimes because they were not wholly independent of the offense charged. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

Aiding or abetting does not require physical assistance during the actual act of penetration. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Evidence sufficient to support a general verdict based upon the alternative methods of committing sexual assault in the first degree, including the third alternative of causing the victim's submission with threats of future retaliation. *James v. People*, 727 P.2d 850 (Colo. 1986).

Evidence that defendant knocked victim unconscious at some point before they had sex establishes that defendant had means to cause submission against the victim's will. *People v. Marko*, 2015 COA 139, 434 P.3d 618, *aff'd*, 2018 CO 97, 432 P.3d 607.

Evidence sufficient to sustain conviction. *Harlan v. People*, 32 Colo. 397, 76 P. 792 (1904); *Boegel v. People*, 95 Colo. 319, 35 P. 2d 855 (1934); *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944); *Armstead v. People*, 168 Colo. 485, 452 P.2d 8 (1969); *People v. Duran, Jr.*, 179 Colo. 129, 498 P.2d 937 (1972); *Yescas v. People*, 197 Colo. 379, 593, P.2d 358 (1979); *People v. Powell*, 716 P.2d 1096 (Colo. 1986);

People v. Mogul, 812 P.2d 705 (Colo. App. 1991).

Evidence to support multiple convictions. Evidence of three separate and distinct incidents of sexual assault which occurred in three different ways, each in a separate time period, is sufficient to support a finding of guilty on three separate counts under this section. *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

Evidence insufficient to support conviction. A conviction for rape based solely upon the evidence of the prosecuting witness, who had passed the age of consent at the time of the alleged crime, where there was no evidence as to what force was used or what resistance was made, and no evidence that the consent of the prosecuting witness was obtained or her resistance prevented by any threat of defendant or fear of violence at his hands, the only threat testified to being a threat to kill her and the rest of the family if she told of the acts, evidence was insufficient to support conviction. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

Evidence insufficient to support conviction as a matter of law under the "physically aided and abetted" standard of subsection (3)(a). *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).

There was sufficient evidence of the required element of penetration beyond a reasonable doubt where the victim testified to the occurrence of penetration and the codefendant pleaded guilty to a crime involving penetration, admitted intrusion with his fingers, and admitted he and the

defendant "raped" the victim. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

The victim's testimony describing soreness, the counselor's testimony that both defendant and the victim were naked from the waist down, and the defendant's statement that "it was consensual" were sufficient circumstantial evidence to prove penetration occurred. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

There was sufficient evidence of an attendant circumstance that defendant impaired victim's power to appraise or control victim's conduct by employing, without victim's consent, a drug to cause victim's submission where defendant gave victim a pill he described as comparable to taking eight naproxen pills for victim's headache, victim blacked out shortly after taking the pill, victim awoke to defendant having sex with her, victim could not move or talk at the time, and victim soon blacked out again. *People v. Garcia*, 2012 COA 79, 296 P.3d 285.

There was sufficient evidence to show victim incapable of appraising the nature of her conduct when defendant was having sex with her. The record showed that the victim suffers from cognitive difficulties and that she took medication prior to bedtime that made her groggy and sleepy. The jury could have inferred, either separately or together, that she was incapable of appraising the nature of her conduct. The jury was not required to agree on the evidence or theory that established the element. *People v. Bertrand*, 2014 COA 142, 342 P.3d 582.

Trial court did not err in providing a dictionary definition of the term "submission" which did not include physical force or violence in response to a jury inquiry, where the jury was explicitly instructed that one of the elements of first degree sexual assault was that the defendant caused the victim's submission through the actual application of physical force or physical violence. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

Trial court erred by admitting victim impact evidence, but error was harmless. The evidence was irrelevant because it did not make any material fact or element of the offense more or less probable, but the error was harmless because it did not substantially influence the verdict or impair the fairness of the trial. *People v. Martinez*, 2020 COA 141, 486 P.3d 412.

But trial court did not err when it admitted victim impact evidence that tended to show the context or circumstances of the crime itself, and any unfair prejudice from the jury sympathizing with the victim was not likely to substantially outweigh the relevance of the evidence. *People v. Mena*, 2025 COA 14, ___ P.3d ___.

D. Jury.

Evidence determines if lesser offense is submitted to jury. It does not follow from the conclusion that the aggravated assault need not be specifically pleaded that a court is invariably required to submit the lesser included crime to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is

charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Where there was uncontroverted evidence that the sexual penetration was obtained by means of physical force, it was not error for the trial court to refuse to instruct the jury on the lesser offense of second degree sexual assault. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

Where the evidence is sufficient to support a charge of assault with intent to commit rape, and such as to justify a simultaneous acquittal of the charge of rape, refusal of a trial court to submit a verdict and instruction on assault with intent to commit rape is error. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Failure of the court to construct an assault with intent to commit rape as a lesser included offense of forcible rape does not affect substantial rights of defendant, and is therefore not cognizable as plain error where defendant was convicted of statutory rape and at trial had denied both assault and commission of act itself. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Jury to evaluate threat. It is for the jury to decide the magnitude of the threat and to evaluate the victim's belief of the defendant's ability at the time the threats were made to carry them out. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

E. Instructions.

"Force" requires no further definition.

The trial court does not commit reversible error by failing to define "force" in its instructions. An instruction which contains the word "force", with no further definition, is written in plain understandable English. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

The court properly defined "physical force" and "physical violence" in its instructions. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

Instructions as to corroboration.

Instruction to the effect that testimony of prosecutrix must be corroborated by other evidence, such as evidence of a struggle, or by making proof of complaint by prosecutrix at her earliest opportunity, or by other evidence tending to prove the commission of the offense charged was held not subject to the criticism that it authorized conviction of forcible rape without any corroboration of testimony of prosecutrix with respect to the question of whether or not the act of intercourse was accompanied by force. *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944).

Complicity instruction not error simply because possibility of inconsistent verdict.

The trial court did not err by instructing on complicity and on sexual assault when the defendant was aided or abetted by others simply because the instructions, when given together, could lead to an inconsistent verdict. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980).

Aiding or abetting must be established beyond a reasonable doubt. Jury instructions which did not inform the jury that being "physically aided or abetted" had to be established beyond a reasonable doubt, coupled with conflicting evidence presented at trial on the issue of aiding or abetting, requires reversal of defendant's conviction for first degree sexual assault as a class two felony. *Beigel v. People*, 683 P.2d 1188 (Colo. 1984).

For deadly weapon sexual assault, it is sufficient to instruct the jury that it needs to consider whether a deadly weapon was used to cause submission. The jury does not need to determine whether submission was obtained by actual physical force or by sufficient consequences reasonably calculated to cause submission. *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Instruction on fear as substitute for force required. In a prosecution for rape following a vicious assault on a victim, the people are entitled to an instruction which adequately and clearly defines fear and apprehension of bodily injury as a substitute for the ingredient of force. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Court erred when instructing the jury that a person is incapable of appraising the nature of his or her conduct when asleep or partially asleep. The proper instruction should have been: A person who is fully or partially asleep during an assault may be incapable of appraising the nature of his or her conduct. The instruction error went to an essential element of the crime, so

the error required reversal because there was a reasonable possibility that the error might have contributed to the conviction. *People v. Bertrand*, 2014 COA 142, 342 P.3d 582.

Failure of trial court to include the sentencing enhancement factor in the elemental instruction to the substantive charge was not plain error. *People v. Torres*, 701 P.2d 78 (Colo. App. 1984).

Sentence enhancers in subsection (4) are not additional substantive elements of the crime and do not require proof of a mens rea. Instruction on enhancer did not need to include "knowingly". *People v. Santana-Medrano*, 165 P.3d 784 (Colo. App. 2006).

The court's failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. In order to convict the defendant of first degree sexual assault or incest the jurors had to accept the victim's testimony because the victim testified unequivocally to actual sexual intercourse while the defendant denied any improper touching at all. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Omission of the definition of "sexual penetration" from jury instructions did not rise to the level of plain error because the issue of whether sexual penetration occurred was not contested at trial. *People v. Lozano-Ruiz*, 2018 CO 86, 429 P.3d 577.

The trial court erred by failing to respond adequately to the jury's question regarding the difference between first and

second degree sexual assault. A jury should be referred back to the instructions only when it is apparent that it has overlooked some portion of the instructions or when the instructions clearly answer its inquiry. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

The court must take adequate measures to insure that the jury understands the difference between the principal charged offense and the lesser included offense if a lesser included offense instruction is given. COLJI-Crim. No. 12:05 is insufficient to apprise the jury of the differences between first and second degree sexual assault, and, accordingly, the conviction for first degree sexual assault should be reversed. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

Sexual assault in the second degree is a lesser included offense of sexual assault in the first degree. *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990).

Trial court did not err in refusing to give the consent defense jury instruction tendered by the defendant in a first degree sexual assault case where the crime itself requires that the prosecution prove a lack of consent. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996); *People v. Bertrand*, 2014 COA 142, 342 P.3d 582.

The jury was not instructed on both elements of alternative (c) and could not have assessed whether the prosecution had proven each element of that alternative beyond a reasonable doubt. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

IV. VERDICT AND SENTENCE.

A sentence imposed beyond the presumptive range for a defendant convicted of both first degree sexual assault with a deadly weapon and a crime of violence does not deny equal protection of law since it cannot be said that the sentencing statutes permit different degrees of punishment for persons in the defendant's situation. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

A rational distinction exists in the sentencing scheme for people convicted of first degree sexual assault with a deadly weapon in contrast to convictions of the same crime without a deadly weapon since the legislature could rationally perceive that use of a deadly weapon during the course of such an assault is more reprehensible and dangerous than commission of such a crime without a deadly weapon. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986), disapproving *People v. Montoya*, 709 P.2d 58 (Colo. App. 1985), rev'd, 736 P.2d 1208 (Colo. 1987).

Consecutive sentences for two counts of sexual assault upheld where the convictions were not supported by identical evidence. Although this section proscribes a single crime of sexual assault, the evidence at trial was sufficient to support a jury finding that, by beginning the assault while the victim was physically helpless, and then using physical force to continue the assault after the victim awoke, defendant committed that crime twice against the victim. *Schneider v. People*, 2016 CO 70, 382 P.3d 835.

Evidence controls whether lesser included offense of assault with intent to rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Section not inconsistent with § 18-3-405. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

Conviction of sexual assault under this section meets conviction of sexual offense criterion within the meaning of § 18-1.3-1001 et seq. The defendant is subject to indeterminate sentencing accordingly. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

Trial court's omission of the word "physically" from its interrogatory distinguishing class 2 from class 4 felony sexual assault did not amount to plain error under the circumstances, and there was no indication that the trial court failed to exercise its discretion with regard to the full range of penalties available for class 2 felonies. Sentencing court's choice of 16 years for the lower component of its indeterminate sentence was well within the permissible range, according to any of the arguably applicable statutes, and the sentencing court supported its exercise of

discretion with reference to the nature of the particular offense, the character of the offender, and the public interest. *Tumentsereg v. People*, 247 P.3d 1015 (Colo. 2011).

Sentence found not excessive. A sentence of 27 to 50 years for sexual assault in the first degree was not excessive. *People v. Hall*, 619 P.2d 492 (Colo. 1980).

Sentence of six years was not inappropriate. The prosecutor recommended a minimum sentence of four years, but it is not improper for the sentencing court, on its own volition, to sentence contrary to the district attorney's recommendation. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Sentence found excessive. Defendant's sentence of a minimum of 32 years exceeded what is authorized by § 18-1.3-401 (6), since the minimum sentence is greater than twice the 12-year presumptive maximum for a class 3 felony. *People v. Clark*, 214 P.3d 531 (Colo. App. 2009), *aff'd* on other grounds, 232 P.3d 1287 (Colo. 2010).

Jury verdict convicting defendant of felony menacing is not inconsistent with the jury's verdict acquitting defendant of first degree sexual assault. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

18-3-403. Sexual assault in the second degree. (Repealed)

Source: **L. 75:** Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 16, effective July 1. **L. 83:** (1)(b) and (2) amended, p. 698, § 2, effective July 1. **L. 88:** (1)(e) amended, p. 725, § 1, effective July 1. **L. 90:** (1)(f) repealed, p. 1033, § 25, effective July 1. **L.**

99: (1)(e.5) added and (2) amended, p. 347, §§ 1, 2, effective July 1. **L. 2000:** Entire section repealed, p. 700, § 19, effective July 1.

18-3-404. Unlawful sexual contact.

(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

- (a) The actor knows that the victim does not consent; or
- (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
- (c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or
- (d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or
- (e) Repealed.
- (f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or
- (g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child by any of the means set forth in section 18-3-402 to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits unlawful sexual contact. For the purposes of this subsection (1.5), the term "child" means any person under the age of eighteen years.

(1.7) Repealed.

(2) (a) Unlawful sexual contact is a class 1 misdemeanor.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (2), unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4)(a), (4)(b), or (4)(c) or if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section or subsection (1.5) of this section.

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall not apply if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section.

(4) A person who is convicted on or after July 1, 2013, of unlawful sexual contact under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

Source: **L. 75:** Entire part R&RE, p. 629, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 17, effective July 1. **L. 86:** (3) added, p. 777, § 6, effective July 1. **L. 89:** (1.5) added and (2) and (3) amended, p. 830, § 41, effective July 1. **L. 90:** (1)(e) repealed, p. 1033, § 25, effective July 1. **L. 91:** (3) amended, p. 1912, § 21, effective June 1. **L. 92:** (1.5) amended and (1.7) added, p. 404, § 15, effective June 3. **L. 94:** (1.5) and (1.7) amended, p. 1717, § 9, effective July 1. **L. 95:** (3) amended, p. 1252, § 10, effective July 1. **L. 96:** (1.7) amended, p. 1581, § 4, effective July 1. **L. 2000:** IP(1), (1.5), (1.7), (2), and (3) amended, p. 700, § 20, effective July 1. **L. 2002:** (3) amended, p. 1513, § 190, effective October 1. **L. 2004:** (2) and (3) amended, p. 635, § 6, effective August 4. **L. 2010:** (1.7)(b) added by revision, (SB 10-128), ch. 415, pp. 2045, 2049, §§ 1, 12. **L. 2013:** (4) added, (SB 13-227), ch. 353, p. 2060, § 7, effective July 1. **L. 2021:** (2)(a) amended, (SB 21-271), ch. 462, p. 3174, § 198, effective March 1, 2022.

Editor's note: (1) This section is similar to former §§ 18-3-403, 18-3-404, and 18-3-410 as they existed prior to 1975.

(2) Subsection (1.7)(b) provided for the repeal of subsection (1.7), effective July 1, 2012. (See L. 2010, pp. 2045, 2049.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to commit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

No violation of equal protection of the laws under the Colorado Constitution is created even though subsection (1)(e) and the offense described in § 18-3-405 (2)(b) contain some similar elements. The offenses also contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

The difference in penalties for unlawful sexual contact (coerce child) under subsection (1.5) and for sexual assault on a child under § 18-3-405 (1) is not

rationally related to a legislative objective and therefore violates equal protection rights of a defendant who was charged with unlawful sexual contact (coerce child) by the means described in § 18-3-402 (1)(d). As applied to that defendant, unlawful sexual contact (coerce child) prohibits either the exact same conduct as, or less egregious conduct than, sexual assault on a child. Yet unlawful sexual contact (coerce child) carries a mandatory prison sentence, while the crime with the more egregious result, sexual assault on a child, does not. *People v. Mena*, 2025 COA 14, ___ P.3d __.

Subsection (1)(g) governs conduct by doctors and others who are, or hold themselves out to be, health treatment providers of any kind and who examine, treat, or purport to examine or treat victims. *McCoy v. People*, 2019 CO 44, 442 P.3d 379.

The general assembly determined that persons who commit unlawful sexual contact with force must be sentenced to at least the midpoint of the sentencing range. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

It was proper for the court to include the definition of "consent" from § 18-1-505 (3)(d) in its instruction for unlawful sexual contact. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

"Touching" means to perceive or experience through the tactile sense. A defendant can perceive and experience the

clothing covering a victim's vaginal area through tactile sense even though there is a sheet between the defendant's hand and the victim's clothing. *People v. Pifer*, 2014 COA 93, 350 P.3d 936.

"[A]nother person" is to be viewed from the perspective of the victim. Consequently, the perpetrator is "another person" in relation to the victim, as used in subsection (1.5). *People v. McEntee*, 2019 COA 139, 461 P.3d 602.

Each of the enumerated ways to commit sexual assault in § 18-3-402 provides possible means of committing unlawful sexual contact (coerce child) under subsection (1.5). *People v. Mena*, 2025 COA 14, __ P.3d __.

Defendant's prior conviction of assault did not bar his subsequent conviction of sexual assault, as offenses had distinct elements that were not subsumed by each other. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

Attempted third degree sexual assault is a lesser included offense of attempted first degree sexual assault. *People v. Staggs*, 740 P.2d 21 (Colo. App. 1987).

The court's failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. Because third degree sexual assault may be committed without proof of sexual penetration, defendant's conviction of that crime could not have been affected by the lack of response to the jurors' inquiry.

People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

A difference in the description of third degree sexual assault between the charging document and the jury instructions was not unconstitutional. The defendant received adequate notice that he could potentially have to defend against allegations that he subjected the victim to sexual contact in the course of attempting to induce her to expose intimate parts. *People v. Madden*, 111 P.3d 452 (Colo. 2005).

To be used as a ground for discipline in an attorney disciplinary proceeding sexual assault in the third degree need only be proved by clear and convincing evidence. In *re Egbune*, 971 P.2d 1065 (Colo. 1999).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. *People v. Bertagnolli*, 922 P.2d 935 (Colo. 1996).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010), overruled in *Page v.*

People, 2017 CO 88, 402 P.3d 468, as annotated below.

Unlawful sexual contact is a lesser included offense of sexual assault. When a defendant is convicted of both offenses based on the same conduct, the conviction for unlawful sexual contact merges into the conviction for sexual assault. Establishing the elements of sexual assault by means of penetration necessarily establishes the elements of unlawful sexual contact. The elements of unlawful sexual contact are a subset of the elements of sexual assault by means of penetration. *Page v. People*, 2017 CO 88, 402 P.3d 468 (overruling *Loyas v. People*, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise).

Evidence of coercion sufficient to sustain conviction. Using bribes and other manipulation to get juveniles to engage in sexual conduct satisfied the coercion element. *People v. Walker*, 321 P.3d 528 (Colo. App. 2011), *aff'd* on other grounds, 2014 CO 6, 318 P.3d 479.

Evidence of sexual gratification sufficient to sustain conviction. Testimony regarding defendant's demeanor during photo sessions, defendant's verbal directions during photo sessions, and defendant's possession of photos and videos all support the sexual gratification element. *People v. Walker*, 321 P.3d 528 (Colo. App. 2011), *aff'd* on other grounds, 2014 CO 6, 318 P.3d 479.

Trial court did not err when it admitted victim impact evidence that tended to show the context or circumstances of the crime itself, and any unfair prejudice from the jury sympathizing with the victim was not likely to substantially outweigh the relevance of the evidence. *People v. Mena*, 2025 COA 14, ___ P.3d __.

A conviction under subsection (1) of this section constitutes a forcible sex offense and therefore is a crime of violence under § 2L1.2 of the United States sentencing guidelines. *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007); *United States v. Reyes-Alfonso*, 653 F.3d 1137 (10th Cir. 2011).

A sex offense may be committed by means that do not involve physical force, yet the offense may still be forcible. When an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent. The use of disparities in situational power, influence, or control meet the definition of force. *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007).

Applied in *People in Interest of M.M.*, 43 Colo. App. 65, 599 P.2d 968 (1979); *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Johnson*, 653 P.2d 737 (Colo. 1982).

18-3-405. Sexual assault on a child.

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or

(b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor has the present ability to execute the threat; or

(c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or

(d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse, whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1)(a), concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5). Prosecution for any incident of sexual contact constituting the offense or any incident of sexual contact constituting the pattern of sexual abuse may be commenced and charged in an information or indictment in a county where at least one of the incidents occurred or in a county where an act in furtherance of the offense was committed.

(3) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraphs (a) to (d) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(4) A person who is convicted on or after July 1, 2013, of sexual assault on a child under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

- (c) Of inheritance from a child conceived as a result of the commission of that offense; and
- (d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

Source: **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 77:** (1) amended, p. 962, § 18, effective July 1. **L. 83:** (2) amended, p. 693, § 2, effective June 15. **L. 86:** (3) added, p. 777, § 7, effective July 1. **L. 89:** (2)(b) and (3) amended and (2)(c) added, p. 903, §§ 2, 3, effective June 1. **L. 90:** (2)(b) repealed, p. 1033, § 25, effective July 1. **L. 95:** (2) and (3) amended, p. 1252, § 11, effective July 1. **L. 2002:** (2)(d) amended, p. 1582, § 8, effective July 1; (3) amended, p. 1513, § 191, effective October 1. **L. 2006:** (2)(d) amended, p. 413, § 2, effective July 1. **L. 2013:** (4) added, (SB 13-227), ch. 353, p. 2061, § 9, effective July 1. **L. 2017:** (2)(d) amended, (HB 17-1109), ch. 97, p. 293, § 2, effective April 4.

Editor's note: This section is similar to former § 18-3-408 as it existed prior to 1975.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For note, "One Year Review of Constitutional Law", see 41 Den. L. Ctr. J. 77 (1964). For article, "The Adolescent Sex Offender: An Overview", see 16 Colo. Law. 1844 (1987). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

Annotator's note. Since § 18-3-405 is similar to former § 18-3-408, as it existed prior to the 1975 revision of this part, and § 40-2-32, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those

provisions have been included in the annotations to this section.

Enhanced crime of violence sentence on conviction for pattern of sexual assault on a child does not violate defendant's due process and equal protection guarantees. Prosecution not required to charge and prove a separate crime of violence count pursuant to § 16-11-309 (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

Neither § 18-3-403 (1) nor subsection (1) is lesser included offense of the other, as each contains elements not found in the other. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

Convictions under both not double jeopardy. Convictions for violations of § 18-3-403 (1) and subsection (1) arising from the same act do not constitute double jeopardy. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

But sexual assault on a child, as described in subsection (1), is a lesser included offense of second degree sexual assault, as described in § 18-3-403 (1)(e). Accordingly, defendant could not be convicted of both offenses, and the court was required to vacate the conviction that would effectuate as fully as possible the jury's verdict. As such, the court was required to consider the general assembly's felony classification of the various crimes committed by the defendant, together with the length of sentences, and maximize the jury's verdict, which gives effect to the most serious offense. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The "pattern" provision of subsection (2)(d) does not violate the double jeopardy protection against multiple punishments. Separate convictions and punishments authorized by the legislature never violate double jeopardy. The general assembly intended to authorize separate convictions for each incident of sexual assault on a child and authorized enhanced punishment of each assault that is committed

as part of a "pattern of sexual abuse". *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

No double jeopardy violation for imposing sentences under §§ 18-3-405 and 18-3-405.3. Each section required a different element, a pattern of abuse for the first and being in a position of trust for the second, thus, there was no double jeopardy violation. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

No double jeopardy violation for conviction of sexual assault on a child and conviction of sexual assault on a child-pattern. Each count was based on a separate volitional incident that was separated by time and intervening events. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

Conviction under this section is not violative of equal protection on grounds that § 18-3-404 prohibits the same conduct with a lesser penalty. Statutory classifications are valid, even if difference in prohibited conduct is only a matter of degree. *People v. Oliver*, 745 P.2d 222 (Colo. 1987).

This section does not violate equal protection of the laws under the Colorado Constitution because, although the felony offense of sexual assault on a child by one in a position of trust and the misdemeanor offense of sexual assault in the third degree under § 18-3-404 (1)(e) contain some of the same elements, the two offenses contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem.

People v. Madril, 746 P.2d 1329 (Colo. 1987).

Although the same conduct can fit sexual assault on a child and child abuse, § 18-6-401, the statutes also proscribe different conduct and have different legislative purposes, so there is no equal protection violation. The sexual assault statute requires sexual contact, and the child abuse statute requires serious bodily injury. Those differences show the legislature's intent to protect child from two different types of conduct even though they may overlap. People v. Lovato, 2014 COA 113, 357 P.3d 212.

"Sexual" modifies "abuse" in the definition of "sexual contact" in § 18-3-401 (4) and is not unconstitutionally vague as applied to a perpetrator who targets a victim's intimate parts for purposes of causing physical harm. People v. Lovato, 2014 COA 113, 357 P.3d 212.

The plain language of § 18-3-401 (4) indicates that sexual contact occurs when a defendant touches an intimate part of a victim for purposes of sexual arousal, gratification, or abuse. A reasonable person could determine that he or she would violate this statute by targeting a victim's intimate parts for purposes of causing physical harm. A reasonable person could also determine that, when a purpose of "sexual abuse" is required, specifically targeting a victim's intimate parts for the purpose of causing pain could constitute sexual abuse, or abuse to the victim's sexual organs. People v. Lovato, 2014 COA 113, 357 P.3d 212.

Subsection (2)(c) does not violate due process by allowing the prosecution to use evidence of alleged uncharged crimes since evidence of multiple instances of sexual abuse is not similar transaction evidence but rather evidence that forms integral part of the offense. People v. Bowring, 902 P.2d 911 (Colo. App. 1995).

Conduct proscribed by this section is different than conduct proscribed by § 18-6-403, sexual exploitation of a child, and imposing different penalties for the two sections does not offend equal protection. People v. Slusher, 844 P.2d 1222 (Colo. App. 1992).

Subsection (2)(c) does not violate equal protection of the law since the classification of those charged with pattern sexual offense involving children has a rational basis in fact and is reasonably related to the legitimate governmental interest of protecting young children. People v. Bowring, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) is not unconstitutionally vague. People v. Longoria, 862 P.2d 266 (Colo. 1993); People v. Graham, 876 P.2d 68 (Colo. App. 1994); People v. Luman, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) was possibly applied ex post facto, therefore, enhancement portion of conviction is reversed where several assaults occurred before this law was enacted, the verdict could have been based on an act that preceded the law's enactment, and the jury was not instructed that the conviction had to be based on an act that

occurred after the law's passage. *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

If the acts preceding the date of the enactment of the statute are included in the charges, the jury must be instructed not to consider them in determining defendant's guilt or innocence with respect to sexual abuse as a part of a pattern of sexual abuse. If the jury is permitted to consider them, the statute, as applied to the defendant, is retrospective and violates the ex post facto prohibition. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the defendant had the requisite fair warning of the consequences of committing the offense with which he was charged. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the conduct that triggered the pattern sexual abuse statute occurred after the statute's effective date. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Although defendant's criminal acts were committed prior to the effective date of subsection (2)(d), application of this subsection to him did not violate the ex post facto clauses of the federal and state constitutions, because the general assembly had passed legislation increasing the penalty for sexual assault as a pattern of sexual abuse as early as 1989, before defendant committed the acts for which he was convicted. Because the acts were therefore not innocent when committed and the

changes to subsection (2)(d) did not change the punishment or deprive defendant of a defense, subsection (2)(d) was not an ex post facto law. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The 1982 amendment extending the statute of limitations from a three-year period to a seven-year period for the offense of sexual assault on a child applies to all offenses which are not time-barred as of the effective date of the amendatory legislation. *People v. Whitesell*, 729 P.2d 985 (Colo. 1986).

Section not inconsistent with § 18-3-402. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

Convictions on four separate counts of sexual assault on a child, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

But, if evidence supports a conclusion that the offenses were separated in time or location, and comprised separate volitional departures, defendant may be charged and convicted on separate offenses for identically worded counts of sexual assault on a child without violating constitutional prohibitions on double jeopardy. *Quintano v. People*, 105 P.3d 585 (Colo. 2005).

The phrase "subjects another ... to any sexual contact" encompasses when an adult defendant allows a child to touch the defendant's intimate parts. By doing so, the defendant subjects the child to sexual contact. The people are not required to prove that the defendant caused the child-victim to become subservient or subordinate or that the child-victim initiated the sexual contact at the defendant's directive. *People v. Sparks*, 2018 COA 1, 434 P.3d 713.

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

Subsections (1) and (2)(a) contain no language requiring the prosecution to prove that a defendant's conduct was against the victim's will. Unlike sexual crimes committed against adults, in which the prosecution must prove nonconsent as an element of the offense, this section contains no such element and recognizes that a child cannot legally consent to sexual contact or to any conduct that facilitates that sexual contact. *People v. Hodge*, 2018 COA 155, 488 P.3d 436.

A child victim cannot consent to the use of force. A defendant may not assert the defense of consent to the force aggravator in subsection (2)(a) when it is not authorized as a defense to the crime itself under subsection (1). A court may not read a nonconsent element into this section or a force aggravator that is not there. *People v. Hodge*, 2018 COA 155, 488 P.3d 436.

The term "pattern of sexual abuse" is clearly and unambiguously defined in § 18-3-401 (2.5) and, therefore, the sentencing enhancement provision of subsection (2)(c) which incorporates that term is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993).

Defining sexual assault on a child as part of a "pattern of sexual abuse" is a sentencing enhancer of sexual assault on a child because it increases the punishment for that offense from a class 4 felony to a class 3 felony. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

The "pattern" provision of subsection (2)(d) is not a separate offense, rather it allows each incident to be elevated to a class 3 felony. The definition of "pattern of sexual abuse" does not establish a separate offense; the unit of prosecution remains the substantive crime. The plain language of the statute authorizes greater punishment for the substantive crime, which is sexual assault on a child. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

A pattern count citing both the statute on sexual assault on a child and the pattern sentence enhancer is sufficient to charge both charges. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Although a conviction for sexual assault on a child as part of a pattern of abuse requires violent crime sentencing, that fact does not make it a violent crime as defined in § 18-1.3-406. *People ex rel. A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

Trial court did not err in denying the request for a jury trial. Since defendant's charge of sexual assault on a child did not include charges of bodily injury, intimidation, threats, or force, defendant was not charged with a crime of violence as defined in § 18-1.3-406 and, subsequently, was not entitled to a jury trial. *People ex rel. A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

In order to impose the pattern of sexual abuse sentence enhancer, defendant must be convicted of at least two completed acts of sexual contact against a child. The jury found defendant guilty of only attempted, not completed offenses, and there was no other conduct that the jury could have relied upon to come to the conclusion there was a pattern of sexual abuse. *People v. Day*, 230 P.3d 1194 (Colo. 2010).

Trial court erred in entering a conviction for "sexual assault on a child - pattern of abuse" since the verdict form that the jury used to find defendant guilty of the pattern of abuse offense did not give the jury the opportunity to find that the defendant committed the elements of sexual assault on a child. At most, the verdict form showed the jury's factual finding of different incidents of sexual contact. In addition, the jury specifically found the defendant not guilty of the charge of sexual assault on a child. *Sanchez v. People*, 2014 CO 29, 325 P.3d 553.

Defendant's position of trust in relation to victim could not be used as aggravating factor under § 18-1-105 where it was also element of substantive crime. *People v.*

Garciadealba, 733 P.2d 1240 (Colo. App. 1986).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

Dismissal of specific counts alleging a violation of subsection (1) does not preclude conviction on subsection (2)(d). *People v. Melillo*, 976 P.2d 353 (Colo. App. 1998), *aff'd*, 25 P.3d 769 (Colo. 2001).

Verdicts for sexual assault on a child as part of a pattern of sexual abuse and sexual assault on a child by one in a position of trust were not inconsistent and were based upon separate statutory provisions requiring proof of different elements. *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

Where the jury instructions invited the jury to find defendant guilty of a pattern of sexual abuse count based on any two sexual acts, regardless of when they occurred, the conviction required reversal. Since the pattern of sexual abuse under subsection (2)(d) is a sentence enhancer to a crime charged under subsection (1), only a count charged under subsection (1) can serve as the predicate offense, and the jury must find the defendant guilty both of the predicate offense and of

another act of sexual abuse occurring within 10 years prior to the period in which the predicate offense occurred. Reversal of the conviction was required where the jury instruction did not specify the 10-year requirement. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Jury verdict form for sexual assault on a child should not have included the word "pattern" because pattern is a sentence enhancement and not a separate offense. However, use of such instruction was not plain error because there was no reasonable possibility that it contributed to defendant's convictions. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

The people adequately elected the specific acts underlying each count that constituted the pattern of sexual abuse. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

Both the predicate act and the earlier pattern act or acts may occur within the period alleged in the pattern of sexual assault count in the information. The period in the information was less than ten years, therefore it would have been impossible to find the defendant guilty of the enhancer unless the jury found the defendant committed two separate acts within the period in the information. *People v. Honeysette*, 53 P.3d 714 (Colo. App. 2002).

Enhanced penalty under subsection (2)(d) improper when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single

sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

Former section held constitutional. *Gallegos v. People*, 176 Colo. 191, 489 P.2d 1301 (1971).

Purpose of former statute was to protect morals of children. The evident purpose of former statute was to protect children under a certain age from those acts which would tend to corrupt their morals, so that the question of the consent or nonconsent of those included within the law was not material, because its prime object was to protect the morals of such youth. *Dekelt v. People*, 44 Colo. 525, 99 P. 330 (1908); *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943); *Cross v. People*, 122 Colo. 469, 223 P.2d 202 (1950).

Former statute was designed to protect children from depravity and licentiousness. *Kidder v. People*, 115 Colo. 72, 169 P.2d 181 (1946).

Former statute was neither obscure nor indefinite. It was designed to protect the morals of children in any place, and arbitrary rules of construction were not to be invoked to restrict its meaning. *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943).

Evidence on age of juvenile-defendant required. Where the petition in delinquency states the respondent's age, although § 19-3-106 and C.R.J.P. 8 specify that "jurisdictional matters of the age and residence of the child shall be deemed admitted . . . unless specifically denied", the juvenile-defendant's age is not thereby

admitted, and it is necessary to present evidence specifically on that element of an offense when it is critical under this section. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Effect of lack of evidence on four-year age differential. Since the four-year age differential is an essential element of the offense, a conviction cannot be sustained where no evidence was adduced as to that element. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Evidence of age differential admitted. An 11-year-old child's estimate of her father's age as within a range greater than her own by only four years is not so inherently speculative as to be without probative value. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Where evidence of many acts, prosecution compelled to select specific transaction for conviction. Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction, and although it is not required to identify the exact date of the offense, it must individualize and select a specific act. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980); *People v. Quintano*, 105 P.3d 585 (Colo. 2005).

The appropriate "unit of prosecution" for the crime of sexual assault on a child is "any sexual contact" not each separate offense of touching within a single incident that encompasses a multitude of types of

sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

Mental state required is "knowingly". The general assembly intended that the mental state requirement for this crime be "knowingly", and that this supersedes any indication of mens rea suggested by the term "intentional" in § 18-3-401. *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981).

Evidence of similar offenses committed by accused against same child is admissible in prosecutions for taking indecent liberties with the child. *Godfrey v. People*, 168 Colo. 299, 451 P.2d 291 (1969).

The exception to the general rule excluding evidence of other offenses allows such evidence to show design, motive, or intent. The exception is broadened in cases of sexual offenses. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Evidence of prior sexual episodes with the victim which goes to prove a common plan, scheme, or design, is admissible under § 16-10-301 (1). *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Evidence of uncharged sexual contact properly admitted as evidence of pattern of sexual assault against same victim. Since the incident occurred within 10 years of the predicate offenses charged under this section, it was evidence that could be used to prove the pattern under this section. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd* on other grounds *sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Similar acts as to other persons cannot be shown in evidence. Huerta v. People, 168 Colo. 276, 450 P.2d 648 (1969).

Other offenses inadmissible where guilty knowledge is necessary conclusion. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. Huerta v. People, 168 Colo. 276, 450 P.2d 648 (1969).

Testimony of prior offenses not prejudicial. Each of the witnesses testified that defendant had perpetrated indecent liberties on occasions prior to the ones with which he was charged. The witnesses gave no dates or in any other manner identified or testified about any particular occurrence. In this circumstance no election is required because the evidence only tends to show one particular transaction, which in each instance was the transaction charged in the information. Examination of the record fails to disclose that the jury could have somehow convicted defendant for some act other than the very ones with which he was charged. Nowels v. People, 166 Colo. 140, 442 P.2d 410 (1968).

Attempt to commit sexual assault on child is offense under Colorado law. People v. Martinez, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Evidence sufficient to support conviction. Rapue v. People, 171 Colo. 324, 466 P.2d 925 (1970); People v. Ortega, 672 P.2d 215 (Colo. App. 1983).

Evidence sufficient to support a charge of sexual assault on a child beyond a reasonable doubt. People v. Carmichael, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Evidence sufficient for conviction. Victim's testimony, if believed by the jury, was enough to convict defendant, and the credibility of witness is almost solely within the province of the jury. People v. McNeely, 222 P.3d 370 (Colo. App. 2009).

Conviction on one count may not be set aside simply because it is factually inconsistent with acquittals on other counts. People v. McNeely, 222 P.3d 370 (Colo. App. 2009).

Evidence insufficient for class 3 conviction sufficient for class 4 conviction. Evidence which was insufficient to support a conviction for a class 3 felony charge was sufficient to convict for a lesser included class 4 felony. People v. Whitesel, 200 Colo. 362, 615 P.2d 678 (1980).

Verdicts of guilty under this section and of contributing to juvenile delinquency. Verdicts of guilty under this section and also as to a count of contributing to juvenile delinquency were not inconsistent. Warren v. People, 121 Colo. 118, 213 P.2d 381 (1949).

In a trial for commission of a crime under subsection (2)(c), no limiting instructions were required, as evidence of multiple sexual abuse incidents is not similar transaction evidence but is evidence of an integral part of the offense. People v. Graham, 876 P.2d 68 (Colo. App. 1994).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

Sentence enhancement under subsection (2)(c) is not precluded by fact that prior conduct contributing to the establishment of pattern sexual abuse occurred in another state. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Conviction for attempted sexual assault on a child constitutes sexual abuse of a minor and therefore is a crime of violence under the United States sentencing guidelines. *United States v. De La Cruz-Garcia*, 590 F.3d 1157 (10th Cir. 2010).

When a defendant is convicted of sexual assault on a child by one in a position of trust, the offense of sexual assault on a child is not a lesser included offense. *People v. Leske*, 957 P.2d 1030 (Colo. 1998); *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

A victim's belief that defendant would continue to hold her against her will unless she complied with his sexual demands could constitute a continuing threat of imminent kidnap sufficient to support defendant's conviction for violating subsection (2)(b). *People v. Zamora*, 940 P.2d 939 (Colo. App. 1996).

Because sexual assault on a child is based not on a sexually exploitative image

but on evidence of a sexual contact, it was appropriate for the trial court to impose the felony sexual exploitation sentences consecutive to defendant's other sentences. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

The bottom end of an indeterminate sentence for a sex offense that is also a crime of violence is between the midpoint and twice the maximum of the presumptive range. *People v. Hunsaker*, 2013 COA 5, 411 P.3d 36, *aff'd*, 2015 CO 46, 351 P.3d 388.

If the court sentences a defendant above the maximum of the presumptive range for a sex offense that is also a crime of violence, the prosecution does not have to establish aggravating circumstances to support sentencing above the maximum range. *People v. Hunsaker*, 2013 COA 5, 411 P.3d 36, *aff'd*, 2015 CO 46, 351 P.3d 388.

Applied in *Continental Liquor Co. v. Kalbin*, 43 Colo. App. 438, 608 P.2d 353 (1977); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *People v. Cavalier*, 41 Colo. App. 119, 584 P.2d 92 (1978); *People v. Boyette*, 635 P.2d 552 (Colo. 1981); *People in Interest of W.C.L.*, 650 P.2d 1302 (Colo. App. 1982); *People v. Green*, 658 P.2d 281 (Colo. App. 1982); *People v. Corbett*, 656 P.2d 687 (Colo. 1983); *People v. Lindsey*, 660 P.2d 502 (Colo. 1983); *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

18-3-405.3. Sexual assault on a child by one in a position of trust.

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim.

(2) Sexual assault on a child by one in a position of trust is a class 3 felony if:

(a) The victim is less than fifteen years of age; or

(b) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time need be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1)(a), concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5). Prosecution for any incident of sexual contact constituting the offense or any incident of sexual contact constituting the pattern of sexual abuse may be commenced and the offenses charged in an information or indictment in a county where at least one of the incidents occurred or in a county where an act in furtherance of the offense was committed.

(3) Sexual assault on a child by one in a position of trust is a class 4 felony if the victim is fifteen years of age or older but less than eighteen years of age and the offense is not committed as part of a pattern of sexual abuse, as described in paragraph (b) of subsection (2) of this section.

(4) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(5) A person who is convicted on or after July 1, 2013, of sexual assault on a child by one in a position of trust under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

Source: **L. 90:** Entire section added, p. 1028, § 16, effective July 1. **L. 98:** Entire section amended, p. 1444, § 33, effective July 1. **L. 2002:** (2)(b) amended, p. 1582, § 9, effective July 1; (4) amended, p. 1513, § 192, effective October 1. **L. 2006:** (2)(b) amended, p. 413, § 3, effective July 1. **L. 2013:** (5) added, (SB 13-227), ch. 353, p. 2061, § 8, effective July 1. **L. 2017:** (2)(b) amended, (HB 17-1109), ch. 97, p. 293, § 3, effective April 4.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Application of this section to the defendant violated the ex post facto clauses of the federal and state constitutions because, while defendant's conviction was based on incidents occurring between June 1, 1990, and June 1, 1991, jurors were not clearly instructed that defendant's conviction had to be based on an act that occurred after July 1, 1990, the effective date of the statute. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The "pattern" provision of subsection (2)(b) does not violate the double jeopardy protection against multiple punishments. Separate convictions and punishments authorized by the legislature never violate double jeopardy. The general assembly intended to authorize separate convictions for each incident of sexual assault on a child by one in a position of trust and authorized enhanced punishment of each assault that is committed as part of a

"pattern of sexual abuse". *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Where identical acts support verdicts for each pattern of abuse count, there is but one pattern of abuse. The enhancer can apply only to the sentence for the latter of two offenses, elevating it from a class 4 felony to a class 3 felony. *People v. Wiseman*, 2017 COA 49M, 413 P.3d 233 (decided under subsection (2)(b) of this section as it existed prior to the deletion of the reference to acts constituting the pattern of sexual abuse committed within ten years prior to the offense charged in the information or indictment).

No double jeopardy violation for imposing sentences under §§ 18-3-405 and 18-3-405.3. Each section required a different element, a pattern of abuse for the first and being in a position of trust for the second, thus, there was no double jeopardy violation. *People v. Tillery*, 231 P.3d 36 (Colo. App.

2009), aff'd sub nom. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Court's failure to submit a sentence enhancer regarding the victim's age to the jury was a *Blakely v. Washington*, 542 U.S. 296 (2004), error, but it was not plain error. The jury was presented with undisputed evidence of the victim's age, thus the court's error does not cast serious doubt on the reliability of the sentence. *People v. Ewing*, 2017 COA 10, 413 P.3d 188.

Convictions on four separate counts of sexual assault on a child, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

The appropriate "unit of prosecution" for the crime of sexual assault on a child is "any sexual contact" not each separate offense of touching within a single incident that encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005); *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

The "unit of prosecution" for the crime of aggravated incest is the same as for the crime of sexual assault on a child because there is no discernible difference between the language used in § 18-6-302 (1)(a) and the phrase "any sexual contact" used in this section. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

To determine if defendant's actions satisfy more than one unit of prosecution, the court looks at all evidence introduced at trial to determine whether evidence relied upon by the jury for conviction supports distinct and separate offenses. Factors to determine distinct offenses include contacts occurring at different locations or times or whether they were the product of new volitional departures. If the acts are not distinct offenses, they merge into a single conviction. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

The "pattern" provision of subsection (2)(b) is not a separate offense, rather it allows each incident to be elevated to a class 3 felony. The definition of "pattern of sexual abuse" does not establish a separate offense; the unit of prosecution remains the substantive crime. The plain language of the statute authorizes greater punishment for the substantive crime, which is sexual assault on a child by one in a position of trust. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

The crime of sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of

trust under analysis of either § 18-1-408 (5)(a) or § 18-1-408 (5)(c). People v. Leske, 957 P.2d 1030 (Colo. 1998).

Violent crime sentencing for patterned enhanced counts of sexual assault on a child by one in a position of trust only apply to offenses committed on or after July 1, 1998. People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

Because this section requires a "knowingly" culpable mental state, the requisite intent by the assailant could be demonstrated in a juvenile proceeding. Swentkowski v. Dawson, 881 P.2d 437 (Colo. App. 1994).

Jury could conclude that defendant was "in a position of trust" relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. People v. Luman, 994 P.2d 432 (Colo. App. 1999) (decided under law in effect prior to 1990 amendment to § 18-3-401 (3.5)).

Defendant in "position of trust" even though he was not performing a specific supervisory duty at the time of the unlawful act. Where victim was pastor's daughter and defendant previously taught victim in Sunday school, defendant and his wife babysat for victim and her sister on

several occasions, defendant joined victim's family often for dinner, defendant helped victim and her sisters with their school work, defendant chaperoned church trip for victim, and victim's parents allowed victim to go to defendant's house by herself to ride horses, defendant assumed a position of trust through an ongoing and continuous supervisory relationship with victim. Pellman v. People, 252 P.3d 1122 (Colo. 2011).

A "position of trust" for purposes of this section and § 18-3-401 (3.5) may be a supervisory position that exists for a "brief" period — a matter of hours or days — or it may extend over a long relationship. Defendant's discrete acts of supervision were the product of the general position of trust that defendant assumed in relation to victim. Pellman v. People, 252 P.3d 1122 (Colo. 2011).

Defendant must be in position of trust at time of unlawful act. Court properly dismissed charges against defendant who met victim while in a position of trust but who was no longer in a position of trust at the time of the unlawful act. People v. Johnson, 167 P.3d 207 (Colo. App. 2007).

A defendant need not be expressly charged with a particular duty or responsibility over the child at the time of the crime in order to occupy a position of trust. A person may occupy a position of trust when an existing relationship or other conduct or circumstances establish that the defendant is entrusted with special access to the child victim. The evidence supported the jury's finding that defendant was in a

position of trust with respect to the victim. *People v. Roggow*, 2013 CO 70, 318 P.3d 446.

Defendant's special access to the victim by virtue of an existing relationship or other conduct or circumstances is evidence of an implied duty or responsibility for the welfare or supervision of the victim during those periods of special access. *Manjarrez v. People*, 2020 CO 53, 465 P.3d 547.

Mental state of "knowingly" does not apply to the position of trust element. Therefore, the court did not erroneously instruct the jury otherwise that the defendant had to know that he was in a position of trust. The position of trust element is offset by the conjunction "if" and appears in an entirely separate clause from the mental state requirement of "knowingly" and therefore does not apply to the position of trust element. *People v. Salazar*, 2023 COA 102, 542 P.3d 1209.

Sufficient evidence of defendant's guilt on solicitation charge when defendant attempted to persuade undercover officer posing as mother to act as his accomplice in his commission of sexual assault on a child by one in a position of trust. *People v. Douglas*, 2012 COA 57, 296 P.3d 234.

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child by one in a position

of trust. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

Enhanced penalty under subsection (2)(b) improper when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

Evidence sufficient to support a charge of sexual assault by one in a position of trust beyond a reasonable doubt. *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Because sexual assault on a child is based not on a sexually exploitative image but on evidence of a sexual contact, it was appropriate for the trial court to impose the felony sexual exploitation sentences consecutive to defendant's other sentences. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

The "subject of the action", for purposes of the hearsay exception in § 13-25-128, is subsection (1) of this section, which establishes the elements of the crime, and is not subsection (2)(a), which escalates the penalty when the child is less than fifteen years of age. *Chirinos-Raudales v. People*, 2023 CO 33, 532 P.3d 1200; *Orellana-Leon v. People*, 2023 CO 34, 530 P.3d 626.

18-3-405.4. Internet sexual exploitation of a child.

(1) An actor commits internet sexual exploitation of a child if the actor knowingly importunes, invites, or entices through communication via a computer network or system, telephone network, or data network or by a text message or instant message, a person whom the actor knows or believes to be under fifteen years of age and at least four years younger than the actor, to:

(a) Expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, or data network or by a text message or instant message; or

(b) Observe the actor's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message.

(2) (Deleted by amendment, L. 2009, (HB 09-1163), ch. 343, p. 1797, § 1, effective July 1, 2009.)

(3) Internet sexual exploitation of a child is a class 4 felony.

Source: **L. 2006:** Entire section added, p. 2056, § 5, effective July 1. **L. 2009:** Entire section amended, (HB 09-1163), ch. 343, p. 1797, § 1, effective July 1; (1) amended, (HB 09-1132), ch. 341, p. 1793, § 3, effective July 1.

Editor's note: Amendments to subsection (1) by House Bill 09-1163 and House Bill 09-1132 were harmonized.

ANNOTATION

Internet child exploitation does not violate the dormant commerce clause. People v. Helms, 2016 COA 90, 396 P.3d 1133.

Internet child exploitation is not unconstitutionally overbroad. The crime does not punish a substantial amount of protected speech. People v. Helms, 2016 COA 90, 396 P.3d 1133.

Internet child exploitation is not unconstitutionally vague. The elements are clear and defendant offered no example of how the statute was capable of more than one interpretation. People v. Helms, 2016 COA 90, 396 P.3d 1133.

"Importuning, inviting, or enticing" requires a defendant to do more than allow a viewer to continue viewing the defendant's intimate parts after the

defendant comes to know or believe that the viewer is younger than 15 years old. People v. Heywood, 2014 COA 99, 357 P.3d 201.

Convictions for internet luring of a child and internet sexual exploitation of a child under a complicity theory vacated because prosecution failed to prove that defendant committed the crimes or that defendant acted as an accomplice to a principal who committed the crimes. People v. Douglas, 2012 COA 57, 296 P.3d 234.

Defendant's request to send him pictures of a sex act that he thought were taken during a previous communication does not constitute an attempt to persuade a child to engage in a sex act "while communicating" with the defendant. Defendant's conviction cannot be sustained on that evidence. People v. Helms, 2016 COA 90, 396 P.3d 1133.

18-3-405.5. Sexual assault on a client by a psychotherapist - definitions.

(1) (a) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits aggravated sexual assault on a client if:

- (I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or
- (II) The actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of therapeutic deception.

(b) Aggravated sexual assault on a client is a class 4 felony.

(2) (a) Any actor who knowingly subjects a victim to any sexual contact commits sexual assault on a client if:

- (I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or
- (II) The actor is a psychotherapist and the victim is a client and the sexual contact occurred by means of therapeutic deception.

(b) Sexual assault on a client is a class 1 misdemeanor.

(3) Consent by the client to the sexual penetration, intrusion, or contact shall not constitute a defense to such offense.

(4) As used in this section, unless the context otherwise requires:

- (a) "Client" means a person who seeks or receives psychotherapy from a psychotherapist.
- (b) "Psychotherapist" means any person who performs or purports to perform psychotherapy, whether the person is licensed or registered by the state pursuant to title 12, C.R.S., or certified by the state pursuant to part 5 of article 1 of title 25, C.R.S.

(c) "Psychotherapy" means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate behavioral or mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors that interfere with effective emotional, social, or intellectual functioning.

(d) "Therapeutic deception" means a representation by a psychotherapist that sexual contact, penetration, or intrusion by the psychotherapist is consistent with or part of the client's treatment.

(5) A person who is convicted on or after July 1, 2013, of sexual assault on a client by a psychotherapist under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

Source: **L. 88:** Entire section added, p. 726, § 1, effective July 1. **L. 89:** (3) amended, p. 831, § 42, effective July 1. **L. 2011:** IP(4) and (4)(b) amended, (SB 11-187), ch. 285, p. 1327, § 69, effective July 1. **L. 2013:** (5) added, (SB 13-227), ch. 353, p. 2062, § 10, effective July 1. **L. 2017:** (4)(c) amended, (SB 17-242), ch. 263, p. 1307, § 141, effective May 25.

Cross references: (1) For the licensing of mental health professionals, see article 245 of title 12.

(2) For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

Section is not unconstitutionally overbroad. Neither the treating psychotherapist nor the psychotherapy client has a fundamental constitutional right to

engage in sexual intercourse with each other during the existence of the psychotherapist-client relationship. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

Although consent is eliminated as a defense, prosecution must still prove mental culpability of the crime. Crime is

not a strict liability offense. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

18-3-405.6. Invasion of privacy for sexual gratification.

(1) A person who knowingly observes or takes a photograph of another person's intimate parts without that person's consent, in a situation where the person observed or photographed has a reasonable expectation of privacy, for the purpose of the observer's own sexual gratification, commits unlawful invasion of privacy for sexual gratification.

(2) (a) Except as otherwise provided in subsection (2)(b) of this section, invasion of privacy for sexual gratification is a class 1 misdemeanor.

(b) Invasion of privacy for sexual gratification is a class 6 felony and is an extraordinary risk crime subject to the modified sentencing range specified in section 18-1.3-401 (10) if either of the following circumstances exist:

(I) The offense is committed subsequent to a prior conviction, as defined in section 16-22-102 (3), C.R.S., for unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S.; or

(II) The person observes or takes a photograph of the intimate parts of a person under fifteen years of age. This subparagraph (II) shall not apply if the defendant is less than four years older than the person observed or photographed.

(3) For purposes of this section, "photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, or chemically produced or reproduced visual material.

Source: L. 2010: Entire section added, (SB 10-128), ch. 415, p. 2045, § 2, effective July 1, 2012. **L. 2022:** (2)(a) amended, (HB 22-1229), ch. 68, p. 344, § 21, effective March 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (2)(a) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

18-3-405.7. Unlawful sexual conduct by a peace officer - definition.

(1) A peace officer commits unlawful sexual conduct by a peace officer by knowingly engaging in sexual contact, sexual intrusion, or sexual penetration under any of the following circumstances:

(a) In the same encounter, the peace officer contacts the victim for the purpose of law enforcement or contacts the victim in the exercise of the officer's employment activities or duties;

(b) The peace officer knows that the victim is, or causes the victim to believe that he or she is, the subject of an active investigation, and the peace officer uses that knowledge to further the sexual contact, intrusion, or penetration; or

(c) In furtherance of sexual contact, intrusion, or penetration, the peace officer makes any show of real or apparent authority.

(2) (a) Unlawful sexual conduct by a peace officer under circumstances when the victim is subject to sexual contact is a class 4 felony.

(b) Unlawful sexual conduct by a peace officer under circumstances in which sexual intrusion or penetration is inflicted on the victim is a class 3 felony.

(3) For the purposes of this section, unless the context otherwise requires, "peace officer" means any person described in article 2.5 of title 16.

(4) It is not a defense to this section that the victim consented to the sexual contact, intrusion, or penetration.

(5) This section does not apply to sexual contact or intrusion that occurs incident to a lawful search.

Source: L. 2019: Entire section added, (HB 19-1250), ch. 287, p. 2662, § 1, effective July 1.

18-3-406. Criminality of conduct. (Repealed)

Source: L. 75: Entire part R&RE, p. 630, § 1, effective July 1. **L. 2001:** Entire section repealed, p. 859, § 5, effective July 1.

Editor's note: Current provisions relating to criminality of conduct are contained in § 18-1-503.5.

18-3-407. Victim's and witness's prior history - evidentiary hearing - victim's identity - protective order.

(1) Subject to constitutional limitations, evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation evidence of the victim's or a witness's sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to subsection (2)(c) of this section. At trial, such evidence is presumed to be irrelevant except evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(2) In any criminal prosecution for class 3 or class 4 felony internet luring of a child, as described in section 18-3-306 (3) or pursuant to sections 18-3-402 to 18-3-405.5, 18-3-504, 18-6-301, 18-6-302, 18-6-403, 18-6-404, and any offense described in part 4 of article 7 of this title 18, or for attempt or conspiracy to commit any of these crimes, if evidence that is not excepted pursuant to subsection (1) of this section of specific instances of the victim's or a witness's prior or subsequent sexual conduct; opinion evidence of the victim's or a witness's sexual conduct; reputation evidence of the victim's or a witness's sexual conduct; or evidence that the victim or a witness has at least one incident of false reporting of unlawful sexual behavior prior to or subsequent to the alleged offense is to be offered at trial, the following procedure shall be followed:

(a) (I) A written motion must be made at least thirty-five days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof articulating facts that would support a judicial finding that the evidence overcomes the presumption of irrelevance and that the probative value of evidence of specific instances of the victim's or witness's prior or subsequent sexual conduct, opinion evidence of the victim's or witness's sexual conduct, reputation evidence of the victim's or witness's sexual conduct, or evidence that the victim or witness has at least one incident of false reporting of unlawful sexual behavior prior to or subsequent to the alleged offense that is not substantially outweighed by the presumptive unfair prejudice, confusion of the issues, misleading of the jury, or unfair invasion of the privacy of the victim or witness.

(II) If the moving party intends to offer evidence concerning at least one incident of false reporting of unlawful sexual behavior prior to or subsequent to the alleged offense pursuant to subsection (2)(a)(I) of this section, the party must also articulate facts that would, by a preponderance of the evidence, demonstrate that the victim or witness has made a report of

unlawful sexual behavior that was demonstrably false or false in fact prior to or subsequent to the alleged offense.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall notify the other party of such. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set a hearing to be held in camera prior to trial. In such hearing, to the extent the facts are in dispute, the court may allow the questioning of the victim or witness regarding the offer of proof made by the moving party or otherwise allow a presentation of the offer of proof, including but not limited to the presentation of witnesses.

(d) An in camera hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown.

(e) At the conclusion of the hearing, or by written order if no hearing is held, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness overcomes the presumption of irrelevance, is relevant to a material issue to the case, and that the probative value of the evidence is not substantially outweighed by the probability that its admission will create unfair prejudice, confusion of the issues, misleading of the jury, or unfair invasion of the privacy of the victim or witness, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

(f) All motions and supporting documents filed pursuant to this section shall be filed under seal and may be unsealed only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence contained in the motion is admissible, only that portion of the motion and supporting documents pertaining to the admissible portion may be unsealed.

(g) The court shall seal all court transcripts, tape recordings, and records of proceedings, other than minute orders, of a hearing held pursuant to this section. The court may unseal the transcripts, tape recordings, and records only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence is admissible, only the portion of the hearing pertaining to the admissible evidence may be unsealed.

(3) (a) In a criminal prosecution including an offense described in subsection (2) of this section, the court may, at any time upon motion of the prosecution or on the court's own motion, issue a protective order pursuant to the Colorado rules of criminal procedure concerning disclosure of information relating to the victim or a witness. The court may punish a violation of a protective order by contempt of court.

(b) The victim who would be the subject of the protective order may object to the motion for a protective order.

(4) (a) Evidence of the victim's manner of dress or hairstyle at the time of, prior to, or subsequent to the alleged offense is not admissible as evidence of the victim's consent to sexual contact, sexual penetration, or sexual intrusion by the defendant in a case involving unlawful sexual behavior, as defined in section 16-22-102 (9); an offense described in part 4 of article 7 of this title 18; or an attempt or conspiracy to commit any of those offenses.

(b) For purposes of this section, "manner of dress" does not mean:

(I) Testimony or physical evidence of the victim's clothing or its physical condition at the time of, prior to, or subsequent to the alleged offense, offered as evidence for a purpose other than the victim's consent; or

(II) Evidence of the voluntary or consensual removal of the victim's clothing.

Source: **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 91:** IP(2) amended, p. 405, § 10, effective June 6. **L. 98:** Entire section amended and IP(2) amended, pp. 399, 400, §§ 7, 8, effective April 21. **L. 2004:** (3) added, p. 375, § 1, effective April 8. **L. 2005:** IP(1), (2)(c), and (2)(e) amended and (2)(f) and (2)(g) added, p. 426, § 5, effective April 29. **L. 2006:** IP(2) amended, p. 2056, § 6, effective July 1. **L. 2012:** (2)(a) amended, (SB 12-175), ch. 208, p. 871, § 127, effective July 1. **L. 2014:** IP(2) amended, (HB 14-1273), ch. 282, p. 1150, § 4, effective July 1. **L. 2024:** (1), IP(2), (2)(a), and (2)(e) amended and (4) added, (HB 24-1072), ch. 123, p. 408, § 2, effective July 1. **L. 2026:** IP(2) amended, (SB 26-015), ch. 335, p. 2040, § 20, effective July 1.

Editor's note: Amendments to the introductory portion to subsection (2) by sections 7 and 8 of House Bill 98-1177 were harmonized.

Cross references: For the legislative declaration in HB 24-1072, see section 1 of chapter 123, Session Laws of Colorado 2024. For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Hearsay in of Evidence: An Overview", see 50 U. Colo. Criminal Cases Under The Colorado Rules L. Rev. 277 (1979).

Rape shield statute not unconstitutional. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Basic purpose of section is one of public policy: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public "fishing expeditions" into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); People v. Braley, 879 P.2d 410 (Colo. App. 1993); People v. Murphy, 919 P.2d 191 (Colo. 1996); People in Interest of K.N., 977 P.2d 868 (Colo. 1999); People v. Kyle, 111 P.3d 491 (Colo. App. 2004); People v. Golden, 140 P.3d 1 (Colo. App. 2005).

This section reflects the general assembly's intent to prevent victims of sexual assaults from being subjected to psychological or emotional abuse as the price of their cooperation in prosecuting sex offenders. People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

Section held not to apply where victim was not a rape victim, the defendant was not accused of sexual assault, the defense asserted was not consent, nor was the evidence offered to impeach the victim's credibility. People v. Miller, 981 P.2d 654 (Colo. App. 1998); People v. Carlson, 72 P.3d 411 (Colo. App. 2003).

Homosexual orientation is within the purview of this section. People v. Koon, 713 P.2d 410 (Colo. App. 1985); People v. Murphy, 919 P.2d 191 (Colo. 1996).

Prosecution may "open the door" to inadmissible evidence of a rape victim's sexual orientation and past sexual conduct, allowing the defendant to inquire into the previously barred matter. People v. Murphy, 919 P.2d 191 (Colo. 1996).

But the concept of "opening the door" is subject to the considerations of relevance and prejudice required under CRE 401 and CRE 403. People v. Melillo, 25 P.3d 769 (Colo. 2001).

But "opening the door" to evidence on an issue does not mean that any evidence on that issue is automatically admissible. Where prosecution opened the door to evidence of victim's homosexuality, defendant was still required to present such evidence via reputation or opinion evidence, not via a specific instance of conduct. People v. Miller, 981 P.2d 654 (Colo. App. 1998).

Victim's statements that he was "not into whatever it is", that he believed the defendant was a "sick bastard", and that he was "not that kind" did not necessarily suggest that the victim was heterosexual, opening the door to evidence of the victim's sexual orientation or past sexual contact. People v. Murphy, 919 P.2d 191 (Colo. 1996).

No denial of right to confront accuser. This section strikes a balance by conditioning admission of evidence of the victim's sexual history on the defendant's preliminary showing that it is relevant, and involves no denial of the defendant's right to confront his accuser for there is no constitutional right to introduce irrelevant

and highly inflammatory evidence. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978).

This section does not deny a defendant's right to confront his accuser. Certain exceptions are made therein to preserve such rights of the defendant. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983).

This section does not violate defendant's confrontation rights. Defendant's inability to confront the victim at trial resulted not from the provisions of this section, but from his failure to follow the procedure set forth in this section or to show good cause why he should have been excused from following that procedure. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Section neither wholly substantive nor procedural. This section cannot be characterized as either purely substantive and thus entirely within the general assembly's power, or purely procedural and thus subject solely to this court's rulemaking power, but rather it is "mixed" in nature. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Section does not unconstitutionally intrude into matters exclusively judicial nor does it violate § 21 of art. III or art. VI, Colo. Const. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978).

Evidence of prior sex act of prosecutrix. It is essential that an accused lay a proper foundation for the introduction of the evidence of the prosecutrix's prior sex act. *People v. Martinez*, 634 P.2d 26 (Colo.

1981); *People v. Prentiss*, 172 P.3d 917 (Colo. App. 2006).

Evidence of a specific instance of sexual activity, offered to show the source or origin of semen, is not precluded by the statutory presumption of irrelevance or the procedural safeguards which are given to other evidence of a prosecutrix's past sexual activity. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Evidence of a prior sexual act with another man, which could explain the presence of semen in the prosecutrix's vaginal tract, is relevant in that it tends to render more probable the inference that defendant did not have sexual intercourse with the prosecutrix. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Victim's testimony about lack of prior sex. This section does not specifically prohibit the victim from testifying as to the lack of prior sexual activity. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983).

Evidence of victim's virginity should not have been admitted because it was so over-inclusive that its prejudicial nature outweighed its probative value. Even evidence falling within an exception to the rape shield statute is not automatically admissible. *Fletcher v. People*, 179 P.3d 969 (Colo. 2007).

Deletion of reference to prior sexual conduct in sexual assault victim's personal diary that was admitted into evidence after she relied on it to pinpoint the date of offense was proper under rape shield law.

People v. Wilson, 678 P.2d 1024 (Colo. App. 1984).

Under subsection (1), evidence of prior or subsequent sexual conduct is presumptively irrelevant unless such contact is with the defendant or unless there are specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or similar evidence that would show that the act charged was not committed by the defendant. People v. Braley, 879 P.2d 410 (Colo. App. 1993).

The term "similar evidence" in subsection (1)(b) refers to evidence having characteristics in common with, or very much like, evidence showing the source or origin of semen, pregnancy, or disease, all of which are examples of physical evidence or condition. People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

If the evidence does not fall within one of the statutory exceptions contained in subsection (1), the presumption of irrelevance may nevertheless be rebutted when the defendant offers proof that the evidence is relevant to a material issue in the case. If the trial court determines the offer of proof to be sufficient, it must conduct an in-camera hearing regarding the evidence. People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

This section applies to evidence of a sexual assault witness's sexual history. There is no exception to the statute if the proffered evidence is not being offered for the truth of the matter asserted. The proponent of such evidence must comply with the offer of proof procedure and in

camera hearing requirement to ensure that the evidence is relevant and material before it can be introduced at trial. People v. MacLeod, 176 P.3d 75 (Colo. 2008).

A defendant is not considered a "witness" for purposes of this section, and, as such, this section does not apply to a defendant who seeks to admit evidence of his or her own prior sexual history, including evidence that the defendant was previously sexually assaulted. People v. Gulyas, 2022 COA 34, 512 P.3d 1049.

Evidence within the ambit of subsection (2) is not automatically admissible, as it remains subject to the usual rules of evidence. Specifically, a trial court must apply CRE 403 to balance the probative value of the proffered evidence against any possible unfair prejudice. People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

Evidence of an alternative suspect's prior sexual conduct with someone other than the victim has questionable relevance to an alternate suspect defense. Even if the evidence is relevant, the probative value of the evidence is substantially outweighed by the danger of confusing the issues and misleading the jury. People v. Salazar, 2012 CO 20, 272 P.3d 1067.

Exception for "similar evidence of sexual intercourse" does not include evidence of a victim's prior sexual conduct because that would defeat the purpose of the rape shield statute. People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

Subsection (2) only requires defense counsel to file a motion and an affidavit in which the offer of proof is stated, and it does not indicate any limitations upon, nor does it identify, who may be an affiant. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Defendant's offer of proof in support of a motion to admit evidence of the victim's prior false reports of sexual assault was insufficient where the defendant did not provide facts establishing that the witnesses' statements referenced in his affidavit were admissible. *People v. Ramcharan*, 2024 COA 110, 562 P.3d 425.

Evidence does not become inadmissible under this section or under CRE 404 simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct. *People v. Cobb*, 962 P.2d 944 (Colo. 1998); *People v. Williamson*, 249 P.3d 801 (Colo. 2011).

Prior sexual conduct evidence not presumptively irrelevant is also not automatically admissible; trial court must apply CRE 403 to balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

Evidence that DNA from someone other than defendant was found on victim's external genitalia not presumptively irrelevant under subsection (1), and probative value of the DNA evidence not substantially outweighed by danger of unfair prejudice under CRE 403. *People v. Hood*, 2024 COA 27, 550 P.3d 723.

Evidence of victim's rape fantasy and victim's statements regarding fantasy admissible under rape shield statute. The evidence and supporting statements should be admitted since the evidence and statements were material and relevant to the issue of consent. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Evidence of defendant's prior sexual relationship with victim subject to "prior sexual contact with actor" exception to rape shield statute. The evidence should be admitted since it is material and relevant to the issue of consent and supported defendant's theory of the case. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Statements acknowledging the existence of a committed romantic relationship are evidence of neither sexual conduct nor sexual orientation. As such, if evidence of such a committed romantic relationship is otherwise relevant to the case, it is admissible and not barred by the rape shield statute. *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

If initial questions into the existence of such a relationship are ruled in order, a court cannot foreclose cross-examination through use of prior inconsistent statements in that regard. *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

Evidence of victim's prior sexual encounter was not logically relevant to the question of whether the defendant committed sexual assault or whether victim consented to intercourse and trial court properly excluded it under the rape shield

statute's presumption of irrelevance. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

A victim's limited mental capacity, like a victim's young age, permits an inference that the victim's sexual knowledge could be explained only by the alleged assault, and therefore evidence offered to show an alternative source of sexual knowledge may overcome the rape shield's presumption of inadmissibility. Trial court abused its discretion finding that the victim's prior sexual conduct was not relevant to show an alternative source of sexual knowledge. *People v. Osorio-Bahena*, 2013 COA 55, 312 P.3d 247.

Trial court did not commit error in denying defendant's motion to admit witness testimony in sexual assault prosecution without a hearing where defendant sought to admit testimony that one of the victims had stated that she was having a sexual relationship with defendant and that she had sex for money. Such evidence was presumptively irrelevant and court properly concluded that offer of proof was insufficient to require evidentiary hearing. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

Proffered testimony that victim owned condoms and had a male visitor was only marginally probative as to whether the victim was sexually active prior to the incidents involving the defendant. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

In addition, the proffered testimony was not the type that if believed would have, by necessity, exculpated the defendant.

Richmond v. Embry, 122 F.3d 866 (10th Cir. 1997).

Moreover, in the context of the entire record, the appellate court was not persuaded that the proffered testimony, even if admitted, would have created a reasonable doubt that did not exist without the evidence. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

Trial court properly excluded evidence under the rape shield statute. The rape shield statute is designed to keep out evidence offered to show the victim was predisposed to homosexual, pedophilic experiences. *People v. Dembry*, 91 P.3d 431 (Colo. App. 2003).

Testimony regarding the victim prostituting herself for drugs a year before the crimes, alone, could not lead to reasonable inference that the victim had a consensual sexual relationship with the defendant shortly before the crimes. *People v. Sims*, 2019 COA 66, 457 P.3d 719.

Credibility of a victim in a sexual assault case may be attacked by showing that she has a history of making false accusations. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983).

Trial court erred in precluding defendant from inquiring into, and if necessary, presenting evidence of, a romantic relationship between alleged victim and a friend. Evidence of alleged victim's romantic and sexual relationship with friend was relevant to a material issue in the case, namely, victim's motive to lie. Trial court's exclusion of the motive

evidence infringed upon defendant's constitutional right to confront witnesses. *People v. Owens*, 183 P.3d 568 (Colo. App. 2007).

Allegation that charges were not brought as a result of other sexual assault allegations is insufficient to warrant the court convening an evidentiary hearing under subsection (2)(c). To invoke such a hearing, the statute requires that the affidavit accompanying the defendant's offer of proof must articulate facts that, if demonstrated at the evidentiary hearing by a preponderance of the evidence, would show that the alleged victim made multiple prior or subsequent reports of sexual assault that were in fact false. *People v. Weiss*, 133 P.3d 1180 (Colo. 2006).

Evidence of a history of falsely reporting sexual assaults does not require that the past reports have been made to law enforcement. Alleged victim's allegedly false reports to "several other people" about one sexual assault and to the victim's girlfriend about another sexual assault are sufficient to establish multiple instances of false reporting in an offer of proof necessary to justify a hearing pursuant to this section. *People v. Buckner*, 2022 COA 14, 509 P.3d 452.

Defendant is not required to prove at the offer of proof stage that the accuser's prior allegations of sexual assault were "false in fact". Rather, defendant needs only to show that, at an evidentiary hearing, he could establish the falsity of the accuser's prior accusations by the low preponderance

of the evidence standard. *People v. Marx*, 2019 COA 138, 467 P.3d 1196.

Defendant's offer of proof that, at best, demonstrated only one prior sexual assault false report is insufficient to warrant a hearing under this section. *People v. Lancaster*, 2015 COA 93, 373 P.3d 655.

Evidence that a third person claimed that the victim had been previously raped while the victim denied the alleged prior rape properly excluded because it was not evidence of false reporting of a rape incident. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

Evidence of victim's reputation for sexual conduct was not relevant, in order to show defendant's state of mind at time he committed alleged sexual assault, where there was no indication that defendant knew anything about victim's reputation at time of assault; accordingly, evidence was properly excluded. *People v. Moreno*, 739 P.2d 866 (Colo. App. 1987).

Where the material issue at trial is whether the complainant consented to the sexual contact, the understanding or state of mind of the accused regarding the complainant's sexual history is neither material nor relevant to the issue of whether the complainant consented, and a trial court may only allow the admission of such evidence that is relevant to a material issue to the case. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Defendant cannot justify his behavior or mitigate his culpability through his

knowledge of the victim's sexual history; accordingly, evidence of the victim's sexual history contained in defendant's offer of proof was held irrelevant and immaterial because it only served to foster an impermissible inference, namely, that the victim's prior sexual activity demonstrated that she did not refuse the defendant's sexual advances. People in Interest of K.N., 977 P.2d 868 (Colo. 1999).

Propounding questions with no reasonable basis in fact for the interrogation. Under CRE 403 and this section, the defendant held not to have established entitlement to elicit the name of the male whom the child sexual assault victim allegedly had intercourse with days before the date of the sexual assault. People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

Evidence of victim's sexual history inadmissible to attack her credibility as a witness after victim stated to a treating nurse that the defendant had taken her virginity, because victim's statement related to a collateral issue, and extrinsic evidence is generally inadmissible to contradict a witness's testimony on a collateral matter. People in Interest of K.N., 977 P.2d 868 (Colo. 1999).

Evidence of past acts of solicitation of prostitution, even when no sexual contact or intercourse occurred, is "sexual conduct" and protected under this

statute. The general assembly intended the term "sexual conduct" to encompass a broader range of behaviors than those that it defined in § 18-3-401. People v. Williamson, 249 P.3d 801 (Colo. 2011).

The term "prior sexual conduct" includes prior sexual assaults. People v. Aldrich, 849 P.2d 821 (Colo. App. 1992); People v. Kyle, 111 P.3d 491 (Colo. App. 2004).

The term "prior or subsequent sexual conduct" includes sexual assaults perpetrated by the victim. Because perpetrators may also be the victims of sexual assault, the court concluded that, under the plain language of this section, such perpetrators are within the statute's protection. Because the defendant failed to comply with the procedural requirements of this section for the introduction of testimony regarding the victim's sexual conduct, such testimony was appropriately barred. People v. Gholston, 26 P.3d 1 (Colo. App. 2000).

Applied in People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979); People in Interest of M.M., 43 Colo. App. 65, 599 P.2d 968 (1979); People v. Gallegos, 644 P.2d 920 (Colo. 1982); People v. Rice, 709 P.2d 67 (Colo. App. 1985); People v. Meis, 837 P.2d 258 (Colo. App. 1992); People v. Wallen, 996 P.2d 182 (Colo. App. 1999); People v. Conyac, 2014 COA 8M, 361 P.3d 1005; People v. Cuellar, 2023 COA 20, 530 P.3d 1236.

18-3-407.5. Victim evidence - forensic evidence - electronic lie detector exam without victim's consent prohibited.

(1) A law enforcement agency with jurisdiction over a sexual assault must pay for any direct cost associated with the collection of forensic evidence from a victim who reports the assault to the law enforcement agency.

(2) A law enforcement agency, prosecuting officer, or other government official may not ask or require a victim of a sexual offense to submit to a polygraph examination or any form of a mechanical or electrical lie detector examination as a condition for proceeding with any criminal investigation or prosecution of an offense. A law enforcement agency shall conduct the examination only with the victim's written informed consent. Consent shall not be considered informed unless the law enforcement agency informs the victim in writing of the victim's right to refuse to submit to the examination. In addition, the law enforcement agency shall orally provide to the victim information about the potential uses of the results of the examination.

(3) (a) A law enforcement agency, prosecuting officer, or other government official may not ask or require a victim of a sexual offense to participate in the criminal justice system process or cooperate with the law enforcement agency, prosecuting officer, or other government official as a condition of receiving a forensic medical examination that includes the collection of evidence.

(b) A victim of a sexual offense shall not bear the cost of a forensic medical examination that includes the collection of evidence that is used for the purpose of evidence collection even if the victim does not want to participate in the criminal justice system or otherwise cooperate with the law enforcement agency, prosecuting officer, or other government official. The division of criminal justice in the department of public safety shall pay the cost of the examination.

(c) When personnel at a medical facility perform a medical forensic examination that includes the collection of evidence based on the request of a victim of a sexual offense and the medical facility performing the examination knows where the crime occurred, the facility shall contact the law enforcement agency in whose jurisdiction the crime occurred regarding preservation of the evidence. If the medical facility does not know where the crime occurred, the facility shall contact its local law enforcement agency regarding preservation of the evidence. Notwithstanding any other statutory requirements regarding storage of biological evidence, the law enforcement agency contacted by the medical facility shall retrieve the evidence from the facility and maintain it pursuant to section 18-1-1103, unless a victim objects to its destruction pursuant to section 24-4.1-303, in which case the law enforcement agency must maintain it for an additional ten years.

(d) A law enforcement agency shall not submit medical forensic evidence associated with an anonymous report submitted pursuant to section 12-240-139 to the Colorado bureau of investigation or any other laboratory for testing as described in section 24-33.5-113. Medical forensic evidence associated with a medical report submitted pursuant to section 12-240-139,

when the victim has consented to evidence testing, shall be submitted to the Colorado bureau of investigation or another laboratory and tested, pursuant to section 24-33.5-113, regardless of whether the victim has chosen to participate in the criminal justice system.

Source: **L. 95:** Entire section added, p. 948, § 3, effective July 1. **L. 2008:** (2) amended and (3) added, p. 263, § 1, effective March 31. **L. 2013:** (1) amended, (HB 13-1163), ch. 215, p. 895, § 2, effective May 13. **L. 2015:** (3)(c) amended and (3)(d) added, (SB 15-128), ch. 65, p. 181, § 2, effective March 30. **L. 2019:** (3)(d) amended, (HB 19-1172), ch. 136, p. 1675, § 92, effective October 1. **L. 2021:** (3)(c) amended, (HB 21-1143), ch. 191, p. 1013, § 6, effective May 27.

Cross references: For the legislative declaration in HB 21-1143, see section 1 of chapter 191, Session Laws of Colorado 2021.

18-3-407.7. Sexual assault victim emergency payment program - creation - eligibility.

(1) There is hereby created the sexual assault victim emergency payment program, referred to in this section as the "program", in the division of criminal justice in the department of public safety. The purpose of the program is to assist victims of sexual assault with medical expenses associated with a sexual assault that are not otherwise covered pursuant to section 18-3-407.5 or any other victim compensation program.

(2) (a) A victim must request and receive a medical forensic examination to be eligible to have medical costs and fees covered through the program. The division of criminal justice shall develop a policy for administering the program. The policy must include a requirement to establish a cap for the amount payable per victim based on actual and reasonable costs and available funds, but the minimum cap must not be less than one thousand dollars. The program must cover medical fees and costs associated with obtaining the medical forensic examination, including but not limited to emergency department fees and costs, laboratory fees, prescription medication, and physician's fees, as long as funds are available. The program may also cover medical fees and costs for injuries directly related to the sexual assault. The program may also pay for any uncovered direct costs of the medical forensic examination. The total amount paid for all expenses must not exceed the annual cap established by the division of criminal justice.

(a.5) A law enforcement agency may request reimbursement to have costs associated with the collection of forensic evidence for a victim covered through the program. The division of criminal justice shall develop a policy, including a requirement to establish an annual cap, for the amount payable to a law enforcement agency based on actual and reasonable costs and available funds.

(b) The program shall be the payer of last resort.

(c) A hospital shall limit the amounts charged for emergency or associated fees and costs eligible for payment pursuant to paragraph (a) of this subsection (2) to not more than the lowest negotiated rate from a private health plan.

(3) The division of criminal justice may waive any requirement set forth in this section for good cause shown or in the interests of justice, if it is so required.

(4) By December 31, 2024, the division of criminal justice shall develop and maintain a system that allows the division to track claims, process invoices, sort information, and produce reports concerning, at a minimum:

(a) The number of medical forensic examinations paid for by the program;

(b) The total cost of services compensated related to medical forensic examinations paid for by the program;

(c) Information concerning the status of claims in the system, including the number of claims paid, the number of claims denied and reasons for denial, the number of claims pending approval or denial, and the average time between reimbursement claim submission and approval or denial by the program;

(d) The names and locations of medical facilities that submitted claims for reimbursement from the program; and

(e) Demographic information of victims whose claims are reimbursed and denied through the program, if available.

(5) (a) On or before January 30, 2026, and on or before January 30 of each year thereafter, the division shall submit a report to the judiciary committees of the house of representatives and the senate, or any successor committees, with the information described in subsection (4) of this section from the preceding calendar year.

(b) The department shall ensure the report does not disclose any information in violation of applicable state and federal laws regarding the confidentiality of an individual's information.

(c) Notwithstanding the requirement in section 24-1-136 (11)(a)(I), the requirement to submit the report required in this subsection (5) continues indefinitely.

Source: L. 2013: Entire section added, (HB 13-1163), ch. 215, p. 895, § 3, effective May 13.
L. 2023: (1) and (2)(a) amended and (2)(a.5), (4), and (5) added, (HB 23-1199), ch. 263, p. 1566, § 3, effective May 25.

18-3-407.9. Forensic nurse examiners - telehealth program - creation - appropriation.

(1) There is created in the division of criminal justice in the department of public safety the forensic nurse examiners telehealth program, referred to in this section as the "program". Telehealth is an important way to offer medical support, especially in the rural parts of Colorado, from experienced forensic nurse examiners, sexual assault nurse examiners, and other health-care providers. Forensic nurse examiners can collaborate during a forensic medical examination with emergency department nurses and doctors at remote sites in real time regardless of location in the state. This helps increase the access to competent forensic examinations and care for victims of crime.

(2) The general assembly shall appropriate money from the economic recovery and relief cash fund, created in section 24-75-228, as enacted by Senate Bill 21-291, enacted in 2021, to the division of criminal justice in the department of public safety to be used for the programs and purposes described in this section that also conform with the allowable purposes set forth in the federal "American Rescue Plan Act of 2021", Pub.L. 117-2, as the act may be subsequently amended. The division of criminal justice in the department of public safety may use up to five percent of any money appropriated by the general assembly pursuant to this subsection (2) for development and administrative costs incurred pursuant to this subsection (2).

Source: L. 2021: Entire section added, (SB 21-292), ch. 291, p. 1721, § 3, effective June 22.

Cross references: For the legislative declaration in SB 21-292, see section 1 of chapter 291, Session Laws of Colorado 2021.

18-3-408. Jury instruction prohibited.

In any criminal prosecution under sections 18-3-402 to 18-3-405, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given. However, the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.

Source: L. 75: Entire part R&RE, p. 631, § 1, effective July 1. **L. 90:** Entire section amended, p. 925, § 8, effective March 27.

ANNOTATION

Section not unconstitutional. This section does not operate to deprive a defendant of due process of law by prohibiting the exercise of trial court discretion with respect to giving this instruction, nor does it violate the constitutional requirement of separation of powers by interfering with the rule-making power of the Colorado supreme court. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

This section does not violate the constitutional requirement of separation of powers (art. III, Colo. Const.) by interfering with the rule-making power of the court established in § 21 of art. VI, Colo. Const. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980).

Failure to instruct the jury on gender bias was not a "structural defect" or plain

error requiring reversal of third degree sexual assault conviction where gender bias was not raised during the trial and the jury was instructed sympathy or prejudice should not influence its decision. *People v. Johnson*, 870 P.2d 571 (Colo. App. 1993).

Where the case involved a homosexual act and the defendant's theory of the case was consent, omission of a gender bias instruction did not rise to the level of plain error. Defendant erroneously equated gender bias with bias against homosexuals, and the record provided no reason to believe the jury would confuse the two concepts. In addition, the trial court instructed the jury not to allow prejudice to influence its decision. Further, omission of the instruction was not a structural error and did not require reversal because it was harmless beyond a reasonable doubt. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

18-3-408.5. Jury instruction on consent - when required.

(1) In any criminal prosecution for a crime listed in subsection (2) of this section or for attempt or conspiracy to commit a crime listed in subsection (2) of this section, upon request of any party to the proceedings, the jury shall be instructed on the definition of consent as set forth in section 18-3-401 (1.5). Notwithstanding the provisions of section 18-1-505 (4), an instruction on the definition of consent given pursuant to this section shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense.

(2) The provisions of subsection (1) of this section shall apply to the following crimes:

- (a) Sexual assault as described in section 18-3-402 (1)(a);
- (b) Sexual assault as described in section 18-3-402 (1)(b), (1)(c), or (1)(e), as they existed prior to July 1, 2000, for offenses committed prior to July 1, 2000;

- (c) Sexual assault in the second degree as described in section 18-3-403 (1)(a) or (1)(b), as they existed prior to July 1, 2000, for offenses committed prior to July 1, 2000;
- (d) Unlawful sexual contact as described in section 18-3-404 (1)(a), (1)(c), or (1)(d);
- (e) Unlawful sexual contact as described in section 18-3-404 (1.7), as it existed prior to July 1, 2010, for offenses committed prior to July 1, 2010;
- (f) Invasion of privacy for sexual gratification as described in section 18-3-405.6; or
- (g) Criminal invasion of privacy in violation of section 18-7-801.

Source: **L. 92:** Entire section added, p. 322, § 4, effective July 1. **L. 2002:** Entire section amended, p. 757, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-128), ch. 415, p. 2047, § 7, effective July 1, 2012.

18-3-409. Marital defense.

Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such defense is specifically set forth in the applicable statutory section by having the elements of the offense specifically exclude a spouse.

Source: **L. 75:** Entire part R&RE, p. 631, § 1, effective July 1. **L. 88:** Entire section R&RE, p. 725, § 2, effective July 1.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. The cases annotated below were all decided prior to the 1988 amendment to this section.

Marital exception of this section is neither arbitrary nor irrational as it may remove an obstacle to the resumption of normal marital relations and also avoids the

difficult emotional issues and problems of proof inherent in this sensitive area. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Section 18-3-402 and this section are severable, so that even if the former were invalidated the latter would still be capable of enforcement. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Former law. For cases construing requirement of former rape statute that the

victim could not be the wife of the actor, see
Waelchi v. People, 77 Colo. 147, 234 P. 1113
(1925); Schreiner v. People, 95 Colo. 392,

36 P.2d 764 (1934); Efsiever v. People, 105
Colo. 88, 96 P.2d 8 (1939); McGee v.
People, 160 Colo. 46, 413 P.2d 901 (1966).

18-3-410. Medical exception.

The provisions of this part 4 shall not apply to any act performed for bona fide medical purposes if such act is performed in a manner which is not inconsistent with reasonable medical practices.

Source: L. 75: Entire part R&RE, p. 631, § 1, effective July 1.

18-3-411. Sex offenses against children - limitation for commencing proceedings - evidence - statutory privilege - definition.

(1) As used in this section, "unlawful sexual offense" means:

(a) Enticement of a child, as described in section 18-3-305; sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1)(a), (1)(b), (1)(c), (1)(d), (1)(g), or (1)(h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1)(e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; human trafficking of a minor for sexual servitude, as described in section 18-3-504 (2); sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; indecent exposure, as described in section 18-7-302; soliciting for commercial sexual activity with a child, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of

commercial sexual activity with a child, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of commercial sexual activity with a child, as described in section 18-7-405.5; engaging in commercial sexual activity with a child, as described in section 18-7-406; class 3 or class 4 felony internet luring of a child, as described in section 18-3-306 (3); internet sexual exploitation of a child, as described in section 18-3-405.4; unlawful electronic sexual communication, as described in section 18-3-418;

(b) Each of the following offenses, as they existed prior to July 1, 2026: Soliciting for child prostitution, in violation of section 18-7-402; keeping a place of child prostitution, in violation of section 18-7-404; inducement of child prostitution, in violation of section 18-7-405.5; or patronizing a prostituted child, in violation of section 18-7-406; or

(c) Criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) No person shall be prosecuted, tried, or punished for a misdemeanor offense specified in section 18-3-402 or 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense. The limitation for commencing criminal proceedings and juvenile delinquency proceedings concerning unlawful sexual offenses that are felonies shall be governed by section 16-5-401 (1)(a), C.R.S.

(3) An out-of-court statement made by a child, as "child" is defined under the statutes that are the subject of the action, or a person under fifteen years of age if "child" is undefined under the statutes that are the subject of the action, describing all or part of an offense of unlawful sexual behavior, as defined in section 16-22-102 (9), performed or attempted to be performed with, by, on, or in the presence of the child declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, may be admissible pursuant to section 13-25-129 (2).

(4) All cases involving the commission of an unlawful sexual offense shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

(6) Prosecution for any incident of sexual contact constituting the offense or any incident of sexual contact constituting a pattern offense of sexual abuse pursuant to section 18-3-405 (2)(d) or 18-3-405.3 (2)(b) may be commenced and the offenses charged in an information or indictment in a county where at least one of the incidents occurred or in a county where an act in furtherance of the offense was committed.

Source: **L. 82:** Entire section added, p. 313, § 1, effective July 1. **L. 83:** (3) added, p. 630, § 2, effective May 25; (4) and (5) added, p. 694, § 3, effective June 15. **L. 85:** (1) and (2) amended, p. 618, § 12, effective July 1. **L. 88:** (5) amended, p. 713, § 19, effective July 1. **L. 91:** (1) amended, p. 406, § 11, effective June 6. **L. 94:** (1) amended, p. 1717, § 10, effective July 1. **L. 2000:** (1) and (2) amended, p. 704, § 29, effective July 1. **L. 2002:** (2) amended, p. 1128, § 2, effective June 3. **L. 2006:** (1) amended, p. 2056, § 8, effective July 1; (2) amended, p. 413, § 4, effective July 1. **L. 2010:** (1) amended, (SB 10-140), ch. 156, p. 538, § 9, effective April 21. **L. 2014:** (1) amended, (HB 14-1273), ch. 282, p. 1155, § 17, effective July 1, 2014. **L. 2015:** (3) amended, (HB 15-1183), ch. 96, p. 276, § 2, effective April 10. **L. 2017:** (6) added, (HB 17-1109), ch. 97, p. 293, § 4, effective April 4. **L. 2019:** (1) amended, (HB 19-1030), ch. 145, p. 1760, § 4, effective July 1; (3) amended, (SB 19-071), ch. 42, p. 145, § 2, effective July 1. **L. 2026:** (1) amended, (SB 26-015), ch. 335, p. 2040, § 21, effective July 1.

Cross references: (1) For provisions concerning child abuse that are similar to the provisions of this section, see § 18-6-401.1; for the husband-wife privilege, see § 13-90-107.

(2) For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986).

Specific expression of legislative intent to apply 10-year statute of limitations to offenses occurring on or after July 1, 1979, overcomes presumption of prospective operation. *People v. Midgley*, 714 P.2d 902 (Colo. 1986).

Flat 10-year statute of limitations applies to offenses allegedly committed before June 3, 2002, due to an ambiguity created in the act enacting the 2002 amendments to this section. The general statutory construction rule of lenity requires

that ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant. Thus, effective date section of the 2002 enacting legislation stating that the act applies to offenses committed on or after passage of the act (June 3, 2002) is controlling despite July 1, 1992 date set forth in the substantive provisions of the statute. *People v. Summers*, 208 P.3d 251 (Colo. 2009) (decided based upon statute as it existed at the time the alleged crimes were committed prior to 2006 amendments).

A defendant is absent from the state for statute of limitations purposes when he or she has been transferred by the department of corrections (DOC) to an out-of-state facility to serve out the remainder of a state

sentence. *People v. Butler*, 2017 COA 117, 431 P.3d 643.

Applicable limitations period tolled while defendant was incarcerated by DOC in another state. Even though defendant was sent out of state by the DOC and the DOC maintained jurisdiction over him while he was in another state, he was, nonetheless, "absent" from the state. The general assembly did not include in the tolling provision, § 16-5-401 (2), language contemplating a defendant's reason for being out of the state, nor whether the defendant was out of the state voluntarily. *People v. Butler*, 2017 COA 117, 431 P.3d 643.

In prosecution for sexual assault, the prosecutor had obligation to provide defense counsel with a victim's prior, allegedly false, rape report because the rape report was highly probative of the victim's credibility as a witness. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983).

No error in instructing jury that exact dates of two offenses charged need not be proved, where evidence clearly showed two different incidents, defendant was charged in connection with both, and neither could have occurred outside the applicable limitation period. *People v. Bolton*, 859 P.2d 303 (Colo. App. 1993).

A person with an out-of-state conviction for an offense comparable to sexual assault on a child in this state is not eligible to discontinue registration with this state's sex offender registry because a person who is convicted in this state of the same offense is not eligible to discontinue registration. *Curtiss v. People*, 2014 COA 107, 410 P.3d 539.

Applied in *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. District Court*, 743 P.2d 432 (Colo. 1987).

18-3-412. Habitual sex offenders against children - indictment or information - verdict of the jury.

(1) For the purpose of this section, "unlawful sexual offense" means:

(a) Sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1)(a), (1)(b), (1)(c), (1)(d), (1)(g), or (1)(h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1)(e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404

(1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; human trafficking of a minor for sexual servitude, as described in section 18-3-504 (2); sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; soliciting for commercial sexual activity with a child, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of commercial sexual activity with a child, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of commercial sexual activity with a child, as described in section 18-7-405.5; engaging in commercial sexual activity with a child, as described in section 18-7-406;

(b) Each of the following offenses, as they existed prior to July 1, 2026: Soliciting for child prostitution, in violation of section 18-7-402; keeping a place of child prostitution, in violation of section 18-7-404; inducement of child prostitution, in violation of section 18-7-405.5; or patronizing a prostituted child, in violation of section 18-7-406; or

(c) Criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) Every person convicted in this state of an unlawful sexual offense who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an unlawful sexual offense or who has been previously convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an unlawful act that, if committed within this state, would be an unlawful sexual offense shall be adjudged an habitual sex offender against children. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a felony, the court shall impose a sentence to the department of corrections of not less than three times the upper limit of the presumptive range for that class felony as set out in section 18-1.3-401. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a misdemeanor, the court shall impose a sentence to the county jail of not less than three times the maximum sentence for that class misdemeanor as set out in section 18-1.3-501.

(3) Any previous conviction of an unlawful sexual offense shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to

identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for suspension of sentence.

(5) The procedures specified in section 18-1.3-803 shall govern in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an unlawful sexual offense as set out in the complaint, indictment, or information.

Source: **L. 82:** Entire section added, p. 316, § 1, effective July 1. **L. 85:** (1) amended, p. 619, § 13, effective July 1. **L. 96:** (5) amended, p. 1846, § 18, effective July 1. **L. 99:** (1) amended, p. 1154, § 18, effective July 1. **L. 2000:** (1) amended, p. 711, § 49, effective July 1; (2) amended, p. 249, § 1, effective August 2. **L. 2002:** (2) and (5) amended, p. 1513, § 193, effective October 1. **L. 2003:** (2) and (4) amended, p. 1427, § 7, effective April 29. **L. 2010:** (1) amended, (SB 10-140), ch. 156, p. 539, § 10, effective April 21. **L. 2014:** (1) amended, (HB 14-1273), ch. 282, p. 1155, § 18, effective July 1. **L. 2026:** (1) amended, (SB 26-015), ch. 335, p. 2041, § 22, effective July 1.

Cross references: (1) For provisions concerning habitual child abusers that are similar to the provisions of this section, see § 18-6-401.2; for limitations on collateral attacks on prior convictions, see § 16-5-402.

(2) For the legislative declaration contained in the 2002 act amending subsections (2) and (5), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

The fact that this section allows a judge, not a jury, to find facts that increase a defendant's sentence beyond that authorized by the jury's verdict is not unconstitutional pursuant to *Ring v.*

Arizona, 536 U.S. 584 (2002); *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

To calculate the maximum permissible minimum end of the indeterminate sentence for a defendant sentenced as a habitual sex offender against children, a trial court must triple the maximum of the presumptive range for the offense and then may double the resulting figure if the court

finds aggravating circumstances under § 18-3-401 (6). *Isom v. People*, 2017 CO 110, 407 P.3d 559.

A defendant sentenced pursuant to subsection (2) of this section and § 18-1.3-1004 (1)(c) must be sentenced to an indeterminate prison sentence with a lower term of three times the maximum of the presumptive range, unless the court finds extraordinary aggravating

circumstances under § 18-1.3-401, then the lower term can be up to six times the maximum of the presumptive range. *People v. Isom*, 2015 COA 89, 410 P.3d 561, *aff'd*, 2017 CO 110, 407 P.3d 559.

There was no abuse of discretion by the court in the use of a prior conviction for sentencing purposes. *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003), *aff'd* on other grounds, 105 P.3d 585 (Colo. 2005).

18-3-412.5. Failure to register as a sex offender.

(1) A person who is required to register pursuant to article 22 of title 16 and who fails to comply with any of the requirements placed on registrants by said article 22, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

- (a) Failure to register pursuant to article 22 of title 16, C.R.S.;
- (b) Submission of a registration form containing false information or submission of an incomplete registration form;
- (c) Failure to provide information or knowingly providing false information to a probation department employee, to a community corrections administrator or his or her designee, or to a judge or magistrate when receiving notice pursuant to section 16-22-106 (1), (2), or (3), C.R.S., of the duty to register;
- (d) If the person has been sentenced to a county jail, otherwise incarcerated, or committed, due to conviction of or disposition or adjudication for an offense specified in section 16-22-103, C.R.S., failure to provide notice of the address where the person intends to reside upon release as required in sections 16-22-106 and 16-22-107, C.R.S.;
- (e) Knowingly providing false information to a sheriff or his or her designee, department of corrections personnel, or department of human services personnel concerning the address where the person intends to reside upon release from the county jail, the department of corrections, or the department of human services. Providing false information shall include, but is not limited to, providing false information as described in section 16-22-107 (4)(b), C.R.S.
- (f) Failure when registering to provide the person's current name and any former names;

(g) Failure to register with the local law enforcement agency in each jurisdiction in which the person resides upon changing an address, establishing an additional residence, or legally changing names;

(h) Failure to provide the person's correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints, or to provide the person's correct address;

(i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside pursuant to section 16-22-108 (4)(a)(II);

(j) When the person's place of residence is a trailer or motor home, failure to register an address at which the trailer or motor home is lawfully located pursuant to section 16-22-109 (1)(a.3), C.R.S.;

(k) Failure to register an email address, instant-messaging identity, or chat room identity prior to using the address or identity if the person is required to register that information pursuant to section 16-22-108 (2.5), C.R.S.

(1.5) (a) In a prosecution for a violation of this section, it is an affirmative defense that:

(I) Uncontrollable circumstances prevented the person from complying;

(II) The person did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply; and

(III) The person complied as soon as the circumstances ceased to exist.

(b) In order to assert the affirmative defense pursuant to this subsection (1.5), the defendant shall provide notice to the prosecuting attorney as soon as practicable, but not later than thirty-five days prior to trial, of his or her notice of intent to rely upon the affirmative defense. The notice shall include a description of the uncontrollable circumstance or circumstances and the dates the uncontrollable circumstances began and ceased to exist in addition to the names and addresses of any witnesses the defendant plans to call to support the affirmative defense. The prosecuting attorney shall advise the defendant of the names and addresses of any additional witnesses who may be called to refute such affirmative defense as soon as practicable after their names become known. Upon the request of the prosecution, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute sufficient evidence to support submission to the jury.

(2) (a) Failure to register as a sex offender is a class 6 felony if the person was convicted of felony unlawful sexual behavior, or of another offense, the underlying factual basis of which includes felony unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute felony unlawful sexual behavior if committed by

an adult, or for another offense, the underlying factual basis of which involves felony unlawful sexual behavior; except that any second or subsequent offense of failure to register as a sex offender by such person is a class 5 felony.

(b) Any person convicted of felony failure to register as a sex offender shall be sentenced pursuant to the provisions of section 18-1.3-401. If such person is sentenced to probation, the court may require, as a condition of probation, that the person participate until further order of the court in an intensive supervision probation program established pursuant to section 18-1.3-1007. If such person is sentenced to incarceration and subsequently released on parole, the parole board may require, as a condition of parole, that the person participate in an intensive supervision parole program established pursuant to section 18-1.3-1005.

(c) A person who is convicted of a felony sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits felony failure to register as a sex offender as specified in paragraph (a) of this subsection (2) and shall be sentenced as provided in paragraph (b) of this subsection (2).

(3) (a) Failure to register as a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor unlawful sexual behavior, or of another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute misdemeanor unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior.

(b) A person who is convicted of a misdemeanor sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits misdemeanor failure to register as a sex offender as specified in paragraph (a) of this subsection (3).

(4) (a) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be placed or committed out of the home for not less than one year.

(b) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a thirty-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence.

(5) For purposes of this section, unless the context otherwise requires, "unlawful sexual behavior" has the same meaning as set forth in section 16-22-102 (9), C.R.S.

(6) (a) When a peace officer determines that there is probable cause to believe that a crime of failure to register as a sex offender has been committed by a person required to register as a sexually violent predator in this state pursuant to article 22 of title 16, C.R.S., or in any other state, the officer shall arrest the person suspected of the crime. It shall be a condition of any bond posted by such person that the person shall register pursuant to the provisions of section 16-22-108, C.R.S., within seven days after release from incarceration.

(b) When a peace officer makes a warrantless arrest pursuant to this subsection (6), the peace officer shall immediately notify the Colorado bureau of investigation of the arrest. Upon receiving the notification, the Colorado bureau of investigation shall notify the jurisdiction where the sexually violent predator last registered. The jurisdiction where the sexually violent predator last registered, if it is not the jurisdiction where the probable cause arrest is made, shall coordinate with the arresting jurisdiction immediately to determine the appropriate jurisdiction that will file the charge. If the sexually violent predator is being held in custody after the arrest, the appropriate jurisdiction shall have no less than seven days after the date of the arrest to charge the sexually violent predator.

Source: **L. 91:** Entire section added, p. 393, § 1, effective April 17. **L. 94:** Entire section R&RE, p. 1736, § 1, effective July 1. **L. 95:** (6) amended and (6.5) and (9) added, p. 1309, § 1, effective June 5; (3) and (4) amended, p. 468, § 16, effective July 1. **L. 96:** (1), (2), (4), and (6) amended and (6.7) added, p. 1581, § 5, effective July 1; (8) amended, p. 1691, § 25, effective January 1, 1997. **L. 97:** IP(6.7) amended, p. 173, § 1, effective March 31; (1)(f) amended, p. 1547, § 19, effective July 1; (2) and (6.7)(c) amended and (6.7)(e) added, pp. 1553, 1554, §§ 6, 7, effective July 1; (3.5) added and IP(7) and (8) amended, p. 1563, § 9, effective July 1. **L. 98:** Entire section amended, p. 389, § 1, effective April 21. **L. 99:** (1)(a)(II), IP(1)(b), (1)(b)(XXI) to (1)(b)(XXIII), (1)(c), (2)(a), (2)(c), (3)(d), (6)(b), (6.5)(b), (6.5)(c), (7)(a)(II), and (7)(a)(III) amended and (1)(d), (4)(a)(III.5), and (6)(b.5) added, pp. 1144, 1146, 1150, 1156, 1155, 1151, §§ 2, 6, 13, 20, 19, 14, 21, effective July 1; IP(4)(a) amended, p. 799, § 19, effective July 1. **L. 2000:** (2)(a)(I) and (6)(b) amended and (3)(e), (3.5)(e), (3.5)(f), and (4)(a)(VI) added, pp. 718, 719, §§ 2, 5, 3, 1, 4, effective May 23; IP(1)(b), (1)(d), (2)(a)(I), (3)(a), (3)(d), (3.5)(a), (6)(c), (6.5)(d), and IP(7)(a) amended and (1)(b)(XXIV), (3.7), (4)(a)(VII), (5)(c), (6)(e), (6.5)(e), and (7)(c) added, pp. 915, 919, 920, 918, §§ 1, 5, 6, 8, 2, 3, 4, effective July 1; (1)(b)(I), (1)(b)(II), (1)(b)(III), (7)(a)(II), and (7)(a)(III) amended, p. 705, § 30, effective July 1; (8.5) added, p. 432, § 2, effective July 1; (6.5)(b) amended, p. 250, § 3, effective August 2. **L. 2001:** (4)(b) and (4)(c) amended, p. 567, § 2, effective May 29; (3)(a)(I.5) and (3.9) added and (7)(c) amended, pp. 656, 658, §§ 1, 8, 2, effective May 30; (2)(a)(I), (2)(a)(II), (3)(e), (3.5)(e), (3.5)(f), (6)(b), (6.5)(c), (6.5)(d), IP(7)(a), (7)(a)(I), (7)(a)(II), and (7)(a)(III) amended and (3.6) and (7)(a)(VI) added, pp.

962, 960, 961, §§ 3, 1, 2, effective June 5. **L. 2002:** Entire section R&RE, p. 1178, § 2, effective July 1; (2)(b) amended, p. 1567, § 393, effective October 1. **L. 2004:** (2)(c) and (5) added and (3) amended, p. 1119, §§ 17, 18, effective May 27; (3) amended, p. 635, § 7, effective August 4. **L. 2006:** (6) added, p. 1313, § 7, effective May 30. **L. 2007:** IP(1) amended and (1)(j) added, p. 211, § 4, effective March 26; (1)(k) added, p. 1682, § 4, effective July 1. **L. 2011:** (1.5) added and (2)(b) amended, (HB 11-1278), ch. 224, p. 965, § 10, effective May 27. **L. 2012:** (1.5)(b) and (6) amended, (SB 12-175), ch. 208, p. 872, § 128, effective July 1. **L. 2018:** IP(1) and (1)(i) amended, (HB 18-1356), ch. 255, p. 1559, § 2, effective August 8. **L. 2022:** (3)(a) amended, (HB 22-1229), ch. 68, p. 344, § 22, effective March 1.

Editor's note: (1) Amendments to subsection (2)(a)(I) by House Bill 00-1232 and House Bill 00-1317 were harmonized. Amendments to subsection (3) by House Bill 04-1388 and Senate Bill 04-154 were harmonized.

(2) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (3)(a) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: (1) For provisions relating to sex offender registration requirements, see article 22 of title 16.

(2) For the legislative declaration contained in the 2000 act enacting subsection (8.5), see section 1 of chapter 125, Session Laws of Colorado 2000. For the legislative declaration contained in the 2001 act amending subsections (4)(b) and (4)(c), see section 1 of chapter 176, Session Laws of Colorado 2001. For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in HB 18-1356, see section 1 of chapter 255, Session Laws of Colorado 2018.

ANNOTATION

Failure to register as a sex offender is a continuing offense. Since the general assembly determined that sex offenders pose a continuous threat to society and registration is necessary to continually monitor sex offenders, it follows that the failure to register offense is a continuing

offense. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

When the prosecution relies on the continuing offense doctrine to prosecute a failure to register offense, the prosecution must provide the court and defense the dates that the prosecution intends to rely

on to prosecute the failure to register offense. The jury instructions should also reflect the dates provided by the prosecution. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

Failure to register as a sex offender is not a strict liability offense but includes the mental state of knowingly. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

Subsection (1)(a) is not a catchall that incorporates all of the duties to register found in article 22 of title 16. Rather, subsection (1)(a) refers to the discrete and statutorily defined set of duties that relate to sex offender registration: Initial registration, registration with the correct law enforcement agency, timely registration, confirmation of registration, and reregistration. *People v. Halbert*, 2013 COA 95, 411 P.3d 47.

Eviction, homelessness, or lack of a fixed residence do not negate requirement to register within five days of release into community. The requirement for initial registration as a sex offender is based on number of days following release into the community and is not tied to where an individual is living or whether that location changed during the five-day period. *People v. Wilson*, 2017 COA 89, 488 P.3d 1.

A person who fails to comply with any of the requirements placed on registrants in subsections (1)(a) through (1)(k) commits the offense of failure to register as a sex offender. Subsections (1)(a) through (1)(k) are not merely examples of failure to register. *People v. Poage*, 272 P.3d 1113 (Colo. App. 2011).

A violation of § 16-22-108 (3)(i) must be charged under the catchall provision of subsection (1) of this section, and not under subsection (1)(g) of this section. If, in 2012, the general assembly had intended to broaden the meaning of subsection (1)(g), it could have amended that provision to explicitly include the situation of a sex offender who lacks a fixed residence. *People v. Jones*, 2017 COA 116, 405 P.3d 504.

Subsection (1)(i) requires that prosecution prove defendant moved away from the county of his or her last registration. The prosecution presented no evidence that defendant, who was homeless, had moved out of the county. Therefore, the conviction must be vacated. *People v. Poage*, 272 P.3d 1113 (Colo. App. 2011).

A prior conviction for failure to register as a sex offender is not an element of the offense for subsequent violation, but instead the prior conviction is a sentence enhancer. *People v. Dorsey*, 2021 COA 126, 503 P.3d 145, *aff'd*, 2023 CO 51, 536 P.3d 314.

Failure to register as a sex offender is not a crime involving moral turpitude under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011).

Defendant not required to register as a sex offender for offense committed in another state if all of the Colorado elements of the crime are not met. Because statute included one element that the other state's statute did not, the prosecution did not satisfy all of the elements of the crime of indecent exposure, thus defendant was not

required to register as a sex offender for a conviction of indecent exposure in another state. *People v. Brooks*, 2012 COA 52, 296 P.3d 216.

Whether defendant's failure to register as a sex offender conviction is a grave and serious offense depends on the circumstances of the conviction. When defendant informed his parole officer of his new residence, but did not register, the failure to register caused little harm to society and thus was not grave and serious. But, when defendant failed to register for

years and lived at eight or nine different residences, the police were unable to determine if he was a threat to society, so that offense was grave and serious. *People v. Foster*, 2013 COA 85, 364 P.3d 1149.

Court did not err in allowing factual evidence of defendant's previous failure to register as a sex offender conviction in subsequent failure to register trial. The evidence showed defendant's knowledge of the requirement and negated any argument of mistake. *People v. Foster*, 2013 COA 85, 364 P.3d 1149.

18-3-412.6. Failure to verify location as a sex offender.

(1) A person who is required to register pursuant to article 22 of title 16, C.R.S., and who lacks a fixed residence, as defined in that article, and who fails to comply with the provisions of section 16-22-109 (3.5)(c)(I) or 16-22-109 (3.5)(c)(II), C.R.S., commits the offense of failure to verify location as a sex offender.

(2) (a) In a prosecution for a violation of this section, it is an affirmative defense that:

(I) Uncontrollable circumstances prevented the person from complying; and

(II) The person did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply; and

(III) The person complied as soon as the circumstances ceased to exist.

(b) In order to assert the affirmative defense pursuant to this subsection (2), the defendant shall provide notice to the prosecuting attorney as soon as practicable, but not later than thirty days prior to trial, of his or her notice of intent to rely upon the affirmative defense. The notice shall include a description of the uncontrollable circumstance or circumstances and the dates that the uncontrollable circumstances began and ceased to exist in addition to the names and addresses of any witnesses the defendant plans to call to support the affirmative defense. The prosecuting attorney shall advise the defendant of the names and addresses of any additional witnesses who may be called to refute the affirmative defense as soon as practicable after their names become known. Upon the request of the prosecution, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute sufficient evidence to support submission to the jury.

(3) Failure to verify location as a sex offender is a class 2 misdemeanor.

(4) Failure to verify location as a sex offender is not a sexual offense subject to the provisions of sections 16-11.7-104 and 16-11.7-105, C.R.S., and, notwithstanding any other provision of law to the contrary, offenders convicted of a violation of this section are not eligible for probation pursuant to part 2 of article 1.3 of this title.

Source: L. 2012: Entire section added, (HB 12-1346), ch. 220, p. 945, § 6, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3174, § 199, effective March 1, 2022.

18-3-413. Video tape depositions - children - victims of sexual offenses.

(1) When a defendant has been charged with an unlawful sexual offense, as defined in section 18-3-411 (1), or incest, as defined in section 18-6-301, and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b)(1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children which would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Source: **L. 83:** Entire section added, p. 694, § 4, effective June 15. **L. 91:** (5) added, p. 406, § 12, effective June 6. **L. 2003:** (1) amended, p. 974, § 6, effective April 17.

Cross references: For provisions concerning video tape depositions of victims of child abuse that are similar to the provisions of this section, see § 18-6-401.3.

ANNOTATION

Law reviews. For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986). For comment, "Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse", see 60 Colo. L. Rev. 659 (1989). For article, "Children as Witnesses", see 31 Colo. Law. 15 (Oct. 2002).

Constitutionality. Implementation of this statute in a manner which preserves other aspects of the right to confrontation is not violative of the defendant's constitutional rights even though witness does not look directly upon the defendant or testify in the defendant's direct physical presence. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988), rev'd on other grounds, 803 P.2d 144 (Colo. 1990).

As subsection (5), enacted in 1991, did not apply to offenses committed before June 6, 1991, this subsection was not applicable to offenses committed between June 1, 1989, and April 10, 1990. *People v. Carter*, 919 P.2d 862 (Colo. App. 1996).

Medical unavailability includes a situation in which testifying in front of the defendant would cause the child substantial and long term emotional or psychological harm. *Thomas v. People*, 803 P.2d 144 (Colo. 1990); *People v. Newbrough*, 803 P.2d 155 (Colo. 1990).

Specific findings required. Testimony about the likely impact of the child's age and emotional inability to testify must be related to the particular child witness. The mere unwillingness, nervousness, excitement, or reluctance to testify are not sufficient to render the child medically unavailable. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988).

Children's videotaped depositions were admitted at sexual abuse trial where evidence established that both victims were medically unavailable and would be severely traumatized by the defendant's presence during their testimony. *Thomas v. Guenther*, 754 F. Supp. 833 (D. Colo. 1990), aff'd, 962 F.2d 1477 (10th Cir. 1992).

This section governs all videotaped statements obtained from child sexual

abuse victims. *People v. Newbrough*, 803 P.2d 155 (Colo. 1990).

18-3-413.5. Use of closed circuit television - child victims of sexual offenses. (Repealed)

Source: **L. 96:** Entire section added, p. 677, § 1, effective May 2. **L. 2003:** IP(1)(a) amended, p. 974, § 7, effective April 17. **L. 2004:** (2)(a)(V) amended, p. 1380, § 7, effective July 1. **L. 2005:** Entire section repealed, p. 427, § 8, effective April 29.

18-3-414. Payment of treatment costs for the victim or victims of a sexual offense against a child.

(1) In addition to any other penalty provided by law, the court may order any person who is convicted of an unlawful sexual offense, as defined in section 18-3-411 (1), or of incest, as defined in section 18-6-301, when the victim was under the age of fifteen at the time of the commission of the offense, to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his or her offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims.

Source: **L. 83:** Entire section added, p. 694, § 5, effective June 15. **L. 2003:** Entire section amended, p. 974, § 8, effective April 17.

Cross references: For provisions concerning payment of treatment costs for child abuse victims that are similar to the provisions of this section, see § 18-6-401.4.

18-3-414.5. Sexually violent predators - assessment - annual report - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Sexually violent predator" means an offender:

(I) Who is eighteen years of age or older as of the date the offense is committed or who is less than eighteen years of age as of the date the offense is committed but is tried as an adult pursuant to section 19-2.5-801 or 19-2.5-802;

(II) Who has been convicted on or after July 1, 1999, of one of the following offenses, or of an attempt, solicitation, or conspiracy to commit one of the following offenses, committed on or after July 1, 1997:

(A) Sexual assault, in violation of section 18-3-402 or sexual assault in the first degree, in violation of section 18-3-402, as it existed prior to July 1, 2000;

(B) Sexual assault in the second degree, in violation of section 18-3-403, as it existed prior to July 1, 2000;

(C) Unlawful sexual contact, in violation of section 18-3-404 (1.5) or (2) or sexual assault in the third degree, in violation of section 18-3-404 (1.5) or (2), as it existed prior to July 1, 2000;

(D) Sexual assault on a child, in violation of section 18-3-405; or

(E) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3;

(III) Whose victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization; and

(IV) Who, based upon the results of a risk assessment screening instrument developed by the division of criminal justice in consultation with and approved by the sex offender management board established pursuant to section 16-11.7-103 (1), C.R.S., is likely to subsequently commit one or more of the offenses specified in subparagraph (II) of this paragraph (a) under the circumstances described in subparagraph (III) of this paragraph (a).

(b) "Convicted" includes having received a verdict of guilty by a judge or jury, having pleaded guilty or nolo contendere, or having received a deferred judgment and sentence.

(2) When a defendant is convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, the probation department shall, in coordination with the evaluator completing the mental health sex offense specific evaluation, complete the sexually violent predator risk assessment, unless the evaluation and assessment have been completed within the six months prior to the conviction or the defendant has been previously designated a sexually violent predator. Based on the results of the assessment, the court shall make specific findings of fact and enter an order concerning whether the defendant is a sexually violent predator. If the defendant is found to be a sexually violent predator, the defendant shall be required to register pursuant to the provisions of section 16-22-108, C.R.S., and shall be subject to community notification pursuant to part 9 of article 13 of title 16, C.R.S. If the department of corrections receives a mittimus that indicates that the court did not make a specific finding of fact or enter an order regarding whether the defendant is a sexually violent predator, the department shall immediately notify the court and, if necessary, return the defendant to the custody of the sheriff for delivery to the court, and the court shall make a finding or enter an order regarding whether the defendant is a sexually violent predator; except that this provision

shall not apply if the court was not required to enter the order when imposing the original sentence in the case.

(3) When considering release on parole or discharge for an offender who was convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, if there has been no previous court order, the parole board shall make specific findings concerning whether the offender is a sexually violent predator, based on the results of a sexually violent predator assessment. If no previous assessment has been completed, the parole board shall order the department of corrections to complete a sexually violent predator assessment. If the parole board finds that the offender is a sexually violent predator, the offender shall be required to register pursuant to the provisions of section 16-22-108, C.R.S., and shall be subject to community notification pursuant to part 9 of article 13 of title 16, C.R.S.

(4) Notwithstanding section 24-1-136 (11)(a)(I), on or before January 15, 2008, and on or before January 15 each year thereafter, the judicial department and the department of corrections shall jointly submit to the division of criminal justice in the department of public safety and to the governor a report specifying the following information:

(a) The number of offenders evaluated pursuant to this section in the preceding twelve months;

(b) The number of sexually violent predators identified pursuant to this section in the preceding twelve months;

(c) The total number of sexually violent predators in the custody of the department of corrections at the time of the report, specifying those incarcerated, those housed in community corrections, and those on parole, including the level of supervision for each sexually violent predator on parole;

(d) The length of the sentence imposed on each sexually violent predator in the custody of the department of corrections at the time of the report;

(e) The number of sexually violent predators discharged from parole during the preceding twelve months;

(f) The total number of sexually violent predators on probation at the time of the report and the level of supervision of each sexually violent predator on probation; and

(g) The number of sexually violent predators discharged from probation during the preceding twelve months.

Source: **L. 97:** Entire section added, p. 1564, § 10, effective July 1. **L. 98:** Entire section amended, p. 397, § 2, effective April 21. **L. 99:** Entire section amended, p. 1148, § 9, effective

July 1. **L. 2000:** (1)(a)(II)(A), (1)(a)(II)(B), and (1)(a)(II)(C) amended, p. 706, § 31, effective July 1. **L. 2001:** (2) amended, p. 657, § 4, effective May 30. **L. 2002:** (2) and (3) amended, p. 1186, § 22, effective July 1. **L. 2006:** IP(1)(a)(II), (1)(b), (2), and (3) amended, p. 1314, § 8, effective May 30. **L. 2007:** (4) added, p. 254, § 1, effective March 26. **L. 2008:** (2) amended, p. 214, § 1, effective March 26. **L. 2017:** IP(4) amended, (SB 17-241), ch. 171, p. 624, § 7, effective April 28; IP(4) amended, (SB 17-031), ch. 92, p. 282, § 10, effective August 9. **L. 2021:** (1)(a)(I) amended, (SB 21-059), ch. 136, p. 721, § 47, effective October 1.

Editor's note: Amendments to subsection IP(4) by SB 17-031 and SB 17-241 were harmonized.

ANNOTATION

Law reviews. For article, "Constitutional Challenges to Sex Offender Registration and Community Notification Laws", see 30 Colo. Law. 51 (Feb. 2001).

Trial court's adjudication of defendant as a sexually violent predator (SVP) under this section did not violate defendant's right to trial under Apprendi v. New Jersey. Lifetime duty to register as a sex offender and posting of defendant's personal information on internet were not additional punishments giving rise to right to trial by jury. *People v. Stead*, 66 P.3d 117 (Colo. App. 2002).

Trial court's adjudication of defendant as an SVP subjecting him to community notification did not violate defendant's right to trial under Apprendi v. New Jersey. Community notification is not additional punishment giving rise to right to trial by jury. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009).

SVP statute does not violate equal protection based on a slight difference

between the arrest rate of a SVP versus a non-sexually violent predator for a sexual offense. *People v. Mendoza*, 313 P.3d 637 (Colo. App. 2011).

SVP statute does not violate procedural due process because some of the evaluation scoring is subjective. Sufficient safeguards are present to ensure that, when an evaluator makes a judgment, it is based on an equal application of the criteria. In addition, defendant had a hearing before the district court that ultimately made the decision. *People v. Mendoza*, 313 P.3d 637 (Colo. App. 2011).

There is no ex post facto violation when a current qualifying SVP offense was not a qualifying offense at the time it was committed. Since SVP status is not punishment, there is no constitutional violation. *People v. Mendoza*, 313 P.3d 637 (Colo. App. 2011).

The fifth amendment right to remain silent does not apply to the sexually violent predator evaluation procedures.

People v. Bryant, 2013 COA 28, 316 P.3d 18.

The sexually violent predator evaluation procedures do not violate equal protection when defendant chooses not to participate. A defendant who chooses to participate is not similarly situated to a defendant who does not participate. People v. Bryant, 2013 COA 28, 316 P.3d 18.

Defendant's due process rights violated when the court determined his SVP status based upon a SVP risk assessment test without making specific findings of fact. People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

Residency of sex offenders. A municipal ordinance that effectively bans all felony and many misdemeanor sex offenders from living within its boundaries, but draws no distinctions based upon the nature of the offense, the treatment the offender has received, the risk that he or she will reoffend against children, and the evaluation and recommendations of qualified state officials, is preempted by state law. Ryals v. City of Englewood, 962 F. Supp. 2d 1236 (D. Colo. 2013). But see Ryals v. City of Englewood, 2016 CO 8, 364 P.3d 900.

City ordinance that effectively bars certain sex offenders from residing within the city is not preempted by state law. Ryals v. City of Englewood, 2016 CO 8, 364 P.3d 900.

The regulation of sex offender residency is, under the present pattern of state laws, a matter of mixed state and local concern.

Ryals v. City of Englewood, 962 F. Supp. 2d 1236 (D. Colo. 2013); Ryals v. City of Englewood, 2016 CO 8, 364 P.3d 900.

The operational effect of the municipal ordinance impermissibly conflicts with the application and effectuation of the state interest in the uniform treatment, management, rehabilitation, and reintegration of sex offenders during and after state supervision. The ordinance not only undermines the underlying policy interests that envelop the existing state regulations, but it also operationally forbids what the state scheme allows. Ryals v. City of Englewood, 962 F. Supp. 2d 1236 (D. Colo. 2013). But see Ryals v. City of Englewood, 2016 CO 8, 364 P.3d 900, annotated above.

This section covers offense of misdemeanor sexual assault by including among its enumerated crimes "[s]exual assault, in violation of § 18-3-402". Misdemeanor sexual assault is set forth in § 18-3-402 (1)(e). People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

Individuals convicted of misdemeanor sexual assaults should not be excluded from designation as SVPs. Because this section plainly covers misdemeanor sexual assault, court need not consider any agency publications. People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

The term "victim" means "intended victim" in the context of a conviction for attempted sexual assault. People v. Buerge, 240 P.3d 363 (Colo. App. 2009).

A fictional 14-year-old girl created by police officers conducting an Internet sting operation, therefore, can be a victim within the meaning of this section. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

The victim of an attempted sexual assault need not have actually been victimized and need not be an actual person. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

When perpetrator has been convicted of an attempted sexual assault, the definition of "victim" does not preclude a finding that defendant is an SVP. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009); *People v. Neustel*, 2023 COA 56, 536 P.3d 342.

"Stranger" means either the victim is not known to the offender or the offender is not known to the victim at the time of the offense. Although defendant was a neighbor of the victims, the fact that defendant wore a mask during the assault and disoriented the victims to the point they could not identify defendant as the assailant made him a stranger for purposes of the sexually violent predator designation. *People v. Hunter*, 2013 CO 48, 307 P.3d 1083.

Offender "establishe[s] a relationship" when the offender creates, starts, or begins the relationship with the victim primarily for the purpose of sexual victimization. *People v. Gallegos*, 2013 CO 45, 307 P.3d 1096.

Offender "promoted a relationship" if, excluding the offender's behavior during the commission of the sexual assault that led to the conviction, the offender otherwise

encouraged a person with whom the offender had a limited relationship to enter into a broader relationship primarily for the purpose of sexual victimization. *People v. Gallegos*, 2013 CO 45, 307 P.3d 1096; *Uribe-Sanchez v. People*, 2013 CO 46, 307 P.3d 1090.

There is no specific intent requirement for establishing or promoting a relationship with a victim primarily for the purpose of sexual victimization. *Candelaria v. People*, 2013 CO 47, 303 P.3d 1202.

The trial court makes the ultimate SVP designation but should give substantial deference to the scored screening instrument. A trial court should not rescore the screening instrument. Rather, if a trial court deviates from the results of the scored screening instrument, it must make specific findings on the record to demonstrate the necessity of the deviation. The record contained sufficient conduct by defendant to determine that defendant would likely reoffend. *Allen v. People*, 2013 CO 44, 307 P.3d 1102.

A court may find that a defendant is an SVP when the screening instrument and evaluator make a contrary recommendation as long as the court states specific reasons for doing so in the record. The screening instrument and evaluator's opinion are intended to assist the court in making a decision, but the court is not bound by the recommendation. *People v. Allen*, 310 P.3d 83 (Colo. App. 2010), *aff'd*, 2013 CO 44, 307 P.3d 1102.

When the evaluator's answers are internally inconsistent and the record does not resolve the discrepancy, the court cannot use the sexually violent predator assessment screening instrument (SVPASI) to conclude that the defendant is an SVP. Instead, the trial court is required to make specific findings on the record with respect to the issue with the internal inconsistency. *People v. Lopez*, 2020 COA 41, 463 P.3d 345.

When the evaluator incorrectly scored one of the questions, giving the defendant a sex offender risk scale (SORS) score of 8, the court is required to make a specific factual finding on the issue rather than rely on the SORS score. *People v. Lopez*, 2020 COA 41, 463 P.3d 345.

The sex offender risk scale meets the statutory requirements for a "risk assessment screening instrument". The sex offender management board satisfied the objectives and criteria set forth in § 16-11.7-103 for developing the screening instrument. *People v. Brosh*, 251 P.3d 456 (Colo. App. 2010).

Court improperly found defendant to be an SVP under this section when there was no evidence in the record to establish that the victim was a stranger or that the defendant established or promoted a relationship for the purpose of sexual victimization. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

Trial court's determination that defendant was an SVP within the meaning of subsection (1)(a)(III) based on the results of

a risk assessment screening instrument must be set aside. The trial court addressed the "promoted a relationship" criterion but did not address the "established a relationship" criterion. Because this section does not grant the sex offender management board the authority to define the phrases "established a relationship" or "promoted a relationship", the two-step inquiry and underlying criteria identified in the screening instrument must be disregarded. *People v. Tunis*, 2013 COA 161, 318 P.3d 524.

Trial court erred in concluding defendant satisfied the third element of the SVP requirement and, thus, in designating him an SVP, since there was no evidence that he had previously promoted a relationship with the victim to facilitate that assault. *People v. Valencia*, 257 P.3d 1203 (Colo. App. 2011).

In case of stepfather who sexually assaulted adolescent stepdaughter, court properly interpreted phrase "promoted a relationship" to include failed attempts to establish a relationship with a stranger or known victim, as well as efforts to encourage a victim with whom the offender has a limited relationship, such as stepfather, to enter into a broader relationship primarily for the purpose of sexual victimization. *People v. Tixier*, 207 P.3d 844 (Colo. App. 2008).

In case of offender who sexually abused the daughter of his girlfriend, trial court erred in its interpretation of "establishing a relationship". That statutory criterion of "establishing a relationship" applies only when an offender, from the outset, seeks out

a victim with whom he or she has no definable relationship for the primary purpose of sexual victimization. Where the offender already has a relationship with the victim independent of the sexual victimization, the offender cannot be considered to have established the relationship for that purpose. *People v. Gallegos*, 240 P.3d 882 (Colo. App. 2009), *aff'd*, 2013 CO 45, 307 P.3d 1096.

A trial court can only designate an offender with a potential developmental disability as an SVP based on a sex offender specific evaluation (SOSE) and SVPASI if either (1) the offender does not have a developmental disability, or (2) the offender was evaluated by a professional qualified to evaluate adults with developmental disabilities. When the evaluator does not definitively establish whether the offender has an "impairment of general intellectual functioning" under the sex offender management board standards, a trial court must make findings on that point before determining that the offender qualifies as an SVP. *People v. Lopez*, 2020 COA 41, 463 P.3d 345.

Evidence supports court's designation of defendant as an SVP. The fact that defendant used alcohol to drug the victim during the sexual assaults supports the fact that defendant promoted the relationship with the victim for the purpose of sexual victimization. Next, the court determined that the public is at-risk for defendant to repeat the crimes and that defendant is unable to abstain from alcohol. Those findings supported the court's conclusion

that defendant was likely to reoffend. *People v. Brosh*, 251 P.3d 456 (Colo. App. 2010).

Court did not err in designating defendant an SVP. The court found that defendant fostered the relationship to sexually victimize the child. *People v. Mendoza*, 313 P.3d 637 (Colo. App. 2011).

This section does not mandate an evidentiary hearing on whether an offender is an SVP. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009).

The court's findings were sufficient to conclude that defendant was an SVP. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

Ample evidence supported court's finding that defendant was highly likely to reoffend, and that finding supported a conclusion that defendant is an SVP. *People v. Torrez*, 2013 COA 37M, 316 P.3d 25; *People v. Williamson*, 2021 COA 77, 494 P.3d 1135.

Court did not err in relying on evaluator's recommendation from section 3A of risk assessment screening instrument to designate defendant an SVP because he had previously been convicted of a felony sex offense. Before approving this section of the screening instrument, the sex offender management board considered current research and evidence-based standards and did not violate the requirements of the enabling statutes. *People v. Williamson*, 2021 COA 77, 494 P.3d 1135.

An unpreserved challenge to an SVP designation may be brought as part of the

direct appeal in the criminal case. Although the SVP designation is not a criminal punishment, it is only imposed in conjunction with a criminal conviction and

should not be separated from the appeal of criminal trial issues. *People v. Salas*, 2017 COA 63, 405 P.3d 416.

18-3-415. Testing for persons charged with sexual offense.

The court shall order any adult or juvenile who is bound over for trial for any sexual offense involving sexual penetration as defined in section 18-3-401 (6), subsequent to a preliminary hearing or after having waived the right to a preliminary hearing, or any person who is indicted for or is convicted of any such offense, to submit to a diagnostic test for a sexually transmitted infection pursuant to section 18-3-415.5. The results of the diagnostic test must be reported to the court or the court's designee, who shall then disclose the results to any victim of the sexual offense who requests such disclosure. Review and disclosure of diagnostic test results by the courts are closed and confidential, and any transaction records relating thereto are also closed and confidential. Disclosure of diagnostic test results must comply with the requirements of section 25-4-410 (2), C.R.S. If the person who is bound over for trial or who is indicted for or convicted of any such offense voluntarily submits to a diagnostic test for sexually transmitted infections, the fact of such person's voluntary submission is admissible in mitigation of sentence if the person is convicted of the charged offense.

Source: **L. 88:** Entire section added, p. 728, § 1, effective July 1. **L. 93:** Entire section amended, p. 1731, § 16, effective July 1. **L. 99:** Entire section amended, p. 1003, § 10, effective May 29. **L. 2000:** Entire section amended, p. 451, § 1, effective April 24. **L. 2016:** Entire section amended, (SB 16-146), ch. 230, p. 916, § 9, effective July 1.

Cross references: (1) For the provision allowing the test to be done without the knowledge and consent of the person, see § 25-4-410 (1)(b).

(2) For the legislative declaration contained in the 1999 act amending this section, see section 1 of chapter 254, Session Laws of Colorado 1999.

ANNOTATION

Law reviews. For article, "Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences", see 93 Denv. L. Rev. 355 (2016).

18-3-415.5. Testing persons charged with certain sexual offenses for serious sexually transmitted infections - mandatory sentencing.

(1) For purposes of this section, "sexual offense" is limited to a sexual offense that consists of sexual penetration, as defined in section 18-3-401 (6), involving sexual intercourse or anal intercourse, and "HIV" has the same meaning set forth in section 25-4-402 (4).

(2) The court shall order any adult or juvenile who is bound over for trial subsequent to a preliminary hearing or after having waived the right to a preliminary hearing on a charge of committing a sexual offense to submit to a diagnostic test for the human immunodeficiency virus (HIV) and HIV infection, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415. The results of the diagnostic test must be reported to the district attorney. The district attorney shall keep the results of such diagnostic test strictly confidential, except for purposes of pleading and proving the mandatory sentencing provisions specified in subsection (5) of this section.

(3) (a) If the person tested pursuant to subsection (2) of this section tests positive for the human immunodeficiency virus (HIV) and HIV infection, the district attorney may contact the state department of public health and environment or any county, district, or municipal public health agency to determine whether the person had been notified prior to the date of the offense for which the person has been bound over for trial that he or she tested positive for the human immunodeficiency virus (HIV) and HIV infection.

(b) If the district attorney determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the district attorney may file an indictment or information alleging such knowledge and seeking the mandatory sentencing provisions authorized in subsection (5) of this section. Any such allegation must be kept confidential from the jury and under seal of court.

(c) The state department of public health and environment or any county, district, or municipal public health agency shall provide documentary evidence limited to whether the person tested pursuant to subsection (2) of this section had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. The parties may stipulate that the person identified in the documents as having notice or discussion of his or her HIV infection is the person tested pursuant to subsection (2) of this section. Such stipulation shall constitute conclusive proof that said person had notice of his or her HIV infection prior to committing the substantive offense, and the court shall sentence said person in accordance with subsection (5) of this section.

(d) If the parties do not stipulate as provided in paragraph (c) of this subsection (3), an officer or employee of the state department of public health and environment or of the county,

district, or municipal public health agency who has had contact with the person tested pursuant to subsection (2) of this section regarding his or her HIV infection and can identify the person shall provide, for purposes of pretrial preparation and in court proceedings, oral and documentary evidence limited to whether the person had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. If the state department or the county, district, or municipal public health agency no longer employs an officer or employee who has had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection, the state department or the county, district, or municipal public health agency shall provide:

(I) The names of and current addresses, if available, for each former officer or employee who had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection;

(II) Documentary evidence concerning whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion; and

(III) If none of said former officers or employees are available, any officer or employee who has knowledge regarding whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. The officer or employee shall provide such evidence for purposes of pretrial preparation and in court proceedings.

(4) Nothing in this section shall be interpreted as abridging the confidentiality requirements imposed on the state department of public health and environment and the county, district, and municipal public health agencies pursuant to part 4 of article 4 of title 25, C.R.S., with regard to any person or entity other than as specified in this section.

(5) (a) If a verdict of guilty is returned on the substantive offense with which the person tested pursuant to subsection (2) of this section is charged, the court shall conduct a separate sentencing hearing as soon as practicable to determine whether said person had notice of his or her HIV infection prior to the date the offense was committed, as alleged. The judge who presided at trial or before whom the guilty plea was entered or a replacement for said judge in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified as provided in section 16-6-201, C.R.S, shall conduct the hearing. At the sentencing hearing, the district attorney has the burden of proving beyond a reasonable doubt that:

(I) The person had notice of his or her HIV infection prior to the date the offense was committed, as alleged; and

(II) The infectious agent of the HIV infection was in fact transmitted.

(b) If the court determines that the person tested pursuant to subsection (2) of this section had notice of the HIV infection prior to the date the offense was committed and the infectious agent of the HIV infection was in fact transmitted, the judge shall sentence the person to a mandatory term of incarceration of at least the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's natural life, as provided in section 18-1.3-1004.

Source: L. 99: Entire section added, p. 1000, § 5, effective May 29. L. 2000: (2) amended, p. 451, § 2, effective April 24. L. 2002: (5)(b) amended, p. 1514, § 195, effective October 1. L. 2010: (3)(a), (3)(c), IP(3)(d), and (4) amended, (HB 10-1422), ch. 419, p. 2073, § 33, effective August 11. L. 2016: Entire section amended, (SB 16-146), ch. 230, p. 916, § 10, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (5)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Criminal Laws Consequences", see 93 Denv. L. Rev. 355 on Sex Work and HIV Transmission: (2016). Mapping the Laws, Considering the

18-3-416. Reports of convictions to department of education.

When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 when the victim is a child and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 90: Entire section added, p. 1025, § 6, effective July 1. L. 2000: Entire section amended, p. 1847, § 31, effective August 2.

18-3-417. Reports of sexual assault by applicants, registrants, or licensed professionals.

When the director of the division of professions and occupations or a board or commission within the division of professions and occupations in the department of regulatory agencies refers a case to the office of expedited settlement or the office of the attorney general for disciplinary action related to an alleged offense described in this part 4, the office of expedited settlement or the office of the attorney general shall forward the victim's contact information to a victim's advocate in the office of the attorney general. The victim's advocate shall make reasonable efforts to advise the victim of the right to pursue criminal action, the right to pursue civil action, the applicable statutes of limitations, and contact information for the police, sheriff, and community-based resources in the jurisdiction where the alleged offense occurred. This provision shall not prohibit additional reporting of criminal offenses by the attorney general.

Source: L. 2007: Entire section added, p. 1109, § 1, effective May 23.

18-3-418. Unlawful electronic sexual communication - person in a position of trust - definitions.

(1) An actor commits unlawful electronic sexual communication if the actor knowingly importunes, invites, or entices through communication via a computer network or system, telephone network, or data network or by a text message or instant message a person whom the actor knows or believes to be fifteen years of age or older but less than eighteen years of age and at least four years younger than the actor, and the actor committing the offense is one in a position of trust with respect to that person, to:

(a) Expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, or data network or by a text message or instant message; or

(b) Observe the actor's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message.

(2) An actor commits unlawful electronic sexual communication if the actor knowingly communicates over a computer or computer network, telephone network, or data network or by a text message or instant message to a person the actor knows or believes to be fifteen years of age or older but less than eighteen years of age and at least four years younger than the actor and, in that communication or in any subsequent communication by computer or computer network, telephone network, or data network or by text message or instant message, describes explicit sexual conduct as defined in section 18-6-403 (2)(e) and, in connection with that description,

makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor committing the offense is one in a position of trust with respect to that person.

(3) As used in this section, unless the context otherwise requires:

(a) "Explicit sexual conduct" has the same meaning as section 18-6-403 (2)(e).

(b) "In connection with" means communications that further, advance, promote, or have a continuity of purpose and may occur before, during, or after the invitation to meet.

(c) "Position of trust" has the same meaning as section 18-3-401 (3.5).

(4) (a) Unlawful electronic sexual communication in violation of subsection (1) of this section is a class 6 felony.

(b) Unlawful electronic sexual communication in violation of subsection (2) of this section is a class 6 felony; except that unlawful electronic sexual communication is a class 5 felony if committed with the intent to meet for the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401.

Source: L. 2019: Entire section added, (HB 19-1030), ch. 145, p. 1758, § 1, effective July 1.

PART 5

HUMAN TRAFFICKING AND SLAVERY

Editor's note: This part 5 was added in 2010. It was repealed and reenacted in 2014, resulting in the addition, relocation, or elimination of sections as well as subject matter. For amendments to this part 5 prior to 2014, consult the 2013 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

Law reviews: For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (Oct. 2006); for article, "Buying and Selling Sex in Colorado", see 41 Colo. Law. 59 (Oct. 2012); for comment, "Finding Safe Harbor: Eliminating the Gap in Colorado's Human Trafficking Laws", see 87 U. Colo. L. Rev. 257 (2016); for comment, "Addressing Labor Trafficking: The Next Step in the Anti-Trafficking Movement", see 99 Denv. L. Rev. 233 (2022).

18-3-501. Legislative declaration.

(1) The general assembly hereby finds and declares that:

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- (a) Human trafficking constitutes a serious problem in Colorado and across the nation;
 - (b) Human trafficking is abhorrent to a civilized society and deserving of the most diligent response from the state;
 - (c) Human trafficking often involves minors who have been forced into involuntary servitude and commercial sexual activity;
 - (d) Human trafficking can take many forms but generally includes the use of physical abuse, threats of harm, or fear of other consequences to prevent victims from reporting the activity; and
 - (e) Human trafficking creates a cycle of violence, impacting victims, families, and communities.
- (2) The general assembly further finds and declares that:
- (a) Legislation is required to combat this despicable practice, to make it easier to prosecute and punish persons who engage in human trafficking, and to protect the victims; and
 - (b) The general assembly supports a comprehensive approach to combating human trafficking, which approach includes prevention, protection, prosecution, and partnerships.
- (3) Now, therefore, the general assembly joins the federal government and other states around the nation in passing legislation in order to combat human trafficking and protect the victims.

Source: L. 2014: Entire part R&RE, (HB 14-1273), ch. 282, p. 1143, § 1, effective July 1.

18-3-502. Definitions.

As used in this part 5, unless the context otherwise requires:

- (1) "Adult" means a person eighteen years of age or older.
- (2) "Coercing" means inducing a person to act or to refrain from acting, if the inducement is accomplished by any one or more of the following means:
 - (a) The use or threat of the use of force against, abduction of, causing of serious harm to, or physical restraint of a person;
 - (b) The use of a plan, pattern, or statement for the purpose of causing the person to believe that failure to perform the act or failure to refrain from performing the act will result in the use of force against, abduction of, causing of serious harm to, or physical restraint of that person or another person;

(c) Using or threatening to use the law or the legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed;

(d) Threatening to notify law enforcement officials that a person is present in the United States in violation of federal immigration laws;

(e) The destruction or taking, or a threat to destroy or take, a person's identification document or other property;

(f) Controlling or threatening to control a person's access to a controlled substance, as defined in section 18-18-102 (5);

(g) The use of debt bondage; or

(h) The exploitation of a person's physical or mental impairment, where such impairment has a substantial adverse effect on the person's cognitive or volitional functions.

(3) "Commercial sexual activity" means sexual activity for which anything of value is given to, promised to, or received by a person.

(4) "Debt bondage" means:

(a) Demanding commercial sexual activity as payment toward or satisfaction of a real or purported debt; or

(b) Demanding labor or services as payment toward or satisfaction of a real or purported debt and failing to apply the reasonable value of the labor or services toward the liquidation of the debt; or

(c) Demanding labor or services where the length of the labor or services is not limited and the nature of the labor or services is not defined.

(5) "Identification document" means a real or purported passport, driver's license, immigration document, travel document, or other government-issued identification document, including a document issued by a foreign government.

(6) "Maintain" means to provide sustenance or care for a minor and includes but is not limited to providing shelter, food, clothing, drugs, medical care, or communication services.

(7) "Makes available" means to facilitate contact between a minor and another person.

(8) "Minor" means a person less than eighteen years of age.

(9) "Person" has the same meaning as set forth in section 2-4-401 (8), C.R.S.

(10) "Serious harm" means bodily injury or any other harm, whether physical or nonphysical, including psychological, financial, or reputational harm, which is sufficiently

serious, under all the surrounding circumstances, to compel a reasonable person to perform or continue to perform labor or services or sexual activity to avoid incurring the harm.

(11) "Sexual activity" means:

- (a) Sexual contact, as defined in section 18-3-401 (4);
- (b) Sexual intrusion, as defined in section 18-3-401 (5);
- (c) Sexual penetration, as defined in section 18-3-401 (6);
- (d) Sexual exploitation of a child, pursuant to section 18-6-403 (3)(a) and (3)(d); or
- (e) An obscene performance, as defined in section 18-7-101.

(11.5) "Travel services" includes, but is not limited to, the following services, offered either on a wholesale or retail basis:

- (a) Transportation by air, sea, road, or rail;
- (b) Related ground transportation;
- (c) Hotel accommodations; or
- (d) Package tours.

(12) "Victim" means a person who is alleged to have been, or who has been, subjected to human trafficking, as described in section 18-3-503 or section 18-3-504.

Source: L. 2014: Entire part R&RE, (HB 14-1273), ch. 282, p. 1144, § 1 effective July 1. **L. 2017:** (11.5) added, (HB 17-1072), ch. 250, p. 1049, § 1, effective September 1.

18-3-503. Human trafficking for involuntary servitude - human trafficking of a minor for involuntary servitude.

(1) A person who knowingly sells, recruits, harbors, transports, transfers, isolates, entices, provides, receives, or obtains by any means another person for the purpose of coercing the other person to perform labor or services commits human trafficking for involuntary servitude.

(2) Human trafficking for involuntary servitude is a class 3 felony; except that human trafficking of a minor for involuntary servitude is a class 2 felony.

(3) It is an affirmative defense to a charge pursuant to this section if the person being charged, at the time of the offense, was a victim of human trafficking for involuntary servitude

who was forced or coerced into engaging in human trafficking for involuntary servitude pursuant to this section.

Source: L. 2014: Entire part R&RE, (HB 14-1273), ch. 282, p. 1146, § 1, effective July 1. **L. 2024:** (3) added, (SB 24-035), ch. 54, p. 187, § 3, effective April 11.

18-3-504. Human trafficking for sexual servitude - human trafficking of a minor for sexual servitude.

(1) (a) A person commits human trafficking for sexual servitude if the person knowingly sells, recruits, harbors, transports, transfers, isolates, entices, provides, receives, or obtains by any means another person for the purpose of coercing the person to engage in commercial sexual activity.

(b) Human trafficking for sexual servitude is a class 3 felony.

(2) (a) A person commits human trafficking of a minor for sexual servitude if the person:

(I) Knowingly sells, recruits, harbors, transports, transfers, isolates, entices, provides, receives, obtains by any means, maintains, or makes available a minor for the purpose of commercial sexual activity; or

(II) Knowingly advertises, offers to sell, or sells travel services that facilitate an activity prohibited pursuant to subsection (2)(a)(I) of this section.

(b) Human trafficking of a minor for sexual servitude is a class 2 felony. The court shall sentence a person convicted of such a class 2 felony to the department of corrections for a term of at least the minimum of the presumptive range for a class 2 felony, as set forth in section 18-1.3-401.

(c) In any prosecution under this subsection (2), it is not a defense that:

(I) The minor consented to being sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, obtained, or maintained by the defendant for the purpose of engaging in commercial sexual activity;

(II) The minor consented to participating in commercial sexual activity;

(III) The defendant did not know the minor's age or reasonably believed the minor to be eighteen years of age or older; or

(IV) The minor or another person represented the minor to be eighteen years of age or older.

(2.5) It is an affirmative defense to a charge pursuant to this section if the person being charged, at the time of the offense, was a victim of human trafficking for sexual servitude who was forced or coerced into engaging in human trafficking for sexual servitude pursuant to this section.

(3) A person does not need to receive any of the proceeds of any commercial sexual activity to commit an offense described in this section.

(4) Conviction for an offense described in this section does not preclude conviction for an offense described in article 6 or 7 of this title based in whole or in part on the same or related conduct, and the court shall not require the prosecution to elect at trial between such offenses.

Source: **L. 2014:** Entire part R&RE, (HB 14-1273), ch. 282, p. 1146, § 1, effective July 1. **L. 2017:** (2)(b) amended, (HB 17-1172), ch. 161, p. 598, § 1, effective August 9; (2)(a) amended and (2.5) added, (HB 17-1072), ch. 250, p. 1049, § 2, effective September 1. **L. 2019:** (1)(a) and (2)(a) amended, (SB 19-185), ch. 147, p. 1766, § 4, effective May 6. **L. 2024:** (2.5) amended, (SB 24-035), ch. 54, p. 187, § 4, effective April 11.

Cross references: For the legislative declaration in SB 19-185, see section 1 of chapter 147, Session Laws of Colorado 2019.

ANNOTATION

Conviction for human trafficking does not violate defendant's right to equal protection because the statute proscribes conduct that is not proscribed by the soliciting for child prostitution statute under § 18-7-402 or by the inducement of child prostitution statute under § 18-7-405.5. Defendant's "maintaining" and "transporting" conduct ran afoul of the human trafficking statute in ways that are not proscribed by the lesser offenses. *People v. Shannon*, 2024 COA 41, 553 P.3d 239.

Former § 18-3-502 prohibited the sale, exchange, barter, or lease of a child but not the sale, exchange, barter, or lease of a

child's services. Patrons of a prostituted minor victim purchased only her services and did not purchase the victim herself. *People v. Cardenas*, 2014 COA 35, 338 P.3d 430.

The phrase "for the purpose of coercing" in subsection (1)(a) requires evidence that the defendant enticed or recruited the victim with the intent of coercing the victim to engage in commercial sexual activity. "For the purpose of coercing" does not mean "with the effect of" coercing. The proper focus of the section is on the defendant's intent, not the victim's susceptibility to being

trafficked. People v. Hines, 2021 COA 45, 491 P.3d 578.

Modified unanimity instruction was not required when the prosecution charged the defendant with a single count of human trafficking based on a series of

discrete acts. Each of the discrete acts was committed by the defendant with an intent to achieve the objective of inducing the victim to engage in commercial sexual activity for his benefit. People v. Hines, 2021 COA 45, 491 P.3d 578.

18-3-505. Human trafficking council - created - duties - repeal.

(1) (a) There is created in the department of public safety the Colorado human trafficking council, referred to within this section as the "council". The purpose of the council is to bring together leadership from community-based and statewide anti-trafficking efforts, to build and enhance collaboration among communities and counties within the state, to establish and improve comprehensive services for victims and survivors of human trafficking, to assist in the successful prosecution of human traffickers, and to help prevent human trafficking in Colorado.

(b) The membership of the council must reflect, to the extent possible, representation of urban and rural areas of the state and a balance of expertise, both governmental and nongovernmental, in issues relating to human trafficking. The council must include members with expertise in child welfare and human services to address the unique needs of child victims, including those child victims who are involved in the child welfare system. The membership of the council consists of the following persons, appointed as follows:

(I) Two representatives from the department of human services, each to be appointed by the executive director of the department of human services;

(II) A representative of the department of law, to be appointed by the attorney general;

(III) A representative of the state department of labor and employment, to be appointed by the executive director of the department of labor and employment;

(IV) A representative of the division of the Colorado state patrol that addresses human smuggling and human trafficking pursuant to section 24-33.5-211, C.R.S., to be appointed by the executive director of the department of public safety;

(V) A representative of a statewide association of police chiefs, to be appointed by the governor or his or her designee;

(VI) A representative of a statewide association of county sheriffs, to be appointed by the governor or his or her designee;

(VII) A representative of a statewide coalition for victims of sexual assault, to be appointed by the governor or his or her designee;

(VIII) A representative of a statewide organization that provides services to crime victims, to be appointed by the governor or his or her designee;

(IX) A representative of a statewide immigrant rights organization, to be appointed by the governor or his or her designee;

(X) A representative of a statewide organization of district attorneys, to be appointed by the governor or his or her designee;

(XI) A representative of a statewide organization of criminal defense attorneys, to be appointed by the governor or his or her designee;

(XII) At least three but not more than five persons, each representing a regional or city-wide human trafficking task force or coalition, each to be appointed by the governor or his or her designee;

(XIII) A representative of a nonprofit organization that facilitates the treatment or housing of human trafficking victims, to be appointed by the governor or his or her designee;

(XIV) A representative of a college or university department that conducts research on human trafficking, to be appointed by the governor or his or her designee;

(XV) A representative of a statewide organization that provides legal advocacy to abused, neglected, and at-risk children, to be appointed by the governor or his or her designee;

(XVI) Two representatives of organizations that provide direct services to victims of human trafficking, to be appointed by the governor or his or her designee;

(XVII) One representative of a faith-based organization that assists victims of human trafficking, to be appointed by the governor or his or her designee;

(XVIII) Two persons, each of whom is a director of a county department of human or social services, one from an urban county and the other from a rural county, each appointed by the governor or his or her designee;

(XIX) One person who provides child welfare services for a county department of human or social services, appointed by the governor or his or her designee;

(XX) Four persons who are former victims of human trafficking, two who are former victims of human trafficking for involuntary servitude and two who are former victims of human trafficking for sexual servitude, each to be appointed by the governor or his or her designee;

(XXI) A representative of a child advocacy center, as defined in section 19-1-103;

(XXII) One person to be appointed by the commissioner of agriculture;

(XXIII) One person representing the judicial branch, to be appointed by the chief justice of the supreme court;

(XXIV) A representative of a statewide coalition for victims of domestic violence, to be appointed by the governor or his or her designee; and

(XXV) One person who is a representative of an organization for victims of labor trafficking or an individual who has extensive professional experience in advocating for victims of labor trafficking, to be appointed by the governor or his or her designee.

(2) The term of a council member expires on December 31 of the year the term is set to expire. The succeeding appointee's term commences on the January 1 following the expiration of the preceding term. The members of the council shall elect presiding officers for the council, including a chair and vice-chair, from among the council members appointed pursuant to subsection (1) of this section, which presiding officers shall serve terms of two years. Council members may reelect a presiding officer.

(3) (a) Except as provided by subsection (3)(b) of this section, each council member must serve at the pleasure of his or her appointing authority for a term of four years. The appointing authority may reappoint the council member for an additional term or terms. Council members must serve without compensation, with the exception of the appointed survivor council members, who must receive an hourly rate for the time for each council meeting attended, not to exceed eight hours per meeting at the current applicable expert rate as stated in chief justice directive 12-03. All council members may be reimbursed for actual travel expenses incurred in the performance of their duties.

(b) Each council member appointed pursuant to subsections (1)(b)(I) to (1)(b)(IV), (1)(b)(XXII), and (1)(b)(XXIII) of this section after May 20, 2019, must serve at the pleasure of his or her appointing authority for a term of three years. The appointing authority may reappoint the council member for an additional term or terms. Council members must serve without compensation but may be reimbursed for actual travel expenses incurred in the performance of their duties.

(4) The council shall meet at least four times each year and shall carry out the following duties:

(a) On or before January 1, 2016, make recommendations to the judiciary committees of the house of representatives and senate, or any successor committees, concerning:

(I) Repealed.

(II) Whether the general assembly should establish a grant program for organizations that provide services to victims of human trafficking, including consideration of how such a grant program may be funded; and

(III) Whether the general assembly should enact legislation concerning:

(A) The prosecution of or granting of immunity to a child victim of commercial sexual exploitation for offenses related to that exploitation;

(B) The creation of other legal protections, including statutory defenses for child victims of commercial sexual exploitation for offenses related to that exploitation and the creation of any necessary changes to title 19, C.R.S., to implement those legal protections or defenses; or

(C) Standards, guidelines, or mandates regarding the appropriate assessment, placement, and treatment of child victims of commercial sexual exploitation through title 19, C.R.S., including but not limited to the use of locked placement;

(a.5) The recommendations submitted pursuant to paragraph (a) of this subsection (4) must include a full explanation of each recommendation with a discussion of the benefits of each recommendation, any problems that might be encountered, and how those problems, if any, might be mitigated.

(b) On or before January 1, 2017, and on or before January 17 of each year thereafter, submit a report to the judiciary committees of the house of representatives and senate, or any successor committees, summarizing the activities of the council during the preceding year;

(c) Consider and make, as it deems necessary, recommendations to the judiciary committees of the house of representatives and senate, or to any successor committees, concerning any statutory changes that the council deems necessary to facilitate the prosecution and punishment of persons who engage in, and to protect the victims of, human trafficking;

(d) Develop an implementation plan for a public awareness campaign to educate the public about human trafficking and place victims services contact information in places where victims of human trafficking are likely to see it;

(e) Develop training standards and curricula for organizations that provide assistance to victims of human trafficking, for persons who work in or who frequent places where human trafficking victims are likely to appear, and for law enforcement agencies;

(f) Identify best practices for the prevention of all forms of human trafficking, including but not limited to child sex trafficking and involuntary servitude trafficking;

(g) Collect data relating to the prevalence of, and the efforts of law enforcement to combat, human trafficking in Colorado. The council shall annually report the data to the judiciary committees of the house of representatives and senate, or to any successor committees.

(h) Research and pursue funding opportunities for the council;

(i) On or after January 1, 2019, perform a post-enactment review of section 18-7-201.3 and report its findings to the judiciary committees of the senate and house of representatives, or any successor committees.

(5) The department of public safety is authorized to accept and expend gifts, grants, and donations for the purpose of assisting the council in fulfilling its duties pursuant to this section.

(6) This section is repealed, effective September 1, 2031. Before repeal, the department of regulatory agencies shall review the council pursuant to section 2-3-1203.

Source: **L. 2014:** Entire part R&RE, (HB 14-1273), ch. 282, p. 1147, § 1, effective July 1. **L. 2015:** (4)(i) added, (SB 15-030), ch. 107, p. 312, § 2, effective April 16; (4)(a) amended and (4)(a.5) added, (HB 15-1019), ch. 237, p. 879, § 1, effective August 5. **L. 2016:** (1)(b)(XXI), (1)(b)(XXII), and (3) amended and (1)(b)(XXIII) added, (HB 16-1033), ch. 64, p. 166, § 1, effective August 10. **L. 2018:** IP(1)(b), (1)(b)(XVIII), and (1)(b)(XIX) amended, (SB 18-092), ch. 38, p. 406, § 27, effective August 8. **L. 2019:** (1)(b)(XX), (1)(b)(XXII), (2), (3), (4)(f), and (6) amended, (1)(b)(XXIV) and (1)(b)(XXV) added, and (4)(a)(I) repealed, (SB 19-149), ch. 233, p. 2324, § 1, effective May 20. **L. 2022:** (2) and IP(4) amended, (SB 22-013), ch. 2, p. 25, § 29, effective February 25. **L. 2024:** (3)(a) and (6) amended, (HB 24-1345), ch. 317, pp. 2123, 2122, §§ 3, 2, effective May 31. **L. 2026:** (1)(b)(XXI) amended, (HB 26-1142), ch. 44, p. 205, § 5, effective August 12.

Cross references: (1) For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

(2) For the short title ("Colorado Child Advocacy Center Act") and the legislative declaration in HB 26-1142, see sections 1 and 2 of chapter 44, Session Laws of Colorado 2026.

PART 6

STALKING

Editor's note: This part 6 was added with relocations in 2010. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

18-3-601. Legislative declaration.

(1) The general assembly hereby finds and declares that:

- (a) Stalking is a serious problem in this state and nationwide;
 - (b) Although stalking often involves persons who have had an intimate relationship with one another, it can also involve persons who have little or no past relationship;
 - (c) A stalker will often maintain strong, unshakable, and irrational emotional feelings for his or her victim and may likewise believe that the victim either returns these feelings of affection or will do so if the stalker is persistent enough. Further, the stalker often maintains this belief, despite a trivial or nonexistent basis for it and despite rejection, lack of reciprocation, efforts to restrict or avoid the stalker, and other facts that conflict with this belief.
 - (d) A stalker may also develop jealousy and animosity for persons who are in relationships with the victim, including family members, employers and co-workers, and friends, perceiving them as obstacles or as threats to the stalker's own "relationship" with the victim;
 - (e) Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim;
 - (f) Stalking involves severe intrusions on the victim's personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim, even in the absence of express threats of physical harm.
- (2) The general assembly hereby recognizes the seriousness posed by stalking and adopts the provisions of this part 6 with the goal of encouraging and authorizing effective intervention before stalking can escalate into behavior that has even more serious consequences.

Source: L. 2010: Entire part added with relocations, (HB 10-1233), ch. 88, p. 293, § 1, effective August 11.

Editor's note: This section is similar to former § 18-9-111 (4)(a) as it existed prior to 2010.

18-3-602. Stalking - penalty - definitions - Vonnie's law.

- (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:
- (a) Makes a credible threat to another person and, in connection with the threat, repeatedly follows, approaches, contacts, or places under surveillance that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship;
- or

(b) Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues; or

(c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress. For purposes of this paragraph (c), a victim need not show that he or she received professional treatment or counseling to show that he or she suffered serious emotional distress.

(2) For the purposes of this part 6:

(a) Conduct "in connection with" a credible threat means acts that further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat.

(b) "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

(c) "Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

(d) "Repeated" or "repeatedly" means on more than one occasion.

(3) A person who commits stalking:

(a) Commits a class 5 felony for a first offense except as otherwise provided in subsection (5) of this section; or

(b) Commits a class 4 felony for a second or subsequent offense, if the offense occurs within seven years after the date of a prior offense for which the person was convicted.

(4) Stalking is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(5) If, at the time of the offense, there was a temporary or permanent protection order, injunction, or condition of bond, probation, or parole or any other court order in effect against the person, prohibiting the behavior described in this section, the person commits a class 4 felony.

(6) Nothing in this section shall be construed to alter or diminish the inherent authority of the court to enforce its orders through civil or criminal contempt proceedings; however, before a

criminal contempt proceeding is heard before the court, notice of the proceedings shall be provided to the district attorney for the judicial district of the court where the proceedings are to be heard and the district attorney for the judicial district in which the alleged act of criminal contempt occurred. The district attorney for either district shall be allowed to appear and argue for the imposition of contempt sanctions.

(7) A peace officer shall have a duty to respond as soon as reasonably possible to a report of stalking and to cooperate with the alleged victim in investigating the report.

(8) (a) When a person is arrested for an alleged violation of this section, the fixing of bail for the crime of stalking shall be done in accordance with section 16-4-105 (4), C.R.S., and a protection order shall issue in accordance with section 18-1-1001 (5).

(b) This subsection (8) shall be known and may be cited as "Vonnie's law".

(9) When a violation under this section is committed in connection with a violation of a court order, including but not limited to any protection order or any order that sets forth the conditions of a bond, any sentences imposed pursuant to this section and pursuant to section 18-6-803.5 or any sentence imposed in a contempt proceeding for violation of the court order shall be served consecutively and not concurrently.

Source: **L. 2010:** Entire part added with relocations, (HB 10-1233), ch. 88, p. 294, § 1, effective August 11. **L. 2012:** (5) amended and (8) and (9) added, (HB 12-1114), ch. 176, pp. 632, 631, § 4, 1, effective May 11. **L. 2014:** (8)(a) amended, (SB 14-212), ch. 397, p. 2000, § 8, effective July 1.

Editor's note: This section is similar to former § 18-9-111 (4)(b), (4)(c), (5), and (6), as they existed prior to 2010.

ANNOTATION

Annotator's note. Since § 18-3-602 is similar to § 18-9-111 as it existed prior to the 2010 amendments to this part, relevant cases construing that provision have been included in the annotations to this section.

Subsection (1)(c) held constitutional. People v. Beauvais, 2014 COA 143, 405

P.3d 269, rev'd on other grounds, 2017 CO 34, 393 P.3d 509.

Under subsection (1)(c), the state must prove in true-threats cases that the defendant had some subjective understanding of the statements' threatening character, based on a showing no more

demanding than recklessness. *Counterman v. Colo.*, 600 U.S. 66 (2023).

A stalking prosecution under subsection (1)(c) not premised on the content of the defendant's expression or communication does not implicate protected speech as contemplated in *Counterman v. Colo.*, 600 U.S. 66 (2023). *People v. Morris*, 2025 COA 15, __ P.3d __.

The prosecution does not need to prove a reckless mens rea if the charge does not rely on the content of the defendant's expression but instead focuses on the defendant's actions. The trial court erred when it required the prosecution to prove defendant's recklessness even after narrowing the stalking jury instruction to solely focus on the repeated contacts, including defendant banging on the front door of victim's place of business and home and attempting to text and call the victim from someone else's phone after the victim blocked the defendant's number. *People v. Morris*, 2025 COA 15, __ P.3d __.

Subsection (4)(a)(II) held constitutional. By burdening only those communications furthering, promoting, or advancing an expressed credible threat, subsection (4)(a)(II) does not reach protected conduct. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Nor is the provision void for vagueness since a person of ordinary intelligence can know what conduct is proscribed. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Requiring a jury to determine "reasonableness" does not make subsection (4)(b)(III) unconstitutionally vague. The statute prohibits contact that inflicts "serious emotional distress" and provides an objective "reasonable person" standard to measure whether the emotional distress inflicted upon the victim was "serious". Thus, it provides notice that conduct that would cause a reasonable person serious emotional distress is prohibited. The only uncertainty raised by the statute is whether the conduct would cause a reasonable person serious emotional distress, and the determination of "reasonableness" is a question for the jury. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd* on other grounds, 101 P.3d 1090 (Colo. 2004).

Subsections (4)(b)(I) and (4)(b)(III) are not unconstitutionally vague or overbroad. The definition of "credible threat" does not substantially burden speech and is specifically sufficient to provide guidance to the public. The term "serious emotional distress" sets forth an identifiable objective standard for measuring the proscribed conduct and therefore is not unconstitutionally vague. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), *rev'd* on other grounds, 127 P.3d 71 (Colo. 2006); *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007); *People v. Pellegrin*, 2021 COA 118, 500 P.3d 384, *aff'd* on other grounds, 2023 CO 37, 532 P.3d 1224.

Application of former § 18-9-111 (4)(b)(II) to sender of e-mails that constituted true threats does not violate

sender's first amendment rights. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

No equal protection violation for convictions for felony stalking and misdemeanor harassment by computer because the statutory provisions proscribe different although related criminal conduct. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Right to access to courts does not include right to file lawsuits in abusive manner; therefore, the stalking convictions that were based, in part, on defendant filing 13 frivolous lawsuits against the victim did not violate the defendant's right to access the courts. *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007).

Because the elements of violation of a mandatory restraining order and the elements of harassment by stalking are not the same, the subsequent prosecution of defendant did not violate double jeopardy protections. *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

The "knowingly" mental state required by subsection (1)(a) is a sufficiently high mens rea to meet the standard announced in *Counterman v. Colorado*, 600 U.S. 66 (2023), annotated above. *People v. Casper*, 2025 COA 69, 577 P.3d 489.

A defendant does not need to know that his or her conduct would cause a reasonable person serious emotional distress. This reading of subsection (4)(b)(III) would impart a nonexistent requirement that the defendant must intend to cause serious emotional distress. The

defendant must only be aware of his or her conduct, and the result of that conduct is evaluated under an objective standard to which his or her specific intent is irrelevant. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd*, 101 P.3d 1090 (Colo. 2004).

It is not each individual act of stalking that must cause a reasonable person to suffer emotional distress, but the combined acts of the defendant that would cause such a result. *People v. Folsom*, 2017 COA 146M, 431 P.3d 652.

The mens rea of knowingly in the crime of emotional distress harassment by stalking does not apply to the element that the stalker be aware that his or her conduct would cause serious emotional distress to a reasonable person. Generally, the mental state applies to all elements of an offense unless the legislative intent is to limit its application. The general assembly recognized the stalker may be oblivious to reality of the emotional distress he or she is causing, and, therefore, it would be absurd to allow a defendant so out-of-touch with reality to avoid criminal prosecution. *People v. Cross*, 127 P.3d 71 (Colo. 2006).

A person commits the offense of stalking if he or she knowingly engages in conduct that causes a reasonable person to fear for his or her safety or the safety of his or her family or intimates. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Harassment is not a lesser included offense of stalking because the offenses of harassment and stalking differ in more ways than the two distinctions identified in § 18-

1-408 (5)(c). *Pellegrin v. People*, 2023 CO 37, 532 P.3d 1224.

An electronic surveillance device installed on the victim's car "repeatedly" stored information about her movements thereby allowing the defendant to gain information about her on repeated occasions, and therefore satisfying the requirements of this section. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

The phrase "in connection with" indicates an intention by the general assembly that a continued relationship between the credible threat and the repeated communications is contemplated. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

A person must directly, or indirectly through another person, knowingly make a credible threat to another person and repeatedly make any form of communication with the recipient of the threat. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

The repeated communications may occur before, during, or after the credible threat but they must be connected to the threat. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Whether the repeated communications are "in connection with" the threat is a matter of fact just as the existence of a credible threat itself. *People v. Baer*, 973

P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Under subsection (1)(a), the term "contacts" includes phone and text message communications. *People v. Burgandine*, 2020 COA 142, 484 P.3d 739.

Under subsection (1)(c), the term "contacts" encompasses the act of making repeated, even if unanswered, phone calls to the victim. *People v. Miller*, 2024 COA 66, 556 P.3d 1262.

"Credible threat" in subsection (2)(b) is not an objective standard, but incorporates the mens rea of the specific charge, which takes into account the defendant's subjective mens rea to satisfy the subjective understanding requirement set forth in *Counterman v. Colorado*, 600 U.S. 66 (2023), annotated above. *People v. Casper*, 2025 COA 69, 577 P.3d 489.

Trial court erred in not instructing the jury that defendant must knowingly engage in conduct taken in connection with the threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

The defendant could not have been charged with a violation of subsection (4) until all of the elements of the crime are completed. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

The defendant may be charged with increased penalties because of amendments to subsection (4) that became effective in July of 1995 when the defendant did not consummate following the victim until August, but had committed elements of the

offense prior to July. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

The phrase "under surveillance" includes electronic surveillance that records a person's whereabouts as that person moves from one location to another and allows the stalker to access that information either simultaneously or shortly thereafter. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Defendant's statement that he was going to kill the victim if she did not see him was sufficient evidence to support a finding that he had made a credible threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

Evidence sufficient to support a finding that contact was made in connection with a credible threat. Defendant called the victim repeatedly on one day and threatened that he would kill her if she did not see him. Following this threat, defendant contacted the victim numerous times in person and by telephone and repeatedly asked to see her. This evidence is sufficient to support a finding that the contact was made in connection with a credible threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

Serious emotional distress was supported by the evidence where the victim testified that she suspected the defendant was stalking her for over a month, that she was concerned about constantly being watched, that she took alternate routes to her destinations, that she was uncomfortable and had stomach aches, that she had trouble sleeping and was anxious, and that she took a leave of absence from

work to enter a safe house for her safety. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Evidence sufficient to support a finding beyond a reasonable doubt of serious emotional distress where the victim testified that defendant's behavior caused her to change her work schedule, take days off from work, and feel unsafe; she was nervous and had trouble sleeping; and she felt she was constantly being watched by defendant. The statute is clear that serious emotional distress need not be such as would compel professional treatment or a breakdown. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

Evidence sufficient to establish a "credible threat". The credible threat does not need to be separate from the harassing behavior or verbal. Therefore, evidence that the defendant was only at the victim's place of employment when the victim was there, the defendant would approach and make eye contact with the victim, and the defendant found out where the victim went to church and attended that church was sufficient to establish a "credible threat". *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

Evidence sufficient to establish that e-mails, with their implicit and explicit threats, would have caused a reasonable person in recipients' position to fear for their safety and the safety of others. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Stalking charges based on repeated contacts and not on the content of those

communications do not require proof that the defendant acted with a reckless state of mind. Thus, stalking charges that are not rooted in the content of any communications are not subject to the Counterman rule. *People v. Crawford*, 2025 CO 22, 568 P.3d 426.

Court's instruction for harassment by stalking was appropriate. The court instructed the jury that "knowingly" applied to both the credible threat and to the conduct in connection with the threat. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

The penalty provision in subsection (5)(a.5) establishes a sentencing enhancer. Since the statute does not prescribe a burden of proof, the prosecution is required to prove the prior conviction by only a preponderance of the evidence, and the court may properly determine the issue without the jury. Therefore, the court erred in admitting the prior conviction into evidence as an element of the harassment by stalking offense. The error required reversal since the evidence was highly prejudicial and had no or little probative value. *People v. Cross*, 114 P.3d 1

(Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

Defendant's course of conduct amounted to a single crime for which the general assembly has not authorized multiple punishments. The plain words of the statute define the unit of prosecution for the crime of stalking as a continuous course of conduct by which one repeatedly follows, approaches, contacts, or places another under surveillance. Furthermore, the statute requires that the acts constituting stalking must be performed "repeatedly". Consequently, per victim, stalking can occur only when there is conduct comprising two or more occurrences of the specified acts. *People v. Herron*, 251 P.3d 1190 (Colo. App. 2010).

An extended time frame alone does not render numerous contacts with the victim factually distinct when contacts with the victim were related to the common desire to reconcile and resume a relationship, and, most significantly, the prosecution did not treat the acts as legally separable at trial. *People v. Wagner*, 2018 COA 68, 434 P.3d 731.

18-3.5 ARTICLE 3.5

Offenses Against Pregnant Women

18-3.5-101. Definitions.

18-3.5-102. Exclusions.

18-3.5-103. Unlawful termination of pregnancy in the first degree.

18-3.5-104. Unlawful termination of pregnancy in the second degree.

18-3.5-105. Unlawful termination of pregnancy in the third degree.

18-3.5-106.	Unlawful termination of pregnancy in the fourth degree.	18-3.5-108.	Aggravated vehicular unlawful termination of pregnancy - definitions.
18-3.5-107.	Vehicular unlawful termination of pregnancy.	18-3.5-109.	Careless driving resulting in unlawful termination of pregnancy - penalty.
		18-3.5-110.	Construction.

18-3.5-101. Definitions.

As used in this article, unless the context otherwise requires:

- (1) "Consent" has the same meaning as provided in section 18-1-505.
- (2) "Intentionally" or "with intent" has the same meaning as provided in section 18-1-501.
- (3) "Knowingly" has the same meaning as provided in section 18-1-501.
- (4) "Pregnancy", for purposes of this article only and notwithstanding any other definition or use to the contrary, means the presence of an implanted human embryo or fetus within the uterus of a woman.
- (5) "Recklessly" shall have the same meaning as provided in section 18-1-501.
- (6) "Unlawful termination of pregnancy" means the termination of a pregnancy by any means other than birth or a medical procedure, instrument, agent, or drug, for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained, or for which the pregnant woman's consent is implied by law.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2186, § 2, effective July 1.

18-3.5-102. Exclusions.

- (1) Nothing in this article shall permit the prosecution of a person for any act of providing medical, osteopathic, surgical, mental health, dental, nursing, optometric, healing, wellness, or pharmaceutical care; furnishing inpatient or outpatient hospital or clinic services; furnishing telemedicine services; or furnishing any service related to assisted reproduction or genetic testing.

(2) Nothing in this article shall permit the prosecution of a woman for any act or any failure to act with regard to her own pregnancy.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2186, § 2, effective July 1.

18-3.5-103. Unlawful termination of pregnancy in the first degree.

(1) A person commits the offense of unlawful termination of pregnancy in the first degree if, with the intent to terminate unlawfully the pregnancy of a woman, the person unlawfully terminates the woman's pregnancy.

(2) Unlawful termination of pregnancy in the first degree is a class 3 felony but is a class 2 felony if the woman dies as a result of the unlawful termination of a pregnancy.

(3) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2187, § 2, effective July 1.

18-3.5-104. Unlawful termination of pregnancy in the second degree.

(1) A person commits the offense of unlawful termination of pregnancy in the second degree if the person knowingly causes the unlawful termination of the pregnancy of a woman.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), unlawful termination of pregnancy in the second degree is a class 4 felony.

(b) If unlawful termination of pregnancy in the second degree is committed under circumstances where the act causing the unlawful termination of pregnancy 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 unlawful termination of pregnancy sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the unlawful termination of pregnancy sufficient for the voice of reason and humanity to be heard, it is a class 5 felony.

(3) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2187, § 2, effective July 1.

18-3.5-105. Unlawful termination of pregnancy in the third degree.

(1) A person commits the offense of unlawful termination of pregnancy in the third degree if, under circumstances manifesting extreme indifference to the value of human life, the person knowingly engages in conduct that creates a grave risk of death to another person, and thereby causes the unlawful termination of the pregnancy of a woman.

(2) Unlawful termination of pregnancy in the third degree is a class 5 felony.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2187, § 2, effective July 1.

18-3.5-106. Unlawful termination of pregnancy in the fourth degree.

(1) A person commits the offense of unlawful termination of pregnancy in the fourth degree if the person recklessly causes the unlawful termination of the pregnancy of a woman at such time as the person knew or reasonably should have known that the woman was pregnant.

(2) (a) Unlawful termination of pregnancy in the fourth degree is a class 6 felony.

(b) Unlawful termination of pregnancy in the fourth degree by any person is a class 5 felony if the pregnancy of the woman, other than a participant in the crime, is unlawfully terminated during the commission or attempted commission of or flight from the commission or attempted commission of murder, assault in the first or second degree, 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, but only to the extent that the person is a principal in the criminal act or attempted criminal act, as described in section 18-1-603.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2188, § 2, effective July 1.

18-3.5-107. Vehicular unlawful termination of pregnancy.

(1) If a person operates or drives a motor vehicle in a reckless manner, and this conduct is the proximate cause of the unlawful termination of the pregnancy of a woman, such person commits vehicular unlawful termination of pregnancy.

(2) Vehicular unlawful termination of pregnancy in violation of subsection (1) of this section is a class 5 felony.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2188, § 2, effective July 1.

18-3.5-108. Aggravated vehicular unlawful termination of pregnancy - definitions.

(1) (a) If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and this conduct is the proximate cause of the unlawful termination of the pregnancy of a woman, such person commits aggravated vehicular unlawful termination of pregnancy. This is a strict liability crime.

(b) As used in this subsection (1):

(I) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(II) "One or more drugs" means all substances defined as a drug in section 12-280-103 (16), and all controlled substances defined in section 18-18-102 (5), and glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor or vapors as defined in section 18-18-412.

(c) The fact that a person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(2) Aggravated vehicular unlawful termination of pregnancy, in violation of paragraph (a) of subsection (1) of this section, is a class 4 felony.

(3) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, shall give rise to the following presumptions:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was not under the influence of alcohol.

(b) If there was at such time in excess of 0.05 grams but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 grams but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was under the influence of alcohol.

(4) The limitations of subsection (3) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(5) (a) If a law enforcement officer has probable cause to believe that a person was driving a motor vehicle in violation of paragraph (a) of subsection (1) of this section, the person, upon the request of the law enforcement officer, shall take and complete, and cooperate in completing, any test or tests of the person's blood, breath, saliva, or urine for the purpose of determining the alcohol or drug content within his or her system. The type of test or tests shall be determined by the law enforcement officer requiring the test or tests. If the person refuses to take, complete, or cooperate in completing any test or tests, the test or tests may be performed at the direction of a law enforcement officer having probable cause, without the person's authorization or consent. If a person refuses to take, complete, or cooperate in taking or completing any test or tests required by this paragraph (a), the person shall be subject to license revocation pursuant to the provisions of section 42-2-126 (3), C.R.S. When the test or tests show that the amount of alcohol in a person's blood was in violation of the limits provided for in section 42-2-126 (3)(a), (3)(b), (3)(d), or (3)(e), C.R.S., the person shall be subject to license revocation pursuant to the provisions of section 42-2-126, C.R.S.

(b) Any person who is required to submit to testing shall cooperate with the person authorized to obtain specimens of his or her blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing.

(c) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person committed a violation of paragraph (a) of subsection (1) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of the testing. Strict compliance with the rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule

has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of the test results. It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with the rules and regulations if the certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(d) No person except a physician, a registered nurse, an emergency medical service provider certified or licensed under section 25-3.5-203 who is authorized within his or her scope of practice to draw blood, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse may withdraw blood for the purpose of determining the alcohol or drug content in the blood. In any trial for a violation of subsection (1)(a) of this section, testimony of a law enforcement officer that the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was authorized to withdraw blood specimens is sufficient evidence that the person was so authorized, and testimony from the person who obtained the blood specimens concerning the person's authorization to obtain blood specimens is not a prerequisite to the admissibility of test results concerning the blood specimens obtained. Civil liability does not attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which the specimens are obtained pursuant to this subsection (5) as a result of the act of obtaining the specimens from any person if the specimens were obtained according to the rules prescribed by the state board of health; except that this subsection (5) does not relieve any such person from liability for negligence in obtaining any specimen sample.

(e) Any person who is dead or unconscious must be tested to determine the alcohol or drug content of the person's blood or any drug content of the person's system as provided in this subsection (5). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency must be allowed to test any blood, urine, or saliva that was obtained and not utilized by a health-care provider and must have access to that portion of the analysis and results of any tests administered by the provider that show the alcohol or drug content of the person's blood or any drug content within the person's system. Such test results are not considered privileged communications, and the provisions of section 13-90-107 relating to the physician-patient privilege do not apply. Any person who is dead, in addition to the tests prescribed, must also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Any information obtained must be made a part of the law enforcement officer's crash report.

(f) If a person refuses to take, complete, or cooperate in completing any test or tests as provided in this subsection (5) and the person subsequently stands trial for a violation of subsection (1)(a) of this section, the refusal to take, complete, or cooperate with completing any test or tests shall be admissible into evidence at the trial, and the person may not claim the privilege against self-incrimination with regard to the admission of his or her refusal to take, complete, or cooperate with completing any test or tests.

(g) Notwithstanding any provision of section 42-4-1301.1, C.R.S., concerning requirements that relate to the manner in which tests are administered, the test or tests taken pursuant to the provisions of this section may be used for the purposes of driver's license revocation proceedings under section 42-2-126, C.R.S., and for the purposes of prosecutions for violations of section 42-4-1301 (1) or (2), C.R.S.

(6) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine his or her alcohol or drug level. This subsection (6) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (6) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2188, § 2, effective July 1. **L. 2018:** (5)(d) and (5)(f) amended, (HB 18-1375), ch. 274, p. 1702, § 26, effective May 29. **L. 2019:** (5)(d) amended, (SB 19-242), ch. 396, p. 3527, § 12, effective May 31; (1)(b)(II) amended, (HB 19-1172), ch. 136, p. 1675, § 93, effective October 1. **L. 2026:** (5)(e) amended, (HB 26-1237), ch. 117, p. 465, § 10, effective August 12.

18-3.5-109. Careless driving resulting in unlawful termination of pregnancy - penalty.

(1) A person who drives a motor vehicle, bicycle, electrical assisted bicycle, electric scooter, or low-power scooter in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances, and causes the unlawful termination of a pregnancy of a woman is guilty of careless driving resulting in unlawful termination of pregnancy. A person convicted of careless driving of a bicycle, electrical assisted bicycle, or electric scooter resulting in the unlawful termination of pregnancy is not subject to section 42-2-127.

(2) Any person who violates any provision of this section commits a class 1 misdemeanor traffic offense.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2192, § 2, effective July 1.
L. 2019: (1) amended, (HB 19-1221), ch. 271, p. 2566, § 18, effective May 23.

18-3.5-110. Construction.

Nothing in this article shall be construed to confer the status of "person" upon a human embryo, fetus, or unborn child at any stage of development prior to live birth.

Source: L. 2013: Entire article R&RE, (HB 13-1154), ch. 372, p. 2192, § 2, effective July 1.

ANNOTATION

Law reviews. For article, "Disposition of Pre-Embryos upon Dissolution of Marriage in Colorado", see 50 Colo. Law. 40 (Feb. 2021).

ARTICLE 4

Offenses Against Property

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PART 8
THEFT OF PUBLIC TRANSPORTATION
SERVICES

18-4-801 to
18-4-802. (Repealed)

PART 1

ARSON

Cross references: For the "Fraudulent Claims and Arson Information Reporting Act", see part 10 of article 4 of title 10.

18-4-101. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Building" means a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present.

(2) "Occupied structure" means any area, place, facility, or enclosure which, for particular purposes, may be used by persons or animals upon occasion, whether or not included within the definition of "building" in subsection (1) of this section, and which is in fact occupied by a person or animal, and known by the defendant to be thus occupied at the time he acts in violation of one or more of sections 18-4-102 to 18-4-105.

(3) Property is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

(4) If a building is divided into units for separate occupancy, any unit not occupied by the defendant is a "building of another".

Source: L. 71: R&RE, p. 425, § 1. C.R.S. 1963: § 40-4-101.

ANNOTATION

The words used in subsection (1) of § 18-4-105 are without technical meaning except for "building", "property of another",

and "occupied structure", which are all adequately defined by statute in this section.

People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Scope of generic term "building". In adopting the generic term "building" in amending the burglary statute, the general assembly intended to encompass not only the structures previously listed, but also to cover all types of structures known but not then included. Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960) (decided under former § 40-3-6, CRS 53).

Rather than limiting the definition of a building to a structure with walls and a roof, which would include a telephone booth, it was the legislative intent that a building is a structure which has the capacity to contain and is designed for the habitation of man or animals or for the sheltering of property. Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960) (decided under former § 40-3-6, CRS 53).

A trailer pulled by a truck tractor, with the capacity to contain, and the design for the sheltering of, property, which is hauled to a construction site and left there for the purpose of storing materials to be used on the project, is clearly a "building" within the statutory definition. People v. Simien, 671 P.2d 1021 (Colo. App. 1983).

When fenced enclosure not "building". A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in subsection (1) so as to support a second degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment or exclusion and affords little protection

against inclement weather and extreme temperatures. People v. Moyer, 635 P.2d 553 (Colo. 1981).

But within definition of "occupied structure". A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in subsection (2), so as to support a second degree burglary charge for the unlawful entry of the enclosure. People v. Moyer, 635 P.2d 553 (Colo. 1981).

Unfinished structure. Under former section, a structure was held to be a building, although it was yet incomplete and unfurnished. El Jebel Shrine Ass'n v. McGlone, 93 Colo. 334, 26 P.2d 108 (1933).

"Dwelling" includes attached garage. A garage attached to a residence is part of a "dwelling" within the meaning of § 18-4-203(2), burglary of a dwelling. People v. Jiminez, 651 P.2d 395 (Colo. 1982).

"Proprietary interest" is a protean concept, the meaning of which emerges from contextual use and application. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Term "proprietary interest" is sufficiently broad to include a legally recognized security interest, such as that of a credit union, which the defendant has neither the right nor the authority to defeat or impair, even though he also had an interest in the secured property. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

The fact that wife's clothing may have been acquired during the course of her

marriage to the defendant and may constitute "marital property" under § 14-10-113 does not create an ownership interest in that property in the defendant for purposes of § 18-4-103. The evidence

presented at the trial concerning wife's ownership is sufficient to support a finding of "property of another" and therefore defendant's arson conviction. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

18-4-102. First degree arson.

(1) A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent commits first degree arson.

(2) First degree arson is a class 3 felony if the arson is of an occupied structure, and it is a class 4 felony if the arson is of a building.

(3) A defendant convicted of committing first degree arson by the use of any explosive shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

Source: **L. 71:** R&RE, p. 426, § 1. **C.R.S. 1963:** § 40-4-102. **L. 77:** (1) amended, p. 962, § 19, effective July 1. **L. 86:** (3) added, p. 777, § 8, effective July 1. **L. 2002:** (3) amended, p. 1515, § 196, effective October 1. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1784, § 7, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-4-102 is similar to former § 40-3-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

At the common law, arson was a crime against the habitation, rather than against property rights. *Lipschitz v. People*, 25 Colo. 261, 53 P. 1111 (1898).

At common law arson was crime against possession or occupancy, rather than ownership. *People ex rel. VanMeveren v. District Court*, 619 P.2d 494 (Colo. 1980).

Conviction of this offense not equal protection violation. Prosecution, conviction, and sentencing for a class 3 felony under this section, rather than for a class 4 felony under the third degree arson statute, § 18-4-104(1), did not violate defendant's right to equal protection under the fourteenth amendment to the United States Constitution. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

First degree arson, by its very nature, occurs in a single criminal episode. *People v. Welborne*, 2018 COA 127, 457 P.3d 71.

Unit of prosecution under this section allows for multiple convictions based on the number of buildings or occupied structures damaged or destroyed by a defendant. The gravamen of each offense is what is damaged, not the number of fires set. *People v. Magana*, 2020 COA 148, 490 P.3d 948, *aff'd*, 2022 CO 25, 511 P.3d 585.

Criminal mischief involving damage to another's building or occupied structure is included in first degree arson involving burning the same building or occupied structure because, though the criminal mischief statute requires all the acts to occur in the course of a single criminal episode and the first degree arson statute does not, first degree arson, by its very nature, occurs in a single criminal episode. *People v. Welborne*, 2018 COA 127, 457 P.3d 71.

Distinguished from third degree arson. The more serious first degree arson statute contains an element not contained in the less serious third degree arson statute: The requirement that the property damaged or destroyed be a "building or occupied

structure of another". *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Distinction not unreasonable. The general assembly's decision to provide a more serious penalty for intentionally burning a "building or occupied structure" than for intentionally burning "any property" is not arbitrary or unreasonable. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Person may be guilty of arson although he is in possession of property. The legal title of property conveyed by deed of trust to secure a debt is in the trustee, and an indictment for conspiracy to commit arson properly alleges the ownership of such property in the trustee. The grantor in a deed of trust may be guilty of arson of the property although he is in possession and occupancy of the property, and has a right to redeem from the trust deed. *Lipschitz v. People*, 25 Colo. 261, 53 P. 111 (1898).

Jury may infer lack of consent where defendant owed a large sum of money to the previous owner and defendant was still making payments to him; it is not necessary for the prosecution to show that the previous owner affirmatively did not consent. *People v. Espinoza*, 989 P.2d 178 (Colo. App. 1999).

Tenant may commit arson upon building owned by other. Where a tenant sets fire to a unit which he occupies, he also damages the property interests of the owner in that building; thus, he may be deemed to have committed first degree arson upon the building of another. *People v. Brown*, 44 Colo. App. 397, 622 P.2d 573 (1980).

The terms "burn" or "set fire to" require more than a mere scorching or discoloration. People v. LeFebre, 190 Colo. 307, 546 P.2d 952 (1976).

However, it is not necessary that the entire "building" or "structure" be totally destroyed or materially injured as long as any part of the "building" or "structure", regardless of its size, is burned or set afire. People v. LeFebre, 190 Colo. 307, 546 P.2d 952 (1976).

Sheetrock ceiling and wooden joists were a part of "building" or "structure" for purposes of arson statute. People v. LeFebre, 190 Colo. 307, 546 P.2d 952 (1976).

Where evidence indicated that it was possible for sheetrock to "burn", defendant's claim of impossibility under this section must fail. People v. LeFebre, 190 Colo. 307, 546 P.2d 952 (1976).

Proof of corpus delicti and intent. In prosecutions for arson, the rule as to proof of corpus delicti and intent is the same as in prosecutions for other crimes where direct evidence is relied on. Exclusion of every possible theory other than guilt is not required. Exclusion of every other rational hypothesis, which means reasonable hypothesis, is the test, and this jury was so instructed. Militello v. People, 95 Colo. 519, 37 P.2d 527 (1934).

Variance in proof that dwelling was burned fatal. The property answering the description contained in the information was never burned, and the defendant cannot stand convicted of burning it. The defendant

was never notified or informed of the fact that he was accused of burning a building other than the dwelling named in the information, and yet the trial court submitted the question to the jury, which found him guilty of an offense with which he was never charged, the nature of which was never disclosed to him. Skidmore v. People, 154 Colo. 363, 390 P.2d 944 (1964).

Testimony showing motive admissible. Introduction of evidence that defendant's father was the major creditor and general manager of the club allegedly arsoned, that the club had been financially unsuccessful and had lost its lease, and that the club premises were insured, offered to show defendant's motive for setting the fire, was admissible when offered in combination with testimony concerning the close business association between the defendant and his father and defendant's desire to ensure the financial success of his father's investment in the club. People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

Evidence that defendant raised his insurance coverage six months before the fire is properly admitted as tending to prove a motive on the part of the defendant to burn his store. People v. Elkhatib, 632 P.2d 275 (Colo. 1981).

Evidence of the underlying reasons for an insurance company's denial of coverage is not relevant in that it has no logical relation to any motive defendant may have had prior to the fire, nor is it probative of any elements of the crime charged. People v. Carlson, 677 P.2d 390 (Colo. App. 1983), aff'd, 712 P.2d 1018 (Colo. 1986).

Denial of fire loss claim. Testimony of insurer that defendant's claim for fire loss to her business had been denied because insurer believed it had a provable arson defense to claim failed to meet logical relevancy requirement of rule of evidence and therefore was not admissible as probative of mens rea element of arson charge since such testimony was directed toward insurer's opinion or belief and not toward defendant's motive. *People v. Carlson*, 712 P.2d 1018 (Colo. 1986).

Question of guilt for jury. It is the sole province of the jury, upon all of the testimony, to determine the precise question of guilt. *Goldberger v. People*, 45 Colo. 327, 101 P. 407 (1909).

Applied in *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People v. Moyer*, 635 P.2d 553 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981).

18-4-103. Second degree arson.

(1) A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure, commits second degree arson.

(2) Second degree arson is:

(a) A petty offense if the value of the property is less than three hundred dollars;

(b) A class 2 misdemeanor if the value of the property is three hundred dollars or more but less than one thousand dollars;

(c) A class 1 misdemeanor if the value of the property is one thousand dollars or more but less than two thousand dollars;

(d) A class 6 felony if the value of the property is two thousand dollars or more but less than five thousand dollars;

(e) A class 5 felony if the value of the property is five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony if the value of the property is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if the value of the property is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony if the value of the property is one million dollars or more.

(3) Repealed.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-103. L. 77: (1) amended, p. 962, § 20, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3174, § 200, effective March 1, 2022; (3)(b) added by revision, (SB 21-271), ch. 462, pp. 3174, 3331, § 200, 803.

Editor's note: Subsection (3)(b) provided for the repeal of subsection (3), effective March 1, 2022. (See L. 2021, pp. 3174, 3331.)

ANNOTATION

Arson of nondwelling cannot be substituted for charge as to dwelling.

Where a count of an information identifies with particularity the exact section of the statute upon which prosecution is based, namely burning a certain dwelling, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution, namely the burning of a nondwelling, in a different location, and belonging to a different person. *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964) (decided under former § 40-3-1, CRS 53).

Unit of prosecution under this section allows for multiple convictions where distinct property belonging to different people was set on fire, burned, or caused to be burned by defendant. However, "any property" indicates that there may be an aggregate component to a second degree

arson charge, and so, every separately identifiable piece of property damaged may not necessarily support its own charge. *People v. Magana*, 2020 COA 148, 490 P.3d 948, *aff'd in part, rev'd in part on other grounds*, 2022 CO 25, 511 P.3d 585.

The fact that wife's clothing may have been acquired during the course of her marriage to the defendant and may constitute "marital property" under § 14-10-113 does not create an ownership interest in that property in the defendant for purposes of this section. The evidence presented at the trial concerning wife's ownership is sufficient to support a finding of "property of another" and therefore defendant's arson conviction. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Applied in *People v. Ray*, 640 P.2d 262 (Colo. App. 1981).

18-4-104. Third degree arson.

(1) A person who, by means of fire or explosives, intentionally damages any property with intent to defraud commits third degree arson.

(2) Third degree arson is a class 5 felony.

Source: L. 71: R&RE, p. 426, § 1. **C.R.S. 1963:** § 40-4-104. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1784, § 8, effective October 1.

ANNOTATION

Distinguished from first degree arson.

The more serious first degree arson statute, § 18-4-102, contains an element not contained in this section: The requirement that the property damaged or destroyed be a "building or occupied structure of another". *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Distinction not unreasonable. The general assembly's decision to provide a more serious penalty for intentionally burning a "building or occupied structure" than for intentionally burning "any property"

is not arbitrary or unreasonable. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Construed in accordance with 18-1-502, this section would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor's control. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Applied in *People v. Elkhatab*, 632 P.2d 275 (Colo. 1981).

18-4-105. Fourth degree arson.

(1) A person who knowingly or recklessly starts or maintains a fire or causes an explosion, on his own property or that of another, and by so doing places another in danger of death or serious bodily injury or places any building or occupied structure of another in danger of damage commits fourth degree arson.

(2) Fourth degree arson is a class 4 felony if a person is thus endangered.

(3) Fourth degree arson is:

(a) A petty offense if only property is thus endangered and the value of the property is less than three hundred dollars;

(b) A class 2 misdemeanor if only property is thus endangered and the value of the property is three hundred dollars or more but less than one thousand dollars;

(c) A class 1 misdemeanor if only property is thus endangered and the value of the property is one thousand dollars or more but less than two thousand dollars;

(d) A class 6 felony if only property is thus endangered and the value of the property is two thousand dollars or more but less than five thousand dollars;

(e) A class 5 felony if only property is thus endangered and the value of the property is five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony if only property is thus endangered and the value of the property is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if only property is thus endangered and the value of the property is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony if only property is thus endangered and the value of the property is one million dollars or more.

(4) Repealed.

(5) It shall not be an arson offense pursuant to this section if:

(a) A person starts and maintains a fire as a controlled agricultural burn in a reasonably cautious manner; and

(b) No person suffers any of the following as a result of the fire:

(I) Bodily injury;

(II) Serious bodily injury; or

(III) Death.

(6) For purposes of this section, "controlled agricultural burn" means a technique used in farming to clear the land of any existing crop residue, kill weeds and weed seeds, or reduce fuel buildup and decrease the likelihood of a future fire.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-105. L. 77: (1) amended, p. 962, § 21, effective July 1. L. 2010: (5) and (6) added, (HB 10-1123), ch. 121, p. 404, § 1, effective August 11. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3175, § 201, effective March 1, 2022; (4)(b) added by revision, (SB 21-271), ch. 462, pp. 3175, 3331, §§ 201, 803.

Editor's note: Subsection (4)(b) provided for the repeal of subsection (4), effective March 1, 2022. (See L. 2021, pp. 3175, 3331.)

ANNOTATION

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Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Control of fire is a matter of great public concern. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Thus the general assembly may make the commission of a prohibited act a crime, irrespective of scienter, when public policy dictates it for the protection of the public health, safety, and welfare. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

The general assembly is not constitutionally restricted to punishing conduct that only "imminently" puts a structure in danger of damage. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Not facially vague. Absent indications that this section is being applied to conduct which a citizen could not reasonably have known was forbidden, the statute should not be ruled unconstitutional on grounds of facial vagueness. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

This is not a statute that employs technical terms with inadequate definitions but uses words of common understanding. This section is drafted in words that are not susceptible to difficulties of interpretation by a person of common understanding and intelligence. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Subsection (1) contains ordinary language with an obvious purpose and a clear meaning. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

The phrase "starts or maintains a fire" conveys a plain meaning as to the general conduct proscribed by the statute. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

However, the phrase "starts or maintains a fire" in this section must be read in accordance with §§ 18-1-501(9) and 18-1-502. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

The statutory requirement that a structure be placed "in danger of damage" gives both the defendant and the jury a practical guideline to acceptable behavior. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

"Building", "property of another", and "occupied structure". The words used in subsection (1) are without technical meaning except for "building", "property of another", and "occupied structure", which are all adequately defined by statute in § 18-4-101. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Property includes property situated anywhere in the state. Therefore, a person can be convicted of fourth degree arson for lighting another person's clothing on fire while that person is wearing the clothing because the person is situated on property in the state. People v. Vasquez, 2022 COA 100, 521 P.3d 1042.

Unit of prosecution under this section allows for multiple convictions based on the number of victims placed in danger of death or serious bodily injury by defendant's fire or explosion. The gravamen of each offense is what or who is

damaged or endangered, not the number of fires set. *People v. Magana*, 2020 COA 148, 490 P.3d 948, *aff'd*, 2022 CO 25, 511 P.3d 585.

Section 18-1-502 expressly removes any ambiguity as to the culpability requirement of this section. That section states that if an offense does not require a culpable mental state on the part of the actor, the offense is one of strict liability. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Prosecution need not prove intent to endanger the person or building. *People v. Owens*, 670 P.2d 1233 (Colo. 1983); *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd*, 2 P.3d 1283 (Colo. 2000).

The knowingly or recklessly mens rea requirement only applies to starting or maintaining a fire, not to the endangerment

provisions. *Copeland v. People*, 2 P.3d 1283 (Colo. 2000).

This section would not apply to a fire started by events beyond the actor's control; the actor must purposefully start a fire, though he may not intend or foresee the consequences. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Construed in accordance with § 18-1-502, this section would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor's control. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Applied in *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

PART 2

BURGLARY AND RELATED OFFENSES

18-4-201. Definitions.

As used in this article, unless the context otherwise requires:

- (1) "Premises" means any real estate and all improvements erected thereon.
- (2) "Separate building" means each unit of a building consisting of two or more units separately secured or occupied.
- (3) A person "enters unlawfully" or "remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his or her intent, enters or remains in or upon premises that are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to him or her by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open

to the public. Except as is otherwise provided in section 33-6-116 (1), C.R.S., a person who enters or remains upon unimproved and apparently unused land that is neither fenced nor otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person or unless notice forbidding entry is given by posting with signs at intervals of not more than four hundred forty yards or, if there is a readily identifiable entrance to the land, by posting with signs at such entrance to the private land or the forbidden part of the land. In the case of a designated access road not otherwise posted, said notice shall be posted at the entrance to private land and shall be substantially as follows:

"ENTERING PRIVATE PROPERTY REMAIN ON ROADS".

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-201. L. 75: (3) amended, p. 634, § 1, effective July 1. L. 84: (3) amended, p. 922, § 9, effective January 1, 1985. L. 99: (3) amended, p. 326, § 1, effective July 1.

Cross references: For the definition of the word "premises" as used in criminal trespass, see § 18-4-504.5.

ANNOTATION

A previously granted invitation to enter or remain in a dwelling can be withdrawn at any time by the person with authority to grant the invitation so long as no other license or privilege exists. *People v. Murray*, 2018 COA 102, 452 P.3d 101.

Burglary of hotel room. Under this section, one who enters a room of a hotel with intent to commit larceny therein is guilty of burglary, and the argument that the offense should have been alleged against the hotel rather than against the guest occupying such room is without merit. *Gallegos v. People*, 150 Colo. 37, 370 P.2d 755 (1962) (decided under former § 40-3-6, CRS 53).

"Open to the public" defined. "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required. *People v. Bozeman*, 624 P.2d 916 (Colo. App. 1980).

Theater manager's office in a completely enclosed space within theater not "open to public" for purposes of subsection (3) of this section. Defendant's use of a pretense to gain entrance to manager's office indicates that he was aware that the office was not open to public and was therefore "unlawfully entering"

premises. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

Defendant entered the premises unlawfully when his possessory interest was subject to the victim's continuing consent and victim revoked license or privilege to remain on premises. Defendant was not a tenant with a possessory interest when he did not have a

lease or rental agreement and did not pay rent; mere contributions to groceries and other bills did not otherwise create a leasehold interest. *People v. Murray*, 2018 COA 102, 452 P.3d 101.

Applied in *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978); *Bollier v. People*, 635 P.2d 543 (Colo. 1981); *People v. Hill*, 2025 COA 12, __ P.3d __.

18-4-202. First degree burglary.

(1) A person commits first degree burglary if the person knowingly enters unlawfully, or remains unlawfully after a lawful or unlawful entry, in a building or occupied structure with intent to commit therein a crime, other than trespass as defined in this article, against another person or property, and if in effecting entry or while in the building or occupied structure or in immediate flight therefrom, the person or another participant in the crime assaults or menaces any person, the person or another participant is armed with explosives, or the person or another participant uses a deadly weapon or possesses and threatens the use of a deadly weapon.

(2) First degree burglary is a class 3 felony.

(3) Repealed.

Source: **L. 71:** R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-202. **L. 73:** p. 572, § 10. **L. 81:** (3) amended, p. 737, § 20, effective July 1. **L. 99:** (1) amended, p. 327, § 2, effective July 1. **L. 2012:** (3) amended, (HB 12-1311), ch. 281, p. 1618, § 40, effective July 1. **L. 2013:** (1) amended, (SB 13-229), ch. 272, p. 1429, § 8, effective July 1. **L. 2023:** (3) repealed, (HB 23-1293), ch. 298, p. 1784, § 9, effective October 1.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-4-202 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases

construing those provisions have been included in the annotations to this section.

For conspiracy to commit burglary, see *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conviction for both assault and burglary constitutional. A conviction for both first degree assault and first degree burglary does not violate the constitutional guarantee against double jeopardy. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

Assault is clearly a lesser included offense of first degree burglary when assault is the predicate offense. Under the terms of subsection (1), assault is one of four predicate offenses for first degree burglary in Colorado. Where assault is the predicate offense, the elements of first degree burglary necessarily include all of the elements of assault. *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001).

Assault, a predicate offense for first degree burglary, is a lesser included offense of first degree burglary. Therefore, the two counts merge. In a case where the lesser included offense carries a higher penalty, the court must vacate the conviction carrying the lower penalty and impose the higher penalty in order maximize the jury's verdict. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

Burglary is an offense against property, and the general assembly intended the additional element of assault in this section to modify and aggravate the offense of burglary and not to change the gravamen of the crime. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

A single entry can support only one conviction of first degree burglary, even if multiple assaults occur. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011); *People v. Carter*, 2015 COA 24M-2, 402 P.3d 480.

Multiple burglary convictions cannot be supported by acts of menacing separate victims during a single unlawful entry. *People v. Carter*, 2015 COA 24M-2, 402 P.3d 480.

The element of intent has remained unchanged in burglary cases. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Specific intent to commit a specific crime is an essential element of the offense of burglary. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Although the jury must agree on the underlying felony defendant intended to commit, the jury is not required to agree on the intended victim of the underlying crime. To commit an actual crime, there must be a victim, however, a person can have the mental state of intent to commit a crime without having an identified specific victim. *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

Violation of a restraining order is a sufficient predicate offense for conviction under this section. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

Burglary is complete when burglar enters with requisite intent, even though object of entry may be impossible. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

Subsection (1) contains no "surreptitious" requirement concerning remaining unlawfully. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Formal defects in information could not be raised after verdict where the

information under this section for burglary, charged the use of explosives "with the purpose, etc.", instead of "for the purpose, etc.". The information also failed to aver expressly the incorporation of the owner of the building. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Criminal trespass is not a lesser included offense of burglary since the crime of criminal trespass contains essential elements which are not elements of the offense of burglary. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

First degree criminal trespass is not a lesser included offense of first degree burglary. However, it is a lesser non-included offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997). But see *People v. Gillis*, 2020 COA 68, 471 P.3d 1197.

The crime of criminal mischief is not a lesser-included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Attempted first degree burglary is a lesser-included offense of first degree burglary. *People v. Simien*, 656 P.2d 698 (Colo. 1983).

First degree criminal trespass is a lesser included offense of first degree burglary.

People v. Gillis, 2020 COA 68, 471 P.3d 1197. But see *People v. Satre*, 950 P.2d 667 (Colo. App. 1997), annotated above.

Distinguished from felony menacing. It is possible to commit a first degree burglary without also perpetrating felony menacing. The merger doctrine does not apply because there is no requirement in this section that a victim be placed in fear of imminent serious bodily injury by a deadly weapon as there is in the felony menacing statute. *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

There is no requirement that victim be placed in fear of imminent serious bodily injury by a deadly weapon under the first degree burglary statute. *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

Specific intent may be inferred from the circumstances surrounding the accused's entry into an apartment, together with what occurred after the entry was gained. *People v. McCormick*, 181 Colo. 162, 508 P.2d 1270 (1973).

Sufficient evidence of specific intent. Where defendant was caught by the police inside a pharmacy while armed and while taking drugs off the shelves, and a crowbar and suitcases were found inside the pharmacy, and during his arrest, he told the police that "he did it for the drugs", and even admitted during cross-examination that he "broke into the pharmacy" to get drugs, this evidence amply supports a jury finding that defendant had the requisite specific intent to commit first degree burglary. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The immediate flight standard of this section requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. Therefore, a person commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Evidence relevant to show plan, scheme, or design. Where evidence relating to the burglary of another apartment was of a transaction similar in nature and closely related to the transaction upon which the defendant was being tried in point of time, in the areas where the burglaries were committed, and in the methods used in obtaining entrance, this evidence was relevant to show plan, scheme, or design, and the trial court committed no error in admitting it into evidence. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Possession of stolen goods after burglary is sufficient to warrant conviction, unless the attending circumstances or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Use of explosive with intent to commit crime sufficient. The breaking and entering must have been with the intent to commit the crime of larceny and the explosive must have been used for the purpose of committing such a crime. It was sufficient if

the forcible entry and the use of an explosive were with the intent to and for the purpose of committing the crime. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Evidence insufficient to support conviction. Where the facts adduced at the trial are just as consistent with a theory of innocence of burglary as of guilt, the conviction cannot stand. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Where the only evidence that defendant entered a room with intent to commit theft is the strong circumstantial evidence that he took a billfold, the evidence is insufficient to establish intent. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Refusal to instruct on criminal trespass not error. In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on a misdemeanor of criminal trespass, as a lesser included offense of the crime of burglary, is without merit. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Circumstantial evidence as foundation for instructions. Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Intent must coincide with the moment of trespass. If burglary is based upon remaining in a structure unlawfully, intent must be present at that time. Pattern jury instruction sufficiently described elements

of crime. *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

Jury instruction is sufficient if it conveys that the intent to commit a crime must be contemporaneous with the moment of trespass. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Instructions for crimes of theft and burglary which were phrased in language of statutes were sufficient. *People v. Bowen*, 182 Colo. 294, 512 P.2d 1157 (1973).

The court did not commit plain error when it failed to instruct the jury that it must unanimously agree on the underlying felony for the first degree burglary conviction. Because the jury unanimously found defendant guilty of attempted aggravated robbery, the finding satisfied the intent requirement of first degree burglary as well as any requirement that the jury agree unanimously to the underlying offense. Therefore, the court's failure to give a unanimity instruction was not plain error because there was no reasonable possibility that any error contributed to defendant's conviction. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Verdicts of guilt as to theft, but not as to burglary, are consistent. Where evidence linking the defendant with the burglary was conflicting or was rebutted, but the evidence clearly established that the defendant was in possession of property recently taken in a burglary, there was evidence to sustain a conviction of larceny and the verdicts of not guilty of burglary but

guilty of larceny were not inconsistent as being irreconcilable with the evidence of each case. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Guilty verdicts for first degree burglary and attempted second degree murder are consistent where reasonable jury could find that defendant entered or remained in home with intent to menace and while there took a substantial step toward causing occupant's death. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Sentence, on separate counts, for first degree burglary-assault/menace and for first degree burglary-deadly weapon was erroneous because, while the general assembly may proscribe alternative means of committing the same offense, a court may not impose multiple punishments for each prohibited method a defendant uses if he or she uses more than one of the proscribed methods to accomplish the offense. *People v. Moore*, 321 P.3d 510 (Colo. App. 2010), *aff'd on other grounds*, 2014 CO 8, 318 P.3d 511.

Sentence concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Sentence of 10 to 20 years did not constitute an abuse of discretion. *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

Where the only evidence concerning the presence of deadly weapons at the time of the robbery was that defendant was carrying stolen items, including weapons, in a canvas sack during commission of the burglary, such evidence was insufficient to prove that defendant was armed with a deadly weapon, a requisite element of burglary. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Second degree burglary is a lesser included offense of first degree burglary. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993).

Second degree burglary becomes first degree burglary when the perpetrator increases the risk of deadly or bodily harm to an occupant or other person present by possessing a deadly weapon such that he knowingly places or attempts to place such person in fear of serious bodily injury or intends to and does cause serious bodily injury to any person. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

If the defendant steals a deadly weapon and thereby becomes armed with a deadly weapon, the burglary is elevated to first degree, and there is no requirement that the prosecution show that the defendant assaulted or menaced anyone with the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

The defendant is considered "armed" with a deadly weapon if the weapon is easily accessible and readily available for use by the defendant. The court need not consider the defendant's willingness or present ability to use the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

Applied in *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. District Court*, 663 P.2d 616 (Colo. 1983).

18-4-202.1. Habitual burglary offenders - punishment - legislative declaration.
(Repealed)

Source: **L. 81:** Entire section added, p. 985, § 1, effective July 1. **L. 82:** (1) and (2) amended, p. 253, § 10, effective May 3. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-804 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-4-203. Second degree burglary.

(1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

(2) (a) Second degree burglary is a class 4 felony if the burglary is of an occupied structure or of a building being used for the operation of a commercial business.

(b) Second degree burglary is a class 3 felony if:

(I) It is a burglary of a dwelling;

(II) The objective of the burglary is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept within any building or occupied structure; or

(III) The objective of the burglary is the theft of one or more firearms or ammunition.

(c) Second degree burglary is a class 2 misdemeanor if the person knowingly violated a written notice by a retailer or an order by a court of lawful jurisdiction specifically restraining a person from entering a particular retail location during hours which the retail store is open to the public.

(d) Second degree burglary is a class 5 felony if the burglary is of any other building not described in subsection (2)(a), (2)(b), or (2)(c) of this section.

Source: L. 71: R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-203. **L. 81:** (2) amended, p. 974, § 9, effective July 1; (2)(b) amended, p. 2031, § 44, effective July 14. **L. 99:** (1) amended, p. 327, § 3, effective July 1. **L. 2012:** (2)(b) amended, (HB 12-1311), ch. 281, p. 1618, § 41, effective July 1. **L. 2018:** (2)(a) and (2)(b) amended and (2)(c) added, (HB 18-1077), ch. 376, p. 2280, § 1, effective June 6. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3176, § 202, effective March 1, 2022. **L. 2023:** (2)(a) amended and (2)(d) added, (HB 23-1293), ch. 298, p. 1784, § 10, effective October 1.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article,

"Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-4-203 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Second degree burglary and second degree sexual assault are not the same offense for purposes of the prohibition against double jeopardy because the elements of the two offenses are different. Childs v. Zavaras, 90 F. Supp. 2d 1141 (D. Colo. 1999).

Common-law burglary consisted of breaking and entering a dwelling at night with felonious intent. Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960).

By statute in Colorado the common law definition of burglary has been modified and broadened to include in some instances, and under some circumstances, a legal entry into the building of another with felonious intent. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

In determining whether the crime of burglary has been committed, the focus is upon the possessory rights of the parties, and not their ownership rights. The law of burglary was designed to protect the dweller, and hence, the controlling question is occupancy rather than ownership. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996); People v. Mondragon, 217 P.3d 936 (Colo. App. 2009).

In determining whether an offense is "a crime against another person or

property" for purposes of establishing a second degree burglary offense, the proper approach involves a case-by-case examination of the underlying elements of the offense as charged and proved. People v. Poindexter, 2013 COA 93, 338 P.3d 352.

A person can be convicted of a burglary if previously granted permission to enter the premises is withdrawn and the person enters or remains on the premises with the intent to commit a crime therein. People v. Ager, 928 P.2d 784 (Colo. App. 1996).

Possessory interest established by previously inhabiting a residence, frequently staying there, and leaving possessions there does not preclude a conviction of burglary if the residence is entered unlawfully with the intent to commit a crime. People v. Joosten, 2018 COA 115, 441 P.3d 14.

Defendant kicked in the door to enter his girlfriend's apartment and destroy her property, thereby relinquishing his possessory interest. People v. Joosten, 2018 COA 115, 441 P.3d 14.

"Open to the public" defined. "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required. People v. Bozeman, 624 P.2d 916 (Colo. App. 1980).

"Dwelling" includes attached garage. A garage attached to a residence is part of a "dwelling" within the meaning of this

section. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

"Dwelling" includes homes under renovation that are intended to be used for habitation in the future. The definition of "dwelling" in § 18-1-901 (3)(g) specifically includes buildings intended to be used for habitation. Because a home undergoing renovation cannot be presently used for habitation does not exclude it from the statute. *People v. Morales*, 2012 COA 2, 298 P.3d 1000.

Burglary of fenced enclosure. A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in § 18-4-101(2) so as to support a second degree burglary charge for the unlawful entry of the enclosure. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in § 18-4-101(1) so as to support a second degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment of exclusion and affords little protection against inclement weather and extreme temperatures. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

Police officer may be guilty of burglary. A contention that a defendant, being a police officer, had a right to enter the building being burglarized by his confederates, and therefore could not be held guilty of burglary, is hostile to the status of implied licensee, since one entitled to such status

must be performing a duty. *Clews v. People*, 151 Colo. 219, 377 P.2d 125 (1962).

Violation of a restraining order is a sufficient predicate offense for conviction under this section. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998); *People v. Dilka*, 2026 CO 12, 584 P.3d 564.

Even in the absence of a restraining order, an estranged spouse is not privileged or licensed to enter the separate residence of the other spouse so as to create a defense to a charge of second degree burglary. *People v. Johnson*, 906 P.2d 122 (Colo. 1995).

Crime of criminal trespass is not a lesser included offense in the crime of burglary; it requires an element not essential to the crime of burglary. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Offenses of burglary and assault with intent to rob are separate and independent since burglary is a crime of entering a dwelling place with intent to commit a felony, while assault with intent to rob is a crime requiring unlawful attempt coupled with a present ability to commit a violent injury on a person, with the specific intent to commit robbery. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967); *Trujillo v.*

People, 178 Colo. 136, 496 P.2d 1026 (1972).

Second degree burglary is a lesser included offense of first degree burglary. Armintrout v. People, 864 P.2d 576 (Colo. 1993).

First degree criminal trespass is a lesser included offense of second degree burglary. An offense is a lesser included offense if at least one of the ways to commit the greater offense necessarily establishes all the elements of the lesser offense. Whiteaker v. People, 2024 CO 25, 547 P.3d 1122.

First degree criminal trespass is always a lesser included offense of second degree burglary because one of the ways to commit second degree burglary satisfies all the elements of first degree criminal trespass. Whiteaker v. People, 2024 CO 25, 547 P.3d 1122.

Both first degree criminal trespass and second degree burglary are committed by knowingly and unlawfully entering a dwelling; second degree burglary differs only because it requires the intent to commit a crime upon entry. People v. Snelling, 2022 COA 116M, 523 P.3d 477 (concluding that People v. Garcia, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997), annotated below, has been implicitly overruled).

First degree criminal trespass is not a lesser included offense of second degree burglary. People v. Garcia, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997), recognized in Whiteaker v. People, 2024 CO 25, 547 P.3d

1122, as implicitly overruled in People v. Snelling, 2022 COA 116M, 523 P.3d 477, annotated above, and as abrogated by Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Second degree criminal trespass (§ 18-4-503) is a lesser included offense of second degree burglary. Second degree criminal trespass requires the defendant to unlawfully enter or remain on the premises of another that are enclosed in a manner designed to exclude intruders. By definition, if a building or structure exists, entry of which is required for second degree burglary, the building or structure is designed to exclude intruders. Thus, all of the elements of second degree criminal trespass are included in the offense of second degree burglary. People v. MacBlane, 952 P.2d 824 (Colo. App. 1997).

Jail cell qualifies as a "dwelling" within the meaning of this section. People v. Nichols, 920 P.2d 901 (Colo. App. 1996).

Second degree burglary and attempted second degree burglary are not per se grave and serious offenses. People v. Session, 2020 COA 158, 480 P.3d 747.

Applied in Vigil v. People, 150 Colo. 582, 375 P.2d 103 (1962); People v. Mangum, 189 Colo. 246, 539 P.2d 120 (1975); People v. Strong, 190 Colo. 189, 544 P.2d 966 (1976); People v. Davis, 194 Colo. 138, 568 P.2d 1175 (1977); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Girard, 196 Colo. 68, 582 P.2d 666 (1978); People v. Bielecki, 41 Colo. App. 256, 588 P.2d 377 (1978); People v. Jacquez, 196 Colo. 569, 588 P.2d 871 (1979); People v.

Hillyard, 197 Colo. 83, 589 P.2d 939 (1979); People v. Griffith, 197 Colo. 544, 595 P.2d 231 (1979); People v. Jacobs, 198 Colo. 75, 596 P.2d 1187 (1979); Germany v. People, 198 Colo. 337, 599 P.2d 904 (1979); People v. Weber, 199 Colo. 25, 604 P.2d 30 (1979); People v. Soper, 628 P.2d 604 (Colo. 1981); People v. Martinez, 628 P.2d 608 (Colo. 1981); People v. Savage, 630 P.2d 1070 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Chavez, 632 P.2d 574 (Colo. 1981); People v. Hotopp, 632 P.2d 600 (Colo. 1981); People v. District Court, 632 P.2d 1022 (Colo. 1981); People v. Brown, 632 P.2d 1025 (Colo. 1981); People in Interest of M.R.J., 633 P.2d 474 (Colo. 1981); People v. Johnson, 634 P.2d 407 (Colo. 1981); People v. Quintana, 634 P.2d 413 (Colo. 1981), overruled on other grounds in People v. Porter, 2015 CO 34, 348 P.3d 922; People v. Cohen, 640 P.2d 1138 (Colo. 1982); People ex rel. VanMeveren v. District Court, 643 P.2d 37 (Colo. 1982); People v. Leonard, 644 P.2d 85 (Colo. App. 1982); People v. Constant, 645 P.2d 843 (Colo. 1982); Chavez v. District Court, 648 P.2d 658 (Colo. 1982); People v. Holloway, 649 P.2d 318 (Colo. 1982); People v. Conwell, 649 P.2d 1099 (Colo. 1982); People v. Elmore, 652 P.2d 571 (Colo. 1982); People v. Johnson, 653 P.2d 737 (Colo. 1982); People v. Fisher, 657 P.2d 922 (Colo. 1983); People v. Quintero, 657 P.2d 948 (Colo. 1983); Flower v. People, 658 P.2d 266 (Colo. 1983); People v. District Court, 664 P.2d 247 (Colo. 1983); People v. Jones, 140 P.3d 325 (Colo. App. 2006).

II. ELEMENTS OF OFFENSE.

This section may be violated in either of the ways mentioned; however, the final result is burglary. People v. Holmes, 129 Colo. 180, 268 P.2d 406 (1954).

Former Colorado burglary statute contained different situations under which the crime of burglary might be committed: A direct trespass to the property, with or without force, but without the consent, express or implied, of the owner or person in possession, and an initial lawful entry into the property or premises with the express or implied invitation or consent of the owner, with a subsequent trespass by an unauthorized entry into any room, apartment, or compartment of the same building. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

The element of intent has remained unchanged in burglary cases. Hutton v. People, 177 Colo. 448, 494 P.2d 822 (1972).

In order to sustain a conviction for second degree burglary, there must be evidence that the accused entered the building with intent to commit a crime. People v. Barnhart, 638 P.2d 814 (Colo. App. 1981).

Specific intent at time of entry essential. An essential element in a charge of burglary is that the accused have the intent to commit a specific crime at the very time and place of breaking and entering. Gomez v. People, 162 Colo. 77, 424 P.2d 387 (1967); Martinez v. People, 163 Colo. 503, 431 P.2d 765 (1967); People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972).

To be convicted under this section, the jury must find that the defendant had made up his mind to commit some other offense at the point at which he or she becomes a trespasser. A person cannot be convicted under this section if the jury finds that the defendant formed the necessary intent at any time while unlawfully remaining on the premises. *Cooper v. People*, 973 P.2d 1234 (Colo. 1999).

Jury must find that the defendant either (1) broke and entered or unlawfully entered with the intent to commit a crime therein or (2) entered lawfully but subsequently remained unlawfully with the intent to commit a crime therein. *Cooper v. People*, 973 P.2d 1234 (Colo. 1999).

But intent at the time of entry is not the sole element of burglary under the statute. *People v. Carstensen*, 161 Colo. 249, 420 P.2d 820 (1966).

A person can be found guilty of second degree burglary if the intent to commit a crime is formed after the unlawful entry. *People v. Angell*, 917 P.2d 312 (Colo. App. 1995), overruled in *Cooper v. People*, 973 P.2d 1234 (Colo. 1999); *People v. Wartena*, 2012 COA 12, 296 P.3d 136.

When the general assembly amended second degree burglary to add the language, "after a lawful or unlawful entry", the general assembly removed the requirement that the intent to commit a crime exist at the time of entry. *People v. Larkins*, 109 P.3d 1003 (Colo. App. 2004); *People v. Wartena*, 2012 COA 12, 296 P.3d 136.

Where defendant was given permission to enter the crawlspace and such permission to enter was not limited to any discrete portion of the crawlspace, the entry was not "unlawful" even though defendant entered the crawlspace with an intent to commit a sexual offense. *People v. Waddell*, 24 P.3d 3 (Colo. App. 2000).

Burglary includes an element of actual or constructive trespass on the property of another with intent to commit some other crime once the intruder has effected an entry into the building of another. *Macias v. People*, 161 Colo. 233, 421 P.2d 116 (1966).

If the owner had not unlocked the apartment, and if the defendant had not been given permission to enter, then the theft of which he was convicted would have been the result of an unlawful breaking or entering, which in turn would support a conviction of burglary. *People v. Carstensen*, 161 Colo. 249, 420 P.2d 820 (1966).

While not explicitly requiring an unauthorized entry, burglary statutes have always been interpreted as requiring an unauthorized entry as well as the intent to commit a felony or misdemeanor. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

One element of the crime of burglary under this statute is that the defendant be a trespasser. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Proof of no lawful right to be in building required. In addition to unlawful intent at the time of entry, this burglary statute requires the people to prove that the defendant had no lawful right to be in the

building. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Unlawful entry of a railroad box car without force, under this section, constitutes the crime of burglary. *Panion v. People*, 138 Colo. 236, 331 P.2d 501 (1958).

Where evidence that the defendant was unlawfully in the victim's home was overwhelming, the court's failure to provide further clarification on the unlawful entry into the dwelling element of the crime did not constitute plain error. *People v. Angell*, 917 P.2d 312 (Colo. App. 1995).

Character of structure as a "dwelling" is a sentence enhancer, not an element of the offense. Therefore, first degree criminal trespass, which has as an essential element entry into a "dwelling," is not a lesser included offense of second degree burglary. *People v. Garcia*, 920 P.2d 878 (Colo. App. 1996), recognized in *Whiteaker v. People*, 2024 CO 25, 547 P.3d 1122, as abrogated by *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

Ownership means any rightful possession. The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against the burglar means any possession which is rightful. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Such possession may be actual or constructive. Possession which is equivalent to ownership for the purpose of proving the offense in this class of cases need not be a possession coupled with actual occupancy, as a dwelling or otherwise, of

the burglarized premises. Proof that one was in actual or constructive possession of the burglarized premises is sufficient to establish his alleged ownership. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Agent may be the owner. Under this section breaking into an unoccupied house is burglary. The ownership is properly laid in an agent having general charge and control of the premises. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Or corporation having possession of the building. A banking corporation having possession of the building burglariously entered, occupying it for the conduct of its business, is the owner for the purposes of a prosecution under this section. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Unlawful entry is an element of the offense of second degree burglary. *People v. Esquibel*, 794 P.2d 1065 (Colo. App. 1990).

A perpetrator is guilty of second degree burglary when, unarmed, he breaks into a building and removes items even though those items may, in other circumstances, be used as deadly weapons. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Second degree burglary becomes first degree burglary when the perpetrator increases the risk of deadly or bodily harm to an occupant or other person present by possessing a deadly weapon such that he knowingly places or attempts to place such person in fear of serious bodily injury or intends to and does cause serious bodily injury to any person. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Actual taking of property, or the value of property taken, need not be proven. This section requires only that the defendant intended to take property. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Violation of a no-contact order constitutes a predicate crime for purposes of second degree burglary. Violation of a municipal no-contact order constitutes a crime under § 18-6-803.5. Therefore, intent to violate a no-contact order by breaking into a home constitutes an "intent to commit therein a crime against person or property" and fulfills the element of the crime of second degree burglary. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998).

Criminal violation of a protection order is always a predicate offense for second degree burglary. Rhorer established a bright-line rule: Because a violation of a criminal protection order under § 18-6-803.5 always involves the harm or threat of harm to another person or property, the violation meets the second degree burglary requirement that a person intends "to commit a crime therein against another person or property". *People v. Dilka*, 2026 CO 12, 584 P.3d 564.

Harassment under § 18-9-111 (1)(a) is a "crime against another person" that can serve as a predicate offense for second degree burglary. To commit harassment under § 18-9-111 (1)(a), one necessarily must subject another to some form of "physical contact". *People v. Wright*, 2021 COA 106, 498 P.3d 1147.

Intrusion of any body part into the prohibited premises is sufficient to

constitute entry as element of crime. Jury instruction clarifying term was a correct statement of the law in this case. *People v. Gonyea*, 195 P.3d 1171 (Colo. App. 2008).

Crime of obstructing a peace officer did not qualify as a crime against another person or property when defendant broke into apartment building to hide from pursuing police after stealing a car. Defendant did not use or threaten the use of force against a peace officer nor did he commit a crime against, or threaten to commit a crime against, the body of anyone, including a peace officer. Therefore, defendant's offense was not a crime against a person and could not be used as a predicate offense for second degree burglary. *People v. Poindexter*, 2013 COA 93, 338 P.3d 352.

Definition in subsection (2)(a) of the class 4 felony offense to which defendant pleaded guilty in 1999 is too broad to constitute generic burglary for purposes of enhancing a sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Defendant's burglary conviction could not qualify therefore as a predicate violent felony. The definition of "building", for purposes of this section, includes entry into vehicles, which is too broad to constitute generic burglary. *United States v. Lozado*, 968 F.3d 1145 (10th Cir. 2020).

III. TRIAL AND PROSECUTION.

A. In General.

B. Indictment or Information.

C. Evidence.

1. In General.
2. Possession of Stolen Property.
3. Sufficiency.

D. Jury.

E. Instructions.

A. In General.

Proof of the breaking with intent to steal is all that is required under this section. In the trial of a burglary case under this section, when the people establish the breaking with intent to steal, nothing more is required. *Windolph v. People*, 96 Colo. 285, 42 P.2d 197 (1935).

Burglary is committed whenever a person willfully breaks and enters, either with or without force, any building with the intent to commit a larceny. No other act is necessary for the commission of the crime of burglary to be complete. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Second degree burglary requires that the prosecution prove that defendant knowingly broke into and entered the liquor store with the intent to commit the crime of theft. *People v. Gomez*, 189 Colo. 91, 537 P.2d 297 (1975).

Crime intended does not have to be actually committed. It is not essential to a conviction under this section that the crime intended in the burglarious entry should have been actually committed. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Under this section one can commit the crime of burglary by entering a building with the unlawful intent prescribed, and

where the intent is to commit larceny, the offense is complete regardless of whether the theft is consummated. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937).

The contemplated theft may be forcibly prevented by an inmate of the building, or the purpose to steal abandoned, and still the perpetrator would be guilty of the crime of burglary. If accomplished, evidence of the larceny would be admissible on the burglary count as the highest proof of the larcenous intent with which entry was made, yet not make the actual larceny one of the essential ingredients of the crime of burglary. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937).

To commit a burglary, the defendant need only have unlawfully entered the structure with the intent to commit the proscribed crime. There is no requirement that the crime intended to be committed be in fact completed. *People v. Archuleta*, 191 Colo. 482, 554 P.2d 307 (1976).

B. Indictment or Information.

Charge of breaking and entering the store building with the intent to commit larceny therein constitutes the charge of burglary and not of larceny. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Information charging burglary must specify by name the ulterior crime which it is alleged the accused intended to commit upon entry into the building. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

The element of intent to commit a specific crime is a matter of substance, not form, and must be set forth in the information;

otherwise, the charge is fatally defective. *Gomez v. People*, 162 Colo. 77, 424 P.2d 387 (1967).

An information charging breaking and entering "with the intent then and there to commit a crime" clearly is insufficient, since a specific crime must be alleged. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968).

In a burglary charge, the allegation "with the intent then and there to commit the crime of theft" meets the requirements of sufficiency to adequately apprise a defendant of the offense charged. *People v. Cordova*, 172 Colo. 522, 474 P.2d 615 (1970).

It is necessary that the specific conduct which constitutes the ulterior crime be clearly defined in order to determine if the defendant's intent was that prescribed by the burglary statute. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972); *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981).

Information reciting elements of attempt, and referring to provision defining ulterior crime, adequate. Where the information recited the elements of the inchoate crime of attempt in the language § 18-2-101 and included a reference to the section defining the burglary allegedly attempted, and where the defendant claimed no surprise or prejudice resulting from the absence of an allegation specifying the ulterior crime to be relied upon by the prosecution in its proof of the elements of burglary, the information adequately described the offense of attempt. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

Insufficient to charge mere larceny in separate count. The mere fact that larceny, as a part of the same transaction, was charged in another count is insufficient to fulfill the requirement that all the basic elements of a burglary charge, including the intent of the accused to commit the specific crime at the time and place of breaking and entering, must be alleged. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

Allegations as to ownership in burglary cases under this section might be placed on the same footing as such averments in charges of larceny. In an information charging larceny the ownership of the goods stolen may be laid in the person in whose possession the property was at the time of the theft, although such person is merely an agent and not the real owner. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Objection that incorporation was not proven too late in supreme court. With respect to an information for the burglary of the banking house of a named state bank, a corporation, the suggestion that the incorporation of the bank was not proven will not be heard, if first presented in the supreme court. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Related acts charged in one count not duplicitous. This section by the use of the word "or" provides disjunctively the ways of its violation; however, acts may be so closely related that they may be charged conjunctively in a single count without being duplicitous. *People v. Holmes*, 129 Colo. 180, 268 P.2d 406 (1954).

Any error in the form of the information was harmless where the defendant had sufficient notice of the elements and the factual basis for the charges prior to trial. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Variance in description of building not prejudicial. Where ample evidence established that the lumber company structure involved was a building, and an "office, shop, and warehouse" describes a building, no prejudice arose from this discrepancy in wording of the information. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

C. Evidence.

1. In General.

Crime may be proven by circumstantial or direct evidence. The essential elements of the crime of burglary may be established by circumstantial evidence as well as direct. A case of circumstantial evidence by its very nature implies the weaving of a fabric of known facts, which, often infinitesimal, immaterial, or even prejudicial when considered alone, become important only as they are tied to others, and when so tied lead to inevitable conclusions as to facts in issue. *Pena v. People*, 147 Colo. 253, 363 P.2d 672 (1961).

Circumstantial evidence, consisting of the possession of goods recently stolen in a burglary, is sufficient to sustain a conviction. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

Frequently burglary must be established by circumstantial evidence, it seldom being

provable by direct evidence of actual breaking and entry by the person charged. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963).

Want of consent by the owner to enter into his premises may be proved by circumstantial evidence. *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

Circumstantial evidence may be, and frequently is, most convincing and satisfactory. *Southard v. People*, 174 Colo. 324, 483 P.2d 962 (1971).

Quantum of proof is the same. The quantum of proof where guilt is based upon circumstantial evidence is the same as where it is based on direct evidence; that is, it must be sufficient to establish guilt beyond a reasonable doubt. *Southard v. People*, 174 Colo. 324, 483 P.2d 962 (1971).

Intent inferred from actions. An accused is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

In the absence of a restraining order or an order granting one party exclusive possession of the marital residence, the question whether one spouse has the sole possessory interest in it depends on whether the evidence shows that both parties had decided to live separately. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Sufficient evidence was presented to establish that defendant had relinquished his possessory interests in the home where

defendant and his wife separated two and one-half months before the burglary, defendant's wife told him she wanted a divorce, defendant left and took his belongings, and defendant's wife changed the locks on the home. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Specific intent may be inferred from commission of crime after entry. In the case of burglary, the fact that a felony was committed after breaking and entering is admissible as evidence from which the jury can infer that the intent to commit the felony existed at the time of the breaking and entering. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Where one breaks and enters into the property of another in the night time, an inference may be drawn that he did so with the intent to commit larceny. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Acts subsequent to entry are admissible to allow the jury to infer the requisite intent for the crime charged, and therefore testimony that certain items on a burglarized premises are moved from their previous locations to a centralized location on the day of the burglary is admissible. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

The specific intent to commit the crime of theft does not have to be proved by direct, substantive evidence, but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People*

v. Germany, 643 P.2d 776 (Colo. App. 1980).

Evidence showing a forcible unauthorized entry and an attempt to conceal the entry imposes a duty on the court to draw an inference of an intent to commit theft. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

Trespass alone is immaterial as to specific intent. The fact that the defendant may have committed a trespass at the time he entered the office where the alleged burglary took place is immaterial as to intent to commit theft. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Trespass to be proved beyond reasonable doubt. The people must prove the element of trespass in prosecution for crime of burglary, like other material elements of the crime charged, beyond a reasonable doubt. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Evidence establishing motive admissible. Evidence which has a direct tendency to establish motive is admissible against the accused, even though it may show him guilty of crimes other than that for which he is on trial. *Wilkinson v. People*, 170 Colo. 336, 460 P.2d 774 (1969).

As are acts at time of arrest. The circumstance of the finding of part of the items stolen from the drugstore had already led to a suspicion that the accused was involved in the burglary. The acts surrounding his conduct when he was arrested, indicating drug use, could be found to support the inference that he had a motive

for the burglary. This made evidence of defendant's acts at the time of the arrest material and relevant to the offense with which he was charged. *Wilkinson v. People*, 170 Colo. 336, 460 P.2d 774 (1969).

Where a defendant is arrested inside a store under circumstances which conclusively establish that his entry was unlawful, articles which are then found on the premises in the possession of defendant, or reasonably attributed to him, and which are foreign to the store, are admissible. *Baca v. People*, 139 Colo. 111, 336 P.2d 712 (1959).

Burglars tools admissible. Exhibits of a tire iron, jack hammer, and punch, although not intrinsically and exclusively burglary tools, but capable of use for that purpose, were admissible under the burglary charge and in support of the charge of possession. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

Articles such as a stocking mask, hammer, and flashlight belonging to a defendant and found in his possession shortly after a burglary are admissible as part of the history of arrest, and when coupled with other pertinent evidence, tends to establish the charge. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

A weapon or other instrument found in the possession of an accused when arrested is admissible as part of the history of the arrest. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

The acquisition or possession of instruments, tools, or other means of

committing burglary is admissible as a significant circumstance; the possession signifies a probable design to use and the instruments need not be such as are entirely appropriate, nor such as were actually put to use. *Baca v. People*, 139 Colo. 111, 336 P.2d 712 (1959).

In a prosecution for burglary, evidence of possession of burglary tools and of property allegedly taken from burglarized premises, is properly admitted. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963).

It is not error to admit into evidence in a burglary case pry bars not belonging to the store which are found near the back doors of the store in which the defendant is found hiding. *People v. Marques*, 180 Colo. 154, 503 P.2d 339 (1972).

But only after burglary shown to have been committed. The possession of burglary tools as evidence in connection with the charge of burglary can only be considered when a burglary is first shown to have been committed. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963).

2. Possession of Stolen Property.

Possession of stolen property admissible. Defendant was shown to have had possession of the stolen tools soon after the burglary, and this is sufficient to justify the reception of such evidence. *Cicarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Evidence of theft and recent possession of goods stolen were important as establishing the identity, and the intent which accompanied the breaking and entering. *Windolph v. People*, 96 Colo. 285, 42 P.2d

197 (1935); *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963).

It requires explanation from defendant.

Although the burden of proof cannot be validly shifted to the defendant in a criminal case, the onus of explanation can be placed upon him. An inference from possession of stolen property recently after the theft is an aid in proof which calls for rebutting or explanatory evidence. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Jury may infer guilt from recent unexplained possession. In a prosecution for larceny or burglary, the jury may infer that the accused committed the theft from the circumstances of his recent, unexplained, exclusive possession of the stolen articles involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

Such possession and proof of burglary support conviction. Proof that a burglary was committed, and that goods were then and there stolen, and shortly thereafter found in the possession of the accused, will sustain a conviction. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958); *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963).

Defendant's explanation need only raise reasonable doubt. Possession of stolen goods after a burglary or theft is sufficient to warrant a conviction, unless the attending circumstances or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958.

If the possession of the property by defendant, unexplained, constitutes a criminalizing circumstance, he need not show, even by a preponderance of testimony, that he came by it honestly. It is not necessary that the explanation should be satisfactory to the jury; if it raises in their minds a reasonable doubt of the defendant's guilt, it is sufficient to require an acquittal. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Unexplained possession instruction may be given where there is evidence that defendant had exclusive possession of the recently stolen goods whether the time of that possession was at the time of defendant's arrest or at an earlier time. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

Rationale of unexplained possession doctrine is that when property is in a defendant's possession recently after a burglary, there is a "high probability" that the defendant has committed the burglary. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

Testimony showing possession of stolen property. Possession of the stolen property for purposes of the unexplained possession doctrine may be established by the testimony of the arresting officer or by the testimony of other witnesses. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

3. Sufficiency.

Evidence insufficient to establish intent. Where the only evidence that defendant

entered a room with intent to commit theft is the strong circumstantial evidence that he took a billfold, the evidence is insufficient to establish intent. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Circumstantial evidence sufficient to support conviction of burglary. *Nunn v. People*, 177 Colo. 87, 493 P.2d 6 (1972).

When no one testified to seeing the actual breaking and entering, but witnesses heard a noise which alerted them and caused them to go see what was happening, and they saw the defendant coming out of the liquor store carrying four bottles of vodka, and investigation disclosed that the door had been forcibly opened, and that the crowbar found in the defendant's car fit exactly the prymarks adjacent to the broken hasp, there is sufficient circumstantial evidence to rebut the defendant's testimony that he purchased the vodka from a youth and was carrying it from the side of the building to his car. *People v. Florez*, 179 Colo. 176, 498 P.2d 1162 (1972).

Evidence held sufficient to support conviction. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947); *People v. Marques*, 180 Colo. 154, 503 P.2d 339 (1972); *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973); *People v. Bueno*, 183 Colo. 304, 516 P.2d 434 (1973); *People v. Maestas*, 187 Colo. 107, 528 P.2d 916 (1974); *People v. Gomez*, 189 Colo. 91, 537 P.2d 297 (1975); *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

Defendant's admissions of the break-in and larceny to several officers and direction of them to a locker in the bus station where

he had placed the loot and where it was found was sufficient to establish his guilt beyond a reasonable doubt. *Hubbard v. People*, 152 Colo. 529, 383 P.2d 317 (1963).

Evidence that a building was burglarized and certain property stolen therefrom, that a defendant was arrested shortly thereafter with the stolen property in his possession, and that heelprints left on papers strewn on the floor of the burglarized building matched the heelprint of a shoe worn by defendant when arrested is sufficient to sustain a conviction. *Brown v. People*, 138 Colo. 354, 332 P.2d 996 (1958).

Evidence, when viewed in the light most favorable to the prosecution, supports defendant's burglary conviction. Facts were sufficient to allow a reasonable fact finder to determine that victim had possessory interest in apartment, defendant entered victim's apartment without permission, and, for purposes of the burglary statutes, defendant entered a building or occupied structure unlawfully. Accordingly, defendant may properly be retried on burglary charges. *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

Where prosecution's chief witness identifies defendant as his accomplice in burglary, evidence is sufficient to support jury's verdict of guilty. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

Verbal warning regarding restraining order given prior to entry was sufficient to establish defendant's knowledge that he was not licensed or privileged to enter. Absent circumstances not present in the case, the court perceives no basis for limiting the

dweller's right to occupancy of the structure to those cases in which the intruder is informed in writing that his former possessory rights are no longer in effect. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

Evidence sufficient to sustain conviction for conspiracy to commit burglary. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Evidence insufficient to support conviction. Where defendant offered to buy all stolen television sets the witness could provide, but the record did not disclose that defendant was informed that burglaries would be committed, it was conceivable that the sets could have been obtained by theft without burglary, and the evidence was insufficient to sustain a conviction of burglary. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Where the evidence establishes that the defendant touched the outer surface of the inside door of the milk chute at the residence burglarized, no innocent purpose was suggested which would be consistent with that activity, but there was no evidence as to the time that the fingerprint was left on the door, no evidence placed the defendant inside the plaintiff's residence on the day of the burglary or at any other time and the fingerprint was the only evidence tending to tie the defendant to the crime, this evidence, when viewed as a whole and in the light most favorable to the prosecution, was not substantial nor sufficient enough to support a conclusion by a reasonable mind that the defendant was guilty of the burglary beyond

a reasonable doubt. *People v. Ray*, 626 P.2d 167 (Colo. 1981).

Since it was not possible for defendant to have walked eight blocks to the gallery, broken in, picked out items to take, loaded plastic bags with the stolen objects, and then carried them back to his residence, evidence, even aided by the inference that arose from his possession of the stolen goods, was insufficient. *People v. Weems*, 676 P.2d 1222 (Colo. App. 1983).

Evidence insufficient to justify overturning sentence. *Triggs v. People*, 197 Colo. 229, 591 P.2d 1024 (1979).

D. Jury.

Questions for the jury. In a prosecution for burglary the identity of stolen property, the effect of proof of recent possession thereof by a defendant, and whether an explanation offered as to the manner in which it was acquired is satisfactory are questions for a jury to determine. *Brown v. People*, 138 Colo. 354, 332 P.2d 996 (1958).

Issue of specific intent to steal was clearly one for the jury to determine from all the evidence and reasonable inferences that could be drawn therefrom. *People v. Romero*, 182 Colo. 50, 511 P.2d 466 (1973); *People v. Green*, 38 Colo. App. 165, 553 P.2d 839 (1976).

"Recent" possession of stolen goods is determined by the facts in each particular case and it may vary from a few days to two years. In practically all cases whether the period of time is "recent" is a question for the jury, and a period of six weeks has been

upheld. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958.

Sufficient evidence to go to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

The argument that a case should not be submitted to the jury when there is no evidence that defendant did breaking and entering is without merit in Colorado, for one may be convicted under the charge of being a principal by proof that he was an accessory thereto. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

Though the evidence relating to the defendant's participation in the burglary of a residence was circumstantial in part, and the credibility of one witness was placed in issue by the defendant who claimed that the testimony of the witness was inherently incredible, the trial court was not in error for submitting the case to the jury. *McClendon v. People*, 174 Colo. 7, 481 P.2d 715 (1971).

E. Instructions.

Specific ulterior crime must be clearly and accurately defined. An essential element of burglary is that at the time and place of entering the structure, the accused must have an intent to commit therein a crime. It is therefore necessary that the specific ulterior crime be clearly and accurately defined in order to determine if the defendant's intent was that proscribed by the burglary statute. *People v. Archuleta*, 191 Colo. 482, 554 P.2d 307 (1976).

Elements of theft explained to jury in attempted burglary case. The elements constituting the crime of theft must be

explained to the jury when that is the ulterior crime referred to in a case alleging an attempted burglary offense. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

The trial court's failure to include the term "unlawful entry" in the jury instruction on second degree burglary was not plain error where, even if the instructions could have been worded more clearly, the jury was instructed using the exact language of the applicable statutory sections. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Instruction on unexplained recent possession of stolen property, which indicated to the jury that the burden of proving rightful possession was on the defendant, shifted the burden to the defendant to prove his innocence and was prejudicial error. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

It would be desirable for the trial court to instruct the jury that the exclusive possession of stolen property recently after a theft or burglary serves to create an inference or incriminating circumstance that the defendant stole such property or burglarized the premises of the owner of such property and that such evidence, if established beyond a reasonable doubt, is sufficient in and of itself to justify a verdict of guilty in the absence of an explanation derived from the evidence in the case or furnished by the defendant raising a reasonable doubt as to his guilt. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Instruction specifying that permission to enter part of a building does not

necessarily include permission to enter other parts of the building was properly applied to a dwelling. Defendant, who lived with his mother and stepfather, was charged with burglary arising from the defendant's alleged theft of money from his mother's bedroom. The instruction was appropriate because defendant was specifically forbidden to enter his mother's bedroom. *People v. Lopez*, 946 P.2d 478 (Colo. App. 1997).

Instruction on burglary with intent to rape. Where the information simply charged burglary with intent to rape, the giving of an instruction that rape could be accomplished by sexual intercourse with the woman's permission if that permission was secured by the perpetrator fraudulently inducing her to believe that he was her husband, was not error. *Thistle v. People*, 199 Colo. 1, 199 P.2d 642 (1948).

Instruction on crime not lesser offense properly refused. In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on the misdemeanor of criminal trespass, as a lesser included offense of the crime of burglary, is without merit. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Instruction indicating that defendant was not otherwise privileged to enter if he knew about a restraining order at the time he entered the premises is a correct statement of the law. Entry into a dwelling in violation of a restraining order is necessarily an unlawful entry. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

Defendant is entitled to a theory of case instruction. If the tendered instruction is unacceptable, so long as it, at least in principle, sets forth a valid theory, the trial court has a duty to work with counsel to draft an acceptable instruction. *People v. Joosten*, 2018 COA 115, 441 P.3d 14.

Attempted first degree criminal trespass may be a lesser included offense to attempted second degree burglary under this section. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990).

IV. VERDICT AND SENTENCE.

Double jeopardy. Defendant, who had been charged with second degree burglary and acquitted on the ground that he had authority to enter the building in question, could not be retried because of double jeopardy provision in state constitution. *People v. Woods*, 182 Colo. 3, 510 P.2d 435 (1973).

Verdict of guilty on charge of conspiracy to commit burglary and verdict of innocent on substantive charge of burglary held not inconsistent. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Verdicts of guilt as to larceny, but not burglary, are consistent. Where there was no evidence to link the defendant with the burglary except his possession of the stolen items shortly after the burglary occurred, and defendant denied any implication in the burglary, the jury could have well believed that the evidence linking defendant with the burglary was too weak to convict, but that the evidence of theft was ample, and therefore, there was no inconsistency in

verdicts of guilty of theft and not guilty of burglary. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

The burglary and larceny should be viewed as a single transaction, indivisible for purposes of punishment. Reason and justice dictate that for the purpose of punishment under these circumstances, these offenses should be merged by concurrent sentencing. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969).

But consecutive sentences may be imposed for burglary and assault. Conviction and sentences for the two distinct offenses of burglary and assault with intent to rob did not put appellees twice in jeopardy. The offenses are separate and independent; two consecutive sentences were within the law and such imposition did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967).

Under circumstances of case, a minimum 20-year term for second degree burglary was excessive. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentence of eight years was not an abuse of discretion. Defendant had

previous convictions for domestic violence and had not complied with a lenient probationary sentence. The defendant had demonstrated an escalating pattern of perpetrating violence on his family based upon his numerous arrests and repeat offenses after release from incarceration and had refused to take personal responsibility for his violent acts. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

On remand, trial court should not treat defendant's second degree burglary convictions as per se grave and serious. The supreme court did not hold, however, that second degree burglary is never a per se grave or serious offense. Instead, a trial court should analyze the facts of each offense to determine whether it is grave and serious. *People v. Tran*, 2020 COA 99, 469 P.3d 568.

Sentence under habitual criminal act valid. *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799.

Mittimus valid. Entering with or without force with the intent to commit larceny constitutes the crime of burglary; hence a mittimus issued following conviction on a charge of breaking and entering without force which recites conviction of burglary is lawful and valid. *McGrath v. Tinsley*, 138 Colo. 18, 328 P.2d 579 (1958).

18-4-204. Third degree burglary.

(1) A person commits third degree burglary if with intent to commit a crime he enters or breaks into any vault, safe, cash register, coin vending machine, product dispenser, money

depository, safety deposit box, coin telephone, coin box, or other apparatus or equipment whether or not coin operated.

(2) Third degree burglary is a class 2 misdemeanor, but it is a class 1 misdemeanor if it is a burglary, the objective of which is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept in or upon the property burglarized.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-204. L. 81: (2) amended, p. 974, § 10, effective July 1; (2) amended, p. 2031, § 45, effective July 14. L. 2012: (2) amended, (HB 12-1311), ch. 281, p. 1619, § 42, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3176, § 203, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-4-204 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Phrase "other apparatus or equipment" not unconstitutionally vague. The phrase is limited to containers with the same characteristics as the other items listed in the statute. The characteristics of the other listed items provide sufficient guidance for a person of common intelligence to understand what type of container constitutes "other apparatus or equipment" under the statute. *People v. Nerud*, 2015 COA 27, 360 P.3d 201.

Degree of theft is not material to charge of attempted burglary under this section. *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While

criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Entering a telephone booth with felonious intent constituted burglary. *Sanchez v. People*, 142 Colo. 58, 349 P.2d 561 (1960).

Information adequate. Information charging defendant with attempted burglary of a coin telephone was not defective even though it did not affirmatively aver that the defendant entered the phone booth. *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973).

"Other apparatus or equipment" must be interpreted to apply only to those things that share the characteristics of the items listed in the statute. *Winter v. People*, 126 P.3d 192 (Colo. 2006).

Parking lot money slot box held to fall within statute. *People v. Garcia*, 784 P.2d 823 (Colo. App. 1989).

A **glass display case** is covered by the "or other apparatus or equipment" language provided in this section and that language is not unconstitutionally vague. *People v. Geyer*, 942 P.2d 1297 (Colo. App. 1996).

Gym lockers are covered by the "or other apparatus or equipment" language in this section when the lockers bear readily ascertainable features suggesting that they are being employed for the safekeeping of money or valuables in the same manner as those items enumerated in the statute. Signs posted around a gym warning members not to place valuables in gym lockers do not alter the lockers' basic design and use. *People v. Nerud*, 2015 COA 27, 360 P.3d 201.

An unsecured and unlocked locker that does not have the appearance of being employed for the safekeeping of valuables is not within the class of items contemplated by this section. The issue of whether a locker is sufficiently "vault-like" to fit within the purview of "other apparatus or equipment" must turn on the particulars of a given case. *Winter v. People*, 126 P.3d 192 (Colo. 2006).

Failure to instruct the jury on the elements of "knowingly" and "unlawful entry" in a third degree burglary case because those elements are present in first and second degree burglary was harmless error because those elements were not

contested at trial. *People v. Geyer*, 942 P.2d 1297 (Colo. App. 1996).

Circumstantial evidence held sufficient to sustain conviction where police officers did not see defendant remove any money from slot box, but observed defendant in front of box and found eleven folded and torn dollar bills in defendant's pocket and a piece of wire suitable for pulling bills from slots in pathway of defendant as he walked away from box. *People v. Garcia*, 784 P.2d 823 (Colo. App. 1989).

The district attorney could not charge under this section for actions that violated the more specific provisions of § 12-47.1-825 under the Limited Gaming Act of 1991. Since the act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal acts related to limited gaming, the general assembly must have intended that actions violating the specified criminal acts would be chargeable only under the Limited Gaming Act or under article 20 of this title, where the criminal provisions of the limited gaming act are repeated verbatim. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

Applied in *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Tate*, 657 P.2d 955 (Colo. 1983).

18-4-205. Possession of burglary tools.

(1) A person commits possession of burglary tools if he possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking, and intends to use the thing possessed, or knows that some person intends to use the thing possessed, in the commission of such an offense.

(2) Possession of burglary tools is a class 2 misdemeanor, but it is a class 5 felony if the burglary tools were knowingly possessed to facilitate a forcible entry into a residence for the purpose of a physical taking.

Source: L. 71: R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-205. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3176, § 204, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-4-205 is similar to former § 40-3-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The conduct proscribed by this section is sufficiently distinguishable from that prohibited by § 18-4-104 to withstand defendant's equal protection challenge. *People v. Gurule*, 924 P.2d 1164 (Colo. App. 1996).

Statute is not constitutionally overbroad. "Innocent possession" of tools is not prohibited by the statute, and the statute cannot be read to criminalize such conduct. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

"Burglary tools" held not unconstitutionally vague. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987);

People v. Gurule, 924 P.2d 1164 (Colo. App. 1996).

A "pouch" made of a pair of bib overalls that defendant specifically designed and adapted for purposes of facilitating a theft by a physical taking is a burglary tool pursuant to this section. However, mere possession of an item does not implicate the statute. The possession of a designed, adapted, or commonly used tool or other article must be accompanied by an intent to commit a burglary or theft by a physical taking. *People v. Gurule*, 924 P.2d 1164 (Colo. App. 1996).

Language of this section is explicit. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Arrangement of this section in prior compilations is not controlling in construing the section, but rather, courts must look to the language of the statute

itself. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Information charging defendant with possession of burglary tools held sufficient. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Statute does not omit the unlawful act element of the crime. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

Statute does not permit conviction solely on the basis of another's intent but requires intent by the accused or knowledge that another intends to use the tool for a burglarious purpose. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

Tools held admissible. Tools not intrinsically and exclusively burglary tools, but capable of use as such, were admissible in evidence in support of a charge of possession of burglary tools, where other evidence was ample to show actual breaking and entering and felonious intent. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

State may appropriate burglar tools. Burglar tools are by definition contraband. The state in the exercise of its police power may appropriate, without compensation, property employed in the commission of a crime in order to prevent the continuance of unlawful activity. It is not reasonable to assume that the general assembly intended

by this section to permit convicted burglars to retain the tools of their trade. *People v. Angerstein*, 194 Colo. 376, 572 P.2d 479 (1977).

There is no right to have them returned. If property is legally seized and it is designed or intended for use as a means of committing a criminal offense or the possession of which is illegal, there is no right to have it returned. *People v. Angerstein*, 194 Colo. 376, 572 P.2d 479 (1977).

The district attorney could not charge under this section for actions that violated the more specific provisions of § 12-47.1-825 under the Limited Gaming Act of 1991. Since the act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal acts related to limited gaming, the general assembly must have intended that actions violating the specified criminal acts would be chargeable only under the Limited Gaming Act or under article 20 of this title, where the criminal provisions of the limited gaming act are repeated verbatim. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

Applied in *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963); *People v. Tate*, 657 P.2d 955 (Colo. 1983).

PART 3

ROBBERY

18-4-301. Robbery.

- (1) A person who knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation commits robbery.
- (2) Robbery is a class 4 felony.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-301. L. 77: (1) amended, p. 963, § 22, effective July 1.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- IV. Verdict and Sentence.

version of this section in effect prior to the 1977 amendment, which inserted "knowingly" preceding "takes anything of value".

I. GENERAL CONSIDERATION.

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For comment on *People v. Gallegos* (130 Colo. 232, 274 P.2d 608 (1954)), see 27 Rocky Mt. L. Rev. 247 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. (1) Since § 18-4-301 is similar to former § 40-5-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

(2) Annotations appearing below from cases prior to 1979 were decided under the

This section is not unconstitutional. It does not contain ambiguities that would trap or ensnare the unwary, and it also complies with the equal protection clause of the fourteenth amendment of the U.S. constitution inasmuch as the legislative classification of the crimes of robbery is neither arbitrary nor discriminatory and operates equally on all persons within the classification. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

Felony murder based on robbery precludes conviction for robbery. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the robbery victim, precludes his simultaneous conviction of the lesser included offense of robbery. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Robbery conviction not precluded by conviction for murder of another after deliberation. Although a separate judgment of conviction for robbery may not simultaneously exist with a judgment of conviction for first degree murder predicated upon the killing of the robbery victim, there is no such impediment to the entry of both a judgment of conviction for first degree murder based upon the killing of another after deliberation and a separate judgment of conviction for the robbery of the same victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

"Robbery" in felony murder provision used in generic sense. The term "robbery", as used in the felony murder statute, is to be construed as meaning this type of felony in its generic sense, including all types of robbery as defined in the statutes. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of reckless manslaughter conviction. *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999).

Any resulting death from robbery supports felony murder conviction. Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction, and all such types of robbery are necessarily merged in a felony

murder charge. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

"Aggravated" and "simple" robbery are but two degrees of the same offense. The former requires that the perpetrator have the intent, if resisted, to kill, maim, or wound the victim. The latter offense does not require this intent. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Simple robbery is a lesser included offense within the charge of aggravated robbery. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970); *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

Aggravated robbery distinguished. The essential difference between simple robbery and that form of aggravated robbery requiring the culpability element of "knowingly" is that the latter offense requires the defendant to "knowingly" put the person robbed or any other person in reasonable fear of death or bodily injury by the use of force, threats or intimidation with a deadly weapon. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Simple robbery and aggravated robbery both require intent to rob. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under §§ 18-3-301 (1)(a) and 18-3-402 and this section. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Attempted robbery lesser included crime of aggravated robbery. Attempted robbery without the element of the specific intent, if resisted, to kill, maim, or wound is a lesser included offense of aggravated robbery which requires the specific intent, if resisted, to kill, maim, or wound. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Third degree assault not included offense. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery, and therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

Theft is not lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

Theft by threat is not lesser offense included in robbery. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971); *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

Attempted robbery is not a lesser included offense of use of a stun gun. *People v. Bass*, 155 P.3d 547 (Colo. App. 2006).

Robbery is a violent felony under the Armed Career Criminal Act's elements clause in 18 U.S.C. § 924(e)(2)(B)(i). Robbery has as an element the use or threatened use of physical force against another person that is capable of causing physical pain or injury. *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017).

Simple robbery is not a crime of violence for purposes of § 4B1.2(a)(1) of

the United States sentencing guidelines. *United States v. Durete*, 207 F. Supp. 3d 1193 (D. Colo. 2016).

Applied in *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960); *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Maes*, 43 Colo. App. 426, 607 P.2d 1028 (1979); *People v. Brown*, 622 P.2d 109 (Colo. App. 1980); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. Derrera*, 667 P.2d 1363 (Colo. 1983); *People v. Ward*, 673 P.2d 47 (Colo. App. 1983); *People v. Marquez*, 692 P.2d 1089 (Colo. 1984).

II. ELEMENTS OF OFFENSE.

A threat is defined as a declaration of purpose or intention to work injury to the person, property, or rights of another by the commission of an unlawful act. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971).

The gravamen of the offense is the manner of the taking. In robbery, the kind and value of the property taken is not material, and the gravamen of the offense being the manner of the taking. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933); *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962).

The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim's person or presence. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Force or fear being the main elements of the offense. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933); *People v. Thomas*, 181 Colo. 317, 509 P.2d 592 (1973).

The gist of the crime of simple robbery is the putting in fear and taking of property of another by force or intimidation. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972); *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

The robbery statutes endorse the basic public policy that even rightful owners should not be permitted to use force to regain their property, once it has been taken. *People v. Scarce*, 87 P.3d 228 (Colo. App. 2003).

The intent to steal is a substantive element in the commission of the crime of robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954), overruled in *People v. Moseley*, 193 Colo. 256, 566 P.2d 331 (1977).

And the taking of property under a fair claim of right of possession does not constitute robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954).

As when a creditor takes money from his debtor in satisfaction of an obligation, even though in so doing he uses force or

intimidation, it cannot be regarded as robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954).

Property is taken from the "presence of another" when it is so within the victim's reach, inspection or observation that he or she would be able to retain control over the property but for the force, threats, or intimidation directed by the perpetrator against the victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Benton*, 829 P. 2d 451 (Colo. App. 1991); *People v. Fox*, 928 P.2d 820 (Colo. App. 1996); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

It is immaterial that the victim was not in the motel lobby when defendant used force to take away the victim's control of the cash register. Defendant's conduct in luring the victim to said defendant's apartment and attacking the victim there in order to steal the money from the cash drawer in the lobby was sufficient evidence to prove that defendant took something of value from the presence of the victim by the use of force. *People v. Clemons*, 89 P.3d 479 (Colo. App. 2003).

A motor vehicle can be taken from the "presence" of the owner even if the owner is still in the vehicle, the key element being the forcible seizure, from the owner, of the present ability to control the motor vehicle. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

A security guard, pursuant to his employment in a department store, was the custodian of property taken by the defendant, and had the right to exercise

control over the property. *People v. Foster*, 971 P.2d 1082 (Colo. App. 1998).

Robbery includes the snatching of an object attached to the person of another if force is used to tear or break the attachment. *People v. Davis*, 935 P.2d 79 (Colo. App. 1996).

Force need not be contemporaneous with taking. There is no requirement that the application of force or intimidation must be virtually contemporaneous with the taking. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

The required "taking" need not be accomplished personally by the robber. If the robber forces another to "take" the property, a robbery has occurred. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

The amount of the property is not an essential element of the offense. There is no provision in this section which makes the amount of property taken an essential element of the offense. Nor is there anything in the nature of robbery as defined by the common law from which it appears that the value of the property has ever been deemed of the essence of the crime. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

In robbery the kind or value of the property taken is immaterial. *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962).

Since punishment does not depend on the value of the property. There is no occasion, as there is in theft, for alleging the value, as the punishment is not made to depend on the value of the property taken.

Rowan v. People, 93 Colo. 473, 26 P.2d 1066 (1933).

Robbery requires no specific intent to permanently deprive the owner of the use or benefit of his property. *People v. Moseley*, 193 Colo. 256, 566 P.2d 331 (1977) (overruling *People v. Gallegos*, 130 Colo. 232, 272 P.2d 608 (1954)).

Robbery of an at-risk adult is a lesser included offense of aggravated robbery; therefore, the conviction for robbery of an at-risk adult must be vacated because it merges with the aggravated robbery conviction. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

B. Defenses.

C. Evidence.

D. Instructions.

A. Indictment and Information.

Information held sufficient. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

An information which substantially follows the terms of this section, is expressed in plain language, and which is easily understood, is sufficient. *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932).

Money referred to in information construed to mean money of the United States. Where the information under this section alleges that money was taken, money will be construed to mean money of the United States, and the court will take

judicial notice of its value. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

It is not necessary to allege that person from whom property was taken was the owner thereof, since it is sufficient if it appears from the allegations that accused was not the owner. Regardless of the legal title, ownership may properly be laid in the person from whose physical possession the property was taken. *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961); *People v. Marquez*, 692 P.2d 1089 (Colo. 1984).

B. Defenses.

Defendant has right to use his mental condition at time of robbery as a defense on the merits of whether or not he had the requisite intent to commit the crime. *People v. Scheidt*, 186 Colo. 142, 526 P.2d 300 (1974).

Self-defense is not affirmative defense. Self-defense cannot justify the taking of a thing of value from the person or presence of another, and the lawfulness of the force used to accomplish the taking is immaterial. Therefore, self-defense is not an affirmative defense to the crime of aggravated robbery. *People v. Beebe*, 38 Colo. App. 80, 557 P.2d 840 (1976).

Defendant was entitled to a jury instruction on self-defense as an affirmative defense to aggravated robbery because defendant introduced some credible evidence to support the defense. *People v. DeGreat*, 2018 CO 83, 428 P.3d 541 (disagreeing with *People v. Beebe* annotated above).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

C. Evidence.

Evidence of other crimes committed or attempted by accused is admissible to prove scienter, or guilty or criminal knowledge, with respect to the crime charged, if similar and occurring at or about the same time, or at a time not too remote. For such evidence to be admissible, such knowledge must be in issue or be an element of the offense charged, and the other offenses must be so connected with that charged as to throw light on the question. Proper evidence tending to show guilty knowledge is not to be excluded because disclosing the commission of a different crime by accused. *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961).

Recent and unexplained possession of fruits of robbery is an incriminating circumstance, and such fact, coupled with the other related facts and circumstances in the instant case, is deemed sufficient to support the verdict. *Martinez v. People*, 156 Colo. 380, 399 P.2d 415 (1965).

When a proper foundation has been laid, evidence that the property taken in the robbery in question was found in the possession of the accused shortly thereafter is admissible against him, subject to the

rules governing the admissibility of evidence of the possession of the fruits of crime generally. There was no error in instructing the jury on this matter, even though the charge was robbery and not larceny. *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961).

A prima facie case of robbery is made out where the victim's wrist watch was later located in defendant's coat pocket, and the victim's pants pocket and billfold were later found on the floor in the back seat of the squad car in close proximity to defendant. *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962).

One may be convicted upon uncorroborated testimony of accomplices, but to support a conviction it must be clear and convincing, must be received with great caution, and show guilt beyond a reasonable doubt. *Bowland v. People*, 136 Colo. 57, 314 P.2d 685 (1957).

Evidence that defendant closely resembles one of three men who held up a supermarket and forced an employee to open the safe, and whose codefendants testify that defendant was a participant, is sufficient to justify the jury in rejecting defendant's alibi and giving credence to the testimony of his codefendants. *Bowland v. People*, 136 Colo. 57, 314 P.2d 685 (1957).

Proof of robbery in felony murder case. Specific intent is not a necessary element in the proof of the offense of robbery, the question of mental capacity to form intent is of no relevance in a felony murder case where in the commission of a robbery a

death occurred. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

Where defendant was charged with committing murder while perpetrating a robbery, it was incumbent on the state to prove that a robbery occurred. The admission by the defendant that he committed the robbery does not prevent the state from presenting separate and independent proof of the fact admitted. *Bizup v. People*, 150 Colo. 214, 371 P.2d 786 (1962).

Evidence sufficient to sustain robbery conviction. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971); *People v. Goff*, 187 Colo. 103, 530 P.2d 514 (1974).

Where a defendant is properly charged with the crime of robbery, the robbery is shown to have occurred, and defendant's role as an accessory is proved, a prima facie case is made, and thus defendant may be properly convicted under this section, although he was an accessory. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Where defendants' fingerprints were found on the inside of the entry door and on an envelope normally kept in a desk drawer in the victim's bedroom, and where defendants theorize that the prints could have been made at a time other than during the commission of the crime, but did not testify nor present other testimony to buttress the theory, the evidence was sufficient for conviction of robbery and conspiracy to commit robbery. *People v. Hannaman*, 181 Colo. 82, 507 P.2d 466 (1973).

Evidence that defendant used force against the victim and that defendant's accomplice took the victim's money was sufficient to constitute robbery. People v. Jompp, 2018 COA 128, 440 P.3d 1166.

D. Instructions.

Evidence in aggravated robbery case held insufficient to support instruction on simple robbery. People v. Reed, 180 Colo. 16, 502 P.2d 952 (1972).

Simple robbery instruction is mandatory when the evidence would justify acquitting a defendant of aggravated robbery while convicting him of simple robbery. Tacorante v. People, 624 P.2d 1324 (Colo. 1981).

Where no rational basis for simple robbery conviction, court may refuse to instruct. Where the evidence presented to the jury showed, at a minimum, that the defendant had participated as a complicitor in the commission of an aggravated robbery, as proscribed by § 18-4-302, there was no rational basis on which the jury could have acted to acquit the defendant of aggravated robbery while convicting him of simple robbery, and the trial court did not therefore err in refusing to instruct the jury on the latter offense. People v. Glenn, 200 Colo. 416, 615 P.2d 700 (1980).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the

lesser included offense of simple robbery. People v. Graham, 41 Colo. App. 390, 590 P.2d 511 (1978), aff'd, 199 Colo. 439, 610 P.2d 494 (1980).

Instruction on theft refused. The trial court did not commit error in refusing to instruct the jury on the crime of larceny where the defendant's theory of the case and his defense were based upon mistaken identity and alibi, and the only evidence presented relating to the incident of the offense was that presented by the people, all of which supported robbery. It is not error for a court to have refused a tendered instruction concerning an issue regarding which no facts were presented. Leyba v. People, 174 Colo. 1, 481 P.2d 417 (1971).

An instruction that a charge of robbery carries with it the lesser included offense of petty and grand theft would have been improper, since the kind and value of the property taken in a robbery is immaterial. Maes v. People, 178 Colo. 46, 494 P.2d 1290 (1972).

Lesser offense instruction is properly refused when an element that distinguishes the greater offense from the lesser offense is uncontested. Thus, defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. People v. Villalobos, 159 P.3d 624 (Colo. App. 2006).

Test applicable to defendant's request for an instruction on the crime of theft is whether there existed a rational basis to acquit him of simple robbery but still

convict him of theft; the test is not whether there is a total absence of evidence showing the defendant to be guilty of simple robbery. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Where, at a minimum, defendant committed simple robbery, no theft instruction. Because the uncontroverted evidence before the jury established, at a minimum, that the defendant had committed simple robbery, he was not entitled to an instruction on the crime of theft. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Trial court properly included in jury instruction language from another case that concerned the definition of "presence". *People v. Benton*, 829 P.2d 451 (Colo. App. 1991).

Money was not taken in "presence" of movie theater ticket taker since money was not in the physical possession of ticket taker and since ticket taker did not have right to exercise control over the money. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

IV. VERDICT AND SENTENCE.

Proof of intent sufficient to support conviction. Proof of an intent to force the giving up of a thing of value is sufficient to support a conviction for robbery. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Verdicts on offense and conspiracy must be consistent. If counsel for the people insist upon submitting to the jury a count of conspiracy as well as a count of robbery where the evidence which would

convict upon either charge is exactly the same, the jury should be instructed that it cannot convict on one count and acquit on the other. *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968).

General verdict treated as conviction of lesser offense. Where a proper instruction on simple robbery was given and the evidence was sufficient to sustain a verdict of guilty on the lesser included offense of simple robbery, the supreme court elected to treat the verdict of guilty "as charged" as a verdict of guilty of simple robbery. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Convictions for two counts of robbery arising out of the same criminal episode are not multiplicitous. The issue turns on whether two robberies can arise out of a single taking of property. The inquiry then focuses on whether the crime of robbery is intended to protect people or property. If robbery is intended to protect people, a single taking could support multiple convictions if the one item is taken from multiple people with control over the item. The plain language of the robbery statute is ambiguous as to whether it is intended to protect people or property. The common law history of robbery and case law indicates robbery statutes are intended to protect people. Therefore, a single taking can support multiple convictions for robbery if the taking is made in the presence of multiple victims. *People v. Borghesi*, 66 P.3d 93 (Colo. 2003).

Defendant's acts constitute separate offenses as to each victim and conviction is

not multiplicitous where the common property taken from the first victim was taken in the second victim's presence. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

The crimes of robbery and theft from the person of another are mutually exclusive. When an element of one crime negates an element of a different crime, those two offenses are mutually exclusive and a defendant cannot be convicted of both. A defendant cannot both take something from another by the use of force and without the use of force in the same occurrence. *People v. Delgado*, 2019 CO 82, 450 P.3d 703.

When two crimes are mutually exclusive, the court must instruct the jury that the defendant cannot be convicted of both

crimes. When the court fails to make that instruction, it is plain error, and the proper remedy is a new trial. *People v. Delgado*, 2019 CO 82, 450 P.3d 703.

A conviction for both robbery and theft from the person of another is a plainly inconsistent verdict. Pursuant to this section, robbery requires the "use of force, threats, or intimidation" while theft from the person of another, pursuant to § 18-4-401, is "by means other than the use of force, threat, or intimidation". The appropriate remedy is a new trial. *People v. Delgado*, 2016 COA 174, 410 P.3d 697, *aff'd*, 2019 CO 82, 450 P.3d 703.

Defendant's sentence of eight to nine years for simple robbery was not excessive. *People v. Nierle*, 624 P.2d 1333 (Colo. 1981).

18-4-302. Aggravated robbery.

(1) A person who commits robbery is guilty of aggravated robbery if during the act of robbery or immediate flight therefrom:

(a) He is armed with a deadly weapon with intent, if resisted, to kill, maim, or wound the person robbed or any other person; or

(b) He knowingly wounds or strikes the person robbed or any other person with a deadly weapon or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury; or

(c) He has present a confederate, aiding or abetting the perpetration of the robbery, armed with a deadly weapon, with the intent, either on the part of the defendant or confederate, if resistance is offered, to kill, maim, or wound the person robbed or any other person, or by the use of force, threats, or intimidation puts the person robbed or any other person in reasonable fear of death or bodily injury; or

(d) He possesses any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or represents verbally or otherwise that he is then and there so armed.

(2) Repealed.

(3) Aggravated robbery is a class 3 felony and is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(4) If a defendant is convicted of aggravated robbery pursuant to paragraph (b) of subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

Source: **L. 71:** R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-302. **L. 77:** (1)(b) amended, p. 963, § 23, effective July 1. **L. 86:** (4) added, p. 777, § 9, effective July 1. **L. 89:** (1)(d) added and (2) repealed, pp. 831, 861, §§ 43, 156, effective July 1. **L. 90:** (1)(c) amended, p. 925, § 9, effective March 27. **L. 2002:** (4) amended, p. 1515, § 197, effective October 1. **L. 2004:** (3) amended, p. 636, § 8, effective August 4.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

Annotator's note. Since § 18-4-302 is similar to former § 40-5-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not violative of equal protection. People v. Aragon, 653 P.2d 715 (Colo. 1982).

The general assembly has not defined separate offenses under this section, but, rather, alternative means of committing the same offense. This is illustrated by the use of the term "or" between paragraphs (a) to (d) of subsection (1). People v. Serna-Lopez, 2023 COA 21, 531 P.3d 410.

The term "aggravated robbery" means a robbery committed with a dangerous weapon and with the intent, if resisted, to kill, maim, or wound the victim or other person. Johnson v. People, 174 Colo. 75, 482 P.2d 105 (1971).

This section provides that the crime of aggravated robbery is established if in the perpetration of such robbery the accused is armed with a dangerous weapon with intent, if resisted, to kill, maim, or wound the person robbed or any other person. *Vigil v. People*, 158 Colo. 268, 406 P.2d 100 (1965).

"Robbery" in felony murder provision used in generic sense. The term "robbery", as used in the felony murder statute, is to be construed as meaning this type of felony in its generic sense, including all types of robbery as defined in the statutes. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Any resulting death from robbery supports felony murder conviction. Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction, and all such types of robbery are necessarily merged in a felony murder charge. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Aggravated robbery was merged in the offense of felony murder and the constitutional protection against double jeopardy precludes conviction for both offenses. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Aggravated robbery is robbery committed under circumstances in which the actor's conduct creates an increased risk of injury to the victim or instills in the victim an enhanced fear of death or injury. *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Attempt to commit aggravated robbery requires same culpability plus substantial step. Criminal attempt to commit aggravated robbery requires that the offender act with the kind of culpability otherwise required for aggravated robbery and engage in a substantial step toward the commission of aggravated robbery. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Explanation of terms before plea of guilty. Where a defendant attempts to plead guilty to a violation of this section, it is mandatory that the court explain to him the nature and elements of "aggravated" robbery, and determine that the accused understands the nature of the charge. *People v. Riney*, 176 Colo. 221, 489 P.2d 1304 (1971).

A dangerous weapon is an article of offense which in its intended or easily adaptable use is likely to produce death or serious bodily injury. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

"Aggravated" and "simple" robbery are but two degrees of the same offense. The former requires that the perpetrator have the intent, if resisted, to kill, maim, or wound the victim. The latter offense does not require this intent. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Aggravated robbery is distinguished from simple robbery by the fact that the accused or a confederate is armed with a dangerous weapon with the intent, if resisted, to maim, wound, or kill. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

Simple robbery is a lesser included offense within the charge of aggravated robbery. *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

Simple robbery distinguished. The essential difference between simple robbery and that form of aggravated robbery requiring the culpability element of "knowingly" is that the latter offense requires the defendant to "knowingly" put the person robbed or any other person in reasonable fear of death or bodily injury by the use of force, threats or intimidation with a deadly weapon. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Felony menacing distinguished. The offense of aggravated robbery may be committed without also committing felony menacing; no merger occurs because the requirement in the felony menacing statute that the actor knowingly place a victim in fear of "serious bodily injury" is distinguishable from the requirement that the robber knowingly place a victim in fear of "bodily injury". *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

Criminal attempt to commit aggravated robbery requires that the offender act with the kind of culpability otherwise required for the commission of aggravated robbery and that he engage in conduct constituting a substantial step towards the commission of that offense. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Conviction of attempted aggravated robbery does not require a showing of specific intent to commit the underlying

crime. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

A defendant's use of force while fleeing after abandoning his attempt to take something of value from another is not sufficient to satisfy the use of force element of attempted aggravated robbery. *People v. Liebler*, 2022 COA 21, 510 P.3d 548.

Convictions of both aggravated robbery and conspiracy to commit robbery do not violate double jeopardy. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Conviction for aggravated robbery and commission of a crime of violence does not violate double jeopardy and equal protection. *People v. Schruder*, 735 P.2d 905 (Colo. App. 1986).

Stipulation by attorney that a guilty verdict to aggravated robbery also established that the defendant was guilty of a crime of violence did not violate defendant's rights since the jury returned a verdict which showed that it found that the defendant placed another in fear by the use of a deadly weapon and since defendant failed to show how a special interrogatory could have produced a different result. *People v. McMullen*, 738 P.2d 23 (Colo. App. 1986).

When the crime of violence statute is superimposed on convictions for both aggravated robbery and simple robbery, there are real differences between the two forms of robbery. These differences provide substantial support for the disparate penalty

applicable to a crime of violence finding which is superimposed on a conviction for aggravated robbery, and such does not violate equal protection of the laws. *People v. Young*, 758 P.2d 667 (Colo. 1988).

It is possible to commit an aggravated robbery without contemporaneously perpetrating a second degree assault. *People v. Grant*, 40 Colo. App. 46, 571 P.2d 1111 (1977); *People v. Toomer*, 43 Colo. App. 182, 604 P.2d 1180 (1979).

Assault with intent to rob is lesser included offense of aggravated robbery. Therefore, since assault with intent to rob is a lesser included offense of aggravated robbery, it was error for the court to permit both verdicts to stand. Thus, the conviction on the lesser included offense must be set aside. *People v. Stephens*, 188 Colo. 8, 532 P.2d 728 (1975).

As is attempted robbery. Attempted robbery without the element of the specific intent, if resisted, to kill, maim, or wound is a lesser included offense of aggravated robbery which requires the specific intent, if resisted, to kill, maim, or wound. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

If a robbery or attempted robbery is established but without additional specific intent, if resisted, to kill, maim, or wound, a person charged with aggravated robbery or attempted aggravated robbery can be found guilty of simple robbery or attempted simple robbery under the lesser included offense in a case where only the greater crime is charged. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Aggravated robbery and assault with intent to murder separate offenses. The offense of assault with intent to murder requires proof of a specific intent to kill, a fact not necessary to sustain a charge of aggravated robbery. On the other hand, aggravated robbery requires proof of a robbery, a fact not necessary for assault. Therefore, punishment for both of these offenses committed during one course of conduct does not violate the constitutional prohibition against double jeopardy for the same offense. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

An argument of the defendants, based on the assumption that to be guilty of aggravated robbery they had to be guilty of assault with intent to murder, is clearly unfounded. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Double jeopardy barred convictions for both aggravated robbery and assault with a deadly weapon. Under the former criminal code, it was impossible to commit aggravated robbery without contemporaneously perpetuating an assault with a deadly weapon. Since assault with a deadly weapon was the lesser included offense, double jeopardy barred a conviction for both crimes. *People v. Hancock*, 186 Colo. 30, 525 P.2d 435 (1974).

Lesser included offense. Attempt to commit robbery is a lesser included offense of attempt to commit aggravated robbery. *People v. Johnson*, 634 P.2d 407 (Colo. 1981).

When aggravated robbery is lesser included offense of felony murder. Where

the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of § 18-1-408(5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Where defendant was convicted of aggravated robbery and was adjudicated a habitual criminal, a subsequent reversal of the adjudication of habitual criminality negated its sentence enhancing effect and required resentencing for the underlying charge since it was not clear from the record that the robbery sentence was imposed independently from the habitual criminal adjudication. When resentencing the trial court could consider all relevant and material factors, including new evidence incorporated in a supplemental presentence report. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Applied in *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960); *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965); *Cowman v. People*, 157 Colo. 120, 401 P.2d 831 (1965); *Bustos v. People*, 158 Colo. 451, 408 P.2d 64 (1965); *Neighbors v. People*, 161 Colo. 587, 423 P.2d 838 (1967); *Jaggers v. People*, 174 Colo. 430, 484 P.2d 796 (1971); *People v. Marchese*, 37 Colo. App. 65, 541 P.2d 1264 (1975); *People v. Brionez*, 39 Colo. App. 396, 570 P.2d 1296 (1977); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *Wells v. People*, 197 Colo. 350, 592 P.2d 1321 (1979); *People v. Culbertson*, 198 Colo. 153, 596 P.2d 1200 (1979); *Watson v. District Court*, 199 Colo.

76, 604 P.2d 1165 (1980); *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v. Bravo*, 630 P.2d 612 (Colo. 1981); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Hogan*, 649 P.2d 326 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. Akins*, 662 P.2d 486 (Colo. 1983).

II. ELEMENTS OF OFFENSE.

Culpable mental state implied. A statute will be presumed to conform to constitutional requirements, and a culpable mental state will be implied from a particular statute which does not contain an intent element on its face. *People v. Smith*, 620 P.2d 232 (Colo. 1980).

Intent is a necessary element in the proof of aggravated robbery, and this section, covering the offense, must be given its full force and effect. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932); *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

It is not essential that a bandit must demonstrate an intent to kill, maim, or wound the victim of the holdup. *Vigil v. People*, 158 Colo. 268, 406 P.2d 100 (1965).

Fact that defendant was armed with intent to harm only goes to the grade and

punishment of crime. In a prosecution for aggravated robbery under this section, the fact that defendant was armed with a dangerous weapon with intent to kill or wound his victim if resisted, is not the essence of the offense of robbery, and proof of these facts is not necessary for a conviction, but goes only to the grade of the crime and punishment to be inflicted. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932).

Being dangerously armed and having the intent described are not essential to the perpetration of a robbery, but proof thereof goes to the degree of the crime, and affects only the punishment to be suffered in event of conviction. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

A simulated pistol, not per se dangerous, may become so factually because of its substance, size, and weight as a bludgeon wielded within striking distance of the person to be robbed. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

Section 18-1-901 prescribes test to determine whether certain items constitute deadly weapons. Section 18-1-901 (3)(e) expressly prescribes a test to determine whether items other than firearms, knives, and bludgeons are deadly weapons, based not on the intrinsic nature of the items but upon their use or intended use. *Bowers v. People*, 617 P.2d 560 (Colo. 1980) (decided prior to 1981 amendment to § 18-1-901 (3)(e)).

Armed with and in possession of a deadly weapon. This element of aggravated robbery may be proven by relying on presumption created by subsection (2).

People v. Castenada, 765 P.2d 641 (Colo. App. 1988).

Quart bottle of whiskey is not a bludgeon but it may satisfy the statutory test defining a deadly weapon as a "device, instrument, material, or substance, . . . which in the manner it is used . . . is capable of producing death or serious bodily injury". *Bowers v. People*, 617 P.2d 560 (Colo. 1980) (decided prior to 1981 amendment to § 18-1-901 (3)(e)).

The state of mind or intent is usually manifested by circumstances and proof thereof necessarily is by circumstantial evidence, and, of course, such intent is ordinarily inferable from the facts. The state of mind of the defendant is concealed within the mind and is not usually, perhaps never, susceptible of direct proof. *Ruark v. People*, 157 Colo. 320, 402 P.2d 637 (1965).

Circumstantial evidence is sufficient to at least present a jury question as to whether the defendant possessed the requisite specific intent to maim, wound, or kill, if resisted. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Differences within and constitutionality of charging under subsection (1). Subsections (1)(b) and (1)(c) proscribe different conduct. To be found guilty based on threats or intimidation under subsection (1)(b), a defendant (or the principal, if the defendant is guilty as a complicitor) must knowingly threaten or intimidate a victim with a deadly weapon. To be found guilty under subsection (1)(c), a defendant (or the principal, if the defendant is guilty as a complicitor) need not use a deadly weapon

to threaten or intimidate the victim. Because the two subsections proscribe different means by which a victim may be robbed through the use of threats or intimidation, they do not contain identical statutory elements, and therefore do not punish identical conduct. There is no equal protection violation where there are reasonable differences between the behaviors proscribed in the statutes, and the differences are both real in fact and reasonably related to the general purposes of the legislation. *People v. Firm*, 2014 COA 32, 342 P.3d 537.

Constitutionality and intent of subsection (2). Clearly, the intent of the general assembly in passing subsection (2) was to prevent armed robbers from escaping aggravated robbery charges by simply concealing deadly weapons in their pockets or under other wraps or devices. Recognizing this legislative intent, the constitutionality of the statute is upheld. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Subsection (2) does not unconstitutionally deny defendant equal protection of the laws by removing the only real distinction between simple and aggravated robbery. *People v. Murphy*, 192 Colo. 411, 559 P.2d 708 (1977).

Or due process. Subsection (2) of this section, which makes a robber's representation that he is armed prima facie evidence that he is in fact armed, does not deny a defendant due process by shifting the prosecution's burden of proof. *People v.*

Hawkins, 192 Colo. 535, 560 P.2d 833 (1977).

The presumption created by subsection (2) does not violate a defendant's constitutional right against self-incrimination. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

As it permits jury inference as to possession. The presumption created by subsection (2) meets the test described by the United States supreme court in that it permits the jury to infer that the defendant actually possessed a deadly weapon when he has made such a representation to another. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Prosecution must still prove additional element. Subsection (2) merely permits the jury to infer that a defendant told the truth when he asserted that he was armed. The prosecution is still required to prove an additional element over and above what is required to prove simply robbery. *People v. Murphy*, 192 Colo. 411, 559 P.2d 708 (1977).

Shifts only part of burden to defendant. The statutory presumption created by subsection (2) does not shift the entire burden of proof to the defendant, but merely the burden of going forward with respect to certain evidence. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Instruction regarding subsection (2) did not shift the burden of proof; rather, the instruction and statute merely shifted the burden of going forward with respect to

certain evidence. *People v. Jones*, 191 Colo. 385, 553 P.2d 770 (1976).

This section and an instruction phrased in the language of this section, with the exception that it does not state that representations of being armed shall be considered "prima facie" evidence that the defendant was armed, do not operate to shift the burden of proof. *People v. Hawkins*, 192 Colo. 535, 560 P.2d 833 (1977).

Attempted robbery without aggravation does not include any element not included in attempted robbery with aggravation. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Inference of possession by victim. In the light of common sense and experience, the victim of a robbery — possessed of reasonable belief — may infer that a defendant possesses a deadly weapon if the defendant makes such a representation. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Simple robbery and aggravated robbery both require the intent to rob. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

B. Evidence.

C. Jury.

D. Instructions.

A. Indictment and Information.

Information held sufficient. *Johnson v. Tinsley*, 155 Colo. 346, 394 P.2d 842 (1964).

Indictment need not specify which method of committing offense charged. As in the case of principals and complicitors, an indictment under this section need not specify which of the two methods of committing the offense is being charged. *People v. Martinez*, 42 Colo. App. 307, 600 P.2d 82 (1979).

Variance between indictment and proof not fatal to prosecution. A variance between the indictment, which accused defendant of having an armed confederate present, and the proof, which showed defendant as the person armed, was not fatal to a prosecution under this section. *People v. Martinez*, 42 Colo. App. 307, 600 P.2d 82 (1979).

B. Evidence.

Evidence of conspiracy to commit aggravated robbery is not inadmissible and is not meaningless and to be ignored merely because plans to commit robbery were frustrated and ended with commission of second degree assault. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Admission of weapon proper. Where no weapon was seen by victim of aggravated robbery, and where tire iron found by cash register did not belong to service station and had not been seen in service station prior to robbery, and where wound on victim's head appeared to have been inflicted by tire tool or similar instrument, admission of tire tool

was not error. *People v. Bedwell*, 181 Colo. 20, 506 P.2d 365 (1973).

Evidence of intent sufficient to go to jury. *McGraw v. People*, 154 Colo. 368, 390 P.2d 819 (1964).

Where it was contended that the evidence was insufficient to prove beyond a reasonable doubt that the gunman had the requisite specific intent, if resisted, to kill, maim, or wound the person robbed or any other person, it was held that the record showed sufficient circumstances from which the jury could reasonably infer that the gunman had the state of mind necessary to sustain the conviction of aggravated robbery. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971).

The pointing of the gun in a threatening manner is sufficient to support the finding of specific intent. *Schermerhorn v. People*, 175 Colo. 256, 486 P.2d 428 (1971).

A threat by a defendant to shoot a victim is sufficient to require submission of an aggravated robbery charge to a jury. *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972).

Evidence held sufficient to support conviction of aggravated robbery. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971); *People v. Bedwell*, 181 Colo. 20, 506 P.2d 365 (1973); *People v. Renfro*, 181 Colo. 159, 508 P.2d 396 (1973); *People v. Hawkins*, 192 Colo. 535, 560 P.2d 833 (1977); *People v. Moseley*, 193 Colo. 256, 566 P.2d 331 (1977); *People v. Larson*, 194 Colo. 338, 572 P.2d 815 (1977); *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339

(1977); *People v. Bowers*, 42 Colo. App. 467, 600 P.2d 95 (1979); *People v. Gregg*, 298 P.3d 983 (Colo. App. 2011).

Where defendant is found hiding near scene of robbery with some of the masks and other items used to perfect the robbers' disguise, evidence against him is substantial and supports his conviction. *Velarde v. People*, 179 Colo. 207, 500 P.2d 125 (1972).

Evidence sufficient to sustain attempted aggravated robbery conviction. *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339 (1977).

Evidence sustained defendant's conviction as accessory to aggravated robbery. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

C. Jury.

Questions for jury. Under an information charging aggravated robbery under this section, the jury must first determine from the evidence whether or not a robbery was committed, and if so, whether defendant was armed with dangerous weapons, and had the intent, if resisted, to kill or wound his victim. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932).

Character of weapon is jury question. Whether an article used as a weapon is dangerous may be, because of its very character or the circumstances of its use, a matter of doubt, and in such case the question should be left to the jury under an instruction as to what constitutes a dangerous weapon. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

D. Instructions.

Instructions on culpable mental state. A culpable mental state is a requisite element of aggravated robbery. If jury instructions taken as a whole are confusing, or imply that no mental state is required to convict, these instructions are constitutionally deficient. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

Instructions using term "aggravated". The use of the word "aggravated" in the information is a matter of form only. There was no objection to instructions which used the word "aggravated", and this did not constitute plain error affecting substantial rights. *Moore v. People*, 164 Colo. 222, 434 P.2d 132 (1967).

Simple robbery instruction is mandatory when the evidence would justify acquitting a defendant of aggravated robbery while convicting him of simple robbery. *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

Where no rational basis for simple robbery conviction, court may refuse to instruct. Where the evidence presented to the jury showed, at a minimum, that the defendant had participated as a complicitor in the commission of an aggravated robbery, as proscribed by this section, there was no rational basis on which the jury could have acted to acquit the defendant of aggravated robbery while convicting him of simple robbery, and the trial court did not therefore err in refusing to instruct the jury on the latter offense. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Use of term "simple robbery". Where the trial court failed to instruct the jury as to what the court meant in referring to "simple robbery" as a lesser included offense of aggravated robbery, but where the instruction in question was worded substantially in the language of the statute, and the record shows that the instructions when read as a whole are not complicated nor difficult to understand, and the jury was fully capable of understanding the concept of "simple robbery" as a lesser included offense of aggravated robbery, there was no error. *People v. Dago*, 179 Colo. 1, 497 P.2d 1261 (1972).

Instruction on specific intent must be delivered to the jury in cases of aggravated robbery. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

A defendant charged with aggravated robbery is entitled to an instruction on the element of specific intent to kill, maim, or wound, if resisted, whether requested or not. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Failure to so instruct requires reversal. A verdict of guilty cannot stand where the element of specific intent is material as to one count of the information or indictment which is related to and joined with a count of conspiracy, when the court's instructions on intent covering either count are erroneous. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Where the supreme court fails to properly instruct the jury on a necessary element of the crime charged, a verdict of guilty as to aggravated robbery cannot stand. *Hampton*

v. People, 171 Colo. 101, 465 P.2d 112 (1970).

Where intent is uncertain, jury must be instructed as to simple robbery. In a prosecution for aggravated robbery under this section, there being evidence tending to negative the specific intent necessary to constitute the crime, it was reversible error for the trial court to refuse to instruct the jury on the question of simple robbery, and to refuse to submit to it a form of verdict covering that feature of the case. Funk v. People, 90 Colo. 167, 7 P.2d 823 (1932).

Where aggravated robbery has been charged, the trial judge must give an instruction on the lesser offense of simple robbery when such instruction is requested by the defendant and when it is supported by the evidence. Hollon v. People, 170 Colo. 432, 462 P.2d 490 (1969); Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970); People v. Reed, 180 Colo. 16, 502 P.2d 952 (1972).

Where the jury can convict defendants of aggravated robbery, it is not prejudicial error to submit instructions and verdicts to the jury on the offense of simple robbery. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Refusal may be reversible error. There was testimony from the victim that there was no violence and no threats. The only evidence of intent was the presence of the loaded pistol. The evidence was such that the jury could find that the people had failed to prove the element of specific intent beyond a reasonable doubt, thus, it was reversible error for the trial judge to refuse

to instruct, as requested, on simple robbery. Hollon v. People, 170 Colo. 432, 462 P.2d 490 (1969).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the lesser included offense of simple robbery. People v. Graham, 41 Colo. App. 390, 590 P.2d 511 (1978), aff'd, 199 Colo. 439, 610 P.2d 494 (1980).

Lesser theft offense instruction is properly refused when an element that distinguishes the greater offense of aggravated robbery from the lesser offense is uncontested. Defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. People v. Villalobos, 159 P.3d 624 (Colo. App. 2006).

Evidence in aggravated robbery case held insufficient to support instruction on simple robbery. Sisneros v. People, 174 Colo. 543, 484 P.2d 1207 (1971); People v. Reed, 180 Colo. 16, 502 P.2d 952 (1972).

Where the suspect pursued by police fired a shot, the defendant charged with aggravated robbery was not entitled to an instruction on simple robbery; he had manifested the specific intent to maim, wound, or kill, if resisted, and placed himself outside of the ambit of the rule requiring an instruction on the lesser

offense. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

Refusal of accessory instruction proper.

The court's refusal to instruct the jury that the crime of accessory during the fact is also a lesser included offense when robbery is charged, which was the defendant's principal theory of the case, was not error because accessory during the fact is a separate and distinct offense which was not charged and which could not properly have been the subject of an instruction. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

The term "confederate" as used in subsection (1)(c) means more than a bystander. The confederate must be "aiding and abetting the perpetration of the robbery". *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

The term "confederate" is not a highly technical one and is well within the comprehension of the jury. The trial court did not err, therefore, in rejecting defendant's jury instruction that incorporated a definition of "confederate" from a legal dictionary or in declining to define the term. *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

Instruction based on subsection (2) properly refused. There being no question that a deadly weapon had been utilized during the robbery, no issue concerning subsection (2) of this section was raised. Hence, the trial court properly refused a tendered instruction based on that subsection. *People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

Instruction adequate. Where the jury was instructed in plain understandable English that a conviction for aggravated robbery requires that the defendant have the specific intent to kill, maim, or wound, if resisted in his attempt to commit the robbery, that instruction, read together with the other instruction requiring the people to prove every element beyond a reasonable doubt, adequately apprised the jury of the law, and the jury was adequately instructed on the elements of aggravated robbery. *People v. Crawford*, 183 Colo. 166, 515 P.2d 631 (1973).

Because the jury indicated it was confused about the meaning of the phrase "use of force or threat or intimidation" and whether carrying a gun meant the same as using a gun, it was proper for the court to give a supplemental instruction. *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

An instruction which permits the jury to draw inferences from the unexplained possession of recently stolen property is proper in cases where robbery is charged. *People v. Grubbs*, 39 Colo. App. 436, 570 P.2d 1299 (1977).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

IV. VERDICT AND SENTENCE.

Verdicts held not inconsistent. Since the statutory elements of aggravated robbery and theft over \$200 (now \$300) are different, jury verdicts convicting a defendant of aggravated robbery of an employee but acquitting the defendant of theft from the employer are not inconsistent and repugnant. *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339 (1977).

Assault with a deadly weapon is a lesser included offense of aggravated robbery, and since the jury convicted the defendant of aggravated robbery, his conviction for the included offense of assault with a deadly weapon must be set aside. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

Acquittal of conspiracy charge required. Where the very same evidence which the jury did not believe was sufficient to prove that the defendant participated in the robbery was the only evidence which could prove him guilty of conspiracy, the conspiracy verdict could not stand. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Verdict of aggravated robbery sufficient. A verdict in a prosecution under this section which finds the defendant guilty of "robbery with a deadly weapon, to-wit, a gun", is not insufficient because it does not include the words, "as charged in the information", or does not more definitely specify the crime as defined by statute. *Van Diest v. People*, 71 Colo. 121, 204 P. 606 (1922).

Where the charge in count one of the information alleged that defendant committed the robbery with the intent to maim, wound, or kill, if resisted, the trial court instructed specifically in the elements necessary to sustain the charge of "aggravated" robbery, and the jury found defendant guilty of "aggravated" robbery "as charged in the first count of the information", this was sufficient to warrant the imposition of the more severe penalty authorized by this section when a robbery is committed with intent to maim, wound, or kill, if resisted. *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

Where the verdict states that defendant is found guilty of "aggravated robbery as charged in the information herein", and the information describes in detail the more serious robbery involving the increased punishment, there remains no basis for the argument that the verdict found the defendant guilty of only simple robbery. *Johnson v. People*, 174 Colo. 75, 482 P.2d 105 (1971).

Verdict treated as conviction of simple robbery. Where the defendant is charged with aggravated robbery, but the case is submitted to the jury upon an instruction for simple robbery, and the jury returns a verdict of "guilty as charged", the court should treat the verdict as a finding of guilty as to simple robbery. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

A charge of aggravated robbery and commission of a violent crime require consistent verdicts when based upon the

same facts. People v. Castenada, 765 P.2d 641 (Colo. App. 1988).

Conviction for conspiracy to commit aggravated robbery, as defined in subsection (1)(b), necessarily requires crime of violence sentencing. People v. Terry, 961 P.2d 500 (Colo. App. 1997), *aff'd*, 977 P.2d 145 (Colo. 1999).

Consecutive sentences for aggravated robbery convictions not mandatory where defendant was not separately charged with a "crime of violence" and was convicted under this section generally, but not subsection (1)(b) specifically. People v. McCoy, 944 P.2d 577 (Colo. App. 1996).

Use of a sealed verdict in prosecution for aggravated robbery was not improper. People v. Herrera, 182 Colo. 302, 512 P.2d 1160 (1973).

Fifteen to 20-year sentence for aggravated robbery was not excessive. People v. Colasanti, 626 P.2d 1136 (Colo. 1981).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of

the court's decision. People v. Palmer, 888 P.2d 348 (Colo. App. 1994).

Convictions for two counts of aggravated robbery arising out of the same criminal episode are not multiplicitous. The issue turns on whether two robberies can arise out of a single taking of property. The inquiry then focuses on whether the crime of robbery is intended to protect people or property. If robbery is intended to protect people, a single taking could support multiple convictions if the one item is taken from multiple people with control over the item. The plain language of the robbery statute is ambiguous as to whether it is intended to protect people or property. The common law history of robbery and case law indicates robbery statutes are intended to protect people. Therefore, a single taking can support multiple convictions for robbery if the taking is made in the presence of multiple victims. People v. Borghesi, 66 P.3d 93 (Colo. 2003); People v. Clifton, 74 P.3d 519 (Colo. App. 2003).

Defendant's acts constitute separate offenses as to each victim and conviction is not multiplicitous where the common property taken from the first victim was taken in the second victim's presence. People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003).

18-4-303. Aggravated robbery of controlled substances. (Repealed)

Source: L. 73: p. 572, § 11. **C.R.S. 1963:** § 40-4-303. **L. 81:** (1) and (2) amended, pp. 737, 974, §§ 21, 11, effective July 1. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1619, § 43,

effective July 1. **L. 2023:** Entire section repealed, (HB 23-1293), ch. 298, p. 1785, § 11, effective October 1.

ANNOTATION

Culpable mental state is element of crime. Because aggravated robbery of drugs is merely a variant of the common-law crime of aggravated robbery, the culpable mental state of "knowingly" is a requisite element of the crime. *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983).

Necessity of chemical testing. While the better practice is to subject narcotics evidence to chemical analysis, chemical

testing is not necessary in all cases to prove that the items taken in a robbery were in fact "narcotic drugs". *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978).

Aggravated robbery of drugs from a pharmacy is a separate offense and not merely a punishment enhancement statute for aggravated robbery. *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984).

18-4-304. Robbery of the elderly or disabled - legislative declaration. (Repealed)

Source: **L. 79:** Entire section added, p. 734, § 2, effective July 1. **L. 80:** (4) amended, p. 794, § 48, May 1. **L. 93:** Entire section repealed, p. 1742, § 42, effective July 1.

18-4-305. Use of photographs, video tapes, or films of property.

Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: **L. 85:** Entire section added, p. 577, § 2, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of theft and trespass, tampering, and criminal mischief, see §§ 18-4-415 and 18-4-514.

PART 4

THEFT

Cross references: For civil damages for loss caused by theft from a mercantile establishment, see § 13-21-107.5.

18-4-401. Theft.

(1) A person commits theft when he or she knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception; receives, loans money by pawn or pledge on, or disposes of anything of value or belonging to another that he or she knows or believes to have been stolen, and:

(a) Intends to deprive the other person permanently of the use or benefit of the thing of value;

(b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;

(c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use or benefit;

(d) Demands any consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person;

(e) Knowingly retains the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement; or

(f) Intentionally misrepresents or withholds a material fact for determining eligibility for a public benefit and does so for the purpose of obtaining or retaining public benefits for which the person is not eligible.

(1.5) For the purposes of this section, a thing of value is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

(2) Except as provided in subsection (2.3) of this section, theft is:

(a) (Deleted by amendment, L. 2007, p. 1690, § 3, effective July 1, 2007.)

(b) A petty offense if the value of the thing involved is less than three hundred dollars;

(b.5) Repealed.

(c) A class 2 misdemeanor if the value of the thing involved is three hundred dollars or more but less than one thousand dollars;

(d) Repealed.

(e) A class 1 misdemeanor if the value of the thing involved is one thousand dollars or more but less than two thousand dollars;

(f) A class 6 felony if the value of the thing involved is two thousand dollars or more but less than five thousand dollars;

(g) A class 5 felony if the value of the thing involved is five thousand dollars or more but less than twenty thousand dollars;

(h) A class 4 felony if the value of the thing involved is twenty thousand dollars or more but less than one hundred thousand dollars;

(i) A class 3 felony if the value of the thing involved is one hundred thousand dollars or more but less than one million dollars; and

(j) A class 2 felony if the value of the thing involved is one million dollars or more.

(2.3) Theft in violation of subsection (1) of this section of a firearm, as defined in section 18-12-101, is a class 6 felony, regardless of the value of the firearm.

(3) and (3.1) Repealed.

(4) (a) When a person commits theft twice or more within a period of six months, two or more of the thefts may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

(b) When a person commits theft twice or more against the same person pursuant to one scheme or course of conduct, the thefts may be aggregated and charged in a single count, in which event they shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

(5) Theft from the person of another by means other than the use of force, threat, or intimidation is a class 5 felony without regard to the value of the thing taken.

(6) In every indictment or information charging a violation of this section, it shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information. The prosecuting attorney shall at the request of the defendant provide a bill of particulars.

(7) Repealed.

(8) A municipality shall have concurrent power to prohibit theft, by ordinance, where the value of the thing involved is less than one thousand dollars.

(9) (a) If a person is convicted of or pleads guilty or nolo contendere to theft by deception and the underlying factual basis of the case involves the mortgage lending process, a minimum fine of the amount of pecuniary harm resulting from the theft shall be mandatory, in addition to any other penalty the court may impose.

(b) A court shall not accept a plea of guilty or nolo contendere to another offense from a person charged with a violation of this section that involves the mortgage lending process unless the plea agreement contains an order of restitution in accordance with part 6 of article 1.3 of this title that compensates the victim for any costs to the victim caused by the offense.

(c) The district attorneys and the attorney general have concurrent jurisdiction to investigate and prosecute a violation of this section that involves making false statements or filing or facilitating the use of a document known to contain a false statement or material omission relied upon by another person in the mortgage lending process.

(d) Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(e) For the purposes of this subsection (9):

(I) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

(II) "Residential mortgage loan" means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

(III) "Residential real property" means real property used as a residence and containing no more than four families housed separately.

(10) Upon a conviction for theft as described in subsection (1)(e) of this section, the court shall consider as part of any restitution ordered the loss of revenue proximately resulting from the failure of the defendant to timely return the property involved.

(11) (a) If the item of value involved is a public benefit, then for purposes of determining the offense level for subsection (2) of this section, the value is the difference between the value of

the public benefit received and the value of the public benefit for which the recipient was eligible.

(b) As used in this subsection (11), "public benefits" means services or aid, or both, including food, cash, and medical assistance, provided through an appropriation of federal, state, or local government money to individuals or households that, because of their economic circumstances or social condition, are in need of and may benefit from such services or aid.

(12) A person's conduct that is limited to the elements of subsection (1)(f) of this section is not subject to prosecution pursuant to any other provision of this section.

Source: **L. 71:** R&RE, p. 428, § 1. **C.R.S. 1963:** § 40-4-401. **L. 75:** IP(1), (2), and (3) amended and (3.1) added, pp. 618, 619, §§ 9, 10, effective July 1. **L. 77:** (4) amended, p. 972, § 1, effective May 27; (2) R&RE, (3) and (3.1) repealed, and (4) amended, pp. 973, 976, §§ 1, 2, 9, effective July 1. **L. 81:** (7) added, p. 987, § 1, effective July 1. **L. 83:** (8) added, p. 665, § 7, effective July 1. **L. 84:** (7)(a) and (7)(b) amended, p. 541, § 1, effective April 12; (2)(b), (2)(c), (4), (7)(a), and (8) amended, p. 536, §§5, 6, effective July 1, 1985. **L. 85:** (7)(a) amended, p. 1360, § 13, effective June 28. **L. 87:** (2)(b), (2)(c), and (4) amended, p. 352, § 3, effective March 16; (1.5) added and (7)(a) amended, pp. 615, 606, §§5, 13, effective July 1. **L. 92:** (2), (4), and (7)(a) amended, p. 433, § 1, effective April 10; (8) amended, p. 439, § 1, effective June 1. **L. 93:** (7) repealed, p. 1742, § 42, effective July 1. **L. 97:** (2)(b) and (2)(c) amended, p. 1548, § 23, effective July 1. **L. 98:** (4) and (8) amended, p. 1437, § 10, effective July 1; (4) amended, p. 793, § 1, effective July 1. **L. 2006:** (9) added, p. 1327, § 2, effective July 1. **L. 2007:** (2), (4), and (8) amended, p. 1690, § 3, effective July 1. **L. 2009:** (4) amended, (HB 09-1334), ch. 244, p. 1099, § 2, effective May 11. **L. 2013:** (1), (2)(b), (2)(c), (2)(d), and (4) amended, (2)(b.5) repealed, and (2)(e), (2)(f), (2)(g), (2)(h), (2)(i), and (2)(j) added, (HB 13-1160), ch. 373, p. 2195, § 1, effective June 5. **L. 2021:** (10) added, (SB 21-030), ch. 189, p. 1006, § 1, effective May 27; IP(1), (2)(b), (2)(c), and (2)(e) amended, (SB 21-271), ch. 462, p. 3176, § 205, effective March 1, 2022; (2)(d)(II) added by revision, (SB 21-271), ch. 462, pp. 3176, 3331, §§ 205, 803. **L. 2022:** IP(1) amended, (HB 22-1229), ch. 68, p. 345, § 23, effective March 1; (11) added, (HB 22-1257), ch. 69, p. 357, § 10, effective April 7; (1)(d) and (1)(e) amended and (1)(f) and (12) added, (HB 22-1224), ch. 112, p. 508, § 1, effective July 1. **L. 2025:** IP(2) amended and (2.3) added, (HB 25-1062), ch. 360, p. 1960, § 1, effective June 2.

Editor's note: (1) Subsection (2)(d)(II) provided for the repeal of subsection (2)(d), effective March 1, 2022. (See L. 2021, pp. 3176, 3331.)

(2) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending IP(1) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: (1) For theft of sound recordings, see part 6 of this article 4; for charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution, see § 16-7-404.

(2) For the legislative declaration contained in the 2006 act enacting subsection (9), see section 1 of chapter 290, Session Laws of Colorado 2006. For the legislative declaration contained in the 2007 act amending subsections (2), (4), and (8), see section 1 of chapter 384, Session Laws of Colorado 2007. For the legislative declaration contained in the 2009 act amending subsection (4), see section 1 of chapter 244, Session Laws of Colorado 2009.

ANNOTATION

I. General Consideration.

III. Indictment or Information.

V. Jury and Instructions.

VI. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Larceny, Embezzlement and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "The Meaning of 'Theft' in Automobile Insurance", see 29 Dicta 119 (1952). For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952). For note, "False Pretenses, Confidence Game, and Short Check in Colorado", see 25 Rocky Mt. L. Rev. 325 (1953). For article, "Highlights of the 1955 Legislative Session -- Criminal Law and Procedure", see 28

Rocky Mt. L. Rev. 69 (1955). For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "One Year Review of Constitutional Law", see 40 Den. L. Ctr. J. 134 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Lending to a Debtor-in-Possession", see 11 Colo. Law. 2382 (1982). For article, "Navigating a Fallen Sky, Civil Theft and Contracts after *Bermel v. BlueRadios, Inc.*", see 51 Colo. Law. 30 (Jan. 2022). For article, "Navigating a Fallen Sky: Civil Theft and Contracts after *Bermel v. BlueRadios, Inc.*", see 51 Colo. Law. 30 (Jan. 2022). For article, "Contractors' Civil Liability Under Colorado's Mechanics' Lien Trust Fund

Statute", see 54 Colo. Law. 32 (May-June 2025).

Annotator's note. (1) Since § 18-4-401 is similar to former § 40-5-2, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

(2) Annotations appearing below from cases decided prior to 1978 were decided under the version of this section in effect prior to the 1975 amendment to this section.

Common-law offenses. Embezzlement is common-law larceny extended by statute to cover cases where the stolen property comes originally into the possession of the defendant without a trespass. The word implies a fraudulent or unlawful intent. *Phenneger v. People*, 85 Colo. 442, 276 P. 983 (1929); *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

Larceny by bailee was not a common-law offense. *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

Embezzlement was not recognized at common law and the corollary offense, larceny, embraced only those thefts which were accompanied by trespass in the original acquisition and possession. It was first recognized in England when parliament enacted the statute so as to embrace nontrespass thefts. It was enacted in Colorado with the same object. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

Former theft statute held not unconstitutionally vague. *Peters v. People*,

151 Colo. 35, 376 P.2d 170 (1962); *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

This section is constitutional. *People v. Edmonds*, 195 Colo. 358, 578 P.2d 655 (1978).

This section is not unconstitutional despite the fact that it does not require a specific allegation of intent in an information or indictment for its violation. *Edwards v. People*, 176 Colo. 478, 491 P.2d 566 (1971).

This section clearly delineates four acts which, if done with the intent specified, constitute the crime of theft, so that any person of common intelligence can readily comprehend the meaning and application of the unambiguous words used by the general assembly in drafting this section. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Statute gives a fair description of the proscribed conduct, and persons of common intelligence can readily appreciate the statute's meaning and application. *People v. Hucal*, 182 Colo. 334, 513 P.2d 454 (1973).

Control in theft statute does not have vague and ambiguous meaning so as to be unconstitutional. *People v. Hucal*, 182 Colo. 334, 513 P.2d 454 (1973).

Intent is not inconsistent with different methods of deprivation. Where what varies in different crimes is the method used to achieve the deprivation, there is no inconsistency between the words used to describe the methods of deprivation with the intent to permanently deprive a person of a

thing of value and the words "unlawfully taking". *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

In enacting § 18-4-410, general assembly intended to reach distinct group of wrongdoers. The class includes those persons who receive, retain, or dispose of property received from another person with the knowledge or reasonable belief that the property has been stolen. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

2013 amendment lowering the classification of thefts of certain values of items from class 4 to class 5 felonies applies retroactively to cases pending in a trial court at the time the general assembly enacted the amendment. *People v. Stellabotte*, 2016 COA 106, 421 P.3d 1164, *aff'd*, 2018 CO 66, 421 P.3d 174; *People v. Patton*, 2016 COA 187, 425 P.3d 1152, *aff'd*, 2018 CO 67, 421 P.3d 184; *People v. Rojas*, 2020 COA 61, 490 P.3d 744, *rev'd on other grounds*, 2022 CO 8, 504 P.3d 296.

The purpose of this section is to remove distinctions and technicalities which previously existed in the pleading and proof of acquisition crimes. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

In enacting the theft statute, the general assembly intended to define one crime of theft which would incorporate all crimes involving the taking or obtaining of personal property without physical force and to eliminate distinctions and technicalities which previously existed in the pleading and proof of such crimes. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972); *People v.*

Terranova, 38 Colo. App. 476, 563 P.2d 363 (1976); *People v. Hopkins*, 40 Colo. App. 568, 584 P.2d 84 (1978).

It is consolidation of former separate crimes. Prior to 1967 the various felonies of larceny, embezzlement and the like were separately defined throughout the criminal statutes. The 1967 general assembly consolidated these formerly separately defined crimes under one broad, enumerated crime designated as theft. *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

It was the purpose of our general assembly to cover every conceivable unlawful conversion by an agent or servant. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

The intent of this section is to bring together in one statute most of the crimes formerly known by several different names, for each of these former crimes has as a material element the unlawful depriving of a person of his property. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Theft is not a lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

The enactment of § 12-44-102 does not preclude prosecution for theft pursuant to this section because § 12-44-102 does not present a comprehensive regulatory scheme intended to limit prosecution under the general theft statute. *People v. Sharp*, 104 P.3d 252 (Colo. App. 2004) (decided prior to 2017 amendments relocating article 44 of title 12 to article 25 of title 6).

This section includes as the objects of theft those means or muniments by which the right and title to property, real and personal, might be ascertained. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Promissory note, being subject to ownership, is personal property even in the hands of the maker, and so is within the purview of this section. *Knepper v. People*, 63 Colo. 396, 167 P. 779 (1917).

This section includes choses in action, chattels, effects, or any other valuable thing. *Miller v. People*, 72 Colo. 375, 211 P. 380 (1922).

Dogs are by statute the subject of larceny. *Thiele v. City & County of Denver*, 135 Colo. 442, 312 P.2d 786 (1957).

The term "theft" in § 18-4-405 refers to "theft" within the meaning of this section and does not encompass the theft of medical records or medical information under § 18-4-412 (1). *Winninger v. Kirchner*, 2021 CO 47, 488 P.3d 1091.

A **"thing of value"**, as used in the former short check felony statute, is a phrase of sufficient generic import to encompass clearly within its meaning an executed lien waiver. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Mechanics' and materialmen's liens are security for the costs of materials and labor furnished. As security, the lien is clearly a "thing of value" to a materialman and by giving it up in exchange for a worthless check, there is a loss of a thing of value. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Stolen checks are a "thing of value" within the meaning of the statutes. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

"Thing of value" is defined to include "real property". *People v. Parga*, 188 Colo. 413, 535 P.2d 1127 (1975).

Although it is a question of fact, taking profit from a corporation without paying shareholders may be considered theft. When majority shareholder used profits for personal uses, the majority shareholder, in essence, declared a distribution. Although a distribution was not formally announced, the trier of fact may find that this is theft from the minority shareholders. *Tisch v. Tisch*, 2019 COA 41, 439 P.3d 89.

Real property may be the subject of theft. *People v. Parga*, 188 Colo. 413, 535 P.2d 1127 (1975).

Although funds from a Ponzi scheme were obtained by theft, the subsequent transfer of these funds by the debtor represented the transfer of an "interest of the debtor in property" for purposes of a chapter 7 bankruptcy action. *In re M & L Bus. Mach. Co., Inc.*, 160 B.R. 851 (Bankr. D. Colo. 1994), *aff'd*, 167 B.R. 219 (Bankr. D. Colo. 1994).

Where the information charged defendant with theft of money, rather than theft of a check, negotiation of the check was the necessary "last act" to begin the running of the statute of limitations under §16-5-401. The date the check was issued was immaterial for purposes of

determining the statute of limitations. *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997).

Colorado courts have jurisdiction over the offense of theft which originated in the state of New Mexico. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Where defendant exercised control over stolen goods in this state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was "committed partly within this state" as contemplated by § 18-1-201 (2), and, therefore, in accordance with § 18-1-201 (1)(a), defendant "is subject to prosecution in this state" for that offense. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Court retains jurisdiction of defendant extradited under former section. Although defendant was arrested out of state on a warrant charging larceny and returned to Colorado, and the crime of larceny was subsequently redesignated as theft, defendant's contention that the warrant charged a nonexistent crime and therefore the trial court had no jurisdiction, was without merit. *Habbord v. People*, 175 Colo. 417, 488 P.2d 554 (1971).

Scope of municipal jurisdiction over theft offenses. Larceny, the subject of statute and of statewide concern, is distinguished from a local and municipal matter in which municipalities may exercise jurisdiction, and a municipal ordinance purporting to cover such field is invalid.

Gazotti v. City & County of Denver, 143 Colo. 311, 352 P.2d 963 (1960).

Municipal courts are particularly adaptable to the handling of the crime of shoplifting of articles of relatively small value and this type of theft should be combated not only by state authorities in state courts but by police departments in municipal courts. *Quintana v. Edgewater Mun. Court*, 179 Colo. 90, 498 P.2d 931 (1972).

When a municipal shoplifting ordinance does not limit shoplifting to goods not exceeding \$100 in value, and thereby goes beyond a municipal or local matter, and contains no severable operative provisions, and when plaintiff allegedly takes articles valued over \$100, the ordinance cannot be constitutionally applied to petty theft. *Quintana v. Edgewater Mun. Court*, 179 Colo. 90, 498 P.2d 931 (1972).

This section is the counterpart to the Longmont municipal code theft ordinance which is comprised of identical elements except for the value of the property. *Bradford v. Longmont Mun. Court*, 830 P.2d 1135 (Colo. App. 1992).

Corporation, rather than stockholder, is victim of theft of value of stock. It is well settled that a shareholder in a corporation, once having obtained his stock, is only entitled to the profits in the corporation, not the divisible assets of the corporation. From this proposition it necessarily follows that a stockholder's loss of the value of his stock, however attributable to defendant, is not a theft of value from the stockholder. If there be a

crime committed under these facts, it was a theft from the corporation, not from the shareholder. The money which defendant allegedly stole was the property of the corporation. *People v. Westfall*, 185 Colo. 110, 522 P.2d 100 (1974).

Theft and theft by receiving are two separate and distinct crimes. The penalty for each is the same, but conviction of one would not support a conviction of the other. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

Participant in theft cannot be convicted of both crimes. A person who has actively participated in a theft cannot be convicted of both theft and theft by receiving of the stolen property. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

A partner cannot be charged with theft of partnership property under this section because partnership property is not a thing of value of another. *People v. Clayton*, 728 P.2d 723 (Colo. 1986) (decided prior to 1987 enactment of subsection (1.5)).

Conduct constituting receiving stolen property is the same conduct punishable by this section where defendant stole property in Colorado and took it to another jurisdiction, and prosecution under this section is therefore barred as double jeopardy where defendant was previously tried for receiving the stolen property in the other jurisdiction. *People v. Morgan*, 785 P.2d 1294 (Colo. 1990).

Section 18-4-402 distinguished. Section 18-4-402 clearly applies to an unlawful temporary deprivation of rental property as

distinguished from a permanent deprivation of property generally as required by this section. *People v. Trigg*, 184 Colo. 78, 518 P.2d 841 (1974).

Distinguished from § 26-4-114. There are reasonable distinctions which can be drawn between this section and the penal provisions of the medical assistance act, § 26-4-114, as the latter deals only with property unlawfully received in a special way from a specific source, as distinguished from the deprivation of property generally. *People v. Donahue*, 41 Colo. App. 70, 578 P.2d 671 (1978).

Criminal mischief distinguished. The gravamen of criminal mischief is the knowing causation of damage to another's property with resulting economic loss to the owner or possessor of the property. The crime of theft, in contrast, is a crime of misappropriation or wrongful taking with no added element of damage or destruction to the property taken. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Because the conduct prohibited by this section is distinct from the conduct prohibited by § 8-81-101 (1)(a), prosecution under one such statute as opposed to the other does not violate a defendant's constitutional rights. *People v. Chesnick*, 709 P.2d 66 (Colo. App. 1985).

Aider/abettor tried as principal. Where appellant knew items were stolen and on this basis agreed to cash checks as an integral part of an overall scheme to acquire and sell stolen goods, he could be properly tried and convicted as an aider and abettor to theft-receiving and thus, as a principal. *People v.*

Silvola, 190 Colo. 363, 547 P.2d 1283 (1976).

The stealing of several articles of property at the same time and place, as one continuous act or transaction, may be prosecuted as a single offense, although the several articles belong to several different owners. *People v. District Court*, 192 Colo. 355, 559 P.2d 1106 (1977).

Ongoing, continuous scheme of embezzlement pursuant to a single criminal impulse with the same victim throughout does not have to be severed into separate counts or dismissed. *People v. Stratton*, 677 P.2d 373 (Colo. App. 1983).

The general assembly did not proscribe the same conduct in § 42-5-104 and this section. Section 42-5-104 requires that the thing stolen be a part of, or contained in, an automobile, and there is no such requirement under this section. *People v. Czajkowski*, 193 Colo. 352, 568 P.2d 23 (1977).

Theft statute held not to violate guaranty of equal protection. *People v. Cowden*, 735 P.2d 199 (Colo. 1987).

Prosecutor's election to prosecute under general intent theft statute did not violate due process even though defendant was precluded from using affirmative defense of impaired mental condition. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Theft statute which imposes penalties according to the value of the thing taken and which contains alternative culpable mental state elements of "knowingly" and

"with intent" represents a legitimate legislative decision regarding the nature of the crime and does not raise an equal protection issue of punishing the same conduct with two different sanctions. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Elements of two crimes of theft and motor vehicle theft are clearly different, and therefore it does not violate equal protection to prosecute under the latter rather than the former. *People v. Wastrum*, 624 P.2d 1302 (Colo. 1981).

Debt arising out of stipulation to entry of judgment for civil theft under this section and deceit based on fraud is nondischargeable under 11 U.S.C. § 523(a)(4) of the federal bankruptcy code. Under 11 U.S.C. § 523(a)(4), a debtor is not discharged from any debt for embezzlement or larceny. The statutory intent in § 18-4-403 indicates that the word "theft" includes embezzlement and larceny, among other crimes. *In re Hauck*, 466 B.R. 151 (Bankr. D. Colo. 2012), *aff'd*, 489 B.R. 208 (D. Colo. 2013).

Attorney's theft requires disbarment. An attorney's misuse of his professional status to accomplish the felonious theft of his clients' funds requires disbarment. *People v. Buckles*, 673 P.2d 1008 (Colo. 1984).

Applied in *In re Pratte*, 19 Colo. 138, 34 P. 680 (1893); *Murray v. People*, 49 Colo. 109, 111 P. 711 (1910); *Wheeler v. People*, 49 Colo. 402, 113 P. 312 (1911); *James v. Phoenix Assurance Co.*, 75 Colo. 209, 225 P. 213 (1924); *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932); *Sanders v. People*,

109 Colo. 243, 125 P.2d 154 (1942); Conyers v. People, 113 Colo. 230, 155 P.2d 988 (1945); Casados v. People, 119 Colo. 444, 204 P.2d 557 (1949); Thurman v. People, 120 Colo. 77, 208 P.2d 927 (1949); People v. Austin, 162 Colo. 10, 424 P.2d 113 (1967); People v. Mangum, 189 Colo. 246, 539 P.2d 120 (1975); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Girard, 196 Colo. 68, 582 P.2d 666 (1978); People in Interest of R.A.D., 196 Colo. 430, 586 P.2d 46 (1978); People v. Bielecki, 41 Colo. App. 256, 588 P.2d 377 (1978); People v. Hallman, 41 Colo. App. 427, 591 P.2d 101 (1978); Eftekhari-Zadeh v. Lusero, 42 Colo. App. 56, 592 P.2d 1347 (1978); People v. Jacquez, 196 Colo. 569, 588 P.2d 871 (1979); People v. Armijo, 197 Colo. 91, 589 P.2d 935 (1979); People v. Hillyard, 197 Colo. 183, 589 P.2d 939 (1979); People v. Burns, 197 Colo. 284, 593 P.2d 351 (1979); Hughes v. District Court, 197 Colo. 396, 593 P.2d 702 (1979); People v. Washburn, 197 Colo. 419, 593 P.2d 962 (1979); People v. Williams, 197 Colo. 559, 596 P.2d 745 (1979); People v. Ortega, 198 Colo. 179, 597 P.2d 1034 (1979); People ex rel. Leidner v. District Court, 198 Colo. 204, 597 P.2d 1040 (1979); People v. Miller, 199 Colo. 32, 604 P.2d 36 (1979); People v. Brand, 43 Colo. App. 347, 608 P.2d 817 (1979); People ex rel. Losavio v. Gentry, 199 Colo. 153, 606 P.2d 57 (1980); P.V. v. District Court, 199 Colo. 357, 609 P.2d 110 (1980); People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980); Godbold v. Wilson, 518 F. Supp. 1265 (D. Colo. 1981); People v. Martinez, 628 P.2d 608 (Colo. 1981); People v. Savage, 630 P.2d 1070

(Colo. 1981); People v. Tucker, 631 P.2d 162 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Boykin, 631 P.2d 1149 (Colo. App. 1981); People v. Elkhatib, 632 P.2d 275 (Colo. 1981); People v. Walters, 632 P.2d 566 (Colo. 1981); People v. Stinson, 632 P.2d 631 (Colo. App. 1981); People ex rel. Gallagher v. District Court, 632 P.2d 1009 (Colo. 1981); People v. Andrews, 632 P.2d 1012 (Colo. 1981); People in Interest of M.R.J., 633 P.2d 474 (Colo. 1981); People v. R.V., 635 P.2d 892 (Colo. 1981); People v. Smith, 638 P.2d 1 (Colo. 1981); People v. Franklin, 640 P.2d 226 (Colo. 1982); People v. Boyd, 642 P.2d 1 (Colo. 1982); People v. Petrie, 642 P.2d 519 (Colo. 1982); People ex rel. VanMeveren v. District Court, 643 P.2d 37 (Colo. 1982); People v. Hearty, 644 P.2d 302 (Colo. 1982); People v. Turner, 644 P.2d 951 (Colo. 1982); People v. Leonard, 644 P.2d 85 (Colo. App. 1982); People v. Conwell, 649 P.2d 1099 (Colo. 1982); People v. Cushon, 650 P.2d 527 (Colo. 1982); People v. Jiminez, 651 P.2d 395 (Colo. 1982); J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982); People v. Williams, 651 P.2d 899 (Colo. 1982); People in Interest of B.R.M., 653 P.2d 77 (Colo. App. 1982); People v. Williams, 654 P.2d 319 (Colo. App. 1982); Hunter v. People, 655 P.2d 374 (Colo. 1982); People v. Fisher, 657 P.2d 922 (Colo. 1983); People v. District Court, 664 P.2d 247 (Colo. 1983); People v. Montoya, 667 P.2d 1377 (Colo. 1983); Landis v. Farish, 674 P.2d 957 (Colo. 1984); People v. Stratton, 677 P.2d 373 (Colo. App. 1983); People v. Lancaster, 683 P.2d 1202 (Colo. 1984); People v. Jeffers, 690 P.2d 194 (Colo. 1984); People v. Eastepp, 884 P.2d

305 (Colo. 1994); *People v. Collie*, 995 P.2d 765 (Colo. App. 1999); *Van Rees v. Unleaded Software, Inc.*, 2016 CO 51, 373 P.3d 603; *In re Palecki*, 667 B.R. 581 (Bankr. D. Colo. 2025).

II. ELEMENTS OF OFFENSE.

A. In General.

B. Threat or Deception.

A. In General.

For elements of former crime of larceny by bailee, see *McGuire v. People*, 83 Colo. 154, 262 P. 1015 (1928); *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967).

For essential elements of former crime of embezzlement, see *Phenneger v. People*, 85 Colo. 442, 276 P. 983 (1929); *Blackett v. People*, 98 Colo. 7, 52 P.2d 389 (1935); *Sparr v. People*, 122 Colo. 35, 219 P.2d 317 (1950); *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

The corpus delicti in theft consists of two elements: (1) That the property is lost by the owner; and (2) that it is lost by a felonious taking. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Theft occurs when any person obtains control of the property of another and knowingly intends to permanently deprive that person of the use or benefit of a thing of value. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

In order to show a prima facie case of theft, the prosecution must establish the elements of the corpus delicti of theft: That the property was lost by the owner and that

it was lost by a felonious taking. *People v. Contreras*, 195 Colo. 80, 575 P.2d 433 (1978).

In 1975 this section was amended to eliminate the receiving element and a new theft by receiving statute was enacted in § 18-4-410. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

For a specific intent to deprive as element prior to 1975 amendment, see *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Intent is a material element of theft. *People in Interest of J. S. C. v. J. S. C.*, 30 Colo. App. 381, 493 P.2d 671 (1972).

The intent to steal is an essential element of proof of the crime of larceny. *Montoya v. People*, 169 Colo. 428, 457 P.2d 397 (1969).

An essential element of the crime of theft is the formation of an intent to permanently deprive the owner of his property. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971); *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

The intent to deprive another permanently of the use or benefit of his property and knowingly obtaining or exerting control over anything of value are both essential elements of the crime of theft and both elements must be proven to exist beyond a reasonable doubt. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

To support a conviction of felony theft, the evidence must show beyond a reasonable doubt that the defendant knowingly or intentionally used the property in such a

manner as to deprive the victim permanently of its use. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Burglarious intent need not be shown.

In making out the case of larceny the prosecutor need not show any burglarious intent or entry, it only being necessary to prove the usual elements of theft as defined by the statute. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937); *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

Defendant charged with felony theft as a result of violating § 38-22-127 of the general mechanic's lien statute can be held criminally liable as set forth in this section, but only where prosecutor proves each of the elements of the crime of theft, including requisite intent. *People v. Mendro*, 731 P.2d 704 (Colo. 1987).

Defendant did not exercise control over the property "without authorization" where another person who was a rightful possessor of the property authorized the defendant to take the property. *People v. McCormick*, 784 P.2d 808 (Colo. App. 1989).

In the context of theft of construction project trust funds, the "knowingly using" element of mental culpability in subsection (1)(b) does not require a conscious objective to deprive another person of the use or benefit of the construction trust funds, but instead requires the offender to be aware that his manner of using the trust funds is practically certain to result in depriving another person of the use or benefit of the funds. *People v. Anderson*, 773 P.2d 542 (Colo. 1989); *In re Helmke*, 398 B.R. 38

(Bankr. D. Colo. 2008); *Franklin Drilling v. Lawrence Constr. Co.*, 2018 COA 59, 463 P.3d 883; *In re Palecki*, 667 B.R. 581 (Bankr. D. Colo. 2025).

Theft requires proof that the accused knowingly obtained possession of or exercised control over the property either without authorization or by threat or deception. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

The culpable mental state "knowingly" in subsection (1) applies to the element of "without authorization". *People v. Stellabotte*, 2016 COA 106, 421 P.3d 1164, *aff'd on other grounds*, 2018 CO 66, 421 P.3d 174.

In the context of theft of real property, actual physical control is not required. The element "to obtain or exercise control" for theft of real property does not require actual physical control of the real property. To obtain or exercise control can mean to retain an interest in the real property without authorization and with intent to permanently deprive another person of the use or benefit of such real property. *People v. Jensen*, 172 P.3d 946 (Colo. App. 2007).

Control need not be unauthorized from the outset. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Subsection (1) makes it clear that theft can occur even though initial control of the property has been authorized; the intent to deprive, or knowing use inconsistent with the owner's benefit, may arise at a later time when control is no longer authorized. *People*

v. Treat, 193 Colo. 570, 568 P.2d 473 (1977).

"Without authorization" defined. Exercising control over property "without authorization", pursuant to subsection (1), means that the owner of the property, or a person in possession of the property with the owner's consent, has not given the actor permission to exercise control over the property. People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978); People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

Unauthorized taking is not necessary element of offense: Exercising control without authorization, combined with the requisite intent, is sufficient. People v. Am. Health Care, Inc., 42 Colo. App. 209, 591 P.2d 1343 (1979).

Where initial control of property is authorized, the intent to deprive may arise at a later time when control is no longer authorized. People v. Am. Health Care, Inc., 42 Colo. App. 209, 591 P.2d 1343 (1979); People v. Carr, 841 P.2d 361 (Colo. App. 1992).

It is not necessary that a person maintain absolute control over the thing of value to commit theft; it is sufficient that the intended use of such thing be inconsistent with the owner's use or benefit. Becker & Tenenbaum v. Eagle Rest., 946 P.2d 600 (Colo. App. 1997).

When the defendant is a substantial distance from the item stolen the defendant's actions do not constitute theft from the person of another. People v. Smith, 121 P.3d 243 (Colo. App. 2005).

It is sufficient that the intended use of the money be inconsistent with the owner's use or benefit. In other words, it is only required that the defendant knowingly exercise unauthorized control over the property, with requisite intent; it is not necessary that he maintain absolute control for his own personal use. People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977).

Property must have belonged to another. An essential element of the crime of embezzlement is that the property alleged to have been converted belongs to another. Kelley v. People, 157 Colo. 417, 402 P.2d 934 (1965).

Money may be taken from living or dead body. It makes no difference in determining guilt whether the money in a theft was taken from a living person or a dead body. People v. Walker, 44 Colo. App. 249, 615 P.2d 57 (1980).

Taking property under control and possession of victim violates section. The taking of a purse from the cart which the victim was pushing, and which was under her control and in her present possession, constituted taking "from the person of another" in violation of subsection (5). People v. Evans, 44 Colo. App. 288, 612 P.2d 1153 (1980).

Restaurant had sufficient proprietary interest in the cash and checks taken (even though not in its possession when taken) to prove that the defendant stole a thing of value from another. A person need not have obtained actual physical custody or delivery of the thing of value in order to have a proprietary interest in it if he has

parted with consideration entitling him to receive the thing of value. *People v. Ferguson*, 701 P.2d 72 (Colo. App. 1984).

The element of theft requiring ownership by "another" does not require proof of the titled ownership by "another". *People v. Schlicht*, 709 P.2d 94 (Colo. App. 1985).

Ownership may be laid either in the real owner or in the person in possession at the time of the theft. *Romero v. People*, 134 Colo. 342, 304 P.2d 639 (1956); *Griffin v. People*, 157 Colo. 72, 400 P.2d 928 (1965).

The actual condition of the legal title is immaterial to the thief and so far as he is concerned, one may be taken as the owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

There can be no theft without wrongful appropriation of another's property. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Critical elements are the defendant's intent to deprive and the location at which his control over the property was no longer authorized. *People v. Carr*, 841 P.2d 361 (Colo. App. 1992).

The elements of the crime of theft need not be proven by direct, substantive evidence, but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Where evidence showed that defendant holding a power of attorney made 32 separate withdrawals from the victim's account, did not issue promissory notes to the victim contemporaneously with each withdrawal, did not attempt to repay the victim in regular installments or to pay interest on the "loans", and concealed the "loans" from the victim's sons, it was for the jury to determine whether the defendant withdrew the money from the victim's account without her authorization and with the intent to permanently deprive her of the use of the money. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

The place where the defendant comes into possession of thing of value not element of offense. *People v. Tinkle*, 714 P.2d 919 (Colo. App. 1985).

Police decoy operation is not consent to being deprived of possession. A police decoy operation set up so that a person otherwise inclined would have the opportunity to take money, is not consent by the police officer to being permanently deprived of possession of the money. *People v. Gresham*, 647 P.2d 243 (Colo. App. 1981).

It is the intent at the time of taking to permanently deprive that is the essential element of theft. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The deprivation need not be permanent; once the wrongful appropriation occurs, this section requires coexistent intent to permanently deprive of use and benefit. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Although a conspiracy to commit theft may continue beyond the commission of the immediate crime, permanent deprivation is not an element of theft. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The return of the property is not a defense. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The fact that a thief may recant and elect to return to the owner the fruits of his larcenous conduct does not purge him of guilt or serve as a defense to prosecution. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

The fact that the defendant eventually returned the proceeds of a check that had been diverted without authorization is not a defense to a theft charge. *People v. Pedrie*, 727 P.2d 859 (Colo. 1986).

The contention that the crime of larceny was not completed because the TV set, though moved out of the house, was left standing at the owner's back property line has no merit. The defendants did have complete control of the TV set, even if only for a few minutes, and did have it in their possession on and off the premises of the owner without his consent. *Scott v. People*, 166 Colo. 432, 444 P.2d 388 (1968).

If a permanent deprivation of property were necessary before a conviction could be sustained, every time stolen property was recovered and returned to its true owner the thief would have to be acquitted; such a rule would be inane. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Return of allegedly stolen property does not necessarily negate the existence of a wrongful intent. *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979).

Attempt to return property does not negate theft element of intent. *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983).

There is no taking where property is delivered to defendant for his use and convenience by the person in charge. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Accessing and viewing electronic information that remains accessible to the information's rightful owner cannot amount to a permanent deprivation of property. *Seale v. Peacock*, 32 F.4th 1011 (10th Cir. 2022).

People are not property or things that can be the subject of a civil theft claim. Losing clients and employees therefore cannot amount to a permanent deprivation of property. *Seale v. Peacock*, 32 F.4th 1011 (10th Cir. 2022).

Agent may form intent to appropriate. Where money has been voluntarily delivered to accused as agent, the fact that he formed the intent to appropriate it at or before the time he received it does not prevent a prosecution for embezzlement or larceny. *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

Larceny by bailee can occur at any time after items are stolen. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

The failure of a debtor to pay his creditor does not constitute embezzlement. Kelley v. People, 157 Colo. 417, 402 P.2d 934 (1965).

To sustain a conviction of the crime of embezzlement, it must appear that the accused received the money or property of another as a fiduciary. Merely refusing to pay money lent cannot be converted into embezzlement. Simpson v. People, 47 Colo. 612, 108 P. 169 (1910).

Failure to report moneys owed pursuant to debtor-creditor relationship is not felony theft. Failure of lessee who sold beverages in park pursuant to lease with county to report money owed to the county based on percentage of gross income as rent does not constitute felony theft. People v. Rotello, 754 P.2d 765 (Colo. 1988).

Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently brought. People v. Martinez, 37 Colo. App. 71, 543 P.2d 1290 (1975).

A conspiracy to commit theft does not continue, per se, until the proceeds are returned. People v. Burke, 37 Colo. App. 289, 549 P.2d 419 (1976).

Statute does not create a separate and continuing crime of theft by deception. Doctrine of continuing crimes can apply only when legislature has unmistakably communicated intent to create such an offense and nothing in statute suggests the

intent to create a separate and distinct crime of theft by deception that continues until deception ends. Roberts v. People, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Statute requires all thefts committed by the same person within six-month period be joined and prosecuted as a single felony, the classification of which is determined by the aggregate value of all things involved. Roberts v. People, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Defendant may raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

The fact that the items were not in fact stolen does not provide a defense to attempted theft where the defendant believed they were stolen. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Lack of consent of both equitable and legal owners of property need not be proven to support a conviction for theft. People v. Diaz, 182 Colo. 369, 513 P.2d 444 (1973).

Whether or not stolen checks were subsequently recovered and returned to owner is irrelevant to the criminal liability for taking the instruments in the first instance. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Crime of joyriding is not a lesser included offense of crime of theft, nor is attempted joyriding a lesser included offense of attempted theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Theft is not a lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

Lesser aggregated theft offense is not included in a greater single act of theft offense because it requires the finding of an additional element not required for conviction of a single act of theft. *Halaseh v. People*, 2020 CO 35M, 463 P.3d 249.

Theft and theft by receiving are separate crimes. Where convictions for theft and theft by receiving arise out of the same transaction, the defendant could not properly be found guilty of both. *People v. Taylor*, 647 P.2d 682 (Colo. 1982).

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Where defendant had contracted with a church to promote an arts festival to raise money for the church and she had an interest in the festival funds similar to that of the church and was the party designated to receive the funds, she could not be guilty of theft under the statute. *People v. McCain*, 191 Colo. 229, 552 P.2d 20 (1976).

Where there is ample evidence in the record that the defendant was the "moving force" behind a corporate operation, it is not cause for dismissal of any theft charges that the defendant may not have participated directly in every act constituting the thefts. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Subsection (5) does not apply where a defendant, through the use of a series of short-change transactions, deceptively obtained money from a store clerk. The enhanced punishment provided by this subsection is for situations where the theft raises a danger of confrontation and involves an invasion of the victim's person and privacy. *People v. Warner*, 790 P.2d 866 (Colo. App. 1989).

Theft from the person of another involves circumstances, such as pickpocketing, where something of value is taken from one who is unconscious or unaware of the theft. The invasion of the victim's person presents an element of danger absent in other theft offenses, which justifies the greater penalty accorded those who violate subsection (5). *People v. Warner*, 801 P.2d 1187 (Colo. 1990).

Theft from the person of another is intended to cover those thefts involving an invasion of the victim's person of which the victim is unaware, but which are not accomplished through the use of force, threats, or intimidation. *People v. Warner*, 801 P.2d 1187 (Colo. 1990), *aff'd*, 801 P.2d 1187 (Colo. 1990).

B. Threat or Deception.

Law reviews. For note, "False Pretenses, Confidence Game, and Short Check in Colorado", see 25 Rocky Mt. L. Rev. 325 (1953).

This section annexed former false pretenses and confidence games provisions. Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

For essential elements of former crime of false pretenses, see People v. Orris, 52 Colo. 244, 121 P. 163 (1911); Stumpff v. People, 51 Colo. 202, 117 P. 134 (1911); Stoltz v. People, 59 Colo. 342, 148 P. 865 (1915); Tracy v. People, 65 Colo. 226, 176 P. 280 (1918); Clarke v. People, 64 Colo. 164, 171 P. 69 (1918); People v. Martin, 78 Colo. 200, 240 P. 695 (1925); Updike v. People, 92 Colo. 125, 18 P.2d 472 (1933); Chilton v. People, 95 Colo. 268, 35 P.2d 870 (1934); Montez v. People, 110 Colo. 208, 132 P.2d 970 (1942); Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943); Rogers v. People, 161 Colo. 317, 422 P.2d 377 (1966); Woodman v. People, 168 Colo. 80, 450 P.2d 330 (1969); Small v. People, 173 Colo. 304, 479 P.2d 386 (1970).

For essential elements of former crime of confidence game, see Lace v. People, 43 Colo. 199, 95 P. 302 (1908); Wheeler v. People, 49 Colo. 402, 113 P. 312 (1911); Powers v. People, 53 Colo. 43, 123 P. 642 (1912); Elliott v. People, 56 Colo. 236, 138 P. 39 (1914); Davis v. People, 96 Colo. 212, 40 P.2d 968 (1935); Bomareto v. People, 111 Colo. 99, 137 P.2d 402 (1943); Olde v. People, 112 Colo. 15, 145 P.2d 100 (1944); People v. Lindsay, 119 Colo. 248, 202 P.2d

951 (1949); Kelly v. People, 121 Colo. 243, 215 P.2d 336 (1950); McBride v. People, 126 Colo. 277, 248 P.2d 725 (1952); Roll v. People, 132 Colo. 1, 284 P.2d 665 (1955); Bevins v. People, 138 Colo. 123, 330 P.2d 709 (1958); Fischer v. People, 138 Colo. 559, 335 P.2d 871 (1959); Gonzales v. People, 149 Colo. 548, 369 P.2d 786 (1962); Woodard v. People, 154 Colo. 162, 389 P.2d 411 (1964); Dodge v. People, 168 Colo. 531, 452 P.2d 759 (1969); Small v. People, 173 Colo. 304, 479 P.2d 386 (1970); Digiallonardo v. People, 175 Colo. 560, 488 P.2d 1109 (1971).

Elements of theft by deception. Where the defendant obtained cash owned by the bank with full knowledge that under no circumstances was he entitled to it, and where the knowledge that the initial check used to open an account was false, shows knowledge that the two subsequent checks drawn on that account were equally false, the necessary elements of the charge of theft by deception are established. Lewis v. People, 174 Colo. 334, 483 P.2d 949 (1971).

Statute does not create a separate and continuing crime of theft by deception. Doctrine of continuing crimes can apply only when legislature has unmistakably communicated intent to create such an offense and nothing in statute suggests the intent to create a separate and distinct crime of theft by deception that continues until deception ends. Roberts v. People, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Statute requires all thefts committed by the same person within six-month period

be joined and prosecuted as a single felony, the classification of which is determined by the aggregate value of all things involved. *Roberts v. People*, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Intent to defraud necessary for deception. When deception is used to perpetrate a theft, the requisite mental state is necessarily an intent to defraud. *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979); *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

Theft by deception statute does not require proof of culpable mental state of specific intent. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Any public assistance benefits received based on false information are obtained by deception. An applicant's potential eligibility for public assistance benefits is not an entitlement to receive benefits. The applicant does not have a legally cognizable interest in public assistance benefits until accurate information is submitted. *People v. Vidauri*, 2021 CO 25, 486 P.3d 239.

Intent to defraud deemed part of § 38-22-137. Because an intent to defraud, necessary to this section, must be proven in order to convict a defendant under § 38-22-137, a prosecution for violation of § 38-22-137 does not conflict with the constitutional prohibition of imprisonment for civil debt in § 12 of art. II, Colo. Const. *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

Reliance of victim necessary for theft by deception. The offense of theft by deception requires proof that misrepresentations made to the victim caused the victim to part with something of value in reliance upon those misrepresentations. *People v. Norman*, 703 P.2d 1261 (Colo. 1985); *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

There is no requirement in the theft statute that the accused personally make the threat toward the victim of the crime. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

Rather, it is sufficient if defendant obtained property as consequence. It is sufficient under this section if a threat was made and the accused knowingly obtained anything of value from the victim of the threat, with specific intent to deprive the victim permanently of the use or benefit of the property. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

Thus, a threat by a confederate would suffice to establish this element of the offense. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

A threat is defined as a declaration of purpose or intention to work injury to the person, property, or rights of another by the commission of an unlawful act. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971).

Theft by deception established. Prosecution established that the defendants obtained control of money belonging to the department store by deceptive practice with the intent to deprive the store of the money.

People v. Todd, 189 Colo. 117, 538 P.2d 433 (1975).

Deception made upon a victim's agent in an effort to commit theft from a victim's estate satisfies the requirements of subsection (1). People v. Devine, 74 P.3d 440 (Colo. App. 2003).

Where evidence showed debtor obtained control over creditor's products by misrepresentation and debtor had no intention of reimbursing creditor for products supplied, such evidence is sufficient to support charge of theft by deception. People v. Stewart, 739 P.2d 854 (Colo. 1987).

Issuance of check on known closed account deemed deception. The mere issuance of a check on an account the defendant knew had been closed is a means of deception proscribed by this section. People v. Attebury, 196 Colo. 509, 587 P.2d 281 (1978).

Theft by threat is not lesser included offense of robbery. Schott v. People, 174 Colo. 15, 482 P.2d 101 (1971); Maes v. People, 178 Colo. 46, 494 P.2d 1290 (1972).

There is no indication that the general assembly enacted the theft by receiving statute in § 18-4-410 to preclude prosecution under the theft statute. Therefore, prosecutor can determine statute under which to prosecute the alleged crime. People v. Smith, 938 P.2d 111 (Colo. 1997).

III. INDICTMENT OR INFORMATION.

The general assembly authorized the use of the term "theft" in an information

and that "theft" is to be substituted for "larceny" wherever it appears in a law of this state. White v. People, 172 Colo. 271, 472 P.2d 674 (1970).

Offense of theft when charged as provided in statute sufficiently advises jury of nature of offense for which defendant is on trial. People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973).

There is no requirement, either constitutional or statutory, that every element of theft be alleged in the information. People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973).

There is no requirement, either constitutional or statutory, that every element of the offense be alleged in the information, and a charging document is sufficient if it advises a defendant of the charges he is facing so that he can adequately defend himself. People v. MacFarland, 189 Colo. 363, 540 P.2d 1073 (1975).

The phrase "on or about a date certain" in subsection (6) is but a minimum requirement, and language in the information approximating the notice it intends to provide a defendant is sufficient. People v. Wolfe, 662 P.2d 502 (Colo. App. 1983); People v. Stratton, 677 P.2d 373 (Colo. App. 1983).

Information charging felony theft, complying with the requirements of subsection (1)(b), was sufficient where an identically worded subsection of a prior theft statute withstood constitutional attack.

People v. MacFarland, 189 Colo. 363, 540 P.2d 1073 (1975).

When bill of particulars required.

Where the crime of theft is charged in the words of the statute, an order for a bill of particulars is mandatory upon the defendant's request. People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979); People v. Stratton, 677 P.2d 373 (Colo. App. 1983).

Purpose of bill of particulars. The requirement in subsection (6) that, upon request, a bill of particulars must be supplied to a defendant constitutes a safeguard to insure that the information by which a defendant is charged will be sufficiently definite in its terms. People v. Wolfe, 662 P.2d 502 (Colo. App. 1983).

Specific intent need not be alleged in charging document although proof of specific intent is essential element of felony theft. People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973).

An indictment charging officers of insurance company with unlawful conspiracy to convert to their own use moneys of the company, held to sufficiently charge larceny by bailee, although there was no express allegation that the property involved was converted to their use "with an intent to steal the same". Helser v. People, 100 Colo. 371, 68 P.2d 543 (1937).

Property must be described with reasonable certainty. In an information under this section, where the thing embezzled is a writing, it must be described with reasonable certainty, or a sufficient reason must appear for the omission of

particularity. "One bank check of the value of", etc., "the property of", etc., held fatally insufficient. Moody v. People, 65 Colo. 339, 176 P. 476 (1918); People v. Allen, 167 Colo. 158, 446 P.2d 223 (1968).

Check. The contention that a criminal charge of the conversion of money was not sustained by proof of conversion of a bank check, is overruled, since the negotiation of a check is equivalent to the receipt of money upon it. McGuire v. People, 83 Colo. 154, 262 P. 1015 (1928).

The information charged the defendant with embezzlement of money, whereas the proof showed embezzlement of a check. Where the check was merely the means by which the money alleged to have been embezzled was procured, there was no variance. People v. Allen, 167 Colo. 158, 446 P.2d 223 (1968).

Where the information charged defendant with theft of money, rather than theft of a check, negotiation of the check was the necessary "last act" to begin the running of the statute of limitations under §16-5-401. The date the check was issued was immaterial for purposes of determining the statute of limitations. People v. Chavez, 952 P.2d 828 (Colo. App. 1997).

Description of money. Under this section an indictment for conspiracy to defraud a bank by unlawfully converting to defendants' own use a specified sum in money, the property of the bank, of the value of the same sum, contains a sufficient description of the property. Imboden v. People, 40 Colo. 142, 90 P. 608 (1907).

In a prosecution for embezzlement where sums of money were alleged to have been converted at different times, it was proper to charge the conversions in a lump sum. *Price v. People*, 78 Colo. 223, 240 P. 688 (1925).

Where conduct violates two provisions, prosecutor determines under which provision crime prosecuted. Where the alleged conduct of a defendant violates both the general theft statute and the more specific motor vehicle theft statute, it is the function of the prosecuting attorney and not the trial court to determine under which statute the alleged crime shall be prosecuted. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

Joinder of two subjects in one count is not duplicitous. It is the common case of an indictment for larceny where various goods and chattels, the subject of a single larceny, are joined in one count, and where proof of the larceny of any one of them sustains the indictment. Such a count is not bad for duplicity. *Kollenberger v. People*, 9 Colo. 233, 11 P. 101 (1886).

Where the information alleges, in a charge of robbery, that money was taken, "money" will be construed to mean money of the United States, and the court will take judicial notice of its value. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

Allegation of ownership sufficient. Allegation of qualified ownership in a criminal information is sufficient to support the charge of embezzlement so far as the element of ownership is concerned. *Price v. People*, 78 Colo. 223, 240 P. 688 (1925).

The purposes of the allegation of ownership in an indictment include showing that the property alleged to have been stolen is not the property of the accused and advising the accused whose property is alleged to have been stolen so that he can be prepared to meet and refute the charges at trial. *People v. Singer*, 663 P.2d 626 (Colo. App. 1983).

Variance in ownership not fatal. It is not a fatal variance to allege property to be that of bailee, and prove, inter alia, real ownership in bailor. *Romero v. People*, 134 Colo. 342, 304 P.2d 639 (1956).

While the true name of the alleged owner of the stolen property should be correctly set forth in the information, the ownership may be laid in one by the name by which he is usually known although it is not his proper name. *Pownall v. People*, 135 Colo. 325, 311 P.2d 714 (1957).

One purpose of allegations of ownership in larceny cases is to show that the property alleged to have been stolen is not the property of the accused or that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. Defendant was not deceived by the allegations in the information and proof that actual title to the car was registered in a name by which the complaining witness was also known was not prejudicial to the defendant where his defense was that he had the consent of the identical person whom he knew under two names. *Pownall v. People*, 135 Colo. 325, 311 P.2d 714 (1957).

Failure to prove corporate status of victim of theft was an immaterial variance. Straub v. People, 145 Colo. 275, 358 P.2d 615 (1961).

Variance between information alleging that defendant stole from named corporation and exhibits introduced to prove theft and showing names of other corporations or organizations was not fatal where various business names were used by enterprise and defendant, as general manager, could not have been misled or deceived. Martinez v. People, 177 Colo. 272, 493 P.2d 1350 (1972).

Statutory language in subsection (4) permits consolidating theft losses suffered by separate victims into one count of theft over \$10,000. People v. Collie, 682 P.2d 1208 (Colo. App. 1983).

Subsection (4)(a) requires the prosecution to prove all the thefts aggregated and charged in a single count. People v. Ramos, 2017 COA 100, 417 P.3d 902.

IV. EVIDENCE.

A. In General.

B. Proof of Value.

C. Possession of Stolen Property.

D. Sufficiency.

A. In General.

The corpus delicti must be established, since it is clearly not permissible that anyone be adjudged guilty until it is shown that a larceny has been committed; and unless the state has shown, prima facie, that

a larceny has been committed, a defendant is not put on proof. Lee v. People, 138 Colo. 321, 332 P.2d 992 (1958).

Intent inferred. Intent to permanently deprive another of use or benefit of a thing of value does not have to be proven by direct, substantive evidence but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. People v. Becker, 187 Colo. 344, 531 P.2d 386 (1975); People v. Am. Health Care, Inc., 42 Colo. App. 209, 591 P.2d 1343 (1979); People v. Piskula, 197 Colo. 148, 595 P.2d 219 (1979).

Intent to permanently deprive may be inferred from the defendant's conduct and the circumstances of the case. People v. Johnson, 618 P.2d 262 (Colo. 1980).

Intent to commit felony theft may be inferred from the defendant's conduct in the circumstances of the case. Miller v. District Court, 641 P.2d 966 (Colo. 1982).

Intent to commit embezzlement of public property, official misconduct, and theft may be inferred from the defendants' conduct and the circumstances of the case. People v. Luttrell, 636 P.2d 712 (Colo. 1981).

Crime may be established by circumstantial evidence. The crime denounced by this section may be established by circumstantial evidence alone. Montez v. People, 110 Colo. 208, 132 P.2d 970 (1942).

Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the

crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

The name of the owner of property stolen is material only to the extent it serves a descriptive purpose, or to show that it is not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. Where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961).

Possession without legal ownership is sufficient proof. In a larceny case, it is sufficient to show that the named victim had possession, control, and custody of the chattel which was the alleged object of the larceny, without determining the legal ownership. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

Proof of a defacto corporate existence is sufficient where corporate ownership is an element of the crime. *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961).

Possession, control, and custody of the named victim is sufficient in a larceny case, without determining the de jure corporate entity. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

Intent need not be proven by direct, substantive evidence, but may be inferred from the defendant's conduct and the reasonable inferences which may be drawn

from the circumstances of the case. *People v. Carr*, 841 P.2d 361 (Colo. App. 1992).

Proof that misrepresentations cause victim to part with something of value. The very nature of the crime of theft by deception requires proof that misrepresentations cause the victim to part with something of value and that the victim relied upon the swindler's misrepresentation. *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1976); *People v. Warner*, 801 P.2d 1187 (Colo. 1990).

Where there was no proof that the misrepresentation caused the undercover agent to purchase stock from the defendant, prosecution for the completed substantive crime of theft by deception was not possible. *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1976).

Admissibility of evidence to show intent. Any evidence going to the intent of a defendant charged with embezzlement is proper. *Hopkins v. People*, 89 Colo. 296, 1 P.2d 937 (1931).

In an action against officers of an insurance company for conspiracy to convert moneys of the company to their own use, evidence of the insolvency of the officers and subsidiary corporations controlled by said officers, held admissible, as having a definite bearing upon their intent, purpose, and design. *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

That defendant intended to convert bailor's property to his own use by pledging it as security for a loan and using the proceeds of the loan for the payment of

another obligation could be inferred from his executing a chattel mortgage representing himself as the owner of the car and from his furnishing the title and power of attorney to the bank. *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967).

Where intent is an element of the crime, it is defendant's acts and conduct, not the victim's stated reaction, which is relevant. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

Where intent is a material element of the offense charged, theft, a defendant has the right to testify specifically as to his intention in the commission of the acts which it is claimed constitute the offense. *People in Interest of J. S. C. v. J. S. C.*, 30 Colo. App. 381, 493 P.2d 671 (1972).

Evidence of other similar crimes in which a defendant has participated is competent and admissible for the purpose of showing plan or design of defendant in his alleged unlawful activities. *Clark v. People*, 105 Colo. 335, 97 P.2d 440 (1939); *Peiffer v. People*, 106 Colo. 533, 107 P.2d 799 (1940).

Evidence of similar offenses offered for the stated purpose of showing intent, motive, design, and system, followed by proper instructions of limitation, is admissible. *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942).

Evidence of transaction similar to that charged in information held admissible. *Moore v. People*, 125 Colo. 306, 243 P.2d 425 (1952).

Where the evidence in a prosecution for embezzlement discloses that the victim and mode of operation were identical in each of several transactions, and the defendant seemingly acted pursuant to the same criminal impulse, felonious purpose and intent, such evidence is not subject to challenge for duplicity. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

Where defendant denies knowledge that property was stolen or that he had an intent to withhold it from its true owner, it is proper for the prosecution to present evidence that loot from other burglaries found in defendant's possession to prove scienter, or guilty knowledge with respect to the crime of larceny by bailee. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

Evidence of thefts committed subsequent to the theft for which defendant was being tried was admissible for the purpose of showing plan, scheme, design, intent, or guilty knowledge where the proper procedures were followed. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Testimony of thief against one charged with receiving stolen goods is not subject to infirmities attached to accomplice testimony. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Scope of discovery. Where the prosecution informs the defendant of the specific section of the theft statute upon which it is relying, of the things of value allegedly taken, of the witnesses who would be called, and of the overt acts it intends to prove in connection with a conspiracy count,

the trial court may deny further requests regarding areas more properly the subject of discovery proceedings. *People v. Lewis*, 671 P.2d 985 (Colo. App. 1983).

B. Proof of Value.

Where the larceny is from the person of another the crime shall be a felony, and no proof of value is required. *People v. McIntosh*, 149 Colo. 555, 369 P.2d 987 (1962).

Evidence of value necessary to fix grade of offense. The necessity of the proof of the real value exists where it is provided that the punishment shall be greater or different when the thing stolen is of or above a certain value, for in such cases the value of the property taken must be established by the evidence in order to ascertain the grade of the offense, and a conviction of the higher grade of offense must be based on sufficient evidence that the property taken was of or above the value fixed by statute for such purpose. In such cases, without proof of the value of stolen property there can be no conviction. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968).

When a conviction for a higher grade offense turns on the value of the property taken, it is incumbent on the prosecution to prove the value of stolen property. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Test of value is reasonable market value of the stolen article at the time of the commission of the alleged offense. *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

The value of a stolen item is measured by its fair market value. *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897 (1979).

The measure of value to be attached to items that are stolen is their reasonable market value at the time of the taking. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980); *People v. Rosa*, 928 P.2d 1365 (Colo. App. 1996).

For purposes of the theft statute, "value" is generally proven by evidence of market value at the time and place of the theft. *Beaudoin v. People*, 627 P.2d 739 (Colo. 1981).

Market value defined. Value in a theft case is market value, where market value is what a willing buyer will pay in cash to the true owner for the stolen item. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

It is the obligation of the people to prove the reasonable market value of the goods at the time involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

To make a prima facie case for violations under these sections it was incumbent upon the people to present competent evidence of the reasonable market value of the goods in question at the time of the commission of the alleged offense. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973).

There must be some basis other than pure speculation for a determination of the real value where the value of the money or goods stolen determines the grade of the offense. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968); *People v. In Interest of*

A.G., 43 Colo. App. 514, 605 P.2d 487 (1979); *People v. Leonard*, 43 Colo. App. 471, 608 P.2d 832 (1979).

Determining the value of public assistance benefits requires a total amount approach. The total amount approach treats the total amount of benefits obtained by deception as the amount stolen. *People v. Vidauri*, 2021 CO 25, 486 P.3d 239.

Where no evidence is presented as to any value amount for items, there is insufficient evidence of the value of those items. *People v. Jamison*, 220 P.3d 992 (Colo. App. 2009).

Value at time of commission of crime. While an owner of goods is always competent to testify as to the value of his property in prosecution for theft and receiving stolen goods, it must relate to its value at the time of the commission of the crime, and where the owner testifies only as to the purchase price of the goods, such testimony is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially, as to allow a reasonable inference that the purchase price is comparable to current fair market value. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973); *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979).

It is not error to aggregate the value of the goods. *People v. Zallar*, 191 Colo. 492, 553 P.2d 756 (1976); *People v. Payne*, 2014 COA 81, 361 P.3d 1040.

Taking where value not expressible as market price also proscribed. This section proscribes the unlawful taking, obtaining, or exercising of control over anything of value, not just those things whose value may be expressed in terms of a market price. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Prima facie value of check is its face value. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974); *People v. Myers*, 43 Colo. App. 256, 609 P.2d 1104 (1979).

For purposes of valuing stolen checks, restrictive indorsements are irrelevant. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Value of credit card. The peculiar value of a credit card is not normally a price which the holder may command for the transfer of his card. It is instead the worth of the privilege to purchase goods or services on credit. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

One objective measure of the value of a credit card is its price on the "street", i.e., in the course of unlawful or illegal trade with a view to its criminal abuse. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

"Street" value is a reflection of the purchasing power of a particular credit card. Accordingly, the authorized line of credit on the card or its "floor limit", i.e., the value of a purchase that could be completed without the necessity of obtaining express

authorization from the credit card company, is also an objective measure of a card's value. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Rewards offered by the issuer of credit cards for the return of lost or stolen cards may also constitute an objective measure of the value of the card. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Where a stolen item, such as a credit card, has no market value in lawful channels, other objective evidence of value may be admitted including evidence of the "illegitimate" market value. *Miller v. People*, 193 Colo. 415, 566 P.2d 1059 (1977).

Evidence of the dollar amount which may be purchased by using the credit card without card company approval provides an objective means of evaluating the illegitimate market value of credit cards. *Miller v. People*, 193 Colo. 415, 566 P.2d 1059 (1977).

Jury is not required to place a precise value upon property involved. *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

Without competent evidence of fair market value in prosecution for theft and receiving stolen goods, the jury would have to base its determination of the value of the goods in question at the time of commission of the crime on pure speculation, and thus the judge properly removed the case from the jury's consideration. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973).

An owner is always competent to testify as to the value of his property. An owner not in the business of selling such items but putting them to use does not have them appraised. The evidence of value is competent regardless of the lack of current used market value. *Rodriguez v. People*, 168 Colo. 190, 450 P.2d 645 (1969).

Testimony of victim of theft as to value of items taken was competent and could properly be admitted for purposes of valuation. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

Evidence of retail price is evidence of market value, especially where the items were being sold over the counter on a more-or-less daily basis, and there is nothing to indicate that the retail price is higher than the true market value. *Maisel v. People*, 166 Colo. 161, 442 P.2d 399 (1968); *People v. Velarde*, 790 P.2d 903 (Colo. App. 1989).

Evidence of retail price is not only admissible but is perhaps the best evidence of market value. *Maisel v. People*, 166 Colo. 161, 442 P.2d 399 (1968).

Evidence of fair market value and retail price was competent evidence to sustain the jury's finding on the question of value. *Lee v. People*, 137 Colo. 465, 326 P.2d 660 (1958).

The retail price of stolen goods is the best evidence of their value, not the wholesale price. *People v. Lindsay*, 636 P.2d 1318 (Colo. App. 1981); *People v. Binkley*, 687 P.2d 480 (Colo. App. 1984), *aff'd* on other grounds, 716 P.2d 1111 (Colo. 1986); *People v. Rosa*, 928 P.2d 1365 (Colo. App. 1996).

Purchase price, junk price, replacement cost, the use of the article, and common knowledge all may be considered in the absence of evidence of market value of a particular item. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961).

Amounts paid to obtain cooperation of one believed to be coconspirator should not be deducted in determining the value of stolen goods when the payments were returned to the owner of the goods. People v. Elkhatab, 198 Colo. 287, 599 P.2d 897 (1979).

A condemnation proceeding is not authority for establishing the value of personal property. There is just too much difference between the depreciation of land and office machines. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970).

Evidence of owner based on original cost sufficient. Testimony of witness as to the value of several stolen articles aggregating more the \$800, which jury found as the value of the stolen property, was sufficient to establish value even though based on original cost of items, and owner being competent to testify to the value of his property. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961).

In a prosecution for felony theft of a used car from the dealer, counsel for both sides stipulated that the value of the car was over \$100, but then the car lot owner was called and testified that he had invested \$4800 in the car, but that it was worth much more on the retail market, and he also stated, over defense objection, that it cost \$1800 to repair the automobile from damage caused

by the defendant's driving. The evidence may have been prejudicial, but was not inadmissible because the defendant caused the damage while driving the stolen vehicle, and the testimony was all part of the circumstances surrounding the theft and defendant's efforts to escape with the car. People v. Hanson, 189 Colo. 101, 537 P.2d 739 (1975).

Evidence of felony insufficient. The only testimony on the value of the money taken was that it was "in the vicinity of one hundred dollars". Such evidence is insufficient to support a conviction of the crime of grand larceny. Henson v. People, 166 Colo. 428, 444 P.2d 275 (1968); People v. Coddington, 191 Colo. 168, 551 P.2d 192 (1976).

Sufficient evidence to sustain petty theft. People v. Coddington, 191 Colo. 168, 551 P.2d 192 (1976).

Evidence held sufficient to support felony conviction. People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

C. Possession of Stolen Property.

When possession supports inference of guilt. Where defendants were found in possession of ore under circumstances clearly indicating that they did not come by it honestly, and they offered no explanation of how they came by it, and the ore was identified as coming from the mine in which defendants were employed, the jury was justified in finding them guilty of larceny. Bergdahl v. People, 27 Colo. 302, 61 P. 228 (1900).

Possession of stolen goods after a burglary or theft is sufficient to warrant a conviction, unless the attending circumstances, or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958 (1960).

In a prosecution for larceny or burglary, the jury may infer that the accused committed the theft from the circumstances of his recent, unexplained, exclusive possession of the stolen articles involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971); *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

Where there is no direct evidence of entry of vehicle from which articles were stolen, court could infer from unexplained possession of stolen articles by defendants shortly thereafter that they were persons who entered vehicle and stole articles. *People v. Romero*, 179 Colo. 159, 499 P.2d 604 (1972).

What is meant by "recent" possession of stolen goods is to be determined by the facts in each particular case and it may vary from a few days to two years. Generally, whether the period of time is "recent" is a question for the jury, and a period of six weeks has been upheld. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958 (1960).

If one agrees in advance to buy stolen property, knowing that the property is to be stolen, he thereby encourages the perpetration of the theft and, if the crime is committed, he is deemed a principal and

punished accordingly. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Mailing of stolen check to defendant inferred control. In prosecution for theft by deception, control over the money can be inferred from evidence that the check which was the basis of the prosecution was mailed to the defendants' home address in the usual course of business. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Control need not be unauthorized from the outset. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Defendant exercised absolute possession. Where defendant removed shirts from the store rack and concealed them in a sack he was carrying, he exercised complete, independent, and absolute control and possession over the goods and it was not necessary for the goods to be removed from the owner's premises to prove the element of loss to the owners. *People v. Contreras*, 195 Colo. 80, 575 P.2d 433 (1978).

Possession need not be sole to constitute the requisite control over stolen goods under this section; where the defendant was merely a passenger in an automobile owned by another, exercising no actual control over the stolen weapons in the automobile, he could nevertheless be found guilty of theft if a jury could reasonably conclude that he was cognizant of the stolen weapons. *People v. Maes*, 43 Colo. App. 365, 607 P.2d 1028 (1979).

D. Sufficiency.

Each of the essential elements of theft as set forth in this section must be proven

beyond a reasonable doubt to support a conviction even where theft is sought to be proven by showing a violation of § 38-22-127. *People v. Erickson*, 695 P.2d 804 (Colo. App. 1984).

For a conspiracy to commit theft, the prosecution is not required to prove an agreement to take goods valued at a particular amount of money. It is required to prove only that there was an agreement to commit theft. For purposes of classifying the level of the crime, the prosecution is required to plead and prove the value of the goods taken. *People v. Samson*, 2012 COA 167, 302 P.3d 311.

Sufficiency of proof of ownership. In an action under this section, evidence was held sufficient to prove the ownership and possession by the alleged owner of the cattle at the time of the alleged theft. *Cahill v. People*, 111 Colo. 173, 138 P.2d 936 (1943).

Evidence did not establish intent to steal. *Bare v. People*, 164 Colo. 93, 432 P.2d 630 (1967).

No intent to steal where property retained on police order. Where defendant was found guilty of larceny as bailee of stolen copper wire which he purchased as a junk dealer and held on hold order of police, it was held that the retention of the property in reliance upon the police order did not constitute an intent to steal, which is one of the essential elements of the crime under this section. *Schiff v. People*, 111 Colo. 333, 141 P.2d 892 (1943).

Inference of intent proper. From a defendant's action of wrongfully

appropriating a check, converting it into a cashier's check, and giving it to third party, a jury could properly infer intent. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Unexplained exclusive possession of recently stolen property creates no more than in inference of participation in the offense. *People v. Beamer*, 668 P.2d 990 (Colo. App. 1983).

Circumstantial evidence insufficient. In a prosecution for larceny and conspiracy to commit larceny the supreme court held the guilty verdicts to be forced verdicts based upon circumstantial evidence insufficient in quantity and quality to support a verdict of guilty. Even had the jury been initially properly instructed on circumstantial evidence, every reasonable hypothesis of innocence was not eliminated by the people's evidence. *Drahn v. People*, 174 Colo. 157, 483 P.2d 209 (1971).

Evidence held insufficient to convict defendant of theft of car. *Union Ins. Soc'y v. Robertson*, 88 Colo. 590, 298 P. 1064 (1931); *People v. Rogers*, 177 Colo. 155, 493 P.2d 21 (1972); *People v. Cheney*, 180 Colo. 138, 503 P.2d 338 (1972).

In a prosecution for larceny of an automobile where the evidence discloses that a defendant is permitted to take a car by the person in charge thereof, and is furnished license plates for his convenience and protection in driving the same, no felonious taking under this section is shown. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Sufficient evidence to sustain conviction of theft. Renfrow v. People, 176 Colo. 160, 489 P.2d 582 (1971); Hutton v. People, 177 Colo. 448, 494 P.2d 822 (1972); People v. Drumright, 181 Colo. 137, 507 P.2d 1097 (1973); Lamb v. People, 181 Colo. 446, 509 P.2d 1267 (1973); People v. Diaz, 182 Colo. 369, 513 P.2d 444 (1973); People v. Miller, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977); People v. Maes, 43 Colo. App. 365, 607 P.2d 1028 (1979); People v. Mandez, 997 P.2d 1254 (Colo. App. 1999).

Sufficiency of conversion to constitute larceny. Quinn v. People, 32 Colo. 135, 75 P. 396 (1904); Compton v. People, 89 Colo. 407, 3 P.2d 418 (1931); Moore v. People, 125 Colo. 306, 243 P.2d 425 (1952).

Evidence from which the jury might conclude that defendant had come into possession of stolen property lawfully, that he thereafter learned that such property had been stolen in a burglary, and with full knowledge thereof converted such property to his own use withholding it from its lawful owner, is sufficient to support a conviction of larceny by bailee. Peters v. People, 151 Colo. 35, 376 P.2d 170 (1962).

Negotiation of a check is equivalent to receipt of money, and failure to pay over the money collected for another is a conversion of it. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

Administrator of estate guilty of embezzlement. Hopkins v. People, 89 Colo. 296, 1 P.2d 937 (1931).

Conviction for embezzlement by a warehouseman reversed when there is no evidence to show that the defendant actually took part in the crime and the prosecution failed to establish that the defendant had some knowledge that the manager had perpetrated the crime. Dressel v. People, 178 Colo. 115, 495 P.2d 544 (1972).

Evidence insufficient to support conviction of false pretenses. Rogers v. People, 161 Colo. 317, 422 P.2d 377 (1966).

Evidence sufficient to support conviction of obtaining property by false pretenses. Shemwell v. People, 62 Colo. 146, 161 P. 157 (1916); Montez v. People, 110 Colo. 208, 132 P.2d 970 (1942).

Evidence sufficient to support conviction of confidence game. Munsell v. People, 122 Colo. 420, 222 P.2d 615 (1950); McBride v. People, 126 Colo. 277, 248 P.2d 725 (1952); Krantz v. People, 150 Colo. 469, 374 P.2d 199 (1962); Dodge v. People, 168 Colo. 531, 452 P.2d 759 (1969).

Evidence insufficient to sustain conviction of confidence game. Bomareto v. People, 111 Colo. 99, 137 P.2d 402 (1943); Graham v. People, 126 Colo. 351, 248 P.2d 730 (1952); White v. People, 126 Colo. 365, 249 P.2d 823 (1952); Bevins v. People, 138 Colo. 123, 330 P.2d 709 (1958); Bledsoe v. People, 138 Colo. 490, 335 P.2d 284 (1959).

Evidence insufficient to show specific intent to deprive customers of their money. People v. McClure, 186 Colo. 274, 526 P.2d 1323 (1974).

Evidence insufficient for conviction. People v. Ferrell, 197 Colo. 253, 591 P.2d 1038 (1979).

V. JURY AND INSTRUCTIONS.

Sufficient evidence to go to jury. People v. Gilkey, 181 Colo. 103, 507 P.2d 855 (1973).

Jury determines grade of crime. It is for the jury under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed. People v. Chapman, 174 Colo. 545, 484 P.2d 1234 (1971).

Where evidence supports misdemeanor offense, to instruct only to felony theft error. Where there was evidence to support the defendant's request for an instruction on a lesser included class 2 misdemeanor offense of theft of goods, it was error for the trial court to instruct the jury only as to felony theft. Beaudoin v. People, 627 P.2d 739 (Colo. 1981).

Defendant is entitled to an instruction on the grade of the offense when there is evidence which tends to reduce the grade. People v. Chapman, 174 Colo. 545, 484 P.2d 1234 (1971).

Instruction on specific intent. Where the trial court adequately instructs the jury on the issue of specific intent required as an element of attempted theft, no error can be assigned. Sandoval v. People, 176 Colo. 414, 490 P.2d 1298 (1971).

Where instruction permits jury to convict of crime of theft without proof of essential

element of that crime, intent to permanently deprive another of use and benefit of property, there is plain error and reversal is required. People v. Butcher, 180 Colo. 429, 506 P.2d 362 (1973).

The instruction "the laws of the State of Colorado provide that any person commits theft when he knowingly obtains or exerts unauthorized control over anything of value of another person with intent to deprive such other person permanently of the use or benefit of the thing of value" clearly spells out the intent required to commit the crime of theft. People v. Gilmer, 182 Colo. 96, 511 P.2d 494 (1973).

Erroneously instructing the jury that the defendant must have acted "intentionally" rather than "knowingly" in taking a thing of value from another person was harmless error as to the defendant because it worked to the defendant's benefit in that "intentionally" requires a more serious form of mental culpability. Blehm v. People, 817 P.2d 988 (Colo. 1991).

No plain error where jury not instructed that defendant must know he or she is deceiving the victims. Deception involves the element of intentional misrepresentation with the purpose of misleading and thus such an instruction is redundant and unnecessary. People v. Collie, 995 P.2d 765 (Colo. App. 1999).

Instruction that failed to require a finding that a defendant must know that any exercise of control is without authorization is erroneous. People v. Bornman, 953 P.2d 952 (Colo. App. 1997); Auman v. People, 109 P.3d 647 (Colo. 2005).

Constructive amendments are reviewed for plain error, not structural error. Although the jury instruction included aggregation language as set forth in subsection (4), the prosecutors never expressly indicated they would be proceeding under subsection (4). This constructive amendment did not constitute plain error, however, because it did not undermine the fundamental fairness of the trial or substantially prejudice the defendant. *Bock v. People*, 2024 CO 61, 555 P.3d 629.

While the standard of proof for the crime of theft by deception requires proof that, in reliance upon misrepresentations by the defendant, the victim parted with something of value, the court is not required to separately instruct the jury on the standard if the jury otherwise is instructed in accordance with the theft statute. *People v. Pollard*, 3 P.3d 473 (Colo. App. 2000).

Instruction could have been interpreted to permit a conviction when the defendant mistakenly believed that she was authorized to take the money and thus was an incorrect statement of the law, but no objection was raised to the jury instruction, the error was not a structural defect, and a review of the evidence found no plain error. *People v. Price*, 969 P.2d 766 (Colo. App. 1998).

Where issue before jury, affirmative defense instructions must be given. Where an issue of renunciation and abandonment is before a jury, proper instructions on this affirmative defense must be given to the jury. *People v. Traubert*, 625 P.2d 991 (Colo. 1981).

Relationship of intent and intoxication. Where court's instruction correctly informed the jury that the "intent to permanently deprive" was an element of theft, and further instructed the jury that the defense of intoxication could be considered in determining whether defendant was incapable of forming "the intent to commit the crime charged", when the two instructions are read together it is apparent that the jury was adequately advised of the relationship between the requisite specific intent and the defense of intoxication. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Test applicable to defendant's request for an instruction on the crime of theft is whether there existed a rational basis to acquit him of simple robbery but still convict him of theft; the test is not whether there is a total absence of evidence showing the defendant to be guilty of simple robbery. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Instructions for crimes of theft and burglary which were phrased in the language of the statutes were sufficient. *People v. Bowen*, 182 Colo. 294, 512 P.2d 1157 (1973).

Where, at a minimum, defendant committed simple robbery, no theft instruction. Because the uncontroverted evidence before the jury established, at a minimum, that the defendant had committed simple robbery, he was not entitled to an instruction on the crime of theft. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the lesser included offense of simple robbery. *People v. Graham*, 41 Colo. App. 390, 590 P.2d 511 (1978), *aff'd*, 199 Colo. 439, 610 P.2d 494 (1980).

There is no reason for including irrelevant portions of theft statute in instruction, but there is no prejudice to the defendant by their inclusion. *People v. Becker*, 187 Colo. 344, 531 P.2d 386 (1975).

Instruction on all sections of a theft statute is not prejudicial although not all sections apply to defendant. *People v. Pack*, 797 P.2d 774 (Colo. App. 1990).

Instruction to jury regarding unexplained, recent possession of stolen property, which indicated to the jury that the burden of proving rightful possession was on the defendant shifted the burden to the defendant to prove his innocence and was prejudicial error. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

The instruction to the jury that the possession of stolen property recently after the commission of a theft or larceny may be a criminal circumstance tending to show that the person in whose possession it was found is guilty of the crime of larceny unless he has satisfied you from the evidence that he came into possession of the property honestly is prejudicial error. *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968).

An instruction which permits the jury to infer guilt of either theft or burglary if recent, exclusive and unexplained possession of stolen property was established beyond a reasonable doubt was not defective. *People v. Maes*, 43 Colo. App. 365, 607 P.2d 1028 (1979).

Instruction on circumstantial evidence should include the essential limiting language that in order to convict on circumstantial evidence alone, circumstances must be such as to exclude every reasonable hypothesis of defendants' innocence. *Drahn v. People*, 174 Colo. 157, 483 P.2d 209 (1971).

Special instruction on "knowingly" as applied to "without authorization" is not required. *People v. Gresham*, 647 P.2d 243 (Colo. App. 1981).

Court did not abuse its discretion in supplementing jury instructions by providing a standard dictionary definition of the term "authorization". The court provided a proper definition that fit the facts of the case and related issues the jury needed to resolve. *People v. Stellabotte*, 2016 COA 106, 421 P.3d 1164, *aff'd* on other grounds, 2018 CO 66, 421 P.3d 174.

Failure to instruct on mens rea of theft. Definitional instruction on whether a person acts "knowingly" failed to instruct properly on mens rea of theft, the ulterior crime of burglary, and was plainly erroneous with regard to burglary in that it did not require jury to be satisfied beyond a reasonable doubt that the taking had to be practically certain in order to obtain from the defendant's conduct the determination that

the defendant had the requisite culpability for commission of theft. *People v. Reed*, 692 P.2d 1122 (Colo. App. 1984).

Accessory instruction proper. Where there was evidence presented at trial to the effect that the defendant had stated, prior to the theft, that he would take all the television sets which could be provided, and there was evidence from which a jury could properly infer that the defendant knew that they would be stolen, the evidence was sufficient to permit submission of the theft by taking count to the jury, it being properly instructed as to an accessory becoming liable as a principal. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Accomplice instruction improper. Where witness admitted burglarizing an establishment and delivering articles stolen to defendant who was charged with receiving stolen goods, such witness was not an accomplice and an instruction concerning the testimony of an accomplice was not appropriate. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Instruction on lesser included offense held sufficient. *People v. Mingo*, 191 Colo. 155, 551 P.2d 196 (1976).

VI. VERDICT AND SENTENCE.

No equal protection violation where person convicted of class 4 felony theft is punished more severely than a class 4 felony sex offender. *People v. Friesen*, 45 P.3d 784 (Colo. App. 2001).

General verdict of guilty held sufficient. Where the indictment sets out the value of the property unlawfully obtained, a general

verdict of "guilty in manner and form as charged in the indictment", is sufficient to support a conviction without a finding of the value of the property taken. *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942); *Archer v. People*, 129 Colo. 313, 269 P.2d 700 (1954).

Trial court is without authority to amend or alter jury finding of value where the jury by its verdict fixes the value of the property taken in the amount of \$325. *People v. Chapman*, 174 Colo. 545, 484 P.2d 1234 (1971).

Larceny from person is felony regardless of value. Where crime charged was larceny from the person, a statement by victim of the amount of money taken from him was immaterial, and it was error to impose sentence as for misdemeanor because amount taken from person was less than \$50. *People v. McIntosh*, 149 Colo. 555, 369 P.2d 987 (1962).

Verdicts of guilt as to theft, but not as to burglary, are consistent. Where evidence linking the defendant with burglary was conflicting or was rebutted, but the evidence clearly established that the defendant was in possession of property recently taken in a burglary, there was evidence to sustain a conviction of larceny and the verdicts of not guilty of burglary but guilty of larceny were not inconsistent as being irreconcilable with the evidence of each case. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Verdict of innocent as to theft but not as to conspiracy to commit theft consistent. Where the evidence under which

the jury acquitted the defendant of the charge of theft was separate and independent from evidence before the jury on the charge of conspiracy to commit theft, which jury convicted defendant of, conspiracy conviction was not an inconsistent verdict. *People v. Forbes*, 185 Colo. 410, 524 P.2d 1377 (1974).

Verdicts held not inconsistent. Since the statutory elements of aggravated robbery and theft over \$200 are different, jury verdicts convicting a defendant of aggravated robbery of an employee but acquitting the defendant of theft from the employer are not inconsistent and repugnant. *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339 (1977).

The crimes of robbery and theft from the person of another are mutually exclusive. When an element of one crime negates an element of a different crime, those two offenses are mutually exclusive and the defendant cannot be convicted of both. The defendant cannot both take something from another by the use of force and without the use of force in the same occurrence. *People v. Delgado*, 2019 CO 82, 450 P.3d 703.

When two crimes are mutually exclusive, the court must instruct the jury that the defendant cannot be convicted of both crimes. When the court fails to make that instruction, it is plain error, and the proper remedy is a new trial. *People v. Delgado*, 2019 CO 82, 450 P.3d 703.

A conviction for both robbery and theft from the person of another is a plainly inconsistent verdict. Pursuant to § 18-4-

301, robbery requires the "use of force, threats, or intimidation" while theft from the person of another, pursuant to this section, is "by means other than the use of force, threat, or intimidation". The appropriate remedy is a new trial. *People v. Delgado*, 2016 COA 174, 410 P.3d 697, *aff'd*, 2019 CO 82, 450 P.3d 703.

Sentence concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

When the burglary and the larceny involve one transaction, typical of many burglary-larceny situations, double, consecutive sentencing for the same transaction is inherently wrong and basically unjust, and evades the legislative intent. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969).

All separately prosecutable thefts committed within a six-month period are a unit of prosecution for double jeopardy purposes. Two convictions for theft within the same six-month period must be merged into one conviction. *People v. Gardner*, 250 P.3d 1262 (Colo. App. 2010).

Defendant who pled guilty to a single count of theft in return for a dismissal of

other counts may not be ordered to pay restitution to the victims in the counts that were dismissed. When an offense requires proof of the identity of a particular victim, the court may not order restitution to another. *People v. Armijo*, 989 P.2d 224 (Colo. App. 1999).

When defendant's actions do not constitute theft from the person of another, the defendant may be convicted of theft, but the court must enter the lowest level of a theft charge if the jury does not find the value of the items stolen. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

Defendant entitled to benefit of amendatory legislation. In 2013, the general assembly amended the theft statutes making theft of more than \$5,000 but less than \$20,000 a class 5 felony. Previously, theft of more than \$1,000 and less than \$20,000 was a class 4 felony. Because defendant was sentenced in 2014, defendant should have been sentenced for a class 5 felony, not a class 4 felony. *People v. Stellabotte*, 2016 COA 106, 421 P.3d 1164, *aff'd*, 2018 CO 66, 421 P.3d 174; *People v. Patton*, 2016 COA 187, 425 P.3d 1152, *aff'd*, 2018 CO 67, 421 P.3d 184.

But, if the value of the items the defendant stole are disputed, further

proceedings are required to determine the stolen items' value if the prosecutor wants to pursue a conviction for theft commensurate with the maximum value that the evidence could support. *People v. Lawrence*, 2019 COA 84, 487 P.3d 1066, *aff'd*, 2021 CO 28, 486 P.3d 269.

The proper remedy when a trial court erroneously instructs the jury as to the value of the property taken and that value is disputed at trial is to remand the case with instructions that the prosecution may elect to retry the theft charge as a whole or to agree to the entry of judgment based on the lowest degree of theft supported by the jury's verdict. *Lawrence v. People*, 2021 CO 28, 486 P.3d 269.

Theft is not a per se grave or serious offense for proportionality review purposes. Theft may be a grave or serious offense if the court makes such a determination after an individualized determination premised on the facts and circumstances surrounding the particular crime committed, i.e., based on consideration of the harm caused or threatened to the victim or society and the offender's culpability. *Melton v. People*, 2019 CO 89, 451 P.3d 415.

18-4-402. Theft of rental property. (Repealed)

Source: L. 71: R&RE, p. 429, § 1. **C.R.S. 1963:** § 40-4-402. **L. 75:** (2) and (3) amended and (4) added, p. 619, § 11, effective July 21. **L. 77:** (1)(b) amended, p. 963, § 24, effective July 1; (2) and (4) amended and (5) added, p. 973, § 3, effective July 1. **L. 84:** (3) and (4) amended, p. 537, § 7, effective July 1. **L. 87:** (6) added, p. 615, § 6, effective July 1. **L. 89:** (4) and (6)

amended, p. 833, § 45, effective July 1. **L. 92:** (2) to (6) amended, p. 434, § 2, effective April 10. **L. 98:** (3), (4), and (6) amended, p. 1437, § 12, effective July 1; (3), (4), and (6) amended, p. 795, § 3, effective July 1. **L. 2007:** (2) to (6) amended and (3.5) added, p. 1691, § 4, effective July 1. **L. 2009:** (6) amended, (HB 09-1334), ch. 244, p. 1100, § 3, effective May 11. **L. 2013:** Entire section repealed, (HB 13-1160), ch. 373, p. 2197, § 2, effective June 5.

18-4-403. Statutory intent.

If any law of this state refers to or mentions larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence games, or shoplifting, that law shall be interpreted as if the word "theft" were substituted therefor; and in the enactment of sections 18-4-401 to 18-4-403 it is the intent of the general assembly to define one crime of theft and to incorporate therein such crimes, thereby removing distinctions and technicalities which previously existed in the pleading and proof of such crimes.

Source: **L. 71:** R&RE, p. 429, § 1. **C.R.S. 1963:** § 40-4-403.

ANNOTATION

Law reviews. For note, "Larceny, Embezzlement, and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953).

Annotator's note. Since § 18-4-403 is similar to former § 40-5-2, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

The theft statute is clearly meant to encompass generally acquisition type crimes. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

This section is a short-cut method of substituting the word "theft" in every statute in which the words larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence game, or shoplifting are used, without having to list all the statutes affected; this technique avoids rendering inoperative, by inadvertence, any statute containing one of the enumerated words. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

Exception for embezzlement of public money is not limitation. Just because the word "theft" should not be substituted for "embezzlement of public moneys" is no indication of a limitation on the general theft statute. Clearly, the crime of embezzlement is included, for unless the general assembly

intent is clearly shown to be otherwise, enactment of a specific criminal statute does not preclude prosecution under a general criminal statute, but rather allows the single

criminal transaction to be prosecuted under either statute. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

18-4-404. Obtaining control over any stolen thing of value - conviction.

Every person who obtains control over any stolen thing of value, knowing the thing of value to have been stolen by another, may be tried, convicted, and punished whether or not the principal is charged, tried, or convicted.

Source: L. 71: R&RE, p. 429, § 1. **C.R.S. 1963: § 40-4-404.**

ANNOTATION

Annotator's note. Since § 18-4-404 is similar to former § 40-5-11, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section makes the buying or receiving of stolen goods a crime. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

For distinctions between larceny and receipt of stolen goods under former statute, see *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Receiving stolen goods is a distinct crime from the original larceny of the property, and the party committing the larceny is not the accomplice of one who purchased the goods from him knowing them to have been stolen. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

An ingredient of the crime of receiving stolen property is knowledge that it has

been stolen. *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959); *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973).

It is fundamental that knowledge of the fact that the property received is stolen is an essential element of the crime, and lack of such proof requires a dismissal. *People v. Schamber*, 182 Colo. 355, 513 P.2d 205 (1973).

Guilty knowledge must be both alleged and proved, and the burden of establishing knowledge on the part of the defendant is upon the prosecution. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

Mere proof of recent, unexplained possession insufficient to support conviction. In order to support a conviction of knowingly receiving stolen goods there must be proof of some circumstances showing knowledge of the theft beyond

mere proof of recent, unexplained, exclusive possession of the property. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *People v. Manning*, 180 Colo. 14, 501 P.2d 1046 (1972).

And juries should be so instructed. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

Although jury may consider such evidence. Recent, unexplained, exclusive possession is a fact which the jury may well consider along with other evidence, either direct or circumstantial, of knowledge of the theft. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

Instruction on inference created by possession of stolen property. It is never proper, in a case for receiving stolen goods knowing them to have been stolen, for the jury to be instructed that the unexplained possession alone of such recently stolen property is either a circumstance from which guilt may be inferred or that such possession is a circumstance strongly indicative of guilt which would justify, support, or warrant a verdict for the state, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

Where the defendant contended that since the court instructed the jury that the exclusive possession of stolen property recently after the commission of a theft may be an incriminating circumstance, the court should have further given an instruction defining "recently" after the commission of a theft, it was held that the court did not err

as such instruction could only have stated that whether or not defendant's possession was recent was a matter for the determination of the jury. *Tatum v. People*, 174 Colo. 301, 483 P.2d 964 (1971).

Manner of describing property. As in larceny, so in receiving, the property is identified by description of the stolen things and their ownership, namely, the thing stolen must be described in the same manner as in larceny. *Miller v. People*, 13 Colo. 166, 21 P. 1025 (1889).

Testimony of thief against one charged with receiving the stolen goods is not subject to infirmities attached to accomplice testimony. Where witness admitted burglarizing an establishment and delivering articles stolen to defendant who was charged with receiving stolen goods, such witness was not an accomplice and an instruction concerning the testimony of an accomplice was not appropriate. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Although it is a question of fact, taking profit from a corporation without paying shareholders may be considered theft. When majority shareholder used profits for personal uses, the majority shareholder, in essence, declared a distribution. Although a distribution was not formally announced, the trier of fact may find that this is theft and gives rise to a claim under this section. *Tisch v. Tisch*, 2019 COA 41, 439 P.3d 89.

Evidence of market value required. To make a prima facie case for violations under this section, it was incumbent upon the people to present competent evidence of the reasonable market value of the goods in

question at the time of the commission of the alleged offense. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973).

Evidence of price of goods insufficient to prove guilty knowledge. Where sole evidence of receipt of stolen goods was that defendant purchased the goods at a price which was not much lower than the fair market price of the goods, it was insufficient to establish guilty knowledge. *People v. Manning*, 180 Colo. 14, 501 P.2d 1046 (1972).

And case lacking proof of knowledge is not for jury. Negation of the essential element of guilt, a defendant's knowledge that property received was stolen at the time he received it, makes an incomplete case, one which should not be submitted to a jury for deliberation and verdict. *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959).

Evidence sufficient to go to jury. Where the evidence shows that a defendant has in his possession goods of the same kind as those stolen, and there is additional evidence and other circumstances from which an inference can reasonably be made that the goods are the same as those previously stolen, or that the accused had knowledge of their stolen character, the case is properly submitted to the jury. *Tatum v. People*, 174 Colo. 301, 483 P.2d 964 (1971).

Sufficient evidence to support conviction. *People v. Bailey*, 191 Colo. 366, 552 P.2d 1014 (1976).

Evidence insufficient for conviction. *People v. Maestas*, 181 Colo. 180, 508 P.2d 782 (1973).

Applied in *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

18-4-405. Rights in stolen property.

All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property. In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees; but monetary damages and attorney fees shall not be recoverable from a good-faith purchaser or good-faith holder of the property.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-405. L. 73: p. 536, § 1. L. 87: Entire section amended, p. 668, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado-Part I", see 30 Colo. Law. 7 (Apr. 2001). For article, "Treble Damages for Civil Theft in Colorado After *Itin v. Ungar*", see 31 Colo. Law. 49 (Mar. 2002). For article, "Bona Fide Purchasers of Real Property: Fraud is Not Civil Theft", see 32 Colo. Law. 101 (Dec. 2003). For article, "Navigating a Fallen Sky, Civil Theft and Contracts after *Bermel v. BlueRadios, Inc.*", see 51 Colo. Law. 30 (Jan. 2022).

Section conflicts with Uniform Commercial Code, § 4-2-403, which holds that a good faith purchaser takes valid title from a person who obtained voluntary delivery from a seller in exchange for a check that is later dishonored. UCC section prevails because it was later in time and because original owner was in a better position to protect his or her interests than the subsequent good faith purchaser. *West v. Roberts*, 143 P.3d 1037 (Colo. 2006).

The economic loss rule does not preclude a cause of action under this section. *Bermel v. BlueRadios, Inc.*, 2017 COA 20, 442 P.3d 923, *aff'd*, 2019 CO 31, 440 P.3d 1150.

Section should not be read as a codification of the remedy of replevin or as a delineation of the grounds for creating a constructive trust. *In re Allen*, 724 P.2d 651 (Colo. 1986).

Return of property does not necessarily preclude a finding of wrongful intent nor purge the defendant of guilt. *Ziegler v. Inabata of Am., Inc.*, 316 F. Supp. 2d 908 (D. Colo. 2004).

Although funds from a Ponzi scheme were obtained by theft, the subsequent transfer of these funds by the debtor represented the transfer of an "interest of the debtor in property" for purposes of a chapter 7 bankruptcy action. *In re M & L Bus. Mach. Co., Inc.*, 160 B.R. 851 (Bankr. D. Colo. 1994), *aff'd*, 167 B.R. 219 (Bankr. D. Colo. 1994).

This section was intended to be a punitive measure depriving thieves and persons who buy and sell stolen goods of the immediate fruits of their criminal activities. *In re Allen*, 724 P.2d 651 (Colo. 1986); *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

The term "theft" in this section refers to "theft" within the meaning of § 18-4-401 and does not encompass the theft of medical records or medical information under § 18-4-412 (1). *Winner v. Kirchner*, 2021 CO 47, 488 P.3d 1091.

Employer of "taker" of property, never having had possession of the property and not being involved in criminal activity, was not subject to this section. *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

"Actual damages" include noneconomic damages as well as economic damages. *Gorsich v. Double B Trading Co., Inc.*, 893 P.2d 1357 (Colo. App. 1994).

The requisite burden of proof for awarding treble damages under this section is the preponderance of evidence standard rather than the higher burden used

in criminal matters of beyond a reasonable doubt. In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

Trial court did not err in concluding that under this section a rightful owner could not recover from a vendor funds belonging to a company that had been embezzled and used to purchase and improve property the vendor reacquired after embezzler's default on a land contract, as vendor no longer had possession of company funds. Cedar Lane Inv. v. Am. Roofing, 919 P.2d 879 (Colo. App. 1996).

Damages may be obtained under this section without proof that the taker of stolen property was convicted of theft, burglary, or robbery. Chryar v. Wolf, 21 P.3d 428 (Colo. App. 2000); Itin v. Bertrand T. Ungar, P.C., 17 P.3d 129 (Colo. 2000).

This statute provides an owner with a private remedy against the taker that requires proof of a specified criminal act but not proof of a prior criminal conviction to recover treble damages, fees, and costs. Itin v. Bertrand T. Ungar, P.C., 17 P.3d 129 (Colo. 2000).

If all of the conditions leading to the award of treble damages have already occurred, then the award of those damages is not contingent, and, if the damages are readily ascertainable, they are liquidated. It is appropriate, therefore, to consider the inclusion of treble damages in calculating debtor's eligibility for chapter 13 bankruptcy relief under 11 U.S.C. § 109(e). In re Krupka, 317 B.R. 432 (Bankr. D. Colo. 2004).

The award of treble damages is not discretionary. Because the language of this section speaks in terms of what the owner may recover as opposed to what the court may award, the statutory language does not support the argument that discretion lies with the trial court to either award treble damages or not as it may deem appropriate. It is appropriate, therefore, to consider the inclusion of treble damages in calculating debtor's eligibility for chapter 13 bankruptcy relief under 11 U.S.C. § 109(e). In re Krupka, 317 B.R. 432 (Bankr. D. Colo. 2004).

This section requires both the return of the stolen property and treble damages. In awarding treble damages, a trial court must treble the actual damages awarded by the jury before subtracting any amounts already repaid. In re Estate of Chavez, 2022 COA 89M, 520 P.3d 194.

There was no justification for assessing the criminal penalty of treble damages, attorney fees, and costs where plaintiff did not prove all the components of "theft" by a preponderance of the evidence. Although there was a violation of § 38-26-109, resulting in an award of actual damages, there was no proof, evidence, or finding of conduct necessary to show criminal conduct or criminal liability under applicable Colorado case law. In re Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007).

Attempt to collect damages unavailing where there was no showing of a criminal act. In re Duran, 483 F.3d 653 (10th Cir. 2007).

Restaurant owners who intentionally intercepted satellite signal to broadcast fight program without paying sub-licensing fee violated this section. Kingvision Pay-Per-View, Ltd. v. Gutierrez, 544 F. Supp. 2d 1179 (D. Colo. 2008).

Plaintiff not entitled to damages under this section, however, because court awarded it statutory damages under the Federal Communications Act, 47 U.S.C. § 605. Any award under this section would therefore constitute impermissible double recovery for the same injury. Kingvision Pay-Per-View, Ltd. v. Gutierrez, 544 F. Supp. 2d 1179 (D. Colo. 2008).

Court properly dismissed plaintiff's claim for civil theft for failure to state a claim under C.R.C.P. 12(b)(5). The only allegation regarding the defendant's mental state is a single, conclusory statement that the defendant acted with the necessary mental state. That alone is not enough to sufficiently plead the requisite intent. Scott v. Scott, 2018 COA 25, 428 P.3d 626.

When two state law claims provide duplicative relief, it is useful to frame the analysis as a multi-factor test where no one factor is determinative. The relevant factors include, but are not limited to, the elements of the claims asserted, the wrongful conduct underlying those claims, and the statutory framework (if any) of the claims. In re McGill, 623 B.R. 876 (Bankr. D. Colo. 2020).

Claimant may not recover misspent trust funds under both this section and § 38-26-109. In re McGill, 623 B.R. 876 (Bankr. D. Colo. 2020).

This section does not authorize recovery against a good faith purchaser who holds record title to real property earlier conveyed under fraudulent circumstances. Strekal v. Espe, 114 P.3d 67 (Colo. App. 2004).

The statute of limitations in § 13-80-102, and not that in § 16-5-401 (1)(a), applies to a theft claim brought under this section. Michaelson v. Michaelson, 923 P.2d 237 (Colo. App. 1995).

This section imposes a statutory penalty within the meaning of C.R.C.P. 98, requiring that the action be tried in the county where the claim arose. Ehrlich Feedlot, Inc. v. Oldenburg, 140 P.3d 265 (Colo. App. 2006).

Award of reasonable attorney fees to a prevailing plaintiff on a civil theft claim is mandatory. Steward Software Co. v. Kopcho, 275 P.3d 702 (Colo. App. 2010).

Judgment against debtor under this section is a nondischargeable debt under 11 U.S.C. § 523. In re Oltmann, 505 B.R. 311 (Bankr. D. Colo. 2014); In re Chisan Chong, 523 B.R. 236 (Bankr. D. Colo. 2014).

Applied in In re Allen, 691 P.2d 749 (Colo. App. 1984); In re McGill, 623 B.R. 876 (Bankr. D. Colo. 2020).

18-4-406. Concealment of goods.

If any person willfully conceals unpurchased goods, wares, or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment, whether the concealment be on his own person or otherwise and whether on or off the premises of said store or mercantile establishment, such concealment constitutes prima facie evidence that the person intended to commit the crime of theft.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-406.

ANNOTATION

Section held to be constitutional. A statute susceptible to different interpretations should be construed in a manner consistent with constitutional principles when reasonable to do so; therefore, the reference to prima facie evidence contained in this section establishes a permissive inference permitting but not requiring the finder of fact to find from evidence of willful concealment that the defendant intended to steal merchandise concealed. *People in Interest of R.M.D.*, 829 P.2d 852 (Colo. 1992).

Willful concealment of goods that results in prima facie evidence of intent to commit theft does not violate due process standards. This section does not eliminate the prosecution's burden of proving intent to commit crime beyond a reasonable doubt. "Prima facie" does not require the fact finder to conclude that the prosecution has met such burden, but establishes a permissible inference. *People In The Matter of R.M.D.*, 829 P.2d 852 (Colo. 1992).

18-4-407. Questioning of person suspected of theft without liability.

If any person triggers an alarm or a theft detection device as defined in section 18-4-417 (2) or conceals upon his person or otherwise carries away any unpurchased goods, wares, or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question such person, in a reasonable manner for the purpose of ascertaining whether the person is guilty of theft. Such questioning of a person by a merchant, merchant's employee, or peace or police officer does not render the merchant, merchant's employee, or peace officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

Source: L. 71: R&RE, p. 429, § 1. **C.R.S. 1963:** § 40-4-407. **L. 2001:** Entire section amended, p. 512, § 1, effective July 1.

ANNOTATION

Annotator's note. Since § 18-4-407 is similar to former § 40-5-31, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Section protects inquiry as to shoplifting. This section affords a degree of protection to one who, acting in good faith and upon probable cause based upon reasonable grounds, questions another for the purpose of ascertaining whether or not the person thus questioned is guilty of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Such protection is not restricted to situations where person stopped has actually committed the offense of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Actions of store are not actions of state. The statute permitting the detention of suspected shoplifters by the store management merely grants a license under state law to detain a suspect; it does not invest the individual with the authority of state law. The statute is intended merely to license a shopkeeper to undertake self-help to protect his property; it does not vest him with the authority of the state. The actions of the storekeepers in pursuit of their own personal interests cannot be considered to

have been taken under color of state law under the civil rights act. *Warren v. Cummings*, 303 F. Supp. 803 (D. Colo. 1969).

The phrase "Such questioning of a person" can only mean the questioning of a person for the purpose of ascertaining whether or not he is guilty of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Reasonable grounds to stop and question is issue of law. The issue as to whether the defendant's agents in stopping the plaintiff and questioning him acted in good faith and upon probable cause based upon reasonable grounds posed an issue of law which should have been resolved by the trial court under an appropriate instruction to the jury. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Reasonableness of actions thereafter is issue of fact. The issue as to whether its agents, even though they had the right to stop and question the plaintiff, thereafter acted in a reasonable manner, which they must also do if they are to be given protection afforded by this section, was a genuinely controverted issue of fact which was properly one to be resolved by the jury. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

In action by shopper, who had been detained as a suspected shoplifter, for false imprisonment and slander, whether, under the statutory privilege relied on by the defendants, the manner and extent of the

investigation and detention of the shopper were reasonable and whether there was probable cause to detain him were questions of fact. *Gonzales v. Harris*, 189 Colo. 518, 542 P.2d 842 (1975).

18-4-408. Theft of trade secrets - penalty.

(1) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or discloses to an unauthorized person a trade secret, or, without authority, makes or causes to be made a copy of an article representing a trade secret, commits theft of a trade secret.

(2) As used in this section:

(a) "Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

(b) "Copy" means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article.

(c) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(d) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a trade secret the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(3) (a) Theft of a trade secret is a class 2 misdemeanor.

(b) Notwithstanding section 16-5-401 (1)(a), C.R.S., any prosecution for violation of this section shall be commenced within three years after discovery of the offense.

Source: **L. 71:** R&RE, p. 430, § 1. **C.R.S. 1963:** § 40-4-408. **L. 89:** (3) amended, p. 833, § 46, effective July 1. **L. 98:** (3) amended, p. 156, § 1, effective July 1. **L. 2021:** (3)(a) amended, (SB 21-271), ch. 462, p. 3177, § 206, effective March 1, 2022. **L. 2023:** (3)(a) amended, (HB 23-1293), ch. 298, p. 1785, § 12, effective October 1.

Cross references: For the "Uniform Trade Secrets Act", see article 74 of title 7.

ANNOTATION

Law reviews. For article, "Trade Secret Litigation: Injunctions and Other Equitable Remedies", see 48 U. Colo. L. Rev. 189 (1977). For article, "Protecting Technical Information: The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "Help for Colorado

Trade Secret Owners", see 15 Colo. Law. 1993 (1986). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado-Part I", see 30 Colo. Law. 7 (Apr. 2001). For article, "Computer Security and Privacy: The Third Wave of Property Law", see 33 Colo. Law. 57 (Feb. 2004).

18-4-409. Motor vehicle theft - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Motor vehicle" means any self-propelled vehicle that is designed primarily for travel on public highways and that is generally and commonly used to transport persons and property over the public highways.

(b) "Vehicle identification number" means the serial number placed upon the motor vehicle by the manufacturer thereof or assigned to the motor vehicle by the department of revenue.

(2) A person commits motor vehicle theft in the first degree if the person knowingly obtains, exercises control over, receives, or retains the motor vehicle of another person; and the person knows or reasonably should have known that the act was without authorization or was by threat or deception; and the person has two prior convictions or adjudications of charges separately brought and tried for an offense involving motor vehicle theft or unauthorized use of a motor vehicle in this state, a municipality, another state, the United States, or any territory subject to the jurisdiction of the United States.

(3) A person commits motor vehicle theft in the second degree if the person knowingly obtains, exercises control over, receives, or retains the motor vehicle of another person; and the person knows or should reasonably have known that the act was without authorization or was by threat or deception; and:

(a) The person retains possession or control of the motor vehicle for more than twenty-four hours;

(b) The person attempts to alter or disguise or alters or disguises the appearance of the motor vehicle;

(c) The person attempts to alter or remove or alters or removes the vehicle identification number;

(d) The person removes the motor vehicle from this state;

(e) The person unlawfully attaches or displays a license plate in or upon the motor vehicle other than those plates officially issued for the motor vehicle;

(f) The person or a participant causes one thousand dollars or more property damage, including property damage to the motor vehicle involved, in the course of obtaining control over, in the exercise of control of, in the course of receiving, or in the course of retaining the motor vehicle;

(g) The person causes bodily injury to another person other than to a participant while in the exercise of control of the motor vehicle;

(h) The person uses or attempts to use the motor vehicle in the commission of a crime other than:

(I) A traffic offense except eluding a police officer as described in section 42-4-1413; or

(II) A first or second degree criminal trespass of the motor vehicle; or

(i) At the time of the act, the motor vehicle displayed a license plate or placard indicating the motor vehicle belongs to a person with a disability.

(4) A person commits motor vehicle theft in the third degree if the person knowingly:

(a) Obtains or exercises control over the motor vehicle of another person; and the person knows or should reasonably have known that the act was without authorization or was by threat or deception; or

(b) Receives or retains the motor vehicle from another person who is not the owner of the motor vehicle; the person exercises control over the motor vehicle; and the person knows or should reasonably have known that the act was without authorization of the owner.

(c) (Deleted by amendment, L. 2023.)

(4.5) Repealed.

(5) Consistent with section 18-1-202, if the theft of a motor vehicle occurs in one jurisdiction and the motor vehicle is recovered in another jurisdiction, the offender may be tried in the jurisdiction where the theft occurred, in any jurisdiction through which the motor vehicle was operated or transported, or in the jurisdiction in which the motor vehicle was recovered.

- (6) (a) Motor vehicle theft in the first degree is a class 3 felony.
- (b) Motor vehicle theft in the second degree is a class 4 felony.
- (c) Motor vehicle theft in the third degree is a class 5 felony.
- (7) A person whose conduct is limited to the elements of this section is not subject to prosecution pursuant to section 18-4-401.

Source: **L. 71:** R&RE, p. 430, § 1. **C.R.S. 1963:** § 40-4-409. **L. 77:** Entire section R&RE, p. 974, § 4, effective July 1. **L. 79:** (2)(e) amended and (2)(f) added, p. 736, § 1, effective April 25; (2)(e) and (4) amended and (2)(g) and (2)(h) added, p. 727, §§ 4, 5, effective July 1. **L. 80:** IP(2), IP(3), and (4) amended, p. 532, § 1, effective January 29. **L. 87:** (2)(a) and (2)(g) amended, p. 668, § 2, effective July 1. **L. 92:** (3) amended, p. 434, § 3, effective April 10. **L. 95:** (3)(b) and (4) amended, p. 1253, § 12, effective July 1. **L. 99:** Entire section amended, p. 1164, § 1, effective July 1, 2000. **L. 2001:** (2)(e) amended, p. 59, § 1, effective August 8. **L. 2003:** (4.5) added, p. 1845, § 1, effective July 1. **L. 2007:** (3) and (4) amended, p. 1692, § 5, effective July 1. **L. 2014:** (3) amended, (HB 14-1266), ch. 155, p. 539, § 6, effective August 6. **L. 2021:** (4)(b) and (4)(c) amended, (SB 21-271), ch. 462, p. 3177, § 207, effective March 1, 2022; (4.5)(b) added by revision, (HB 21-1314), ch. 460, pp. 3099, 3104, §§ 9, 22. **L. 2023:** (1)(a), (2), (3), and (4) amended and (6) and (7) added, (SB 23-097), ch. 309, p. 1885, § 1, effective July 1.

Editor's note: Subsection (4.5)(b) provided for the repeal of subsection (4.5), effective January 1, 2022. (See L. 2021, pp. 3099, 3104.)

Cross references: For the legislative declaration contained in the 2007 act amending subsections (3) and (4), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Annotator's note. Since § 18-4-409 is similar to former § 40-5-2, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Elements of the crimes of theft and motor vehicle theft are clearly different,

and therefore it does not violate equal protection to prosecute under the latter rather than the former. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

This section is not intended to control all aspects of motor vehicle theft. The legislature is within its powers to punish the

same conduct with more than one offense by creating multiple statutory sections related to the conduct. Thus, motor vehicle theft is not exclusive of another crime, such as criminal trespass, § 18-4-502. *People v. Wentling*, 2015 COA 172, 409 P.3d 411.

Proof of prior convictions is not an element of the class 3 felony described in this section. Subsection (3) addresses only the class of felony; this statutory structure does not create separate crimes. Therefore, the trial court was not required to submit this "element" to the jury for its determination beyond a reasonable doubt. *People v. Hopkins*, 2013 COA 74, 328 P.3d 253.

Where conduct violates two provisions, prosecutor determines under which provision crime prosecuted. Where the alleged conduct of a defendant violates both the general theft statute and the more specific motor vehicle theft statute, it is the function of the prosecuting attorney and not the trial court to determine under which statute the alleged crime shall be prosecuted. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

Crime defined by offender's conduct and mental state. This section defined the crime of aggravated motor vehicle theft in terms of the offender's conduct and his culpable mental state and does not condition criminal responsibility on the action of a third party after the prohibited conduct already has occurred. *People v. Andrews*, 632 P.2d 1012 (Colo. 1981).

Inference based on possession of recently stolen automobile. If there is independent evidence which proves beyond

a reasonable doubt that a theft occurred, defendant's possession of a recently stolen automobile permits the jury to infer that defendant was the person who exercised control from the time of the theft to the time of apprehension. *People v. Clay*, 644 P.2d 81 (Colo. App. 1982).

Jury could reasonably conclude that defendant exercised dominion and control over a car where the evidence supported a reasonable inference that the defendant (1) had possession of the car keys, (2) was in the car long enough to gather items of value, (3) poured accelerant on the car and set it on fire, and (4) walked away as it burned, still carrying the keys. *People v. Harper*, 205 P.3d 452 (Colo. App. 2008).

Elements of culpable mental state. Subsection (2)(a) contemplates a culpable mental state involving an awareness by the offender that he is obtaining or exercising control over the vehicle of another and that his control is indeed without authorization. *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Liability for first degree aggravated motor vehicle theft is to be imposed whenever a person who has knowingly stolen a motor vehicle uses that motor vehicle in the commission of a crime other than a traffic offense, regardless of the mens rea associated with the particular crime committed. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

The culpable mental state "knowingly" in subsection (2) applies to a defendant's exercise of control over a vehicle and also

to his or her awareness of lack of authority. People v. Stellabotte, 2016 COA 106, 421 P.3d 1164, aff'd on other grounds, 2018 CO 66, 421 P.3d 174.

The trial court did not err in instructing the jury because the court listed the culpable state "knowingly" as a separate element. Therefore, "knowingly" applied to the succeeding elements of first degree aggravated motor vehicle theft, including "without authorization", indicating that the defendant had to know that his possession of the automobile was not authorized. People v. Stellabotte, 2016 COA 106, 421 P.3d 1164, aff'd on other grounds, 2018 CO 66, 421 P.3d 174.

Not every alteration is a subsection (2)(b) aggravating factor. Not every act that alters the appearance of a vehicle is an aggravating factor falling within the purview of subsection (2)(b). People v. Hale, 654 P.2d 849 (Colo. 1982).

Such as changing license plates. Prior to adoption of subsection (2)(h), placing unrelated license plates on a car did not constitute altering or disguising the appearance of the vehicle within the meaning of subsection (2)(b). People v. Hale, 654 P.2d 849 (Colo. 1982).

Trial court erred in its answer to a jury question regarding whether defendant had to know license plates on stolen truck did not belong to the truck. Trial court's response telling the jury that defendant did not have to know that the plates did not belong to the truck was incorrect, and its subsequent reminder that all elements of the relevant jury instruction had to be proved

beyond a reasonable doubt was inadequate to rectify the error. People v. Manier, 197 P.3d 254 (Colo. App. 2008).

Such error was not harmless. While there was ample evidence connecting defendant with the stolen truck, there was little if any evidence that could be inferred that defendant had any involvement in attaching or displaying fictitious license plates on it. People v. Manier, 197 P.3d 254 (Colo. App. 2008).

The evidence was sufficient, however, to establish defendant's liability for second degree aggravated motor vehicle theft. People v. Manier, 197 P.3d 254 (Colo. App. 2008).

Under previous version of statute, aggravator that yields a felony only if "committed by a person who has been twice previously convicted" requires that both prior convictions have entered before the commission of the instant offense. People v. Houcks, 75 P.3d 1155 (Colo. App. 2003).

Defendant convicted of aggravated motor vehicle theft even though vehicle was taken after crime of first-degree assault had been committed because the vehicle was used to flee the scene of the crime of first degree assault. People v. McCoy, 944 P.2d 577 (Colo. App. 1996).

Defendant was not entitled to instructions on intoxication defense and defining "voluntary act" as provided in § 18-1-501 (9) where he was charged with aggravated motor vehicle theft under this section. People v. Huskey, 624 P.2d 899 (Colo. App. 1980).

Court did not abuse its discretion in supplementing jury instructions by providing a standard dictionary definition of the term "authorization". The court provided a proper definition that fit the facts of the case and related issues the jury needed to resolve. *People v. Stellabotte*, 2016 COA 106, 421 P.3d 1164, *aff'd* on other grounds, 2018 CO 66, 421 P.3d 174.

Joyriding is less severe offense than larceny of motor vehicle. *People v. Rivera*, 185 Colo. 337, 524 P.2d 1082 (1974).

The crime of joyriding is not a lesser included offense of the crime of theft, nor is attempted joyriding a lesser included offense of attempted theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Crime of joyriding is not a lesser included offense of the crime of theft. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Vehicular homicide is not a lesser included offense of aggravated motor vehicle theft under the strict elements test even if its proof might satisfy an element of

aggravated motor vehicle theft under the facts of a particular case. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Convictions for aggravated motor vehicle theft and attempted aggravated robbery are factually and legally inconsistent. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

Vehicular eluding is a lesser included offense to aggravated motor vehicle theft. A conviction for vehicular eluding must merge into a conviction for aggravated motor vehicle theft. *People v. Ramirez-Armas*, 2026 COA 1, 586 P.3d 209.

No private cause of action under this section. *In re Duran*, 483 F.3d 653 (10th Cir. 2007).

Applied in *People v. R.V.*, 43 Colo. App. 349, 606 P.2d 1311 (1979); *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People v. Martinez*, 656 P.2d 1317 (Colo. 1983); *People v. Eastepp*, 884 P.2d 305 (Colo. 1994).

18-4-409.5. Unauthorized use of a motor vehicle - definition.

(1) A person commits unauthorized use of a motor vehicle if the person obtains or exercises control over the motor vehicle of another person without authorization of the owner and:

(a) The person does not commit a criminal offense other than a misdemeanor traffic offense except eluding a police officer as described in section 42-4-1413 in the course of obtaining control over or in the exercise of control of a motor vehicle; and

(b) The motor vehicle is returned to the owner or recovered by law enforcement within twenty-four hours after being reported as missing or stolen by the owner, with no damage to the motor vehicle.

(2) Unauthorized use of a motor vehicle is a class 1 misdemeanor; except that a second or subsequent offense for a violation of this section is a class 5 felony.

(3) As used in this section, unless the context otherwise requires, "motor vehicle" has the same meaning as defined in section 18-4-409.

Source: L. 2023: Entire section added, (SB 23-097), ch. 309, p. 1888, § 2, effective July 1.

18-4-410. Theft by receiving. (Repealed)

Source: L. 75: Entire section added, p. 619, § 12, effective July 21. **L. 77:** Entire section R&RE, p. 975, § 5, effective July 1. **L. 84:** (3), (4), and (6) amended, p. 537, § 8, effective July 1, 1985. **L. 87:** (6) amended, p. 607, § 14, effective July 1. **L. 92:** (2) to (6) amended, p. 435, § 4, effective April 10. **L. 98:** (3), (4), and (6) amended, p. 795, § 4, effective July 1; (3), (4), and (6) amended and (7) added, p. 1438, § 13, effective July 1. **L. 99:** (7) amended, p. 797, § 11, effective July 1. **L. 2007:** (2) to (7) amended and (3.5) added, p. 1692, § 6, effective July 1. **L. 2009:** (7) amended, (HB 09-1334), ch. 244, p. 1100, § 4, effective May 11. **L. 2013:** Entire section repealed, (HB 13-1160), ch. 373, p. 2197, § 3, effective June 5.

18-4-411. Transactions for profit in stolen goods.

If any person obtains control over stolen property knowing or believing the property to have been stolen, and such offense involves two or more separate stolen things of value each of which is the property of a separate owner, such commission of theft constitutes prima facie evidence that the person is engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit.

Source: L. 77: Entire section added, p. 890, § 3, effective July 1. **L. 81:** Entire section amended, p. 989, § 1, effective April 23. **L. 87:** Entire section amended, p. 669, § 3, effective July 1. **L. 2013:** Entire section amended, (HB 13-1160), ch. 373, p. 2198, § 4, effective June 5.

ANNOTATION

Purpose of section. The apparent purpose of this section is to assist the prosecution in proving the "fencing" element of § 18-4-410 (6). *People v. Williams*, 651 P.2d 899 (Colo.

1982); *People v. Salazar*, 715 P.2d 1265 (Colo. App. 1985).

Presumption of former section violative of due process. The value of a stolen article has no significant relationship to the business of buying, selling, or otherwise disposing of stolen goods for a profit, as merely proving the fact of value does not create a probability that one is engaged in such business. Thus, the criminal statutory presumption found in this section prior to the 1981 amendment did not satisfy due process standards. *Brown v. District Court*, 197 Colo. 219, 591 P.2d 99 (1979).

Instruction to jury correct. Where the evidence supported the inference that the defendant possessed three or more separate items belonging to separate owners, the trial court correctly instructed the jury in accordance with this section even though no single count of information charged possession of "three or more separate things of value". *People v. Salazar*, 715 P.2d 1265 (Colo. App. 1985).

Applied in *People v. Williams*, 651 P.2d 899 (Colo. 1982).

18-4-411.5. Interagency task force on organized retail theft - legislative declaration - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1278, § 2, effective July 1.

Editor's note: Subsection (6) provided for the repeal of this section, effective February 1, 2007. (See L. 2006, p. 1278.)

18-4-412. Theft of medical records or medical information - penalty - definitions.

(1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

(2) As used in this section:

(a) "Medical record" means the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health-care services, including medical marijuana services, performed at the direction of a physician or other licensed health-care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency

medical service providers, mental health professionals, prehospital providers, or other health-care personnel. "Medical record" includes such diagnostic documentation as X rays, electrocardiograms, electroencephalograms, and other test results. "Medical record" includes data entered into the prescription drug monitoring program under section 12-280-403.

(b) "Medical information" means any information contained in the medical record or any information pertaining to the medical, mental health, and health-care services performed at the direction of a physician or other licensed health-care provider which is protected by the physician-patient privilege established by section 13-90-107 (1)(d), C.R.S.

(c) "Proper authorization" means:

(I) A written authorization signed by the patient or his or her duly designated representative; or

(II) An appropriate order of court; or

(III) Authorized possession pursuant to law or regulation for claims processing, possession for medical audit or quality assurance purposes, possession by a consulting physician to the patient, or possession by hospital personnel for record-keeping and billing purposes; or

(IV) Authorized possession pursuant to section 18-3-415, 18-3-415.5, 25-1-122, or 30-10-606 (6), C.R.S.; or

(V) Authorized possession by a law enforcement officer or agency, acting in official capacity and pursuant to an official investigation.

(d) "Copy" means any facsimile, replica, photograph, sound recording, magnetic or electronic recording, or other reproduction of a medical record and any note, drawing, or sketch made of or from a medical record.

(3) Theft of a medical record or medical information is a class 1 misdemeanor; except that if the person steals or discloses the medical record or information to an unauthorized person, it is a class 5 felony.

(4) The obtaining, accessing, use, or disclosure of relevant medical records or medical information pursuant to 18 U.S.C. sec. 922 (t) and sections 24-33.5-424, 13-5-142, and 13-9-123, C.R.S., by the Colorado bureau of investigation, the clerk of the court of any judicial district in the state, the clerk of the probate court of the city and county of Denver, or by any of their employees and accessing such records and information through the NICS system shall not constitute theft of a medical record or medical information under this section.

(5) This section shall not apply to covered entities, their business associates, or health oversight agencies as each is defined in the federal "Health Insurance Portability and

Accountability Act of 1996" as amended by the federal "Health Information Technology for Economic and Clinical Health Act" and the respective implementing regulations.

Source: **L. 79:** Entire section added, p. 727, § 6, effective July 1. **L. 89:** (3) amended, p. 834, § 47, effective July 1. **L. 99:** (2)(c) amended, p. 1003, § 11, effective May 29. **L. 2000:** (4) added, p. 12, § 4, effective March 7; (2)(a) amended, p. 545, § 22, effective July 1. **L. 2001:** (2)(c)(IV) amended, p. 736, § 6, effective July 1. **L. 2002:** (4) amended, p. 756, § 3, effective January 1, 2003. **L. 2003:** (2)(c)(IV) amended, p. 1021, § 2, effective April 17; (5) added, p. 1785, § 20, effective July 1. **L. 2007:** (2)(a) and (2)(b) amended, p. 1689, § 9, effective July 1. **L. 2010:** (2)(c)(V) added and (5) amended, (SB 10-167), ch. 296, p. 1399, §§ 15, 16, effective May 26. **L. 2011:** (2)(a) amended, (SB 11-192), ch. 230, p. 987, § 12, effective July 1; (2)(a) amended, (HB 11-1043), ch. 266, p. 1214, § 27, effective July 1. **L. 2012:** (2)(a) amended, (HB 12-1059), ch. 271, p. 1436, § 15, effective July 1; (2)(a) amended, (HB 12-1311), ch. 281, p. 1619, § 44, effective July 1. **L. 2016:** (2)(c)(IV) amended, (SB 16-146), ch. 230, p. 918, § 11, effective July 1. **L. 2019:** (2)(a) amended, (HB 19-1172), ch. 136, p. 1675, § 94, effective October 1. **L. 2023:** (3) amended, (HB 23-1293), ch. 298, p. 1785, § 13, effective October 1.

Editor's note: Amendments to subsection (2)(a) by House Bill 11-1043 and Senate Bill 11-192 were harmonized. Amendments to subsection (2)(a) by House Bill 12-1059 and House Bill 12-1311 were harmonized.

Cross references: (1) For the legislative declaration contained in the 2000 act enacting subsection (4), see section 1 of chapter 5, Session Laws of Colorado 2000. For the legislative declaration in the 2010 act adding subsection (2)(c)(V) and amending subsection (5), see section 1 of chapter 296, Session Laws of Colorado 2010.

(2) For the "Health Insurance Portability and Accountability Act of 1996", see Pub.L. 104-191, codified at 42 U.S.C. sec. 201 et seq. For the "Health Information Technology for Economic and Clinical Health Act", see Pub.L. 111-5.

ANNOTATION

Law reviews. For article, "The Authorization to Release Medical Information Form: Its Genesis and Usage", see 11 Colo. Law. 1179 (1982). For article, "The Legal Risks of AIDS: Moving Beyond

Discrimination", see 18 Colo. Law. 606 (1989).

The term "theft" in § 18-4-405 refers to "theft" within the meaning of § 18-4-401

and does not encompass the theft of medical records or medical information under subsection (1) of this section. *Winninger v. Kirchner*, 2021 CO 47, 488 P.3d 1091.

Employment-required drug tests and physical ability tests do not fall under the

definition of either medical record or medical information as defined in subsection (2), thus, the defense failed to establish a prima facie case of theft of the defendant's medical records. *People v. Palomo*, 31 P.3d 879 (Colo. 2001).

18-4-413. Mandatory sentencing for repeated felony theft from a store - store defined.

(1) For purposes of this section and section 18-4-414, "store" means any establishment primarily engaged in the sale of goods at retail.

(2) Any person convicted of felony theft, which felony theft was from a store, who within the immediately preceding four years was twice convicted of felony theft, which felony theft was each time from a store, shall be sentenced to at least the minimum term provided for such offense. A person convicted under this section shall not be eligible for probation or suspension of sentence.

(3) The mandatory sentencing requirements specified in subsection (2) of this section shall not apply when the person is being sentenced pursuant to section 18-4-401 (4).

Source: L. 85: Entire section added, p. 668, § 1, effective July 1. **L. 2003:** (2) amended, p. 1427, § 8, effective April 29.

18-4-414. Evidence of value.

(1) For purposes of this part 4, when theft occurs from a store, evidence of the retail value of the thing involved shall be prima facie evidence of the value of the thing involved. Evidence offered to prove retail value may include, but shall not be limited to, affixed labels and tags, signs, shelf tags, and notices.

(2) For the purposes of this part 4, in all cases where theft occurs, evidence of the value of the thing involved may be established through the sale price of other similar property and may include, but shall not be limited to, testimony regarding affixed labels and tags, signs, shelf tags, and notices tending to indicate the price of the thing involved. Hearsay evidence shall not be excluded in determining the value of the thing involved.

Source: **L. 85:** Entire section added, p. 668, § 1, effective July 1. **L. 88:** Entire section amended, p. 713, § 20, effective July 1.

ANNOTATION

Law reviews. For article, "Proving Covered Personal Property Loss Under a Homeowners Policy", see 51 Colo. Law. 30 (Oct. 2022).

Section does not violate the defendant's sixth amendment constitutional right to confront his accuser. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

By enacting this section, the general assembly has determined that a price tag affixed to an item for sale ordinarily is sufficiently trustworthy so as to speak for itself regarding that item's value and that the utility of confrontation is very remote. The statute allows an accused to rebut the presumption of value by calling a store manager or another witness to establish a value other than that specified on the price tag. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

Determining the value of public assistance benefits requires a total amount approach. The total amount approach treats the total amount of benefits obtained by deception as the amount stolen. *People v. Vidauri*, 2021 CO 25, 486 P.3d 239.

Kelley blue book may be admitted as proof of value under this section without the need for expert testimony to substantiate the blue book's valuation. The blue book indicates the sale price of other similar property, and thus the officer's valuation based thereon was not subject to exclusion as hearsay, even if such an objection had been raised. *People v. Thornton*, 251 P.3d 1147 (Colo. App. 2010).

Error in admitting evidence about repair cost rather than sale price was harmless. Additional evidence was presented that the value of victim's property damage exceeded \$500. *People v. Reed*, 2013 COA 113, 338 P.3d 364.

Statute creates a specific hearsay exception. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

Hearsay evidence may provide proof of value only where the hearsay regards affixed labels and tags, signs, shelf tags, and notices, or other reliable evidence of the sale price of other similar property. *People v. Jaeb*, 2018 COA 179, 434 P.3d 785.

Applied in *People v. Pearman*, 209 P.3d 1144 (Colo. App. 2008).

18-4-415. Use of photographs, video tapes, or films of property.

Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: L. 85: Entire section added, p. 577, § 3, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of robbery and trespass, tampering, and criminal mischief, see §§ 18-4-305 and 18-4-514.

18-4-416. Theft by resale of a lift ticket or coupon.

Any unauthorized person who, with the intent to profit therefrom, resells or offers to resell any ticket, pass, badge, pin, coupon, or other device that then entitles the bearer to the use, benefit, or enjoyment of any skiing service or skiing facility commits a civil infraction. A peace officer must not, under any circumstances, arrest a person being charged with this civil infraction, and a summons to the appropriate court of jurisdiction must be issued to the accused person.

Source: L. 90: Entire section added, p. 986, § 10, effective April 24. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3177, § 208, effective March 1, 2022. **L. 2022:** Entire section amended, (HB 22-1229), ch. 68, p. 345, § 24, effective March 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending this section is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

18-4-417. Unlawful acts - theft detection devices.

(1) (a) It is unlawful for any person to knowingly manufacture, distribute, or sell a theft detection shielding device or a theft detection deactivating device with the knowledge that some person intends to use the device in the commission of an offense involving theft.

(b) It is unlawful for any person to possess a theft detection shielding device or a theft detection deactivating device with the intent to use the device possessed, or with the knowledge that some person intends to use the device possessed, in the commission of an offense involving theft.

(c) It is unlawful for any person to knowingly deactivate or remove a theft detection device or any component thereof in any store or mercantile establishment without authorization prior to purchase.

(2) As used in this section:

(a) "Theft detection deactivating device" means any tool, instrument, mechanism, or other article adapted, designed, engineered, used, or operated to inactivate, incapacitate, or remove a theft detection device without authorization. "Theft detection deactivating device" includes, but is not limited to, jumper wires, wire cutters, and electronic article surveillance removal devices.

(b) "Theft detection device" means an electronic or magnetic mechanism, machine, apparatus, tag, or article designed and operated for the purpose of detecting the unauthorized removal of merchandise from a store or mercantile establishment.

(c) "Theft detection shielding device" means any tool, instrument, mechanism, or article adapted, designed, engineered, used, or operated to avoid detection by a theft detection device during the commission of an offense involving theft. "Theft detection shielding device" includes, but is not limited to, foil-lined or otherwise modified clothing, bags, purses, or containers capable of and for the sole purpose of avoiding detection devices.

(3) Any person who violates any of the provisions of subsection (1) of this section commits a class 2 misdemeanor.

Source: **L. 2001:** Entire section added, p. 512, § 2, effective July 1. **L. 2012:** (2)(a) and (2)(c) amended, (HB 12-1304), ch. 237, p. 1050, § 3, effective May 29. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3177, § 209, effective March 1, 2022.

Cross references: For the legislative declaration in the 2012 act amending subsections (2)(a) and (2)(c), see section 1 of chapter 237, Session Laws of Colorado 2012.

18-4-418. Fuel piracy. (Repealed)

Source: L. 2002: Entire section added, p. 1131, § 1, effective July 1. **L. 2013:** Entire section repealed, (HB 13-1160), ch. 373, p. 2198, § 5, effective June 5.

18-4-419. Newspaper theft. (Repealed)

Source: L. 2004: Entire section added, p. 445, § 2, effective July 1. **L. 2013:** Entire section repealed, (HB 13-1160), ch. 373, p. 2198, § 6, effective June 5; entire section repealed, (HB 13-1014), ch. 7, p. 17, § 1, effective August 7.

18-4-420. Chop shop activity - ownership or operation of a chop shop - altered or removed identification number - penalties - definitions.

- (1) A person commits ownership or operation of a chop shop if he or she knowingly:
 - (a) Owns or operates a chop shop, knowing that it is a chop shop, or conspires with another person to own or operate a chop shop, knowing that it is a chop shop;
 - (b) Transports an unlawfully obtained motor vehicle or major component motor vehicle part to or from a chop shop, knowing that it is a chop shop; or
 - (c) Sells or transfers to, or purchases or receives from, a chop shop, knowing that it is a chop shop, an unlawfully obtained motor vehicle or major component motor vehicle part.
- (2) A violation of paragraph (a) of subsection (1) of this section is a class 4 felony. A violation of paragraph (b) or (c) of subsection (1) of this section is a class 5 felony.
- (3) (a) A person commits altering or removing a vehicle identification number if he or she knowingly:
 - (I) Removes, changes, alters, counterfeits, defaces, destroys, disguises, falsifies, forges, or obliterates the vehicle identification number, manufacturer's number, or engine number of a motor vehicle or major component motor vehicle part with an intent to misrepresent the identity or prevent the identification of a motor vehicle or major component motor vehicle part; or
 - (II) Possesses, purchases, disposes of, sells, or transfers a motor vehicle or a major component motor vehicle part with knowledge that it contains a removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated vehicle identification number, manufacturer's number, or engine number unless such motor vehicle or major component motor vehicle part is otherwise in compliance with the provisions of section 42-5-110, C.R.S.

(b) This subsection (3) does not apply to a private party or to an agent of a private party that is acting with the authorization of a law enforcement agency to lawfully seize, retain, recycle, transport, or otherwise dispose of a motor vehicle or major component motor vehicle part with a vehicle identification number, manufacturer number, or engine number that is removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated.

(4) Altering or removing a vehicle identification number is a class 5 felony.

(5) As used in this section, unless the context otherwise requires:

(a) "Chop shop" means any building, lot, facility, or other structure or premise where:

(I) Any person or persons possess, receive, store, disassemble, or alter, including the alteration or concealment of any identifying feature or number, an unlawfully obtained motor vehicle or major component motor vehicle part for the purpose of using, selling, or disposing of the motor vehicle or major component motor vehicle part; or

(II) Two or more unlawfully obtained motor vehicles are present for the purpose of alteration, sale, or disposal; or

(III) Six or more unlawfully obtained major component motor vehicle parts from two or more motor vehicles are present for the purpose of alteration, sale, or disposal.

(b) "Major component motor vehicle part" means any of the following parts of a motor vehicle:

(I) The engine;

(II) The transmission;

(III) A front fender;

(IV) The hood;

(V) Any door allowing entrance to or egress from the passenger compartment of the vehicle;

(VI) The front or rear bumper;

(VII) A rear quarter panel;

(VIII) The deck lid, tailgate, or hatchback;

(IX) The trunk floor pan;

(X) The cargo box of a pickup truck;

(XI) The frame, or if the vehicle has a unitized body, the supporting structure or structures that serve as the frame;

- (XII) The cab of a truck;
 - (XIII) The body of a passenger vehicle;
 - (XIV) An airbag or airbag assembly;
 - (XV) A wheel or tire;
 - (XVI) A catalytic converter; or
 - (XVII) Any other part of a motor vehicle that is comparable in design or function to any of the parts that have been listed, or that have been labeled with a unique traceable identification number.
- (c) "Motor vehicle" means all vehicles of whatever description that are propelled by any power other than muscular power; except that "motor vehicle" does not include vehicles that run on rails.
- (d) "Unlawfully obtained" means obtained by theft, fraud, or deceit or obtained without the permission of the owner.

Source: L. 2014: Entire section added, (SB 14-176), ch. 392, p. 1981, § 1, effective August 6.
L. 2022: (5)(b)(XV) and (5)(b)(XVI) amended and (5)(b)(XVII) added, (SB 22-009), ch. 418, p. 2958, § 2, effective June 7.

PART 5

TRESPASS, TAMPERING, AND CRIMINAL MISCHIEF

18-4-501. Criminal mischief.

- (1) A person commits criminal mischief when he or she knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode.
- (2) and (3) Repealed.
- (4) Criminal mischief is:
- (a) A petty offense when the aggregate damage to the real or personal property is less than three hundred dollars;

- (b) A class 2 misdemeanor when the aggregate damage to the real or personal property is three hundred dollars or more but less than one thousand dollars;
- (c) A class 1 misdemeanor when the aggregate damage to the real or personal property is one thousand dollars or more but less than two thousand dollars;
- (d) A class 6 felony when the aggregate damage to the real or personal property is two thousand dollars or more but less than five thousand dollars;
- (e) A class 5 felony when the aggregate damage to the real or personal property is five thousand dollars or more but less than twenty thousand dollars;
- (f) A class 4 felony when the aggregate damage to the real or personal property is twenty thousand dollars or more but less than one hundred thousand dollars;
- (g) A class 3 felony when the aggregate damage to the real or personal property is one hundred thousand dollars or more but less than one million dollars; and
- (h) A class 2 felony when the aggregate damage to the real or personal property is one million dollars or more.

Source: **L. 71:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-501. **L. 77:** entire section amended, p. 963, § 25, effective July 1. **L. 81:** entire section amended, p. 975, § 12, effective July 1. **L. 84:** entire section amended, p. 537, § 9, effective July 1, 1985. **L. 92:** entire section amended, p. 435, § 5, effective April 10. **L. 98:** entire section amended, p. 1438, § 14, effective July 1; entire section amended, p. 795, § 5, effective July 1. **L. 99:** entire section amended, p. 391, § 1, effective July 1. **L. 2002:** (1) amended, p. 1581, § 7, effective July 1. **L. 2003:** (2) amended, p. 1904, § 3, effective July 1; (3) added, p. 1845, § 2, effective July 1. **L. 2007:** (1) amended, p. 1693, § 7, effective July 1. **L. 2009:** (2) and (3) repealed, (HB 09-1266), ch. 347, p. 1814, § 1, effective August 5. **L. 2014:** (1) amended and (4) added, (HB 14-1266), ch. 155, p. 534, § 1, effective August 6. **L. 2021:** (4)(a), (4)(b), (4)(c), and (4)(d) amended, (SB 21-271), ch. 462, p. 3178, § 210, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2007 act amending subsection (1), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, "Highlights of Law and Procedure", see 28 Rocky Mt. L. the 1955 Legislative Session — Criminal Rev. 69 (1955). For article, "One Year

Review of Criminal Law and Procedure", see 39 Dicta 81 (1962).

Annotator's note. Since § 18-4-501 is similar to former §§ 49-18-1 and 40-18-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is criminal, and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime, independent of any evil purpose or intention. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913); *Koch v. People*, 71 Colo. 119, 204 P. 332 (1922); *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Civil prosecution for same acts prohibited by this section has no part in a prosecution under this section. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913).

There must exist criminal intention. In a prosecution under this section for injury occasioned to a bridge, there can be no conviction, unless a criminal intention on the part of the accused appears. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913); *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Criminal intent need not be expressly proved in criminal mischief cases, but may be implied or inferred from the surrounding facts and circumstances or from the relation existing between the defendant and the owner of the property injured or destroyed. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

It must be the direct and not incidental object of an act. Neither the mere concealment of the crime, the omitting of the performance of a statutory duty, nor the mere intentional doing of an act prohibited by statute, constitutes criminal mischief, although it may damage the property of another. A conspiracy with a fraudulent or malicious intent wrongfully to injure the property of another is punishable. The mischief must be the direct object of the act, and not incidental to some other lawful or unlawful act, or must be the natural consequence of the act. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Abandonment is no defense to completed crime of criminal mischief. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

The damage element in criminal mischief relates to economic loss caused by the knowing infliction of damage to the real or personal property of another. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Value is an essential element of felony criminal mischief. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Theft distinguished. The gravamen of criminal mischief is the knowing causation of damage to another's property with resulting economic loss to the owner or possessor of the property. The crime of theft, in contrast, is a crime of misappropriation or wrongful taking with no added element of damage or destruction to the property taken. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Value is relevant to the damage element because an offender cannot cause an economic loss that surpasses the actual value of the property damaged. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Actual value will generally be determined by market value, that is, the price a willing buyer would pay for the object in the open market. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

Unless there is no market for the item. Where, however, there is no market for the particular item, then such factors as the original purchase price, replacement cost, the general use and purpose of the article, and salvage value may be considered as some evidence of actual value. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Criminal mischief involving damage to another's building or occupied structure is included in first degree arson involving burning the same building or occupied structure because first degree arson, by its very nature, occurs in a single criminal episode. *People v. Welborne*, 2018 COA 127, 457 P.3d 71.

The pulling up of one or more posts of a fence in process of erection warrants a conviction under this section. *Olson v. People*, 56 Colo. 199, 138 P. 21 (1914).

This section does not apply to the pulling down of a fence by defendant, erected across land claimed by him and in his possession without his consent. *Koch v. People*, 71 Colo. 119, 204 P. 332 (1922).

Police officer's undisputed testimony of estimated damage is admissible at a preliminary hearing. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

Evidence held sufficient to sustain a conviction. *People v. O'Donnell*, 184 Colo. 434, 521 P.2d 771 (1974).

Evidence held insufficient to sustain a conviction. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

For instructions on previously required element of malice, see *People v. Woods*, 179 Colo. 441, 501 P.2d 117 (1972).

Instruction on intentional conduct not plain error. An instruction that the culpable mental state for criminal mischief is intentional conduct does not constitute plain error as intentional conduct is a higher degree of culpability than the knowing conduct required by this section, and, therefore, the erroneous instruction actually benefits the defendant. *People v. Founds*, 631 P.2d 1166 (Colo. App. 1981).

Self-defense instruction inappropriate for charge of criminal mischief where case involved unreasonable or excessive force by police during an arrest. Although

self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances, such instruction was not appropriate as to charge of criminal mischief arising from events after defendant was taken into custody. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

But defendant is entitled to a jury instruction on self-defense as an affirmative defense when defendant caused property damage in order to distract person grasping defendant. A reasonable jury could have concluded that defendant knowingly kicked her ex-boyfriend's car door to defend herself by distracting him and by giving herself

leverage to pull away from his grasp. *People v. Coahran*, 2019 COA 6, 436 P.3d 617.

A violation of a local ordinance that does not necessarily violate subsection (1) does not qualify as a countable misdemeanor or a petty offense under the federal sentencing guidelines. *United States v. Abeyta*, 877 F.3d 935 (10th Cir. 2017).

Applied in *Corder v. People ex rel. Smiley*, 87 Colo. 251, 287 P. 85 (1930); *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir. 1969); *People v. Griffith*, 197 Colo. 544, 595 P.2d 231 (1979); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *People v. Holloway*, 649 P.2d 318 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982).

18-4-502. First degree criminal trespass.

(1) A person commits the crime of first degree criminal trespass if such person:

- (a) Knowingly and unlawfully enters or remains in a dwelling of another; or
- (b) Enters any motor vehicle with intent to commit a crime therein.

(2) (a) First degree criminal trespass committed pursuant to subsection (1)(a) of this section is a class 1 misdemeanor, but it is a class 6 felony if the dwelling is inhabited or occupied.

(b) First degree criminal trespass committed pursuant to subsection (1)(b) of this section is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-502. **L. 77:** Entire section amended, p. 963, § 26, effective July 1. **L. 92:** Entire section amended, p. 404, § 16, effective June 3. **L. 93:** Entire section amended, p. 1732, § 17, effective July 1. **L. 98:** Entire section amended, p. 1443, § 31, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3178, § 211, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-4-502 is similar to former § 40-3-8 C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

For the treatment of breaking and entering under previous statute, see Howard v. People, 173 Colo. 209, 477 P.2d 378 (1970); Garcia v. People, 174 Colo. 372, 483 P.2d 1347 (1971); People v. Major, 179 Colo. 204, 499 P.2d 1200 (1972).

Under previous statute, entering motor vehicle included box part of pickup. People v. Romero, 179 Colo. 159, 499 P.2d 604 (1972).

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third degree is that the prosecution must prove the additional element that the property which was unlawfully entered is a dwelling for first degree trespass. People v. Marshall, 196 Colo. 381, 586 P.2d 41 (1978).

"Dwelling" encompasses the entire residential structure, including an attached garage. People v. Hanna, 981 P.2d 627 (Colo. App. 1998).

That the dwelling is "of another" is an essential element of first degree criminal trespass. Pattern jury instruction was incorrect because it omitted that element. People v. Peoples, 8 P.3d 577 (Colo. App. 2000).

"With intent to commit a crime therein" is only an element to first degree criminal trespass of a motor vehicle. It does not apply to first degree criminal trespass of a dwelling. People v. Rodriguez, 43 P.3d 641 (Colo. App. 2001).

A person enters "unlawfully" for purposes of first degree criminal trespass if the person secures permission to enter a dwelling by means of ruse, trickery, or deception. People v. Hill, 2025 COA 12, __ P.3d __.

Criminal trespass charge is defective if the count failed to identify an ulterior crime. People v. Williams, 961 P.2d 533 (Colo. App. 1997), aff'd, 984 P.2d 56 (Colo. 1999).

Criminal trespass charge is defective in form but not in substance if the count fails to identify an ulterior crime. People v. Williams, 984 P.2d 56 (Colo. 1999).

This section is not divisible as to the ulterior offense. Lujan Jimenez v. Sessions, 893 F.3d 704 (10th Cir. 2018) (overruling United States v. Venzor-Granillo, 668 F.3d 1224 (10th Cir. 2012)).

Even the absence of a restraining order, an estranged spouse is not privileged or licensed to enter the separate residence of the other spouse so as to create a defense to a charge of first degree criminal trespass. People v. Johnson, 906 P.2d 122 (Colo. 1995).

First degree trespass of motor vehicle.

First degree criminal trespass embraces situations where a person knowingly and unlawfully enters a motor vehicle with the intent to steal something of value. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

Unlawful entry into semitrailer included in offense. The general assembly intended to make the crime of first degree criminal trespass encompass unlawful entry into a semitrailer for the purpose of theft. *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977).

The general assembly intended to include tractor-trailer units as "motor vehicles" for the purpose of criminal trespass. *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977).

By entering the open portion of a pickup truck, one "enters [a] motor vehicle" as that phrase is used in this section. *People v. Banuelos*, 40 Colo. App. 267, 577 P.2d 305 (1977).

It was reversible error for the prosecution to tell the jury that in order to be guilty of first degree criminal trespass of a motor vehicle, the defendant could form unlawful intent at any time, because the prosecutor's argument improperly permitted the jury to adopt a version of the law pursuant to which it could find defendant guilty, regardless of when he formed the intent to steal property from the van. *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999).

Entry into motor vehicle not required to be "knowing and unlawful", so no error

in trial court's refusal to instruct the jury that defendant's entry into a van must have been "unlawful". *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999).

"Entry" into a motor vehicle requires an intrusion into the protected area of the motor vehicle. Entry into the door jamb portion of the car for the purpose of opening the car door without a key does not cross the threshold into the protected premises and is not sufficient to constitute an "entry" for purposes of the statute. *People v. Rhodus*, 2012 COA 127, 303 P.3d 117.

Conviction of being accessory to first degree criminal trespass requires a showing that the accused knew that the principal had committed an unlawful trespass in acquiring the stolen property. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

First degree criminal trespass is a lesser included offense of second degree burglary. An offense is a lesser included offense if at least one of the ways to commit the greater offense necessarily establishes all the elements of the lesser offense. *Whiteaker v. People*, 2024 CO 25, 547 P.3d 1122.

First degree criminal trespass is always a lesser included offense of second degree burglary because one of the ways to commit second degree burglary satisfies all the elements of first degree criminal trespass. *Whiteaker v. People*, 2024 CO 25, 547 P.3d 1122.

Both first degree criminal trespass and second degree burglary are committed by knowingly and unlawfully entering a

dwelling; second degree burglary differs only because it requires the intent to commit a crime upon entry. *People v. Snelling*, 2022 COA 116M, 523 P.3d 477 (concluding that *People v. Garcia*, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997), annotated below, has been implicitly overruled).

First degree criminal trespass is not a lesser included offense of second degree burglary. *People v. Garcia*, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997), recognized in *Whiteaker v. People*, 2024 CO 25, 547 P.3d 1122, as implicitly overruled in *People v. Snelling*, 2022 COA 116M, 523 P.3d 477, annotated above, and as abrogated by *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

First degree criminal trespass is not a lesser included offense of first degree burglary. However, it is a lesser non-included offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997). But see *People v. Gillis*, 2020 COA 68, 471 P.3d 1197, annotated below.

Attempted first degree criminal trespass may be a lesser included offense to attempted second degree burglary. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990).

First degree criminal trespass is a lesser included offense of first degree burglary. *People v. Gillis*, 2020 COA 68, 471 P.3d

1197; *People v. Miller*, 2024 COA 66, 556 P.3d 1262. But see *People v. Satre*, 950 P.2d 667 (Colo. App. 1997), annotated above.

To commit first degree burglary, a person must, among other things, knowingly enter unlawfully, or remain unlawfully in a building or occupied structure. Thus, proving those elements proves first degree criminal trespass. It follows then that first degree criminal trespass is a lesser included offense of first degree burglary. *People v. Miller*, 2024 COA 66, 556 P.3d 1262.

Third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. While unlawful entry upon the premises is a necessary element of the completed offense of third degree criminal trespass, it is not a necessary element of attempted first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Evidence sufficient for a finding of intent under this section. *People v. Sorber*, 179 Colo. 434, 501 P.2d 121 (1972).

A conviction for first degree criminal trespass is not a crime involving moral turpitude. *Lujan Jimenez v. Sessions*, 893 F.3d 704 (10th Cir. 2018).

Conviction for residential criminal trespass is a crime of violence and thus an aggravated felony qualifying defendant for an increased sentence under the United States sentencing guidelines. United States

v. Venegas-Ornelas, 348 F.3d 1273 (10th Cir. 2003).

Although first degree criminal trespass may not be a per se grave or serious offense for proportionality review purposes, the circumstances of a particular case can make the conviction a grave and serious offense. The harm caused to the victim in this case made the conviction grave and serious. *People v. Green*, 2012 COA 68M, 296 P.3d 260.

District court did not err in imposing sentencing enhancement under the sentencing guidelines. This section, under which defendant was sentenced, is ambiguous because it reaches a broad range of conduct, some of which merits the enhancement and some of which does not. The charging document and plea agreement underlying defendant's prior conviction reveal, however, that defendant necessarily admitted all the elements of the generic offense of attempt to commit theft. Therefore, the district court did not err in

imposing the sentence enhancement under the United States sentencing guidelines. *United States v. Venzor-Granillo*, 668 F.3d 1224 (10th Cir. 2012), overruled in part in *Lujan Jimenez v. Sessions*, 893 F.3d 704 (10th Cir. 2018).

Plain language of statute means that a defendant entering a motor vehicle with the intent to commit any crime inside the motor vehicle commits criminal trespass. *People v. Wentling*, 2015 COA 172, 409 P.3d 411.

Applied in *People in Interest of D.G.P.*, 194 Colo. 238, 570 P.2d 1293 (1977); *People v. Newman*, 195 Colo. 367, 578 P.2d 1051 (1978); *People v. Huston*, 197 Colo. 125, 589 P.2d 1367 (1979); *People v. Ortega*, 198 Colo. 179, 597 P.2d 1034 (1979); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *Bollier v. People*, 635 P.2d 543 (Colo. 1981); *People v. Schreyer*, 640 P.2d 1147 (Colo. 1982); *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-4-503. Second degree criminal trespass.

(1) A person commits the crime of second degree criminal trespass if such person:

(a) Unlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced; or

(b) Knowingly and unlawfully enters or remains in or upon the common areas of a hotel, motel, condominium, or apartment building; or

(c) Knowingly and unlawfully enters or remains in a motor vehicle of another.

(2) (a) Second degree criminal trespass in violation of subsection (1)(a) or (1)(b) of this section is a petty offense, but it is a class 5 felony if the person trespasses on premises so classified as agricultural land with the intent to commit a felony thereon.

(b) Second degree criminal trespass in violation of subsection (1)(c) of this section is a class 2 misdemeanor.

(3) Repealed.

Source: **L. 71:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-503. **L. 81:** Entire section amended, p. 990, § 1, effective June 4. **L. 83:** Entire section amended, p. 666, § 8, effective July 1. **L. 84:** (2)(a) amended, p. 1119, § 14, effective June 7. **L. 93:** (1) amended, p. 1732, § 18, effective July 1. **L. 94:** (1) amended, p. 1718, § 11, effective July 1. **L. 2002:** (1) amended, p. 1582, § 11, effective July 1. **L. 2003:** (3) added, p. 1846, § 4, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3178, § 212, effective March 1, 2022; (3)(b) added on revision, (HB 21-1314), ch. 460, pp. 3099, 3104, §§ 10, 22. **L. 2023:** (2)(a) amended, (HB 23-1293), ch. 298, p. 1785, § 14, effective October 1.

Editor's note: Subsection (3)(b) provided for the repeal of subsection (3), effective January 1, 2022. (See L. 2021, pp. 3099, 3104.)

ANNOTATION

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third degree is that the prosecution must prove the additional element that the property which was unlawfully entered is a dwelling for first degree trespass. *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978).

Second degree criminal trespass is a lesser included offense of second degree burglary (§18-4-203). Second degree criminal trespass requires the defendant to unlawfully enter or remain on the premises

of another that are enclosed in a manner designed to exclude intruders. By definition, if a building or structure exists, entry of which is required for second degree burglary, the building or structure is designed to exclude intruders. Thus, all of the elements of second degree criminal trespass are included in the offense of second degree burglary. *People v. MacBlane*, 952 P.2d 824 (Colo. App. 1997).

Applied in *People in Interest of D.G.P.*, 194 Colo. 238, 570 P.2d 1293 (1977); *People v. Smith*, 638 P.2d 1 (Colo. 1981).

18-4-504. Third degree criminal trespass.

(1) A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another.

(2) Third degree criminal trespass is a petty offense, but:

(a) Repealed.

(b) It is a class 5 felony if the person trespasses on premises classified as agricultural land with the intent to commit a felony thereon; except that it is a class 6 felony if the agricultural land did not have a fence securing the perimeter.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-504. L. 83: Entire section amended, p. 666, § 9, effective July 1. L. 84: (2)(a) amended, p. 1119, § 15, effective June 7. L. 89: (2)(b) amended, p. 834, § 48, effective July 1. L. 93: (1) amended, p. 1732, § 19, effective July 1. L. 2021: IP(2) amended, (SB 21-271), ch. 462, p. 3179, § 213, effective March 1, 2022; (2)(a)(II) added by revision, (SB 21-271), ch. 462, pp. 3179, 3331, §§ 213, 803. L. 2023: (2)(b) amended, (HB 23-1293), ch. 298, p. 1785, § 15, effective October 1.

Editor's note: Subsection (2)(a)(II) provided for the repeal of subsection (2)(a), effective March 1, 2022. (See L. 2021, pp. 3179, 3331.)

ANNOTATION

Law reviews. For comment, "People v. Emmert: A Step Backward for Recreational Water Use in Colorado", see 52 U. Colo. L. Rev. 247 (1981). For note, "The Right to Float: The Need for the Colorado Legislature to Clarify River Access Rights", see 83 U. Colo. L. Rev. 845 (2012).

Public has no right to use of water overlying private lands for recreational purposes without the consent of the owner. People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979).

"Breaking the close" is trespass. Whoever "breaks the close" — intrudes upon the space above the surface of the land — without the permission of the owner, whether it be for fishing or for other recreational purposes, such as floating, commits a trespass. People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979).

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third degree is that the prosecution must prove the additional element that the property which was

unlawfully entered is a dwelling for first degree trespass. *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978).

But third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

Officers who enter under a warrant and rightfully seize certain property but

wrongfully seize other property are liable as trespassers **ab initio** as to the property wrongfully seized. *Walker v. City of Denver*, 720 P.2d 619 (Colo. App. 1986).

Applied in *People v. Huston*, 197 Colo. 125, 589 P.2d 1367 (1979); *People v. Hight*, 198 Colo. 299, 599 P.2d 885 (1979).

18-4-504.5. Definition of premises.

As used in sections 18-4-503 and 18-4-504, "premises" means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

Source: L. 77: Entire section added, p. 977, § 1, effective June 10.

ANNOTATION

Law reviews. For comment, "*People v. Emmert: A Step Backward for Recreational Water Use in Colorado*", see 52 U. Colo. L. Rev. 247 (1981). For note, "*The Right to Float: The Need for the Colorado*

Legislature to Clarify River Access Rights", see 83 U. Colo. L. Rev. 845 (2012).

Applied in *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979); *Bollier v. People*, 635 P.2d 543 (Colo. 1981).

18-4-505. First degree criminal tampering.

Except as provided in sections 18-4-506.3 and 18-4-506.5, a person commits the crime of first degree criminal tampering if, with intent to cause interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, the person tampers with property of a utility or institution. First degree criminal tampering is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-505. L. 80: Entire section amended, p. 534, § 2, effective July 1. L. 89: Entire section amended, p. 905, § 2, effective July 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3179, § 214, effective March 1, 2022.

18-4-506. Second degree criminal tampering.

Except as provided in sections 18-4-506.3 and 18-4-506.5, a person commits the crime of second degree criminal tampering if he tampers with property of another with intent to cause injury, inconvenience, or annoyance to that person or to another or if he knowingly makes an unauthorized connection with property of a utility. Second degree criminal tampering is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-506. L. 77: Entire section amended, p. 963, § 27, effective July 1. L. 80: Entire section amended, p. 533, § 1, effective January 29; entire section amended, p. 535, § 3, effective July 1. L. 89: Entire section amended, p. 905, § 3, effective July 1.

ANNOTATION

This section fairly describes prohibited conduct in terms sufficiently understandable so that persons who wish to comply with it may do so; therefore, it is not constitutionally void for vagueness. People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978).

Words "unauthorized connections" are intended to reach the situation in which a

person connects to the property of a utility an apparatus which procures the services of the utility without cost. People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978).

Applied in People v. Shearer, 650 P.2d 1293 (Colo. App. 1982); Nowakowski v. District Court, 664 P.2d 709 (Colo. 1983).

18-4-506.3. Tampering with equipment associated with oil or gas gathering operations - penalty.

(1) Any person who in any manner knowingly destroys, breaks, removes, or otherwise tampers with or attempts to destroy, break, remove, or otherwise tamper with any equipment associated with oil or gas gathering operations commits a class 2 misdemeanor.

(2) Any person who in any manner, without the consent of the owner or operator, knowingly alters, obstructs, interrupts, or interferes with or attempts to alter, obstruct, interrupt, or interfere

with the action of any equipment used or associated with oil or gas gathering operations commits a class 2 misdemeanor.

Source: L. 89: Entire section added, p. 905, § 1, effective July 1.

18-4-506.5. Tampering with a utility meter - penalty.

(1) Any person who connects any pipe, tube, stopcock, wire, cord, socket, motor, or other instrument or contrivance with any main, service pipe, or other medium conducting or supplying gas, water, or electricity to any building without the knowledge and consent of the person supplying such gas, water, or electricity commits a class 2 misdemeanor.

(2) Any person who in any manner alters, obstructs, or interferes with the action of any meter provided for measuring or registering the quantity of gas, water, or electricity passing through said meter without the knowledge and consent of the person owning said meter commits a class 2 misdemeanor.

(3) Nothing in this section shall be construed to apply to any licensed electrical or plumbing contractor while performing usual and ordinary services in accordance with recognized customs and standards.

Source: L. 80: Entire section added, p. 534, § 1, effective July 1.

18-4-507. Defacing or destruction of written instruments.

Every person who defaces or destroys any written instrument evidencing a property right, whether vested or contingent, with the intent to defraud commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-507. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3179, § 215, effective March 1, 2022.

18-4-508. Defacing, destroying, or removing landmarks, monuments, or accessories.

(1) Any person who knowingly cuts, fells, alters, or removes any certain boundary tree knowing such is a boundary tree, monument, or other allowed landmark, to the damage of any person, or any person who intentionally defaces, removes, pulls down, injures, or destroys any

location stake, side post, corner post, landmark, or monument, or any other legal land boundary monument in this state, designating or intending to designate the location, boundary, or name of any mining claim, lode, or vein of mineral, or the name of the discoverer or date of discovery thereof, commits a class 2 misdemeanor.

(2) Any person who knowingly removes or knowingly causes to be removed any public land survey monument, as defined by section 38-53-103 (18), C.R.S., or control corner, as defined in section 38-53-103 (6), C.R.S., or a restoration of any such monument or who knowingly removes or knowingly causes to be removed any bearing tree knowing such is a bearing tree or other accessory, as defined by section 38-53-103 (1), C.R.S., even if said person has title to the land on which said monument or accessory is located, commits a class 2 misdemeanor unless, prior to such removal, said person has caused a Colorado professional land surveyor to establish at least two witness corners or reference marks for each such monument or accessory removed and has filed or caused to be filed a monument record pursuant to article 53 of title 38, C.R.S.

Source: **L. 71:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-508. **L. 77:** Entire section amended, p. 963, § 28, effective July 1. **L. 79:** Entire section amended, p. 478, § 4, effective July 1. **L. 84:** (2) amended, p. 1119, § 16, effective June 7. **L. 94:** (2) amended, p. 1507, § 37, effective July 1.

Cross references: For the definition of professional land surveyor, see § 12-120-302 (6).

18-4-509. Defacing a cave - definitions.

(1) (a) and (b) Repealed.

(c) (I) Any person who, with regard to a cave that is public property or the property of another, knowingly performs any of the following acts without the consent of the owner commits the crime of defacing property:

(A) Breaking or damaging any lock, fastening, door, or structure designed to enclose or protect any such cave;

(B) Defacing, damaging, or breaking from any part of such cave any cave resource; or

(C) Removing from such cave any cave resource.

(II) For purposes of this section:

(A) "Cave" means any naturally occurring void, cavity, recess, lava tube, or system of interconnected passages that occurs beneath the surface of the earth or within a cliff or ledge, including any cave resource therein, but not including any mine, tunnel, aqueduct, or other

artificial excavation, and that is large enough to permit an individual to enter, regardless of whether the entrance is naturally formed or has been artificially created or enlarged. "Cave" includes any natural pit, sinkhole, or other feature that is an extension of the entrance.

(B) "Cave resource" includes any material or substance occurring naturally in caves, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens, and speleothems.

(B.5) "Juvenile" has the same meaning as set forth in section 19-2.5-102.

(C) "Speleogen" means relief features on the walls, ceiling, or floor of any cave that are part of the surrounding rock, including, but not limited to, anastomoses, scallops, meander niches, petromorphs, and rock pendants in solution caves and similar features unique to volcanic caves.

(D) "Speleothem" means any natural mineral formation or deposit occurring in a cave, including, but not limited to, any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.

(2) (a) (I) Defacing a cave is a class 2 misdemeanor.

(II) In sentencing a person who violates this section, the court has discretion to impose alternatives in sentencing as described in part 1 of article 1.3 of this title 18, including but not limited to restorative justice practices, as defined in section 18-1-901 (3)(o.5), or in the case of a juvenile offender, to impose restorative justice, as defined in section 19-2.5-102.

(III) Repealed.

(IV) Fifty percent of the fines collected pursuant to this subsection (2)(a) shall be credited to the highway users tax fund, created in section 43-4-201, and allocated and expended as specified in section 43-4-205 (5.5)(a), and fifty percent of the fines collected pursuant to this subsection (2)(a) shall be credited to the juvenile diversion cash fund created in section 19-2.5-403; except that the fines collected pursuant to subsection (1)(c) of this section shall be credited to the Colorado travel and tourism promotion fund created in section 24-49.7-106.

(b) Any person convicted of defacing property pursuant to paragraph (b) or (c) of subsection (1) of this section shall be ordered by the court to personally make repairs to any property damaged, or properties similarly damaged, if possible. If the property cannot be repaired, the court shall order a person convicted of defacing property to replace or compensate the owner for the damaged property but may, in the case of a violation of paragraph (b) of subsection (1) of this section, limit such compensation to two thousand five hundred dollars.

(c) Repealed.

Source: **L. 71:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-509. **L. 89:** (2) R&RE, p. 875, § 10, effective June 5. **L. 93:** (2) amended, p. 1732, § 20, effective July 1. **L. 94:** (2) amended, p. 1463, § 2, effective July 1. **L. 97:** (2) amended, p. 1536, § 2, effective July 1. **L. 2003:** Entire section amended, p. 1903, § 1, effective July 1. **L. 2004:** (1)(c) added and (2) amended, pp. 69, 70, §§ 1, 2, effective August 4. **L. 2005:** (2)(a) amended, p. 140, § 3, effective April 5. **L. 2009:** (2)(c) repealed, (HB 09-1266), ch. 347, p. 1814, § 2, effective August 5. **L. 2011:** (1)(c)(II)(B.5) added and (2)(a) amended, (SB 11-256), ch. 254, pp. 1101, 1099, §§ 3, 1, effective August 10. **L. 2021:** (1)(c)(II)(B.5), (2)(a)(II), and (2)(a)(IV) amended, (SB 21-059), ch. 136, p. 721, § 48, effective October 1; (2)(a)(I) amended, (SB 21-271), ch. 462, p. 3179, § 216, effective March 1, 2022; (1)(a)(II), (1)(b)(II), and (2)(a)(III)(B) added by revision, (SB 21-271), ch. 462, pp. 3179, 3331, §§ 216, 803.

Editor's note: Subsections (1)(a)(II), (1)(b)(II), and (2)(a)(III)(B) provided for the repeal of subsections (1)(a), (1)(b), and (2)(a)(III), respectively, effective March 1, 2022. (See L. 2021, pp. 3179, 3331.)

ANNOTATION

Evidence held insufficient for conspiracy to destroy property. Bates v. People, 179 Colo. 81, 498 P.2d 1136 (1972) (decided under former § 40-18-1, C.R.S. 1963).

A violation of a local ordinance that does not necessarily violate subsection

(1)(b) does not qualify as a countable misdemeanor or a petty offense under the federal sentencing guidelines. United States v. Abeyta, 877 F.3d 935 (10th Cir. 2017).

Applied in People v. Shearer, 650 P.2d 1293 (Colo. App. 1982).

18-4-510. Defacing posted notice.

Any person who knowingly mars, destroys, or removes any posted notice authorized by law commits a civil infraction.

Source: **L. 71:** R&RE, p. 432, § 1. **C.R.S. 1963:** § 40-4-510. **L. 77:** Entire section amended, p. 964, § 29, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3180, § 217, effective March 1, 2022.

Cross references: For penalty for willfully defacing or destroying notices, see § 30-15-202.

18-4-511. Littering of public or private property - repeal.

(1) Any person who deposits, throws, or leaves any litter on any public or private property or in any waters commits littering.

(2) It shall be an affirmative defense that:

(a) Such property is an area designated by law for the disposal of such material and the person is authorized by the proper public authority to so use the property; or

(b) The litter is placed in a receptacle or container installed on such property for that purpose; or

(c) Such person is the owner or tenant in lawful possession of such property, or he has first obtained written consent of the owner or tenant in lawful possession, or the act is done under the personal direction of said owner or tenant.

(3) (a) The term "litter" as used in this section means all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind, and description.

(b) The phrase "public or private property" as used in this section includes, but is not limited to, the right-of-way of any road or highway, any body of water or watercourse, including frozen areas or the shores or beaches thereof, any park, playground, or building, any refuge, conservation, or recreation area, and any residential, farm, or ranch properties or timberlands.

(4) (a) Except as otherwise provided in subsection (4)(b)(I) of this section and sections 33-15-108 (2) and 42-4-1406, littering is a civil infraction punishable, upon conviction, notwithstanding the provisions of section 18-1.3-503, by a mandatory fine of not less than twenty dollars nor more than five hundred dollars upon a first conviction, by a mandatory fine of not less than fifty dollars nor more than one thousand dollars upon a second conviction, and by a mandatory fine of not less than one hundred dollars nor more than one thousand dollars upon a third or subsequent conviction.

(b) (I) On and after January 1, 2020, the mandatory fines specified in subsection (4)(a) of this section are adjusted annually by the annual percentage change in the United States department of labor's bureau of labor statistics consumer price index for Denver-Aurora-Lakewood for all items paid by all urban consumers, or its applicable successor index. Notwithstanding any other provision of law, the clerk of the court shall transmit the amount of the fine attributable to the adjustment specified in this subsection (4)(b)(I) to the state treasurer,

who shall credit the money to the Colorado circular communities cash fund created in section 25-16.5-109 (4).

(II) This subsection (4)(b) is repealed, effective September 1, 2032.

(5) It is in the discretion of the court, upon the conviction of any person and the imposition of a fine under this section, to suspend any or all of the fine in excess of the mandatory minimum fine upon the condition that the convicted person gather and remove from specified public property or specified private property, with prior permission of the owner or tenant in lawful possession thereof, any litter found thereon, or upon the condition that the convicted person pick up litter at a time prescribed by and a place within the jurisdiction of the court for not less than eight hours upon a first conviction or for not less than sixteen hours upon a second or subsequent conviction.

(6) Whenever litter is thrown, deposited, dropped, or dumped from any motor vehicle in violation of this section, the operator of said motor vehicle is presumed to have caused or permitted the litter to be so thrown, deposited, dropped, or dumped therefrom.

(7) In addition to those law enforcement officers and agencies of this state and the political subdivisions thereof authorized to enforce this section, the officers of the Colorado state patrol and the district wildlife managers and other commissioned officers of the division of parks and wildlife are expressly authorized, empowered, and directed to enforce the provisions of this section.

(8) Any time a person is charged with committing littering, the peace officer shall issue a summons and complaint for the person's appearance in court. Notwithstanding section 16-2.3-102, a peace officer shall not issue a penalty assessment for littering.

Source: **L. 71:** R&RE, p. 432, § 1. **C.R.S. 1963:** § 40-4-511. **L. 73:** p. 537, § 1. **L. 77:** (4) amended, p. 1195, § 2, effective July 1. **L. 79:** (7) amended, p. 1212, § 2, effective June 21. **L. 81:** (4) amended, p. 2025, § 18, effective July 14. **L. 85:** (4) R&RE and (5) amended, p. 670, §§1, 2, effective July 1. **L. 2002, 3rd Ex. Sess.:** (4) amended, p. 53, § 3, effective July 18. **L. 2019:** (4) amended, (SB 19-192), ch. 362, p. 3353, § 3, effective August 2. **L. 2021:** (4)(a) amended, (SB 21-271), ch. 462, p. 3180, § 218, effective March 1, 2022. **L. 2022:** (8) added, (HB 22-1229), ch. 68, p. 345, § 25, effective March 1. **L. 2024:** (4)(b) amended, (HB 24-1449), ch. 192, p. 1129, § 3, effective July 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act adding subsection (8) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: For the power and duty of the executive director of the department of natural resources to establish programs to control litter in Colorado, see § 24-33-102 (5); for prohibitions against putting foreign matters on highways, see § 42-4-1406; for littering lands or waters under the control of the division of wildlife in the department of natural resources, see §§ 33-10-102 (10) and 33-15-108; for affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For note, "Water Pollution Control in Colorado", see 36 U. Colo. L. Rev. 413 (1964).

Annotator's note. Since § 18-4-511 is similar to former § R.S. 08, § 1817, relevant cases construing that provision have been included in the annotations to this section.

Littering is not a lesser included offense of throwing a missile at a vehicle. A throwing a missile offense is completed once a person knowingly projects a missile, regardless of where it lands. A littering offense is completed only if the object later lands on property. The two offenses occur sequentially and not simultaneously. *People v. Kern*, 2020 COA 96, 474 P.3d 197.

Purpose of section. This section plainly shows a design to protect from pollution the waters of creeks used as the feeders for reservoirs for public use, without any reference to whether such pollution in fact appreciably affects the waters when arrived at the reservoir. Nor does such construction render this act objectionable. The design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and

regulate the use of private property so as to protect the common right of all the citizens of the state. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Scope of police power. Former section prohibiting pollution of streams held within the police power of the state, and it is the duty of the courts to enforce it. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Health being the sine qua non of all personal enjoyment, it is not only the right but the duty of a state or of a municipality possessing the police power to pass such laws or ordinances as may be necessary for the preservation of the health of the people. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Section applies to municipalities. On the question as to whether municipalities have a right to pollute state public streams this section controls. There is nothing inherent in a municipality which gives it any greater right to so do than that which a natural person has. *Mack v. Craig*, 68 Colo. 337, 191 P. 101 (1920).

And it applies to hotel discharging waste in running stream. The manager of a

hotel or eating house who discharges into a running stream the waste from his premises, or other offensive matter, is within this

section, and liable to the penalty thereby imposed. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

18-4-512. Abandonment of a motor vehicle.

(1) Any person who abandons any motor vehicle upon a street, highway, right-of-way, or any other public property, or upon any private property without the express consent of the owner or person in lawful charge of that private property commits abandonment of a motor vehicle.

(2) To "abandon" means to leave a thing with the intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving.

(3) It is prima facie evidence of the necessary intent that:

- (a) The motor vehicle has been left for more than seven days unattended and unmoved; or
- (b) License plates or other identifying marks have been removed from the motor vehicle; or
- (c) The motor vehicle has been damaged or is deteriorated so extensively that it has value only for junk or salvage; or
- (d) The owner has been notified by a law enforcement agency to remove the motor vehicle, and it has not been removed within three days after notification.

(4) Abandonment of a motor vehicle is a petty offense.

Source: L. 71: R&RE, p. 432, § 1. **C.R.S. 1963:** § 40-4-512. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3180, § 219, effective March 1, 2022.

Cross references: For the towing and storage of abandoned and illegally parked motor vehicles, see part 18 of article 4 of title 42.

18-4-513. Criminal use of a noxious substance.

(1) Any person who deposits on the land or in the building or vehicle of another, without the other person's consent, any stink bomb or device, irritant, or offensive-smelling substance with the intent to interfere with another's use or enjoyment of the land, building, or vehicle commits a civil infraction.

(2) It shall be an affirmative defense that a peace officer in the performance of his duties reasonably used a noxious substance.

Source: L. 71: R&RE, p. 433, § 1. C.R.S. 1963: § 40-4-513. L. 73: p. 538, § 2. L. 2021: (1) amended, (SB 21-271), ch. 462, p. 3180, § 220, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-4-514. Use of photographs, video tapes, or films of property.

Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: L. 85: Entire section added, p. 577, § 4, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of robbery and theft, see §§ 18-4-305 and 18-4-415.

18-4-515. Entry to survey property - exception to criminal trespass.

(1) Effective July 1, 1992, no person shall be in violation of the trespass laws of this part 5 if the requirements of this section are met. The provisions of this section provide an exception to the trespass laws only and do not affect or supersede the provisions and requirements of articles 1 to 7 of title 38, C.R.S., concerning condemnation proceedings, notwithstanding any laws to the contrary.

(2) Any person who is licensed as a professional land surveyor pursuant to section 12-120-313, or who is under the direct supervision of such a person as an employee, agent, or representative, may enter public or private land to investigate and utilize boundary evidence and to perform boundary surveys if the notice requirement in this subsection (2) is met. The notice of the pending survey shall contain the identity of the party for whom the survey is being performed

and the purpose for which the survey will be performed, the employer of the surveyor, the identity of the surveyor, the dates the land will be entered, the time, location, and timetable for such entry, the estimated completion date, the estimated number of entries that will be required, and a statement requesting the landowner to provide the surveyor with the name of each person who occupies the land as a tenant or lessee, whether on a permanent or a temporary basis. Nothing in this subsection (2) shall be deemed to confer liability upon a landowner who fails or refuses to provide such requested statement. At least fourteen days before the desired date of entry, the professional land surveyor shall cause such notice to be given to the landowner by certified mail, return receipt requested, and by regular mail. Any landowner may waive the requirement that notice be given by certified mail, return receipt requested, and by regular mail. The waivers described in this subsection (2) may be given orally or in writing.

(3) If a landowner does not acknowledge receipt of the notice within fourteen days of such receipt, the professional land surveyor or other persons described in subsection (2) of this section shall have the right to enter the land pursuant to the specifications given in the notice. If a landowner acknowledges receipt of the notice within fourteen days of receipt, such landowner has the right to modify the time and other provisions of the surveyor's access, as long as such modifications do not unreasonably restrict completion of the survey.

(4) All persons described in subsection (2) of this section who enter land pursuant to and for a purpose described in this section shall carry upon their person at all times during entry and stay upon the land sufficient identification to identify themselves and their employer or principal, and shall present such identification upon request.

(5) Persons described in subsection (2) of this section shall be liable for actual damages caused during entry and stay upon a landowner's land. No professional land surveyor or person under such surveyor's direct supervision shall have a civil cause of action against a landowner or lessee for personal injury or property damage incurred while on the land for purposes consistent with those described in subsection (2) of this section, except when such damages and injury were willfully or deliberately caused by the landowner.

Source: L. 92: Entire section added, p. 429, § 1, effective April 29. **L. 2004:** (2) amended, p. 1310, § 53, effective May 28. **L. 2019:** (2) amended, (HB 19-1172), ch. 136, p. 1675, § 95, effective October 1.

ANNOTATION

Giving the word "affect" its plain and ordinary meaning, this section does not change, alter, or lessen the requirements

of articles 1 through 7 of title 38 in condemnation actions. San Miguel County

Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

Giving the word "supersede" its plain and ordinary meaning, this section does not void, replace, supplant, or make unnecessary any provisions or requirements of articles 1 through 7 of title 38 in condemnation actions. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

This section may not be used in place of applicable condemnation procedures. There is no basis to conclude, however, that it does not apply or may not be used in support of or in conjunction with a contemplated condemnation proceeding. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

A government entity's entry onto private property for survey purposes prior to initiating eminent domain proceedings does not constitute a

compensable taking. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

This section provides that a licensed surveyor may lawfully enter land to investigate boundary evidence, to utilize such evidence, and to perform boundary surveys. It does not state or imply that a surveyor must conduct the survey for the benefit of an existing legal interest in neighboring land or that the lawfulness of the entry is conditioned on the manner in which the surveyor will utilize the evidence obtained by the survey or on the purposes motivating the survey. It does not state or imply that the boundary evidence may only be utilized to describe the boundaries themselves and may not be utilized to create a derivative legal description related to the land. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

18-4-516. Criminal operation of a device in motion picture theater.

(1) A person who, while within a motion picture theater, knowingly operates an audiovisual recording function of a device for the purpose of recording a motion picture, while a motion picture is being exhibited, without the consent of the owner or lessee of the motion picture theater, commits the offense of criminal operation of a device in a motion picture theater.

(2) Criminal operation of a device in a motion picture theater is a civil infraction.

(3) If a person operates or appears to operate an audiovisual recording function for the purpose of recording a motion picture in a motion picture theater, the owner or lessee of a facility in which a motion picture is being exhibited, or the authorized agent or employee of the owner or lessee, or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question such person, in a reasonable manner for the purpose of ascertaining whether the person is guilty of criminal operation of a device in motion picture theater. Such questioning of a person by the owner or lessee of a motion picture

theater, or the authorized agent or employee of the owner or lessee, or peace or police officer does not render the owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, or peace or police officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

(4) This section does not prevent a lawfully authorized investigative, law enforcement, or intelligence-gathering employee or agent of the state or federal government, while operating within the scope of lawfully authorized investigative, protective, law enforcement, or intelligence-gathering activities, from operating an audiovisual recording function of a device in a motion picture theater.

(5) Nothing in this section prevents prosecution under any other provision of law providing for greater penalty.

(6) As used in this section:

(a) "Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology now known or hereafter developed.

(b) "Motion picture theater" means a movie theater, screening room, or other venue when used primarily for the exhibition of motion pictures.

Source: L. 2004: Entire section added, p. 922, § 1, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3180, § 221, effective March 1, 2022.

PART 6

THEFT OF SOUND RECORDINGS

18-4-601. Definitions.

As used in this part 6, unless the context otherwise requires:

(1) "Aggregate wholesale value" means the average wholesale value of lawfully manufactured and authorized sound or audio-visual recordings corresponding to the number of nonconforming recorded articles involved in the offense. Proof of the specific wholesale value of each nonconforming device shall not be required.

(1.3) "Article" means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, memory card, flash drive, hard drive, data storage device, or other medium now

existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates, in whole or in part, the original.

(1.5) "Copyright" means the ownership rights that accrue to an owner and relate solely to the common law copyright accruing to such owner. The term "copyright" does not include a federal copyright, which inures to the benefit of owners pursuant to Public Law 92-140, as amended by Public Law 93-573, which became effective February 15, 1972. For the purposes of this part 6, no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.

(1.7) "Manufacturer" means the person who actually makes a recording or causes a recording to be made. "Manufacturer" does not include a person who manufactures a medium upon which sounds or images can be recorded or stored, or who manufactures the cartridge or casing itself, unless such person actually makes the recording or causes the recording to be made.

(2) "Owner" means the person who owns the copyright on the original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded and from which the transferred recorded sounds are directly derived.

(3) "Person" means any individual, firm, partnership, corporation, or association.

Source: L. 76: Entire part added, p. 553, § 1, effective July 1. L. 2009: (1) amended and (1.3), (1.5), and (1.7) added, (SB 09-036), ch. 185, p. 809, § 1, effective August 5.

18-4-602. Unlawful transfer for sale.

(1) A person who knowingly and without the consent of the owner transfers any copyrighted sounds recorded on a phonograph record, video disc, wire, tape, film, or other article on which sounds are recorded with the intent to sell such article on which such sounds are so transferred or to cause the same to be sold for profit or to be used to promote the sale of any product commits unlawful transfer for sale.

(2) Unlawful transfer for sale is a class 6 felony.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1. L. 77: (1) amended, p. 978, § 1, effective May 26. L. 89: (2) amended, p. 834, § 49, effective July 1.

18-4-603. Unlawful trafficking in unlawfully transferred articles.

(1) A person who knowingly, or who reasonably should have such knowledge, advertises, offers for sale or resale, sells or resells, distributes, or possesses for any of the purposes provided in this subsection (1) any article that has been transferred without consent of the owner as provided in section 18-4-602 commits unlawful trafficking in unlawfully transferred articles.

(2) Each act of unlawful trafficking in unlawfully transferred articles is a petty offense.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3180, § 222, effective March 1, 2022.

18-4-604. Dealing in unlawfully packaged recorded articles.

(1) A person who knowingly and for commercial advantage or private financial gain advertises, offers for sale or resale, sells or resells, transports, or possesses for any of the purposes provided in this subsection (1) any article on which sounds are recorded, the cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual name and address of the manufacturer, commits dealing in unlawfully packaged recorded articles.

(2) Dealing in unlawfully packaged recorded articles is a petty offense. If the offense involves more than one hundred unlawfully packaged recorded articles or the offense is a second or subsequent offense, the court shall assess a fine of at least one thousand dollars.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1. L. 2005: Entire section amended, p. 202, § 1, effective July 1. L. 2009: Entire section amended, (SB 09-036), ch. 185, p. 810, § 2, effective August 5. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3181, § 223, effective March 1, 2022.

18-4-604.3. Unlawful recording of a live performance.

(1) A person who, without the consent of the owner of the right to record a live performance, records or causes to be recorded the live performance on a phonograph record, compact disc, video disc, wire, tape, film, or other article on which a live performance is recorded with the intent to sell the article on which the live performance is recorded or to cause the same to be sold for profit or to be used to promote the sale of any product commits unlawful recording of a live performance.

(2) In the absence of a written agreement or law to the contrary, the performer or performers of a live performance are presumed to own the rights to record the live performance.

(3) For purposes of this section, a person who is authorized to maintain custody and control of business records that reflect whether the owner of the live performance consented to having the live performance recorded is a competent witness in a proceeding regarding the issue of consent.

(4) Unlawful recording of a live performance is a petty offense.

(5) As used in this section, "live performance" means a recitation, rendering, or playing of a series of images, musical, spoken, or other sounds, or a combination of images and sounds, in an audible sequence.

Source: L. 2005: Entire section added, p. 202, § 2, effective July 1. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3181, § 224, effective March 1, 2022.

18-4-604.7. Trafficking in unlawfully recorded live performance.

(1) A person who knows or reasonably should know that an article has been recorded in violation of section 18-4-604.3 and advertises, offers for sale or resale, sells or resells, or distributes the article, or possesses the article for any of the said purposes, commits trafficking in an unlawfully recorded live performance.

(2) Each act of trafficking in an unlawfully recorded live performance is a class 2 misdemeanor.

Source: L. 2005: Entire section added, p. 202, § 2, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3181, § 225, effective March 1, 2022.

18-4-605. Applicability.

(1) This part 6 shall not apply to:

(a) Any broadcaster who, in connection with or as part of a radio, television, or cable broadcast transmission or for the purpose of archival preservation, transfers any copyrighted sounds recorded on a sound recording;

(b) Any person who transfers copyrighted sounds in the home for personal use and without compensation for such transfer.

(2) This part 6 shall neither enlarge nor diminish the rights of the respective parties in a civil litigation concerning the subject matter of this part 6.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1.

18-4-606. Confiscation and disposition of items.

(1) A law enforcement officer shall, upon discovery, confiscate all unlawfully labeled, transferred, or recorded articles possessed for the purposes of selling or distributing in violation of this part 6 and all equipment and components used or intended to be used to knowingly and unlawfully transfer, manufacture, or record articles for the purposes of selling or distributing in violation of this part 6.

(2) Notwithstanding any other provision of law, recorded articles and equipment and components that are confiscated pursuant to subsection (1) of this section are contraband and shall be delivered to the district attorney in the county in which the confiscation was made. Upon conviction of the person, the district attorney may request a court order for destruction of the recorded articles and a court order for distribution of the equipment and components. Upon conviction of the person and motion of the district attorney, the court shall order the recorded articles to be destroyed or otherwise disposed of if the court finds that the person claiming title to the recorded articles possessed the recorded articles for the purposes of selling or distributing in violation of this part 6. The court shall order the equipment and components distributed to a charitable or educational organization if the court finds that the person claiming title to the equipment possessed the equipment to record nonconforming articles for the purposes of selling or distributing in violation of this part 6.

Source: L. 2009: Entire section added, (SB 09-036), ch. 185, p. 810, § 3, effective August 5.

18-4-607. Restitution.

Notwithstanding any other provision of law, upon conviction of a violation of this part 6, the convicted person shall be ordered to make restitution to the owner or lawful producer of the master sound or audio-visual recording, or to the trade association representing the owner or lawful producer who suffered injury resulting from the crime. The order of restitution shall be based on the aggregate wholesale value of lawfully manufactured and authorized recordings corresponding to the number of nonconforming recorded articles involved in the offense unless a

greater value can be proven. The order of restitution shall also include investigative costs relating to the offense.

Source: L. 2009: Entire section added, (SB 09-036), ch. 185, p. 811, § 3, effective August 5.

PART 7

THEFT OF CABLE TELEVISION SERVICE

18-4-701. Theft of cable service - definitions.

(1) As used in this part 7, unless the context otherwise requires:

(a) "Cable operator" means any person who:

(I) Provides cable service over a cable system in which such person directly or through one or more affiliates owns a significant interest; or

(II) Controls or is responsible for the management and operation of such cable system through any arrangement.

(b) "Cable service" means:

(I) The one-way transmission to subscribers of a video programming service;

(II) Two-way interactive services delivered over a cable system;

(III) Subscriber interaction, if any, that is required for the selection or use of such video programming or interactive service.

(c) "Cable system" means a facility consisting of a set of closed transmission paths and associated signal operation, reception, and control equipment that is designed to provide cable service.

(2) A person commits theft of cable service if such person knowingly:

(a) Obtains cable service from a cable operator by trick, artifice, deception, use of an unauthorized device or decoder, or other means without authorization or with the intent to deprive such cable operator of lawful compensation for the services rendered;

(b) (I) Makes or maintains, without authority from or payment to a cable operator, a connection or connections, whether physical, electrical, mechanical, acoustical, or otherwise with any cable, wire, component, or other device used for the distribution of cable services.

(II) Notwithstanding subparagraph (I) of this paragraph (b), this paragraph (b) shall not include circumstances where a person has attached a wire or cable to extend service that the person has paid for or that has been authorized to an additional outlet, or where the cable operator has failed to disconnect a previously authorized cable service.

(c) Modifies, alters, or maintains a modification or alteration to a device installed or capable of being installed with the authorization of a cable operator, which modification or alteration is for the purpose of intercepting or receiving cable service carried by such cable operator without authority from or payment to such cable operator;

(d) Possesses without authority, with the intent to receive cable operator services without authorization from or payment to a cable operator, a device or printed circuit board designed in whole or in part to facilitate the following acts:

(I) To receive cable services offered for sale over a cable system; or

(II) To perform or facilitate the performance of any act set forth in paragraphs (a) to (c) of this subsection (2).

(e) Manufactures, imports into this state, distributes, sells, leases, or offers or advertises for sale or lease, with the intent to receive cable services or with the intent to promote the reception of cable services without payment or authorization from a cable operator, any device, printed circuit board, or plan or kit for a device or printed circuit board designed in whole or in part to facilitate the following acts:

(I) To receive any cable services offered for sale over a cable system; or

(II) To perform or facilitate the performance of any act set forth in paragraphs (a) to (c) of this subsection (2).

(f) Fails to return or surrender equipment used to receive cable service and provided by a cable operator, after such service has been terminated for any reason.

(3) This section does not apply to satellite dishes.

(4) Any person who violates this section commits a petty offense.

Source: **L. 84:** Entire part added, p. 544, § 1, effective July 1. **L. 98:** Entire section amended, p. 411, § 1, effective August 5. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3181, § 226, effective March 1, 2022.

18-4-702. Civil action - damages.

(1) (a) A licensed or duly permitted cable operator may bring a civil action for damages against any person who commits civil theft of cable service.

(b) Civil theft of cable service is the willful or intentional commission of any act described in section 18-4-701 (2).

(c) No plaintiff that files an action pursuant to this section for theft of cable services shall be required to plead damages with particularity as a condition precedent for maintaining such an action.

(d) There is a rebuttable presumption that a violation of section 18-4-701 (2)(a) has occurred if there exists in the actual possession of the person a device that permits the reception of unauthorized cable services for which no payment has been made to a cable operator and no legitimate purpose exists.

(e) There is a rebuttable presumption that a violation of section 18-4-701 (2)(b) has occurred if cable service to the person's business or residential property was disconnected by a cable operator, notification of such action by certified mail was provided to such person, and a connection of such service exists at such person's business or residential property after the date of the disconnection.

(f) There is a rebuttable presumption that a violation of section 18-4-701 (2)(c) has occurred if the cable operator, as a matter of standard procedure:

(I) Places written warning labels on its converters or decoders explaining that tampering with such devices is a violation of law and a converter or decoder is found to have been tampered with, altered, or modified so as to allow the reception or interception of cable services without authority from or payment to a cable operator; or

(II) Seals its converters or decoders with a label or mechanical device and the label or device has been removed or broken.

(g) There is a rebuttable presumption that a violation of section 18-4-701 (2)(d) has occurred if a person possesses ten or more devices or printed circuit boards. If such rebuttable presumption is not overcome, the court shall find that such person committed civil theft of cable service willfully and for purposes of commercial advantage and shall increase the damages award in accordance with paragraph (a) of subsection (3) of this section.

(h) There is a rebuttable presumption that a violation of section 18-4-701 (2)(e) has occurred if the person, while engaging in any of the prohibited acts, made apparent to the buyer that the product would enable the buyer to obtain cable service without payment to a cable operator. If such rebuttable presumption is not overcome, the court shall find that such person committed

civil theft of cable service willfully and for purposes of commercial advantage and shall increase the damages award in accordance with paragraph (a) of subsection (3) of this section.

(i) There is a rebuttable presumption that a violation of section 18-4-701 (2)(f) has occurred if a cable operator mailed by certified mail to the person, at the provided address, a written demand requesting the return of an operator-owned converter, decoder, or other device and the person failed to return said device or to make reasonable arrangements to do so within fifteen days after the date of such notice. Such reasonable arrangements may include requesting that the cable operator collect the equipment, subject to the cable operator's policies.

(2) In any civil action brought pursuant to this section, a cable operator shall be entitled, upon proof of civil theft of cable service, to recover the greater of the following amounts as damages:

(a) Four thousand dollars; or

(b) Three times the amount of any actual damages sustained.

(3) (a) Notwithstanding any provision of subsection (2) of this section to the contrary, a court may increase the award of damages in any civil action brought pursuant to this section by an amount of not more than fifty thousand dollars if such court finds that civil theft of cable service was committed willfully and for the purpose of commercial advantage.

(b) In any civil action described in paragraph (a) of this subsection (3), a cable operator need not prove that the final purchaser actually used the device, plan, kit, or printed circuit board without authorization from or payment to a cable operator.

(c) No attempt by a person to limit or shift legal liability in an action described in this subsection (3) by requiring purchasers to sign a disclaimer acknowledging their responsibility to report use of a device, plan, kit, or printed circuit board to a cable operator shall be effective, and any such disclaimer shall be void.

(d) (Deleted by amendment, L. 98, p. 830, § 57, effective August 5, 1998.)

(4) In any action for civil theft of cable service, the prevailing party shall be awarded reasonable attorney fees and direct costs incurred as a result of such theft, including, but not limited to, the costs of any investigation, disconnection or reconnection, service calls, employees, equipment, and expert witnesses and costs of the civil action.

(5) A cable operator may seek an injunction to enjoin or restrain a violation of this section and damages arising from such violation in the same action.

Source: L. 84: Entire part added, p. 545, § 1, effective July 1. **L. 98:** Entire section amended, p. 413, § 2, effective August 5; (1)(g), (1)(h), and (3)(d) amended, p. 830, § 57, effective August 5.

18-4-703. Severability.

If any provision of this part 7 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications of this part 7 which can be given effect without the invalid provision or application, and to this end the provisions of this part 7 are declared to be severable.

Source: L. 84: Entire part added, p. 545, § 1, effective July 1.

PART 8

THEFT OF PUBLIC TRANSPORTATION SERVICES

18-4-801 to 18-4-802. (Repealed)

Source: L. 2012: Entire part repealed, (SB 12-044), ch. 274, p. 1448, § 4, effective June 8.

Editor's note: This part 8 was added in 1998. For amendments to this part 8 prior to its repeal in 2012, consult the 2011 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

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PART 1

FORGERY, SIMULATION, IMPERSONATION, AND RELATED OFFENSES

18-5-101. Definitions.

As used in sections 18-5-101 to 18-5-110, unless the context otherwise requires:

(1) "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

(1.5) "Document-making implement" means any implement or impression, including, but not limited to, a template or a computerized template or form, specially designed or primarily used for making identification documents, false identification documents, or another document-making implement.

(2) To "falsely alter" a written instrument means to change a written instrument without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

(3) To "falsely complete" a written instrument means:

(a) To transform an incomplete written instrument into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or

(b) To transform an incomplete written instrument into a complete one by adding or inserting materially false information or adding or inserting a materially false statement. A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

(4) To "falsely make" a written instrument means to make or draw a written instrument, whether complete or incomplete, which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or the drawing thereof.

(5) "Forged instrument" means a written instrument which has been falsely made, completed, or altered.

(6) "Government" means the United States, any state, county, municipality, or other political unit, any department, agency, or subdivision of any of the foregoing, or any corporation or other entity established by law to carry out governmental functions.

(6.5) "Identification document" means a document made or issued by or under the authority of the United States government, a state, political subdivision of a state, a foreign government, political subdivision of a foreign government, an international governmental, or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

(7) "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

(7.5) "Produce" includes alter, authenticate, or assemble.

(8) "Utter" means to transfer, pass, or deliver, or attempt or cause to be transferred, passed, or delivered, to another person any written instrument, article, or thing.

(9) "Written instrument" means any paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, credit card, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, which is capable of being used to the advantage or disadvantage of some person.

Source: L. 71: R&RE, p. 433, § 1. C.R.S. 1963: § 40-5-101. L. 94: (3) amended, p. 1718, § 12, effective July 1. L. 2000: (1.5), (6.5), and (7.5) added, p. 646, § 2, effective July 1. L. 2005: (3)(b) amended, p. 1499, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (Oct. 2006).

Authentic, in legal parlance, means vested with all due formalities and legally attested. Downing v. Brown, 3 Colo. 571 (1877) (decided under former R.S. 08, § 69).

Where deletion of computer records was basis for forgery, computer disk was a "written instrument" and the deletion of records on the disk constituted a "false alteration". People v. Avila, 770 P.2d 1330 (Colo. App. 1988).

A person "falsely completes" an instrument when he or she adds or inserts

materially false information or a materially false statement into any instrument, genuine or non-genuine, thereby purporting to complete the instrument so as to render it

legally operative. *People v. Kovacs*, 2012 COA 111, 284 P.3d 186.

Applied in *People v. Gray*, 710 P.2d 1149 (Colo. App. 1985).

18-5-102. Forgery.

(1) A person commits forgery, if, with intent to defraud, the person falsely makes, completes, alters, or utters a written instrument that is or purports to be, or that is calculated to become or to represent if completed:

(a) Part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency; or

(b) Part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property; or

(c) A deed, will, codicil, contract, assignment, commercial instrument, promissory note, or other instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(d) A public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant; or

(e) A written instrument officially issued or created by a public office, public servant, or government agency; or

(f) Part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation; or

(g) Part of an issue of lottery tickets or shares designed for use in the lottery held pursuant to article 40 of title 44; or

(h) A document-making implement that may be used or is used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.

(2) Forgery is a class 5 felony.

(3) Uttering a forged document to a peace officer shall create a presumption that the person intended to defraud such peace officer.

Source: L. 71: R&RE, p. 434, § 1. C.R.S. 1963: § 40-5-102. L. 89: (2) amended, p. 834, § 50, effective July 1. L. 93: Entire section R&RE, p. 1988, § 16, effective July 1. L. 2000: (1)(h) added, p. 647, § 3, effective July 1. L. 2003: (3) added, p. 1888, § 2, effective May 22. L. 2018: (1)(g) amended, (HB 18-1027), ch. 31, p. 363, § 9, effective October 1. L. 2023: IP(1) and (1)(c) amended, (HB 23-1293), ch. 298, p. 1786, § 16, effective October 1.

ANNOTATION

Annotator's note. Since § 18-5-102 is similar to former § 40-6-1, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Because conduct prohibited by this section is distinguishable from conduct prohibited by § 8-81-101 (1)(a), charging a defendant under this section did not violate his or her right to equal protection of the laws. *People v. Clanton*, 2015 COA 8, 361 P.3d 1056.

The general assembly did not intend to preclude prosecution under this section where the conduct underlying the charge also arguably violates § 8-81-101 (1)(a). *People v. Clanton*, 2015 COA 8, 361 P.3d 1056.

The general assembly did not intend to preclude prosecution under this section where the conduct underlying the charge also violates the mail ballot offense statute, § 1-13-112. *People v. Curtis*, 2021 COA 103, 498 P.3d 677 (decided under law in effect prior to the 2021 amendment to § 1-13-112).

Reasonable distinctions can be drawn between crimes prohibited by credit card

and forgery statutes, and the existence of the specific statute regarding the misuse of credit cards does not preclude prosecution or conviction of appellant under the state's general forgery statute. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972).

Circumstances sufficient to establish prima facie case of forgery. *Duncan v. People*, 178 Colo. 314, 497 P.2d 1029 (1972).

To satisfy subsection (1)(c), a document must purport to have legal efficacy that affects some right or status, and fraudulent letter to the prosecutor's office recanting the initial statement of events and purporting to contain the victim's signature meets statutory requirements, since the prosecutor would likely rely on the letter in determining whether probable cause exists to move forward with the prosecution, which would affect defendant's legal status in the pending criminal matter. *People v. Cunefare*, 102 P.3d 302 (Colo. 2004).

"[F]iled or required by law to be filed or legally fileable in or with a public office or public servant" under subsection (1)(d) refers to those instruments actually delivered to a public office or public servant pursuant

to a legal mandate, such as documents that have a specific legal requirement of delivery to a public officer or with a public office for a specific purpose, like income taxes or license applications. *People v. Carian*, 2017 COA 106, 414 P.3d 34.

"Legally fileable" document may also include real property conveyancing documents and other documents relating to interests in real property that may be "legally fileable" even though they are not filed pursuant to a legal mandate. *People v. Carian*, 2017 COA 106, 414 P.3d 34.

Evidence of giving a forged resident alien card to a police officer was insufficient to support a charge of forgery with the intent to defraud the immigration and naturalization service. *People v. Miralda*, 981 P.2d 676 (Colo. App. 1999).

Requisite intent to commit forgery can exist in case where defendant used a false written instrument prepared by another. Prosecution is not obligated to prove defendant either mailed the false instrument or explicitly directed another to do so on defendant's behalf. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

Section 42-3-133 does not preclude prosecution under this section for altering and displaying a temporary license plate; therefore, this section is an appropriate statute to prosecute persons who alter

temporary license plates. *People v. Stansberry*, 83 P.3d 1188 (Colo. App. 2003).

A person "falsely completes" an instrument when he or she adds or inserts materially false information or a materially false statement into any instrument, genuine or non-genuine, thereby purporting to complete the instrument so as to render it legally operative. *People v. Kovacs*, 2012 COA 111, 284 P.3d 186.

Urinalysis test results were "instrument[s]" within the reach of subsection (1)(d) since those documents recorded and conveyed information to defendant's probation officer regarding the apparent results of his mandatory drug tests required as a condition of his probation. *People v. Carian*, 2017 COA 106, 414 P.3d 34.

Forged urinalysis test results are not admissible evidence for prosecution of probation revocation under subsection (1)(d). Because urinalysis test results were not filed, are not required by law to be filed, and are not legally fileable as provided in subsection (1)(d) as a probation requirement, the forged urinalysis test results evidence did not show that defendant engaged in alleged felony forgery. *People v. Carian*, 2017 COA 106, 414 P.3d 34.

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978).

18-5-103. Second degree forgery. (Repealed)

Source: L. 71: R&RE, p. 434, § 1. **C.R.S. 1963:** § 40-5-103. **L. 82:** (1)(d) amended and (1)(e) added, p. 385, § 3, effective April 30. **L. 89:** (2) amended, p. 834, § 51, effective July 1. **L. 93:** Entire section repealed, p. 1988, § 17, effective July 1.

18-5-104. Second degree forgery.

(1) A person commits second degree forgery if, with intent to defraud, such person falsely makes, completes, alters, or utters a written instrument of a kind not described in section 18-5-102 or 18-5-104.5.

(2) Second degree forgery is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-104. **L. 93:** Entire section amended, p. 1989, § 18, effective July 1. **L. 96:** (1) amended, p. 841, § 2, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3181, § 227, effective March 1, 2022.

ANNOTATION

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-104.5. Use of forged academic record.

(1) A person commits use of a forged academic record if, with intent to seek employment or with intent to seek admission to a public or private institution of higher education in this state or for the purpose of securing a scholarship or other form of financial assistance from the institution itself or from other public or private sources of financial assistance, such person falsely makes, completes, alters, or utters a written instrument which is or purports to be, or is calculated to become or to represent if completed, a bona fide academic record of an institution of secondary or higher education.

(2) For purposes of this section:

(a) "Academic record" means a transcript, diploma, grade report, or similar document of an institution of secondary or higher education.

(b) "Financial assistance" means financial assistance for educational purposes, including, but not limited to, loans, scholarships, grants, fellowships, assistantships, work-study programs, or other forms of financial aid.

(3) Use of a forged academic record is a class 2 misdemeanor.

Source: L. 96: Entire section added, p. 840, § 1, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3181, § 228, effective March 1, 2022.

18-5-105. Criminal possession of a forged instrument.

A person commits a class 6 felony when, with knowledge that it is forged and with intent to use to defraud, such person possesses any forged instrument of a kind described in section 18-5-102.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-105. **L. 89:** Entire section amended, p. 834, § 52, effective July 1. **L. 93:** Entire section amended, p. 1989, § 19, effective July 1.

ANNOTATION

Section requires guilty knowledge and intent to defraud. This crime requires not only possession of the forged or counterfeit instruments with knowledge that they were counterfeit, but also the intent to utter and pass the same with intent to defraud. *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972) (decided under former § 40-6-4, C.R.S. 1963).

Mere possession of a forged instrument is insufficient to support a conviction under this section. Merely handing a forged resident alien card to a police officer upon demand was insufficient to establish an intent to defraud. *People v. Miralda*, 981 P.2d 676 (Colo. App. 1999).

18-5-106. Criminal possession of second degree forged instrument. (Repealed)

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-106. **L. 93:** Entire section repealed, p. 1989, § 20, effective July 1.

18-5-107. Criminal possession of second degree forged instrument.

A person commits a petty offense, when, with knowledge that it is forged, and with intent to defraud, the person possesses any forged instrument of a kind covered by section 18-5-104.

Source: **L. 71:** R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-107. **L. 93:** Entire section amended, p. 1989, § 21, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3181, § 229, effective March 1, 2022.

18-5-108. Merger of offenses.

A person may not be convicted of both forgery and criminal possession of a forged instrument with respect to the same written instrument.

Source: **L. 71:** R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-108.

18-5-109. Criminal possession of forgery devices.

(1) A person commits criminal possession of forgery devices when:

(a) Such person makes or possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks; or

(b) Such person makes or possesses any device, apparatus, equipment, or article capable of or adaptable to a use specified in paragraph (a) of this subsection (1), with intent to use it, or to aid or permit another to use it, for purposes of forgery or the production of counterfeit marks; or

(c) Such person illegally possesses a genuine plate, die, or other device used in the production of written instruments or counterfeit marks, with intent to fraudulently use the same; or

(d) Such person unlawfully makes, produces, possesses, or utters a document-making implement knowing that such document-making implement may be used or is used in the production of a false identification document or counterfeit mark or another implement for the production of false identification documents or counterfeit marks.

(2) Criminal possession of forgery devices:

(a) Committed in violation of subsection (1)(a), (1)(b), or (1)(d) of this section is a class 5 felony;

(b) Committed in violation of subsection (1)(c) of this section is a class 6 felony.

(3) As used in this section, "counterfeit mark" has the meaning set forth in section 18-5-110.5 (3)(a).

Source: **L. 71:** R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-109. **L. 89:** (2) amended, p. 834, § 53, effective July 1. **L. 2000:** (1)(d) added, p. 647, § 4, effective July 1. **L. 2001:** Entire section amended, p. 768, § 3, effective August 8. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1786, § 17, effective October 1.

Cross references: For the legislative declaration contained in the 2001 act amending this section, see section 1 of chapter 224, Session Laws of Colorado 2001.

18-5-110. Criminal simulation.

(1) A person commits a criminal simulation, when:

(a) With intent to defraud, he makes, alters, or represents any object in such fashion that it appears to have an antiquity, rarity, source or authorship, ingredient, or composition which it does not in fact have; or

(b) With knowledge of its true character and with intent to use to defraud, he utters, misrepresents, or possesses any object made or altered as specified in paragraph (a) of this subsection (1).

(2) Criminal simulation is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-110. **L. 87:** (1)(b) amended, p. 1578, § 23, effective July 10. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3181, § 230, effective March 1, 2022.

ANNOTATION

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-110.5. Trademark counterfeiting.

(1) A person commits trademark counterfeiting if such person intentionally manufactures, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute marks, goods, or services that the person knows are, bear, or are identified by one or more counterfeit marks and has possession, custody, or control of more than twenty-five items bearing a counterfeit mark.

(2) (a) Trademark counterfeiting is:

(I) A petty offense if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is less than three hundred dollars;

(II) A class 2 misdemeanor if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is three hundred dollars or more but less than one thousand dollars;

(III) A class 1 misdemeanor if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is one thousand dollars or more but less than two thousand dollars;

(IV) A class 6 felony if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is two thousand dollars or more but less than five thousand dollars;

(V) A class 5 felony if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is five thousand dollars or more but less than twenty thousand dollars;

(VI) A class 4 felony if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is twenty thousand dollars or more but less than one hundred thousand dollars;

(VII) A class 3 felony if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is one hundred thousand dollars or more but less than one million dollars; and

(VIII) A class 2 felony if the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is one million dollars or more.

(b) In addition to the penalties specified in paragraph (a) of this subsection (2), any person convicted under this section shall be liable for a fine in an amount equal to three times the total retail value of all goods or services that bear or are identified by a counterfeit mark unless extenuating circumstances are shown by such person.

(c) The remedies provided in this section are in addition to, and not in lieu of, any other civil or criminal penalties or remedies provided by law.

(3) For purposes of this section:

(a) "Counterfeit mark" means a mark identical to or substantially indistinguishable from a trademark that, without the permission of the owner of the trademark, is:

(I) Affixed or designed to be affixed to, or displayed or otherwise associated with, goods; or

(II) Displayed in advertising for, or otherwise associated with, services.

(b) (I) "Retail value" means the counterfeiter's regular selling price for the goods or services that bear or are identified by a counterfeit mark.

(II) In the case of items bearing a counterfeit mark that are components of a finished product, "retail value" means the counterfeiter's regular selling price for the finished product.

(III) For purposes of subsection (2) of this section, the quantity or retail value of goods or services shall include the aggregate quantity or retail value of all marks, goods, and services that are, bear, or are identified by counterfeit marks.

(c) "Trademark" means any trademark registered under the laws of this state or of the United States.

(4) In a trial under this section, any state or federal certificate of registration of a trademark shall be prima facie evidence of the facts stated therein.

Source: L. 2001: Entire section added, p. 767, § 2, effective August 8. L. 2021: (2)(a) amended, (SB 21-271), ch. 462, p. 3181, § 231, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2001 act enacting this section, see section 1 of chapter 224, Session Laws of Colorado 2001.

18-5-111. Unlawfully using slugs.

(1) A person commits unlawfully using slugs, if:

(a) With intent to defraud the vendor of property or a service sold by means of a coin machine, he knowingly inserts, deposits, or uses a slug in such machine or causes the machine to be operated by any other unauthorized means; or

(b) He makes, possesses, or disposes of a slug or slugs with intent to enable a person to use it or them fraudulently in a coin machine.

(2) "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or token made for the purpose and, in return for the insertion or deposit thereof, to offer, to provide, to assist in providing, or to permit the acquisition of some property or some public or private service.

(3) "Slug" means any object or article which, by virtue of its size, shape, or any other quality, is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token, and of thereby enabling a person to obtain without valid consideration the property or service sold through the machine.

(4) Unlawfully using slugs is a petty offense.

Source: L. 71: R&RE, p. 435, § 1. C.R.S. 1963: § 40-5-111. L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3182, § 232, effective March 1, 2022.

18-5-112. Obtaining signature by deception.

(1) A person commits obtaining signature by deception if, by deception and with intent to defraud or to acquire a benefit for himself or another, he causes another to sign or execute a written instrument.

(2) As used in this section, "by deception" means by knowingly:

(a) Creating or confirming another's impression which is false and which the deceiver does not believe to be true; or

(b) Failing to correct a false impression held by another which the deceiver previously has created or confirmed; or

(c) Preventing another from acquiring information pertinent to any matter material to a proper understanding of any transaction in which the signature of such person is procured.

(3) Obtaining signatures by deception is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 436, § 1. C.R.S. 1963: § 40-5-112.

ANNOTATION

Falsely inducing another to indorse check is within section. One who by false representations induces another to indorse a check for the payment of money, which the indorser thereafter is compelled to pay to a holder for value, is guilty of obtaining a

thing of value by false pretenses. *Miller v. People*, 72 Colo. 375, 211 P. 380 (1922) (decided under former R.S. 08, § 1849).

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-113. Criminal impersonation.

(1) A person commits criminal impersonation if he or she knowingly:

(a) Assumes a false or fictitious identity or legal capacity, and in such identity or capacity he or she:

(I) Marries, or pretends to marry, or to sustain the marriage relation toward another without the connivance of the latter;

(II) Becomes bail or surety for a party in an action or proceeding, civil or criminal, before a court or officer authorized to take the bail or surety; or

(III) Confesses a judgment, or subscribes, verifies, publishes, acknowledges, or proves a written instrument which by law may be recorded, with the intent that the same may be delivered as true; or

(b) Assumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she:

(I) Performs an act that, if done by the person falsely impersonated, subjects such person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty;

(II) Performs an act that, if done by the person falsely impersonated, might subject the person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty; or

(III) Performs any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another.

(2) (a) Criminal impersonation in violation of subsection (1)(a)(III) or (1)(b)(I) of this section is a class 6 felony.

(a.5) Criminal impersonation in violation of subsection (1)(a)(I) or (1)(a)(II) of this section is a class 5 felony.

(b) Criminal impersonation in violation of subsection (1)(b)(II) of this section is a class 1 misdemeanor.

(c) Criminal impersonation in violation of subsection (1)(b)(III) of this section is a class 2 misdemeanor.

(3) For the purposes of subsection (1) of this section, using false or fictitious personal identifying information, as defined in section 18-5-901 (13), shall constitute the assumption of a false or fictitious identity or capacity.

Source: L. 71: R&RE, p. 436, § 1. C.R.S. 1963: § 40-5-113. L. 77: IP(1) amended, p. 964, § 30, effective July 1. L. 89: (2) amended, p. 834, § 54, effective July 1. L. 2011: (1) amended and (3) added, (SB 11-201), ch. 217, p. 947, § 1, effective May 27. L. 2021: (1)(b) and (2) amended, (SB 21-271), ch. 462, p. 3182, § 233, effective March 1, 2022. L. 2023: (2)(a) amended and (2)(a.5) added, (HB 23-1293), ch. 298, p. 1786, § 18, effective October 1.

ANNOTATION

Annotator's note. Since § 18-5-113 is similar to former CSA, C. 48, § 338, a relevant case construing that provision has been included in the annotations to this section.

Subsection (1)(e) is not unconstitutionally vague and overbroad. People v. Lambert, 194 Colo. 421, 572 P.2d 839 (1978).

Criminal impersonation defined. This section defines criminal impersonation as (now knowingly) assuming a false or fictitious identity or capacity, and in that identity or capacity, doing any act with intent to unlawfully gain a benefit or injure or defraud another. People v. Brown, 193 Colo. 120, 562 P.2d 754 (1977); People v. Borrego, 738 P.2d 59 (Colo. App. 1987).

To falsely impersonate means to pretend to be a particular person without

lawful authority. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

And to perform act in assumed character for benefit. It is an offense under this section to falsely impersonate another, and in such assumed character to do any act whereby any benefit might accrue to the offender or to another person. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

Even though such person is dead. The offense of impersonation may be committed although the person who is impersonated is dead. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

Continuing offense. The offense of criminal impersonation can be continuing or can occur at a specific time. People v. Perez, 129 P.3d 1090 (Colo. App. 2005).

Criminal impersonation is categorically a crime involving moral turpitude. Veloz-Luvevano v. Lynch, 799 F.3d 1308 (10th Cir. 2015) (decided under law in effect prior to 2011 amendment).

Venue is not an element of the crime of criminal impersonation. People v. Perez, 129 P.3d 1090 (Colo. App. 2005).

Section does not require two overt acts to be committed. Section requires assuming a false identity and doing an act with the intent to gain a benefit. Giving a fictitious name to police because the defendant was on parole from another state satisfies both requirements. People v. Johnson, 30 P.3d 718 (Colo. App. 2000).

Paragraphs (d) and (e) of subsection (1) may be construed independently of the first three paragraphs, and any construction need not relate back to them. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

Subsection (1)(e) criminalizes knowingly using a false or fictitious identity or capacity with the intent to unlawfully gain a benefit for himself or another person or to injure or defraud another person. Subsection (1)(e) requires the prosecution to prove one act and two culpable mental states. In this case, the defendant used a fictitious name to avoid arrest on an outstanding warrant to commit criminal impersonation. Alvarado v. People, 132 P.3d 1205 (Colo. 2006).

The requisite intent to gain a benefit may be inferred from the accused's knowing use of a false identity and the

acknowledged intent to secure some advantage from the impersonation. People v. Borrego, 738 P.2d 59 (Colo. App. 1987).

The common meaning of "assumes a false or fictitious identity" is not to hold oneself out as someone that he or she is not; it requires the assumption of the identity of another person, whether that other person is real or fictitious. People v. Jones, 841 P.2d 372 (Colo. App. 1992).

Criminal impersonation is not a specific instance of attempt to influence a public servant. People v. Van De Weghe, 2012 COA 204, 312 P.3d 231.

Attorney with suspended license guilty of criminal impersonation for practicing law. The court held that "continuing to represent himself as an attorney and performing legal work when he was aware that he had no valid license to do so amounts to the assumption of a false or fictitious capacity for purposes of the criminal impersonation statute." People v. Bauer, 80 P.3d 896 (Colo. App. 2003).

Failure to provide an accurate social security number was not equivalent to the assumption of another persona where such information was not the sole, identifying fact. People v. Jones, 841 P.2d 312 (Colo. App. 1992); Montes-Rodriguez v. People, 241 P.3d 924 (Colo. 2010).

Use of a false social security number did not constitute the assumption of a false capacity. A lender's requirements to obtain a loan are different from the legal requirements to obtain a loan. Montes-

Rodriguez v. People, 241 P.3d 924 (Colo. 2010).

Even though he supplied a false social security number, defendant did not assume a false identity since he provided his correct name, address, birth date, and place of employment. Montes-Rodriguez v. People, 241 P.3d 924 (Colo. 2010).

Defendant's giving of a false birth date did not satisfy the "any other act" element of criminal impersonation under subsection (1)(e). People v. Peay, 5 P.3d 398 (Colo. App. 2000).

Passing falsified gift certificates. The second element of criminal impersonation, i.e., an act with intent unlawfully to gain a benefit or to defraud another, was met by the defendant's passing in exchange for property gift certificates falsified when a false name was written to facilitate the passing. The defendant knew the certificates, as signed, were false, and from this, intent to defraud could be inferred. Further, writing the false name demonstrated that the defendant knew he was not entitled to exchange the certificates for merchandise. People v. Brown, 193 Colo. 120, 562 P. 2d 754 (1977).

Indictment under this section should allege that the injury or benefit mentioned in the section would accrue. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

Indictment sufficient. An indictment alleging that accused at a certain time and place did then and there wilfully, unlawfully, feloniously, and falsely impersonate another, and in such assumed character did agree to

take, and did take a civil service examination given on a certain day, and by reason thereof did receive a certain sum of money from the person falsely impersonated, is sufficient and states a complete offense under this section. People v. Horkans, 109 Colo. 177, 123 P.2d 824 (1942).

Where no evidence that false name resulted in benefit, no guilty verdict. Where the prosecution failed to present evidence to the jury that the use of a false name would result in a benefit to the defendant, the evidence was insufficient to sustain a guilty verdict of criminal impersonation. People v. Shaw, 44 Colo. App. 533, 616 P.2d 185 (1980).

Trial court did not abuse its discretion in excluding character witness testimony because defendant admitted to using a false social security number he knew was not his own, and any evidence pertaining to his character for truthfulness was irrelevant in that respect. People v. Montes-Rodriguez, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Similarly, trial court did not abuse its discretion in excluding evidence regarding whether or not defendant knew whose social security number he used. Because defendant admitted to using a social security number that was not his own, the evidence was irrelevant. People v. Montes-Rodriguez, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Defendant was not entitled to jury instruction that offense of false reporting

to authorities was a lesser included offense of criminal impersonation because false reporting has the additional element of making or transmission of a report to law enforcement authorities. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Nor did evidence support jury instruction on offense of false reporting to

authorities as a lesser non-included offense of criminal impersonation absent the initiation of affirmative action intended to communicate information. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Applied in *People v. Stinson*, 632 P.2d 631 (Colo. App. 1981).

18-5-114. Offering a false instrument for recording.

(1) A person commits offering a false instrument for recording in the first degree if, knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contains a material false statement or material false information, and with intent to defraud, he presents or offers it to a public office or a public employee, with the knowledge or belief that it will be registered, filed, or recorded or become a part of the records of that public office or public employee.

(2) Offering a false instrument for recording in the first degree is a class 5 felony.

(3) A person commits offering a false instrument for recording in the second degree if, knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contains a material false statement or material false information, he presents or offers it to a public office or a public employee, with the knowledge or belief that it will be registered, filed, or recorded or become a part of the records of that public office or public employee.

(4) Offering a false instrument for recording in the second degree is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 437, § 1. **C.R.S. 1963:** § 40-5-114. **L. 80:** Entire section amended, p. 536, § 1, effective April 13. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3183, § 234, effective March 1, 2022.

ANNOTATION

Comparison with section 18-8-114. Abuse of public records under § 18-8-114 was not meant to cover the offense of offering a false instrument for recording

under this section. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

Information charging this offense must set forth alleged false statements, either verbatim or in substance. *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd* in part, *rev'd* in part on other grounds, 749 P.2d 952 (Colo. 1988).

Offering a false instrument for recording in the second degree is a lesser included offense of offering a false instrument for recording in the first degree. *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

The use of an intermediary to file a false statement with a public office will

not insulate a person from liability. Because there was evidence that defendant directed that medicaid billings be prepared with false information and that the defendant had knowledge that these forms would be submitted to the medicaid office, the trial court did not err in finding that there was sufficient evidence that the defendant "offered or presented" the billings. *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

Applied in *People v. Swearingen*, 649 P.2d 1102 (Colo. 1982), *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-5-115. Charitable fraud. (Repealed)

Source: **L. 75:** Entire section added, p. 636, § 1, effective July 14. **L. 77:** (1)(b) and (1)(c) amended, p. 964, § 31, effective July 1. **L. 84:** (1)(a) amended and (1)(d) added, p. 546, § 1, effective April 12. **L. 87:** (1)(e) to (1)(g) added, p. 611, § 24, effective July 1. **L. 88:** Entire section repealed, p. 359, § 3, effective July 1.

18-5-116. Controlled substances - inducing consumption by fraudulent means.

(1) It is unlawful for any person, surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge, to cause any other person to unknowingly consume or receive the direct administration of any controlled substance, as defined in section 18-18-102 (5); except that nothing in this section shall diminish the scope of health care authorized by law.

(2) Any person who violates the provisions of this section commits a class 4 felony.

Source: **L. 80:** Entire section added, p. 538, § 1, effective February 14. **L. 81:** (1) amended, p. 738, § 22, effective July 1. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1619, § 45, effective July 1.

18-5-117. Unlawful possession of personal identifying information. (Repealed)

Source: **L. 2004:** Entire section added, p. 1960, § 5, effective August 4. **L. 2005:** (3) amended, p. 766, § 28, effective June 1. **L. 2006:** Entire section repealed, p. 1318, § 3, effective July 1.

18-5-118. Offenses involving forgery of a penalty assessment notice issued to a minor under the age of eighteen years - suspension of driving privilege. (Repealed)

Source: **L. 2004:** Entire section added, p. 1336, § 10, effective July 1, 2005. **L. 2009:** Entire section repealed, (HB 09-1266), ch. 347, p. 1815, § 3, effective August 5.

18-5-119. Theft of personal identifying information. (Repealed)

Source: **L. 2005:** Entire section added, p. 847, § 6, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 4, effective July 1.

18-5-120. Gathering personal information by deception. (Repealed)

Source: **L. 2005:** Entire section added, p. 796, § 1, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 5, effective July 1.

Editor's note: This section was originally numbered as § 18-5-119 in House Bill 05-1347 but was renumbered on revision for ease of location.

Cross references: For current provisions relating to gathering identity information by deception, see § 18-5-904.

18-5-121. Division of motor vehicles official product protection - vehicular document piracy - applicability - penalty - definitions.

- (1) As used in this section, unless the context otherwise requires:
 - (a) "Document" means a thing that uses writing to serve as evidence or proof.
 - (b) (I) "Official document" means a document created for the purposes of administering article 1, 2, 3, 4, 6, or 12 of title 42 by the department of revenue or the department's agents.
 - (II) "Official document" includes the following documents concerning an individual's identification, a motor vehicle, or an off-highway vehicle:
 - (A) A license plate;
 - (B) A temporary license plate;
 - (C) A driver's license;
 - (D) An identification card;
 - (E) An identifying placard;
 - (F) A certificate of title;
 - (G) Evidence of an emissions test; or
 - (H) A registration.
- (2) A person commits vehicular document piracy if the person makes, distributes, advertises, sells, promotes, completes, alters, or produces or causes to be made, distributed, advertised, sold, promoted, completed, altered, or produced a document that:
 - (a) Simulates an official document; or
 - (b) Closely resembles an official document.
- (3) A person does not commit vehicular document piracy if the person received the express written permission of the department of revenue to make, distribute, advertise, sell, promote, complete, alter, or produce the official document.
- (4) A violation of this section may be charged in addition to any other violation committed by the person in the course of violating this section.
- (5) This section does not apply to agents of the department of revenue who are engaging in business on behalf of the department as part of the person's official responsibilities as an agent.
- (6) Vehicular document piracy is a civil infraction and is punishable by a fine of not more than one thousand dollars.

Source: L. 2025: Entire section added, (HB 25-1076), ch. 16, p. 60, § 1, effective August 6.

PART 2

FRAUD IN OBTAINING PROPERTY OR SERVICES

18-5-201. Definitions. (Repealed)

Source: L. 71: R&RE, p. 437, § 1. **C.R.S. 1963:** § 40-5-201. **L. 84:** Entire section repealed, p. 552, § 3, effective July 1.

18-5-201.1. Definitions relating to guaranteed check cards. (Repealed)

Source: L. 81: Entire section added, p. 991, § 1, effective April 30. **L. 84:** Entire section repealed, p. 552, § 3, effective July 1.

18-5-202. Fraudulent use of a credit device. (Repealed)

Source: L. 71: R&RE, p. 437, § 1. **C.R.S. 1963:** § 40-5-202. **L. 72:** p. 593, § 68. **L. 84:** Entire section repealed, p. 552, § 3, effective July 1.

18-5-202.1. Fraudulent use of guaranteed check card. (Repealed)

Source: L. 81: Entire section added, p. 991, § 1, effective April 30. **L. 84:** Entire section repealed, p. 552, § 3, effective July 1.

18-5-203. Theft of credit device or guaranteed check card. (Repealed)

Source: L. 71: R&RE, p. 438, § 1. C.R.S. 1963: § 40-5-203. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-204. Criminal possession of credit device or guaranteed check card. (Repealed)

Source: L. 71: R&RE, p. 438, § 1. C.R.S. 1963: § 40-5-204. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-205. Fraud by check - definitions - penalties.

(1) As used in this section, unless the context otherwise requires:

(a) "Check" means a written, unconditional order to pay a sum certain in money, drawn on a bank, payable on demand, and signed by the drawer. "Check", for the purposes of this section only, also includes a negotiable order of withdrawal and a share draft.

(b) "Drawee" means the bank upon which a check is drawn or a bank, savings and loan association, or credit union on which a negotiable order of withdrawal or a share draft is drawn.

(c) "Drawer" means a person, either real or fictitious, whose name appears on a check as the primary obligor, whether the actual signature be that of himself or of a person authorized to draw the check on himself.

(d) "Insufficient funds" means a drawer has insufficient funds with the drawee to pay a check when the drawer has no checking account, negotiable order of withdrawal account, or share draft account with the drawee or has funds in such an account with the drawee in an amount less than the amount of the check plus the amount of all other checks outstanding at the time of issuance; and a check dishonored for "no account" shall also be deemed to be dishonored for "insufficient funds".

(e) "Issue". A person issues a check when he makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.

(f) "Negotiable order of withdrawal" and "share draft" mean negotiable or transferable instruments drawn on a negotiable order of withdrawal account or a share draft account, as the case may be, for the purpose of making payments to third persons or otherwise.

(g) "Negotiable order of withdrawal account" means an account in a bank or savings and loan association and "share draft account" means an account in a credit union, on which payment of interest or dividends may be made on a deposit with respect to which the bank or savings and loan association or the credit union, as the case may be, may require the depositor to give notice

of an intended withdrawal not less than thirty days before the withdrawal is made, even though in practice such notice is not required and the depositor is allowed to make withdrawal by negotiable order of withdrawal or share draft.

(2) Any person, knowing he has insufficient funds with the drawee, who, with intent to defraud, issues a check for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value, commits fraud by check.

(3) Fraud by check is:

(a) (Deleted by amendment, L. 2007, p. 1693, § 8, effective July 1, 2007.)

(a.5) Repealed.

(a.7) A petty offense if the fraudulent check was for less than three hundred dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling less than three hundred dollars in the aggregate;

(b) A class 2 misdemeanor if the fraudulent check was for the sum of three hundred dollars or more but less than one thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling three hundred dollars or more but less than one thousand dollars in the aggregate;

(b.5) (Deleted by amendment, L. 2014.)

(c) A class 1 misdemeanor if the fraudulent check was for the sum of one thousand dollars or more but less than two thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling one thousand dollars or more but less than two thousand dollars in the aggregate;

(d) A class 6 felony if the fraudulent check was for the sum of two thousand dollars or more but less than five thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling two thousand dollars or more but less than five thousand dollars in the aggregate;

(e) A class 5 felony if the fraudulent check was for the sum of five thousand dollars or more but less than twenty thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony if the fraudulent check was for the sum of twenty thousand dollars or more but less than one hundred thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if the fraudulent check was for the sum of one hundred thousand dollars or more but less than one million dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty- day period in the state of Colorado totaling one hundred thousand dollars or more but less than one million dollars;

(h) A class 2 felony if the fraudulent check was for the sum of one million dollars or more or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling one million dollars or more; and

(i) A class 6 felony if the fraudulent check was drawn on an account which did not exist or which has been closed for a period of thirty days or more prior to the issuance of said check.

(4) Any person having acquired rights with respect to a check which is not paid because the drawer has insufficient funds shall have standing to file a complaint under this section, whether or not he is the payee, holder, or bearer of the check.

(5) Any person who opens a checking account, negotiable order of withdrawal account, or share draft account using false identification or an assumed name for the purpose of issuing fraudulent checks commits a class 2 misdemeanor.

(6) If deferred prosecution is ordered, the court as a condition of supervision shall require the defendant to make restitution on all checks issued by the defendant that are unpaid as of the date of commencement of the supervision in addition to other terms and conditions appropriate for the treatment or rehabilitation of the defendant.

(7) A bank, savings and loan association, or credit union is not civilly or criminally liable for releasing information relating to the drawer's account to a sheriff, deputy sheriff, undersheriff, police officer, agent of the Colorado bureau of investigation, division of gaming investigator, division of lottery investigator, parks and outdoor recreation officer, Colorado wildlife officer, district attorney, assistant district attorney, deputy district attorney, or authorized investigator for a district attorney or the attorney general investigating or prosecuting a charge under this section.

(8) This section does not relieve the prosecution from the necessity of establishing the required culpable mental state. However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check or order, if:

(a) He has no account upon which the check or order is drawn with the bank or other drawee at the time he issues the check or order; or

(b) He has insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

(9) Restitution for offenses described in this section may be collected as a condition of pretrial diversion by a district attorney, an employee of a district attorney's office, or a person

under contract with a district attorney's office. Such collection is governed by the provisions of article 18.5 of title 16, C.R.S., and is not the collection of a debt.

Source: **L. 71:** R&RE, p. 438, § 1. **C.R.S. 1963:** § 40-5-205. **L. 72:** p. 281, § 2. **L. 75:** (3) amended, p. 619, § 13, effective July 21. **L. 77:** (1), (2), (3)(b), (3)(c), and (5) R&RE and (3)(d) added, pp. 979, 980, §§ 1, 2, effective June 2. **L. 80:** (1)(a), (1)(b), (1)(d), (5), and (7) amended and (1)(f) and (1)(g) added, p. 539, § 1, effective April 13. **L. 81:** (3)(a), (3)(b), and (3)(c) amended and (8) added, p. 993, §§ 1, 2, effective July 1. **L. 84:** (3)(b) and (3)(c) amended, p. 538, § 12, effective July 1, 1985. **L. 89:** (3)(c) and (3)(d) amended, p. 834, § 55, effective July 1. **L. 92:** (3) amended, p. 435, § 6, effective April 10. **L. 93:** (3) amended, p. 971, § 1, effective July 1. **L. 94:** (7) amended, p. 1719, § 13, effective July 1. **L. 98:** (3)(b) and (3)(c) amended, p. 1438, § 15, effective July 1; (3)(b) and (3)(c) amended, p. 796, § 6, effective July 1. **L. 2000:** (6) amended, p. 1050, § 17, effective September 1. **L. 2002:** (9) added, p. 760, § 7, effective July 1. **L. 2003:** (7) amended, p. 1632, § 77, effective August 6. **L. 2007:** (3)(a), (3)(b), and (3)(c) amended and (3)(b.5) added, p. 1693, § 8, effective July 1. **L. 2013:** (1)(b), (1)(g), and (7) amended, (SB 13-154), ch. 282, p. 1487, § 65, effective July 1. **L. 2014:** (3) amended, (HB 14-1266), ch. 155, p. 535, § 2, effective August 6. **L. 2021:** (3)(a.7), (3)(b), (3)(c), (3)(d), and (3)(e) amended and (3)(f), (3)(g), (3)(h), and (3)(i) added, (SB 21-271), ch. 462, p. 3183, § 235, effective March 1, 2022; (3)(a.5)(II) added by revision, (SB 21-271), ch. 462, pp. 3183, 3331, §§ 235, 803.

Editor's note: Subsection (3)(a.5)(II) provided for the repeal of subsection (3)(a.5), effective March 1, 2022. (See L. 2021, pp. 3183, 3331.)

Cross references: (1) For issuance of a bad check, see § 18-5-512.

(2) For the legislative declaration contained in the 2007 act amending subsections (3)(a), (3)(b), and (3)(c) and enacting subsection (3)(b.5), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For comment on *Moore v. People* (124 Colo. 197, 235 P.2d 798 (1951)), see 24 Rocky Mt. L. Rev. 123 (1951). For note, "False Pretenses, Confidence Game, and Short Check in

Colorado", see 25 Rocky Mt. L. Rev. 325 (1953). For article, "One Year Review of Criminal Law and Procedure", see 36 *Dicta* 34 (1959). For article, "Criminal Law", which discusses Tenth Circuit decisions

dealing with bank crime, see 61 Den. L.J. 255 (1984).

Annotator's note. Since § 18-5-205 is similar to former § 40-14-20, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For history of section, see *Moore v. People*, 124 Colo. 197, 235 P.2d 798 (1951); *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999).

This section gives fair warning of forbidden conduct so that men of common intelligence can understand the statute's meaning and application. *People v. Quinn*, 190 Colo. 534, 549 P.2d 1332 (1976).

For the unconstitutionality of subsection (2) before the 1977 amendment, see *People v. Quinn*, 190 Colo. 534, 549 P.2d 1332 (1976).

For the unconstitutionality of former version of section, see *People v. Vinnola*, 177 Colo. 405, 494 P.2d 826 (1972).

For the former definition of "insufficient funds" which was invalid, see *People v. Vinnola*, 177 Colo. 405, 494 P.2d 826 (1972).

Liability is imposed by the writing of the check, and not by a bank's subsequent failure to honor it. The language of the current statute satisfies the standard set out in *People v. Vinnola* (177 Colo. 405, 494 P.2d 826 (1972)), which would construe as constitutional a statute which "creates a crime when the drawer knows at the time of

issuance that the check will not be paid". *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

"Thing of value" construed. The right to possession and ownership of goods is a "thing of value" within the meaning of this section. *People v. Kunzelman*, 649 P.2d 340 (Colo. App. 1982).

Check must be written as payment for something of value. The requirement of subsection (2) that a check be for payment of "services, wages, salary, commissions, labor, rent, money, property, or other thing of value", means only that the check may be written as payment for anything of value, including the above-named items. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

District court erred in reasoning that defendant could not be convicted because she had not obtained "thing of value" in exchange for check when prosecution presented sufficient evidence for a jury to determine that the short check was issued for "wages". *People v. Steerman*, 735 P.2d 876 (Colo. 1987).

The issuance of an insufficient funds check in payment, or partial payment, of a pre-existing debt can constitute fraud by check. The plain meaning of "for the payment of" is not limited to a contemporaneous exchange. The check need not induce the giving of things of value because a causal relationship between the issuance of the check and the act of obtaining the thing of value is no longer necessary. *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999).

"Money" includes loan proceeds. Therefore, the payment of an outstanding loan is payment for "money". People v. Gutierrez, 1 P.3d 241 (Colo. App. 1999).

General rule that criminal intent will be presumed from commission of the unlawful act does not apply under this section, because the crime consists of the act combined with a specific intent, and proof of the commission of the act does not warrant any presumption that defendant had specific intent to defraud. Before the defendant can be convicted, it must be shown that he intended to defraud, and did defraud, the complaining witness. Moore v. People, 124 Colo. 197, 235 P.2d 798 (1951); Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952).

The law does not allow an intent to defraud to be presumed whenever a bank refuses to honor a check. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

Prosecution will not be permitted to utilize presumption of guilt as basis for obtaining conviction. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

Specific intent to defraud payee is necessary element of proof in the commission of this offense. People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974).

Specific intent to deceive must be demonstrated. This section requires the prosecution to demonstrate that the defendant formed a specific intent to deceive in order to sustain a verdict of guilty. People

v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

Prosecution must prove drawer of check knew there were insufficient funds in his account to pay the check. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

Intent to defraud negated. The intent to defraud the payee would be conclusively negated if a defendant disclosed, at the time of the issuance of a check, that he did not have sufficient funds on deposit to cover the check. People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974).

Specific intent not negated by subsequent restitution. Neither the defendant's belated, partial payment of the check nor his promise to pay off the balance in the near future serves to negate, as a matter of law, probable cause to believe that the defendant had the specific intent to defraud when the check was issued. People v. Taylor, 655 P.2d 382 (Colo. 1982).

The fact that defendant at some time after the check was cashed attempted to make restitution, or tried to undo the wrong, is not a defense; nor does such conduct negate, as a matter of law, a finding of the specific intent to defraud. People v. Nicholas, 700 P.2d 921 (Colo. App. 1984).

It is the defendant's state of mind at the time of the issuance of the check which is determinative of his criminal liability for fraud by check, not his state of mind at some time subsequent to the completion of the transaction. The making of restitution in order to compensate a victim for a loss

caused by the accused's past conduct is not a legal defense to a criminal charge based upon that conduct. *People v. Taylor*, 655 P.2d 382 (Colo. 1982).

Postdated check implies notice of insufficient funds. A postdated check, in the absence of a present representation that the check is good, carries on its face implied notice that the maker does not presently have sufficient funds on deposit to pay the check, but before this notice will be implied, the payee must be made aware that the check is, in fact, postdated. *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Function of jury to consider question of intent. In a prosecution for obtaining property by means of a worthless check, where defendant contended that he did not intend to defraud or deceive anyone by issuing a check on a bank in which he had no account, it was the function of the jury to pass on the question of intent from a consideration of all the testimony, and its verdict if amply supported by the evidence will not be disturbed. *Parrott v. People*, 144 Colo. 587, 357 P.2d 634 (1960).

Intent evidenced by absence of funds in bank. Where defendant passed a short check without resorting to any fraudulent scheme by which he sought to obtain the confidence of the complaining witness, and no special confidence was reposed in defendant, such case comes squarely within the terms of this section, if there was intent to defraud, which is clearly evidenced by the fact that defendant had no funds whatever in the bank at the time he gave the check. *People v.*

Lindsay, 119 Colo. 248, 202 P.2d 951 (1949).

Convictions for fraud by check vacated where jury instruction had the effect of removing the "knowing" element by creating a mandatory presumption that defendant knew he had insufficient funds to pay the check. Such an instruction violates due process by shifting the burden of producing evidence or the burden of persuasion on an essential element of the crime. *People v. Felgar*, 58 P.3d 1122 (Colo. App. 2002).

Probable cause to support crime. At a preliminary hearing, evidence that the defendant issued a check knowing that he had insufficient funds to pay the check, that he failed to deliver a trade-in vehicle as part payment for his purchase, and that he failed to take actions which would have placed funds into his account establishes probable cause to believe that the defendant had the intent to defraud at the time he issued the check. *People v. Spurrier*, 712 P.2d 486 (Colo. 1986).

Evidence of financial resources is relevant. Evidence that defendant's stepbrother had the financial ability to make an expected deposit into defendant's account, which would tend to corroborate in part defendant's testimony, is relevant in dealing with whether defendant had the specific intent to defraud. *Nora v. People*, 176 Colo. 454, 491 P.2d 62 (1971).

Evidence of plan, design, and scheme was material to show intent to defraud. *People v. Lindsay*, 119 Colo. 248, 202 P.2d 951 (1949).

The argument of a defendant convicted of issuing a check on a bank in which he did not have sufficient funds that the admission of evidence of other checks did not tend to prove intent, design, or motive in the commission of the charge being tried because of the remoteness of time of the other checks involved, is without merit where the checks were all passed within one month prior to the issuance of the check on which defendant was convicted. *Van Pelt v. People*, 173 Colo. 201, 476 P.2d 999 (1970).

Subsection (4) not limitation on filing felony actions. Subsection (4), giving specific authority for certain individuals to file a complaint, refers only to those persons who may file a complaint for petty offense or misdemeanor fraud by check and not to felony fraud by check, which is commenced by filing of a felony complaint. Thus, this provision does not operate to limit filing of complaints in felony actions to persons having acquired rights with respect to a check. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Instruction on lesser included offense refused. The contention of defendant who was convicted of issuing a check for \$100 on a bank in which he did not have sufficient funds, that he was entitled to an instruction on the lesser included offense of issuing a short check under \$100, is without merit where in evidence was the check

which on its face was for the sum of \$100; a check cannot be for a sum and under that sum at the same time. *Van Pelt v. People*, 173 Colo. 201, 476 P.2d 999 (1970).

Even though there was no proof as to the date the check was presented for collection and therefor the prosecution could not use the statutory presumption of knowledge, the prosecution's evidence was nonetheless sufficient to support a guilty verdict on a charge of fraud by check. *People v. Nicholas*, 700 P.2d 921 (Colo. App. 1984).

No expectation of privacy. In bad check cases, the drawer loses any expectation of privacy in the bank accounts being investigated and the banks were entitled to reveal the existence and status of such accounts to the government. *People v. Lopez*, 776 P.2d 390 (Colo. 1989); *People v. Selph*, 786 P.2d 1078 (Colo. 1989).

Applied in *People ex rel. Metzger v. District Court*, 119 Colo. 451, 208 P.2d 79 (1949); *Best v. People ex rel. Florum*, 121 Colo. 100, 212 P.2d 1007 (1949); *People ex rel. Metzger v. District Court*, 121 Colo. 141, 215 P.2d 327 (1949); *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971); *White v. District Court*, 180 Colo. 152, 503 P.2d 342 (1972); *People v. Emig*, 191 Colo. 223, 552 P.2d 312 (1976); *Brennan v. Zapien*, 470 F. Supp. 1300 (D. Colo. 1979); *People v. Mason*, 643 P.2d 745 (Colo. 1982).

18-5-206. Defrauding a secured creditor or debtor.

(1) If a person, with intent to defraud a creditor by defeating, impairing, or rendering worthless or unenforceable any security interest, sells, assigns, transfers, conveys, pledges,

encumbers, conceals, destroys, or disposes of any collateral subject to a security interest, the person commits:

- (a) (Deleted by amendment, L. 2007, p. 1694, § 9, effective July 1, 2007.)
 - (b) Repealed.
 - (b.5) (Deleted by amendment, L. 2014.)
 - (c) A petty offense if the value of the collateral is less than three hundred dollars;
 - (d) A class 2 misdemeanor if the value of the collateral is three hundred dollars or more but less than one thousand dollars;
 - (e) A class 1 misdemeanor if the value of the collateral is one thousand dollars or more but less than two thousand dollars;
 - (f) A class 6 felony if the value of the collateral is two thousand dollars or more but less than five thousand dollars;
 - (g) A class 5 felony if the value of the collateral is five thousand dollars or more but less than twenty thousand dollars;
 - (h) A class 4 felony if the value of the collateral is twenty thousand dollars or more but less than one hundred thousand dollars;
 - (i) A class 3 felony if the value of the collateral is one hundred thousand dollars or more but less than one million dollars; and
 - (j) A class 2 felony if the value of the collateral is one million dollars or more.
- (2) If a creditor, with intent to defraud a debtor, sells, assigns, transfers, conveys, pledges, buys, or encumbers a promissory note or contract signed by the debtor, the creditor commits:
- (a) (Deleted by amendment, L. 2007, p. 1694, § 9, effective July 1, 2007.)
 - (b) Repealed.
 - (b.5) (Deleted by amendment, L. 2014.)
 - (c) A petty offense if the amount owing on the note or contract is less than three hundred dollars;
 - (d) A class 2 misdemeanor if the amount owing on the note or contract is three hundred dollars or more but less than one thousand dollars;
 - (e) A class 1 misdemeanor if the amount owing on the note or contract is one thousand dollars or more but less than two thousand dollars;

(f) A class 6 felony if the amount owing on the note or contract is two thousand dollars or more but less than five thousand dollars;

(g) A class 5 felony if the amount owing on the note or contract is five thousand dollars or more but less than twenty thousand dollars;

(h) A class 4 felony if the amount owing on the note or contract is twenty thousand dollars or more but less than one hundred thousand dollars;

(i) A class 3 felony if the amount owing on the note or contract is one hundred thousand dollars or more but less than one million dollars; and

(j) A class 2 felony if the amount owing on the note or contract is one million dollars or more.

Source: **L. 71:** R&RE, p. 440, § 1. **C.R.S. 1963:** § 40-5-206. **L. 75:** Entire section amended, p. 620, § 14, effective July 21. **L. 77:** Entire section R&RE, p. 975, § 6, effective July 1. **L. 84:** (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 538, § 13, effective July 1, 1985. **L. 89:** (1)(c) and (2)(c) amended, p. 835, § 56, effective July 1. **L. 92:** Entire section amended, p. 436, § 7, effective April 10. **L. 98:** (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 1439, § 16, effective July 1; (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 796, § 7, effective July 1. **L. 2007:** Entire section amended, p. 1694, § 9, effective July 1. **L. 2014:** (1) and (2) amended, (HB 14-1266), ch. 155, p. 536, § 3, effective August 6. **L. 2021:** (1)(c), (1)(d), (1)(e), (2)(c), (2)(d), and (2)(e) amended, (SB 21-271), ch. 462, p. 3184, § 236, effective March 1, 2022; (1)(b)(II) and (2)(b)(II) added by revision, (SB 21-271), ch. 462, pp. 3184, 3331, §§ 236, 803.

Editor's note: Subsections (1)(b)(II) and (2)(b)(II) provided for the repeal of subsections (1)(b) and (2)(b), respectively, effective March 1, 2022. (See L. 2021 pp. 3184, 3331.)

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959).

This section applies to any valid security interest, perfected or not. *People v. Armijo*, 197 Colo. 91, 589 P.2d 935 (1979).

Applied in *People v. Brigner*, 978 P.2d

163 (Colo. App. 1999).

18-5-207. Purchase on credit to defraud.

A person who purchases any personal property on credit and thereafter, before paying for it, sells, hypothecates, pledges, or disposes of it with intent to defraud the seller or vendor commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 440, § 1. C.R.S. 1963: § 40-5-207.

ANNOTATION

Purpose of section. This section was not intended to have any effect whatever in the determination of the validity or invalidity of any contracts of sale made by the vendor. In this respect, it extended no greater protection to the creditor than the law gave

him before this section was enacted. It is simply a penal statute, intended to punish the man guilty under its provisions. *Nicholls v. McShane*, 16 Colo. App. 165, 64 P. 375 (1901) (decided under former section).

18-5-208. Dual contracts to induce loan.

It is a class 2 misdemeanor for any person to knowingly make, issue, deliver, or receive dual contracts for the purchase or sale of real property. The term "dual contracts", either written or oral, means two separate contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price, and is used, or intended to be used, to induce persons to make a loan or a loan commitment on such real property in reliance upon the stated inflated value.

Source: L. 71: R&RE, p. 440, § 1. C.R.S. 1963: § 40-5-208. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3185, § 237, effective March 1, 2022.

18-5-209. Issuing a false financial statement - obtaining a financial transaction device by false statements.

(1) A person commits issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of himself or another person and which is false in some material respect and reasonably relied upon; or

(b) Represents in writing that a written instrument purporting to describe another person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the instrument to be materially false in that respect and reasonably relied upon.

(2) Issuing a false financial statement is a class 2 misdemeanor.

(3) A person commits issuing a false financial statement for purposes of obtaining a financial transaction device, as defined in section 18-5-701 (3), if, with intent to defraud, upon filing an application for a financial transaction device with an issuer, he knowingly makes or causes to be made a false statement or report, which is false in some material respect and reasonably relied upon, relative to his name, occupation, financial condition, assets, or liabilities or willfully and substantially overvalues any assets or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction device.

(4) Issuing a false financial statement for purposes of obtaining a financial transaction device when such device is used to obtain property or services or money is a class 2 misdemeanor.

(5) Issuing two or more false financial statements for purposes of obtaining two or more financial transaction devices when such devices are used to obtain property or services or money is a class 6 felony.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-209. L. 84: (3) to (5) added, p. 548, § 1, effective July 1. L. 89: (5) amended, p. 835, § 57, effective July 1. L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3185, § 238, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-5-209 is similar to former G.S. § 884, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The ingredients of the offense are the obtainment of money by false pretenses with

intent to defraud. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

Defendant's false representation must be shown. To sustain a conviction under this section, it is necessary to show that the representation of the defendant of his responsibility or wealth was false when

made. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

And also proof that someone suffered harm. The offense can only be committed by the obtainment of credit on false representations coupled with proof that as a result of it some person has suffered harm. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

But it is not necessary that an intention to defraud any particular person should exist. If the false report which has been procured results in defrauding any person of

his property, the offense is complete whether the offender had such person in mind or not. An indictment setting forth that the person charged caused others to report falsely of his honesty, wealth, or mercantile character, and that by means of the report some person or persons, naming them, were imposed upon so that they extended credit to the offender, and that he thereby obtained possession of their property, would contain substantially all the facts necessary to constitute an offense. *Schayer v. People*, 5 Colo. App. 75, 37 P. 43 (1894).

18-5-210. Receiving deposits in a failing financial institution.

A person commits a class 6 felony if, as an officer, manager, or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or investment, knowing that the institution is insolvent. A financial institution is insolvent within the meaning of this section when from any cause it is unable to pay its obligations in the ordinary or usual course of business or its liabilities exceed its assets.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-210. L. 89: Entire section amended, p. 835, § 58, effective July 1.

18-5-211. Insurance fraud - definitions.

(1) A person commits insurance fraud if the person does any of the following:

(a) With an intent to defraud presents or causes to be presented in written, verbal, or digital form an application or request for the issuance, modification, or renewal of an insurance policy, which application or request, or documentation in support of such application or request, contains false material information or withholds material information that is requested by the insurer and results in the issuance of an insurance policy or insurance coverage for the applicant or another;

(b) With an intent to defraud presents or causes to be presented any insurance claim, which claim contains false material information or withholds material information;

(c) With an intent to defraud causes or participates, or purports to be involved, in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent insurance claim;

(d) With an intent to defraud presents or causes to be presented an insurance claim where the loss or damage claimed occurred outside of the period of time that coverage was in effect for the applicable contract of insurance or policy unless otherwise permitted under the contract of insurance or policy; or

(e) With an intent to defraud presents or causes to be presented any written, verbal, or digital material or statement as part of, in support of or in opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the material or statement contains false material information or withholds material information.

(2) A person commits insurance fraud if he or she knowingly moves, diverts, or misappropriates premium funds belonging to an insurer or unearned premium funds belonging to an insured or applicant for insurance from a trust or other account without the authorization of the owner of the funds or other lawful justification.

(3) A person commits insurance fraud if he or she with an intent to defraud makes, alters, presents, or causes to be presented a certificate or other evidence of the existence of insurance in any form that contains false material information or omits material information.

(4) (a) Insurance fraud committed in violation of subsection (1)(a) of this section is a class 2 misdemeanor.

(b) Insurance fraud committed in violation of subsections (1)(b) to (1)(e) or subsection (3) of this section is a class 6 felony.

(c) Insurance fraud committed in violation of subsection (2) of this section is a class 5 felony.

(5) The commissioner of insurance shall revoke the license to conduct business in this state of any licensed insurance producer under article 2 of title 10, C.R.S., who is convicted of any provision under this section.

(6) No provision of this article 5 may be interpreted to supersede, limit, abrogate, or impair the ability of the prosecuting authority to concurrently bring charges for any other state criminal offense that is otherwise applicable in addition to any offenses described by this section.

(7) As used in this section, unless the context otherwise requires:

(a) "Claim" means a demand for money, property, or services pursuant to a contract of insurance as well as any documentation in support of such claim whether submitted contemporaneously with the claim or at a different time. A claim and any supporting information may be in written, verbal, or digital form.

- (b) "Insurance" has the same meaning as defined in section 10-1-102 (12), C.R.S.
- (c) "Insurance producer" has the same meaning as defined in section 10-2-103 (6), C.R.S.
- (d) "Insurer" has the same meaning as defined in section 10-1-102 (13), C.R.S.
- (e) "Material information" is a statement or assertion directly pertaining to an application for insurance or an insurance claim that a reasonable person making such an assertion knows or should know will affect the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that would directly or indirectly benefit the person making the assertion.

Source: L. 2014: Entire section added, (SB 14-092), ch. 190, p. 708, § 1, effective July 1. **L. 2017:** (1)(a), (1)(b), (1)(d), (1)(e), (2), (3), (6), and (7)(a) amended, (HB 17-1048), ch. 68, p. 214, § 1, effective August 9. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3186, § 239, effective March 1, 2022. **L. 2023:** (4) amended, (HB 23-1293), ch. 298, p. 1786, § 19, effective October 1.

ANNOTATION

When a defendant is convicted under subsection (1)(b) for presenting a fraudulent insurance claim and subsection (1)(e) for making false statements in support of the same insurance claim, the prohibition against double jeopardy and multiplicity will generally require the conviction under subsection (1)(e) to merge into the

conviction under subsection (1)(b). *People v. Robinson*, 2022 COA 124, 524 P.3d 300.

By joining alternatives disjunctively in subsections (1)(a) to (1)(e), the general assembly intended to describe alternate ways of committing a single crime rather than to create separate offenses. *People v. Robinson*, 2022 COA 124, 524 P.3d 300.

PART 3

FRAUDULENT AND DECEPTIVE SALES AND BUSINESS PRACTICES

18-5-301. Fraud in effecting sales.

- (1) A person commits a class 2 misdemeanor if, in the course of business, he knowingly:
 - (a) Uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) Sells, offers, or exposes for sale or delivers less than the represented quantity of any commodity or service; or

(c) Takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(d) Sells, offers, or exposes for sale an adulterated or mislabeled commodity. "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute of the state of Colorado or the United States providing criminal penalties for such variance, or set by established commercial usage. "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed or pursuant to any statute of the state of Colorado or the United States providing criminal penalties for such variance, or set by established commercial usage; or

(e) Makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services.

(f) Repealed.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-301. L. 79: (1)(f) repealed, p. 730, § 11, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Annotator's note. Since § 18-5-301 is similar to former CSA, C. 48, § 317, a relevant case construing that provision has been included in the annotations to this section.

The state of Colorado has exercised its police power by proscribing false and misleading statements in advertising with a criminal sanction. *Ve-ri-tas, Inc. v. Advertising Review Council of Metro.*

Denver, Inc., 411 F. Supp. 1012 (D. Colo. 1976), *aff'd*, 567 F.2d 963 (10th Cir. 1977).

And has not violated first amendment freedoms. The state of Colorado can sanction false and misleading advertising through the criminal process without violating first amendment freedoms. *Ve-ri-tas, Inc. v. Advertising Review Council of Metro. Denver, Inc.*, 411 F. Supp. 1012 (D. Colo. 1976), *aff'd*, 567 F.2d 963 (10th Cir. 1977).

This section is sufficiently broad to cover practically every known method of public announcement which can be made

or circulated by means of printed matter. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Publication need not be in newspaper.

To hold that in order to violate the provisions of this section the publication must be made in a newspaper is to unduly restrict the meaning of the act and wholly disregard its plain and unambiguous provisions. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Conspiracy to effect sales. If a defendant's agents and solicitors, in

cooperation and agreement with him, make false and misleading statements in order to effectuate sales of defendant's publications, the latter is guilty of a conspiracy to effect sales under the provisions of this section. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Truth of statements is a jury question.

Whether written statements and representations concerning a book to be published were untrue and misleading was for the jury. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

18-5-302. Unlawful activity concerning the selling of land.

(1) Any person who, after once selling, bartering, or disposing of any land, or executing any bond or agreement for sale of any land, again sells, barters, or disposes of the same tract of land or any part thereof, or executes any bond or agreement to sell or barter or dispose of the same land or any part thereof, to any other person, with intent to defraud, commits selling land twice. Selling land twice is a class 5 felony.

(2) Any person who knowingly makes a false representation as to the existence of an ownership interest in land which he has as a seller or which his principal has, and which is relied upon, commits a class 6 felony.

(3) A person who signs a lien waiver for a construction loan under section 38-22-119 and knowingly fails to timely pay any debts resulting from a construction agreement covered by the waiver commits a class 2 misdemeanor, unless there is a bona fide dispute as to the existence or amount of the debt.

Source: **L. 71:** R&RE, p. 442, § 1. **C.R.S. 1963:** § 40-5-302. **L. 89:** Entire section amended, p. 835, § 59, effective July 1. **L. 2009:** (3) added, (SB 09-137), ch. 145, p. 610, § 1, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3186, § 240, effective March 1, 2022.

ANNOTATION

The second sale must be for a consideration to make out a case under this section. *Clement v. Major*, 1 Colo. App. 297, 29 P. 19 (1892); *Clement v. Major*, 8 Colo. App. 86, 44 P. 776 (1896)(both cases decided under former G.S. § 888).

Term "ownership interest in land" not vague. The term "ownership interest in land", in the context of a false representation made to another, is not so vague or uncertain that persons of ordinary intelligence must guess as to its meaning or necessarily differ as to its application. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

Subsection (2) requires actual reliance by the victim, without regard to how a

reasonable person might have understood and reacted to the misrepresentation, and this requirement of actual reliance satisfies due process standards. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

True representation not basis for conviction. This section does not permit a conviction for the making of a true representation as to an ownership interest in land, notwithstanding the fact that the true representation may create a false or mistaken belief in the victim with respect to the nature of the seller's interest in the land. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

18-5-303. Bait advertising.

(1) A person commits bait advertising if, in any manner, including advertising or any other means of communication, he offers property or services as part of a scheme or plan, with the intent, plan, or purpose not to sell or provide the advertised property or services at all, or not at the price at which he offered them, or not in a quantity sufficient to meet the reasonable expected public demand, unless the quantity is specifically stated in the advertisement.

(2) It shall be an affirmative defense that a television or radio broadcasting station or a publisher or printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301 (1)(e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser's or subscriber's intent, plan, or purpose.

(3) Bait advertising is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-303. L. 73: p. 538, § 3.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

This section and § 42-5-102 (2) criminal conduct. People v. Bossert, 722 P.2d 998 (Colo. 1986).
prescribe different, albeit related,

18-5-304. False statements as to circulation.

It is a civil infraction for any person engaged in the publication of any newspaper, magazine, periodical, or other advertising medium published in the state of Colorado or for any employee of any such publisher knowingly to make any statement concerning the circulation of the newspaper, magazine, periodical, or other advertising medium which is untrue or misleading where such publisher fixes his charges for advertising space in the publication on the amount of its circulation.

Source: L. 71: R&RE, p. 442, § 1. **C.R.S. 1963:** § 40-5-304. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3186, § 241, effective March 1, 2022.

18-5-305. Identification number - altering - possession.

(1) A person commits the crime of altering identification number if, with intent that identification of an article be hindered or prevented, he obscures an identification number or in the course of business he sells, offers for sale, leases, or otherwise disposes of an article knowing that an identification number thereon is obscured.

(2) "Identification number" means a serial or motor number placed by the manufacturer upon an article as a permanent individual identifying mark.

(3) "Obscure" means to destroy, remove, alter, conceal, or deface so as to render illegible by ordinary means of inspection.

(4) Possession of an article on which an identification number is obscured is prima facie evidence that the person possessing it obscured the number with intent to hinder or prevent identification of the article, and that he knows that the identification number is obscured, unless, prior to his arrest or the issuance of a warrant for a search of the premises where the article is kept, whichever is earlier, he reports possession of the article to the police or other appropriate law enforcement agency.

(5) Altering identification number is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-305. L. 2021: (5) amended, (SB 21-271), ch. 462, p. 3186, § 242, effective March 1, 2022.

ANNOTATION

Obliteration of number is probable cause for arrest and seizure. Upon discovery that the serial number on a piece of equipment had been obliterated, this is evidence that a crime has been committed

and there is probable cause to arrest and seize the property incident to the arrest. People v. Mangum, 189 Colo. 246, 539 P.2d 120 (1975).

18-5-306. Counterfeit or imitation controlled substances. (Repealed)

Source: L. 81: Entire section added, p. 995, § 1, effective July 1; (1)(a) amended, p. 2031, § 46, effective January 1, 1982. L. 83: Entire section repealed, p. 704, § 4, effective July 1.

18-5-307. Fee paid to private employment agencies.

(1) As used in this section:

(a) "Applicant" means any person applying to a private employment agency in order to secure employment with any person, firm, association, or corporation other than the private employment agency.

(b) "Employment" means every character of service rendered or to be rendered for wages, salary, commission, or other form of remuneration.

(b.5) "Fee-paid position" means a position of employment which is available to an applicant where no fee or cost accrues to the applicant as a condition of obtaining such position.

(c) (I) "Private employment agency" means any nongovernmental person, firm, association, or corporation which secures or attempts to secure employment, arranges an interview between an applicant and a specific employer other than itself, or, by any form of advertising or representation, holds itself out to a prospective applicant as able to secure employment for the applicant with any person, firm, association, or corporation other than itself, or engages in employment counseling and in connection therewith supplies or represents that it is able to

supply employers or available jobs, where an applicant may become liable for the payment of a fee, either directly or indirectly.

(II) "Private employment agency" also means any nongovernmental person, firm, association, or corporation which provides a list of potential employers or available jobs in a publication, if the primary purpose of the publication, as represented by the provider, is to enable applicants to find employment or to list available jobs and if the applicant is charged more than twenty dollars within any period of time of thirty days or less for access to the publication or revisions or updates thereof, unless the listings of all jobs in the publication are initiated by employers rather than the provider.

(2) Any fee paid by an applicant to a private employment agency shall be by written contractual agreement which includes specific provisions for refunds and extended payment options. The exclusion of said options from the contractual agreement shall be explicitly stated in said agreement.

(3) No fee shall be charged by a private employment agency until an applicant is placed in employment.

(4) In the event employment terminates for any reason within one hundred calendar days, an applicant shall not be required to pay a fee to a private employment agency in excess of one percent of the total fee for each calendar day elapsed between the beginning and termination of employment. For purposes of this subsection (4), the amount of the total fee shall be based on the actual gross income earned, annualized in accordance with the contractual fee schedule.

(5) In the event employment terminates for any reason within one hundred calendar days, a private employment agency shall refund any portion of a fee paid by an applicant in excess of the limits specified in subsection (4) of this section. Such a refund shall be made in full within seven calendar days of said agency's receipt of written notification of the termination of employment; except that, if it has not been determined within that period of time that the instrument used to pay the fee is backed by sufficient funds, the refund is due upon such determination. If a refund is not made when due, the private employment agency is liable to the applicant for the refund due plus an additional sum equal to the amount of the refund.

(5.5) It shall be unlawful for any private employment agency knowingly to do or cause to be done any of the following:

(a) Send an applicant to any fictitious job or position or make any false representation concerning the availability of employment;

(b) Send an applicant to any place where a strike or lockout exists or is impending without notifying the applicant of the circumstances;

(c) Conspire or arrange with any employer to secure the discharge of an employee or give or receive any gratuity or divide or share with an employer any fee, charge, or remuneration received from any applicant for employment;

(d) Circulate or publish, by advertisement or otherwise, any false statements or representations to persons seeking employment or to employers seeking employees;

(e) Fail to refund fees to an applicant where such refund is due pursuant to subsection (5) of this section;

(f) Advertise or represent the availability of fee-paid positions where no cost accrues to the applicant if hired in such a manner as to confuse such position with other available positions which are not available on a fee-paid basis;

(g) Advertise or represent that an available position is available on a free or no fee basis or otherwise indicate that no charge or cost accrues to anyone when in fact the employer is obligated to pay a fee contingent upon the acceptance of employment of the applicant;

(h) Advertise for any position, including personnel for its own staff, without identifying in the advertisement that it is a private employment agency.

(6) A private employment agency or any employee of such agency commits a class 2 misdemeanor if said agency or employee knowingly violates any provision of this section.

(7) A private employment agency which has been convicted of a misdemeanor pursuant to this article, or any person connected therewith pursuant to paragraph (c) of subsection (1) of this section prior to conducting business in this state after such conviction, regardless of how classified as person, firm, association, or corporation, shall file with the department of labor and employment a cash or corporate surety bond in the sum of twenty thousand dollars. Such bond shall be executed by the private employment agency as principal and by a surety company authorized to do business in this state. Said private employment agency shall maintain such bond in effect as long as it conducts business in this state. Any person who suffers loss or damage as the result of a violation of this article, including any person who is owed a refund or any part thereof pursuant to subsections (4) and (5) of this section, may recover against the bond to the extent of the loss or damage suffered. A surety on any bond filed under the provisions of this section shall be released therefrom after such surety serves written notice thereof to the department of labor and employment at least sixty days prior to such release. Said release shall not discharge or otherwise affect any claim for loss or damage which occurred while said bond was in effect or which occurred under any contract executed during any period of time when said bond was in effect, except when another bond is filed in a like amount and provides indemnification for any such loss. The sole responsibilities of the department of labor and employment under this subsection (7) shall be to serve as a repository of bonds filed pursuant to this subsection (7) and to notify the district attorney in the county in which a private employment

agency is located when the department of labor and employment receives written notice from a surety seeking release from a bond that has been filed with the department of labor and employment by said private employment agency pursuant to this subsection (7). A private employment agency that violates the provisions of this section with regard to any three or more different applicants in any one-year period shall be deemed a class 1 public nuisance and shall be subject to the provisions of part 3 of article 13 of title 16, C.R.S. Any surety bond filed by such agency shall be forfeited and the proceeds distributed as provided in section 16-13-311, C.R.S.

Source: L. 83: Entire section added, p. 699, § 1, effective June 10. **L. 88:** (1)(b.5), (5.5), and (7) added and (1)(c) amended, pp. 346, 347, §§ 13, 14, effective July 1. **L. 2021:** (6) amended, (SB 21-271), ch. 462, p. 3186, § 243, effective March 1, 2022.

18-5-308. Electronic mail fraud.

(1) A person commits electronic mail fraud if he or she violates any provision of 18 U.S.C. sec. 1037 (a).

(2) This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.

(3) Electronic mail fraud is a class 2 misdemeanor.

Source: L. 2008: Entire section added, p. 596, § 2, effective August 5. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3186, § 244, effective March 1, 2022.

18-5-309. Money laundering - illegal investments - penalty - definitions.

(1) A person commits money laundering if he or she:

(a) Conducts or attempts to conduct a financial transaction that involves money or any other thing of value that he or she knows or believes to be the proceeds, in any form, of a criminal offense:

(I) With the intent to promote the commission of a criminal offense; or

(II) With knowledge or a belief that the transaction is designed in whole or in part to:

(A) Conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or

- (B) Avoid a transaction reporting requirement under federal law;
- (b) Transports, transmits, or transfers a monetary instrument or moneys:
 - (I) With the intent to promote the commission of a criminal offense; or
 - (II) With knowledge or a belief that the monetary instrument or moneys represent the proceeds of a criminal offense and that the transportation, transmission, or transfer is designed, in whole or in part, to:
 - (A) Conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or
 - (B) Avoid a transaction reporting requirement under federal law; or
 - (c) Intentionally conducts a financial transaction involving property that is represented to be the proceeds of a criminal offense, or involving property that the person knows or believes to have been used to conduct or facilitate a criminal offense, to:
 - (I) Promote the commission of a criminal offense;
 - (II) Conceal or disguise the nature, location, source, ownership, or control of property that the person believes to be the proceeds of a criminal offense; or
 - (III) Avoid a transaction reporting requirement under federal law.
- (2) Money laundering is a class 3 felony.
- (3) As used in this section, unless the context otherwise requires:
 - (a) "Conducts or attempts to conduct a financial transaction" includes, but is not limited to, initiating, concluding, or participating in the initiation or conclusion of a transaction.
 - (b) "Financial transaction" means a transaction involving:
 - (I) The movement of moneys by wire or other means;
 - (II) One or more monetary instruments;
 - (III) The transfer of title to any real property, vehicle, vessel, or aircraft; or
 - (IV) The use of a financial institution.
 - (c) "Monetary instrument" means:
 - (I) Coin or currency of the United States or any other country; a traveler's check; a personal check; a bank check; a cashier's check; a money order; a bank draft of any country; or gold, silver, or platinum bullion or coins;

(II) An investment security or negotiable instrument in bearer form or in other form such that title passes upon delivery; or

(III) A gift card or other device that is the equivalent of money and can be used to obtain cash, property, or services.

(d) "Represent" includes, but is not limited to, the making of a representation by a peace officer, a federal officer, or another person acting at the direction of, or with the approval of, a peace officer or federal officer.

(e) "Transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition and, with respect to a financial institution, includes a deposit; a withdrawal; a transfer between accounts; an exchange of currency; a loan; an extension of credit; a purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument; the use of a safe deposit box; or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means.

Source: L. 2010: Entire section added, (HB 10-1081), ch. 256, p. 1138, § 1, effective August 11.

ANNOTATION

A complicitor is liable for a principal's act of money laundering if the prosecution can prove that (1) the principal committed an act of money laundering; (2) the complicitor aided, abetted, advised, or encouraged that specific act of money laundering; (3) the complicitor intended to do so; (4) the complicitor was aware that the principal knew or believed that the property involved in the specific money laundering transaction represented the proceeds of a criminal offense; and (5) the complicitor was aware that the principal knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the

criminal offense. *Butler v. People*, 2019 CO 87, 450 P.3d 714.

Prosecution's ultimate obligation is to prove defendant's complicity for the specific acts charged rather than participation in an overall plan or operation, which lowers the bar for prosecution. *Butler v. People*, 2019 CO 87, 450 P.3d 714.

Trial court did not err by omitting statutory definitions in the elemental jury instruction for money laundering. The instruction for money laundering substantially tracked the language of the statute, and the language is clear. Additionally, the definitions have not taken on any technical or particular meanings beyond their ordinary and common

understandings and were unlikely to be misunderstood by the jury so as to require further definition. Because the statutory definitions do not diverge from the ordinary and plain understandings of the terms, there was no need to specially define those terms for the jury. *People v. Butler*, 2017 COA 98, 454 P.3d 280, *aff'd* on other grounds, 2019 CO 87, 450 P.3d 714.

Colorado lacked subject matter jurisdiction under § 18-1-201 over a defendant convicted of money laundering when the defendant opened a bank account in Texas, received and disbursed funds in Texas, and never solicited the Colorado victims to wire transfer funds to Texas. *People v. Nevelik*, 2021 COA 30, 491 P.3d 492.

To sustain a conviction under subsection (1)(b)(I), the defendant must

have done the transferring and must have transferred "a monetary instrument or moneys", not something else in exchange for money. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Evidence insufficient to sustain conviction where the defendant received money and discussed the transfer of money but did not personally transfer money. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Subsection (1)(b)(I) does not require proof that the funds involved in the transaction or transfer were derived from an offense separate from the transaction or transfer charged. It is enough that the transaction or transfer promoted the "commission of a criminal offense". *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

PART 4

BRIBERY AND RIGGING OF CONTESTS

18-5-401. Commercial bribery and breach of duty to act disinterestedly.

(1) A person commits a class 6 felony if he solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

- (a) Agent or employee; or
- (b) Trustee, guardian, or other fiduciary; or
- (c) Lawyer, physician, accountant, appraiser, or other professional adviser; or
- (d) Officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or
- (e) Duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or

(f) Arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services commits a class 6 felony if he knowingly solicits, accepts, or agrees to accept any benefit to alter, modify, or change his selection, appraisal, or criticism.

(3) A person commits a class 6 felony if he confers or offers or agrees to confer any benefit the acceptance of which would be a felony under subsections (1) and (2) of this section.

Source: L. 71: R&RE, p. 443, § 1. C.R.S. 1963: § 40-5-401. L. 77: (2) amended, p. 964, § 32, effective July 1. L. 89: IP(1), (2), and (3) amended, p. 835, § 60, effective July 1.

Cross references: For bribery of a public servant, see § 18-8-302.

ANNOTATION

Constitutionality of subsection (1)(a) and (1)(d). Subsection (1)(a) and (1)(d) is not void for vagueness and provides sufficient notice that conduct contemplated by the defendants was prohibited so as to serve as predicate acts for RICO prosecution and also provides a sufficiently clear,

objective standard to satisfy due process. U.S. v. Gaudreau, 860 F.2d 357 (10th Cir. 1988).

Statute does not unconstitutionally delegate legislative power to private persons to define duty of fidelity. People v. Lee, 717 P.2d 493 (Colo. 1986).

18-5-402. Rigging publicly exhibited contests.

(1) A person commits a civil infraction if, with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it, the person:

(a) Confers or offers or agrees to confer any benefit upon, or threatens any detriment to a participant, official, or other person associated with the contest or exhibition; or

(b) Tamper with any person, animal, or thing; or

(c) Knowingly solicits, accepts, or agrees to accept any benefit the conferring of which is prohibited by paragraph (a) of this subsection (1).

(2) A person commits a civil infraction if the person knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited or advertised contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct prohibited by this section.

Source: L. 71: R&RE, p. 443, § 1. **C.R.S. 1963:** § 40-5-402. **L. 2021:** IP(1) and (2) amended, (SB 21-271), ch. 462, p. 3186, § 245, effective March 1, 2022.

18-5-403. Bribery in sports.

(1) As used in this section:

(a) "Sports contest" means any professional or amateur sport or athletic game, race, or contest viewed by the public.

(b) "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant, or member of a team, or as a coach, manager, trainer, owner, or other person directly associated with a player, contestant, team, or entry.

(c) "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge, or otherwise to officiate at a sports contest.

(2) A person commits bribery in sports if:

(a) He confers, or offers or agrees to confer, any benefit upon or threatens any detriment to a sports participant with intent to influence him not to give his best efforts in a sports contest; or

(b) He confers, or offers or agrees to confer, any benefit upon or threatens any detriment to a sports official with intent to influence him to perform his duties improperly; or

(c) Being a sports participant, he knowingly accepts, agrees to accept, or solicits any benefit from another person upon an understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

(d) Being a sports official, he knowingly accepts, agrees to accept, or solicits any benefit from another person upon an understanding that he will perform his duties improperly; or

(e) With intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official, or any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

(3) Bribery in sports is a class 6 felony.

Source: L. 71: R&RE, p. 444, § 1. C.R.S. 1963: § 40-5-403. L. 77: (2)(c) and (2)(d) amended, p. 964, § 33, effective July 1. L. 89: (3) amended, p. 836, § 61, effective July 1.

PART 5

OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE

18-5-501. Definitions.

The definitions set forth in the "Uniform Commercial Code", title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511.

Source: L. 71: R&RE, p. 444, § 1. C.R.S. 1963: § 40-5-501.

18-5-502. Failure to pay over assigned accounts.

(1) When, under the terms of an assignment of an account, as defined in section 4-9-102 (a)(2), the assignor, being permitted to collect the proceeds from the debtor, is to pay over to the assignee any of the proceeds and, after collection thereof, the assignor willfully and wrongfully fails to pay over to the assignee the proceeds, the person commits failure to pay over assigned accounts.

(2) Failure to pay over assigned accounts is:

- (a) A petty offense if the amount is less than three hundred dollars;
- (b) A class 2 misdemeanor if the amount is three hundred dollars or more but less than one thousand dollars;
- (c) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars;
- (d) A class 6 felony if the amount is more than two thousand dollars but less than five thousand dollars;
- (e) A class 5 felony if the amount is five thousand dollars or more but less than twenty thousand dollars;
- (f) A class 4 felony if the amount is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if the amount is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony if the amount is one million dollars or more.

Source: **L. 71:** R&RE, p. 444, § 1. **C.R.S. 1963:** § 40-5-502. **L. 89:** Entire section amended, p. 836, § 62, effective July 1. **L. 98:** Entire section amended, p. 796, § 8, effective July 1. **L. 2001:** Entire section amended, p. 1446, § 39, effective July 1. **L. 2007:** Entire section amended, p. 1695, § 10, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3187, § 246, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

18-5-503. Criminal liability of transferor of a bulk transfer. (Repealed)

Source: **L. 71:** R&RE, p. 445, § 1. **C.R.S. 1963:** § 40-5-503. **L. 91:** Entire section repealed, p. 270, § 8, effective July 1.

18-5-504. Concealment or removal of secured property.

(1) If a person who has given a security interest in personal property, as security interest is defined in section 4-1-201 (b)(35), or other person with actual knowledge of the security interest, during the existence of the security interest, knowingly conceals or removes the encumbered property from the state of Colorado without written consent of the secured creditor, the person commits concealment or removal of secured property.

(2) Concealment or removal of secured property is:

(a) A petty offense if the amount is less than three hundred dollars;

(b) A class 2 misdemeanor if the amount is three hundred dollars or more but less than one thousand dollars;

(c) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars;

(d) A class 6 felony if the amount is more than two thousand dollars but less than five thousand dollars;

(e) A class 5 felony if the amount is five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony if the amount is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if the amount is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony if the amount is one million dollars or more.

Source: **L. 71:** R&RE, p. 445, § 1. **C.R.S. 1963:** § 40-5-504. **L. 77:** Entire section amended, p. 964, § 34, effective July 1. **L. 89:** Entire section amended, p. 836, § 63, effective July 1. **L. 98:** Entire section amended, p. 797, § 9, effective July 1. **L. 2006:** Entire section amended, p. 503, § 46, effective September 1. **L. 2007:** Entire section amended, p. 1695, § 11, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3187, § 247, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

This section applies to any valid security interest, perfected or not. *People v. Armijo*, 197 Colo. 91, 589 P.2d 935 (1979).

This section is designed to protect the ability of a secured creditor to look to the particular security underlying a debt in the event of default. Removal and concealment of security is conduct which impairs that ability and is thus violative of this section. *People v. O'Cana*, 725 P.2d 1139 (Colo. 1986).

This section provides ample notice to the populace of the prohibited conduct and a sufficiently precise standard for those charged with its enforcement to satisfy constitutional standards of specificity and to withstand a void for vagueness challenge. *People v. O'Cana*, 725 P.2d 1139 (Colo. 1986).

No affirmative conduct by any third party is necessary to complete the offense defined in this section. Even though a secured party who is the victim of the conduct proscribed by this section may elect not to report such conduct to prosecuting

officials does not alter the fact that the offense is completed by the accused's conduct. *People v. O'Cana*, 725 P.2d 1139 (Colo. 1986).

The offense of removing secured property established by this section requires proof that the defendant knew of the existence of the security interest, knew that he was removing the secured property from Colorado without first having obtained

the creditor's written consent to such removal, and knew that such removal would impair the creditor's security interest. *People v. O'Cana*, 725 P.2d 1139 (Colo. 1986).

Leaving the state with a vehicle in which a former client has a security interest was found to be a violation of this section in an attorney disciplinary proceeding and was a basis for disbarment. *People v. Odom*, 941 P.2d 919 (Colo. 1997).

18-5-505. Failure to pay over proceeds unlawful.

(1) When, under the terms of an instrument creating a security interest in personal property, as security interest is defined in section 4-1-201 (b)(35), the person giving the security interest and retaining possession of the encumbered property and having liberty of sale or other disposition, is required to account to the secured creditor for the proceeds of the sale or other disposition, and willfully and wrongfully fails to pay to the secured creditor the amounts due on account thereof, the person giving the security interest commits failure to pay over proceeds.

(2) Failure to pay over proceeds is:

- (a) A petty offense if the amount is less than three hundred dollars;
- (b) A class 2 misdemeanor if the amount is three hundred dollars or more but less than one thousand dollars;
- (c) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars;
- (d) A class 6 felony if the amount is more than two thousand dollars but less than five thousand dollars;
- (e) A class 5 felony if the amount is five thousand dollars or more but less than twenty thousand dollars;
- (f) A class 4 felony if the amount is twenty thousand dollars or more but less than one hundred thousand dollars;
- (g) A class 3 felony if the amount is one hundred thousand dollars or more but less than one million dollars; and
- (h) A class 2 felony if the amount is one million dollars or more.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-505. L. 89: Entire section amended, p. 836, § 64, effective July 1. L. 98: Entire section amended, p. 797, § 10, effective July 1. L. 2006: Entire section amended, p. 503, § 47, effective September 1. L. 2007: Entire section amended, p. 1695, § 12, effective July 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3188, § 248, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

18-5-506. Fraudulent receipt - penalty.

A warehouse, as defined in section 4-7-102 (a)(13), or any officer, agent, or servant of a warehouse, that issues or aids in issuing a receipt knowing that the goods for which the receipt is issued have not been actually received by the warehouse, or are not under the warehouse's actual control at the time of issuing the receipt, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-506. L. 89: Entire section amended, p. 837, § 65, effective July 1. L. 2006: Entire section amended, p. 504, § 48, effective September 1. L. 2023: Entire section amended, (HB 23-1293), ch. 298, p. 1786, § 20, effective October 1.

18-5-507. False statement in receipt - penalty.

A warehouse, as defined in section 4-7-102 (a)(13), C.R.S., or any officer, agent, or servant of a warehouse, that fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-507. L. 2006: Entire section amended, p. 504, § 49, effective September 1.

18-5-508. Duplicate receipt not marked - penalty.

A warehouse, as defined in section 4-7-102 (a)(13), or any officer, agent, or servant of a warehouse, that issues or aids in issuing a duplicate or additional negotiable receipt for goods

knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without placing upon the face thereof the word "duplicate", except in case of a lost or destroyed receipt after proceedings as provided for in section 4-7-601, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-508. L. 89: Entire section amended, p. 837, § 66, effective July 1. L. 2006: Entire section amended, p. 504, § 50, effective September 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3189, § 249, effective March 1, 2022.

18-5-509. Warehouse's goods mingled - receipts - penalty.

Where there are deposited with or held by a warehouse, as defined in section 4-7-102 (a)(13), C.R.S., goods of which the warehouse is owner, either solely or jointly or in common with others, the warehouse or any of the warehouse's officers, agents, or servants that, knowing this ownership, issue or aid in issuing a negotiable receipt for the goods that does not state such ownership commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-509. L. 2006: Entire section amended, p. 504, § 51, effective September 1.

18-5-510. Delivery of goods without receipt - penalty.

A warehouse, as defined in section 4-7-102 (a)(13), C.R.S., or any officer, agent, or servant of a warehouse, that delivers goods out of the possession of such warehouse, knowing that a negotiable receipt the negotiation of which would transfer the right of the possession of those goods is outstanding and uncanceled, without obtaining the possession of that receipt at or before the time of the delivery, except the cases provided for in section 4-7-601, C.R.S., commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 446, § 1. C.R.S. 1963: § 40-5-510. L. 2006: Entire section amended, p. 504, § 52, effective September 1.

18-5-511. Mortgaged goods receipt - penalty.

Any person who deposits goods to which the person does not have title, or upon which there is a security interest in personal property, as security interest is defined in section 4-1-201 (b)(35), C.R.S., and who takes for such goods a negotiable receipt that the person afterwards negotiates for value with intent to deceive and without disclosing the person's want of title or the existence of such security interest, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 446, § 1. **C.R.S. 1963:** § 40-5-511. **L. 2006:** Entire section amended, p. 505, § 53, effective September 1.

18-5-512. Issuance of bad check.

(1) In adopting this section, the general assembly declares as a matter of policy that the issuance and delivery of a known bad check by any person is, in itself, not only harmful to the person to whom it is given but is also injurious to the community at large and is, therefore, a proper subject for criminal sanction without regard to the purpose for which the check was given.

(2) "Insufficient funds" means not having a sufficient balance in account with a bank or other drawee for the payment of a check or order when the check or order is presented for payment and it remains unpaid thirty days after such presentment.

(3) Except as provided in section 18-5-205, a person commits a petty offense if the person issues or passes a check or similar sight order for the payment of money, knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

(4) This section does not relieve the prosecution from the necessity of establishing the required knowledge by evidence. However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check or order, if:

(a) He has no account with the bank or other drawee at the time he issues the check or order;
or

(b) He has insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

(5) A bank shall not be civilly or criminally liable for releasing information relating to the issuer's account to a sheriff, deputy sheriff, undersheriff, police officer, agent of the Colorado bureau of investigation, division of gaming investigator, division of lottery investigator, parks and outdoor recreation officer, Colorado wildlife officer, district attorney, assistant district

attorney, deputy district attorney, or authorized investigator for a district attorney investigating or prosecuting a charge under this section.

(6) Restitution for offenses described in this section may be collected as a condition of pretrial diversion by a district attorney, an employee of a district attorney's office, or a person under contract with a district attorney's office. Such collection is governed by the provisions of article 18.5 of title 16, C.R.S., and is not the collection of a debt.

Source: L. 72: p. 284, § 2. C.R.S. 1963: § 40-5-512. L. 89: (2) amended, p. 757, § 6, effective July 1. L. 2002: (6) added, p. 760, § 8, effective July 1. L. 2003: (5) amended, p. 1632, § 78, effective August 6. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3189, § 250, effective March 1, 2022.

Cross references: For the recovery of damages for insufficient funds or no account instruments, see § 13-21-109.

ANNOTATION

This section does not contain the former constitutionally infirm language of section 18-5-205 (2), which made a bank's failure to honor the check a material element of the crime of fraud by check. *People v.*

Quinn, 190 Colo. 534, 549 P.2d 1332 (1976).

Applied in *People v. Attebury*, 196 Colo. 509, 587 P.2d 281 (1978).

PART 6

IMITATION CONTROLLED SUBSTANCES ACT

18-5-601 to 18-5-606. (Repealed)

Source: L. 92: Entire part repealed, p. 393, § 25, effective July 1.

Editor's note: This part 6 was added in 1983. For amendments to this part 6 prior to its repeal in 1992, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

PART 7

FINANCIAL TRANSACTION DEVICE CRIME ACT

Cross references: For obtaining a financial transaction device by false statements, see § 18-5-209.

18-5-701. Definitions.

As used in this part 7, unless the context otherwise requires:

(1) "Account holder" means the person or business entity named on the face of a financial transaction device to whom or for whose benefit the financial transaction device is issued by an issuer.

(2) "Automated banking device" means any machine which, when properly activated by a financial transaction device or a personal identification code, may be used for any of the purposes for which a financial transaction device may be used.

(3) "Financial transaction device" means any instrument or device whether known as a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card, or account number representing a financial account or affecting the financial interest, standing, or obligation of or to the account holder, that can be used to obtain cash, goods, property, or services or to make financial payments, but shall not include a "check", a "negotiable order of withdrawal", and a "share draft" as defined in section 18-5-205.

(4) "Issuer" means any person or banking, financial, or business institution, corporation, or other business entity that assigns financial rights by acquiring, distributing, controlling, or canceling a financial transaction device.

(5) "Personal identification code" means any grouping of letters, numbers, or symbols assigned to the account holder of a financial transaction device by the issuer to permit authorized electronic use of that financial transaction device.

(6) "Sales form" means any written record of a financial transaction involving use of a financial transaction device.

Source: L. 84: Entire part added, p. 549, § 2, effective July 1.

18-5-702. Unauthorized use of a financial transaction device.

(1) A person commits unauthorized use of a financial transaction device if he uses such device for the purpose of obtaining cash, credit, property, or services or for making financial payment, with intent to defraud, and with notice that either:

- (a) The financial transaction device has expired, has been revoked, or has been canceled; or
- (b) For any reason his use of the financial transaction device is unauthorized either by the issuer thereof or by the account holder.

(2) For purposes of paragraphs (a) and (b) of subsection (1) of this section, "notice" includes either notice given in person or notice given in writing to the account holder. The sending of a notice in writing by registered or certified mail, return receipt requested, duly stamped and addressed to such account holder at his last address known to the issuer, evidenced by a signed returned receipt signed by the account holder, is prima facie evidence that the notice was received.

(3) Unauthorized use of a financial transaction device is:

- (a) (Deleted by amendment, L. 2007, p. 1695, § 13, effective July 1, 2007.)
- (b) Repealed.
- (c) A petty offense if the value of the cash, credit, property, or services obtained or of the financial payments made is less than three hundred dollars;
- (d) A class 2 misdemeanor if the value of the cash, credit, property, or services obtained or of the financial payments made is three hundred dollars or more but less than one thousand dollars;
- (e) A class 1 misdemeanor if the value of the cash, credit, property, or services obtained or of the financial payments made is one thousand dollars or more but less than two thousand dollars;
- (f) A class 6 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is two thousand dollars or more but less than five thousand dollars;
- (g) A class 5 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is five thousand dollars or more but less than twenty thousand dollars;
- (h) A class 4 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is twenty thousand dollars or more but less than one hundred thousand dollars;
- (i) A class 3 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is one hundred thousand dollars or more but less than one million dollars; and

(j) A class 2 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is one million dollars or more.

(4) The value of the cash, credit, property, or services obtained and the financial payments made shall be the total value of the cash, credit, property, or services obtained or financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use.

Source: **L. 84:** Entire part added, p. 549, § 2, effective July 1; (3)(b) and (3)(c) amended, p. 539, § 16, effective July 1, 1985. **L. 89:** (3)(c) amended, p. 837, § 67, effective July 1. **L. 92:** (3) amended, p. 436, § 8, effective April 10. **L. 98:** (3)(b) and (3)(c) amended, p. 1439, § 17, effective July 1; (3)(b) and (3)(c) amended, p. 797, § 11, effective July 1. **L. 2007:** (3) amended, p. 1695, § 13, effective July 1. **L. 2014:** (3) amended, (HB 14-1266), ch. 155, p. 538, § 4, effective August 6. **L. 2021:** (3)(c), (3)(d), and (3)(e) amended, (SB 21-271), ch. 462, p. 3189, § 251, effective March 1, 2022; (3)(b)(II) added by revision, (SB 21-271), ch. 462, pp. 3189, 3331, §§ 251, 803.

Editor's note: Subsection (3)(b)(II) provided for the repeal of subsection (3)(b), effective March 1, 2022. (See L. 2021, p. 3189, 3331.)

Cross references: For the legislative declaration contained in the 2007 act amending subsection (3), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Defendant's equal protection rights not violated by defendant's identity theft conviction. The unauthorized use of a financial transaction device statute and the identity theft statute do not prohibit identical conduct while imposing different penalties. Unlike the unauthorized use of a financial transaction device statute, the conviction for identity theft required the jury to find that the credit card belonged to the victim and not the defendant. *People v. Jauch*, 2013

COA 127, 411 P.3d 53; *People v. Trujillo*, 2015 COA 22, 369 P.3d 693.

Neither this statute nor the identity theft statute imposes an affirmative duty that the defendant obtain the victim's consent before using the victim's financial device. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

Fraudulent use of credit card. In prosecution based upon fraudulent use of another's credit card, fact that defendant was

charged under § 18-5-103 rather than this more specific section was not error requiring dismissal. *People v. Ortega*, 181 Colo. 223, 508 P.2d 784 (1973) (decided under former § 40-14-21, C.R.S. 1963).

Notice requirement applies to the account holder or to one in possession of the financial transaction device with permission of the account holder and not to one using an allegedly lost or stolen device. Therefore, the prosecution was not required to prove that the defendant who had used a lost or stolen device had been given notice that his use was not authorized in order to get a conviction. *People v. Pipkin*, 762 P.2d 736 (Colo. App. 1988).

Requirement that defendant receive notice that the "device has expired, has been revoked, or has been cancelled" is not limited to notice in person or in writing. The phrase "includes either notice given in person or notice given in writing" is an example of the types of notice permissible under the statute. "Includes" is a term of extension and illustration, not exhaustion or exclusion. *People v. Patton*, 2016 COA 187, 425 P.3d 1152, *aff'd* on other grounds, 2018 CO 67, 421 P.3d 184.

Trial court did not err in refusing to give jury instruction defining the

affirmative defense of consent where proof of the elements of the charged offense necessarily required disproof of the issues raised by said defense. *People v. Bush*, 948 P.2d 16 (Colo. App. 1997).

Section requires proof that a defendant in fact obtained possession or use of cash, credit, property, or services through the unauthorized use of a financial transaction device. *People v. Novitskiy*, 81 P.3d 1070 (Colo. App. 2003).

The state lacked subject matter jurisdiction over defendant's prosecution because none of defendant's conduct forming a material element of either unauthorized use of a financial transaction device or identity theft occurred in the state, and the unauthorized use and identity theft statutes do not include a result element. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

Knowledge that the victim lives in the state is a circumstantial element, and is not a conduct or result element of the crime of unauthorized use of a financial transaction device or of identity theft and therefore should not be considered when determining jurisdiction. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

18-5-703. Criminal possession of a financial transaction device. (Repealed)

Source: **L. 84:** Entire part added, p. 550, § 2, effective July 1. **L. 86:** (3) amended, p. 770, § 7, effective July 1. **L. 89:** (3) and (4) amended, p. 837, § 68, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 6, effective July 1.

Cross references: For current provisions relating to criminal possession of a financial device, see § 18-5-903.

18-5-704. Sale or possession for sale of a financial transaction device. (Repealed)

Source: L. 84: Entire part added, p. 550, § 2, effective July 1. L. 89: (1) amended, p. 837, § 69, effective July 1. L. 2006: Entire section repealed, p. 1319, § 7, effective July 1.

18-5-705. Criminal possession or sale of a blank financial transaction device.

(1) A person commits criminal possession or sale of a blank financial transaction device if, without the authorization of the issuer or manufacturer, he has in his possession or under his control or receives from another person, with intent to use, deliver, circulate, or sell it or with intent to cause the use, delivery, circulation, or sale of it, or sells any financial transaction device which has not been embossed or magnetically encoded with the name of the account holder, personal identification code, expiration date, or other proprietary institutional information.

(2) Criminal possession of a blank financial transaction device is a class 6 felony.

(3) Criminal possession of two or more blank financial transaction devices is a class 5 felony.

(4) Delivery, circulation, or sale of one blank financial transaction device is a class 5 felony.

(5) Delivery, circulation, or sale of two or more blank financial transaction devices is a class 3 felony.

(6) For purposes of this section, a blank financial transaction device is one that has at least one or more characteristics of a financial transaction device but does not contain all of the characteristics of a completed financial transaction device.

Source: L. 84: Entire part added, p. 550, § 2, effective July 1. L. 89: (2) to (4) amended, p. 837, § 70, effective July 1.

18-5-706. Criminal possession of forgery devices.

(1) A person commits possession of forgery devices if he possesses any tools, photographic equipment, printing equipment, or any other device adapted, designed, or commonly used for committing or facilitating the commission of an offense involving the unauthorized manufacture, printing, embossing, or magnetic encoding of a financial transaction device or the altering or addition of any uniform product codes, optical characters, or holographic images to a financial transaction device, and intends to use the thing possessed, or knows that some person intends to use the thing possessed, in the commission of such an offense.

(2) Possession of a forgery device is a class 5 felony.

Source: L. 84: Entire part added, p. 551, § 2, effective July 1. L. 89: (2) amended, p. 838, § 71, effective July 1. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1787, § 21, effective October 1.

18-5-707. Unlawful manufacture of a financial transaction device.

(1) A person commits unlawful manufacture of a financial transaction device if, with intent to defraud, he:

(a) Falsely makes or manufactures, by printing, embossing, or magnetically encoding, a financial transaction device; or

(b) Falsely alters or adds uniform product codes, optical characters, or holographic images to a device which is or purports to be, or which is calculated to become or to represent if completed, a financial transaction device; or

(c) Falsely completes a financial transaction device by adding to an incomplete device to make it a complete one.

(2) As used in this section, unless the context otherwise requires:

(a) To "falsely alter" a financial transaction device means to change such device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

(b) To "falsely complete" a financial transaction device means to transform an incomplete device into a complete one by adding, inserting, or changing matter without the authority of

anyone entitled to grant that authority, so that the complete device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

(c) To "falsely make" a financial transaction device means to make or manufacture a device, whether complete or incomplete, which purports to be an authentic creation of its ostensible issuer, but which is not, either because the ostensible issuer is fictitious or because, if real, he did not authorize the making or the manufacturing thereof.

(3) Unlawful manufacture of a financial transaction device is a class 5 felony.

Source: L. 84: Entire part added, p. 551, § 2, effective July 1; (1)(b) amended, p. 1125, § 43, effective July 1. L. 89: (3) amended, p. 838, § 72, effective July 1.

ANNOTATION

Annotator's note. Since § 18-5-707 is similar to former § 40-14-21, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Credit card may be forged. In an instruction on the subject of the forgery, a credit card not only has legal efficacy, but also specifically falls within the language of the forgery statute. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

And prosecutor may proceed under forgery or credit card provisions. Since the credit card and forgery statutes have as their subject matter two different kinds of criminal transactions, the existence of the

specific credit card statute does not preclude prosecution under the state's general forgery statute and also it is the proper discretionary function of the prosecutor to elect to proceed under the felony rather than the misdemeanor statute. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

Reasonable distinctions can be drawn between the two crimes which are the subject matter of the credit card and forgery statutes, and the existence of the specific statute regarding the misuse of credit cards does not preclude prosecution or conviction of appellant under the state's general forgery statute. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972).

PART 8

EQUITY SKIMMING AND RELATED OFFENSES

18-5-801. Definitions.

As used in this part 8, unless the context otherwise requires:

(1) "Lease" means any grant of use and possession for consideration, with or without an option to buy.

(2) "Real property" means land and any interest or estate in land and includes a manufactured home as defined in section 42-1-102 (48.8).

(3) "Rent" means any moneys or any other thing of value received as a payment or as a deposit for the privilege of living in or using real property.

(4) "Security interest" means an interest in personal property which secures payment or performance of an obligation.

(5) "Vehicle" means any device of conveyance capable of moving itself or of being moved from place to place upon wheels or a track or by water or air, whether or not intended for the transport of persons or property, and includes any space within such "vehicle" adapted for overnight accommodation of persons or animals or for the carrying on of business. "Vehicle" does not include a manufactured home as defined in section 42-1-102 (48.8).

Source: L. 87: Entire part added, p. 670, § 1, effective July 1. **L. 94:** (2) and (5) amended, p. 2552, § 42, effective January 1, 1995. **L. 2022:** (2) and (5) amended, (SB 22-212), ch. 421, p. 2969, § 28, effective August 10.

18-5-802. Equity skimming of real property.

(1) A person commits the crime of equity skimming of real property if the person knowingly:

(a) Acquires an interest in real property that is encumbered by a loan secured by a mortgage or deed of trust and the loan is in arrears at the time the person acquires the interest or is placed in default within eighteen months after the person acquires the interest; and

(b) Either:

(I) Fails to apply all rent derived from the person's interest in the real property first toward the satisfaction of all outstanding payments due on the loan and second toward any fees due to any association of real property owners that charges such fees for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part before appropriating the remainder of such rent or any part thereof for any other purpose except for the purpose of repairs necessary to prevent waste of the real property; or

(II) After a foreclosure in which title has vested pursuant to section 38-38-501, C.R.S., collects rent on behalf of any person other than the owner of the real property.

(2) Repealed.

(3) Equity skimming of real property is a class 5 felony.

(4) It shall be an affirmative defense to this section:

(a) That all deficiencies in all underlying encumbrances at the time of acquisition have been fully satisfied and brought current and that, in addition, any regular payments on the underlying encumbrances during the succeeding nine months after the date of acquisition have been timely paid in full; except that this shall not be an affirmative defense to a crime that includes the element set forth in subparagraph (II) of paragraph (b) of subsection (1) of this section;

(b) That any fees due to an association of real property owners for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part have been paid in full.

(5) The provisions of this section shall not apply to any bona fide lender who accepts a deed in lieu of foreclosure or who forecloses upon the real property.

(6) The provisions of this section shall not apply to any bona fide purchaser who acquires fee title in any real property without agreeing to pay all underlying encumbrances and takes fee title subject to all underlying encumbrances, if the following written, verbatim warning was provided to the seller in capital letters of no less than ten-point, bold-faced type and acknowledged by the seller's signature:

WARNING: PURCHASER, _____, WILL NOT ASSUME OR PAY ANY PRESENT MORTGAGE, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AGAINST THE PROPERTY. THE SELLER, _____, UNDERSTANDS HE/SHE WILL REMAIN RESPONSIBLE FOR ALL PAYMENTS DUE ON SUCH MORTGAGES, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AND FOR ANY DEFICIENCY JUDGMENT UPON FORECLOSURE.

I HAVE HAD THE FOREGOING READ TO ME AND UNDERSTAND THE PURCHASER, _____, WILL NOT ASSUME ANY PRESENT MORTGAGES, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AGAINST THE PROPERTY DESCRIBED AS _____.

DATE _____

SELLER _____.

Source: L. 87: Entire part added, p. 671, § 1, effective July 1. **L. 89:** (1)(b) and (4) amended, p. 907, § 1, effective April 24; (2) repealed and (3), (4)(a), and (6) amended, pp. 861, 838, §§

156, 73, effective July 1. **L. 2009:** (1) and (4)(a) amended, (HB 09-1227), ch. 155, p. 668, § 1, effective September 1.

ANNOTATION

Law reviews. For article, "Equity Skimming: A Crisis in Residential Real Estate", see 19 Colo. Law. 871 (1990).

Violation of this section subjects attorney to disciplinary action as engaging

in conduct involving dishonesty, conduct reflecting adversely on the practice of law, and conduct which constitutes the violation of a criminal law. *People v. Phelps*, 837 P.2d 755 (Colo. 1992).

18-5-803. Equity skimming of a vehicle.

(1) A person commits equity skimming of a vehicle if, knowing the vehicle is subject to a security interest, lien, or lease, he accepts possession of or exercises any control over the vehicle in exchange for consideration given which may be verbal assurance or otherwise, and:

(a) Obtains or exercises control over the vehicle of another and then sells or leases the vehicle to a third party without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party, unless the entire balance of the security interest, lien, or lease is paid or satisfied within thirty days of said transaction; or

(b) Arranges the sale or lease of the vehicle of another to a third party without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party and exercises control over any part of the funds received, unless the entire balance of the security interest, lien, or lease is paid or satisfied within thirty days of said transaction; or

(c) Knowingly fails to ascertain on a monthly basis whether payments are due to the secured creditor, lienholder, or lessor and to apply all funds he receives for any lease or sale of the vehicle toward the satisfaction of any outstanding payment due to the secured creditor, lienholder, or lessor in a timely manner.

(2) Equity skimming of a vehicle is:

(a) A petty offense if the amount is less than three hundred dollars;

(b) A class 2 misdemeanor if the amount is three hundred dollars or more but less than one thousand dollars;

(c) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars;

(d) A class 6 felony if the amount is two thousand dollars or more but less than five thousand dollars;

(e) A class 5 felony if the amount is five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony if the amount is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony if the amount is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony if the amount is one million dollars or more.

Source: **L. 87:** Entire part added, p. 671, § 1, effective July 1. **L. 89:** (2) amended, p. 839, § 74, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3190, § 252, effective March 1, 2022.

18-5-804. Civil action.

A condominium association, a property owners' association, or any like association of real property owners which charges fees for the upkeep of a housing facility, a housing project, or a common area thereof may proceed pursuant to rule 102 of the Colorado rules of civil procedure if such fees have not been received by the condominium association, property owners' association, or any like association for a period of ninety days or more.

Source: **L. 87:** Entire part added, p. 672, § 1, effective July 1.

PART 9

IDENTITY THEFT AND RELATED OFFENSES

18-5-901. Definitions.

As used in this part 9, unless the context otherwise requires:

(1) "Account holder" means any person or business entity named on or associated with the account or named on the face of a financial device to whom or for whose benefit the financial device is issued by an issuer.

(2) "Extension of credit" means any loan or agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(3) To "falsely alter" a written instrument or financial device means to change a written instrument or financial device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that the written instrument or financial device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

(4) To "falsely complete" a written instrument or financial device means:

(a) To transform an incomplete written instrument or financial device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument or financial device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or

(b) To transform an incomplete written instrument or financial device into a complete one by adding or inserting materially false information or adding or inserting a materially false statement. A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

(5) To "falsely make" a written instrument or financial device means to make or draw a written instrument or financial device, whether it be in complete or incomplete form, that purports to be an authentic creation of its ostensible maker, but that is not, either because the ostensible maker is fictitious or because, if real, the ostensible maker did not authorize the making or the drawing of the written instrument or financial device.

(6) "Financial device" means any instrument or device that can be used to obtain cash, credit, property, services, or any other thing of value or to make financial payments, including but not limited to:

(a) A credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card;

(b) A check;

(c) A negotiable order of withdrawal;

(d) A share draft; or

(e) A money order.

(7) "Financial identifying information" means any of the following that can be used, alone or in conjunction with any other information, to obtain cash, credit, property, services, or any other thing of value or to make a financial payment:

(a) A personal identification number, credit card number, banking card number, checking account number, debit card number, electronic fund transfer card number, guaranteed check card number, or routing number; or

(b) A number representing a financial account or a number affecting the financial interest, standing, or obligation of or to the account holder.

(8) "Government" means:

(a) The United States and its departments, agencies, or subdivisions;

(b) A state, county, municipality, or other political unit and its departments, agencies, or subdivisions; and

(c) A corporation or other entity established by law to carry out governmental functions.

(9) "Issuer" means a person, a banking, financial, or business institution, or a corporation or other business entity that assigns financial rights by acquiring, distributing, controlling, or canceling an account or a financial device.

(10) "Number" includes, without limitation, any grouping or combination of letters, numbers, or symbols.

(11) "Of another" means that of a natural person, living or dead, or a business entity as defined in section 16-3-301.1 (11)(b), C.R.S.

(12) "Personal identification number" means a number assigned to an account holder by an issuer to permit authorized use of an account or financial device.

(13) "Personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

(14) "Utter" means to transfer, pass, or deliver, or to attempt or cause to be transferred, passed, or delivered, to another person a written instrument or financial device, article, or thing.

(15) "Written instrument" means a paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, that is capable of being used to the advantage or disadvantage of another.

Source: L. 2006: Entire part added, p. 1319, § 8, effective July 1.

ANNOTATION

No evidence that defendant could have used gift card with no available funds "to obtain . . . any . . . thing of value" under subsection (6). Evidence insufficient, therefore, to support conviction for criminal possession of a financial device under § 18-5-903. *People v. Reed*, 2013 COA 113, 338 P.3d 364.

The inclusion of "debit card", without qualification, in subsection (6)(a)'s definition of "financial device", demonstrates, without more, that a debit card is a financial device for purposes of subsection (6). Neither subsection (6) generally nor subsection (6)(a) in particular says anything about a debit card being usable at the time of possession. *People v. Hudson*, 2025 CO 52, 576 P.3d 131.

Subsection (6) of this section and § 18-5-903 (1) do not require the prosecution to prove beyond a reasonable doubt that a

debit card is capable of use at the time of possession to support a conviction for criminal possession of a financial device. Whether a debit card is expired, cancelled, or active, a debit cardholder's name, financial institution, and signature could be used to steal the cardholder's identity. The criminal possession of a debit card establishes the precursor to identity theft about which the legislature was concerned. *People v. Hudson*, 2025 CO 52, 576 P.3d 131.

The term "specific individual" in the definition of "personal identifying information" in subsection (13) means one identified human being. Defendant's conduct of using a nonprofit's name and tax-exempt document cannot constitute the use of personal identifying information because a nonprofit is not a human being. *People v. Rodriguez-Morelos*, 2022 COA 107M, 522 P.3d 213, *aff'd*, 2025 CO 2, 562 P.3d 71.

18-5-902. Identity theft.

(1) A person commits identity theft if he or she:

(a) Knowingly uses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment;

(b) Knowingly possesses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority, with the intent to use or to aid or permit some other person to use such information or device to obtain cash, credit, property, services, or any other thing of value or to make a financial payment;

(c) With the intent to defraud, falsely makes, completes, alters, or utters a written instrument or financial device containing any personal identifying information or financial identifying information of another;

(d) Knowingly possesses the personal identifying information or financial identifying information of another without permission or lawful authority to use in applying for or completing an application for a financial device or other extension of credit; or

(e) Knowingly uses or possesses the personal identifying information of another without permission or lawful authority with the intent to obtain a government-issued document.

(f) (Deleted by amendment, L. 2009, (SB 09-093), ch. 326, p. 1737, § 1, effective July 1, 2009.)

(2) (a) Identity theft in violation of subsection (1)(a) or (1)(c) of this section is a class 4 felony.

(b) Identity theft in violation of subsection (1)(b), (1)(d), or (1)(e) of this section is a class 2 misdemeanor; except that it is a class 5 felony if the person possesses three or more financial devices or the personal or financial identifying information of three or more persons.

(3) Repealed.

Source: L. 2006: Entire part added, p. 1322, § 8, effective July 1. L. 2009: (1)(a), (1)(f), and (3) amended, (SB 09-093), ch. 326, p. 1737, § 1, effective July 1. L. 2021: (1)(d), (1)(e), and (2) amended, (SB 21-271), ch. 462, p. 3190, § 253, effective March 1, 2022. L. 2023: (2)(b) amended and (3) repealed, (HB 23-1293), ch. 298, p. 1787, § 22, effective October 1.

ANNOTATION

Defendant's equal protection rights not violated by defendant's identity theft conviction. The unauthorized use of a

financial transaction device statute and the identity theft statute do not prohibit identical conduct while imposing different penalties.

Unlike the unauthorized use of a financial transaction device statute, the conviction for identity theft required the jury to find that the credit card belonged to the victim and not the defendant. *People v. Jauch*, 2013 COA 127, 411 P.3d 53; *People v. Trujillo*, 2015 COA 22, 369 P.3d 693.

To convict a defendant of identity theft under subsection (1)(a), the prosecution must prove that the defendant knew that the personal identifying information, financial identifying information, or financial device he or she used was, in fact, the information or device of another person. *People v. Perez*, 2013 COA 65, 488 P.3d 18, *aff'd*, 2016 CO 12, 367 P.3d 695; *People v. Molina*, 2017 CO 7, 388 P.3d 894.

Neither this statute nor the unauthorized use of a financial transaction device statute imposes an affirmative duty that the defendant obtain the victim's consent before using the victim's financial device. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

The crime of identity theft under subsection (1)(a) is not a continuing course of conduct, and each discrete use of another's identity is a separate chargeable offense. *People v. Allman*, 2017 COA 108, 454 P.3d 289, *aff'd*, 2019 CO 78, 451 P.3d 826.

Criminal possession of a financial device, such as a credit or debit card, is not a lesser included offense of identity theft. *People v. Poot-Baca*, 2023 COA 112, 544 P.3d 683.

Section 18-1-901 (3)(r)'s definition of "thing of value" applies to subsection (1)(a) of this section. *People v. Molina*, 2017 CO 7, 388 P.3d 894 (overruling *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008), to the extent that the court held that § 18-1-901's definitions do not apply to subsection (1) of this section).

Definition of "thing of value" in identity theft statute is narrower than definition contained in § 18-1-901 (3)(r). The term does not include nonpecuniary benefits of misleading and influencing actions of police officer by obtaining use of another person's driving record. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008), overruled in *People v. Molina*, 2017 CO 7, 388 P.3d 894, to the extent that the court held that § 18-1-901's definitions do not apply to subsection (1) of this section.

Employment is a "thing of value" for purposes of this section where defendant used a victim's social security number to obtain employment. *People v. Campos*, 2015 COA 47, 351 P.3d 553; *People v. Molina*, 2017 CO 7, 388 P.3d 894.

An apartment lease is a "thing of value" for purposes of this section and § 18-1-901 (3)(r). An apartment lease is both a "contract right" and a "right of use" of "real property". *People v. Molina*, 2017 CO 7, 388 P.3d 894.

When defendant used the last name and social security number of another person to obtain a lease, she committed identity theft. *People v. Molina*, 2017 CO 7, 388 P.3d 894.

Defendant providing false name at traffic stop could not be charged with using false information to obtain a "thing of value" under identity theft statute. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

The state lacked subject matter jurisdiction over defendant's prosecution because none of defendant's conduct forming a material element of either unauthorized use of a financial transaction device or identity theft occurred in the state, and the unauthorized use and identity theft

statutes do not include a result element. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

Knowledge that the victim lives in the state is a circumstantial element, and is not a conduct or result element of the crime of unauthorized use of a financial transaction device or of identity theft and therefore should not be considered when determining jurisdiction. *People v. Brennan*, 2025 COA 68, 577 P.3d 62.

18-5-903. Criminal possession of a financial device.

(1) A person commits criminal possession of a financial device if the person has in his or her possession or under his or her control any financial device that the person knows, or reasonably should know, to be lost, stolen, or delivered under mistake as to the identity or address of the account holder.

(2) (a) Except as provided in subsection (2)(c) of this section, criminal possession of one or more financial devices is a class 2 misdemeanor.

(b) (Deleted by amendment, L. 2023.)

(c) Criminal possession of three or more financial devices, of which at least two are issued to different account holders, is a class 5 felony.

Source: **L. 2006:** Entire part added, p. 1323, § 8, effective July 1. **L. 2021:** (2)(a) amended, (SB 21-271), ch. 462, p. 3191, § 254, effective March 1, 2022. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1787, § 23, effective October 1.

ANNOTATION

Annotator's note. Since § 18-5-903 is similar to repealed § 18-5-703, a relevant case construing that provision has been included in the annotations to this section.

Because this section is worded in the disjunctive, it includes both a mental culpability offense and a strict liability offense. The court did not err in allowing the prosecution to amend the information to

charge the defendant only with the strict liability alternative. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

This section is not facially unconstitutional based on an overbreadth argument, because possession of a stolen credit transaction device is neither a fundamental right nor constitutionally protected conduct. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

This section is not unconstitutionally void for vagueness, because it adequately sets out the circumstances under which a person commits the strict liability offense of possession of a lost or stolen credit transaction device. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

Subsection (1) of this section and § 18-5-901 (6) do not require the prosecution to prove beyond a reasonable doubt that a debit card is capable of use at the time of possession to support a conviction for criminal possession of a financial device. Whether a debit card is expired, cancelled, or active, a debit cardholder's name, financial institution, and signature could be used to steal the cardholder's identity. The criminal possession of a debit card

establishes the precursor to identity theft about which the legislature was concerned. *People v. Hudson*, 2025 CO 52, 576 P.3d 131.

Criminal possession of a financial device, such as a credit or debit card, is not a lesser included offense of identity theft. *People v. Poot-Baca*, 2023 COA 112, 544 P.3d 683.

Evidence insufficient to support conviction for criminal possession of a financial device - four or more devices with two victims. Prosecution failed to prove that one of the financial devices possessed by defendant, a gift card with another person's name but no available funds, was capable of being used to obtain anything of value. *People v. Reed*, 2013 COA 113, 338 P.3d 364.

Evidence was sufficient, however, to support conviction on the lesser included offense of criminal possession of a financial device - four or more devices with one victim. Guilt on the lesser offense is implicit and part of the jury's verdict when all of the elements of a lesser included offense are included in the more serious offense. *People v. Reed*, 2013 COA 113, 338 P.3d 364.

18-5-903.5. Criminal possession of an identification document - bias-motivated crime enforcement - civil actions.

(1) A person commits criminal possession of an identification document if the person knowingly confiscates or possesses or controls another person's actual driver's license, actual government-issued identification card, actual social security card, or actual passport without permission or lawful authority.

(2) (a) Except as described in section 18-9-121, criminal possession of one or more identification documents issued to the same individual is a class 2 misdemeanor.

(b) Criminal possession of two or more identification documents, of which at least two are issued to different persons, is a class 6 felony.

(3) An individual who is harmed by a person's commission of the offense described in this section may:

(a) Request that the court order the person to return the identification document immediately; and

(b) Bring a civil action to recover any damages caused by the person's commission of the offense.

Source: **L. 2009:** Entire section added, (SB 09-093), ch. 326, p. 1738, § 2, effective July 1, 2011. **L. 2021:** (2)(a) amended, (SB 21-271), ch. 462, p. 3191, § 255, effective March 1, 2022. **L. 2026:** (1) and (2)(a) amended and (3) added, (HB 26-1283), ch. 363, p. 2180, § 3, effective June 3.

Editor's note: Section 5 of chapter 363 (HB 26-1283), Session Laws of Colorado 2026, provides that the act changing this section applies to conduct occurring on or after June 3, 2026.

Cross references: For the legislative declaration in HB 26-1283, see section 1 of chapter 363, Session Laws of Colorado 2026.

18-5-904. Gathering identity information by deception.

(1) A person commits gathering identity information by deception if he or she knowingly makes or conveys a materially false statement, without permission or lawful authority, with the intent to obtain, record, or access the personal identifying information or financial identifying information of another.

(2) Gathering identity information by deception is a class 5 felony.

Source: **L. 2006:** Entire part added, p. 1323, § 8, effective July 1.

18-5-905. Possession of identity theft tools.

- (1) A person commits possession of identity theft tools if he or she possesses any tools, equipment, computer, computer network, scanner, printer, or other article adapted, designed, or commonly used for committing or facilitating the commission of the offense of identity theft as described in section 18-5-902, and intends to use the thing possessed, or knows that a person intends to use the thing possessed, in the commission of the offense of identity theft.
- (2) Possession of identity theft tools is a class 5 felony.

Source: L. 2006: Entire part added, p. 1323, § 8, effective July 1.

18-5.5 ARTICLE 5.5

Computer Crime

18-5.5-101. Definitions.

18-5.5-102. Cybercrime.

18-5.5-101. Definitions.

As used in this article 5.5, unless the context otherwise requires:

- (1) "Authorization" means the express consent of a person which may include an employee's job description to use said person's computer, computer network, computer program, computer software, computer system, property, or services as those terms are defined in this section.
- (2) "Computer" means an electronic, magnetic, optical, electromagnetic, or other data processing device which performs logical, arithmetic, memory, or storage functions by the manipulations of electronic, magnetic, radio wave, or light wave impulses, and includes all input, output, processing, storage, software, or communication facilities which are connected or related to or operating in conjunction with such a device.
- (3) "Computer network" means the interconnection of communication lines (including microwave or other means of electronic communication) with a computer through remote terminals, or a complex consisting of two or more interconnected computers.
- (4) "Computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

(5) "Computer software" means computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(6) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, and software.

(6.3) "Damage" includes, but is not limited to, any impairment to the integrity of availability of information, data, computer program, computer software, or services on or via a computer, computer network, or computer system or part thereof.

(6.5) "Encoding machine" means an electronic device that is used to encode information onto a payment card.

(6.7) "Exceed authorized access" means to access a computer with authorization and to use such access to obtain or alter information, data, computer program, or computer software that the person is not entitled to so obtain or alter.

(7) "Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, debit card, or marketable security.

(7.5) "Payment card" means a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

(8) "Property" includes, but is not limited to, financial instruments, information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

(8.5) "Scanning device" means a scanner, reader, wireless access device, radio-frequency identification scanner, near-field communications technology, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information from a payment card.

(9) "Services" includes, but is not limited to, computer time, data processing, and storage functions.

(10) To "use" means to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

Source: L. 79: Entire article added, p. 728, § 7, effective July 1. **L. 83:** (1) R&RE and (10) added, p. 705, §§ 1, 2, effective July 1. **L. 2000:** (2) amended and (6.3) and (6.7) added, p. 694, § 7, effective July 1. **L. 2018:** IP amended and (6.5), (7.5), and (8.5) added (HB 18-1200), ch. 379, p. 2290, § 1, effective August 8.

18-5.5-102. Cybercrime.

(1) A person commits cybercrime if the person knowingly:

(a) Accesses a computer, computer network, or computer system or any part thereof without authorization; exceeds authorized access to a computer, computer network, or computer system or any part thereof; or uses a computer, computer network, or computer system or any part thereof without authorization or in excess of authorized access; or

(b) Accesses any computer, computer network, or computer system, or any part thereof for the purpose of devising or executing any scheme or artifice to defraud; or

(c) Accesses any computer, computer network, or computer system, or any part thereof to obtain, by means of false or fraudulent pretenses, representations, or promises, money; property; services; passwords or similar information through which a computer, computer network, or computer system or any part thereof may be accessed; or other thing of value; or

(d) Accesses any computer, computer network, or computer system, or any part thereof to commit theft; or

(e) Without authorization or in excess of authorized access alters, damages, interrupts, or causes the interruption or impairment of the proper functioning of, or causes any damage to, any computer, computer network, computer system, computer software, program, application, documentation, or data contained in such computer, computer network, or computer system or any part thereof; or

(f) Causes the transmission of a computer program, software, information, code, data, or command by means of a computer, computer network, or computer system or any part thereof with the intent to cause damage to or to cause the interruption or impairment of the proper functioning of or that actually causes damage to or the interruption or impairment of the proper functioning of any computer, computer network, computer system, or part thereof; or

(g) Uses or causes to be used a software application that runs automated tasks over the internet to access a computer, computer network, or computer system, or any part thereof, that circumvents or disables any electronic queues, waiting periods, or other technological measure intended by the seller to limit the number of event tickets that may be purchased by any single person in an online event ticket sale as defined in section 6-1-720, C.R.S.; or

(h) Solicits or offers to arrange a situation in which a minor may engage in prostitution, by means of using a computer, computer network, computer system, or any part thereof; or

(i) Directly or indirectly uses a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the payment card without the permission of

the authorized user of the payment card, and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant; or

(j) Directly or indirectly uses an encoding machine to place information encoded on the payment card onto a different payment card without the permission of the authorized user of the payment card from which the information being reencoded was obtained, and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(2) (Deleted by amendment, L. 2000, p. 695, § 8, effective July 1, 2000.)

(3) (a) Except as provided in subsections (3)(b), (3)(b.5), and (3)(c) of this section, if the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by a violation of this section is:

(I) (Deleted by amendment, L. 2018.)

(II) Less than three hundred dollars, cybercrime is a petty offense;

(III) Three hundred dollars or more but less than one thousand dollars, cybercrime is a class 2 misdemeanor;

(IV) One thousand dollars or more but less than two thousand dollars, cybercrime is a class 1 misdemeanor;

(V) Two thousand dollars or more but less than five thousand dollars, cybercrime is a class 6 felony;

(VI) Five thousand dollars or more but less than twenty thousand dollars, cybercrime is a class 5 felony;

(VII) Twenty thousand dollars or more but less than one hundred thousand dollars, cybercrime is a class 4 felony;

(VIII) One hundred thousand dollars or more but less than one million dollars, cybercrime is a class 3 felony; and

(IX) One million dollars or more, cybercrime is a class 2 felony.

(b) Cybercrime committed in violation of subsection (1)(a) of this section is a class 2 misdemeanor.

(b.5) Cybercrime committed in violation of subsection (1)(h), (1)(i), or (1)(j) of this section is a class 5 felony.

(c) (I) Cybercrime committed in violation of subsection (1)(g) of this section is a class 2 misdemeanor.

(II) If cybercrime is committed to obtain event tickets, each ticket purchased shall constitute a separate offense.

(III) Subsection (1)(g) of this section shall not prohibit the resale of tickets in a secondary market by a person other than the event sponsor or promoter.

(d) Consistent with section 18-1-202, a prosecution for a violation of subsection (1)(g) of this section may be tried in the county where the event has been, or will be, held.

(4) Nothing in this section precludes punishment pursuant to any other section of law.

(5) Notwithstanding any other provision of this section, an individual may authorize an agent to access and process, on that individual's behalf, that individual's personal data or other information held on a computer, computer network, or computer system and that is otherwise accessible to the individual. An authorized agent remains liable for any unauthorized activity on a system under applicable unfair competition laws; the federal "Computer Fraud and Abuse Act", 18 U.S.C. sec. 1030 et seq., as amended; and other provisions of this section.

Source: **L. 79:** Entire article added, p. 728, § 7, effective July 1. **L. 83:** (1) amended, p. 705, § 3, effective July 1. **L. 84:** (3) amended, p. 538, § 14, effective July 1, 1985. **L. 89:** (3) amended, p. 839, § 75, effective July 1. **L. 92:** (3) amended, p. 437, § 9, effective April 10. **L. 98:** (3) amended, p. 1440, § 18, effective July 1; (3) amended, p. 797, § 12, effective July 1. **L. 2000:** Entire section amended, p. 695, § 8, effective July 1. **L. 2007:** (3)(a) amended, p. 1696, § 14, effective July 1. **L. 2008:** (1)(g), (3)(c), and (3)(d) added and (3)(a) amended, p. 2230, §§ 3, 4, effective July 1. **L. 2014:** (3)(a) amended, (HB 14-1266), ch. 155, p. 539, § 5, effective August 6. **L. 2018:** IP(1) and (3) amended and (1)(h), (1)(i), (1)(j), and (4) added, (HB 18-1200), ch. 379, p. 2290, § 2, effective August 8. **L. 2021:** (3)(a)(II), (3)(a)(III), (3)(a)(IV), and (3)(c)(I) amended, (SB 21-271), ch. 462, p. 3191, § 256, effective March 1, 2022. **L. 2022:** (5) added, (SB 22-113), ch. 463, p. 3294, § 7, effective August 10. **L. 2023:** (3)(b) amended, (HB 23-1293), ch. 298, p. 1787, § 24, effective October 1.

Cross references: For the legislative declaration contained in the 2007 act amending subsection (3)(a), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, "Ownership of Software and Computer-stored Data", see 13 Colo. Law. 577 (1984).

Section not unconstitutionally vague or overbroad. *People v. Pahl*, 169 P.3d 169

(Colo. App. 2006) (decided under former law).

Subsection (1)(e) is not facially unconstitutionally vague. Deleting documents from one's employer's laptop clearly falls within the definition of "damage". The definition of damage is specific enough to provide a person of ordinary intelligence notice that the deletion of documents from a computer may cause damage to data in the computer. *People v. Stotz*, 2016 COA 16, 381 P.3d 357.

An applied constitutionally vague challenge to subsection (1)(e) fails. Subsection (1)(e) prohibits, with sufficient clarity, an employee's knowing deletion of the only electronic copies of thousands of computer documents, when the employee knows that deletion is not authorized by the employer. *People v. Stotz*, 2016 COA 16, 381 P.3d 357.

Subsection (1)(e) is not unconstitutionally overbroad. Subsection (1)(e) proscribes knowingly damaging an employer's property, knowing that the

employee has no permission to do so. Such conduct is within the state's power to regulate. *People v. Stotz*, 2016 COA 16, 381 P.3d 357.

Term "access", as used in subsections (1)(c) and (1)(d), is clear and unambiguous as defined in the dictionary. Therefore, defendant accessed a computer system when she communicated with an automated telephone system by inputting data in response to computer-generated questions about her unemployment status. *People v. Rice*, 198 P.3d 1241 (Colo. App. 2008).

The term "knowingly" applies to every element of the offense in subsection (1)(e). *People v. Stotz*, 2016 COA 16, 381 P.3d 357.

Computer crime under subsection (1)(b) does not require an injury, loss, or damage for a conviction. When a victim suffers no injury, the penalty is the one that is associated with the lowest dollar threshold. *People v. Galang*, 2016 COA 68, 382 P.3d 1241.

ARTICLE 6

Offenses Involving the Family Relations

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18-6-105. (Repealed)

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(Repealed)

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INCEST

- 18-6-301. Incest.
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- 18-6-803.5. Crime of violation of a
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18-6-803.6.	Duties of peace officers and prosecuting agencies - preservation of evidence.	18-6-805.	Repeal of sections. (Repealed)
18-6-803.7.	Central registry of protection orders - creation.	18-6-806.	Notification of potential violation of military protection order - definitions.
18-6-803.8.	Foreign protection orders. (Repealed)	18-6-807.	Mandatory lethality assessments - short title - legislative declaration - definitions.
18-6-803.9.	Assaults and deaths related to domestic violence - report. (Repealed)		

PART 1

ABORTION

18-6-101 to 18-6-105. (Repealed)

Source: L. 2013: Entire part repealed, (HB 13-1154), ch. 372, p. 2192, § 3, effective July 1.

Editor's note: This article was numbered as article 6 of chapter 40, C.R.S. 1963. For amendments to this part 1 prior to its repeal in 2013, consult the 2012 Colorado Revised Statutes, the Colorado statutory research explanatory note beginning on page vii in the front of this volume, and the editor's note following the article heading.

Cross references: For the legislative declaration in the 2013 act repealing this part 1, see section 1 of chapter 372, Session Laws of Colorado 2013.

PART 2

BIGAMY

18-6-201. Bigamy.

(1) A married person who, while still married, marries or enters into a civil union in this state with another person commits bigamy, unless as an affirmative defense it appears that at the time of the subsequent marriage or subsequent civil union:

- (a) The accused reasonably believed the prior spouse to be dead; or
- (b) The prior spouse had been continually absent for a period of five years during which time the accused did not know the prior spouse to be alive; or
- (c) The accused reasonably believed that he or she was legally eligible to remarry or legally eligible to enter into a civil union.

(1.5) A person who is a partner in a civil union, while still legally in a civil union, who marries or enters into another civil union in the state with another person other than a current partner in a civil union commits bigamy, unless as an affirmative defense it appears that at the time of the subsequent marriage or subsequent civil union:

- (a) The accused reasonably believed the prior partner to be dead; or
- (b) The prior partner had been continually absent for a period of five years during which time the accused did not know the prior partner to be alive; or
- (c) The accused reasonably believed that he or she was legally eligible to marry or legally eligible to enter into a civil union.

(2) Bigamy is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-201. L. 89: (2) amended, p. 839, § 76, effective July 1. L. 2016: Entire section amended, (SB 16-150), ch. 263, p. 1081, § 7, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3191, § 257, effective March 1, 2022. L. 2026: IP(1) and IP(1.5) amended, (SB 26-013), ch. 9, p. 37, § 1, effective August 12.

Cross references: (1) For the "Uniform Marriage Act", see article 2 of title 14; for the "Uniform Dissolution of Marriage Act", see article 10 of title 14.

(2) For the legislative declaration in SB 16-150, see section 1 of chapter 263, Session Laws of Colorado 2016.

ANNOTATION

Law reviews. For note, "The Presumption of Death and a Second Marriage", see 27 Dicta 414 (1950). For article, "Criminality of Voluntary Sexual Acts in Colorado", see 40 U. Colo. L. Rev. 268 (1968).

Annotator's note. Since § 18-6-201 is similar to former C.L. § 6835, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

"Absent" means being away from the home. The word "absent", as used in bigamy statutes, has been regarded as having such confined and technical meaning as it has in the rule regarding the presumption of death. "Absent" therefore means being away from the home or place where one has established a residence. Schell v. People, 65 Colo. 116, 173 P. 1141 (1918).

Remarriage within statutory period is at party's peril. It is the clear intent of this section that one who marries within the period designated by the statute shall do so at his peril. Schell v. People, 65 Colo. 116, 173 P. 1141 (1918).

But death of former spouse or divorce may validate prior marriage. Upon the dissolution of the subsisting marriage by death or by a competent decree of divorce, an intended marriage contracted in good faith by a party thereto prior to the removal of the disability is rendered valid and binding by the continued cohabitation of the parties to such union, as the original intention to become husband and wife, is

presumed to continue so as to effectuate a valid common-law marriage. Davis v. People, 83 Colo. 295, 264 P. 658 (1928).

Cohabitation a question for jury. When acts and complicating circumstances are proved, it becomes largely a question for the jury to determine whether there was in fact such continuation as amounted to a living together. People v. Bright, 77 Colo. 563, 238 P. 71 (1925).

The wife is a competent witness against the husband in a prosecution for bigamy. The offense is construed to be a crime against the wife. Schell v. People, 65 Colo. 116, 173 P. 1141 (1918).

Defense of ignorance that former spouse was living must be established by defendant. Clause of this section concerning knowledge that a former spouse is still living constitutes an exception which it is neither for the information to negative, nor for the prosecution in the first instance to disprove. If defendant relies upon the fact that he did not know that his former wife was still alive, he must produce evidence thereof. Magee v. People, 79 Colo. 328, 245 P. 708 (1926).

Spouse held not absent. Defendant deserted his family, leaving them in Nebraska, in 1903, where they continued at their then residence until 1913. Defendant's second marriage occurred in less than two years after the first wife's departure from the former matrimonial domicile. While remaining at such former domicile the first

wife was not "absent", within the meaning of this section, and a conviction was affirmed. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

Information that follows this section is sufficient. An information which describes

the offense in the language of this section, or so clearly that what is charged may be readily understood by a jury, is sufficient. *Magee v. People*, 79 Colo. 328, 245 P. 708 (1926).

18-6-202. Marrying a bigamist - repeal. (Repealed)

Source: L. 71: R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-202. **L. 2021:** (2) added by revision, (SB 21-271), ch. 462, p. 3191, 3331, §§ 258, 803.

Editor's note: Subsection (2) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3191, 3331.)

18-6-203. Definitions. (Repealed)

Source: L. 71: R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-203. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3192, § 259, effective March 1, 2022. **L. 2026:** Entire section repealed, (SB 26-013), ch. 9, p. 37, § 2, effective August 12.

PART 3

INCEST

18-6-301. Incest.

(1) Any person who knowingly marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, as defined in section 18-3-401, an ancestor or descendant, including a natural child, child by adoption, or stepchild twenty-one years of age or older, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood commits incest, which is a class 4 felony. For the purpose of this section only, "descendant" includes a child by adoption and a stepchild, but only if the person is not legally married to the child by adoption or the stepchild.

(2) When a person is convicted of, pleads nolo contendere to, or receives a deferred sentence for a violation of the provisions of this section and the victim is a child who is under eighteen years of age and the court knows the person is a current or former employee of a school district or a charter school in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: **L. 71:** R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-301. **L. 83:** Entire section amended, p. 695, § 6, effective June 15. **L. 86:** Entire section amended, p. 770, § 8 effective July 1. **L. 90:** Entire section amended, p. 1025, § 7, effective July 1. **L. 2000:** (2) amended, p. 1847, § 32, effective August 2. **L. 2003:** (2) amended, p. 2514, § 2, effective June 5.

ANNOTATION

Law reviews. For article, "Incest and Ethics: Confidentiality's Severest Test", see 61 Den. L.J. 619 (1984).

Annotator's note. Since § 18-6-301 is similar to former § 40-9-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Under former section essential elements of incest were (1) the act of sexual intercourse; and, (2) such an act between persons related within the prohibited degrees defined by statute. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Neither the age of the victim nor the age of the perpetrator is material as a requisite of this offense. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Neither is the unwed status of the female an element. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Rape and incest are separate and distinct crimes, with certain different

elements essential to their proof. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Either or both of these crimes may be charged in an appropriate factual situation. Where an act of sexual intercourse occurs between male and female persons who are related within certain prohibited degrees, where the female is unmarried and under the age of 18, and the male is over the age of 18 years, both the crime of statutory rape and the crime of incest could have been committed in the same transaction, and the people may charge the male participant with either or both crimes. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

The courts failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. In order to convict the defendant of first degree sexual assault or incest the jurors had to accept the victim's testimony because the victim testified unequivocally to

actual sexual intercourse while the defendant denied any improper touching at all. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Retrial on habitual criminality barred notwithstanding trial court's erroneous interpretation or application of substantive law in dismissing habitual charges against

the defendant where such dismissal occurs after jeopardy attached upon the impaneling and swearing of the jury. *People v. Hrapski*, 718 P.2d 1050 (Colo. 1986).

Evidence held sufficient to sustain conviction under this section. *Kingsbury v. People*, 44 Colo. 403, 99 P. 61 (1908).

18-6-302. Aggravated incest.

(1) A person commits aggravated incest when he or she knowingly:

(a) Marries his or her natural child or inflicts sexual penetration or sexual intrusion on or subjects to sexual contact, as defined in section 18-3-401, his or her natural child, stepchild, or child by adoption, but this paragraph (a) shall not apply when the person is legally married to the stepchild or child by adoption. For the purpose of this paragraph (a) only, "child" means a person under twenty-one years of age.

(b) Marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, as defined in section 18-3-401, a descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood who is under ten years of age.

(2) Aggravated incest is a class 3 felony.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: **L. 71:** R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-302. **L. 77:** (1) amended, p. 965, § 35, effective July 1. **L. 83:** Entire section added, p. 695, § 7, effective June 15. **L. 90:** (3) added, p. 1026, § 8, effective July 1. **L. 2000:** (3) amended, p. 1847, § 33, effective August 2.

ANNOTATION

Statute is not unconstitutionally vague as applied to stepchildren of common law

marriage. *People v. Perez-Rodriguez*, 2017 COA 77, 411 P.3d 259.

The "unit of prosecution" for the crime of aggravated incest is the same as for the crime of sexual assault on a child because there is no discernible difference between the language used in subsection (1)(a) of this section and the phrase "any sexual contact" used in § 18-3-405.3. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

To determine if defendant's actions satisfy more than one unit of prosecution, the court looks at all evidence introduced at trial to determine whether evidence relied upon by jury for conviction supports distinct and separate offenses. Factors to determine distinct offenses include contacts occurring

at different locations or times or whether they were the product of new volitional departures. If the acts are not distinct offenses, they merge into a single conviction. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

Aggravated incest, as defined by this section, constitutes a crime of violence within the meaning of § 4B1.2 of the U.S. sentencing guidelines. *United States v. Vigil*, 334 F.3d 1215 (10th Cir. 2003).

Victim who identified defendant as her natural father was competent to testify concerning her own parentage. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

18-6-303. Sentencing.

(1) The court may suspend a portion of the sentence of any person who is convicted of a violation committed prior to November 1, 1998, of any offense listed in this part 3 who is not a habitual sex offender against children, as described in section 18-3-412, if the offender receives a presentence evaluation that recommends a treatment program and the offender satisfactorily completes the recommended treatment program.

(2) In addition to any other penalty provided by law, the court may sentence a defendant who is convicted of a first offense pursuant to this part 3, committed prior to November 1, 1998, to a period of probation for purposes of treatment that, when added to any time served, does not exceed the maximum sentence imposed for the offense.

(3) The court shall sentence a defendant who is convicted of any offense specified in this part 3 committed on or after November 1, 1998, pursuant to the provisions of part 10 of article 1.3 of this title.

Source: L. 83: Entire section added, p. 695, § 8, effective June 15. **L. 98:** Entire section amended, p. 1293, § 14, effective November 1. **L. 2002:** (3) amended, p. 1567, § 391, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 4

WRONGS TO CHILDREN

18-6-401. Child abuse - definition.

(1) (a) A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

(b) (I) Except as otherwise provided in subparagraph (III) of this paragraph (b), a person commits child abuse if such person excises or infibulates, in whole or in part, the labia majora, labia minora, vulva, or clitoris of a female child. A parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child commits child abuse if he or she allows the excision or infibulation, in whole or in part, of such child's labia majora, labia minora, vulva, or clitoris.

(II) Belief that the conduct described in subparagraph (I) of this paragraph (b) is required as a matter of custom, ritual, or standard practice or consent to the conduct by the child on whom it is performed or by the child's parent or legal guardian shall not be an affirmative defense to a charge of child abuse under this paragraph (b).

(III) A surgical procedure as described in subsection (1)(b)(I) of this section is not a crime if the procedure:

(A) Is necessary to preserve the health of the child on whom it is performed and is performed by a person licensed to practice medicine under article 240 of title 12; or

(B) Is performed on a child who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed to practice medicine under article 240 of title 12.

(IV) If the district attorney having jurisdiction over a case arising under this paragraph (b) has a reasonable belief that any person arrested or charged pursuant to this paragraph (b) is not a citizen or national of the United States, the district attorney shall report such information to the immigration and naturalization service, or any successor agency, in an expeditious manner.

(c) (I) A person commits child abuse if, in the presence of a child, or on the premises where a child is found, or where a child resides, or in a vehicle containing a child, the person knowingly engages in the manufacture or attempted manufacture of a controlled substance, as defined by section 18-18-102 (5), or knowingly possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of a controlled substance. It shall be no defense to the crime of child abuse, as described in this subparagraph (I), that the defendant did not know a child was present, a child could be found, a child resided on the premises, or that a vehicle contained a child.

(II) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person is engaged in the manufacture or attempted manufacture of methamphetamine commits child abuse.

(III) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of methamphetamine commits child abuse.

(2) In this section, "child" means a person under the age of sixteen years.

(3) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.

(4) No person, other than the perpetrator, complicitor, coconspirator, or accessory, who reports an instance of child abuse to law enforcement officials shall be subjected to criminal or civil liability for any consequence of making such report unless he knows at the time of making it that it is untrue.

(5) Deferred prosecution is authorized for a first offense under this section unless the provisions of subsection (7.5) of this section or section 18-6-401.2 apply.

(6) Repealed.

(7) (a) Where death or injury results, the following shall apply:

(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).

(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.

(III) When a person acts knowingly or recklessly and the child abuse results in serious bodily injury to the child, it is a class 3 felony.

(IV) When a person acts with criminal negligence and the child abuse results in serious bodily injury to the child, it is a class 4 felony.

(V) When a person acts knowingly or recklessly and the child abuse results in any injury other than serious bodily injury, it is a class 1 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(VI) When a person acts with criminal negligence and the child abuse results in any injury other than serious bodily injury to the child, it is a class 2 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(b) Where no death or injury results, the following shall apply:

(I) An act of child abuse when a person acts knowingly or recklessly is a class 2 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(II) An act of child abuse when a person acts with criminal negligence is a class 2 misdemeanor; except that, if it is committed under the circumstances described in subsection (7)(e) of this section, then it is a class 5 felony.

(c) When a person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the child, such person commits the crime of murder in the first degree as described in section 18-3-102 (1)(f).

(d) When a person commits child abuse as described in paragraph (c) of subsection (1) of this section, it is a class 3 felony.

(e) A person who has previously been convicted of a violation of this section or of an offense in any other state, the United States, or any territory subject to the jurisdiction of the United States that would constitute child abuse if committed in this state and who commits child abuse as provided in subparagraph (V) or (VI) of paragraph (a) of this subsection (7) or as provided in subparagraph (I) or (II) of paragraph (b) of this subsection (7) commits a class 5 felony if the trier of fact finds that the new offense involved any of the following acts:

(I) The defendant, who was in a position of trust, as described in section 18-3-401 (3.5), in relation to the child, participated in a continued pattern of conduct that resulted in the child's malnourishment or failed to ensure the child's access to proper medical care;

(II) The defendant participated in a continued pattern of cruel punishment or unreasonable isolation or confinement of the child;

(III) The defendant made repeated threats of harm or death to the child or to a significant person in the child's life, which threats were made in the presence of the child;

(IV) The defendant committed a continued pattern of acts of domestic violence, as that term is defined in section 18-6-800.3, in the presence of the child; or

(V) The defendant participated in a continued pattern of extreme deprivation of hygienic or sanitary conditions in the child's daily living environment.

(7.3) Felony child abuse is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10). Misdemeanor child abuse is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(7.5) If a defendant is convicted of the class 2 or class 3 felony of child abuse under subparagraph (I) or (III) of paragraph (a) of subsection (7) of this section, the court shall sentence the defendant in accordance with section 18-1.3-401 (8)(d).

(8) Repealed.

(9) (a) If a parent is charged with permitting a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, pursuant to subsection (1)(a) of this section, and the child was thirty days old or younger at the time of the alleged offense, it is an affirmative defense to the charge that the parent safely, reasonably, and knowingly handed the child over to a firefighter, as defined in section 18-3-201 (1.5), or to a staff member who engages in the admission, care, or treatment of patients at a hospital or community clinic emergency center, as defined in subsection (9)(b) of this section, when the firefighter is at a fire station, or the staff member is at a hospital or community clinic emergency center, as defined in subsection (9)(b) of this section.

(b) "Community clinic emergency center" means a community clinic licensed by the department of public health and environment pursuant to section 25-3-101 (2)(a)(I)(B) that:

(I) Delivers emergency services; and

(II) Provides emergency care twenty-four hours per day and seven days a week throughout the year, except if located in a rural or frontier area that does not have the demand to support

twenty-four-hour service or only operates each year during a specified time period due to seasonal population influx.

Source: **L. 71:** R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-401. **L. 73:** p. 538, § 4. **L. 75:** (7) amended and (8) added, p. 620, § 15, effective July 21. **L. 79:** (7) amended, p. 729, § 8, effective July 1. **L. 80:** (1) and (7) R&RE and (8) amended, pp. 544, 545, §§ 1, 2, effective May 6. **L. 85:** (1), (4), and (5) amended, (7) R&RE, and (7.5) added, pp. 672, 673, §§ 1, 2, effective June 7. **L. 87:** (6) amended, p. 817, § 21, effective October 1. **L. 89:** (6) R&RE, p. 924, § 2, effective June 7. **L. 90:** (8) repealed, p. 1037, § 6, effective April 3. **L. 91:** (1) amended, p. 422, § 1, effective May 24. **L. 95:** (7)(a)(I) amended and (7)(c) added, p. 1222, § 4, effective July 1. **L. 99:** (1) amended, p. 803, § 2, effective May 24. **L. 2000:** (9) added, p. 2004, § 1, effective June 3. **L. 2001:** (6) repealed, p. 334, § 1, effective July 1. **L. 2002:** (7.5) amended, p. 1515, § 198, effective October 1. **L. 2003:** (1)(c) and (7)(d) added, p. 2383, §§ 1, 2, effective July 1. **L. 2004:** (7.3) added, p. 636, § 9, effective August 4. **L. 2006:** (1)(c) amended, p. 1705, § 4, effective July 1; (7)(a)(V), (7)(a)(VI), (7)(b)(I), and (7)(b)(II) amended and (7)(e) added, p. 2047, § 1, effective July 1. **L. 2009:** (7)(a)(V), (7)(a)(VI), (7)(b), and (7)(e) amended, (HB 09-1163), ch. 343, p. 1797, § 2, effective July 1. **L. 2011:** (1)(b)(IV) amended, (HB 11-1303), ch. 264, p. 1157, § 33, effective August 10. **L. 2014:** (9) amended, (HB 14-1214), ch. 336, p. 1499, § 10, effective August 6. **L. 2018:** (9) amended, (SB 18-050), ch. 20, p. 269, § 1, effective March 7. **L. 2019:** (1)(b)(III) amended, (HB 19-1172), ch. 136, p. 1676, § 96, effective October 1. **L. 2021:** (7)(b)(II) amended, (SB 21-271), ch. 462, p. 3192, § 260, effective March 1, 2022. **L. 2026:** (9)(a) amended, (HB 26-1024), ch. 74, p. 291, § 2, effective August 12.

Cross references: (1) For the "Child Protection Act of 1987", see part 3 of article 3 of title 19.

(2) For the statutory privilege between patient and physician and between husband and wife, see § 13-90-107.

(3) For the legislative declaration contained in the 2002 act amending subsection (7.5), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2006 act amending subsection (1)(c), see section 1 of chapter 341, Session Laws of Colorado 2006.

ANNOTATION

Law reviews. For article, "Child Abuse — The Legislative Response", see 44 Den. L.J. 3 (1967). For article, "Disposition of	Pre-Embryos upon Dissolution of Marriage in Colorado", see 50 Colo. Law. 40 (Feb. 2021).

This section is not unconstitutionally vague. People v. Kailey, 662 P.2d 168 (Colo. 1983).

Subsection (1)(a) is not unconstitutionally vague as applied to defendant stepmother who lived in the same house as abused child, failed to intervene in husband's child abuse, and actively covered up the abuse. Defendant plainly permitted the child to be placed in a "situation that poses a threat of injury to the child's life or health" and had adequate notice of the proscribed conduct. People v. Pineda, 40 P.3d 60 (Colo. App. 2001).

Former subsection (1) constitutional and does not prescribe different degrees of punishment for same conduct. People v. Schwartz, 678 P.2d 1000 (Colo. 1984).

Subsection (1)(c) does not unconstitutionally infringe on parents' right to raise their children. The state has a parens patriae interest in protecting children from imminent physical harm. People v. Laurent, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Subsection (1)(c) is not unconstitutionally overbroad because it proscribes as felony child abuse the manufacture or attempted manufacture of controlled substances in a home where a child resides without proscribing as child abuse the commission of other crimes in a home where a child resides. People v. Laurent, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Defendant's claim that subsection (1)(c) violated equal protection fails because subsections (1)(c) and (7)(a)(I) to (7)(a)(VI) do not affect persons who are similarly situated. People v. Laurent, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Although the same conduct can fit sexual assault on a child, § 18-3-405, and child abuse, the statutes also proscribe different conduct and have different legislative purposes, so there is no equal protection violation. The sexual assault statute requires sexual contact, and the child abuse statute requires serious bodily injury. Those differences show the legislature's intent to protect child from two different types of conduct even though they may overlap. People v. Lovato, 2014 COA 113, 357 P.3d 212.

Prohibition of cruel punishment in former subsection (1)(c) constitutional. The prohibition in the child abuse statute against cruel punishment was sufficiently precise to satisfy due process requirements. People v. Jennings, 641 P.2d 276 (Colo. 1982).

Classification of child abuse as more serious than negligent homicide constitutional. The legislative classification of child abuse as a crime more serious in penalty than the offense of criminally negligent homicide is neither arbitrary nor unreasonable and does not violate equal protection of the laws. People v. Taggart, 621 P.2d 1375 (Colo. 1981); People v. Mann, 646 P.2d 352 (Colo. 1982).

Criminally negligent homicide is a lesser included offense of criminally negligent child abuse resulting in death. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Sections 18-6-401 and 18-3-405 do not proscribe identical conduct. The proscriptions of this section encompass conduct that is particularly abusive to children, that is directed specifically against a child, and that results in injury to that child. Criminally negligent homicide, on the other hand, proscribes in general terms a gross carelessness that causes death to anyone, adult or child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

More serious penalty than reckless manslaughter constitutional. The legislative classification of felony child abuse as a crime warranting a more serious penalty than reckless manslaughter, though proscribing identical conduct, does not violate equal protection of the laws. *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Third degree assault is not a lesser included offense of child abuse. As charged, the elements of third degree assault are included in the elements of child abuse. The culpable mental state is identical -- knowingly or recklessly. And the "bodily injury" element of third degree assault, § 18-3-204 (1)(a), is both a subset of (under the strict elements test) and involves a less serious risk of injury (under § 18-1-408 (5)(c)) than the "any injury other than serious bodily injury" element of child abuse, subsection (7)(a)(V) of this section.

Thus, under both the strict elements test and § 18-1-408 (5)(c), if the two convictions arise from a single act against the same victim, they must merge into a single conviction for child abuse -- not a single conviction for third degree assault. Multiple convictions for two separate offenses -- one a lesser included of the other -- can clearly stand if the offenses were committed by distinctly different conduct. *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

When the additional factors set forth in subsection (7)(a)(I) are met, a defendant commits child abuse murder, not child abuse resulting in death. Child abuse resulting in death is a lesser included offense of child abuse murder. *Friend v. People*, 2018 CO 90, 429 P.3d 1191.

This section does not authorize separate convictions for each instance of child abuse and for its respective pattern of abuse. It does not have a separate subsection for pattern of child abuse. Instead, pattern of child abuse is an alternative way of committing child abuse. Therefore, a defendant may not be convicted of both child abuse and child abuse-pattern of conduct. *People v. Friend*, 2014 COA 123M, 431 P.3d 614, *aff'd*, 2018 CO 90, 429 P.3d 1191.

Common-law limits of parental chastisement codified. The parental privilege set out in § 18-1-703(1)(a) and the definition of criminal child abuse in § 18-1-401 codify common-law principles concerning the limits of permissible parental chastisement. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

This section depends on no source of duty; therefore, defendant was sufficiently charged under the statute, despite the information's failure to allege the defendant's duty to act or the source of such duty. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Under this section, any person owes a legal duty to refrain from either: (1) Permitting a child to be unreasonably placed in a situation that poses a threat; or (2) engaging in a continued pattern of child abuse. This duty attaches even if the person causes no injury to the child victim. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Defendant sufficiently apprised of the charges against him because the information was framed in the words of the statute and the trial court had granted his request for a bill of particulars. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Prosecution has burden of establishing guilt beyond reasonable doubt as to each material element of this offense. *People v. Durbin*, 187 Colo. 230, 529 P.2d 630 (1974).

Prosecution must establish guilt of defendant raising affirmative defense beyond reasonable doubt. Where, in a prosecution for child abuse, the evidence raises the affirmative defense of justified physical force for disciplinary purposes, the prosecution must establish the guilt of the defendant beyond a reasonable doubt as to

that issue as well as all other elements of the offense. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

"Child", as used in this section to describe a victim of abuse, includes a fetus that is injured while in the womb, is subsequently born and lived outside the womb, and then dies from the injuries sustained. While Colorado has no provisions criminalizing the injuring or killing of a fetus, the state common law "born alive" doctrine permits a criminal prosecution of the perpetrator when a child is born alive and then dies of the prenatal injuries and civil law in the state has held that such a victim is a person within Colorado's wrongful death statute. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009), overruled in *People v. Jones*, 2020 CO 45, 464 P.3d 735.

Definition of "child" used in this section to describe a victim of abuse does not include a fetus who is injured while in the womb and is later born alive. Under the statute, a child is a person under the age of sixteen years. An unborn fetus is not a person for purposes of this definition. The court refused to apply the common law "born alive" doctrine to define a criminal element in the child abuse statute. *People v. Jones*, 2020 CO 45, 464 P.3d 735 (overruling *People v. Lage*, 232 P.3d 138 (Colo. App. 2009)).

The term "health" includes both physical and mental well-being. *People v. Sherrod*, 204 P.3d 472 (Colo. App. 2007), rev'd on other grounds, 204 P.3d 466 (Colo. 2009).

The phrase "without justifiable excuse" in former subsection (1) of this section referred to the specific statute on justification, particularly § 18-1-703 (1)(a), which concerns the use of physical force in the special relationship of one who is entrusted with the care of a minor. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

Use of jury instruction containing phrase "without justifiable excuse" instead of word "unreasonably" from subsection (1)(a) was not plain error. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

The word "may" in former subsection (1)(a) of this section was construed to mean that there was a reasonable probability that the child's life or health will be endangered from the situation in which the child is placed. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977); *People v. Jennings*, 641 P.2d 276 (Colo. 1982); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Lack of jury instruction on meaning of word "may" did not constitute plain error where evidence established a reasonable probability that child's life and health might be endangered and lack of instruction could not be said to have reasonably contributed to defendant's conviction of child abuse. *People v. Rubanowitz*, 688 P.2d 231 (Colo. 1984).

The phrase "endanger the child's . . . health" in former subsection (1)(a) of this section contained no constitutional infirmities. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

There is no constitutional impediment to the general assembly punishing conduct creating less than imminent danger, and it is a particularly appropriate standard where the protection of children is the statutory purpose. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

"Endanger" in former subsection (1)(a) meant an imminent danger and "may endanger" in subsection (1)(b) meant a reasonable probability of harm. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

The phrase "that ultimately results in the death of a child or serious bodily injury" in subsection (1)(a) applies only to the last enumerated pattern of abuse — "an accumulation of injuries" — not the whole series. *People v. Weeks*, 2015 COA 77, 369 P.3d 699.

"Except" deleted. By statutory construction, the court deleted the "except" clauses in former subsections (7)(a)(I), (7)(a)(III), and (7)(a)(V). *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

Child abuse definition sufficiently particular to furnish adequate notice to potential wrongdoers. The term "negligently" (amended to read "through criminal negligence" in 1980), as used in this section, is not irreconcilably at odds with "tortured" and "cruelly punished", and the statutory definition of child abuse is sufficiently particular to furnish adequate notice to potential wrongdoers of the proscribed conduct and to protect against discriminatory enforcement. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

"Knowingly". The requirement of "knowingly" in former subsection (1) did not refer to the actor's awareness that his conduct was practically certain to cause the proscribed result; instead, "knowingly" referred to the actor's general awareness of the abusive nature of his conduct in relation to the child or his awareness of the circumstances in which he committed an act against the well-being of the child. *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Thompson*, 756 P.2d 353 (Colo. 1988).

The mental state "knowingly" is implied in former subsection (1)(c) because the statute required the accused to engage in the manufacture of a controlled substance. Both the terms "engage" and "manufacture" imply that the accused must be aware of the type of conduct participated in, and must seek to accomplish a particular task. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to subsection (1)(c)).

"Knowing" child abuse does not require that the defendant is aware that his conduct will cause serious bodily injury. Instead, to knowingly commit child abuse, a defendant need only be aware of the conduct he is engaging in with the child. *People v. Archer*, 2022 COA 71, 518 P.3d 1143.

Similarly, to recklessly commit child abuse, a defendant need only consciously disregard a substantial and unjustifiable risk that, given the child's circumstances, the child may be injured. *People v. Archer*, 2022 COA 71, 518 P.3d 1143.

Even if there is a logical inconsistency between acting knowingly or recklessly and acting with criminal negligence, no legal inconsistency exists based on § 18-1-503 (3). By returning a guilty verdict on child abuse that required a finding of knowingly or recklessly, the jury, as a matter of law, necessarily found that the defendant had acted with criminal negligence and was guilty of child abuse that required criminal negligence. *People v. Struckmeyer*, 2020 CO 76, 474 P.3d 57.

The culpable mental states applicable to the crime of child abuse relate not to a particular result, but rather to the nature of the offender's conduct in relation to the child or to the circumstances under which the act or omission occurred. *People v. Deskins*, 927 P.2d 368 (Colo. 1996).

Evidence that abuse resulted in serious bodily injury, as defined in § 18-1-901 (3)(p) sufficient to support charges of felony child abuse must relate to the extent of the injury at the time it occurred, not at the time of trial. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

Prior abusive conduct is not itself sufficient to be admissible as proof of defendant's knowledge or recklessness for a conviction for child abuse resulting in death under subsection (7)(c) when prior abusive conduct did not also result in serious bodily injury or death to a child and the prior abusive conduct bore no resemblance to the acts defendant allegedly committed in this case. The prior abusive conduct and the conduct resulting in death must be substantially similar in order to be

admissible under CRE 404(b). *People v. Casias*, 2012 COA 117, 312 P.3d 208.

Nor is it admissible to prove absence of mistake. *People v. Casias*, 2012 COA 117, 312 P.3d 208.

But defendant failed to demonstrate a reasonable probability that the error in admitting the evidence contributed to his conviction. *People v. Casias*, 2012 COA 117, 312 P.3d 208.

Inaction may be act of mistreatment. The child abuse statute proscribes acts of mistreatment which include inaction as well as action. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

"Tortured" and "cruelly punished", as used in former subsection (1), referred to actus reus, as measured by the consequences wrought on the child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

Placing child in debilitating physical situation may be considered torture. A person may negligently cause or permit a child to be placed in a situation so debilitating to the child's physical well-being that a reasonable juror, looking at the effect of the offender's conduct on the child, would consider it torture or cruel punishment. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Conduct prohibited by former subsection (1)(b) was punished as provided in subsection (7)(b). *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

Medical records protected by the physician-patient privilege outlined in § 13-90-107 (1)(d) do not fall within the child-abuse exception to the physician-patient privilege because subsection (3) of this section expressly states that the child abuse exception applies to "testimony", not to documents. *People v. Soron*, 2026 CO 3, 581 P.3d 778.

"Good faith" under former subsection (6) means an objectively reasonable belief that a child is not suffering from a condition which, if medically untreated, will endanger a child's life or will pose a substantial risk of serious bodily harm to the child. A belief is objectively reasonable when based on a reasonable assessment of the facts and circumstances known or discernible to the parent. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Thus, treatment by spiritual means defense is inapplicable where a parent believes that the child is not in danger of death or serious bodily harm but such belief is not based on a reasonable assessment of the facts and circumstances that are known to the parent. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Treatment by spiritual means was an affirmative defense under former subsection (6) if there was credible evidence that the parent had an honest and reasonable belief that the child was not suffering from a condition which, if

untreated, would endanger the child's life or pose a substantial risk of serious bodily harm to the child, that the parent was a duly accredited practitioner of a recognized church or religious denomination, and the parent elected to treat the child solely by spiritual means in accordance with tenets and practices of the parent's church. Record shows sufficient evidence raised by defendant to submit affirmative defense to the jury. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Subsection (7)(a) applies only when death or injury occurs and subsection (7)(b) applies when no such result occurs. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

A class 3 felony conviction under subsection (7)(a)(III) requires a causal connection between each listed form of child abuse and the alleged serious bodily injury, and, because the prosecution failed to make that connection between the situation that posed a threat of injury to the child and a resulting serious bodily injury, the prosecution lacked sufficient evidence on their second alternative theory of liability. *People v. Dunaway*, 88 P.3d 619 (Colo. 2004).

No reasonable interpretation of subsection (1)(a) would lead to the conclusion that proof of injury or serious bodily injury for purposes of meeting elements in subsection (7)(a) is made or

inferred through proof of the conduct listed in subsection (1)(a). *People v. Dunaway*, 88 P.3d 619 (Colo. 2004).

A person commits child abuse if he or she causes injury to a child's life or health, or permits a child to be unreasonably placed in a situation which poses a threat of injury to the child's life or health, and such offense does not depend on the offense resulting in death. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Fact that a child victim dies is a sentence enhancement factor and not an element of the crime of child abuse. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

The distinction of a position of trust in subsection (7)(c) is not nominal and it sufficiently justifies the harsher penalty imposed under that subsection. *People v. Martinez*, 51 P.3d 1046 (Colo. App. 2001), rev'd on other grounds, 74 P.3d 316 (Colo. 2003).

The age distinction for the victims mentioned in subsection (7)(c) is based on differences that are real in fact and that are reasonably related to the more severe penalty associated with subsection (7)(c). *People v. Martinez*, 51 P.3d 1046 (Colo. App. 2001), rev'd on other grounds, 74 P.3d 316 (Colo. 2003).

The prior child abuse conviction provision in subsection (7)(e) is a sentence enhancer, not an element of a child abuse crime. The trial court erred in allowing the people to introduce evidence of and make repeated references to defendant's prior child

abuse conviction. *People v. Becker*, 2014 COA 36, 347 P.3d 1168.

Acts similar in character admissible to negate claim of justification. Where all the prior acts of child abuse the prosecution sought to introduce into evidence were committed against the same person, each act was occasioned by normal childhood behavior on the part of the victim, each act was similar in severity in that noticeable bruises and marks were left on the child's body, each act took place while the child's mother was absent, and, finally, each act was followed by the defendant's explanation that it was for disciplinary purposes, that acts were sufficiently similar in character to be admissible for purposes of establishing criminal culpability and of negating any claim of accident or justification. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Acquittal on assault charge not bar to prosecution for knowing child abuse. A verdict of acquittal on a charge of assault does not bar reprosecution for knowing child abuse, since a finding that the defendant did not have the specific intent to cause serious injury is not an ultimate fact essential to proof of knowing child abuse because a conviction on that charge may be sustained by conduct that is done knowingly or negligently. *People v. Hoehl*, 629 P.2d 1083 (Colo. App. 1980).

Failure to include the phrase "without justifiable excuse" in a jury instruction on a crime of child abuse was not error where the affirmative defense of reasonable and appropriate discipline was not raised by the defense. *People v. Lybarger*, 700 P.2d 910

(Colo. 1985), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Jury instruction delivered by trial court constructively amended the count of reckless child abuse resulting in death. The information charged one form of child abuse, causing an injury to a child's life or health, and the jury instruction stated another, uncharged form of child abuse, permitting a child to be unreasonably placed in a situation that may have endangered the child's life or health. *People v. Weinreich*, 98 P.3d 920 (Colo. App. 2004), aff'd, 119 P.3d 1073 (Colo. 2005).

Because the amendment prejudiced defendant's substantial rights, the error rises to plain error. The amendment occurred after the close of evidence, and, therefore, defendant was deprived of the opportunity to present evidence on whether he had unreasonably placed his deceased daughter in a situation that may have endangered her life or health. *People v. Weinreich*, 98 P.3d 920 (Colo. App. 2004), aff'd, 119 P.3d 1073 (Colo. 2005).

Consistency of verdicts. There is no logical inconsistency between the guilty verdicts for the crimes of felony child abuse and reckless manslaughter. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Because defendant's two child abuse charges were based on identical conduct, the criminal negligence abuse charge was a lesser included offense of the knowing or reckless abuse charge, and the trial court must merge the two child abuse convictions and amend the mittimus. *People v. Wilson*, 2025 COA 94, 585 P.3d 248.

A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Prosecution presented several acts that could have constituted child abuse, so the prosecution needed to elect the specific act on which it relied for conviction or the court needed to give the jury a modified unanimity instruction. *People v. Childress*, 2012 COA 116, 409 P.3d 365, rev'd on other grounds, 2015 CO 65M, 363 P.3d 155.

Defendant not entitled to a modified unanimity instruction where the prosecution charged and presented the case on a theory that defendant committed child abuse by engaging in a single criminal transaction resulting in a child's death, and because there was no reasonable likelihood the jurors disagreed on which specific act caused the child's death. *Archuleta v. People*, 2020 CO 63, 467 P.3d 307.

Evidence sufficient to support a general verdict of guilty on charge brought under subsection (1)(a) where the evidence challenged on appeal consisted of alternative methods of establishing a single element. Therefore, the rule that requires sufficient evidence to support each alternative theory of prosecution's case does not apply. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Defendant's active participation in the decision-making process that led to children's deaths sufficient to support his convictions. Defendant did not simply fail to intervene; to the contrary, he engaged in affirmative acts of mistreatment, thereby rendering irrelevant the question of his relationship with the victims. *People v. Archer*, 2022 COA 71, 518 P.3d 1143.

Manufacturing a controlled substance is a lesser included offense of child abuse based on manufacturing a controlled substance. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to subsection (1)(c)).

Native and citizen of Mexico convicted under subsections (1)(a) and (7)(b)(I) of this section not entitled to cancellation of removal under the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The conviction falls within the definition of "a crime of child abuse, child neglect, or child abandonment" in 8 U.S.C. § 1227(a)(2)(E)(i) of the federal statute. *Zarate-Alvarez v. Garland*, 994 F.3d 1158 (10th Cir. 2021).

Applied in *People v. Sheldon*, 198 Colo. 519, 602 P.2d 869 (1979); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Raffaelli*, 647 P.2d 230 (Colo. 1982); *People v. Gordon*, 738 P.2d 404 (Colo. App. 1987).

18-6-401.1. Child abuse - limitation for commencing proceedings - evidence - statutory privilege.

(1) For the purposes of this section, "child abuse" means child abuse as defined in section 18-6-401 (1).

(2) No person shall be prosecuted, tried, or punished for an act of child abuse other than the misdemeanor offenses specified in section 18-6-401 (7)(a)(V), (7)(a)(VI), and (7)(b), unless the indictment, information, complaint, or action for the same is found or instituted within ten years after commission of the offense. No person shall be prosecuted, tried, or punished for the misdemeanor offenses specified in section 18-6-401 (7)(a)(V), (7)(a)(VI), and (7)(b), unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense.

(3) An out-of-court statement made by a child, as "child" is defined under the statutes that are the subject of the action, describing any act of child abuse to which the child declarant was subjected or that the child declarant witnessed, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, may be admissible pursuant to section 13-25-129 (3).

(4) All cases involving the commission of an act of child abuse shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the victim-patient and his physician and between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an act of child abuse.

Source: L. 85: Entire section added, p. 673, § 3, effective June 7. **L. 2019:** (3) amended, (SB 19-071), ch. 42, p. 146, § 3, effective July 1.

Cross references: For provisions concerning sex offenses against children that are similar to the provisions of this section, see § 18-3-411; for the physician-patient and husband-wife privileges, see § 13-90-107.

18-6-401.2. Habitual child abusers - indictment or information - verdict of the jury.

(1) For the purposes of this section, "child abuse" means child abuse as defined in section 18-6-401 (1).

(2) Every person convicted in this state of an act of child abuse who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an act of child abuse or who has been previously convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an unlawful act which, if committed within this state, would be an act of child abuse shall be adjudged an habitual child abuser. If the second or subsequent

act of child abuse for which a defendant is convicted constitutes a class 3 felony under section 18-6-401 (7)(a)(II) or a class 4 felony under section 18-6-401 (7)(a)(IV), the sentence imposed shall be served in the department of corrections and shall not be less than the upper limit of the presumptive range for that class felony as set out in section 18-1.3-401. If the second or subsequent act of child abuse for which a defendant is convicted constitutes a misdemeanor, the sentence imposed shall be served in the county jail and shall not be less than the maximum sentence for that class misdemeanor as set out in section 18-1.3-501.

(3) Any previous conviction of an act of child abuse shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for probation or suspension of sentence or deferred prosecution.

(5) The procedures specified in section 18-1.3-803 shall govern in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an act of child abuse as set out in the complaint, indictment, or information.

Source: **L. 85:** Entire section added, p. 674, § 3, effective June 7. **L. 96:** (5) amended, p. 1846, § 19, effective July 1. **L. 2002:** (2) and (5) amended, p. 1515, § 199, effective October 1. **L. 2003:** (2) amended, p. 1428, § 9, effective April 29.

Cross references: (1) For provisions concerning habitual sex offenders against children that are similar to the provisions of this section, see § 18-3-412.

(2) For the legislative declaration contained in the 2002 act amending subsections (2) and (5), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-6-401.3. Video tape depositions - children - victims of child abuse.

(1) When a defendant has been charged with an act of child abuse, as defined in section 18-6-401 (1), and when the victim at the time of the commission of the act is a child less than fifteen

years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b)(1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children that would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Source: **L. 85:** Entire section added, p. 675, § 3, effective June 7. **L. 2000:** (5) added, p. 453, § 8, effective April 24.

Cross references: For provisions concerning video tape depositions of child victims of sexual offenses that are similar to the provisions of this section, see § 18-3-413.

ANNOTATION

Law reviews. For article, "Children as Witnesses", see 31 Colo. Law. 15 (Oct. 2002).

18-6-401.4. Payment of treatment costs for the victim or victims of an act of child abuse.

(1) In addition to any other penalty provided by law, the court may order any person who is convicted of an act of child abuse, as defined in section 18-6-401 (1), to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims.

Source: L. 85: Entire section added, p. 675, § 3, effective June 7. L. 2003: (2) amended, p. 976, § 14, effective April 17.

Cross references: For provisions concerning payment of treatment costs for victims of sexual offenses against children that are similar to the provisions of this section, see § 18-3-414.

18-6-402. Trafficking in children. (Repealed)

Source: L. 77: Entire section added, p. 981, § 1, effective July 1. L. 2006: Entire section amended, p. 1308, § 2, effective May 30. L. 2009: (2) and (3) amended, (HB 09-1123), ch. 306, p. 1652, § 1, effective May 21. L. 2010: Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-502 in 2010.

18-6-403. Sexual exploitation of a child - legislative declaration - definitions.

(1) The general assembly hereby finds and declares that the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of the child's body for a sexual purpose or to the use of all or part of the child's image to create sexually exploitative material; and that to protect children from sexual exploitation it is necessary to prohibit the production of material that involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(1.5) The general assembly further finds and declares that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of sexual abuse of a child; that the creation or the mere possession or control of computer-generated material or digital depictions using all or part of the image of a child in sexually exploitative material results in the victimization of our children; that each time such material is shown or viewed, the child is harmed; that such material is used to break down the will and resistance of other children to encourage them to participate in similar acts of sexual abuse; that laws banning the production and distribution of such material are insufficient to halt this abuse; that in order to stop the sexual exploitation and abuse of our children, it is necessary for the state to ban the possession of any sexually exploitative materials; and that the state has a compelling interest in outlawing the possession of any sexually exploitative materials in order to protect society as a whole, and particularly the privacy, health, and emotional welfare of its children.

(2) As used in this section, unless the context otherwise requires:

(a) "Child" means a person who is less than eighteen years of age.

(b) (Deleted by amendment, L. 2003, p. 1882, § 1, effective July 1, 2003.)

(b.5) "Defense counsel personnel" means any defense attorney lawfully representing a defendant in a criminal case or a juvenile in a delinquency case that involves sexually exploitative material or another individual employed or retained by the defense attorney who performs or assists in the duties relating to the defense of the accused that may involve sexually exploitative materials.

(b.7) "Digitization" has the same meaning as in section 18-7-107 (6)(i).

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) "Explicit sexual conduct" means sexual intercourse, sexual intrusion, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

(e.3) "Identifiable child" means a person who:

(I) Was under the age of eighteen at the time a realistic visual depiction of the person was created, produced, or altered or a person whose image is used to create or produce a realistic visual depiction or whose image is altered to be a realistic visual depiction, and who was under the age of eighteen at the time the image was captured; and

(II) Is identifiable by virtue of the individual's face, likeness, or other distinguishing characteristic, including a unique birthmark or other recognizable feature.

(e.5) "Law enforcement personnel" means any peace officer, prosecutor, criminal investigator, crime analyst, or other individual who is employed by a law enforcement agency or district attorney's office and who performs or assists in investigative duties that may involve sexually exploitative materials.

(f) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

(g) "Sadomasochism" means:

(I) Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or

(II) The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(h) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(i) "Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(i.5) "Sexual intrusion" means an intrusion, however slight, by an object or a part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purpose of sexual arousal, gratification, or abuse.

(j) "Sexually exploitative material" means:

(I) A photograph, motion picture, video, recording or broadcast of moving visual images, live stream, print, negative, slide, or other mechanically, electronically, chemically, or digitally

reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct; or

(II) A realistic visual depiction, which has been created, altered, or produced by digitization or computer-generated means, that depicts an identifiable child, in whole or in part, engaged in, participating in, observing, or being used for explicit sexual conduct.

(k) "Video", "recording or broadcast", or "motion picture" means any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:

(a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or

(b) Prepares, arranges for, publishes, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, distributes, transports or transfers to another person, or makes accessible to another person, including, but not limited to, through digital or electronic means, any sexually exploitative material; or

(b.5) Accesses with intent to view, views, possesses, or controls any sexually exploitative material for any purpose; except that this subsection (3)(b.5) does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or

(c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or

(d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance, or accesses with intent to view or views explicit sexual conduct in the form of a performance involving a child if the conduct in the performance was caused, induced, enticed, requested, directed, or specified by the viewer or potential viewer.

(3.5) A juvenile's conduct that is limited to the elements of the petty offense of possession of a private intimate image or intimate digital depiction by a juvenile, as described in section 18-7-109 (2), or limited to the elements of the civil infraction of exchange of a private intimate image or intimate digital depiction by a juvenile, as described in section 18-7-109 (3), is not subject to prosecution pursuant to subsection (3)(b) or (3)(b.5) of this section.

(4) (Deleted by amendment, L. 2003, p. 1882, § 1, effective July 1, 2003.)

(5) (a) Except as provided in paragraph (b) of this subsection (5), sexual exploitation of a child is a class 3 felony.

(b) Sexual exploitation of a child pursuant to subsection (3)(b.5) of this section is a class 5 felony for each item of sexually exploitative material accessed with intent to view, viewed, possessed, or controlled; except that said offense is a class 4 felony if:

(I) It is a second or subsequent offense; or

(II) The item accessed with intent to view, viewed, possessed, or controlled is a video, recording or broadcast of moving visual images, or motion picture.

(5.5) Sexual exploitation of a child is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10) if the sexually exploitative material depicts a child who is:

(a) Under twelve years of age;

(b) Subjected to the actual application of physical force or violence; or

(c) Subject to sexual intercourse, sexual intrusion, or sadomasochism.

(5.7) Notwithstanding section 16-22-113 (3)(c) to the contrary, an adult who has more than one conviction of subsection (3)(b.5) of this section in a single criminal case is eligible to petition for removal from the registry pursuant to section 16-22-113.

(6) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

(7) A juvenile charged with a violation of section 18-7-109 (1) is not subject to prosecution for violation of this section for the same electronic or digital photograph, video, or image arising out of the same criminal episode.

(8) Nothing in this section changes the discovery procedure for sexually exploitative material as described in section 16-9-601.

(9) A prosecution brought pursuant to this section does not require proof of the actual identity of an identifiable child.

(10) When the charged offense involves sexually exploitative material pursuant to subsection (2)(j)(II) of this section, it is not a defense that the defendant lacked knowledge of whether the realistic visual depiction was created, altered, or produced by digitization or computer-generated means.

Source: **L. 79:** Entire section added, p. 737, § 1, effective July 1. **L. 81:** (3)(a) amended, p. 997, § 1, effective July 1. **L. 84:** (1) and (3) amended, p. 553, § 1, effective July 1. **L. 88:** (1.5) and (3)(b.5) added, (2)(c), (2)(d), (2)(f), and (5) amended, and (4) R&RE, pp. 730, 712, 731, §§ 1, 2, 4, 18, 3, effective July 1. **L. 98:** (2)(j), IP(3), (3)(b), and (3)(c) amended, p. 398, § 3, effective April 21. **L. 2003:** (2)(b), (3)(a), (3)(c), and (4) amended, p. 1882, § 1, effective July 1. **L. 2006:** (5) amended, p. 2043, § 1, effective July 1; (5) amended, p. 2056, § 7, effective July 1. **L. 2009:** (2)(j) and (5) amended and (2)(k) added, (HB 09-1163), ch. 343, p. 1799, § 3, effective July 1. **L. 2015:** Entire section amended, (HB 15-1341), ch. 274, p. 1113, § 1, effective August 5. **L. 2017:** (2)(b.5) and (2)(e.5) added and (3)(b.5) amended, (SB 17-115), ch. 141, p. 470, § 1, effective April 18; (3.5) and (7) added, (HB 17-1302), ch. 390, p. 2013, § 3, effective January 1, 2018. **L. 2018:** (8) added, (HB 18-1066), ch. 58, p. 600, § 1, effective March 22. **L. 2021:** (2)(e), (2)(j), (3)(b), (3)(b.5), (3)(d), and (5)(b) amended and (2)(i.5), (5.5), and (5.7) added, (HB 21-1069), ch. 446, p. 2940, § 2, effective September 7. **L. 2025:** (1), (1.5), (2)(j), and (3.5) amended and (2)(b.7), (2)(e.3), (9), and (10) added, (SB 25-288), ch. 339, p. 1825, § 2, effective August 6.

Editor's note: Amendments to subsection (5) by House Bill 06-1011 and House Bill 06-1092 were harmonized.

Cross references: (1) For the legislative declaration in HB 17-1302 stating the purpose of, and the provision directing legislative service agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2020, see sections 1 and 7 of chapter 390, Session Laws of Colorado 2017. To obtain a copy of the review, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

(2) For the legislative declaration in HB 21-1069 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2024, see sections 1 and 7 of chapter 446, Session Laws of Colorado 2021. To obtain a copy of the review, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Constitutionality. This section does not constitute a denial of due process nor infringe upon first amendment freedom of speech. The sale of child pornography is not constitutionally protected conduct. *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

The constitutionality of this section is preserved by the statutory requirements that a person knowingly took sexually explicit photographs of a child and that the content of those photographs, viewed objectively, would lead to sexual gratification or

stimulation of a reasonable viewer. *People v. Grady*, 126 P.3d 218 (Colo. App. 2005).

Defining "sexual gratification or stimulation of one or more of the persons involved" objectively, so as to include a reasonable viewer of sexual materials that have been distributed, furthers the statute's legislative intent of protecting children from sexual exploitation and does not cause the statute to be unconstitutionally overbroad and vague. *People v. Grady*, 126 P.3d 218 (Colo. App. 2005).

Subsection (1) is a statement of legislative purpose, and does not alter the elements of the crime as set forth in subsection (3). *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

Section is not unconstitutionally vague. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

Subsection (2)(d) that defines "erotic nudity" is not unconstitutionally overbroad. The category of "sexual conduct" proscribed through the definition of "erotic nudity" in subsection (2)(d) is suitably limited to conduct that is not constitutionally protected. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

Subsection (3)(a) is not constitutionally overbroad on its face because it prohibits only the use of real children in the production of pornography and does not prohibit the making or possession of photographs that "appear to be" of a minor engaged in sexually explicit conduct. *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

Subsection (3)(b) is not unconstitutionally overbroad or vague on its face when used to prosecute for making materials depicting erotic nudity as defined by subsection (2)(d). *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

Subsection (3)(b) is not overbroad or vague as applied to the defendant who was charged with sexual exploitation of a child because he knowingly made photographs of his daughter for no reason other than defendant's sexual gratification. *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

The sexual abuse language from the legislative declaration does not modify the elements of the offense of sexual exploitation of a child. *People in Interest of T.B.*, 2019 CO 53, 445 P.3d 1049.

The elements of possessing sexually exploitative material, subsection (3)(b.5), are unambiguous, so a court cannot import a sexual abuse of a child component from the legislative declaration into the statute. *People in Interest of T.B.*, 2016 COA 151M, 452 P.3d 36, *aff'd*, 2019 CO 53, 445 P.3d 1049.

Prior to January 1, 2018, sexual exploitation of a child applied to a juvenile who engaged in sexting. *People in Interest of T.B.*, 2019 CO 53, 445 P.3d 1049.

The crime of possessing sexually exploitative material, subsection (3)(b.5), applies to adults and juveniles alike. *People in Interest of T.B.*, 2016 COA 151M, 452 P.3d 36, *aff'd*, 2019 CO 53, 445 P.3d 1049.

Based on the plain language of subsections (3)(b) and (3)(b.5), the general assembly intended the prohibited behavior relating to each discrete item of sexually exploitative material to constitute an allowable unit of prosecution. Each sexually exploitative image is a permanent record and, therefore, constitutes a discrete act of victimization of the child. *People v. Renander*, 151 P.3d 657 (Colo. App. 2006) (decided under former law).

Because subsection (3) is written in the disjunctive, constructed as a series of acts referencing the same subject (sexually exploitative materials) and governed by a common mens rea, it prescribes alternative ways of committing the same offense. Therefore, a defendant cannot be convicted of both creating and possessing sexually exploitative material for a single occurrence. *People v. Meils*, 2019 COA 180, 471 P.3d 1130.

Defendant's possession of 294 images subjects defendant to only one conviction under subsection (3)(b.5). The unit of prosecution under the statute is an act of possession, not an individual image. Multiplicitous convictions for a single act of possession violate defendant's rights under the double jeopardy clause. *People v. Bott*, 2019 COA 100, 479 P.3d 29, *aff'd*, 2020 CO 86, 477 P.3d 137.

Unless the evidence at trial can establish factually distinct acts of possession, a defendant may be convicted only once for the simultaneous possession of multiple sexually exploitative videos so that a defendant's rights are not violated under

the double jeopardy clause. *People v. Abad*, 2021 COA 6, 490 P.3d 1094.

In this case, the fact that sexually exploitative material was found on three different electronic devices or storage sites, standing alone, did not establish factually distinct offenses justifying multiple convictions and punishments. *People v. Abad*, 2021 COA 6, 490 P.3d 1094.

Subsection (3)(b) does not apply to the duplication of photographs by the prosecution for use by defense counsel in preparation for trial when the court has taken adequate precautions to limit their use. *People v. Arapahoe County Court*, 74 P.3d 429 (Colo. App. 2003).

"Arranges for" in subsection (3)(b) does not include either arranging for the distribution of material, or arranging to obtain material. *People v. Mantos*, 250 P.3d 586 (Colo. App. 2009).

The requisite mental state of "knowingly" in subsection (3) must be deemed to apply to every element of the offense of sexual exploitation of a child, including the element of age, absent a clear intent to the contrary. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Section 18-3-406 (1) eliminates the culpable mental state as to age prescribed by subsection (3), "knowingly", and replaces it with that of § 18-3-406 (1), "lack of reasonable belief". *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Section 18-3-406 (1), by providing for the affirmative defense of reasonable belief, manifests clear legislative intent

that the culpable mental state of "knowingly" in subsection (3) does not apply to the age of the victim. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Even if the individual has not developed the film, a prosecution under subsection (3)(a) may be predicated upon an individual's photographing a child engaged in sexually explicit conduct. The critical question for the jury to resolve is whether the individual photographed the child for the purpose of producing a visual depiction of explicit sexual conduct. *People v. St. James*, 75 P.3d 1122 (Colo. App. 2002).

Evidence that a person has knowingly received prohibited material in an e-mail could be accepted as proof that the person knowingly possessed the material, because a person who knowingly receives an e-mail is aware of the nature of its content and has immediate and knowing dominion or control over it. *Fabiano v. Armstrong*, 141 P.3d 907 (Colo. App. 2006).

To determine whether a nude photo is for the purpose of sexual gratification or stimulation, a court should consider whether the display appears to be intended or designed to elicit a sexual response. The factors to consider are: (1) whether the focal point is on the breasts, genitals, or pubic area of the child; (2) whether the setting, pose, or attire depicted is sexually suggestive, considering the age of the child; and (3) whether the depiction appears to be staged to suggest a willingness to engage in sexual activity. *People in Interest of T.B.*, 2019 CO 53, 445 P.3d 1049.

Photos that focused on the breasts and pubic area and appeared to be staged to be sexually suggestive and suggested a willingness to engage in sexual activity were for the purpose of sexual gratification or stimulation. *People in Interest of T.B.*, 2019 CO 53, 445 P.3d 1049.

Definition of "erotic nudity" does not require that the "real or simulated overt sexual gratification or stimulation" be depicted in the material, but only that the overt sexual gratification or stimulation be of any of the persons involved in the activity. *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

A display or picture qualifies as "erotic nudity" under subsection (2)(d) if: (1) The display or picture depicts the human breasts or undeveloped or developing breast area of a child; and (2) the display or picture is for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

"Prepares" as used in subsection (3)(b) means engaging in the process of creating any sexually exploitative material. *People v. Mantos*, 250 P.3d 586 (Colo. App. 2009).

The meaning of "publishes" and "distributes" in subsection (3)(b) includes downloading sexually exploitative material to a computer using peer-to-peer file sharing software and saving that material in shareable files or folders accessible by others using such software. *People v. Robles-Sierra*, 2018 COA 28, 488 P.3d 337.

For purposes of this section, "possession" means the non-exclusive control or dominion over sexually exploitative material. People v. Marsh, 396 P.3d 1 (Colo. App. 2011), *aff'd*, 2017 CO 10M, 389 P.3d 100.

When a computer user seeks out and views child pornography on the internet, the user possesses the images viewed. The internet cache of images qualifies as relevant evidence that the user viewed and possessed the images. Knowingly seeking out and viewing child pornography on the internet constitutes knowing possession under this section. Marsh v. People, 2017 CO 10M, 389 P.3d 100.

The presence of digital images in an internet cache can constitute evidence of a prior act of possession. There was enough evidence that the jury could infer that the defendant knowingly viewed the images in the internet cache. People v. Marsh, 396 P.3d 1 (Colo. App. 2011), *aff'd*, 2017 CO 10M, 389 P.3d 100.

The requirement of "possesses or controls any sexually exploitative material" in subsection (3)(b.5) does not contain any requirement that the material be retained for any minimum period of time. Fabiano v. Armstrong, 141 P.3d 907 (Colo. App. 2006).

"Offer" means making sexually exploitative material available or accessible to others. A defendant offers sexually exploitative material by knowingly leaving it in a computer share folder for other users to download. There was sufficient evidence that defendant knew he

offered sexually exploitative material to others through a peer-to-peer file share system. People v. Rowe, 2012 COA 90, 318 P.3d 57.

A person who uses electronic media to solicit or orchestrate erotic images is a "person involved" for the purposes of subsection (2)(d). People in Interest of T.B., 2019 CO 53, 445 P.3d 1049.

The phrase "one or more of the persons involved" in subsection (2)(d) is not limited to just the persons depicted in a photograph. The sexual gratification of the person need not be shown in the photograph, a person can gain sexual gratification from asking for and observing the photograph. People in Interest of T.B., 2016 COA 151M, 452 P.3d 36, *aff'd*, 2019 CO 53, 445 P.3d 1049.

Court need not find that photos taken of minor by defendant were obscene in order for defendant to be prosecuted for sexual exploitation of a child. People v. Gagnon, 997 P.2d 1278 (Colo. App. 1999).

Images that, when viewed objectively, are not "erotic nudity" do not become so merely because a particular person — one not involved in the creation or distribution of the images — looks at them for the purpose of sexual gratification. A particular viewer's purpose in looking at such images is irrelevant for the purpose of determining whether the images are erotic nudity. People v. Henley, 2017 COA 76, 488 P.3d 195.

Images created using a generative-AI tool to blend authentic images of classmates'

actual faces and clothed bodies with computer-generated images portraying naked intimate body parts to make it appear as though the classmates are nude do not fall within the scope of the definition of "sexually exploitive material" in subsection (2)(j). People of Interest of S.G.H., 2025 CO 59, 578 P.3d 505 (decided under law in effect in 2023).

The digital images are not photographs, motion pictures, videos, recordings or broadcasts of moving visual images, livestreams, prints, negatives, or slides. Nor are they mechanically, electronically, chemically, or digitally reproduced. Although the images were digital, they were not reproduced. People of Interest of S.G.H., 2025 CO 59, 578 P.3d 505 (decided under law in effect in 2023).

Conduct proscribed by this section is different than conduct proscribed by § 18-3-405, sexual assault on a child, and imposing different penalties for the two sections does not offend equal protection. People v. Slusher, 844 P.2d 1222 (Colo. App. 1992).

Defendant can be prosecuted under this section for photographing his 18-year-old wife having sex with a 15-year-old girl even if the defendant's wife could not be prosecuted for having sex with the girl pursuant to § 18-3-402 (1)(e). People v. Campbell, 94 P.3d 1186 (Colo. App. 2004).

18-6-404. Procurement of a child for sexual exploitation.

Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another person a child for the purpose of sexual

When there is nothing in the statute nor any evidence in the record that would support requiring defendants to inquire regarding the victim's age, the convictions of defendants cannot be sustained based solely on their failure to do so. People v. Bath, 890 P.2d 269 (Colo. App. 1994).

A person convicted of violating 18 U.S.C. § 2252(a)(2) has engaged in conduct that, if committed in Colorado, would constitute sexual exploitation of a child in violation of subsection (3)(b.5) of this section and is, therefore, subject to the registration requirement of § 16-22-103 (1)(b). Fabiano v. Armstrong, 141 P.3d 907 (Colo. App. 2006).

A person's prior conviction under subsection (3)(b.5) of this section relates to child pornography for purposes of 18 U.S.C. § 2252A(b)(2), triggering the ten-year mandatory minimum sentence. United States v. Bennett, 823 F.3d 1316 (10th Cir. 2016).

Court could properly impose consecutive sentences for multiple sexual exploitation convictions since the crime recognizes that each sexually exploitive image of a child constitutes a discrete act of victimization of the child. People v. Rabes, 258 P.3d 937 (Colo. App. 2010).

exploitation of a child commits procurement of a child for sexual exploitation, which is a class 3 felony.

Source: L. 83: Entire section added, p. 696, § 9, effective June 15.

18-6-405. Reports of convictions to department of education.

(1) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

(2) Repealed.

Source: L. 90: Entire section added, p. 1026, § 9, effective July 1. **L. 96:** Entire section amended, p. 1291, § 4, effective January 1, 1997. **L. 2000:** (2) repealed, p. 1722, § 4, effective June 1; (1) amended, p. 1847, § 34, effective August 2.

PART 5

ADULTERY

18-6-501. Adultery. (Repealed)

Source: L. 71: R&RE, p. 449, § 1. **C.R.S. 1963:** § 40-6-501. **L. 2013:** Entire section repealed, (HB 13-1166), ch. 59, p. 195, § 1, effective August 7.

PART 6

HARBORING A MINOR

18-6-601. Harboring a minor.

(1) (a) A person commits the crime of harboring a minor if the person knowingly provides shelter to a minor without the consent of a parent, guardian, custodian of the minor, or the person

with whom the child resides the majority of the time pursuant to a court order allocating parental responsibilities and if the person intentionally:

(I) Fails to release the minor to a law enforcement officer after being requested to do so by the officer; or

(II) Fails to disclose the location of the minor to a law enforcement officer when requested to do so, if the person knows the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location; or

(III) Obstructs a law enforcement officer from taking the minor into custody; or

(IV) Assists the minor in avoiding or attempting to avoid the custody of a law enforcement officer; or

(V) Fails to notify the parent, guardian, custodian of the minor, or the person with whom the child resides the majority of the time pursuant to a court order allocating parental responsibilities or a law enforcement officer that the minor is being sheltered within twenty-four hours after shelter has been provided.

(b) If the shelter provided to the minor is by a licensed child care facility, including a licensed homeless youth shelter, the minor, despite the minor's status, may reside at such facility or shelter for a period not to exceed two weeks after the time of intake, pursuant to the procedures set forth in article 5.7 of title 26, C.R.S.

(c) It is a defense to a prosecution under this section that the defendant had custody of the minor or lawful parenting time with the minor pursuant to a court order.

(2) Harboring a minor is a class 2 misdemeanor.

Source: L. 86: Entire part added, p. 780, § 1, effective April 14; (3) amended, p. 1225, § 46, effective May 30. L. 94: (2)(b) amended, p. 2656, § 139, effective July 1. L. 96: (2)(c) amended, p. 1842, § 7, effective July 1. L. 97: Entire section amended, p. 975, § 1, effective May 22. L. 98: IP(1)(a), (1)(a)(V), and (1)(c) amended, p. 1403, § 57, effective February 1, 1999.

ANNOTATION

In order to satisfy the failure to release element in subsection (1)(a)(I), the prosecution must prove that the defendant failed to release the minor to the specific officer who made the request. The statute's

use of the word "the" to reference the officer requesting a minor's release particularizes or defines that officer as the same previously referenced law enforcement officer to whom

the minor would be released. People v. Flynn, 2020 COA 54, 463 P.3d 360.

PART 7

CONTRIBUTING TO DELINQUENCY

18-6-701. Contributing to the delinquency of a minor.

(1) (a) Any person who induces, aids, or encourages a child to violate any state law that is a felony victims rights act crime as defined in section 24-4.1-302 (1) commits first degree contributing to the delinquency of a minor.

(b) Any person who induces, aids, or encourages a child to violate any municipal or county ordinance, court order, or state or federal law that is not a felony victims rights act crime as defined in section 24-4.1-302 (1) commits second degree contributing to the delinquency of a minor.

(c) As used in this section, the term "child" means any person under the age of eighteen years.

(2) (a) First degree contributing to the delinquency of a minor is a class 4 felony.

(b) Second degree contributing to the delinquency of a minor is a class 1 misdemeanor.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: **L. 87:** Entire part added, p. 817, § 22, effective October 1. **L. 90:** (3) added, p. 1026, § 10, effective July 1. **L. 92:** (1) amended, p. 404, § 17, effective June 3. **L. 2000:** (3) amended, p. 1847, § 35, effective August 2. **L. 2021:** (1) and (2) amended, (SB 21-271), ch. 462, p. 3192, § 261, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

Annotator's note. The following annotations include cases decided under former § 19-3-119.

A law enforcement officer does not violate this section when, in the completion of undercover activities, he encourages a child to violate a law or ordinance. *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988); *People in Interest of J.A.L.*, 761 P.2d 1137 (Colo. 1988) (both cases decided under former § 19-3-119).

An adult may be charged with violating this statute regardless of whether the minor was actually charged with or convicted of a crime or whether the minor was old enough to be charged with or convicted of a crime. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

This is a criminal statute. *Miller v. People in Interest of Edwin*, 102 Colo. 259, 78 P.2d 624 (1938).

The statute does not require that a minor child be charged or convicted of a crime or that the child be older than ten years old for a person to be found guilty of contributing to the delinquency of a minor. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

The required mens rea for an offense under this section is knowingly; except that the mens rea does not apply to the defendant's knowledge of the age of the minor victim. The purpose of this section is to protect minors. Thus, the defendant's awareness of the victim's age is not the focus of the statute, and the intent of the general assembly is to hold the defendant responsible if he or she engaged in the prohibited conduct and the victim's age fell within the statutorily defined age element. *People v. Hastings*, 983 P.2d 78 (Colo. App.

1999), *aff'd*, 19 P.3d 662 (Colo. 2000); *People v. Gorman*, 983 P.2d 92 (Colo. App. 1999), *aff'd*, 19 P.3d 662 (Colo. 2000).

The affirmative defense of reasonable belief with regard to the age of the victim, created in this section, applies to an offense charged under this section. But the trial court did not err in refusing to instruct the jury on the affirmative defense where the defendant failed to present sufficient evidence of the defense at trial. *People v. Hastings*, 983 P.2d 78 (Colo. App. 1999), *aff'd*, 19 P.3d 662 (Colo. 2000); *People v. Gorman*, 983 P.2d 92 (Colo. App. 1999), *aff'd*, 19 P.3d 662 (Colo. 2000).

Section materially the same as prior section of law on same subject, and specific violations of liquor code must be prosecuted under that law and not this provision. General assembly's reenactment of this section does not change the result. *People v. O'Donnell*, 926 P.2d 114 (Colo. App. 1996).

Evidence held insufficient. *Moore v. People*, 111 Colo. 584, 144 P.2d 776 (1943).

Possession of marijuana is not a lesser included offense of contributing to the delinquency of a minor under this section or transferring marijuana under § 18-18-406 (7)(b). *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

Applied in *Gibson v. People*, 44 Colo. 600, 99 P. 333 (1908); *Sass v. People*, 48 Colo. 125, 109 P. 263 (1910); *McClelland v. People*, 49 Colo. 538, 113 P. 640 (1911); *Sharp v. People*, 90 Colo. 356, 9 P.2d 483 (1932); *May v. People*, 636 P.2d 672 (Colo.

1981); *People v. Corpening*, 837 P.2d 249 (Colo. App. 1992).

PART 8

DOMESTIC VIOLENCE

Cross references: For provisions relating to domestic abuse programs, see article 7.5 of title 26.

Law reviews: For article, "Domestic Violence Protections for Unauthorized Migrant Victims in Colorado: A Federal-State Partnership", see 91 *Denv. U.L. Rev.* 617 (2014).

18-6-800.3. Definitions.

As used in this part 8, unless the context otherwise requires:

(1) "Domestic violence" means an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. "Domestic violence" also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

(2) "Intimate relationship" means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.

Source: **L. 89:** Entire section added, p. 909, § 1, effective April 4. **L. 94:** (1) amended, p. 2020, § 1, effective June 3; entire section amended, p. 2025, § 1, effective July 1. **L. 95:** IP and (1) amended, p. 566, § 1, effective July 1. **L. 2007:** (1) amended, p. 726, § 7, effective July 1.

Editor's note: Subsection (1) was amended in Senate Bill 94-51. Those amendments were superseded by the amendment of the entire section in House Bill 94-1253.

ANNOTATION

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Law reviews. For article, "Injunctive Remedies for Interpersonal Violence", see 18 Colo. Law. 1743 (1989). For article, "1994 Legislature Strengthens Domestic Violence Protective Orders", see 23 Colo. Law. 2327 (1994).

Evidence of a sexual relationship is not necessary to establish the existence of an intimate relationship. People v. Disher, 224 P.3d 254 (Colo. 2010).

A sexual relationship may be an indicator, but never a necessary condition, of an intimate relationship for purposes of the Colorado domestic violence statute. The relationship must be more than that of a roommate, friend, or acquaintance, and there must be a romantic attachment or shared

parental status between the parties. People v. Disher, 224 P.3d 254 (Colo. 2010).

When determining whether a relationship is an "intimate relationship", a court may take into account the following three factors: (1) The length of time the relationship has existed or did exist; (2) the nature or type of the relationship; and (3) the frequency of interaction between the parties. People v. Disher, 224 P.3d 254 (Colo. 2010).

The existence of a dating relationship indicates the kind of romantic attachment required by the statute. Whether that dating relationship was sexual in nature should not have been the determining factor. People v. Disher, 224 P.3d 254 (Colo. 2010).

18-6-801. Domestic violence - sentencing.

(1) (a) In addition to any sentence that is imposed upon a person for violation of any criminal law under this title 18, any person who is convicted of any crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), or any crime against property, whether or not such crime is a felony, when such crime is used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship shall be ordered to complete a treatment program and a treatment evaluation that conform with the standards adopted by the domestic violence offender management board as required by section 16-11.8-103 (4); except a person granted probation whose supervision is transferred to another state pursuant to the interstate compact for the supervision of adult offenders shall follow the requirements for a treatment evaluation and a treatment program of the state where the person is being supervised. Except for a person granted probation whose supervision is transferred pursuant to the interstate compact for the supervision of adult offenders, if an intake evaluation conducted by an approved treatment program provider discloses that sentencing to a treatment program would be inappropriate, the person shall be referred back to the court for alternative disposition.

(b) The court may order a treatment evaluation to be conducted prior to sentencing if a treatment evaluation would assist the court in determining an appropriate sentence. The person

ordered to undergo such evaluation shall be required to pay the cost of the treatment evaluation. If such treatment evaluation recommends treatment, and if the court so finds, the person shall be ordered to complete a treatment program that conforms with the standards adopted by the domestic violence offender management board as required by section 16-11.8-103 (4); except a person granted probation whose supervision is transferred to another state pursuant to the interstate compact for the supervision of adult offenders shall follow the requirements for a treatment evaluation and a treatment program of the state where the person is being supervised.

(c) Nothing in this subsection (1) shall preclude the court from ordering domestic violence treatment in any appropriate case.

(2) Subsection (1) of this section shall not apply to persons sentenced to the department of corrections.

(3) A person charged with the commission of a crime, the underlying factual basis of which includes an act of domestic violence as defined in section 18-6-800.3 (1), shall not be entitled to plead guilty or plead nolo contendere to an offense which does not include the domestic violence designation required in section 16-21-103, C.R.S., unless the prosecuting attorney makes a good faith representation on the record that such attorney would not be able to establish a prima facie case that the person and the alleged victim were currently or formerly involved in an intimate relationship if the defendant were brought to trial on the original domestic violence offense and upon such a finding by the court. The prosecuting attorney's record and the court's findings shall specify the relationship in the alleged domestic violence case which the prosecuting attorney is not able to prove beyond a reasonable doubt and the reasons therefor. No court shall accept a plea of guilty or nolo contendere to an offense which does not include the domestic violence designation required in section 16-21-103, C.R.S., when the facts of the case indicate that the underlying factual basis includes an act of domestic violence as defined in section 18-6-800.3 (1) unless there is a good faith representation by the prosecuting attorney that he or she would be unable to establish a prima facie case if the defendant were brought to trial on the original offense.

(4) No person accused or convicted of a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), shall be eligible for home detention in the home of the victim pursuant to section 18-1.3-105 or 18-1.3-106. Nothing in this subsection (4) is intended to prohibit a court from ordering a deferred sentence for a person accused or convicted of a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1).

(5) Before granting probation, the court shall consider the safety of the victim and the victim's children if probation is granted.

(6) Nothing in this section shall preclude the ability of a municipality to enact concurrent ordinances.

(7) (a) Any misdemeanor offense that includes an act of domestic violence is a class 5 felony if the defendant at the time of sentencing has been previously convicted of three or more prior offenses that included an act of domestic violence and that were separately brought and tried and arising out of separate criminal episodes.

(b) The prior convictions must be set forth in apt words in the indictment or information. For the purposes of this section, "conviction" includes any federal, state, or municipal conviction for a felony, misdemeanor, or municipal ordinance violation.

(c) Trials in cases alleging that the defendant is an habitual domestic violence offender pursuant to this subsection (7) must be conducted in accordance with the rules of criminal procedure for felonies. The trier of fact shall determine whether an offense charged includes an act of domestic violence.

(d) Following a conviction for an offense which underlying factual basis includes an act of domestic violence:

(I) If any prior conviction included a determination by a jury or was admitted by the defendant that the offense included an act of domestic violence, the court shall proceed to sentencing without further findings as to that prior conviction by the jury or by the court, if no jury trial is had;

(II) For any prior conviction in which the factual basis was found by the court to include an act of domestic violence, but did not include a finding of domestic violence by a jury or that was not admitted by the defendant, the trial court shall proceed to a sentencing stage of the proceedings. The prosecution shall present evidence to the trier of fact that the prior conviction included an act of domestic violence. The prosecution has the burden of proof beyond a reasonable doubt.

(III) At the sentencing stage, the following applies:

(A) A finding of domestic violence made by a court at the time of the prior conviction constitutes prima facie evidence that the crime involved domestic violence;

(B) Evidence of the prior conviction is admissible through the use of certified documents under seal, or the court may take judicial notice of a prior conviction;

(C) Evidence admitted in the guilt stage of the trial, including testimony of the defendant and other acts admitted pursuant to section 18-6-801.5, may be considered by the finder of fact.

(8) (a) **Sentencing requirements.** In addition to any sentence that is imposed upon a defendant for violation of any criminal law under this title 18, if a defendant is convicted of any

crime, the underlying factual basis of which is found by the court on the record to be a misdemeanor crime of domestic violence, as defined in 18 U.S.C. sec. 921 (a)(33), or that is punishable by a term of imprisonment exceeding one year and includes an act of domestic violence, as defined in section 18-6-800.3 (1), the court:

(I) Shall order the defendant to:

(A) Refrain from possessing or purchasing any firearm or ammunition until the defendant's sentence is satisfied; and

(B) Relinquish any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control; and

(II) May require that before the defendant is released from custody on bond, the defendant relinquish any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control; and

(III) Shall schedule a compliance hearing pursuant to subsection (8)(e) of this section and notify the defendant of the hearing date and that the defendant shall appear at the hearing in person unless the hearing is vacated pursuant to subsection (8)(e)(I) of this section.

(b) **Time period to relinquish.** The defendant shall relinquish, in accordance with subsection (8)(d) of this section, any firearm or ammunition not more than twenty-four hours, excluding legal holidays and weekends, after sentencing; except that a court may allow a defendant up to an additional twenty-four hours to relinquish a firearm if the defendant demonstrates to the satisfaction of the court that the defendant is unable to comply within the time frame set forth in this subsection (8)(b).

(c) **Additional time to comply if defendant is in custody.** If a defendant is unable to satisfy the provisions of this subsection (8) because the defendant is incarcerated or otherwise held in the custody of a law enforcement agency, the court shall require the defendant to satisfy the provisions not more than twenty-four hours, excluding legal holidays and weekends, after the defendant's release from incarceration or custody or be held in contempt of court. Notwithstanding any provision of this subsection (8)(c), the court may, in its discretion, require the defendant to relinquish any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control before the end of the defendant's incarceration. In such a case, a defendant's failure to relinquish a firearm or ammunition as required constitutes contempt of court.

(d) **Relinquishment options.** To satisfy the requirement in subsection (8)(b) of this section, the defendant shall either:

(I) Sell or transfer possession of the firearm or ammunition to a federally licensed firearms dealer described in 18 U.S.C. sec. 923, as amended; except that this provision must not be

interpreted to require any federally licensed firearms dealer to purchase or accept possession of any firearm or ammunition; or

(II) Arrange for the storage of the firearm or ammunition by a law enforcement agency or by a storage facility with which the law enforcement agency has contracted for the storage of transferred firearms or ammunition, pursuant to subsection (8)(g) of this section; except that this provision must not be interpreted to require any law enforcement agency to provide storage of firearms or ammunition for any person; or

(III) Sell or otherwise transfer the firearm or ammunition to a private party who may legally possess the firearm or ammunition; except that a defendant who sells or transfers a firearm pursuant to this subsection (8)(d)(III) shall satisfy all of the provisions of section 18-12-112 concerning private firearms transfers, including but not limited to the performance of a criminal background check of the transferee.

(e) Compliance hearing and affidavit.

(I) The court shall conduct a compliance hearing not less than eight but not more than twelve business days after sentencing to ensure the defendant has complied with subsection (8)(e)(II) of this section. The court may vacate the hearing if the court determines the defendant has completed the affidavit described in subsection (8)(e)(II) of this section. Failure to appear at a hearing described in this subsection (8)(e)(I) constitutes contempt of court.

(II) The defendant shall complete an affidavit, which must be filed in the court record within seven business days after sentencing, stating the number of firearms in the defendant's immediate possession or control or subject to the defendant's immediate possession or control, the make and model of each firearm, any reason the defendant is still in immediate possession or control of such firearm, and the location of each firearm. If the defendant does not possess a firearm at the time of sentencing, the defendant shall indicate such nonpossession in the affidavit.

(III) If the defendant possessed a firearm at the time of the qualifying incident giving rise to the duty to relinquish the firearm pursuant to this section but transferred or sold the firearm to a private party prior to sentencing, the defendant shall disclose the sale or transfer of the firearm to the private party in the affidavit described in subsection (8)(e)(II) of this section. The defendant, within seven business days after sentencing, shall acquire a written receipt and signed declaration that complies with subsection (8)(h)(I)(A) of this section, and the defendant shall file the signed declaration at the same time the defendant files the affidavit pursuant to subsection (8)(e)(II) of this section.

(IV) The state court administrator shall develop the affidavit described in subsection (8)(e)(II) of this section and all other forms necessary to implement this subsection (8) no later than January 1, 2022. State courts may use the forms developed by the state court administrator

pursuant to this subsection (8)(e) or another form of the court's choosing, so long as the forms comply with the requirements of this subsection (8)(e).

(V) Upon the sworn statement or testimony of the petitioner or of any law enforcement officer alleging there is probable cause to believe the respondent has failed to comply with the provisions of this section, the court shall determine whether probable cause exists to believe that the respondent has failed to relinquish all firearms or a concealed carry permit in the respondent's custody, control, or possession. If probable cause exists, the court shall issue a search warrant that states with particularity the places to be searched and the items to be taken into custody.

(f) **Relinquishment to a federally licensed firearms dealer.** A federally licensed firearms dealer who takes possession of a firearm or ammunition pursuant to this subsection (8) shall issue a written receipt and signed declaration to the defendant at the time of relinquishment. The declaration must memorialize the sale or transfer of the firearm. The federally licensed firearms dealer shall not return the firearm or ammunition to the defendant unless the dealer:

(I) Contacts the Colorado bureau of investigation, referred to in this subsection (8) as the "bureau", to request that a criminal background check of the defendant be performed; and

(II) Obtains approval of the transfer from the bureau after the performance of the criminal background check.

(g) **Storage by a law enforcement agency or storage facility.**

(I) A local law enforcement agency may elect to store firearms or ammunition for a defendant pursuant to this subsection (8). The law enforcement agency may enter into an agreement with any other law enforcement agency or storage facility for the storage of transferred firearms or ammunition. If a law enforcement agency elects to store firearms or ammunition for a defendant:

(A) The law enforcement agency may charge a fee for the storage, the amount of which must not exceed the direct and indirect costs incurred by the law enforcement agency in providing the storage;

(B) The law enforcement agency shall establish policies for disposal of abandoned or stolen firearms or ammunition; and

(C) The law enforcement agency shall issue a written receipt and signed declaration to the defendant at the time of relinquishment. The declaration must memorialize the sale or transfer of the firearm.

(II) If a local law enforcement agency elects to store firearms or ammunition for a defendant pursuant to this subsection (8)(g), the law enforcement agency shall not return the firearm or ammunition to the defendant unless the law enforcement agency:

(A) Contacts the bureau to request that a criminal background check of the defendant be performed; and

(B) Obtains approval of the transfer from the bureau after the performance of the criminal background check.

(III) (A) A law enforcement agency that elects to store a firearm or ammunition for a defendant pursuant to this subsection (8) may elect to cease storing the firearm or ammunition. A law enforcement agency that elects to cease storing a firearm or ammunition for a defendant shall notify the defendant of the decision and request that the defendant immediately make arrangements for the transfer of the possession of the firearm or ammunition to the defendant or, if the defendant is prohibited from possessing a firearm, to another person who is legally permitted to possess a firearm.

(B) If a law enforcement agency elects to cease storing a firearm or ammunition for a defendant and notifies the defendant as described in subsection (8)(g)(III)(A) of this section, the law enforcement agency may dispose of the firearm or ammunition if the defendant fails to make arrangements for the transfer of the firearm or ammunition and complete the transfer within ninety days after receiving the notification.

(IV) A law enforcement agency that elects to store a firearm or ammunition shall obtain a search warrant to examine or test the firearm or ammunition or facilitate a criminal investigation if a law enforcement agency has probable cause to believe the firearm or ammunition has been used in the commission of a crime, is stolen, or is contraband. This subsection (8)(g)(IV) does not preclude a law enforcement agency from conducting a routine inspection of the firearm or ammunition prior to accepting the firearm for storage.

(h) Relinquishment to a private party.

(I) If a defendant sells or otherwise transfers a firearm or ammunition to a private party who may legally possess the firearm or ammunition, as described in subsection (8)(d)(III) of this section, the defendant shall acquire:

(A) From the federally licensed firearms dealer, a written receipt and signed declaration memorializing the transfer, which receipt must be dated and signed by the defendant, the transferee, and the federally licensed firearms dealer; and

(B) From the federally licensed firearms dealer who requests from the bureau a criminal background check of the transferee, as described in section 18-12-112, a written statement of the results of the criminal background check.

(II) The defendant shall not transfer the firearm to a private party living in the same residence as the defendant at the time of the transfer.

(III) Notwithstanding section 18-12-112, if a private party elects to store a firearm for a defendant pursuant to this subsection (8), the private party shall not return the firearm to the defendant unless the private party acquires from the federally licensed firearms dealer, who requests from the bureau a criminal background check of the defendant, a written statement of the results of the criminal background check authorizing the return of the firearm to the defendant.

(i) **Requirement to file signed declaration.**

(I) The defendant shall file a copy of the signed declaration issued pursuant to subsection (8)(f), (8)(g)(I)(C), or (8)(h)(I)(A) of this section, and, if applicable, the written statement of the results of a criminal background check performed on the defendant, as described in subsection (8)(h)(I)(B) of this section, with the court as proof of the relinquishment at the same time the defendant files the signed affidavit pursuant to subsection (8)(e)(II) of this section. The signed declaration and written statement filed pursuant to this subsection (8)(i) are only available for inspection by the court and the parties to the proceeding. If a defendant fails to timely transfer or sell a firearm or file the signed declaration or written statement as described in this subsection (8)(i)(I):

(A) The failure constitutes a class 2 misdemeanor, and the defendant is punished as provided in section 18-1.3-501; and

(B) The court shall issue a warrant for the defendant's arrest.

(II) In any subsequent prosecution for a violation of this subsection (8)(i), the court shall take judicial notice of the defendant's failure to transfer or sell a firearm, or file the signed declaration or written statement, which constitutes prima facie evidence that the defendant has violated this subsection (8), and testimony of the clerk of the court or the clerk of the court's deputy is not required.

(j) (I) A law enforcement agency that elects in good faith to not store a firearm or ammunition for a defendant pursuant to subsection (8)(g) of this section is not criminally or civilly liable for such inaction.

(II) A law enforcement agency that returns possession of a firearm or ammunition to a defendant in good faith as permitted by subsection (8)(g) of this section is not criminally or civilly liable for such action.

(k) **Immunity.** A federally licensed firearms dealer, law enforcement agency, storage facility, or private party that elects to store a firearm pursuant to this subsection (8) is not civilly liable for any resulting damages to the firearm, as long as such damage did not result from the willful and wrongful act or gross negligence of the federally licensed firearms dealer, law enforcement agency, storage facility, or third party.

Source: **L. 88:** Entire part added, p. 732, § 1, effective July 1. **L. 89:** Entire section R&RE, p. 909, § 2, effective April 4. **L. 94:** (1) amended and (3) to (6) added, p. 2026, § 2, effective July 1. **L. 95:** (3) amended, p. 566, § 2, effective July 1. **L. 2000:** (7) added, p. 1011, § 1, effective July 1; (1)(a) and (1)(b) amended, p. 913, § 2, effective January 1, 2001. **L. 2002:** (4) and (7) amended, p. 1515, § 200, effective October 1. **L. 2009:** (1)(a) and (1)(b) amended, (SB 09-292), ch. 369, p. 1948, § 32, effective August 5. **L. 2013:** (8) added, (SB 13-197), ch. 366, p. 2137, § 5, effective June 5; (4) amended, (HB 13-1156), ch. 336, p. 1957, § 5, effective August 7. **L. 2014:** (8)(i)(I)(A) amended, (HB 14-1363), ch. 302, p. 1264, § 12, effective May 31. **L. 2016:** (7) amended, (HB 16-1066), ch. 106, p. 306, § 1, effective July 1. **L. 2018:** (8)(j)(I) amended, (HB 18-1375), ch. 274, p. 1703, § 27, effective May 29. **L. 2021:** (8) amended with relocated provisions, (HB 21-1255), ch. 293, p. 1747, § 3, effective June 22. **L. 2023:** (1)(a) and (1)(b) amended, (HB 23-1268), ch. 233, p. 1225, § 3, effective August 7.

Editor's note: Subsections (8)(d)(I), (8)(d)(II), and (8)(d)(III) are similar to former § 18-6-801 (8)(b)(I), (8)(b)(II), and (8)(b)(III) as they existed prior to 2021.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (4) and (7), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2013 act adding subsection (8), see section 1 of chapter 366, Session Laws of Colorado 2013.

ANNOTATION

Law reviews. For article, "What Family Law Practitioners Should Know About Domestic Violence", see 19 Colo. Law. 53 (1990). For article, "Plea Bargaining, Legislative Limits, and the Separation of Powers", see 32 Colo. Law. 63 (Mar. 2003). For article, "The New Domestic Violence Treatment Standards for 2010", see 39 Colo. Law. 45 (Sept. 2010).

Subsection (1)(a), which allows a trial court to make a factual finding that a defendant's underlying criminal

conviction included an act of domestic violence, does not run afoul of the sixth amendment of the federal constitution under *Alleyne v. United States*, 570 U.S. 99 (2013). *People v. Heisler*, 2017 COA 58, 488 P.3d 176.

Court-ordered domestic violence treatment, imposed pursuant to subsection (1)(a), is not a form of punishment and, therefore, the statute does not mandate a penalty as contemplated by *Apprendi v. New Jersey*, 530 U.S. 466

(2000), and its progeny. *People v. Heisler*, 2017 COA 58, 488 P.3d 176; *Pellegrin v. People*, 2023 CO 37, 532 P.3d 1224.

Accordingly, a defendant does not have a sixth amendment right to have a jury, instead of a trial judge, determine whether the crimes for which the defendant is convicted include an act of domestic violence. *Pellegrin v. People*, 2023 CO 37, 532 P.3d 1224.

Domestic violence sentencing statute regarding mandatory attendance of domestic violence treatment and evaluation is not facially violative of defendant's constitutional right to a jury trial under the sixth amendment. Trial court made a factual finding that the defendant's underlying criminal conviction included an act of domestic violence, and the court-ordered domestic violence treatment imposed by subsection (1)(a) does not mandate a penalty because this treatment prioritizes rehabilitation as well as victim and public safety and is not analogous to traditional forms of punishment. *People v. Heisler*, 2017 COA 58, 488 P.3d 176.

Any form of treatment ordered for domestic violence offenders must conform with the standards adopted by the domestic violence offender management board, despite the seeming inconsistency between subsections (1)(a) and (1)(b) regarding recommendation for treatment and what treatment includes. *Partners in Change, L.L.C. v. Philp*, 197 P.3d 232 (Colo. App. 2008).

If a court sentences a defendant to prison, it cannot order the defendant to

complete a domestic violence treatment program as provided in subsection (1). This exception in subsection (2), however, does not apply to a defendant who has been sentenced to jail. *People v. Trujillo*, 2019 COA 74, 487 P.3d 1051.

Subsection (3) does not provide that the absence of the required domestic violence designation in the complaint divests the court of jurisdiction. Because defendant did not object to the form of the complaint and did not show how he was prejudiced, the technical defect could be corrected by remanding the case to the trial court to allow the prosecution to amend the complaint to reflect that the underlying facts involved domestic violence. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

When there is no dispute that the underlying factual basis for the charges against defendant included an act of domestic violence and defendant is appropriately advised concerning the nature and consequences of his or her plea such that the placement of a domestic violence designation on the complaint will not alter defendant's understanding of the agreement, the appropriate remedy for the trial court's technical violation of subsection (3) is to remand the case to allow the prosecution to amend the complaint to include a domestic violence designation. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

Under § 16-5-301 and subsection (7) of this section, in order to demand and receive a preliminary hearing, defendant must be charged with a class 4, 5, or 6 felony. Here, the substantive offense with

which defendant was charged was a misdemeanor. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007), overruled in *People v. Vanness*, 2020 CO 18, 458 P.3d 901.

Under subsection (7), defendant could only stand convicted of a class 5 felony if first convicted of the misdemeanor and subsequently adjudged a habitual offender by the court. Because count one of the information did not charge defendant with a substantive felony offense requiring mandatory sentencing, the exception in § 16-5-301 (1)(a) allowing for a preliminary hearing under such circumstances is inapplicable. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007), overruled in *People v. Vanness*, 2020 CO 18, 458 P.3d 901.

For the purpose of finding whether the defendant is a habitual domestic violence offender, the trier of fact must find whether prior offenses included an act of domestic violence, unless a statutory exception applies. *People v. Ryan*, 2022 COA 136, 525 P.3d 673.

The trial court erred in making the domestic violence finding for prior

convictions, and the error required reversal. *People v. Ryan*, 2022 COA 136, 525 P.3d 673.

Because the requirements of subsection (7) permit a defendant to be convicted of a felony, the defendant must also be provided with felony procedural protections. Defendant was charged with misdemeanor counts as well as felony counts pursuant to the statute, which exposed defendant to a felony conviction and entitled defendant to be tried in accordance with felony trial procedures. *People v. Vigil*, 2013 COA 102, 328 P.3d 1066.

Where jury found that defendant violated a protection order, but the verdict did not reflect a finding of "coercion, control, punishment, intimidation, or revenge", defendant's aggravated sentencing under subsection (7) violated defendant's sixth amendment right to a jury trial under *Apprendi v. New Jersey* and *Blakely v. Washington*, 542 U.S. 296, (2004). *People v. Jaso*, 2014 COA 131, 347 P.3d 1174.

18-6-801.5. Domestic violence - evidence of similar transactions.

(1) The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence.

(2) In criminal prosecutions involving domestic violence in which the defendant and the victim named in the information have engaged in an intimate relationship as of the time alleged in the information, evidence of any other acts of domestic violence between the defendant and the victim named in the information, and between the defendant and other persons, constitute

other acts or transactions for the purposes of this section, and the court may authorize the admission of evidence as provided in subsection (3) of this section.

(3) The proponent of evidence of other acts or transactions under this section shall advise the trial court by offer of proof of such evidence and shall specify whether the evidence is offered to show a common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge or for some other purpose.

(4) Upon the offer of proof under subsection (3) of this section, the trial court shall determine whether the probative value of the evidence of similar acts or transactions is substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading of the jury if the evidence is allowed or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(5) Upon admitting evidence of other acts or transactions into evidence pursuant to this section and again in the general charge to the jury, the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it.

Source: **L. 94:** Entire section added, p. 2020, § 2, effective June 3. **L. 2001:** (2) amended, p. 730, § 1, effective July 1.

ANNOTATION

A court should consider evidence of previous incidents as necessary in evaluating subsequently charged acts of domestic violence. This section does not abrogate the standard set forth in *People v. Garner*, 806 P.2d 366 (Colo. 1991), that the prosecution has the burden of proving by a preponderance of the evidence that the prior acts actually occurred. This section does not require, however, that the court hold an evidentiary hearing on an offer of proof. *People v. Ma*, 104 P.3d 273 (Colo. App. 2004), rev'd on other grounds, 121 P.3d 205 (Colo. 2005).

Court applies *People v. Spoto* (795 P.2d 1314 (Colo. 1990)) test in determining

admissibility of prior acts and this section does not limit admissibility of evidence of other acts to married partners. *People v. Raglin*, 21 P.3d 419 (Colo. App. 2000).

Evidence of prior transaction properly admitted. *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

Evidence of a prior act of domestic violence may be relevant to prove an intent to harm the victim, rather than to frighten him or her. *People v. Torres*, 141 P.3d 931 (Colo. App. 2006).

Court properly admitted evidence of acts toward intimate partners. The court, at a hearing, found the defendant committed

the acts and the acts were related to a material fact with logical relevance. The court found the probative value of the evidence was not outweighed by the danger of unfair prejudice. *People v. Lujan*, 2018 COA 95, 484 P.3d 718, rev'd on other grounds, 2020 CO 26, 461 P.3d 494.

Trial court's failure to give contemporaneous limiting instructions in connection with testimony about two prior instances of domestic violence did not cast a serious doubt on the reliability of defendant's conviction and, thus, was not plain error. Although the trial court did not give the limiting instruction during the

testimony of two witnesses, it alleviated any potential prejudice by (1) giving the instruction during the testimony of a third witness; (2) stating, at that time, that the instruction applied not only to the testimony of that witness but also to the testimony of the other two witnesses; and (3) providing the jury with a written instruction at the close of the evidence explicitly reminding them that the testimony of the three witnesses had been admitted only for a limited purpose. *People v. Moore*, 117 P.3d 1 (Colo. App. 2004).

Applied in *People v. Cross*, 2023 COA 24, 531 P.3d 444.

18-6-801.6. Domestic violence - summons and complaint.

Any person completing or preparing a summons, complaint, summons and complaint, indictment, information, or application for an arrest warrant shall indicate on the face of such document whether the facts forming the basis of the alleged criminal act, if proven, could constitute domestic violence as defined in section 18-6-800.3 (1).

Source: L. 94: Entire section added, p. 2027, § 3, effective July 1.

18-6-802. Domestic violence - local board - treatment programs - liability immunity - repeal. (Repealed)

Source: L. 88: Entire part added, p. 732, § 1, effective July 1. **L. 89:** (3)(a) amended, p. 910, § 3, effective April 4. **L. 94:** (1)(a) amended, p. 2656, § 140, effective July 1. **L. 96:** (2)(e) repealed, p. 1263, § 172, effective August 7. **L. 2000:** (4) added, p. 913, § 3, effective July 1.

Editor's note: Subsection (4) provided for the repeal of this section, effective January 1, 2001. (See L. 2000, p. 913.)

18-6-802.5. Domestic violence - treatment programs.

Any defendant who is sentenced to a treatment program pursuant to section 18-6-801 or who is ordered to complete an evaluation pursuant to section 18-6-801 (1) shall pay for the evaluation and treatment programs on a sliding fee basis, as provided in the standardized procedures for the treatment evaluation of domestic violence offenders and the guidelines and standards for a system of programs for the treatment of domestic violence offenders adopted by the domestic violence offender management board pursuant to section 16-11.8-103, C.R.S.

Source: L. 2001: Entire section added, p. 980, § 3, effective August 8.

18-6-803. Commission - manual of standards for treatment of domestic violence perpetrators - repeal. (Repealed)

Source: L. 88: Entire part added, p. 733, § 1, effective July 1. **L. 2000:** (1) amended and (5) added, p. 913, § 4, effective July 1.

Editor's note: Subsection (5) provided for the repeal of this section, effective January 1, 2001. (See L. 2000, p. 913.)

18-6-803.5. Crime of violation of a protection order - penalty - peace officers' duties - definitions.

(1) A person commits the crime of violation of a protection order if, after the person has been personally served with a protection order that identifies the person as a restrained person or otherwise has acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identifies the person as a restrained person, the person:

(a) (I) Contacts, harasses, injures, intimidates, molests, threatens, or touches the protected person or protected property, including an animal, identified in the protection order;

(II) Enters or remains on premises or comes within a specified distance of the protected person, protected property, including an animal, or premises;

(III) Possesses or consumes alcohol or controlled substances if prohibited by the protection order;

(IV) Violates any other provision of the protection order to protect the protected person from imminent danger to life or health, and the conduct is prohibited by the protection order;

(b) Except as permitted pursuant to section 18-13-126 (1)(b), hires, employs, or otherwise contracts with another person to locate or assist in the location of the protected person; or

(c) (I) Violates a civil protection order issued pursuant to section 13-14-105.5 by:

(A) Possessing or attempting to purchase or receive a firearm or ammunition while the protection order is in effect; or

(B) Failing to timely file a signed affidavit or written statement with the court as described in section 13-14-105.5; or

(II) Violates a mandatory protection order issued pursuant to section 18-1-1001 that includes terms required by section 18-1-1001 (9) by:

(A) Possessing or attempting to purchase or receive a firearm or ammunition while the protection order is in effect; or

(B) Failing to timely file a signed affidavit or written statement with the court as described in section 18-1-1001 (9)(i) or 18-6-801 (8)(i).

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued. "Protected person" does not include the defendant.

(a.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person or protected animal, or from entering or remaining on premises, or from coming within a specified distance of a protected person or protected animal or premises or any other provision to protect the protected person or protected animal from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, section 18-1-1001, section 19-2.5-607, section 19-4-111, or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004;

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation; or

(D) Any other order of a court that prohibits a person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises.

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-110, C.R.S.

(b) "Registry" means the computerized information system created in section 18-6-803.7 or the national crime information center created pursuant to 28 U.S.C. sec. 534.

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(d) (Deleted by amendment, L. 2003, p. 1003, § 6, effective July 1, 2003.)

(2) (a) Violation of a protection order is a class 2 misdemeanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, or the basis for issuing the protection order included an allegation of stalking or the parties were in an intimate relationship, the violation is a class 1 misdemeanor.

(a.5) Repealed.

(b) (Deleted by amendment, L. 95, p. 567, § 3, effective July 1, 1995.)

(c) Nothing in this section precludes the ability of a municipality to enact concurrent ordinances. Any sentence imposed for a violation of this section must run consecutively and not concurrently with any sentence imposed for a crime involving domestic violence as defined in section 18-6-800.3 or a crime listed in section 24-4.1-302, except for the crimes listed in section 24-4.1-302 (1)(cc.5) and (1)(cc.6).

(3) (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(b.5) Notwithstanding the requirement in subsection (3)(b) of this section to arrest, or seek a warrant for the arrest of, a restrained person, a peace officer may exercise discretion in determining whether to arrest or seek an arrest warrant for a restrained person or issue a restrained person a summons to appear when a peace officer has probable cause that the restrained person has violated or attempted to violate a protection order by:

(I) Possessing or consuming alcohol or controlled substances pursuant to subsection (1)(a)(III) of this section;

(II) Violating a term included in the protection order to protect the protected person from imminent danger to life or health pursuant to subsection (1)(a)(IV) of this section when the protection order was not issued in a case involving domestic violence as defined in section 18-6-800.3 or a case involving crimes listed in section 24-4.1-302, except for the crimes listed in section 24-4.1-302 (1)(cc.5) and (1)(cc.6); or

(III) Failing to timely file a signed affidavit or written statement with the court pursuant to subsection (1)(c)(II) of this section.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made, or the arrested person may be taken to the jail in the county where the protection order was issued. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

(4) If a restrained person is on bond in connection with a violation or attempted violation of a protection order in this or any other state and is subsequently arrested for violating or attempting to violate a protection order, the arresting agency shall notify the prosecuting attorney who shall file a motion with the court which issued the prior bond for the revocation of the bond and for the issuance of a warrant for the arrest of the restrained person if such court is satisfied that probable cause exists to believe that a violation of the protection order issued by the court has occurred.

(5) A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

(6) (a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged victim's children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is willing to accept the child, whether or not there is a custody order or an order allocating parental responsibilities with respect to such child or an order for the care and control of the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (6).

(b) For purposes of this subsection (6), "shelter" means a battered women's shelter, a friend's or family member's home, or such other safe haven as may be designated by the protected person and which is within a reasonable distance from the location at which the peace officer found the victim.

(7) The protection order must contain in capital letters and bold print a notice informing the protected person that the protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or, if the order is issued in a criminal action, request the prosecuting attorney to initiate contempt proceedings or the prosecution of criminal conduct.

(8) A protection order issued in the state of Colorado shall contain a statement that:

(a) The order or injunction shall be accorded full faith and credit and be enforced in every civil or criminal court of the United States, another state, an Indian tribe, or a United States territory pursuant to 18 U.S.C. sec. 2265;

(b) The issuing court had jurisdiction over the parties and subject matter; and

(c) The defendant was given reasonable notice and opportunity to be heard.

(9) A criminal action charged pursuant to this section may be tried either in the county where the offense is committed or in the county in which the court that issued the protection order is located, if such court is within this state.

Source: **L. 91:** Entire section added, p. 418, § 1, effective May 31. **L. 92:** Entire section amended, p. 294, § 4, effective April 23; (1) and (2) amended, p. 404, § 18, effective June 3; entire section amended, p. 177, § 3, effective July 1. **L. 94:** (2) and (3) amended and (6) added, p. 2027, § 4, effective July 1; entire section amended, p. 2010, § 7, effective January 1, 1995. **L. 95:** (1), (2), and (3)(d) amended, p. 567, § 3, effective July 1. **L. 96:** (3)(d) amended, p. 736, § 6, effective July 1; (1.5)(d) amended, p. 1692, § 26, effective January 1, 1997. **L. 98:** (1.5)(b), (1.5)(d), and (3)(c) amended and (8) added, p. 1232, § 3, effective July 1; (6)(a) amended, p. 1404, § 58, effective February 1, 1999. **L. 99:** (1.5)(d) amended, p. 502, § 11, effective July 1. **L. 2000:** (1) and (1.5)(d) amended, p. 1011, § 2, effective July 1. **L. 2003:** Entire section amended, p. 1003, § 6, effective July 1. **L. 2004:** (1.5)(a.5) amended, p. 555, § 12, effective July 1; (2)(a.5) added, p. 636, § 10, effective August 4. **L. 2005:** (3)(d) amended and (9) added, p. 427, § 6, effective April 29. **L. 2006:** (1) amended, p. 1057, § 2, effective July 1. **L. 2007:** (1)(a) and (1.5)(a.5)(I) amended, p. 726, § 8, effective July 1. **L. 2008:** IP(1) amended, p. 1718, § 1, effective July 1. **L. 2013:** (1) amended, (SB 13-197), ch. 366, p. 2130 § 2, effective June 5; (1.5)(a.5)(II) amended, (HB 13-1259), ch. 218, p. 1016, § 19, effective July 1. **L. 2014:** (1)(c) amended, (HB 14-1363), ch. 302, p. 1264, § 13, effective May 31. **L. 2021:** IP(1)(c) and (1)(c)(II) amended, (HB 21-1255), ch. 293, p. 1753, § 4, effective June 22; (1.5)(a.5)(I)(A) amended, (SB 21-059), ch. 136, p. 722, § 49, effective October 1; (1.5)(a) and (2)(a) amended, (SB 21-271), ch. 462, p. 3192, § 262, effective March 1, 2022. **L. 2022:** (2)(a.5) repealed, (HB 22-1229), ch. 68, p. 345, § 26, effective March 1; (1)(c)(II) amended (SB 22-212), ch. 421, p. 2969, § 29, effective August 10. **L. 2025:** (1)(a), (1)(c), (2)(c), and (7) amended and (3)(b.5) added, (HB 25-1148), ch. 154, p. 624, § 2, effective July 1.

Editor's note: (1) Amendments to this section in House Bill 92-1075 and House Bill 92-1078 were harmonized. Amendments to this section in House Bill 94-1090 and House Bill 94-1253 were harmonized.

(2) Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act repealing subsection (2)(a.5) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: For the legislative declaration in the 2013 act amending subsection (1), see section 1 of chapter 366, Session Laws of Colorado 2013.

ANNOTATION

Law reviews. For article, "1994 Legislature Strengthens Domestic Violence Protective Orders", see 23 Colo. Law. 2327 (1994). For article, "Animal-Related Legal Disputes: Litigation, ADR, and Court Appointments", see 42 Colo. Law. 43 (Dec. 2013).

Criminal violation of a protection order is always a predicate offense for second degree burglary. Rhorer established a bright-line rule: Because a violation of a criminal protection order under this section always involves the harm or threat of harm to another person or property, the violation meets the second degree burglary requirement that a person intends "to commit a crime therein against another person or property". People v. Dilka, 2026 CO 12, 584 P.3d 564.

Because the elements of violation of a mandatory restraining order and the elements of harassment by stalking are not the same, the subsequent prosecution of defendant did not violate double jeopardy protections. People v. Carey, 198 P.3d 1223 (Colo. App. 2008).

Because the elements of violation of a protection order and harassment are not the same, the principles of double jeopardy do not require that the convictions for both offenses be merged. People v. Thomeczek, 284 P.3d 110 (Colo. App. 2011).

To constitute "contact" in violation of the statute, defendant's conduct must involve physical touching or some element of direct or indirect communication or attempted communication with the victim. Incidental contact that occurs unintentionally and is unavoidable is not sufficient, by itself, to establish a violation. People v. Serra, 2015 COA 130, 361 P.3d 1122.

Violation may consist of more than coming within specified distance. Where defendant came within 100 feet of protected person and thereafter broke into her apartment with intent to make direct contact with her, the intent to make direct contact supplied the intent to commit a "crime" upon entry so as to support a conviction for first degree burglary. People v. Widhalm, 991 P.2d 291 (Colo. App. 1999).

The required culpable state of mind of "knowingly" applies to all elements of the crime of violation of a restraining order. People v. Coleby, 34 P.3d 422 (Colo. 2001).

The defense of consent of the victim is not available regarding a violation of a permanent criminal protection order (CPO). As stated in § 13-14-106, a CPO is an order of the court and not an order issued by the protected person, and the protected person's consent cannot, as a matter of law, constitute a restrained party's defense to the crime for violation of a protection order.

Hotsenpiller v. Morris, 2017 COA 95, 488 P.3d 219.

Contact with victim. Victim's testimony that defendant stared at her for ten to fifteen seconds and smirked at her, coupled with her testimony that she had previously seen

him use the same facial expression as a form of communication was sufficient, although barely, for a reasonable jury to determine that defendant communicated or attempted to communicate with victim. People v. Serra, 2015 COA 130, 361 P.3d 1122.

18-6-803.6. Duties of peace officers and prosecuting agencies - preservation of evidence.

(1) When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in section 18-6-800.3 (1), has been committed, the officer shall, without undue delay, arrest the person suspected of its commission pursuant to the provisions in subsection (2) of this section, if applicable, and charge the person with the appropriate crime or offense. Nothing in this subsection (1) shall be construed to require a peace officer to arrest both parties involved in an alleged act of domestic violence when both claim to have been victims of such domestic violence. Additionally, nothing in this subsection (1) shall be construed to require a peace officer to arrest either party involved in an alleged act of domestic violence when a peace officer determines there is no probable cause to believe that a crime or offense of domestic violence has been committed. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made.

(2) If a peace officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by one or more persons. In determining whether a crime has been committed by one or more persons, the officer shall consider the following:

- (a) Any prior complaints of domestic violence;
- (b) The relative severity of the injuries inflicted on each person;
- (c) The likelihood of future injury to each person; and
- (d) The possibility that one of the persons acted in self-defense.

(3) (a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged victim's children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is willing to accept the child, whether or not there is a custody order or an order for the care and control of the child or an

order allocating parental responsibilities with respect to the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (3).

(b) For purposes of this subsection (3), "shelter" means a battered women's shelter, a friend's or family member's home, or such other safe haven as may be designated by the protected person and which is within a reasonable distance from the location at which the peace officer found the victim.

(4) (a) The arresting agency shall make reasonable efforts to collect and preserve any pertinent evidence until the time of final disposition of the matter, including, but not limited to, the following:

- (I) Any dispatch tape recording relating to the event;
- (II) Any on-scene video or audio tape recordings;
- (III) Any medical records of treatment of the alleged victim or the defendant; and
- (IV) Any other relevant physical evidence or witness statements.

(b) However, in the absence of bad faith, any failure to collect or preserve any evidence listed in paragraph (a) of this subsection (4) shall not be grounds to dismiss the matter.

(4.5) When a peace officer responds to a call or is otherwise responding to a report about an alleged offense involving domestic violence, as defined in section 18-6-800.3 (1), or other domestic dispute, the officer shall include in his or her written or oral report concerning such incident whether children may have seen or heard the alleged offense; except that, in the absence of bad faith, the failure of a peace officer to note that a child may have seen or heard the alleged offense shall not be grounds to dismiss the matter.

(5) A peace officer shall not be held civilly or criminally liable for acting pursuant to this section if the peace officer acts in good faith and without malice.

Source: **L. 94:** Entire section added. p. 2029, § 5, effective July 1. **L. 95:** (1) amended, p. 568, § 4, effective July 1. **L. 98:** (1) amended, p. 1231, § 2, effective July 1; (3)(a) amended, p. 1404, § 59, effective February 1, 1999. **L. 2001:** (4.5) added, p. 980, § 4, effective August 8.

ANNOTATION

Law reviews. For article, "1994 Protective Orders", see 23 Colo. Law. 2327 Legislature Strengthens Domestic Violence (1994).

18-6-803.7. Central registry of protection orders - creation.

(1) As used in this section:

(a) "Bureau" means the Colorado bureau of investigation.

(b) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(b.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises, that is issued by a court of this state or an authorized municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, section 18-1-1001, section 19-2.5-607, section 19-4-111, or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004; or

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation.

(II) "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as described in section 13-14-110, C.R.S.

(c) "Registry" means a computerized information system.

(d) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(e) (Deleted by amendment, L. 2003, p. 1007, § 7, effective July 1, 2003.)

(f) "Subsequent order" means an order which amends, modifies, supplements, or supersedes a protection order.

(2) (a) There is hereby created in the bureau a computerized central registry of protection orders which shall be accessible to any state law enforcement agency or to any local law enforcement agency having a terminal which communicates with the bureau. The central registry computers shall communicate with computers operated by the state judicial department.

(b) The clerk of the court issuing the protection order shall enter protection orders and subsequent orders into the registry; except that orders issued pursuant to sections 18-1-1001 and 19-2.5-607 must be entered into the registry only at the discretion of the court or upon motion of the district attorney. The clerk of the court issuing the protection order is responsible for updating the registry electronically in a timely manner to ensure the notice is as complete and accurate as is reasonably possible with regard to the information specified in subsection (3) of this section.

(c) The restrained person's attorney, if present at the time the protection order or subsequent order is issued, shall notify the restrained person of the contents of such order if the restrained person was absent when such order was issued.

(d) Protection orders and subsequent orders shall be placed in the registry not later than twenty-four hours after they have been issued; except that, if the court issuing the protection order or subsequent order specifies that it be placed in the registry immediately, such order shall be placed in the registry immediately.

(e) Upon reaching the expiration date of a protection order or subsequent order, if any, the bureau shall note the termination in the registry.

(f) In the event the protection order or subsequent order does not have a termination date, the clerk of the issuing court shall be responsible for noting the termination of the protection order or subsequent order in the registry.

(3) (a) In addition to any information, notice, or warning required by law, a protection order or subsequent order entered into the registry shall contain the following information, if such information is available:

(I) The name, date of birth, sex, and physical description of the restrained person to the extent known;

(II) The date the order was issued and the effective date of the order if such date is different from the date the order was issued;

(III) The names of the protected persons and their dates of birth;

(IV) If the protection order is one prohibiting the restrained person from entering in, remaining upon, or coming within a specified distance of certain premises, the address of the premises and the distance limitation;

(V) The expiration date of the protection order, if any;

(VI) Whether the restrained person has been served with the protection order and, if so, the date and time of service;

(VII) The amount of bail and any conditions of bond which the court has set in the event the restrained person has violated a protection order; and

(VIII) An indication whether the conditions of the protection order are also conditions of a bail bond for a felony charge.

(b) If available, the protection order or subsequent order shall contain the fingerprint-based state identification number issued by the bureau to the restrained person.

Source: **L. 94:** Entire section added, p. 2013, § 8, effective January 1, 1995. **L. 96:** (1)(e) amended, p. 1692, § 27, effective January 1, 1997. **L. 98:** (2)(b) amended, p. 947, § 5, effective May 27; (1)(e) amended, p. 1233, § 4, effective July 1. **L. 99:** (1)(e) amended, p. 503, § 12, effective July 1. **L. 2003:** Entire section amended, p. 1007, § 7, effective July 1. **L. 2004:** (1)(b.5) amended, p. 556, § 13, effective July 1. **L. 2010:** (3)(a)(VIII) added, (HB 10-1218), ch. 177, p. 640, § 1, effective April 29. **L. 2013:** (1)(b.5)(II) amended, (HB 13-1259), ch. 218, p. 1016, § 20, effective July 1. **L. 2021:** (1)(b.5)(I)(A) and (2)(b) amended, (SB 21-059), ch. 136, p. 722, § 50, effective October 1.

ANNOTATION

Law reviews. For article, "1994 Protective Orders", see 23 Colo. Law. 2327 (1994).
Legislature Strengthens Domestic Violence

18-6-803.8. Foreign protection orders. (Repealed)

Source: **L. 98:** Entire section added, p. 1233, § 5, effective July 1. **L. 2003:** (4) amended, p. 1009, § 8, effective July 1. **L. 2004:** Entire section repealed, p. 554, § 5, effective July 1.

18-6-803.9. Assaults and deaths related to domestic violence - report. (Repealed)

Source: **L. 94:** Entire section added, p. 2029, § 5, effective July 1. **L. 2017:** Entire section amended, (HB 17-1059), ch. 91, p. 278, § 4, effective August 9. **L. 2024:** Entire section repealed, (SB 24-135), ch. 34, p. 106, § 4, effective March 22.

18-6-804. Repeal of part. (Repealed)

Source: **L. 88:** Entire part added, p. 734, § 1, effective July 1. **L. 91:** Entire section amended, p. 399, § 1, effective March 27. **L. 95:** Entire section repealed, p. 569, § 9, effective July 1; entire section repealed, p. 1254, § 13, effective July 1.

18-6-805. Repeal of sections. (Repealed)

Source: **L. 95:** Entire section added, p. 569, § 10, effective July 1. **L. 96:** (1) amended, p. 1470, § 12, effective June 1. **L. 98:** Entire section amended, p. 771, § 1, effective May 22. **L. 99:** (1) amended, p. 623, § 20, effective August 4. **L. 2000:** Entire section repealed, p. 914, § 5, effective July 1.

18-6-806. Notification of potential violation of military protection order - definitions.

- (1) As used in this section, unless the context otherwise requires:
- (a) "Armed forces" means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard of the United States.
 - (b) "Commanding officer" means a commissioned officer or warrant officer in a position of command in the armed forces or National Guard.
 - (c) "Military protection order" means a protection order issued against a current member of the armed forces or National Guard by the member's commanding officer that prohibits the member from:
 - (I) Contacting, harassing, injuring, intimidating, molesting, threatening, touching, or stalking a protected person;
 - (II) Committing sexual violence by sexually assaulting or abusing a protected person;
 - (III) Entering or remaining on premises or coming within a specified distance of a protected person or premises;
 - (IV) Taking, transferring, concealing, harming, disposing of, or threatening harm to an animal owned, possessed, leased, kept, or held by a protected person; or
 - (V) Posing any other risk or threat of physical harm to the protected person or threat of psychological or emotional harm to the protected person.
 - (d) "National Guard" means the federally recognized Army National Guard and Air National Guard.

(e) "Protected person" means the person identified in a military protection order as the person for whose benefit the protection order was issued.

(2) When a peace officer has reasonable suspicion that a crime of domestic violence has occurred, the peace officer shall search the national crime information center database to determine whether a military protection order has been issued against one of the parties. If a military protection order has been issued against a party, the peace officer shall notify the military law enforcement agency that entered the protection order into the national crime information center database.

Source: L. 2026: Entire section added, (SB 26-085), ch. 107, p. 435, § 1, effective August 12.

18-6-807. Mandatory lethality assessments - short title - legislative declaration - definitions.

(1) **Short title.** The short title of this section is the "Colorado Mandatory Lethality Assessment Act".

(2) **Legislative declaration.** The general assembly finds and declares that requiring law enforcement agencies to administer a standardized, evidence-based lethality assessment when responding to a domestic violence incident will ensure high-risk victims promptly receive safety resources and referrals.

(3) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Domestic violence incident" means an incident of domestic violence, as defined in section 18-6-800.3.

(b) "High-risk victim" means a victim who is determined high-risk by a lethality assessment or by a peace officer pursuant to subsection (4) of this section.

(c) "Lethality assessment" means a validated, evidence-based screening tool that includes standardized questions and that is administered by a peace officer when responding to a report of domestic violence.

(d) "Peace officer" means a person certified by the P.O.S.T. board pursuant to section 24-31-305 who responds to and investigates initial reports of domestic violence as part of the peace officer's routine duties. A "peace officer" does not include a parole or probation officer.

(4) **Mandatory lethality assessment.**

(a) Beginning July 1, 2027, a peace officer is required to conduct a lethality assessment when responding to a domestic violence incident and include the completed lethality assessment in the

incident report. This subsection (4)(a) does not require a peace officer to administer a lethality assessment if a victim is unavailable, not at the scene, incapacitated, or if circumstances otherwise make the administration of the lethality assessment impossible or impracticable.

(b) If the lethality assessment indicates that an individual is a high-risk victim, or if the assessment does not indicate the victim is high-risk but a peace officer determines that the individual is a high-risk victim based on the totality of the circumstances, the peace officer shall immediately contact a community-based victim's advocate, as defined in section 13-90-107 (1)(k)(II), either by phone or in person, and provide the high-risk victim the opportunity to speak with the community-based victim's advocate.

(5) Training and implementation.

(a) The attorney general's office, in consultation with a Colorado-based coalition that advocates for survivors of domestic violence, shall develop a mandatory training for peace officers to learn how to administer the lethality assessment and provide victim referrals pursuant to subsection (4) of this section. At a minimum, the training must address language access.

(b) No later than June 1, 2027, the attorney general shall make the mandatory training available and offer assistance to law enforcement agencies in providing the mandatory training.

(c) Beginning July 1, 2027, each law enforcement agency shall ensure that each peace officer employed by the agency has completed the mandatory training developed pursuant to this subsection (5). A law enforcement agency that has provided training on the administration of lethality assessments prior to July 1, 2027, is not required to provide additional training pursuant to this subsection (5)(c).

(6) Reporting and oversight.

(a) Beginning January 2028, and each January thereafter, the attorney general's office shall report the total number of domestic violence incidents in the previous calendar year, the total number of lethality assessments conducted, the total number of high-risk victims identified, and the total number of referrals made, as part of the office's "SMART Act" presentation required pursuant to part 2 of article 7 of title 2.

(b) No later than January 31, 2030, the domestic violence fatality review board created in section 24-31-702 shall evaluate the effectiveness of mandatory lethality assessments and referral to resources pursuant to this section and submit the evaluation to the house of representatives judiciary committee and the senate judiciary committee, or their successor committees.

(c) Each law enforcement agency that utilizes a lethality assessment shall annually report the following information to the attorney general's office, in a manner prescribed by the attorney general:

(I) The total number of domestic violence incidents the law enforcement agency responded to during the preceding calendar year;

(II) The total number of lethality assessments conducted by the law enforcement agency during the preceding calendar year; and

(III) The total number of lethality assessments that resulted in identification of a high-risk victim.

(7) **Nonliability.** This section does not impose criminal, administrative, or civil liability on any person for an act or omission made in good faith related to administering a lethality assessment, including, but not limited to, the interpretation or use of a lethality assessment, deciding whether to administer a lethality assessment, or declining to use the lethality assessment.

Source: L. 2026: Entire section added, (HB 26-1009), ch. 336, p. 2044, § 1, effective June 3.

18-6.5 ARTICLE 6.5

Wrongs to At-risk Adults

18-6.5-101.	Legislative declaration.	18-6.5-107.	Surcharge - collection and distribution of funds - crimes against at-risk persons surcharge fund - creation - report.
18-6.5-102.	Definitions.		
18-6.5-103.	Crimes against at-risk persons - classifications.		
18-6.5-103.5.	Video tape depositions - at-risk adult victims and witnesses.	18-6.5-108.	Mandatory reports of mistreatment of at-risk elders and at-risk adults with IDD - list of reporters - penalties.
18-6.5-104.	Statutory privilege not allowed.		
18-6.5-105.	Preferential trial dates of cases involving crimes against at-risk persons.	18-6.5-109.	At-risk adults with intellectual and developmental disabilities mandatory reporting implementation task force - report - repeal. (Repealed)
18-6.5-106.	Payment of treatment costs for victims of crimes against at-risk persons - restitution.		

18-6.5-101. Legislative declaration.

The general assembly recognizes that fear of mistreatment is one of the major personal concerns of at-risk persons and that at-risk persons are more vulnerable to and disproportionately damaged by crime in general but, more specifically, by abuse, exploitation, and neglect because they are less able to protect themselves against offenders, a number of whom are in positions of trust, and because they are more likely to receive serious injury from crimes committed against them and not to fully recover from such injury. At-risk persons are more impacted by crime than the general population because they tend to suffer great relative deprivation, financially, physically, and psychologically, as a result of the abuses against them. A significant number of at-risk persons are not as physically, intellectually, or emotionally equipped to protect themselves or aid in their own security as non-at-risk persons in society. They are far more susceptible than the general population to the adverse long-term effects of crimes committed against them, including abuse, exploitation, and neglect. The general assembly therefore finds that penalties for specified crimes committed against at-risk persons should be more severe than the penalties for the commission of the same crimes against other members of society.

Source: **L. 91:** Entire article added, p. 1778, § 2, effective July 1. **L. 93:** Entire section amended, p. 1733, § 22, effective July 1. **L. 2016:** Entire section amended, (HB 16-1394), ch. 172, p. 545, § 1, effective July 1.

ANNOTATION

The legislative declaration focuses on the at-risk victim's inability to protect himself or herself as effectively from crime, compared to a victim who does not have at-risk status. The declaration does

not mention that the goal of this article is to serve as a deterrent to would-be criminals or focus on an offender's awareness of a victim's at-risk status. *People v. Nardine*, 2016 COA 85, 409 P.3d 441.

18-6.5-102. Definitions.

As used in this article 6.5, unless the context otherwise requires:

(1) "Abuse" means any of the following acts or omissions committed against an at-risk person:

(a) The nonaccidental infliction of bodily injury, serious bodily injury, or death;

(b) Confinement or restraint that is unreasonable under generally accepted caretaking standards; or

(c) Subjection to sexual conduct or contact classified as a crime under this title.

(2) "At-risk adult" means any person who is seventy years of age or older or any person who is eighteen years of age or older and is a person with a disability as said term is defined in subsection (11) of this section.

(2.5) "At-risk adult with IDD" means a person who is eighteen years of age or older and is a person with an intellectual and developmental disability, as defined in section 25.5-10-202 (26)(a), C.R.S.

(3) "At-risk elder" means any person who is seventy years of age or older.

(4) "At-risk juvenile" means any person who is under the age of eighteen years and is a person with a disability as said term is defined in subsection (11) of this section.

(4.5) "At-risk person" means an at-risk adult, an at-risk adult with IDD, an at-risk elder, or an at-risk juvenile.

(5) "Caretaker" means a person who:

(a) Is responsible for the care of an at-risk person as a result of a family or legal relationship;

(b) Has assumed responsibility for the care of an at-risk person; or

(c) Is paid to provide care or services to an at-risk person.

(6) (a) "Caretaker neglect" means neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or any other treatment necessary for the health or safety of an at-risk person is not secured for an at-risk person or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise, or a caretaker knowingly uses harassment, undue influence, or intimidation to create a hostile or fearful environment for an at-risk person.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (6), the withholding, withdrawing, or refusing of any medication, any medical procedure or device, or any treatment, including but not limited to resuscitation, cardiac pacing, mechanical ventilation, dialysis, and artificial nutrition and hydration, in accordance with any valid medical directive or order or as described in a palliative plan of care, is not deemed caretaker neglect.

(c) As used in this subsection (6), "medical directive or order" includes a medical durable power of attorney, a declaration as to medical treatment executed pursuant to section 15-18-104, C.R.S., a medical order for scope of treatment form executed pursuant to article 18.7 of title 15, C.R.S., and a CPR directive executed pursuant to article 18.6 of title 15, C.R.S.

(7) "Clergy member" means a priest; rabbi; duly ordained, commissioned, or licensed minister of a church; member of a religious order; or recognized leader of any religious body.

(8) "Convicted" and "conviction" mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

(9) "Crime against an at-risk person" means any offense listed in section 18-6.5-103 or criminal attempt, conspiracy, or solicitation to commit any of those offenses.

(10) "Exploitation" means an act or omission committed by a person who:

(a) Uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk person of the use, benefit, or possession of any thing of value;

(b) Employs the services of a third party for the profit or advantage of the person or another person to the detriment of the at-risk person;

(c) Forces, compels, coerces, or entices an at-risk person to perform services for the profit or advantage of the person or another person against the will of the at-risk person; or

(d) Misuses the property of an at-risk person in a manner that adversely affects the at-risk person's ability to receive health care or health-care benefits or to pay bills for basic needs or obligations.

(10.5) "Mistreated" or "mistreatment" means:

(a) Abuse;

(b) Caretaker neglect; or

(c) Exploitation.

(11) "Person with a disability" means any person who:

(a) Is impaired because of the loss of or permanent loss of use of a hand or foot or because of blindness or the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness;

(b) Is unable to walk, see, hear, or speak;

(c) Is unable to breathe without mechanical assistance;

(d) Is a person with an intellectual and developmental disability as defined in section 25.5-10-202, C.R.S.;

(e) Has a mental health disorder, as defined in section 27-65-102;

(f) Is mentally impaired as the term is defined in section 24-34-501 (1.3)(b)(II), C.R.S.;

- (g) Is blind as that term is defined in section 26-2-103 (3), C.R.S.; or
- (h) Is receiving care and treatment for a developmental disability under article 10.5 of title 27, C.R.S.
- (12) "Position of trust" means assuming a responsibility, duty, or fiduciary relationship toward an at-risk adult or at-risk juvenile.
- (13) "Undue influence" means the use of influence to take advantage of an at-risk person's vulnerable state of mind, neediness, pain, or emotional distress.
- (14) "Unlawful abandonment" means the intentional and unreasonable desertion of an at-risk person in a manner that endangers the safety of that person.

Source: **L. 91:** Entire article added, p. 1778, § 2, effective July 1. **L. 92:** (3)(d) amended, p. 1397, § 54, effective July 1. **L. 93:** (1.5) added and (3)(a) and (3)(f) amended, pp. 1733, 1637, §§ 23, 21, effective July 1. **L. 2006:** (3)(e) amended, p. 1388, § 17, effective August 7. **L. 2007:** (3.5) added, p. 2006, § 1, effective July 1. **L. 2010:** (3)(e) amended, (SB 10-175), ch. 188, p. 786, § 31, effective April 29. **L. 2012:** (1.7) and (1.8) added, (HB 12-1226), ch. 279, p. 1486, § 1, effective August 15. **L. 2013:** Entire section amended, (SB 13-111), ch. 233, p. 1119, § 3, effective May 16; (3)(d) amended, (HB 13-1314), ch. 323, p. 1804, § 30, effective March 1, 2014. **L. 2014:** (1), (10)(a), and (13) amended, (SB 14-098), ch. 103, p. 386, § 1, effective April 7. **L. 2015:** (2.5) added, (SB 15-109), ch. 278, p. 1140, § 2, effective June 5; (11)(f) amended, (SB 15-264), ch. 259, p. 952, § 40, effective August 5. **L. 2016:** (1), (2.5), (5), (6), (9), (10), and (13) amended and (4.5) and (10.5) added, (HB 16-1394), ch. 172, p. 545, § 2, effective July 1. **L. 2017:** IP and (11)(e) amended, (SB 17-242), ch. 263, p. 1307, § 142, effective May 25. **L. 2019:** (14) added, (SB 19-172), ch. 365, p. 3359, § 2, effective July 1. **L. 2022:** (11)(e) amended, (HB 22-1256), ch. 451, p. 3229, § 27, effective August 10.

Editor's note: Amendments to subsection (3)(d) by House Bill 13-1314 and Senate Bill 13-111 were harmonized, and subsection (3)(d) was relocated to subsection (11)(d).

Cross references: For the legislative declaration in the 2013 act amending this section, see section 1 of chapter 233, Session Laws of Colorado 2013. For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017. For the legislative declaration in SB 19-172, see section 1 of chapter 365, Session Laws of Colorado 2019.

18-6.5-103. Crimes against at-risk persons - classifications.

- (1) Crimes against at-risk persons are as prescribed in this section.
- (2) Any person whose conduct amounts to criminal negligence, as defined in section 18-1-501 (3), commits:
 - (a) A class 4 felony if such negligence results in the death of an at-risk person;
 - (b) A class 5 felony if such negligence results in serious bodily injury to an at-risk person; and
 - (c) A class 6 felony if such negligence results in bodily injury to an at-risk person.
- (3)
 - (a) Any person who commits a crime of assault in the first degree, as such crime is described in section 18-3-202, and the victim is an at-risk person, commits a class 4 felony if the circumstances described in section 18-3-202 (2)(a) are present and a class 2 felony if such circumstances are not present.
 - (b) Any person who commits a crime of assault in the second degree, as such crime is described in section 18-3-203, and the victim is an at-risk person, commits a class 5 felony if the circumstances described in section 18-3-203 (2)(a) are present and a class 3 felony if such circumstances are not present.
 - (c) Any person who commits a crime of assault in the third degree, as such crime is described in section 18-3-204, and the victim is an at-risk person, commits a class 6 felony.
- (4) Any person who commits robbery, as such crime is described in section 18-4-301 (1), and the victim is an at-risk person, commits a class 3 felony. If the offender is convicted of robbery of an at-risk person, the court shall sentence the defendant to the department of corrections for at least the presumptive sentence under section 18-1.3-401 (1).
- (5) Any person who commits theft, and commits any element or portion of the offense in the presence of the victim, as such crime is described in section 18-4-401 (1), and the victim is an at-risk person, or who commits theft against an at-risk person while acting in a position of trust, whether or not in the presence of the victim, or who commits theft against an at-risk person knowing the victim is an at-risk person, whether in the presence of the victim or not, commits a class 5 felony if the value of the thing involved is less than five hundred dollars or a class 3 felony if the value of the thing involved is five hundred dollars or more. Theft from the person of an at-risk person by means other than the use of force, threat, or intimidation is a class 4 felony without regard to the value of the thing taken.
- (5.5) (Deleted by amendment, L. 2016.)

(6) (a) Any person who knowingly commits caretaker neglect against an at-risk person or knowingly acts in a manner likely to be injurious to the physical or mental welfare of an at-risk person commits a class 1 misdemeanor.

(b) A person who unlawfully abandons an at-risk person commits a class 1 misdemeanor.

(7) (a) Any person who commits a crime of sexual assault, as such crime is described in section 18-3-402, sexual assault in the first degree, as such crime was described in section 18-3-402, as it existed prior to July 1, 2000, and the victim is an at-risk person, commits a class 2 felony.

(b) Any person who commits a crime of sexual assault in the second degree, as such crime was described in section 18-3-403, as it existed prior to July 1, 2000, and the victim is an at-risk person, commits a class 3 felony.

(c) Any person who commits unlawful sexual contact, as such crime is described in section 18-3-404, or sexual assault in the third degree, as such crime was described in section 18-3-404, as it existed prior to July 1, 2000, and the victim is an at-risk person, commits a class 6 felony; except that the person commits a class 3 felony if the person compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4)(a), (4)(b), or (4)(c), or if the actor engages in the conduct described in section 18-3-404 (1)(g) or (1.5).

(d) Any person who commits sexual assault on a child, as such crime is described in section 18-3-405, and the victim is an at-risk juvenile, commits a class 3 felony; except that, if the circumstances described in section 18-3-405 (2)(a), (2)(b), (2)(c), or (2)(d) are present, the person commits a class 2 felony.

(e) Any person who commits sexual assault on a child by one in a position of trust, as such crime is described in section 18-3-405.3, and the victim is an at-risk juvenile, commits a class 2 felony if the victim is less than fifteen years of age or a class 3 felony if the victim is fifteen years of age or older but less than eighteen years of age.

(f) Any person who commits sexual assault on a client by a psychotherapist, as such crime is described in section 18-3-405.5, and the victim is an at-risk person, commits a class 3 felony if the circumstances described in section 18-3-405.5 (1) exist or a class 6 felony if such circumstances are not present.

(7.5) (a) A person commits criminal exploitation of an at-risk person when he or she knowingly uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk person of the use, benefit, or possession of any thing of value.

(b) Criminal exploitation of an at-risk person is a class 3 felony if the thing of value is five hundred dollars or greater. Criminal exploitation of an at-risk person is a class 5 felony if the thing of value is less than five hundred dollars.

(8) (Deleted by amendment, L. 2016.)

(9) (a) A person commits false imprisonment of an at-risk person if without proper legal authority:

(I) (A) The person knowingly confines or detains an at-risk person in a locked or barricaded room or other space; and

(B) Such confinement or detention was part of a continued pattern of cruel punishment or unreasonable isolation or confinement of the at-risk person; or

(II) The person knowingly and unreasonably confines or detains an at-risk person by tying, caging, chaining, or otherwise using similar physical restraints to restrict the at-risk person's freedom of movement; or

(III) The person knowingly and unreasonably confines or detains an at-risk person by means of force, threats, or intimidation designed to restrict the at-risk person's freedom of movement.

(b) It is an affirmative defense for any person with responsibility for the care or supervision of an at-risk person whose conduct would otherwise constitute an offense pursuant to subsection (9)(a)(II) of this section that the conduct with respect to the at-risk person is reasonable and appropriate under the circumstances and is also reasonably necessary to promote the safety and welfare of the at-risk person.

(c) (I) False imprisonment of an at-risk person pursuant to subsection (9)(a)(I) or (9)(a)(II) of this section is a class 6 felony.

(II) False imprisonment of an at-risk person pursuant to subsection (9)(a)(III) of this section is a class 1 misdemeanor.

Source: **L. 91:** Entire article added, p. 1779, § 2, effective July 1. **L. 93:** Entire section amended, p. 1733, § 24, effective July 1. **L. 95:** (3) amended, p. 1254, § 14, effective July 1. **L. 97:** (7) added, p. 1539, § 2, effective July 1. **L. 98:** (5) amended and (8) added, pp. 1440, 1441, §§ 19, 24, effective July 1. **L. 99:** (6) amended, p. 799, § 20, effective July 1. **L. 2000:** (7)(a), (7)(b), and (7)(c) amended, p. 706, § 32, effective July 1. **L. 2002:** (4) amended, p. 1516, § 201, effective October 1. **L. 2003:** (4) amended, p. 1428, § 10, effective April 29. **L. 2007:** (5) amended, p. 2006, § 2, effective July 1. **L. 2013:** (5.5) and (7.5) added and (6) and (8) amended, (SB 13-111), ch. 233, p. 1122, § 4, effective May 16. **L. 2014:** (7.5) R&RE, (SB 14-098), ch. 103, p. 387, § 2, effective April 7. **L. 2016:** Entire section amended, (HB 16-1394), ch. 172, p. 547, § 3, effective July 1. **L. 2019:** (6) amended and (9) added, (SB 19-172), ch. 365, p. 3359, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2013 act adding subsections (5.5) and (7.5) and amending subsections (6) and (8), see section 1 of chapter 233, Session Laws of Colorado 2013. For the legislative declaration in SB 19-172, see section 1 of chapter 365, Session Laws of Colorado 2019.

ANNOTATION

Subsection (2) is a separate substantive offense, not a sentence enhancer. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

Subsection (2) is not void for vagueness; it prohibits any criminally negligent act or omission that results in bodily injury to an at-risk adult or juvenile. Although broad, the proscription is not so vague that a person of common intelligence must necessarily guess at its meaning. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

Although the court's instruction deviated from the language in subsection (2), it was not error. The deviation from the statute worked to defendant's benefit by creating a more demanding standard of culpability, so defendant may not claim error. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

Robbery of an at-risk adult is a lesser included offense of aggravated robbery; therefore, the conviction for robbery of an at-risk adult must be vacated because it merges with the aggravated robbery conviction. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

Under the rule of lenity, defendant's felony convictions for bodily injury

against an at-risk adult under subsection (3)(c) and third degree assault against an at-risk person under § 18-3-204 must nevertheless merge even if bodily injury against an at-risk adult is not a lesser included offense of third degree assault under § 18-1-408 (5)(a). *Thomas v. People*, 2021 CO 84, 500 P.3d 1095.

The general assembly's intent is that subsection (7)(b) would apply only to sexual assault crimes committed before July 1, 2000, that fit the previous definition of second degree assault. *People v. Renfro*, 117 P.3d 43 (Colo. App. 2004).

Subsection (5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense. To prove that a defendant has committed theft from an at-risk adult, the prosecution first must prove that the defendant has committed general theft. *People v. McKinney*, 99 P.3d 1038 (Colo. 2004).

A complicitor can be held strictly liable for the sentence enhancer when the complicitor is unaware that an at-risk victim is present if the complicitor intended to aid in the theft and was aware of the circumstances constituting the elements of the underlying offense. *People in Interest of*

B.D., 2020 CO 87, 477 P.3d 143; People in Interest of N.D.O., 2021 COA 100, 497 P.3d 1070.

"Portion of the offense" as used in subsection (5) means conduct taken in furtherance of the crime that occurs in temporal proximity to an element of the offense and is physically close to the victim. The general assembly did not intend for only an element of the offense to have occurred in the presence of the victim for a defendant to be convicted of the sentence enhancer. People v. Lopez, 2018 COA 119, 488 P.3d 373.

The crime of unlawful sexual contact on an at-risk person does not include an implied element of mens rea. The prosecution does not need to prove that the defendant either knew or should have known of the victim's at-risk status. People v. Nardine, 2016 COA 85, 409 P.3d 441.

Trial court erred by relying on the jury's answer to an at-risk-person verdict question to enter a judgment of conviction for the uncharged lesser nonincluded offense of criminal negligence resulting in the death of an at-risk person under subsection (2)(a) because such use of the answer would effectively subject the defendant to a conviction for an offense that was not originally charged. People v. Martinez, 2024 COA 34, 552 P.3d 551.

Trial court did not err in refusing to give jury instruction defining "presence", as used in subsection (5), where the jurors are capable of applying the word in its ordinary usage. People v. Lopez, 2018 COA 119, 488 P.3d 373.

Trial court did not err in refusing to instruct the jury that knowledge of the age of the victim was an element of the offense of robbery of an at-risk adult. There is no indication that the general assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. There is no mens rea element in the statute. Hence no defense of reasonable mistake of the victim's age. People v. Davis, 935 P.2d 79 (Colo. App. 1996).

Trial court did not err in refusing to impose a lesser sentence than the presumptive sentence under § 18-1-105 (1), as the sentence was required by this section. By reference only to that section and using the mandatory word "shall", the general assembly did not allow a trial court discretion to engraft probation, part of an entirely separate statutory scheme, onto its sentencing decision. People v. Davis, 935 P.2d 79 (Colo. App. 1996).

Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit. Defendant was convicted of second degree assault and causing serious bodily injury to an at-risk adult by criminal negligence when, despite defendant's medical training, defendant failed to respond to father's worsening condition, left father bedridden for a significant length of time without proper change of clothing, toileting, or

hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

checks on behalf of a family trust and a common stock company rather than in their individual capacities. *People v. Pahl*, 169 P.3d 169 (Colo. App. 2006).

Convictions for theft from an at-risk adult reversed where at-risk adults signed

18-6.5-103.5. Video tape depositions - at-risk adult victims and witnesses.

(1) In any case in which a defendant is charged with a crime against an at-risk adult or at-risk elder, or in any case involving a victim or witness who is an at-risk adult or at-risk elder, the prosecution may file a motion with the court at any time prior to commencement of the trial for an order that a deposition be taken of the testimony of the victim or witness and that the deposition be recorded and preserved on a video imaging format.

(2) The prosecution shall file a motion requesting a recorded deposition at least fourteen days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition. The defendant shall have the right to be present and to be represented by counsel at the deposition; except that for good cause shown, the court may permit the filing of a motion requesting a recorded deposition less than fourteen days prior to taking the deposition.

(3) (a) (I) Upon receipt of the motion, the court shall schedule the deposition to take place within fourteen days without further findings, except for good cause shown by the prosecution if the motion asks for the deposition to be taken in less than fourteen days, if the victim is an at-risk elder.

(II) Except for depositions of at-risk elder victims as described in subparagraph (I) of this paragraph (a), upon the filing of the motion by the prosecution stating reasons the victim or witness may be unavailable at trial, the court may order a deposition for an at-risk adult victim or witness or at-risk elder witness. Filing the motion creates a rebuttable presumption that a deposition should be taken to prevent injustice. The court may deny the motion for deposition upon a finding that granting the motion will not prevent injustice. The prosecution may file a new request for a deposition if circumstances change prior to trial.

(III) Both the prosecution and the defendant shall provide all available discovery no later than five days before the scheduled deposition. If the discovery has not been provided as set forth in this subparagraph (III), either party may file a motion with the court to reschedule the deposition in order to obtain the necessary discovery to adequately prepare for the deposition.

(b) The deposition must be taken, preserved on a video imaging format, and conducted pursuant to rule 15 (d) of the Colorado rules of criminal procedure; except that after consultation with the chief judge of the judicial district, the trial court may appoint an active or senior district

or county court judge to serve in its place and preside over all aspects of the taking of the deposition. After the deposition is taken, the prosecution shall transmit the recording to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that the victim or witness is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the recording of the victim's or witness' deposition as former testimony under rule 804 (b)(1) of the Colorado rules of evidence.

Source: **L. 2000:** Entire section added, p. 416, § 1, effective April 13. **L. 2004:** (3) amended, p. 422, § 1, effective August 4. **L. 2013:** (1) amended, (SB 13-111), ch. 233, p. 1127, § 12, effective May 16. **L. 2016:** Entire section amended, (HB 16-1027), ch. 179, p. 615, § 1, effective July 1.

Cross references: For the legislative declaration in the 2013 act amending subsection (1), see section 1 of chapter 233, Session Laws of Colorado 2013.

18-6.5-104. Statutory privilege not allowed.

The statutory privileges provided in section 13-90-107 (1), C.R.S., are not available for excluding or refusing testimony in any prosecution for a crime committed against an at-risk person pursuant to this article.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1734, § 25, effective July 1. **L. 2016:** Entire section amended, (HB 16-1394), ch. 172, p. 550, § 4, effective July 1.

18-6.5-105. Preferential trial dates of cases involving crimes against at-risk persons.

Consistent with the constitutional right to a speedy trial, all cases involving the commission of a crime against an at-risk person must take precedence before the court, and the court shall hear these cases as soon as possible after they are filed.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1735, § 26, effective July 1. **L. 2016:** Entire section amended, (HB 16-1394), ch. 172, p. 550, § 5, effective July 1.

18-6.5-106. Payment of treatment costs for victims of crimes against at-risk persons - restitution.

(1) In addition to any other penalty provided by law, the court may order any person who is convicted of a crime against an at-risk person, as set forth in this article, to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of such person's offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims, which, when added to any time served, does not exceed the maximum sentence imposable for the offense.

(3) If an at-risk person has sustained monetary damages as a result of the commission of a crime described in this article against such person, the court shall order the offender to provide restitution pursuant to article 18.5 of title 16 and article 28 of title 17, C.R.S. If, after a reasonable period not to exceed one hundred eighty-two days, the offender has not, in the opinion of the court, completed adequate restitution, the offender's probation may be revoked. However, any remaining amount of restitution continues to have the full force and effect of a final judgment and remain enforceable pursuant to article 18.5 of title 16, C.R.S.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1735, § 27, effective July 1. **L. 2000:** (3) amended, p. 1050, § 18, effective September 1. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 873, § 129, effective July 1. **L. 2016:** (1) and (3) amended, (HB 16-1394), ch. 172, p. 550, § 6, effective July 1.

18-6.5-107. Surcharge - collection and distribution of funds - crimes against at-risk persons surcharge fund - creation - report.

(1) Each person who is convicted of a crime against an at-risk person or who is convicted of identity theft pursuant to section 18-5-902, when the victim is an at-risk person, shall be required to pay a surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(2) Surcharges pursuant to subsection (1) of this section shall be in the following amounts:

(a) For each class 2 felony of which a person is convicted, one thousand five hundred dollars;

(b) For each class 3 felony of which a person is convicted, one thousand dollars;

(c) For each class 4 felony of which a person is convicted, five hundred dollars;

(d) For each class 5 felony of which a person is convicted, three hundred seventy-five dollars;

(e) For each class 6 felony of which a person is convicted, two hundred fifty dollars;

(f) For each class 1 misdemeanor of which a person is convicted, two hundred dollars;

(g) For each class 2 misdemeanor of which a person is convicted, one hundred fifty dollars;
and

(h) For each class 3 misdemeanor of which a person is convicted, seventy-five dollars.

(3) The clerk of the court shall allocate the surcharge required pursuant to this section as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (3). Such amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the crimes against at-risk persons surcharge fund created pursuant to subsection (4) of this section.

(4) (a) There is created in the state treasury the crimes against at-risk persons surcharge fund, referred to in this section as the "fund", that consists of money received by the state treasurer pursuant to this section. The money in the fund is subject to annual appropriation by the general assembly to the state office on aging in the department of human services, created pursuant to section 26-11-202, C.R.S., for distribution to a fiscal agent that is an affiliate of a national organization that serves individuals affected by a disability and chronic condition across the life span and is working with the state of Colorado to implement the lifespan respite care program, referred to in this section as the "fiscal agent". Provided that programs selected to receive money from the fund meet the guidelines for distribution pursuant to paragraph (b) of this subsection (4), the fiscal agent shall award money to programs selected by a statewide coalition of nonprofit or not-for-profit organizations that focus on the needs of caregivers of at-risk persons.

(b) The state office on aging in the department of human services shall establish guidelines for the distribution of the moneys from the fund, including but not limited to:

(I) Procedures for programs to use in applying for an award of moneys from the fund;

(II) Procedures for the fiscal agent to use in reporting to the state office on aging pursuant to paragraph (e) of this subsection (4); and

(III) Accountability and performance standards for programs that receive moneys from the fund.

(c) Notwithstanding any provisions of paragraph (a) of this subsection (4) to the contrary, the fiscal agent may use a portion of the money that it receives pursuant to paragraph (a) of this subsection (4) for training and to facilitate the coordination of programs that provide respite services for caregivers of at-risk persons. The fiscal agent shall distribute the remainder of the money directly to the programs.

(d) Each program that receives moneys from the fund shall:

(I) Provide respite services that allow a caregiver to have a break from caregiving;

(II) Have a signed agreement and protocol with the fiscal agent;

(III) Conduct a fingerprint-based criminal history record check of staff and providers; and

(IV) Satisfy the accountability and performance standards established by the state office on aging pursuant to subparagraph (III) of paragraph (b) of this subsection (4).

(e) The fiscal agent shall report to the state office on aging in the department of human services on a regular basis to be specified by the state office on aging. The report shall include, but need not be limited to:

(I) A list of all programs that received moneys from the fund in the preceding fiscal year;

(II) A description of how each program that received moneys from the fund in the preceding fiscal year used those moneys; and

(III) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the criteria specified in paragraph (d) of this subsection (4).

(f) The state office on aging shall not expend any moneys until the fund has enough money to pay the expenses necessary to administer the fund.

(g) All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(5) The court may waive all or any portion of the surcharge required by subsection (1) of this section if the court finds that a person convicted of a crime against an at-risk person is indigent or financially unable to pay all or any portion of the surcharge. The court may waive only that

portion of the surcharge that the court finds that the person convicted of a crime against an at-risk person is financially unable to pay.

Source: L. 2012: Entire section added, (HB 12-1226), ch. 279, p. 1486, § 2, effective August 15. **L. 2016:** (1), (4)(a), (4)(c), and (5) amended, (HB 16-1394), ch. 172, p. 550, § 7, effective July 1.

18-6.5-108. Mandatory reports of mistreatment of at-risk elders and at-risk adults with IDD - list of reporters - penalties.

(1) (a) On and after July 1, 2016, a person specified in paragraph (b) of this subsection (1) who observes the mistreatment of an at-risk elder or an at-risk adult with IDD, or who has reasonable cause to believe that an at-risk elder or an at-risk adult with IDD has been mistreated or is at imminent risk of mistreatment, shall report such fact to a law enforcement agency not more than twenty-four hours after making the observation or discovery.

(b) The following persons, whether paid or unpaid, shall report as required by subsection (1)(a) of this section:

(I) Any person providing health care or health-care-related services, including general medical, surgical, or nursing services; medical, surgical, or nursing speciality services; dental services; vision services; pharmacy services; chiropractic services; naturopathic medicine services; or physical, occupational, musical, or other therapies;

(II) Hospital and long-term care facility personnel engaged in the admission, care, or treatment of patients;

(III) First responders including emergency medical service providers, fire protection personnel, law enforcement officers, and persons employed by, contracting with, or volunteering with any law enforcement agency, including victim advocates;

(IV) Medical examiners and coroners;

(V) Code enforcement officers;

(VI) Veterinarians;

(VII) Psychologists, addiction counselors, professional counselors, marriage and family therapists, and unlicensed psychotherapists, as those persons are defined in article 245 of title 12;

(VIII) Social workers, as defined in part 4 of article 245 of title 12;

(IX) Staff of case management agencies, as defined in section 25.5-6-1702 (2);

(X) Staff, consultants, or independent contractors of service agencies as defined in section 25.5-10-202 (34), C.R.S.;

(XI) Staff or consultants for a licensed or unlicensed, certified or uncertified, care facility, agency, home, or governing board, including but not limited to long-term care facilities, home care agencies, or home health providers;

(XII) Staff of, or consultants for, a home care placement agency, as defined in section 25-27.5-102 (5), C.R.S.;

(XIII) Persons performing case management or assistant services for at-risk elders or at-risk adults with IDD;

(XIV) Staff of county departments of human or social services;

(XV) Staff of the state departments of human services, public health and environment, or health care policy and financing;

(XVI) Staff of senior congregate centers or senior research or outreach organizations;

(XVII) Staff, and staff of contracted providers, of area agencies on aging, except attorneys at law providing legal assistance to individuals pursuant to a contract with an area agency on aging, the staff of such attorneys at law, and the long-term care ombudsmen;

(XVIII) Employees, contractors, and volunteers operating specialized transportation services for at-risk elders and at-risk adults with IDD;

(XIX) Court-appointed guardians and conservators;

(XX) Personnel at schools serving persons in preschool through twelfth grade;

(XXI) Clergy members; except that the reporting requirement described in paragraph (a) of this subsection (1) does not apply to a person who acquires reasonable cause to believe that an at-risk elder or an at-risk adult with IDD has been mistreated or has been exploited or is at imminent risk of mistreatment or exploitation during a communication about which the person may not be examined as a witness pursuant to section 13-90-107 (1)(c), C.R.S., unless the person also acquires such reasonable cause from a source other than such a communication; and

(XXII) (A) Personnel of banks, savings and loan associations, credit unions, and other lending or financial institutions who directly observe in person the mistreatment of an at-risk elder or who have reasonable cause to believe that an at-risk elder has been mistreated or is at imminent risk of mistreatment; and

(B) Personnel of banks, savings and loan associations, credit unions, and other lending or financial institutions who directly observe in person the mistreatment of an at-risk adult with IDD or who have reasonable cause to believe that an at-risk adult with IDD has been mistreated

or is at imminent risk of mistreatment by reason of actual knowledge of facts or circumstances indicating the mistreatment.

(c) A person who willfully violates subsection (1)(a) of this section commits a class 2 misdemeanor and shall be punished in accordance with section 18-1.3-501.

(d) Notwithstanding the provisions of paragraph (a) of this subsection (1), a person described in paragraph (b) of this subsection (1) is not required to report the mistreatment of an at-risk elder or an at-risk adult with IDD if the person knows that another person has already reported to a law enforcement agency the same mistreatment that would have been the basis of the person's own report.

(2) (a) A law enforcement agency that receives a report of mistreatment of an at-risk elder or an at-risk adult with IDD shall acquire, to the extent possible, the following information from the person making the report:

(I) The name, age, address, and contact information of the at-risk elder or at-risk adult with IDD;

(II) The name, age, address, and contact information of the person making the report;

(III) The name, age, address, and contact information of the caretaker of the at-risk elder or at-risk adult with IDD, if any;

(IV) The name of the alleged perpetrator;

(V) The nature and extent of any injury, whether physical or financial, to the at-risk elder or at-risk adult with IDD;

(VI) The nature and extent of the condition that required the report to be made; and

(VII) Any other pertinent information.

(b) Not more than twenty-four hours after receiving a report of mistreatment of an at-risk elder or an at-risk adult with IDD, a law enforcement agency shall provide the report to the county department for the county in which the at-risk elder or at-risk adult with IDD resides and the district attorney's office of the location where the mistreatment occurred.

(c) The law enforcement agency shall complete a criminal investigation when appropriate. The law enforcement agency shall provide a summary report of the investigation to the county department for the county in which the at-risk elder or at-risk adult with IDD resides and to the district attorney's office of the location where the mistreatment occurred.

(3) A person, including but not limited to a person specified in paragraph (b) of subsection (1) of this section, who reports mistreatment of an at-risk elder or an at-risk adult with IDD to a law enforcement agency pursuant to subsection (1) of this section is immune from suit and

liability for damages in any civil action or criminal prosecution if the report was made in good faith; except that such a person is not immune if he or she is the alleged perpetrator of the mistreatment.

(4) A person, including but not limited to a person specified in subsection (1)(b) of this section, who knowingly makes a false report of mistreatment of an at-risk elder or an at-risk adult with IDD to a law enforcement agency commits a class 2 misdemeanor and must be punished as provided in section 18-1.3-501 and is liable for damages proximately caused thereby.

(5) The reporting duty described in subsection (1) of this section does not create a civil duty of care or establish a civil standard of care that is owed to an at-risk elder or an at-risk adult with IDD by a person specified in paragraph (b) of subsection (1) of this section.

Source: **L. 2013:** Entire section added, (SB 13-111), ch. 233, p. 1117, § 2, effective May 16. **L. 2015:** (1)(a), (1)(b)(IX), (1)(b)(XVI), (1)(d), and (2) to (5) amended, (SB 15-109), ch. 278, p. 1140, § 3, effective July 1, 2016. **L. 2016:** (1)(a), (1)(b)(IX), (1)(b)(XVI), (1)(d), and (2) to (5) amended, (HB 16-1394), ch. 172, p. 551, § 8, effective July 1. **L. 2017:** IP(1)(b) and (1)(b)(I) amended, (SB 17-106), ch. 302, p. 1649, § 7, effective August 9. **L. 2018:** (1)(b)(XVII) amended, (HB 18-1405), ch. 392, p. 2345, § 1, effective September 1. **L. 2019:** (1)(b)(VII) and (1)(b)(VIII) amended, (HB 19-1172), ch. 136, p. 1676, § 97, effective October 1. **L. 2020:** (1)(b)(VII) amended, (HB 20-1206), ch. 304, p. 1550, § 63, effective July 14. **L. 2021:** (1)(c) and (4) amended, (SB 21-271), ch. 462, p. 3193, § 263, effective March 1, 2022; (1)(b)(IX) amended, (HB 21-1187), ch. 83, p. 326, § 6, effective July 1, 2024.

Cross references: For the legislative declaration in the 2013 act adding this section, see section 1 of chapter 233, Session Laws of Colorado 2013.

ANNOTATION

A corporate entity does not meet the definition of person and is therefore not entitled to immunity under subsection (3) for reporting the mistreatment of an at-risk elder or at-risk adult with IDD. While "person"

can be defined as a corporate entity in some cases, its plain and ordinary meaning in the context of this section is a human being. *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, 535 P.3d 969.

18-6.5-109. At-risk adults with intellectual and developmental disabilities mandatory reporting implementation task force - report - repeal. (Repealed)

Source: L. 2015: Entire section added, (SB 15-109), ch. 278, p. 1137, § 1, effective June 5.

Editor's note: Subsection (9) provided for the repeal of this section, effective July 1, 2016. (See L. 2015, p. 1137.)

ARTICLE 7

Offenses Relating to Morals

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PART 1

OBSCENITY - OFFENSES

Editor's note: This title was repealed and reenacted in 1971, and this part 1 was subsequently repealed and reenacted in 1976, 1977, and 1981, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 1 prior to 1981, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading. Former C.R.S. section numbers prior to 1981 are shown in editor's notes following those sections that were relocated.

Cross references: For power of boards of county commissioners and governing bodies of municipalities to regulate obscene material or performance, see §§ 30-15-401 (1)(c) and 31-15-401 (1)(g).

18-7-101. Definitions.

As used in this part 1, unless the context otherwise requires:

(1) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three-dimensional obscene device.

(1.5) "Minor" means a person under eighteen years of age.

(2) "Obscene" means material or a performance that:

(a) The average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(b) Depicts or describes:

(I) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(II) Patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernibly turgid state; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

(3) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of tolerance.

(5) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(6) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6.5) "Prurient interest" means a shameful or morbid interest.

(7) "Simulated" means the explicit depiction or description of any of the types of conduct set forth in paragraph (b) of subsection (2) of this section, which creates the appearance of such conduct.

(8) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(9) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

Source: **L. 81:** Entire part R&RE, p. 998, § 1, effective July 1. **L. 86:** (2)(b)(II) and (4) amended and (6.5) added, p. 782, § 1, effective April 21. **L. 94:** (1.5) added, p. 1720, § 16, effective July 1.

Editor's note: This section is similar to former § 18-7-101 as it existed prior to 1981.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982). For article, "Obscenity and Pornography: Forging Decency Through the Law", see 17 Colo. Law. 45 (1988).

Annotator's note. Cases decided under the 1971 and 1977 versions of this section which are deemed to be relevant appear below.

The 1977 version of the Colorado obscenity statute was unconstitutional. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Provisions regulating promotion of obscene devices held unconstitutional. The provisions of the statutory scheme which regulate the promotion of obscene devices impermissibly burden the right of privacy. *People v. Seven Thirty-five E. Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Definition of "patently offensive" contained in this section is unconstitutionally overbroad. The first amendment to the U.S. Constitution requires a "tolerance" standard, for determining whether material or a performance is "patently offensive". *People v. Seven Thirty-five E. Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Subsection (2)(b) held constitutional. The terms used in this paragraph are sufficiently specific to satisfy requirements of *Miller v. California*, and thus statute is not unconstitutionally overbroad. *People v. Seven Thirty-five E. Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

Obscenity statute provides sufficiently adequate standards to enable courts and juries to apply the law consistently and is not impermissibly vague. *People v. Ford*, 773 P.2d 1059 (Colo. 1989).

Obscenity statute that defines material that is patently offensive in terms of community standards of tolerance

satisfies Colorado and U.S. constitutions and is not overbroad. People v. Ford, 773 P.2d 1059 (Colo. 1989).

Terms "materials" and "promote" as used in this section held not constitutionally defective. People v. Seven Thirty-five E. Colfax, Inc., 697 P.2d 348 (Colo. 1985).

Federal court abstained from determining provisions' constitutionality until state courts determined validity. The United States district court for Colorado chose to abstain from the determining any federal constitutional question concerning Colorado legislation regulating obscene material, § 18-7-101 et seq., until the Colorado state courts were afforded an opportunity to construe the provisions and determine their validity or invalidity under the state constitution. Bergstrom v. Ricketts, 495 F. Supp. 210 (D. Colo. 1980).

United States supreme court decisions binding on state. United States supreme court decisions interpreting the scope of the first amendment's protections in obscenity cases are binding upon the state supreme court. People v. Berger, 185 Colo. 85, 521 P.2d 1244 (1974).

A statewide community standard is dictated by the constitution. To impose less than a statewide standard in the interpretation of a state obscenity statute would be to denigrate the constitutional guarantees that are afforded to every person. People v. Tabron, 190 Colo. 161, 544 P.2d 380 (1976).

Anything less than a statewide standard is unworkable when state obscenity statutes are involved. People v. Tabron, 190 Colo. 161, 544 P.2d 380 (1976).

Obscenity test derived from supreme court decisions. The three-fold test of obscenity set forth in subsection (5)(now (6)) is derived from the United States supreme court's decision in Roth v. United States, 354 U.S. 476 (1957), as further defined in Memoirs v. Massachusetts, 383 U.S. 413 (1968), and Redrup v. New York, 386 U.S. 767 (1967). People v. Berger, 185 Colo. 85, 521 P.2d 1244 (1974).

Question of obscenity is one of law, not of fact. Houston v. Manerbino, 185 Colo. 1, 521 P.2d 166 (1974).

Whether the statutory tests of subsection (5)(now (6)) have been properly applied in a given case, as well as whether the materials are obscene, are questions of law in the first instance. People v. Berger, 185 Colo. 85, 521 P.2d 1244 (1974).

For a review of the history of obscenity regulation, see People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

Magazine can be banned where pictures, without reference to text, declared obscene. Where an allegedly obscene magazine consists of both words and pictures, the pictures can be declared obscene and the entire magazine banned under this part without reference to whether the included text or other articles imbue the magazine with serious literary, artistic, political, or scientific value. People v. New

Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

Obscenity provisions could not support injunction or criminal charge. The 1977 version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Denver obscenity ordinance held in conflict with legislative grant of power. *Pierce v. City & County of Denver*, 193 Colo. 347, 565 P.2d 1337 (1977).

Applied in *Citizens for Free Enter. v. Dept. of Rev.*, 649 P.2d 1054 (Colo. 1982).

18-7-102. Obscenity.

(1) (a) Except as otherwise provided in subsection (1.5) of this section, a person commits wholesale promotion of obscenity if, knowing its content and character, such person wholesale promotes or possesses with intent to wholesale promote any obscene material.

(b) Wholesale promotion of obscenity is a class 1 misdemeanor.

(1.5) (a) A person commits wholesale promotion of obscenity to a minor if, knowing its content and character, such person wholesale promotes to a minor or possesses with intent to wholesale promote to a minor any obscene material.

(b) Wholesale promotion of obscenity to a minor is a class 6 felony.

(2) (a) Except as otherwise provided in subsection (2.5) of this section, a person commits promotion of obscenity if, knowing its content and character, such person:

(I) Promotes or possesses with intent to promote any obscene material; or

(II) Produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(b) Promotion of obscenity is a class 2 misdemeanor.

(2.5) (a) A person commits promotion of obscenity to a minor if, knowing its content and character, such person:

(I) Promotes to a minor or possesses with intent to promote to a minor any obscene material; or

(II) Produces, presents, or directs an obscene performance involving a minor or participates in a portion thereof that is obscene or that contributes to its obscenity.

(b) Promotion of obscenity to a minor is a class 6 felony.

(3) Repealed.

(4) A person who possesses six or more identical obscene materials is presumed to possess them with intent to promote the same.

(5) This section does not apply to a person who possesses or distributes obscene material or participates in conduct otherwise proscribed by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

(6) This section does not apply to a person's conduct otherwise proscribed by this section which occurs in that person's residence as long as that person does not engage in the wholesale promotion or promotion of obscene material in his residence.

Source: **L. 81:** Entire part R&RE, p. 999, § 1, effective July 1. **L. 83:** (5) and (6) amended, p. 2048, § 4, effective October 14. **L. 86:** (1)(a), (2)(a)(I), (4), and (5) amended and (3) repealed, pp. 782, 785, §§ 2, 8, effective April 21. **L. 94:** (1) and (2) amended and (1.5) and (2.5) added, p. 1720, § 17, effective July 1.

Editor's note: This section is similar to former §§ 18-7-103, 18-7-104, 18-7-105, and 18-7-106 as they existed prior to 1981.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982). For article, "Constitutional Law", which discusses a Tenth Circuit decision dealing with obscenity, see 62 Den. U. L. Rev. 95 (1985). For article, "Obscenity and Pornography: Forging Decency Through the Law", see 17 Colo. Law. 45 (1988).

Annotator's note. Cases decided under the 1971 and 1977 versions of this section

which are deemed to be relevant appear below.

For the unconstitutionality of the 1971 statute, see *People v. Hildebrandt*, 190 Colo. 167, 554 P.2d 384 (1976).

The 1977 version of the Colorado obscenity statute was unconstitutional. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Provisions regulating promotion of obscene devices held unconstitutional. The provisions of the statutory scheme which regulate the promotion of obscene devices impermissibly burden the right of privacy.

People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Presumption of scienter contained in subsection (3) unconstitutional. The requirement that statutes regulating obscenity contain an element of scienter is based upon the potential for a strict liability obscenity provision to inhibit the exercise of protected speech. People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (decided prior to 1986 repeal of subsection 3).

Presumption contained in subsection (4) is constitutional and comports with the requirements of due process. People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).

Promotion of obscenity to minor is not unconstitutionally vague. A person of common intelligence reading "promote" in context with the statutory definition would

understand its meaning and application. The fact that the legislature defined promote differently than its common meaning does not make it unconstitutional. People v. Boles, 280 P.3d 55 (Colo. App. 2011).

Obscenity statute does not lack criminally culpable mens rea and does not premise liability on the mental state of a third party nor does it premise liability on discretionary acts of a third party. People v. Ford, 773 P.2d 1059 (Colo. 1989).

For a review of the history of obscenity regulation, see People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

Obscenity provisions could not support injunction or criminal charge. The 1977 version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

18-7-103. Injunctions to restrain the promotion of obscene materials.

(1) The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction to enjoin the wholesale promotion, promotion, or display of obscene materials as specified in this section and to issue all necessary and proper restraining orders, injunctions, and writs and processes in connection therewith not inconsistent with this article.

(2) The district attorney of the county in which a person, firm, or corporation wholesale promotes, promotes, or displays, or is about to wholesale promote, promote, or display, or has in his, her, or its possession with intent to wholesale promote, promote, or display, or is about to acquire possession with intent to wholesale promote, promote, or display any obscene material may maintain an action for injunction against such person, firm, or corporation to prevent the wholesale promotion, promotion, or display or further wholesale promotion, promotion, or display of said material described or identified in said suit for injunction.

(3) This article shall not authorize the issuance of temporary restraining orders except where exigent circumstances require the same. In matters of exigent circumstances, the restraining order shall provide that the action must be commenced on the earliest possible date. No temporary restraining order may be issued to restrain the continued exhibitions of a motion picture being shown commercially before the public, notwithstanding the existence of exigent circumstances.

(4) No temporary restraining order or temporary injunction may be issued except after notice to the person, firm, or corporation sought to be enjoined and only after all parties have been offered or afforded an opportunity to be heard. A person, firm, or corporation shall be deemed to have been offered or afforded an opportunity to be heard if notice has been given and he, she, or it fails to appear. At such hearing, evidence shall be presented and witnesses examined.

(5) Before or after the commencement of the hearing on an application for a temporary injunction, the court may, and on motion of the party sought to be restrained shall, order the trial on the action on the merits to be advanced and consolidated with the hearing on the application. Where such hearings are not so consolidated, and a temporary injunction or restraining order is issued, the court shall hold a final hearing and a trial of the issues within one day after joinder of issue, and a decision shall be rendered within two days of the conclusion of the trial. If a final hearing is not held within one day after joinder of issue or a decision not rendered within two days of the conclusion of the trial, the injunction shall be dissolved. No temporary injunction or restraining order shall issue until after a showing of probable cause to believe that the material or display is obscene and a showing of probable success on the merits. Any such temporary injunction or restraining order shall provide that the defendant may not be punished for contempt if the material is found not to be obscene after joinder of issue, final hearing, and trial.

(6) Nothing contained in this article shall prevent the court from issuing a temporary restraining order forbidding the removing, destroying, deleting, splicing, or otherwise altering of any motion picture alleged to be obscene.

(7) Any person, firm, or corporation sought to be permanently enjoined shall be entitled to a full adversary trial of the issues within one day after the joinder of issue, and a decision shall be rendered by the court within two days of the conclusion of the trial. If the defendant in any suit for a permanent injunction filed under the terms of this article shall fail to answer or otherwise join issue within the time required to file his, her, or its answer, the court, on motion of the party applying for the injunction, shall enter a general denial for the defendant and set a date for hearing on the question raised in the suit for injunction within fourteen days following the entry of the general denial entered by the court. The court shall render its decision within two days after the conclusion of the hearing.

(8) In the event that a final order or judgment of injunction is entered against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision

directing the person, firm, or corporation to surrender to the sheriff of the county in which the action was brought any of the material described in subsection (2) of this section, and such sheriff shall be directed to seize and destroy the same six months after the entry of the said final order unless criminal proceedings or an indictment is brought before that time, in which event, said material may be used as evidence in such criminal proceeding.

(9) In any action brought as herein provided, the district attorney shall not be required to file any undertaking, bond, or security before the issuance of any injunction order provided for above, shall not be liable for costs, and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm, or corporation sought to be enjoined.

(10) Every person, firm, or corporation who wholesale promotes, promotes, displays, or acquires possession with intent to wholesale promote, promote, or display any of the material described in subsection (2) of this section, after the service upon him of a summons and complaint in an action brought pursuant to this article, is chargeable with knowledge of the contents.

Source: **L. 81:** Entire part R&RE, p. 1000, § 1, effective July 1. **L. 86:** (1) to (5) amended, p. 783, § 3, effective April 21. **L. 87:** (8) and (10) amended, p. 1579, § 24, effective July 10. **L. 2012:** (7) amended, (SB 12-175), ch. 208, p. 873, § 130, effective July 1.

Editor's note: This section is similar to former § 18-7-102 as it existed prior to 1981.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982).

This section held constitutional. The procedures established by this statute are sufficient to satisfy due process. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

Requirement of adversary hearing. Where injunctive relief is sought which amounts to prior restraint, or where a search warrant is sought, there is required an adversary hearing, which may be on short notice, to determine whether the materials sought to be seized are in fact obscene. *People ex rel. McKevitt v. Harvey*, 176 Colo. 447, 491 P.2d 563 (1971) (decided under former § 40-9-19, C.R.S. 1963).

Obscenity provisions could not support injunction or criminal charge. The 1977

version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. People

v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980) (decided under former § 18-7-102).

18-7-104. Applicability of this part 1. (Repealed)

Source: **L. 81:** Entire part R&RE, p. 1001, § 1, effective July 1. **L. 86:** Entire section repealed, p. 785, § 8, effective April 21.

Editor's note: This section was similar to former § 18-7-107 as it existed prior to 1981.

18-7-104.5. Remedies under the "Colorado Organized Crime Control Act".

When a person or persons, through an enterprise, engage in a pattern of racketeering activity for which the predicate offenses are the promotion or wholesale promotion of obscenity, pursuant to article 17 of this title, the difference in the fair market value of real property in the vicinity of the location of such enterprise from what the value would be if such enterprise or any part thereof were not located in the vicinity, as established by the opinion testimony of experts or otherwise, shall be deemed a compensable injury for which the owners of victimized real property can exercise all civil remedies set forth in article 17 of this title, in addition to any other measure of damages provable pursuant to article 17 of this title.

Source: **L. 86:** Entire section added, p. 784, § 4, effective April 21.

18-7-105. Severability.

If any provision of this part 1 is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of this part 1 are valid, unless it appears to the court that the valid provisions of this part 1 are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed that the general assembly would have enacted the valid provisions without the void provision or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Source: L. 81: Entire part R&RE, p. 1002, § 1, effective July 1.

ANNOTATION

Qualified severability clause used by court in determining legislative intent.

Such a clause creates a presumption that the legislature would have been satisfied with

the portions of the statute that remain after the unconstitutional provisions are stricken. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

18-7-106. Constitutional questions expedited. (Repealed)

Source: L. 81: Entire part R&RE, p. 1002, § 1, effective July 1.

Editor's note: Subsection (2) provided for the repeal of this section, effective January 1, 1983. (See L. 81, p. 1002.)

18-7-107. Disclosing a private intimate image or intimate digital depiction for harassment - definitions.

(1) (a) An actor who is eighteen years of age or older commits the offense of disclosing a private intimate image or intimate digital depiction for harassment if the actor discloses or threatens to disclose through the use of electronic media or a website a private intimate image or an intimate digital depiction without the depicted individual's consent:

(I) to (III) (Deleted by amendment, L. 2025.)

(IV) (A) With the intent to harass, intimidate, or coerce the depicted individual; or

(B) When the actor knew or reasonably should have known that the depicted individual had a reasonable expectation that the private intimate image or intimate digital depiction would remain private; and

(V) The disclosure or threat to disclose caused physical, emotional, or reputational harm to the depicted individual.

(b) Disclosing a private intimate image or intimate digital depiction for harassment is a class 1 misdemeanor; except that it is a class 6 felony if the actor disclosed the private intimate image or intimate digital depiction and the disclosure posed an imminent and serious threat to the

depicted individual's safety or the safety of the depicted individual's immediate family and the actor knew or reasonably should have known of the imminent and serious threat.

(c) Notwithstanding section 18-1.3-501 (1)(a.5), in addition to any other sentence the court may impose, the court shall fine the defendant up to ten thousand dollars. The fines collected pursuant to this subsection (1)(c) must be credited to the crime victim compensation fund created in section 24-4.1-117.

(2) Repealed.

(2.5) It is not a defense to an alleged violation of this section that there is a disclaimer stating that the intimate digital depiction of the depicted individual was unauthorized or that the depicted individual did not participate in the creation or development of the intimate digital depiction.

(3) Nothing in this section precludes punishment under any section of law providing for greater punishment.

(4) (a) Repealed.

(b) An individual whose private intimate image has been disclosed in accordance with this section retains a protectable right of authorship regarding the commercial use of the private intimate image.

(5) (a) Nothing in this section imposes liability on the provider of an interactive computer service, as defined in 47 U.S.C. sec. 230 (f)(2); an information service, as defined in 47 U.S.C. sec. 153 (24); or a telecommunications service, as defined in 47 U.S.C. sec. 153 (53), for content provided by another person.

(b) Nothing in this section imposes liability on the provider of an interactive computer service, as defined in 47 U.S.C. sec. 230 (f)(2), for:

(I) An action the provider of an interactive computer service takes voluntarily and in good faith to restrict access to or availability of a private intimate image or intimate digital depiction; or

(II) An action the provider of an interactive computer service takes to enable or make available to information content providers, as defined in 47 U.S.C. sec. 230 (f)(3), or other persons the technical means to restrict access to a private intimate image or intimate digital depiction.

(5.5) This section does not apply to a disclosure of a private intimate image or an intimate digital depiction if the disclosure was made in good faith:

(a) To law enforcement while reporting a violation of this section; or

(b) To the court, a party, or a finder of fact in a criminal proceeding brought pursuant to this section.

(6) For purposes of this section, unless the context otherwise requires:

(a) to (e) (Deleted by amendment, L. 2025.)

(f) "Computer-generated" means created, developed, made, or produced by digital software, including, but not limited to, phone applications and image editing software.

(g) "Depicted individual" means an individual who is eighteen years of age or older and who is identifiable by virtue of the individual's face, likeness, or other distinguishing characteristic, including a unique birthmark or other recognizable feature, and who:

(I) By digital or computer-generated means appears in whole or in part in an intimate digital depiction; or

(II) Appears in whole or in part in a private intimate image.

(h) "Digital depiction" means a photograph, film, videotape, recording, digital file, or other highly realistic visual depiction of a depicted individual that falsely appears to be authentic or truthful, features a depiction of an individual appearing to act in a way that the individual did not act, and has been created, altered, or produced by digitization or computer-generated means. "Digital depiction" does not include handmade drawings or cartoons.

(i) "Digitization" means creating or altering visual or printed matter in a realistic manner using images of another person or computer-generated images, regardless of whether the creation or alteration is accomplished manually or through an automated process. "Digitization" includes, but is not limited to, creation or alteration of visual or printed matter using generative AI software.

(j) "Disclose" means to transfer, publish, distribute, or make accessible.

(k) "Electronic media" means an electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including, but not limited to, videos, still photographs, blogs, video blogs or chats, live blogs or live streams, podcasts, instant messages, direct messages, electronic mail, or internet website profiles.

(l) "Generative AI" means a subset of artificial intelligence that involves using algorithms and models to generate or create new and original content.

(m) "Image editing software" means a computer program that allows editing, modification, or alteration of an image or video.

(n) "Intimate digital depiction" means a digital depiction that depicts:

(I) The intimate parts of a depicted individual; or

(II) Sexual acts of a depicted individual.

(o) "Private intimate image" means a photograph, film, videotape, recording, digital file, or other reproduction that depicts the private intimate parts of a depicted individual or a depicted individual engaging in sexual acts, regardless of whether or not intimate parts are visible in the image.

(p) "Private intimate parts" means external genitalia or the perineum or the anus or the pubes of a person or the breast of a female.

(q) "Sexual acts" means sexual intrusion or sexual penetration as defined in section 18-3-401.

Source: **L. 2014:** Entire section added, (HB 14-1378), ch. 283, p. 1160, § 1, effective July 1. **L. 2018:** IP(1)(a), (1)(a)(I), and (4) amended, (2) repealed, and (6) R&RE, (HB 18-1264), ch. 192, p. 1276, § 1, effective July 1. **L. 2019:** (4)(a) repealed, (SB 19-100), ch. 88, p. 330, § 2, effective April 8. **L. 2024:** IP(1)(a) amended and (2.5) added, (SB 24-011), ch. 402, p. 2768, § 5, effective August 7. **L. 2025:** (1), (2.5), (4)(b), (5), and (6) amended and (5.5) added, (SB 25-288), ch. 339, p. 1826, § 3, effective August 6.

Cross references: For the legislative declaration in SB 24-011, see section 1 of chapter 402, Session Laws of Colorado 2024.

ANNOTATION

"Breast of a female" can be interpreted to mean either the whole breast or simply a portion of the breast. Further, interpreting that phrase to mean any portion of the

female breast is not constitutionally vague. *People v. Pellegrin*, 2021 COA 118, 500 P.3d 384, *aff'd* on other grounds, 2023 CO 37, 532 P.3d 1224.

18-7-108. Disclosing a private intimate image or intimate digital depiction for pecuniary gain - definitions.

(1) (a) An actor who is eighteen years of age or older commits the offense of disclosing a private intimate image or intimate digital depiction for pecuniary gain if the actor discloses or threatens to disclose through electronic media or a website a private intimate image or intimate digital depiction without the depicted individual's consent:

(I) With the intent to obtain a pecuniary benefit from a person as a result of the disclosure, threatened disclosure, or retraction of the private intimate image or intimate digital depiction; or

(II) When the actor knew or reasonably should have known that:

(A) The depicted individual had a reasonable expectation that the private intimate image or intimate digital depiction would remain private; and

(B) The disclosure would cause financial harm to the depicted individual.

(b) Disclosing a private intimate image or intimate digital depiction for pecuniary gain is a class 1 misdemeanor; except that it is a class 6 felony if the actor disclosed the private intimate image or intimate digital depiction and the disclosure posed an imminent and serious threat to the depicted individual's safety or the safety of the depicted individual's immediate family and the actor knew or reasonably should have known of the imminent and serious threat.

(c) Notwithstanding section 18-1.3-501 (1)(a.5), in addition to any other sentence the court may impose, the court shall fine the defendant up to ten thousand dollars. The fines collected pursuant to this subsection (1)(c) must be credited to the crime victim compensation fund created in section 24-4.1-117.

(2) Repealed.

(2.5) It is not a defense to an alleged violation of this section that there is a disclaimer stating that the intimate digital depiction of the depicted individual was unauthorized or that the depicted individual did not participate in the creation or development of the intimate digital depiction.

(3) Nothing in this section precludes punishment under any section of law providing for greater punishment.

(4) (a) Repealed.

(b) An individual whose private intimate image has been disclosed in accordance with this section retains a protectable right of authorship regarding the commercial use of the private intimate image.

(5) (a) Nothing in this section imposes liability on the provider of an interactive computer service, as defined in 47 U.S.C. sec. 230 (f)(2); an information service, as defined in 47 U.S.C. sec. 153 (24); or a telecommunications service, as defined in 47 U.S.C. sec. 153 (53), for content provided by another person.

(b) Nothing in this section imposes liability on the provider of an interactive computer service, as defined in 47 U.S.C. sec. 230 (f)(2), for:

(I) An action the provider of an interactive computer service takes voluntarily and in good faith to restrict access to or availability of a private intimate image or intimate digital depiction; or

(II) An action the provider of an interactive computer service takes to enable or make available to information content providers, as defined in 47 U.S.C. sec. 230 (f)(3), or other persons the technical means to restrict access to a private intimate image or intimate digital depiction.

(5.5) This section does not apply to a disclosure of a private intimate image or an intimate digital depiction if the disclosure was made in good faith:

(a) To law enforcement while reporting a violation of this section; or

(b) To the court, a party, or a finder of fact in a criminal proceeding brought pursuant to this section.

(6) For purposes of this section, unless the context otherwise requires:

(a) to (e) (Deleted by amendment, L. 2025.)

(f) "Computer-generated" means created, developed, made, or produced by digital software, including, but not limited to, phone applications and image editing software.

(g) "Depicted individual" means an individual who is eighteen years of age or older and who is identifiable by virtue of the individual's face, likeness, or other distinguishing characteristic, including a unique birthmark or other recognizable feature, and who:

(I) By digital or computer-generated means appears in whole or in part in an intimate digital depiction; or

(II) Appears in whole or in part in a private intimate image.

(h) "Digital depiction" means a photograph, film, videotape, recording, digital file, or other highly realistic visual depiction of a depicted individual that falsely appears to be authentic or truthful, features a depiction of an individual appearing to act in a way that the individual did not act, and has been created, altered, or produced by digitization or computer-generated means. "Digital depiction" does not include handmade drawings or cartoons.

(i) "Digitization" means creating or altering visual or printed matter in a realistic manner using images of another person or computer-generated images, regardless of whether the creation or alteration is accomplished manually or through an automated process. "Digitization" includes, but is not limited to, creation or alteration of visual or printed matter using generative AI software.

(j) "Disclose" means to transfer, publish, distribute, or make accessible.

(k) "Electronic media" means an electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including, but not limited to, videos, still photographs, blogs, video blogs or chats, live blogs or live streams, podcasts, instant messages, direct messages, electronic mail, or internet website profiles.

(l) "Generative AI" means a subset of artificial intelligence that involves using algorithms and models to generate or create new and original content.

(m) "Image editing software" means a computer program that allows editing, modification, or alteration of an image or video.

(n) "Intimate digital depiction" means a digital depiction that depicts:

(I) The intimate parts of a depicted individual; or

(II) Sexual acts of a depicted individual.

(o) "Private intimate image" means a photograph, film, videotape, recording, digital file, or other reproduction that depicts the private intimate parts of a depicted individual or a depicted individual engaging in sexual acts, regardless of whether or not intimate parts are visible in the image.

(p) "Private intimate parts" means external genitalia or the perineum or the anus or the pubes of any person or the breast of a female.

(q) "Sexual acts" means sexual intrusion or sexual penetration as defined in section 18-3-401.

Source: **L. 2014:** Entire section added, (HB 14-1378), ch. 283, p. 1160, § 1, effective July 1. **L. 2018:** IP(1)(a) and (4) amended, (2) repealed, and (6) R&RE, (HB 18-1264), ch. 192, p. 1277, § 2, effective July 1. **L. 2019:** (4)(a) repealed, (SB 19-100), ch. 88, p. 330, § 3, effective April 8. **L. 2024:** IP(1)(a) amended and (2.5) added, (SB 24-011), ch. 402, p. 2769, § 6, effective August 7. **L. 2025:** (1), (2.5), (4)(b), (5), and (6) amended and (5.5) added, (SB 25-288), ch. 339, p. 1830, § 4, effective August 6.

Cross references: For the legislative declaration in SB 24-011, see section 1 of chapter 402, Session Laws of Colorado 2024.

18-7-109. Disclosure, possession, or exchange of a private intimate image or intimate digital depiction by a juvenile - definitions - penalties.

(1) A juvenile commits the offense of disclosing a private intimate image or intimate digital depiction by a juvenile if the juvenile, through digital or electronic means:

(a) Knowingly discloses or threatens to disclose to the view of another person a private intimate image or an intimate digital depiction of another individual who is at least fourteen years of age or is less than four years younger than the juvenile:

(I) Without the depicted individual's consent; or

(II) When the recipient did not solicit or request to be supplied with the private intimate image or intimate digital depiction and suffered emotional distress; or

(III) When the juvenile knew or should have known that the depicted individual had a reasonable expectation that the private intimate image or intimate digital depiction would remain private; or

(b) Knowingly discloses or threatens to disclose, to the view of another person who is at least fourteen years of age or is less than four years younger than the juvenile, a private intimate image or intimate digital depiction of himself or herself when the recipient did not solicit or request to be supplied with the image and suffered emotional distress.

(2) A juvenile commits the offense of possessing a private intimate image or intimate digital depiction by a juvenile if the juvenile, through digital or electronic means, knowingly possesses a private intimate image or intimate digital depiction of another individual who is at least fourteen years of age or is less than four years younger than the juvenile without the depicted individual's consent; except that it is not a violation of this subsection (2) if the juvenile:

(a) Took reasonable steps to either destroy or delete the private intimate image or intimate digital depiction within seventy-two hours after initially viewing the image or depiction; or

(b) Reported the initial viewing of the image or depiction to law enforcement or a school resource officer within seventy-two hours after initially viewing the image or depiction.

(3) A juvenile commits the civil infraction of exchange of a private intimate image or intimate digital depiction by a juvenile if the juvenile, through digital or electronic means:

(a) Knowingly sends a private intimate image or intimate digital depiction of himself or herself to another person who is at least fourteen years of age or is less than four years younger than the juvenile, and the image or depiction depicts only the sender and no other person and the sender reasonably believed that the recipient had solicited or otherwise agreed to the transmittal of the image or depiction; or

(b) Knowingly possesses a private intimate image or intimate digital depiction of another person who is at least fourteen years of age or is less than four years younger than the juvenile, and the image or depiction depicts only the sender and no other person and the juvenile reasonably believed that the depicted individual had transmitted the image or depiction or otherwise agreed to the transmittal of the image or depiction.

(4) It is an affirmative defense to subsection (1), (2), or (3) of this section if a juvenile is coerced, threatened, or intimidated into disclosing, possessing, or exchanging a private intimate image or intimate digital depiction of a person under eighteen years of age.

(5) (a) Disclosing a private intimate image or intimate digital depiction by a juvenile is a class 2 misdemeanor; except that it is a class 1 misdemeanor if:

(I) The juvenile committed the offense with the intent to coerce, intimidate, threaten, or otherwise cause emotional distress to the depicted individual; or

(II) The juvenile had previously disclosed a private intimate image or intimate digital depiction and completed a diversion program or education program for the act pursuant to the provisions of this section or had a prior adjudication for disclosing a private intimate image or intimate digital depiction by a juvenile; or

(III) The juvenile disclosed three or more images or depictions that depicted three or more separate and distinct individuals.

(b) Possessing a private intimate image or intimate digital depiction by a juvenile is a petty offense; except that it is a class 2 misdemeanor if the unsolicited possessor of the image or depiction possessed ten or more separate images or depictions that depicted three or more separate and distinct individuals.

(c) Exchange of a private intimate image or intimate digital depiction by a juvenile is a civil infraction and is punishable by participation in a program designed by the school safety resource center or other appropriate program addressing the risks and consequences of exchanging a private intimate image or intimate digital depiction of a juvenile or a fine of up to fifty dollars, which may be waived by the court upon a showing of indigency. If the juvenile fails to appear in response to a civil infraction citation or fails to complete the required class or pay the imposed fee, the court may issue an order to show cause requiring the juvenile's appearance in court and impose additional age-appropriate penalties. The court shall not issue a warrant for the arrest of the juvenile or impose incarceration as a penalty.

(d) In addition to any other sentence the court may impose for a violation of subsection (1) of this section, the court shall order the juvenile be assessed for suitability to participate in restorative justice practices, if available, and, upon a determination of suitability, the court shall inform the victim about the possibility of restorative justice practices as defined in section 18-1-

901 (3)(o.5). The court shall not consider the victim's unwillingness to participate in restorative justice practices when determining other sentencing options.

(e) Each district attorney is encouraged to develop a diversion program for juveniles who violate the provisions of this section and offer the program to a juvenile who is alleged to have violated this section for the first time. If the jurisdiction does not have a diversion program, the district attorney is encouraged to provide alternative programming designed to allow the juvenile to avoid any adjudication.

(6) The court shall order all records in a juvenile delinquency case in the custody of the court, and any records related to the case and charges in the custody of any other agency, person, company, or organization, that are related to an offense pursuant to this section expunged within forty-two days after the completion of the sentence or other alternative program.

(7) A person who is a victim of a violation of subsection (1), (2), or (3) of this section is eligible for compensation and services pursuant to part 1 of article 4.1 of title 24.

(8) As used in this section, unless the context otherwise requires:

(a) and (b) (Deleted by amendment, L. 2025.)

(c) "Computer-generated" means created, developed, made, or produced by digital software, including, but not limited to, phone applications and image editing software.

(d) "Depicted individual" means an individual who is identifiable by virtue of the individual's face, likeness, or other distinguishing characteristic, including a unique birthmark or other recognizable feature, and who:

(I) By digital or computer-generated means appears in whole or in part in an intimate digital depiction; or

(II) Appears in whole or in part in a private intimate image.

(e) "Digital depiction" means a photograph, film, videotape, recording, digital file, or other highly realistic visual depiction of a depicted individual, which falsely appears to be authentic or truthful and which features a depiction of an individual appearing to act in a way that the individual did not act and which has been created, altered, or produced by digitization or computer-generated means. "Digital depiction" does not include handmade drawings or cartoons.

(f) "Digitization" means creating or altering visual or printed matter in a realistic manner using images of another person or computer-generated images, regardless of whether the creation or alteration is accomplished manually or through an automated process. "Digitization" includes, but is not limited to, creation or alteration of visual or printed matter using generative AI software.

(g) "Disclose" means to transfer, publish, distribute, or make accessible.

(h) "Electronic media" means an electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including, but not limited to, videos, still photographs, blogs, video blogs or chats, live blogs or live streams, podcasts, instant messages, direct messages, electronic mail, or internet website profiles.

(i) "Generative AI" means a subset of artificial intelligence that involves using algorithms and models to generate or create new and original content.

(j) "Image editing software" means a computer program that allows editing, modification, or alteration of an image or video.

(k) "Intimate digital depiction" means a digital depiction that depicts:

(I) The intimate parts of a depicted individual; or

(II) A depicted individual engaging in sexual acts.

(l) "Juvenile" means a person under eighteen years of age.

(m) "Private intimate image" means a photograph, film, videotape, recording, digital file, or other reproduction that depicts the private intimate parts of a depicted individual or a depicted individual engaging in sexual acts, regardless of whether or not intimate parts are visible in the image.

(n) "Private intimate parts" means external genitalia or the perineum or the anus or buttocks or the pubes of a person or the breast of a female.

Source: **L. 2017:** Entire section added, (HB 17-1302), ch. 390, p. 2013, § 4, effective January 1, 2018. **L. 2024:** IP(8) and (8)(b) amended, (SB 24-011), ch. 402, p. 2769, § 7, effective August 7. **L. 2025:** (1), (2), (3), (4), (5)(a), (5)(b), (5)(c), and (8) amended, (SB 25-288), ch. 339, p. 1833, § 6, effective August 6.

Cross references: (1) For the legislative declaration in HB 17-1302 stating the purpose of, and the provision directing legislative service agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2020, see sections 1 and 7 of chapter 390, Session Laws of Colorado 2017. To obtain a copy of the review, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

(2) For the legislative declaration in HB 17-1302, see section 1 of chapter 390, Session Laws of Colorado 2017. For the legislative declaration in SB 24-011, see section 1 of chapter 402, Session Laws of Colorado 2024.

ANNOTATION

Law review. For comment, "The Kids Criminalization of Adolescent Sexuality",
Are Alright: Teen Sexting, Child see 91 U. Colo. L. Rev. 251 (2020).
Pornography Charges, and the

PART 2

PROSTITUTION

Cross references: For provisions relating to HIV infection and acquired immune deficiency syndrome, see part 14 of article 4 of title 25.

18-7-201. Prostitution prohibited.

(1) Any person who performs or offers or agrees to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not his spouse in exchange for money or other thing of value commits prostitution.

(2) (a) "Fellatio", as used in this section, means any act of oral stimulation of the penis.

(b) "Cunnilingus", as used in this section, means any act of oral stimulation of the vulva or clitoris.

(c) "Masturbation", as used in this section, means stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse.

(d) "Anal intercourse", as used in this section, means contact between human beings of the genital organs of one and the anus of another.

(3) Prostitution is a petty offense.

Source: **L. 71:** R&RE, p. 451, § 1. **C.R.S. 1963:** § 40-7-201. **L. 77:** Entire section R&RE, p. 987, § 1, effective May 27. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3193, § 264, effective March 1, 2022.

ANNOTATION

This is an offense involving moral turpitude. R & F Enters., Inc. v. Bd. of County Comm'rs, 199 Colo. 137, 606 P.2d 64 (1980).

Applied in People v. Mason, 642 P.2d 8 (Colo. 1982).

18-7-201.3. Affirmative defense - human trafficking - expungement of record protective order - definitions.

(1) A person charged with prostitution, as described in section 18-7-201 or any corresponding municipal code or ordinance, for an offense committed on or after July 1, 2015, which offense was committed as a direct result of being a victim of human trafficking, may assert as an affirmative defense that he or she is a victim of human trafficking as defined in subsection (4) of this section. To assert the affirmative defense pursuant to this subsection (1), the person charged with the offense must demonstrate by a preponderance of the evidence that he or she was a victim of human trafficking at the time of the offense. An official determination or documentation is not required to assert an affirmative defense pursuant to this subsection (1), but official documentation from a federal, state, local, or tribal government agency indicating that the defendant was a victim at the time of the offense creates a presumption that his or her participation in the offense was a direct result of being a victim.

(2) Repealed.

(3) At the request of a person who asserted the affirmative defense pursuant to subsection (1) of this section, the court may at any time issue a protective order concerning protecting the confidentiality of the person asserting the affirmative defense.

(4) As used in this section, unless the context otherwise requires:

(a) "Human trafficking" means an offense described in part 5 of article 3 of this title or any conduct that, if it occurred prior to the enactment of such part 5, would constitute an offense of human trafficking pursuant to part 5 of article 3 of this title.

(b) "Victim of human trafficking" means a "victim" as defined in section 18-3-502 (12).

Source: L. 2015: Entire section added, (SB 15-030), ch. 107, p. 311, § 1, effective April 16. **L. 2017:** (2)(b) repealed, (HB 17-1204), ch. 206, p. 784, § 5, effective November 1. **L. 2019:** (2)(a) amended, (HB 19-1275), ch. 295, p. 2747, § 3, effective August 2. **L. 2022:** (2)(a) and (2)(c) repealed, (SB 22-099), ch. 276, p. 1985, § 5, effective August 10.

18-7-201.4. Victim of human trafficking of a minor for sexual servitude - provision of services - reporting.

If a law enforcement officer encounters a person who is under eighteen years of age and who is engaging in any conduct that would be a violation of section 18-7-201, 18-7-202, 18-7-204, or 18-7-207 or a prostitution-related offense pursuant to a county or municipal ordinance and there is probable cause to believe that the minor is a victim of human trafficking of a minor for sexual servitude pursuant to section 18-3-504, the law enforcement officer or agency shall immediately report a suspected violation of human trafficking of a minor for sexual servitude to the appropriate county department of human or social services or the child abuse reporting hotline system created pursuant to section 26-5-111. The county department of human or social services shall subsequently follow the reporting requirements set forth in section 19-3-308 (4)(c).

Source: L. 2019: Entire section added, (SB 19-185), ch. 147, p. 1767, § 6, effective May 6.

Cross references: For the legislative declaration in SB 19-185, see section 1 of chapter 147, Session Laws of Colorado 2019.

18-7-201.5. Acquired immune deficiency syndrome testing for persons convicted of prostitution. (Repealed)

Source: L. 90: Entire section added, p. 987, § 13, effective April 24. **L. 99:** Entire section amended, p. 997, § 2, effective May 29. **L. 2000:** (1) amended, p. 452, § 3, effective April 24. **L. 2016:** Entire section repealed, (SB 16-146), ch. 230, p. 914, § 3, effective July 1.

18-7-201.7. Prostitution with knowledge of being infected with acquired immune deficiency syndrome. (Repealed)

Source: L. 90: Entire section added, p. 987, § 13, effective April 24. **L. 99:** (3) added, p. 998, § 3, effective May 29. **L. 2016:** Entire section repealed, (SB 16-146), ch. 230, p. 914, § 3, effective July 1.

18-7-202. Soliciting for prostitution.

(1) A person commits soliciting for prostitution if he:

- (a) Solicits another for the purpose of prostitution; or
- (b) Arranges or offers to arrange a meeting of persons for the purpose of prostitution; or
- (c) Directs another to a place knowing such direction is for the purpose of prostitution.

(2) Soliciting for prostitution is a petty offense. A person who is convicted of soliciting for prostitution may be required to pay a fine of not more than five thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-501, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513.

Source: L. 71: R&RE, p. 451, § 1. C.R.S. 1963: § 40-7-202. L. 2011: (2) amended, (SB 11-085), ch. 257, p. 1128, § 3, effective August 10. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3193, § 265, effective March 1, 2022.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

ANNOTATION

Constitutionality. This section does not violate one's due process, equal protection, or constitutional privacy rights, and is neither vague nor overbroad. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is no constitutionally protected right the exercise of which would be threatened by the legislative prohibition of soliciting, pandering, and pimping. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is an element in pandering not necessarily present in pimping, i.e., the

affirmative, knowing action of arranging or offering to arrange an assignation for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

Court did not err by instructing the jury on the lesser included offense of soliciting for prostitution in a soliciting for child prostitution case. *People v. Ross*, 2019 COA 79, 482 P.3d 452, *aff'd* on other grounds, 2021 CO 9, 479 P.3d 910.

18-7-203. Pandering.

(1) Any person who does any of the following for money or other thing of value commits pandering:

(a) Inducing a person by menacing or criminal intimidation to commit prostitution; or

(b) Knowingly arranging or offering to arrange a situation in which a person may practice prostitution.

(2) (a) Pandering under paragraph (a) of subsection (1) of this section is a class 5 felony. A person who is convicted of pandering under paragraph (a) of subsection (1) of this section shall be required to pay a fine of not less than five thousand dollars and not more than ten thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-401, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513, C.R.S.

(b) Pandering pursuant to subsection (1)(b) of this section is a class 2 misdemeanor. A person who is convicted of pandering shall be required to pay a fine of not less than five thousand dollars and not more than ten thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-501, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513.

Source: L. 71: R&RE, p. 452, § 1. **C.R.S. 1963:** § 40-7-203. **L. 73:** p. 535, § 3. **L. 2011:** (2) amended, (SB 11-085), ch. 257, p. 1128, § 4, effective August 10. **L. 2021:** (2)(b) amended, (SB 21-271), ch. 462, p. 3193, § 266, effective March 1, 2022.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

ANNOTATION

Constitutionality. This section does not violate one's due process, equal protection, or constitutional privacy rights, and is neither vague nor overbroad. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is no constitutionally protected right the exercise of which would be threatened by the legislative prohibition of soliciting, pandering, and pimping. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

Subsection (1)(b) is clearly directed at specific type of conduct, and is designed to punish persons who act as "brokers" to bring prostitutes together with their customers. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

There is an element in pandering not necessarily present in pimping, i.e., the affirmative, knowing action of arranging or

offering to arrange an assignation for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

Applied in *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

18-7-204. Keeping a place of prostitution.

(1) Any person who has or exercises control over the use of any place which offers seclusion or shelter for the practice of prostitution and who performs any one or more of the following commits keeping a place of prostitution if he:

- (a) Knowingly grants or permits the use of such place for the purpose of prostitution; or
- (b) Permits the continued use of such place for the purpose of prostitution after becoming aware of facts or circumstances from which he should reasonably know that the place is being used for purposes of prostitution.

(2) Keeping a place of prostitution is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 452, § 1. **C.R.S. 1963: § 40-7-204.**

ANNOTATION

Annotator's note. Since § 18-7-204 is similar to former § 40-9-15, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Defendant must have had control of or assisted in management of house. In order to sustain a conviction under this section it must be shown that the accused had control of and conducted, or assisted in the management of the affairs of the house, so

as to be in some manner responsible for the immoral practices there carried on; or must at least have been so in control as to be able to bring about, or assist in bringing about, such immoral practices. To merely aid, abet, advise, or encourage another in the conduct of the house is not within the statute, and to so construe it is to read into it the descriptive elements of an accessory, and so enlarge it by construction. *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911).

Statute as basis for jurisdiction. See *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Applied in *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

18-7-205. Patronizing a prostitute.

(1) Any person who performs any of the following with a person not his spouse commits patronizing a prostitute:

- (a) Engages in an act of sexual intercourse or of deviate sexual conduct with a prostitute; or
- (b) Enters or remains in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct.

(2) Patronizing a prostitute is a petty offense. A person who is convicted of patronizing a prostitute may be required to pay a fine of not more than five thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-401 or 18-1.3-503, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-205. L. 2005: (2) amended, p. 1332, § 1, effective July 1. L. 2011: (2) amended, (SB 11-085), ch. 257, p. 1129, § 5, effective August 10. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3194, § 267, effective March 1, 2022.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

18-7-205.5. Acquired immune deficiency syndrome testing for persons convicted of patronizing a prostitute. (Repealed)

Source: L. 90: Entire section added, p. 987, § 13, effective April 24. L. 99: Entire section amended, p. 999, § 4, effective May 29. L. 2000: (1) amended, p. 452, § 4, effective April 24. L. 2016: Entire section repealed, (SB 16-146), ch. 230, p. 914, § 3, effective July 1.

18-7-205.7. Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome. (Repealed)

Source: **L. 90:** Entire section added, p. 987, § 13, effective April 24. **L. 2016:** Entire section repealed, (SB 16-146), ch. 230, p. 914, § 3, effective July 1.

18-7-206. Pimping.

Any person who knowingly lives on or is supported or maintained in whole or in part by money or other thing of value earned, received, procured, or realized by any other person through prostitution commits pimping, which is a class 3 felony.

Source: **L. 71:** R&RE, p. 452, § 1. **C.R.S. 1963:** § 40-7-206. **L. 72:** p. 274, § 3. **L. 83:** Entire section amended, p. 707, § 1, effective March 22.

ANNOTATION

Annotator's note. Since § 18-7-206 is similar to former § 40-9-11, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally vague. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Pimping is a continuing offense. *People v. Grosko*, 2021 COA 28, 491 P.3d 484.

The unit of prosecution for pimping is defined as per person, that is, an individual who is supported by funds derived from another's prostitution may be prosecuted based on the number of prostitutes that they receive money or other things of value from. *People v. Grosko*, 2021 COA 28, 491 P.3d 484.

There is an element in pandering not necessarily present in pimping, i.e., the affirmative, knowing action of arranging or offering to arrange an assignation for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

The phrase "lives on" is defined as to be maintained in life; to acquire a livelihood, to subsist with, on, or by, as to live on spoils of those who live by labor. *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911); *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Receipt of proceeds of prostitution from pimp did not support conviction. See *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911).

Receiving money pursuant to legitimate business transaction not proscribed. One who receives money or any other thing of value from a prostitute pursuant to a legitimate business transaction, i.e., in consideration of the sale of merchandise or services, does not come within the proscription of this section. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Evidence that defendant was a pimp under this section was held admissible to show motive in prosecution for murder of police officer who was attempting to take defendant's "woman" away from him. *Coates v. People*, 106 Colo. 483, 106 P.2d 354 (1940).

Establishment of prima facie case. Where the people's evidence establishes that a person knowingly applies a thing of value received through another's act of prostitution to his own benefit, whether it be a business or personal benefit, a prima facie case of proof of the crime of pimping has been made. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Evidence supporting inference of support by prostitution. Evidence that a

prostitute has given all her earnings for a certain time period to the defendant, and that the defendant's other sources of income were insufficient to pay his living expenses, supports a reasonable inference that the defendant had knowingly lived on or been supported in whole or in part by money earned through prostitution. *People v. Barron*, 195 Colo. 390, 578 P.2d 649 (1978).

Despite defendant's argument that he merely received money for "room rent" and not from acts of prostitution, jury's finding that defendant was guilty of pimping was supported by evidence that purpose of businesses was to allow prostitution, that businesses were given 30% of the money the women received for acts of prostitution, and that defendant had full knowledge of how each business operated. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); *aff'd on other grounds*, 900 P.2d 45 (Colo. 1995).

Applied in *People v. Stage*, 195 Colo. 110, 575 P.2d 423 (1978); *People v. Franklin*, 645 P.2d 1 (Colo. 1982).

18-7-207. Prostitute making display.

Any person who by word, gesture, or action endeavors to further the practice of prostitution in any public place or within public view commits a petty offense.

Source: L. 71: R&RE, p. 452, § 1. **C.R.S. 1963:** § 40-7-207. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3194, § 268, effective March 1, 2022.

18-7-208. Promoting sexual immorality. (Repealed)

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-208. L. 2013: Entire section repealed, (HB 13-1166), ch. 59, p. 195, § 2, effective August 7.

18-7-209. Immunity from prostitution-related offenses - victims - human trafficking of a minor for involuntary servitude - human trafficking of a minor for sexual servitude.

If probable cause exists to believe that a minor charged with a prostitution-related activity pursuant to section 18-7-201, 18-7-202, 18-7-204, or 18-7-207 or a prostitution-related offense pursuant to a county or municipal ordinance was a victim of human trafficking of a minor for involuntary servitude, pursuant to section 18-3-503 (2), or human trafficking of a minor for sexual servitude, pursuant to section 18-3-504 (2), at the time of the offense being charged, the minor is immune from criminal liability or juvenile delinquency proceedings for such charges.

Source: L. 2019: Entire section added, (SB 19-185), ch. 147, p. 1765, § 3, effective May 6.

Cross references: For the legislative declaration in SB 19-185, see section 1 of chapter 147, Session Laws of Colorado 2019.

ANNOTATION

Law reviews. For comment, "Addressing Anti-Trafficking Movement", see 99 Denv. Labor Trafficking: The Next Step in the L. Rev. 233 (2022).

PART 3

PUBLIC INDECENCY

18-7-301. Public indecency.

(1) Any person who performs any of the following in a public place or where the conduct may reasonably be expected to be viewed by members of the public commits public indecency:

(a) An act of sexual intercourse; or

(b) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)

(c) A lewd exposure of an intimate part as defined by section 18-3-401 (2) of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person; or

(d) A lewd fondling or caress of the body of another person; or

(e) A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

(2) Public indecency is a petty offense.

(3) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)

Source: L. 71: R&RE, p. 453, § 1. **C.R.S. 1963:** § 40-7-301. **L. 2008:** (1)(d) amended and (1)(e) and (3) added, p. 1716, §§ 1, 2, effective July 1. **L. 2010:** Entire section amended, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3194, § 269, effective March 1, 2022.

ANNOTATION

"[L]ewd fondling or caress" language in subsection (1)(d) refers to lascivious conduct of an overtly sexualized nature, and subsection (1)(d) is not unconstitutionally overbroad. Because subsection (1)(d) prohibits only overtly sexualized behavior in public, it does not reach any constitutionally protected speech or expressive activity. *People v. Graves*, 2016 CO 15, 368 P.3d 317.

And, because defendant's conduct was clearly proscribed by subsection (1)(d), he cannot claim that the law was vague as applied to him. *People v. Graves*, 2016 CO 15, 368 P.3d 317.

The plain language of this offense reflects the general assembly's intent to

make public indecency a strict liability crime without a culpable mental state.

Because this section makes it a crime to perform any of the stated acts where the conduct may reasonably be expected to be viewed by members of the public, it does not matter whether the defendant knew he was in a public place. The objective standard depends on what a reasonable person in the defendant's position should have known. Therefore, the trial court did not err in rejecting a jury instruction that would have required the jury to find the defendant knew he was in a public place. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

Department of Youth Corrections teachers, staff, and juvenile residents are

"members of the public" under subsection (1). People In Interest of D.C., 2019 COA 22, 439 P.3d 72.

The common area in a prison facility is a "public" area for purposes of subsection (1)(e) because it is used by

other inmates and staff. People v. Lopez, 2020 COA 119, 471 P.3d 1285.

Public indecency was a lesser nonincluded offense of indecent exposure where defendant lacked the requisite intent to commit indecent exposure. People v. Lopez, 2020 COA 119, 471 P.3d 1285.

18-7-302. Indecent exposure - definitions.

(1) A person commits indecent exposure:

(a) If he or she knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;

(b) If he or she knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

(2) (a) (Deleted by amendment, L. 2003, p. 1435, § 31, effective July 1, 2003.)

(b) Indecent exposure is a class 1 misdemeanor.

(3) (Deleted by amendment, L. 2002, p. 1587, § 21, effective July 1, 2002.)

(4) Indecent exposure is a class 6 felony if the violation is committed:

(a) Subsequent to two prior convictions of a violation of this section or of a violation of a comparable offense in any other state or in the United States, or of a violation of a comparable municipal ordinance; or

(b) When the person who commits indecent exposure knew there was a child in view of the act and the person is more than eighteen years of age and more than four years older than the child.

(5) As used in this section, unless the context otherwise requires:

(a) "Child" means a person under fifteen years of age.

(b) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

Source: L. 72: p. 275, § 4. C.R.S. 1963: § 40-7-302. L. 77: (1) amended, p. 965, § 36, effective July 1. L. 94: (2) amended and (3) and (4) added, p. 1721, § 18, effective July 1. L. 95: (2) to (4) amended, p. 1254, § 15, effective June 3. L. 2002: (2)(b), (3), and (4) amended, p. 1587, § 21, effective July 1. L. 2003: (2) and (4) amended, p. 1435, § 31, effective July 1. L. 2010: (1) amended and (5) added, (HB 10-1334), ch. 359, p. 1708, § 2, effective August 11. L. 2023: (4) and (5) amended, (HB 23-1135), ch. 422, p. 2479, § 1, effective June 7.

ANNOTATION

Subsection (1) provides a sufficiently clear standard of conduct, and application of the statute of the defendant's conduct did not deprive him of due process of law. *People v. Randall*, 711 P.2d 689 (Colo. 1985).

Elements of offense not satisfied simply by proof that defendant was naked. A person must do something that would make his or her genitals visible to another person.

People v. Barrus, 232 P.3d 264 (Colo. App. 2009).

Subsection (4) is a sentence enhancer, not a substantive offense. Therefore, the prosecution must prove the prior convictions to the court, not the jury. The burden of proof to the court is preponderance of the evidence. *People v. Schreiber*, 226 P.3d 1221 (Colo. App. 2009); *People v. Riley*, 2016 COA 76, 433 P.3d 43.

PART 4

COMMERCIAL SEXUAL ACTIVITY WITH A CHILD

Editor's note: This part 4 was repealed in 1977 and was subsequently recreated and reenacted in 1979, resulting in the addition, relocation, and elimination of sections as well as subject matter. This part 4 was not amended prior to its repeal in 1977. For the text of this part 4 prior to 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

18-7-401. Definitions.

As used in this part 4, unless the context otherwise requires:

- (1) "Child" means a person who is under eighteen years of age.
- (2) "Commercial sexual activity" means sexual activity for which anything of value is given to, promised to, or received by a person.

(3) "Sexual activity" means:

- (a) Sexual contact, as defined in section 18-3-401 (4);
- (b) Sexual intrusion, as defined in section 18-3-401 (5);
- (c) Sexual penetration, as defined in section 18-3-401 (6);
- (d) Sexual exploitation of a child pursuant to section 18-6-403 (3)(a) and (3)(d); or
- (e) An obscene performance, as defined in section 18-7-101.

Source: **L. 79:** Entire part RC&RE, p. 740, § 1, effective May 31. **L. 85:** (6) and (7) amended, p. 623, § 8, effective July 1. **L. 2026:** Entire section R&RE, (SB 26-015), ch. 335, p. 2030, § 2, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

18-7-402. Soliciting for commercial sexual activity with a child - sentencing.

- (1) A person commits soliciting for commercial sexual activity with a child if the person:
 - (a) Knowingly solicits a child for commercial sexual activity;
 - (b) Knowingly solicits another for commercial sexual activity with a child;
 - (c) Arranges or offers to arrange a meeting of persons knowing the meeting will facilitate commercial sexual activity with a child; or
 - (d) Directs another to a place knowing the direction will facilitate commercial sexual activity with a child.
- (2) (a) Soliciting for commercial sexual activity with a child is a class 3 felony.
- (b) A person convicted of soliciting for commercial sexual activity with a child shall be sentenced in accordance with the provisions of section 18-1.3-401 and this subsection (2).

(c) If the court sentences the person to a term of probation as permitted by section 18-1.3-202, the court shall order as a condition of probation, in addition to the requirements of section 18-1.3-1007 (1)(a), that the person serve three hundred sixty-four days imprisonment in the county jail. During the mandatory period of imprisonment, the person is not eligible for deductions of their sentence pursuant to section 17-26-109, including for trusty prisoner status pursuant to section 17-26-109 (1)(b); except that the person receives credit for the time served in custody for the offense prior to the conviction. During the mandatory period of imprisonment, the court does not have discretion to employ any sentencing alternatives described in section 18-1.3-106.

Source: **L. 79:** Entire part RC&RE, p. 741, § 1, effective May 31. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2031, § 3, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

The statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution. The offense of soliciting for child prostitution is an offense in and of itself with its own designated penalty level. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

The person seeking the illicit act and the person who acts as the agent between the person seeking the illicit act and the child prostitute are both guilty of solicitation of prostitution under this section. *People v. Emerterio*, 819 P.2d 516 (Colo. App. 1991), rev'd on other grounds sub nom.

People v. San Emerterio, 839 P.2d 1161 (Colo. 1992).

Subsections (1)(a) and (1)(b) require proof that the defendant's purpose was child prostitution, not that the defendant's purpose was prostitution and that the victim was a child. Neither the victim's age nor the defendant's knowledge of, or belief concerning, the victim's age is an element of soliciting for child prostitution. *People v. Ross*, 2021 CO 9, 479 P.3d 910.

The culpable mental state of soliciting for child prostitution under subsections (1)(a) and (1)(b) is "knowingly". Although

these subsections do not expressly include a culpable mental state, the culpable mental state of knowingly must be imputed. Subsections (1)(a) and (1)(b) proscribe certain conduct when it is accompanied by a particular attendant circumstance, but they do not require a result. The culpable mental state of knowingly is defined in terms of conduct, the attendant circumstances, the result of the offense, or a combination of any of the three. The culpable mental state of "intentionally" is defined only in terms of the result of the offense. Therefore, knowingly is the culpable mental state that best fits in subsections (1)(a) and (1)(b). *Randolph v. People*, 2025 CO 44, 570 P.3d 1022.

Court did not err by instructing the jury on the lesser included offense of

soliciting for prostitution in a soliciting for child prostitution case. *People v. Ross*, 2019 COA 79, 482 P.3d 452, *aff'd* on other grounds, 2021 CO 9, 479 P.3d 910, and *overruled* on other grounds in *Randolph v. People*, 2025 CO 44, 570 P.3d 1022.

Jury instruction need not explicitly state mens rea as long as it informs jurors about governing law. A jury can infer the mental state of a defendant without instruction to do so. *People v. Dominguez*, 2024 COA 32, 551 P.3d 1205.

Abandonment and renunciation is not an affirmative defense to soliciting for child prostitution. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

18-7-403. Pandering of a child.

(1) A person who does any of the following for money or other thing of value commits pandering of a child:

(a) Inducing a child by menacing or criminal intimidation to engage in commercial sexual activity; or

(b) Knowingly arranging or offering to arrange a situation in which a child may engage in commercial sexual activity.

(2) (a) Pandering of a child pursuant to subsection (1)(a) of this section is a class 2 felony. The court shall sentence a person convicted of pandering of a child as described in subsection (1)(a) of this section to the department of corrections for a term of at least the minimum of the presumptive range for a class 2 felony, as set forth in section 18-1.3-401.

(b) Pandering of a child pursuant to subsection (1)(b) of this section is a class 3 felony. The court shall sentence a person convicted of pandering of a child as described in subsection (1)(b) of this section to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2032, § 4, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

18-7-403.5. Procurement of a child.

(1) A person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another person a child for commercial sexual activity commits procurement of a child.

(2) Procurement of a child is a class 3 felony. The court shall sentence a person convicted of procurement of a child to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 83: Entire section added, p. 696, § 10, effective June 15. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2032, § 5, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

18-7-404. Keeping a place for commercial sexual activity with a child.

(1) A person who has or exercises control over the use of any place which offers seclusion or shelter for commercial sexual activity with a child commits keeping a place of commercial sexual activity with a child if the person:

(a) Knowingly grants or permits the use of the place for commercial sexual activity with a child; or

(b) Permits the continued use of the place for commercial sexual activity with a child after becoming aware of facts or circumstances from which the person should reasonably know that the place is being used for commercial sexual activity with a child.

(2) Keeping a place of commercial sexual activity with a child is a class 3 felony. The court shall sentence a person convicted of keeping a place of commercial sexual activity with a child to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2032, § 6, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

18-7-405. Pimping of a child.

(1) A person who knowingly lives on or is supported or maintained in whole or in part by money or other thing of value earned, received, procured, or realized by a child through commercial sexual activity commits pimping of a child.

(2) Pimping of a child is a class 3 felony. The court shall sentence a person convicted of pimping of a child to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2033, § 7, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Defendant's convictions for pimping of a child and patronizing a prostituted child did not violate defendant's state constitutional right to equal protection as applied to him. The pimping of a child

statute does not penalize the same or more culpable conduct proscribed by the harsher patronizing a prostituted child statute. *People v. Price*, 2023 COA 96, 542 P.3d 268.

18-7-405.5. Inducement of commercial sexual activity with a child.

(1) A person who by word or action, other than conduct specified in section 18-7-403 (1)(a), induces a child to engage in commercial sexual activity commits inducement of commercial sexual activity with a child.

(2) Inducement of commercial sexual activity with a child is a class 3 felony. The court shall sentence a person convicted of inducement of commercial sexual activity with a child to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 81: Entire section added, p. 1003, § 1, effective May 28. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2033, § 8, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Inducement of child prostitution involves "an act which is prostitution by a child" and conflicts with the definition of patronizing a prostituted child, which includes, in part, "an act which is prostitution ... by a child". Because patronizing a prostituted child has a harsher penalty than inducement of child prostitution, charging a defendant with both inducement and patronizing due to prostitution by a child violates a defendant's right to equal protection under the law. *People v. Dominguez*, 2024 COA 32, 551 P.3d 1205.

Defendant's conduct of offering a child money to masturbate in his presence

constitutes one type of conduct intended to be punished by the general assembly, and, therefore statute is not unconstitutionally vague. *People v. Young*, 694 P.2d 841 (Colo. 1985).

Statute proscribes inducing a child to masturbate in presence of accused. *People v. Young*, 694 P.2d 841 (Colo. 1985).

Evidence insufficient to support verdict. If a defendant's attempts at persuasion do not induce the child to perform, or to agree to perform, a sexual act in exchange for money or other thing of value, he is not guilty of inducement of child prostitution. *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985).

18-7-406. Engaging in commercial sexual activity with a child.

(1) A person who performs any of the following with a child commits engaging in commercial sexual activity with a child:

- (a) Engages in commercial sexual activity with a child; or
- (b) Enters or remains in a place for commercial sexual activity with a child with intent to engage in commercial sexual activity with a child.

(2) Engaging in commercial sexual activity with a child is a class 3 felony. The court shall sentence a person convicted of engaging in commercial sexual activity with a child to the department of corrections for a term of at least the minimum of the presumptive range for a class 3 felony, as set forth in section 18-1.3-401.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31. **L. 2026:** Entire section amended, (SB 26-015), ch. 335, p. 2034, § 9, effective July 1.

Editor's note: Section 26 of chapter 335 (SB 26-015), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

Cross references: For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Patronizing a prostituted child includes, in part, "an act which is prostitution ... by a child", whereas inducement of child prostitution involves "an act which is prostitution by a child". Because patronizing a prostituted child has a harsher penalty than inducement of child prostitution, charging a defendant with both inducement and patronizing due to prostitution by a child violates a defendant's right to equal protection under the law. *People v. Dominguez*, 2024 COA 32, 551 P.3d 1205.

Offense of patronizing a child under subsection (1) is not unconstitutionally vague. Subsection (1)(a) requires that a defendant perform one of the prohibited acts with a child. The plain language of the statute makes clear that the actions of a child alone do not constitute an offense under that subsection. *People v. Houser*, 2020 COA 128, 490 P.3d 863.

The intent behind the crime of patronizing a prostituted child is to punish those people who either profit from or pay for sex with a child. *People v. Madden*, 111 P.3d 452 (Colo. 2005).

The crime of patronizing a prostituted child requires an exchange of something

of value, a commercial transaction. It is precisely this exchange that distinguishes this crime from that of sexual assault. *People v. Madden*, 111 P.3d 452 (Colo. 2005).

Charging defendant with patronizing a prostituted child violated defendant's right to equal protection under the state constitution because the same conduct or more culpable conduct than conduct engaged in by defendant is proscribed by other statutes with lighter sentences. Defendant was convicted of patronizing a prostituted child for engaging in "prostitution of a child" by inducing the child into prostitution with others or inducing her by coercion or threat or intimidation to allow others to perform sexual acts in exchange for money. Patronizing a prostituted child is subject to an indeterminate sentence, which is a harsher sentence than for the crimes of pandering of a child and inducement of child prostitution, which could be charged for the same conduct. *People v. Maloy*, 2020 COA 71, 465 P.3d 146.

Defendant's convictions for pimping of a child and patronizing a prostituted child did not violate defendant's state constitutional right to equal protection as

applied to him. The pimping of a child statute does not penalize the same or more culpable conduct proscribed by the harsher

patronizing a prostituted child statute. *People v. Price*, 2023 COA 96, 542 P.3d 268.

18-7-407. Criminality of conduct.

In any criminal prosecution under sections 18-7-402 to 18-7-407, it shall be no defense that the defendant did not know the child's age or that he reasonably believed the child to be eighteen years of age or older.

Source: L. 79: Entire part RC&RE, p. 742, § 1, effective May 31.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

This provision controls over § 18-1-503.5 and prohibits a defendant from offering a reasonable belief in age defense. *People v. Houser*, 2013 COA 11, 337 P.3d 1238; *People v. Maloy*, 2020 COA 71, 465 P.3d 146.

Denying mistake of age defense does not violate equal protection or due

process of law. *People v. Maloy*, 2020 COA 71, 465 P.3d 146.

This section prevents a defendant from raising the defense that he believed that the prostitute was of legal age, but it does not relieve the prosecution of its burden of proving defendant's specific intent to engage in child prostitution. *People v. Ross*, 2019 COA 79, 482 P.3d 452, *aff'd* on other grounds, 2021 CO 9, 479 P.3d 910.

18-7-408. Severability.

If any provision of this part 4 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 4 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 4 are declared to be severable.

Source: L. 79: Entire part RC&RE, p. 742, § 1, effective May 31.

18-7-409. Reports of convictions to department of education.

When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 90: Entire section added, p. 1026, § 11, effective July 1. **L. 2000:** Entire section amended, p. 1848, § 36, effective August 2.

PART 5

SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

Editor's note: The Colorado Supreme Court held this entire part 5 unconstitutional because the display provision of section 18-7-502 (5) was overly broad and infringed upon free speech rights of adults and the provision of section 18-7-503 which allowed an exemption to "accredited" museums, libraries, schools, and institutions of higher education was vague. See *Tattered Cover, Inc., v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-501. Definitions.

As used in this part 5, unless the context otherwise requires:

- (1) "Child" means a person under the age of eighteen years.
- (2) "Harmful to children" means that quality of any description or representation, in whatever form, of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
 - (a) Taken as a whole, predominantly appeals to the prurient interest in sex of children;
 - (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for children; and
 - (c) Is, when taken as a whole, lacking in serious literary, artistic, political, and scientific value for children.
- (3) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, or both, of:

(a) The character and content of any material described herein which is reasonably susceptible of examination; and

(b) The age of the child; however, an honest mistake shall constitute an excuse from liability hereunder if a reasonable bona fide attempt is made to ascertain the true age of such child.

(4) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(5) "Sexual conduct" means actual or explicitly simulated acts of masturbation, sexual intercourse, sodomy, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such be female, breast.

(6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the areola, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Source: L. 81: Entire part added, p. 1004, § 1, effective June 29. **L. 2025:** (5) amended, (SB 25-298), ch. 298, p. 1522, § 1, effective May 30.

ANNOTATION

Law reviews. For article, "Obscenity Law Constitutional Statute", see 60 Den. L.J. 49 in Colorado: The Struggle to Pass a (1982).

18-7-502. Unlawful acts.

(1) It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a child:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

(2) It shall be unlawful for any person knowingly to sell to a child an admission ticket or pass, or knowingly to admit a child to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by children not admitted to any such premises.

(3) It shall be unlawful for any child falsely to represent to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this section, or with the intent to procure his admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(4) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is the parent or guardian of any juvenile, or that any child is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this section, or with the intent to procure any child's admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(5) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (5), or explicit verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

(6) A violation of any provision of this section is a class 2 misdemeanor.

Source: L. 81: Entire part added, p. 1005, § 1, effective June 29.

ANNOTATION

Law reviews. For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982).

Display provisions in subsection (5) unconstitutional. Display provisions must

be narrowly drawn so as to only have an incidental effect on the bookseller's right to sell adult materials and an adult's ability to purchase them. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-503. Applicability.

(1) Nothing contained in this part 5 shall be construed to apply to:

(a) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school, or institution of higher education;

(b) The exhibition or performance of any play, drama, tableau, or motion picture by any theater, museum, school, or institution of higher education, either supported by public appropriation or which is an accredited institution supported by private funds.

Source: L. 81: Entire part added, p. 1006, § 1, effective June 29.

ANNOTATION

Term "accredited" unconstitutionally vague. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

Deletion of "accredited" from the exception provision creates a

classification which is not supported by an overriding justification thus exception violates equal protection. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-504. Severability.

If any provision of this part 5 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 5 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 5 are declared to be severable.

Source: L. 81: Entire part added, p. 1006, § 1, effective June 29.

ANNOTATION

Severing of unconstitutional provisions declared unconstitutional. Tattered Cover, under this section would frustrate clear Inc. v. Tooley, 696 P.2d 780 (Colo. 1985). legislative intent; therefore entire part is

PART 6

VISUAL REPRESENTATIONS CONTAINING ACTUAL VIOLENCE

18-7-601. Dispensing violent films to minors - misdemeanors.

(1) No person shall sell, rent, or otherwise furnish to a minor any video tape, video disc, film representation, or other form of motion picture if:

(a) The average person, applying contemporary community standards, would find that the work, taken as a whole, predominantly appeals to the interest in violence; and

(b) The work depicts or describes, in a patently offensive way, repeated acts of actual, not simulated, violence resulting in serious bodily injury or death; and

(c) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) For the purposes of this section, "minor" means any person under eighteen years of age, and "serious bodily injury" shall be defined as provided in section 18-1-901 (3)(p).

(3) Any person who violates subsection (1) of this section is guilty of a civil infraction and, upon conviction thereof, shall be punished by a fine of one thousand dollars; except that, for a second or subsequent offense, the fine shall be five thousand dollars.

Source: L. 88: Entire part added, p. 735, § 1, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3194, § 270, effective March 1, 2022.

PART 7

SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

18-7-701. Sexual conduct in a correctional institution.

(1) An employee, contract employee, or volunteer of a correctional institution or an individual who performs work or volunteer functions in a correctional institution who engages in sexual conduct with a person who is in lawful custody in a correctional institution commits the offense of sexual conduct in a correctional institution.

(2) For purposes of this section:

(a) "Correctional institution" means a correctional facility, as defined in section 17-1-102 (1.7), C.R.S., a local jail, as defined in section 17-1-102 (7), C.R.S., operated by or under contract with the department of corrections, a jail, a facility operated by or under contract with the department of human services in which juveniles are or may be lawfully held for detention or commitment for the commission of a crime, or a facility of a community corrections program as defined in section 17-27-102 (3), C.R.S.

(b) "Sexual conduct" means sexual contact as defined in section 18-3-401 (4), sexual intrusion as defined in section 18-3-401 (5), or sexual penetration as defined in section 18-3-401 (6). "Sexual conduct" does not include acts of an employee of a correctional institution or a person who has custody of another person that are performed to carry out the necessary duties of the employee or the person with custody.

(3) Sexual conduct in a correctional institution is a class 5 felony if the sexual conduct includes sexual intrusion or sexual penetration and is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution or for the department of corrections, the department of human services, or a community corrections program.

(4) Sexual conduct in a correctional institution is a class 6 felony if:

(a) The sexual conduct consists solely of sexual contact and is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution or for the department of corrections, the department of human services, or a community corrections program;

(b) The sexual conduct includes sexual intrusion or sexual penetration and is committed by a volunteer.

(5) Sexual conduct in a correctional institution is a class 1 misdemeanor if the sexual conduct consists solely of sexual contact and is committed by a volunteer.

Source: L. 2000: Entire part added, p. 920, § 7, effective July 1. **L. 2002:** Entire section amended, p. 488, § 1, effective July 1. **L. 2010:** Entire section amended, (HB 10-1277), ch. 262, p. 1189, § 1, effective July 1.

PART 8

CRIMINAL INVASION OF PRIVACY

18-7-801. Criminal invasion of privacy.

(1) A person who knowingly observes or takes a photograph of another person's intimate parts, as defined in section 18-3-401 (2), without that person's consent, in a situation where the person observed or photographed has a reasonable expectation of privacy, commits criminal invasion of privacy.

(2) Criminal invasion of privacy is a class 2 misdemeanor.

(3) For the purposes of this section, "photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, digitally, or chemically reproduced visual material.

Source: L. 2004: Entire part added, p. 655, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-128), ch. 415, p. 2046, § 3, effective July 1.

PART 9

UNLAWFUL DISTRIBUTION OF SUICIDE RECORDINGS

18-7-901. Unlawful distribution of a suicide recording - definitions - Lil' Von Mercado's Law.

(1) A person commits the offense of posting an image of suicide of a minor if the person intentionally posts or distributes through the use of social media or any website, or disseminates through other means, an image of a minor attempting suicide, dying by suicide, or having died by suicide, with the intent to harass, intimidate, or coerce any person, and the posting or distribution results in serious emotional distress to any person.

(2) Posting an image of suicide as described in subsection (1) of this section of a minor is a civil infraction and is punishable by a penalty of one hundred dollars per violation; except that

posting an image of suicide of a minor is a class 2 misdemeanor if the person was the first or original person to post, distribute, or disseminate the image.

(3) For purposes of this section, unless the context otherwise requires:

(a) "Image" means a photograph, film, videotape, recording, digital file, or other reproduction.

(b) "Social media" means any electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including but not limited to videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail, or internet website profiles.

(4) It is not an offense under this section if the posting or distribution of the image is a fictional work or a documentary; or is related to a matter of public interest or public concern; or related to the reporting of unlawful conduct; or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.

(5) This section is known as and may be cited as "Lil' Von Mercado's Law".

Source: L. 2019: Entire part added, (HB 19-1334), ch. 388, p. 3455, § 1, effective August 2.
L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3194, § 271, effective March 1, 2022.

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PART 5

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PART 1

OBSTRUCTION OF PUBLIC JUSTICE

18-8-101. Definitions.

As used in this article 8, unless the context otherwise requires:

- (1) "Government" has the same meaning as described in section 18-1-901 (3)(i).
- (2) "Governmental function" has the same meaning as described in section 18-1-901 (3)(j).
- (2.5) "Peace officer" has the same meaning as described in section 16-2.5-101, C.R.S.
- (2.7) "Public safety emergency call center" means any public entity that provides emergency response services to the public, including, but not limited to, 911 dispatch centers.
- (2.8) "Public safety entity" means a law enforcement agency, fire department, fire district, emergency medical services provider, or any other public organization responsible for public safety.
- (3) "Public servant" has the same meaning as described in section 18-1-901 (3)(o).
- (4) "Shelter-in-place order" means an official order or direction from government officials to the occupants of a building to seek shelter from an external threat in the building or a safe structure.

Source: **L. 71:** R&RE, p. 453, § 1. **C.R.S. 1963:** § 40-8-101. **L. 92:** Entire section amended, p. 405, § 19, effective June 3. **L. 2003:** (2.5) added, p. 1628, § 63, effective August 6. **L. 2023:** IP amended and (4) added, (SB 23-249), ch. 418, p. 2469, § 1, effective June 7. **L. 2025:** (2.7) and (2.8) added, (SB 25-060), ch. 74, p. 318, § 1, effective October 1.

Editor's note: Subsection (2.5) was originally enacted as subsection (4) but was renumbered on revision for ease of location.

ANNOTATION

Corporation or a corporate body is not included in the definition of "government". Bailey v. People, 200 Colo. 549, 617 P.2d 549 (1980).

servant" performing a "governmental function" on behalf of a "government" as defined in this section. Bailey v. People, 200 Colo. 549, 617 P.2d 549 (1980).

Employee of the Colorado Springs urban renewal effort is not a "public

18-8-102. Obstructing government operations.

(1) (a) A person commits obstructing government operations if the person intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant by using or threatening to use violence, force, or physical interference or obstacle.

(b) A person commits obstructing government operations if the person repeatedly contacts or calls a public safety emergency call center or public safety entity and the contact or call is not for the legitimate reporting of a public safety concern, to report an emergency, or to seek assistance.

(2) It shall be an affirmative defense that:

(a) The obstruction, impairment, or hindrance was of unlawful action by a public servant; or

(b) The obstruction, impairment, or hindrance was of the making of an arrest; or

(c) The obstruction, impairment, or hindrance of a governmental function was by lawful activities in connection with a labor dispute with the government.

(3) Obstructing government operations is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 453, § 1. C.R.S. 1963: § 40-8-102. L. 73: p. 538, § 5. L. 2022: (3) amended, (HB 22-1229), ch. 68, p. 345, § 27, effective March 1. L. 2025: (1) amended, (SB 25-060), ch. 74, p. 318, § 2, effective October 1.

Editor's note: Section 47 of chapter 68 (HB 22-1229), Session Laws of Colorado 2022, provides that the act amending subsection (3) is effective March 1, 2022, but the governor did not approve the act until April 7, 2022.

Cross references: For impeding any public official in the lawful performance of his or her duties or activities, see § 18-9-110.

18-8-103. Resisting arrest.

(1) A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means which creates a substantial risk of causing bodily injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the peace officer was attempting to make an arrest which in fact was unlawful, if he was acting under color of his official authority, and in attempting to make the arrest he was not resorting to unreasonable or excessive force giving rise to the right of self-defense. A peace officer acts "under color of his official authority" when, in the regular course of assigned duties, he is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him.

(3) The term "peace officer" as used in this section and section 18-8-104 means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person whose arrest is attempted.

(4) Resisting arrest is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 454, § 1. C.R.S. 1963: § 40-8-103. L. 72: p. 593, § 69. L. 77: IP(1) amended, p. 965, § 37, effective July 1. L. 81: (1)(b) amended, p. 981, § 5, effective May 13.

ANNOTATION

Law reviews. For article, "Impeding Unlawful Arrest: A Question of Authority and Criminal Liability", see 61 Den. L.J. 655 (1984).

Since the first amendment protects the right to criticize police, it protects the right to remain in the area to be able to criticize the observable police conduct.

Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Because arrestee's criticism was constitutionally protected by the first amendment, there was no probable cause to arrest him. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Arrestee's first amendment rights were clearly established at the time of his arrest such that there was no arguable probable cause to arrest him for criticizing the police. *Jordan v. Adams County Sheriff's Office*, 73 F.4th 1162 (10th Cir. 2023).

Grant of summary judgment on qualified immunity claims improper where criticism directed at police is protected by the first amendment and cannot justify adverse police action. The first amendment does not protect only quiet and respectful behavior toward police; it protects loud criticism that may annoy or distract the officer. *Jordan v. Adams County Sheriff's Office*, 73 F.4th 1162 (10th Cir. 2023).

The general assembly is free to prescribe different punishments for conduct perceived to result in varying degrees of social consequences, and the distinction between this section and § 18-2-203 (1)(f) is not arbitrary or inadvertent. Therefore § 18-2-203 (1)(f) is not unconstitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Resisting arrest is distinguishable from second degree assault on a peace officer, as described in § 18-3-203, and third degree assault, as described in § 18-3-204, and therefore these sections do not violate equal protection. This section and § 18-3-204 require that the defendant act knowingly, whereas § 18-3-203 requires that the defendant act intentionally. Further, § 18-3-203 requires the defendant to intend to cause bodily harm, while this section

requires only that the defendant use or threaten to use physical force. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Section allows reasonable force. A citizen in resisting an unlawful arrest cannot act with any more force than could the officer in effecting a lawful arrest. This section does not broaden the long accepted rule that one may not act to protect himself or property, whether it be in self-defense or otherwise, with more force than is reasonably necessary. *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613 (1972) (decided under former § 40-7-57, C.R.S. 1963).

Use of force prohibited. A person may not use force to resist being placed under arrest or in protective custody by a police officer engaged in the performance of his duties, regardless of whether the police conduct is unlawful. *People v. Hess*, 687 P.2d 443 (Colo. 1984).

The unit of prosecution for resisting arrest is the number of discrete volitional acts of resisting arrest. The unit of prosecution is not based on the number of victim-officers resisted or the number of arrests resisted. *People v. Lowe*, 2020 COA 116, 486 P.3d 397.

A person is "arrested" when an officer applies a level of physical control over the person resisting arrest so as to reasonably ensure that the person does not leave. *Thomas v. People*, 2021 CO 84, 500 P.3d 1095.

In this case, the deputies effected the defendant's arrest when they handcuffed him. It was improper for a jury to consider

defendant's conduct after he was handcuffed with regard to the resisting arrest charge. *Thomas v. People*, 2021 CO 84, 500 P.3d 1095.

Where defendant was charged with both resisting arrest and second degree assault, one of the factors in determining whether the defendant is guilty of one or both of the charges shall be whether the actions of the defendant, which caused injury to the officers, were continuous, stemming from his efforts to resist arrest, or whether there was a break between his actions to thwart the officers efforts to arrest him and the actions which lead to the injury of the officers. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

A person using violence against a peace officer to avoid arrest commits the crime of resisting arrest up to the point of arrest. However, after the arrest is made, a person in custody who uses violence against a peace officer commits second degree assault under § 18-3-203. *People v. Stanley*, 56 P.3d 1241 (Colo. App. 2002).

Resisting arrest is a lesser included offense of second degree assault on a peace officer under the strict elements test. *People v. Snider*, 2021 COA 19, 491 P.3d 423.

Self-defense instruction required for case involving unreasonable or excessive force during an arrest when defendant charged with resisting arrest. Self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that

their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

Resisting arrest applies only to arrests made by peace officers acting under color of official authority and not to an off-duty police officer privately employed as a security guard for a skating rink. *People In Interest of J.J.C.*, 835 P.2d 553 (Colo. App. 1992), *aff'd*, 854 P.2d 801 (Colo. 1993).

Defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to the criminal act of obstructing a peace officer and resisting arrest. *People v. Brown*, 217 P.3d 1252 (Colo. 2009).

Conviction sustained by evidence. *Feste v. People*, 93 Colo. 206, 25 P.2d 177 (1933) (decided under former C.L. § 6793); *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

The undisputed record shows defendant was in custody when he tried to escape from the police, so there was no basis for a lesser included instruction for resisting arrest. *People v. Jompp*, 2018 COA 128, 440 P.3d 1166.

The use of a takedown maneuver to slam to the ground a nonviolent misdemeanor convicted under this section who poses no immediate threat to an officer or others based on minimal resistance to arrest is unreasonable and constitutes excessive force under the fourth

amendment. *Surat v. Klamser*, 52 F.4th 1261 (10th Cir. 2022).

Applied in *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983).

18-8-104. Obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer.

(1) (a) A person commits obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority; knowingly obstructs, impairs, or hinders the prevention, control, or abatement of fire by a firefighter, acting under color of his or her official authority; knowingly obstructs, impairs, or hinders the administration of medical treatment or emergency assistance by an emergency medical service provider or rescue specialist, acting under color of his or her official authority; or knowingly obstructs, impairs, or hinders the administration of emergency care or emergency assistance by a volunteer, acting in good faith to render such care or assistance without compensation at the place of an emergency or crash.

(b) To assure that animals used in law enforcement or fire prevention activities are protected from harm, a person commits obstructing a peace officer or firefighter when, by using or threatening to use violence, force, physical interference, or an obstacle, he or she knowingly obstructs, impairs, or hinders any such animal.

(1.5) A person shall not be charged with the offense described in subsection (1) of this section because the person remained silent or because the person stated a verbal opposition to an order by a government official.

(2) It is not a defense to a prosecution under this section that the peace officer was acting in an illegal manner, if he or she was acting under color of his or her official authority. A peace officer acts "under color of his or her official authority" if, in the regular course of assigned duties, he or she makes a judgment in good faith based on surrounding facts and circumstances that he or she must act to enforce the law or preserve the peace.

(2.5) If a person is alleged to have committed the offense described in subsection (1)(a) or (1)(b) of this section by using or threatening to use an unmanned aircraft system as an obstacle, the offense does not apply if the person who operates the unmanned aircraft system:

(a) Obtains permission to operate the unmanned aircraft system from a law enforcement agency or other entity that is coordinating the response of peace officers, firefighters, emergency medical service providers, rescue specialists, or volunteers to an emergency or crash;

(b) Continues to communicate with such entity during the operation of the unmanned aircraft system; and

(c) Complies immediately with any instructions from the entity concerning the operation of the unmanned aircraft system.

(3) Repealed.

(4) Obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer is a class 2 misdemeanor.

(5) For purposes of this section, unless the context otherwise requires:

(a) "Emergency medical service provider" means a member of a public or private emergency medical service agency, whether that person is a volunteer or receives compensation for services rendered as such emergency medical service provider.

(b) "Obstacle" includes an unmanned aircraft system.

(c) "Rescue specialist" means a member of a public or private rescue agency, whether that person is a volunteer or receives compensation for services rendered as such rescue specialist.

Source: **L. 71:** R&RE, p. 454, § 1. **C.R.S. 1963:** § 40-8-104. **L. 77:** (1) amended, p. 965, § 38, effective July 1. **L. 83:** (3) repealed, p. 671, § 23, effective July 1. **L. 90:** (1) amended, p. 1611, § 2, effective July 1. **L. 96:** (1) and (4) amended, p. 1477, § 41, effective June 1; (1)(a) and (4) amended and (5) added, p. 956, § 1, effective July 1. **L. 2012:** (2) amended, (HB 12-1310), ch. 268, p. 1398, § 15, effective June 7. **L. 2018:** (2.5) and (5)(c) added and (5)(b) amended, (HB 18-1314), ch. 385, p. 2309, § 2, effective August 8. **L. 2021:** (1.5) added, (SB 21-271), ch. 462, p. 3194, § 272, effective March 1, 2022. **L. 2026:** (1)(a) and (2.5)(a) amended, (HB 26-1237), ch. 117, p. 465, § 11, effective August 12.

Editor's note: Amendments to subsections (1) and (4) in House Bill 96-208 and Senate Bill 96-68 were harmonized.

Cross references: For the legislative declaration in HB 18-1314, see section 1 of chapter 385, Session Laws of Colorado 2018.

ANNOTATION

Since the first amendment protects the right to criticize police, it protects the right to remain in the area to be able to criticize the observable police conduct. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Because arrestee's criticism of police was constitutionally protected by the first amendment, there was no probable cause to arrest him. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Arrestee's first amendment rights were clearly established at the time of his arrest such that there was no arguable probable cause to arrest him for criticizing the police. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Grant of summary judgment on qualified immunity claims improper where criticism directed at police is protected by the first amendment and cannot justify adverse police action. The first amendment does not protect only quiet and respectful behavior toward police; it protects loud criticism that may annoy or distract the officer. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

A violation of subsection (1)(a) is punishable as a class 2 misdemeanor and supports only the use of minimal force by police under the fourth amendment. Jordan v. Adams County Sheriff's Office, 73 F.4th 1162 (10th Cir. 2023).

Interference with peace officer is a matter of both local and statewide

concern. City & County of Denver v. Howard, 622 P.2d 568 (Colo. 1981).

And Denver ordinance does not conflict with section. Denver revised municipal code 846.1-2 (interfering with a police officer) does not conflict with this section. City & County of Denver v. Howard, 622 P.2d 568 (Colo. 1981).

If violation of municipal ordinance may result in fine or imprisonment, then the ordinance is penal in nature within the meaning of this section. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

Term "enforcement" as used in subsection (1) encompasses those activities which a peace officer is under a duty to perform in order to give effect to a penal law. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

Obstruction of booking process is violation of this section. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

While mere verbal opposition alone may not suffice to merit a conclusion of interference or obstruction, a combination of statements and acts, viewed in the totality of the circumstances, can form the crime of obstruction. Dempsey v. People, 117 P.3d 800 (Colo. 2005); People in Interest of K.D.W., 2020 COA 110, 471 P.3d 1276.

Obstruction of a peace officer under this section is a lesser included offense of second degree assault under § 18-3-203 (1)(c) and (1)(f) since all of the elements contained in the definition of obstruction of a peace officer would be necessarily

established by the proof of the elements of second degree assault under § 18-3-203 (1)(c). *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under this section was a lesser included offense of second degree assault under § 18-3-203 (1)(c) was error requiring a new trial where defendant acknowledged the officers sustained bodily injury but there was no admission that he intended to act in a manner that would cause the injury. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under this section was a lesser included offense of second degree assault under § 18-3-203 (1)(f) was error requiring a new trial where defendant testified that the only action he volitionally took after the first officer entered the cell was to raise his arms. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Self-defense is an available defense against a charge under this section when a defendant reasonably believes that unreasonable or excessive force is being used by a peace officer. *People v. Barrus*, 232 P.3d 264 (Colo. App. 2009).

Defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to the criminal act of obstructing a peace officer and resisting arrest. *People v. Brown*, 217 P.3d 1252 (Colo. 2009).

The unit of prosecution for obstruction is defined in terms of discrete volitional acts of obstruction that interfere with government operations. The people were not required to prove that defendant resisted or obstructed a particular officer, just that the defendant resisted or obstructed any officer. *People v. Snider*, 2021 COA 19, 491 P.3d 423.

The use of a takedown maneuver to slam to the ground an arrestee who poses no immediate threat to an officer or others based on minimal resistance to arrest is unreasonable and constitutes excessive force under the fourth amendment. *Surat v. Klamser*, 52 F.4th 1261 (10th Cir. 2022); *Jordan v. Adams County Sheriff's Office*, 73 F.4th 1162 (10th Cir. 2023).

Applied in *United States v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014); *Holdridge v. Blank*, 255 F. Supp. 3d 1088 (D. Colo. 2017).

18-8-105. Accessory to crime.

(1) A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person.

(2) "Render assistance" means to:

- (a) Harbor or conceal the other; or
 - (a.5) Harbor or conceal the victim or a witness to the crime; or
 - (b) Warn such person of impending discovery or apprehension; except that this does not apply to a warning given in an effort to bring such person into compliance with the law; or
 - (c) Provide such person with money, transportation, weapon, disguise, or other thing to be used in avoiding discovery or apprehension; or
 - (d) By force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person; or
 - (e) Conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.
- (3) Being an accessory to crime is a class 4 felony if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, and if that crime is designated by this code as a class 1 or class 2 felony.
- (4) Being an accessory to crime is a class 5 felony if the offender knows that the person being assisted is suspected of or wanted for a crime, and if that crime is designated by this code as a class 1 or class 2 felony.
- (5) Being an accessory to crime is a class 5 felony if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, or is suspected of or wanted for a crime, and if that crime is designated by this code as a felony other than a class 1 or class 2 felony; except that being an accessory to a class 6 felony is a class 6 felony.
- (6) Being an accessory to crime is a petty offense if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, or is suspected of or wanted for a crime, and if that crime is designated by this code as a misdemeanor of any class.

Source: L. 71: R&RE, p. 454, § 1. C.R.S. 1963: § 40-8-105. L. 91: (5) amended, p. 406, § 13, effective June 6. L. 97: (2)(a.5) added and (2)(e) amended, p. 1547, § 20, effective July 1. L. 2021: (6) amended, (SB 21-271), ch. 462, p. 3195, § 273, effective March 1, 2022.

ANNOTATION

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Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 35 Dicta 26 (1958). For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982).

Annotator's note. Since § 18-8-105 is similar to former §§ 40-1-12 and 40-1-13, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. At common law the accused must have rendered some assistance to a felon, and that assistance must have been such as to shelter him to some extent from prosecution, such as concealing him in his house. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The common-law rule that a person cannot be prosecuted as an accessory after the fact until after the principal has been convicted does not apply. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

Since the early days of the English common law, it has been generally held that any assistance whatever given to one known to be a felon in order to hinder his being apprehended, or tried, or suffering punishment makes the assistor an accessory after the fact. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

Constitutionality. Former section held not unconstitutionally vague since it gave fair warning of the conduct forbidden, and men of common intelligence can readily apprehend the statute's meaning and application. This is the accepted test in this

jurisdiction. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

This section does not violate a defendant's constitutional privilege against self-incrimination. An accessory after the fact, by definition, does not assent to the commission of the principal's crime. And this section does not impose liability upon defendant for his failure to reveal his complicity, but rather for his affirmative acts which constituted the interdicted conduct. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

This section gives fair warning of the conduct forbidden. Men of common intelligence can readily comprehend the statute's meaning and application. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

The word "might" must be construed to mean a reasonable probability that the forbidden result would obtain and thus the statute is not unconstitutionally vague. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Neither is this section unconstitutionally overbroad. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Any assistance whatever given to one known to be a felon, including the harboring and protection of the wrongdoer, constitutes "rendering assistance" within the meaning of this section. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

Although the mere failure to inform public authorities of one's knowledge of a felon may not be sufficient to establish that an accused is an accessory to the crime, the offense can be established by

proving the defendant was of personal help to, or aided, the offender in avoiding arrest and prosecution. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

The act of an accessory providing a felon with a secret hiding place in order that he would avoid detection and arrest constituted giving shelter or refuge and thus violated the statutory prohibition against harboring and/or concealing. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

The act of harboring or concealing a wanted person, coupled with the requisite intent under this section, forms the basis of the criminal offense. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

For factors supporting the conclusion that accessory was harboring and/or concealing a felon, see *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

Section applicable to noncriminal-code crimes. There is nothing in the statutory context of this section indicating a legislative intent to prohibit the application of its provisions on being an accessory to crime to noncriminal-code crimes. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal had committed a crime. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

Knowledge that a theft has occurred is knowledge sufficient to sustain a conviction of accessory to theft of auto parts. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

It is not necessary for the defendant to have known that the crime committed was a particular class. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

When such classification is relevant. The statutory classification of the crime committed by the principal (class one or two felony) is only relevant in determining the degree of the accessory charge (class four or five felony or class one petty offense). *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

The phrase "charged with", as used in the former accessory after the fact statute, means more than a mere formal charge and includes responsibility for the crime. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

Elements of offense. The offense may be committed by either concealing the commission of the crime from the magistrate, or by harboring or protecting the felon. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

To convict a defendant under this section it must be proved that a crime has been committed; that after full knowledge of the commission of such crime, the defendant concealed the same from the magistrate, or that defendant harbored and protected the criminal after he had full knowledge that the crime had been committed. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Where defendant was prosecuted as an accessory to murder, it was necessary for the people to prove that the alleged killer had murdered his wife, and that defendant with knowledge of that fact concealed the

commission of the crime, or that after full knowledge of the commission of the crime had harbored and protected the murderer. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Whether one is an accessory depends on whether what he did was a personal help to the offender to elude punishment. He need only aid the criminal to escape arrest and prosecution. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

To establish that an accused is guilty of being an accessory under subsection (5), the following statutory elements must be proven: (1) A crime has been committed; (2) the accused rendered assistance to the actor; (3) the accused intended to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of the principal; (4) the accused knew that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with such crime, or is suspected of or wanted in connection with such crime; and, (5) the underlying crime is designated as a felony other than a class 1 or 2 felony. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

Mere silence is not enough. Mere silence as to one's knowledge of a felony, with no intent to aid the felon, or mere failure to inform the public authorities, does not establish such person as an accessory. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Specific statutory definition of "render assistance" must be included in jury

instructions, where failure to do so may lead jurors to conclude that the defendant's mere presence at scene of crime is "assistance". *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Section does not retain full knowledge requirement of previous accessory after fact statutes. Prior to the adoption of subsection (1), proof that the defendant had full knowledge of the underlying crime actually committed was a condition precedent to conviction for the statutory offense of accessory after the fact. *People v. Barreras*, 44 Colo. App. 402, 618 P.2d 704 (1980), *aff'd*, 636 P.2d 686 (Colo. 1981).

This section has no application to one who was guilty of the principal offense as a complicitor, if the commission of both offenses is grounded upon the same act; a different specific intent is required for accessory offenses than for the crime of conspiracy. *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Evidence that defendant rendered assistance to his companions' efforts to conceal or destroy evidence of murder for which defendant was convicted supported defendant's conviction of being an accessory, on the basis of complicity, to the conduct of his two companions. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

This section has no application to one who was a principal in the commission of the crime. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Guilt of principal, not legal status, is element of section. The guilt or innocence

of an accessory after the fact depends as to one element on the factual status of the principal as to guilt or innocence; not on his legal status as regards liability or nonliability to suffer a penalty. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

Thus, the state must establish that the crime was in fact committed on the trial of the accessory, and the result of the trial of the principal, if there is a trial, is immaterial. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

Since this section creates a crime complete in itself, before a conviction may be had every necessary element must be established in the case in which the accessory is on trial, including the factual commission of the antecedent crime concealed or the perpetrator of which was harbored. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

On the trial of a criminal charge of accessory to a murder, the state is required to establish the killing, and this requirement is not satisfied by evidence of the prior conviction of the principal perpetrator of the crime. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

To successfully convict a defendant of being an accessory, there must be sufficient evidence presented to show that there was, in fact, a principal who was guilty of the crime charged, even though it is inconsequential whether or not the principal was ever charged with the criminal offense. *Britto v. People*, 178 Colo. 216, 497 P.2d 325 (1972).

But conviction of principal is not condition precedent. Under this article, being an accessory after the fact is a statutory offense, and a person may be convicted thereof although the principal had not been formally charged with, or convicted of the crime. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The accessory statute is held to create a substantive statutory crime and, as construed, the conviction of the principal is not a condition precedent to the conviction of an accessory. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

The conviction of the principal is not a condition precedent to the conviction of an accessory. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

The guilty plea of a codefendant as substantive evidence of the defendant's guilt is admissible where the defendant is charged with only acting as an accessory to the codefendant's offense. A codefendant's guilty plea to menacing is admissible to prove that the antecedent offense actually occurred. *People v. Rios*, 2020 COA 2, 463 P.3d 322.

Accessory distinguished from one who aids or abets a crime. It is not true that one can be indicted as principal whose conduct is such as to make of him an accessory. The penalty provided for this crime is entirely different from that authorized for one who "aids, abets, or assists", or who has advised and encouraged the perpetration of the crime, and the essential ingredients of the crimes under comparison are entirely

different. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

Accessory after the fact is not lesser included offense. As to accessories after the fact a specific charge raising that issue is necessary. Questions relating thereto are not included, upon the theory of a lesser included offense, within an information in which the persons accused are charged as principals. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968); *Mingo v. People*, 171 Colo. 474, 468 P.2d 849 (1970).

The court's refusal to instruct the jury that the crime of accessory during the fact is also a lesser included offense when robbery is charged, which was the defendant's principal theory of the case, was not error because accessory during the fact is a separate and distinct offense which was not charged and which could not properly have been the subject of an instruction. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

And acquittal of a criminal charge does not bar conviction as an accessory after

the fact. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

This section requires only that a defendant obstruct anyone in the performance of any act which might aid in detection of the principal; this section does not require that the act be successful. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

This section is distinguishable from § 18-8-111. A deliberate attempt to thwart law enforcement is more destructive than conduct not designed to do so. As a result, the greater punishment for the offense of accessory to a crime is justified. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Applied in *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979); *People v. McCall*, 43 Colo. App. 117, 603 P.2d 950 (1979); *People v. Archuleta*, 616 P.2d 977 (Colo. 1980); *People v. R.V.*, 635 P.2d 892 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983).

18-8-106. Refusal to permit inspections.

(1) A person commits a civil infraction if, knowing that a public servant is legally authorized to inspect property:

(a) He refuses to produce or make available the property for inspection at a reasonable hour; or

(b) If the property is available for inspection he refuses to permit the inspection at a reasonable hour.

(2) For purposes of this section, "property" means any real or personal property, including books, records, and documents which are owned, possessed, or otherwise subject to the control

of the defendant. A "legally authorized inspection" means any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision.

Source: L. 71: R&RE, p. 455, § 1. C.R.S. 1963: § 40-8-106. L. 2021: IP(1) amended, (SB 21-271), ch. 462, p. 3195, § 274, effective March 1, 2022.

18-8-107. Refusing to aid a peace officer - repeal. (Repealed)

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-107. L. 2021: (2) added by revision, (SB 21-271), ch. 462, pp. 3195, 3331, §§ 275, 803.

Editor's note: Subsections (1)(b)(II) and (1)(d)(II) provided for the repeal of subsections (1)(b) and (1)(d), respectively, effective March 1, 2022. (See L. 2021, pp. 3204, 3331.)

18-8-108. Compounding.

(1) A person commits compounding if he accepts or agrees to accept any pecuniary benefit as consideration for:

- (a) Refraining from seeking prosecution of an offender; or
- (b) Refraining from reporting to law enforcement authorities the commission or suspected commission of any crime or information relating to a crime.

(2) It is an affirmative defense to prosecution under this section that the benefit received by the defendant did not exceed an amount which the defendant reasonably believed to be due as restitution or indemnification for harm caused by the crime.

(3) Compounding is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-108. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3195, § 276, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Annotator's note. Since § 18-8-108 is similar to former G.S. § 810, relevant cases construing that provision have been included in the annotations to this section.

A promise to compound any criminal offense is itself a crime and affords no valid consideration for a contract. *Lomax v. Colo. Nat'l Bank*, 46 Colo. 229, 104 P. 85 (1909).

Thief or third person may recompense owner for loss resulting from theft. A thief

is under a legal, as well as a moral, duty to repay the person whose property he has stolen, and it is not in itself an illegal contract for him to give his own obligation therefor, or for a third party to agree to recompense the owner for the loss. *Giles v. De Cow*, 30 Colo. 412, 70 P. 681 (1902); *Lomax v. Colo. Nat'l Bank*, 46 Colo. 229, 104 P. 85 (1909).

18-8-109. Concealing death.

Any person who conceals the death of another person and thereby prevents a determination of the cause or circumstances of death commits a class 1 misdemeanor. For the purpose of this section only, "another person" includes a fetus born dead.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-109.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Elements of offense. A violation of this section requires proof that a defendant both

conceal a death and, by concealing the death, prevent a determination of the cause of the death. *People v. T & S Leasing, Inc.*, 763 P.2d 1049 (Colo. 1988).

18-8-110. False report of explosives, weapons, or harmful substances.

(1) Any person who reports to any other person that a bomb or other explosive, any chemical or biological agent, any poison or weapon, or any harmful radioactive substance has been placed

in any public or private place or vehicle designed for the transportation of persons or property, knowing that the report is false, commits a class 5 felony.

(2) Any person who reports to any other person that there is a mass shooting or an active shooter in a public or private place or vehicle designed for the transportation of persons or property, knowing that the report is false, causing the occupants of a building, place of assembly, or facility of public transportation to be evacuated or to be issued a shelter-in-place order; causing any disruptions or impacts to regular activities; or resulting in the initiation of a standard response protocol in response to the false report, commits a class 6 felony.

Source: **L. 71:** R&RE, p. 456, § 1. **C.R.S. 1963:** § 40-8-110. **L. 79:** Entire section amended, p. 743, § 1, effective July 1. **L. 81:** Entire section amended, p. 975, § 14, effective July 1. **L. 89:** Entire section amended, p. 839, § 77, effective July 1. **L. 2023:** Entire section amended, (SB 23-249), ch. 418, p. 2469, § 2, effective June 7; entire section amended, (HB 23-1293), ch. 298, p. 1788, § 25, effective October 1.

Editor's note: Amendments to this section by SB 23-249 and HB 23-1293 were harmonized.

ANNOTATION

Prosecution must prove that a person reported that a bomb had been placed at a location at the time of the report. If the substance of and circumstances surrounding a defendant's report permit a reasonable inference that a prohibited item or substance

was placed in a public or private place or vehicle, a fact finder may conclude that the "has been placed" element is satisfied. People ex rel. C.F., 2012 COA 75, 279 P.3d 1231.

18-8-111. False reporting to authorities - false reporting of an emergency - definition.

(1) (a) A person commits false reporting to authorities if:

(I) He or she knowingly:

(A) Causes by any means, including but not limited to activation, a false alarm of fire or other emergency or a false emergency exit alarm to sound or to be transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency which deals with emergencies involving danger to life or property; or

(B) Prevents by any means, including but not limited to deactivation, a legitimate fire alarm, emergency exit alarm, or other emergency alarm from sounding or from being transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency that deals with emergencies involving danger to life or property; or

(II) He or she makes a report or knowingly causes the transmission of a report to law enforcement authorities of a crime or other incident within their official concern when he or she knows that it did not occur; or

(III) He or she makes a report or knowingly causes the transmission of a report to law enforcement authorities pretending to furnish information relating to an offense or other incident within their official concern when he or she knows that he or she has no such information or knows that the information is false; or

(IV) Repealed.

(b) False reporting to authorities is a class 2 misdemeanor.

(c) Repealed.

(2) (a) A person commits false reporting of an emergency if he or she knowingly commits an act in violation of subsection (1) of this section that includes a knowing false report of an imminent threat to the safety of a person or persons by use of a deadly weapon.

(b) (I) Except as otherwise provided in this subsection (2)(b), false reporting of an emergency is a class 2 misdemeanor.

(II) False reporting of an emergency is a class 1 misdemeanor, if:

(A) The threat causes the occupants of a building, place of assembly, or facility of public transportation to be evacuated or to be issued a shelter-in-place order, the threat causes any disruptions or impacts to regular activities, or the threat results in the initiation of a standard response protocol in response to the false report; or

(B) The emergency response results in bodily injury of another person.

(III) False reporting of an emergency is a class 4 felony if the emergency response results in serious bodily injury of another person.

(IV) False reporting of an emergency is a class 3 felony if the emergency response results in the death of another person.

(c) Upon a conviction pursuant to this subsection (2), in addition to any other sentence imposed or restitution ordered, the court shall sentence the defendant to pay restitution in an amount equal to the cost of any emergency response or evacuation, including but not limited to fire and police response, emergency medical service or emergency preparedness response, and

transportation of any individual from the building, place of assembly, or facility of public transportation.

(d) It is not a defense to a prosecution pursuant to this subsection (2) that the defendant or another person did not have the intent or capability of committing the threatened or reported act.

(3) For purposes of subsections (1) and (2) of this section, the offense is committed and the defendant may be tried in the county where the defendant made the report, the county where the false report was communicated to law enforcement, or the county where law enforcement responded to the false report.

(4) A violation of this section does not preclude a conviction for a violation of any other criminal offense.

Source: **L. 71:** R&RE, p. 456, § 1. **C.R.S. 1963:** § 40-8-111. **L. 77:** (1)(b) and (1)(c) amended, p. 965, § 39, effective July 1. **L. 86:** (2) amended, p. 771, § 9, effective July 1. **L. 96:** (1)(c) amended and (1)(d) and (3) added, pp. 1840, 1841, §§ 2, 3, effective July 1. **L. 97:** (3) amended, p. 1541, § 6, effective July 1. **L. 2012:** (1)(a) and (2) amended, (HB 12-1304), ch. 237, p. 1049, § 2, effective May 29. **L. 2018:** Entire section amended, (SB 18-068), ch. 401, p. 2370, § 1, effective July 1. **L. 2021:** (1)(b), (2)(b)(I), and IP(2)(b)(II) amended, (SB 21-271), ch. 462, p. 3195, § 277, effective March 1, 2022; (1)(a)(IV)(B) and (1)(c)(II) added by revision, (SB 21-271), ch. 462, pp. 3195, 3331, §§ 277, 803. **L. 2023:** (2)(b)(II)(A) amended, (SB 23-249), ch. 418, p. 2470, § 3, effective June 7.

Editor's note: Subsections (1)(a)(IV)(B) and (1)(c)(II) provided for the repeal of subsections (1)(a)(IV) and (1)(c), respectively, effective March 1, 2022. (See L. 2021, pp. 3195, 3331.)

Cross references: For the legislative declaration in the 2012 act amending subsections (1)(a) and (2), see section 1 of chapter 237, Session Laws of Colorado 2012.

ANNOTATION

Defendant was not entitled to jury instruction that offense of false reporting to authorities was a lesser included offense of criminal impersonation because false reporting has the additional element of making or transmission of a report to law

enforcement authorities. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Nor did evidence support jury instruction on offense of false reporting to authorities as a lesser non-included

offense of criminal impersonation absent the initiation of affirmative action intended to communicate information. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Any error in refusing to give a false reporting instruction was harmless because it did not prohibit defendant from presenting his theory of defense. Trial court properly refused to give a false reporting instruction because there was no evidentiary basis upon which the jury could both rationally acquit on the greater charges but convict on the false reporting charge. Further, the failure to instruct on false reporting did not prevent defendant from presenting his theory that a passenger was driving the car at the time of the accident. One passenger testified that the other passenger, not defendant, was driving the car at the time of the accident. And defense counsel so argued in closing argument. Thus, any error in refusing to give the false reporting instruction was harmless because it did not prohibit defendant from presenting his theory of defense. *People v. Medrano-Bustamante*, 2013 COA 139, 412 P.3d 581, *aff'd in part, rev'd in part on other grounds sub nom. Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816.

This section is distinguishable from § 18-8-105. A deliberate attempt to thwart law enforcement is more destructive than conduct not designed to do so. As a result, the greater punishment for the offense of accessory to a crime is justified. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

False reporting to authorities is not a specific instance of attempt to influence a public servant. The crime of false reporting penalizes those who provide untruthful information to public officials, regardless of an attempt to influence public officials. The attempted influence offense can occur without any false reporting at all. Thus, the attempted influence charge and the false reporting charge do not differ solely by prohibiting general and specific conduct. *People v. Blue*, 253 P.3d 1273 (Colo. App. 2011).

A person reporting child abuse does not commit false reporting to authorities if he or she reports child abuse that cannot be proven because allegations of child abuse are a matter of public concern. *Lawson v. Stow*, 2014 COA 26, 327 P.3d 340.

18-8-111.5. False reporting of identifying information to law enforcement authorities - definition.

- (1) A person commits false reporting of identifying information if the person knowingly provides false identifying information to law enforcement authorities.
- (2) False reporting of identifying information is a class 2 misdemeanor; except that it is a class 6 felony if providing the false identifying information results in substantially impeding the

investigation or arrest of a person for the commission of a crime as defined in section 24-4.1-302 (1) that is a felony.

(3) As used in this section, "identifying information" means a person's name, address, birth date, social security number, or driver's license or Colorado identification number.

Source: L. 2021: Entire section added, (SB 21-271), ch. 462, p. 3196, § 278, effective March 1, 2022.

18-8-112. Impersonating a peace officer.

(1) A person who falsely pretends to be a peace officer and performs an act in that pretended capacity commits impersonating a peace officer.

(2) Impersonating a peace officer is a class 5 felony.

Source: L. 71: R&RE, p. 456, § 1. **C.R.S. 1963:** § 40-8-112. **L. 2003:** Entire section amended, p. 1383, § 1, effective May 1. **L. 2004:** Entire section amended, p. 1080, § 1, effective July 1. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1788, § 26, effective October 1.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

18-8-113. Impersonating a public servant.

(1) A person commits impersonating a public servant if he falsely pretends to be a public servant other than a peace officer and performs any act in that pretended capacity.

(2) It is no defense to a prosecution under this section that the office the actor pretended to hold did not in fact exist.

(3) Impersonating a public servant is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 457, § 1. C.R.S. 1963: § 40-8-113. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3196, § 279, effective March 1, 2022.

18-8-114. Abuse of public records.

- (1) A person commits a class 2 misdemeanor if:
 - (a) The person knowingly makes a false entry in or falsely alters any public record; or
 - (b) Knowing the person lacks the authority to do so, the person knowingly destroys, mutilates, conceals, removes, or impairs the availability of any public record; or
 - (c) Knowing the person lacks the authority to retain the record, the person refuses to deliver up a public record in the person's possession upon proper request of any person lawfully entitled to receive such record; or
 - (d) Knowing the person has not been authorized by the custodian of the public record to do so, the person knowingly alters any public record.
- (2) As used in this section, the term "public record" includes all official books, papers, or records created, received, or used by or in any governmental office or agency.

Source: L. 71: R&RE, p. 457, § 1. C.R.S. 1963: § 40-8-114. L. 77: (1)(b) amended, p. 966, § 40, effective July 1. L. 96: (1) amended, p. 1561, § 15, effective July 1. L. 2021: IP(1) amended, (SB 21-271), ch. 462, p. 3196, § 280, effective March 1, 2022.

ANNOTATION

Applicability of section. This section applies only to records after they are created, received, or used by a public office. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

Records in custody or control of public agency. A violation of this section occurs only where a person falsifies or otherwise corrupts a record which is in, or is required by law to be in, the custody or control of a public agency at the time of falsification. *People v. Trujillo*, 185 Colo. 14, 521 P.2d 769 (1974).

Limitation imposed on section improper. Imposing limitation that criminal liability for a violation of this section hinges on whether the document in question is open to public inspection is not proper. *People v. Trujillo*, 185 Colo. 14, 521 P.2d 769 (1974).

Comparison with section 18-5-114. Abuse of public records under this section was not meant to cover the offense of offering a false instrument for recording under § 18-5-114. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

Term "record" includes civil service examination questions with answers. The word, "record", in the sense in which the word is used in this section, includes examination questions of the state personnel system with the answers of applicants thereto, but does not include unused examination question. *Shimmel v. People*, 108 Colo. 592, 121 P.2d 491 (1942) (decided under former CSA, C. 48, § 151).

Personal book kept by probate judge for his own information and convenience which contained records not germane to his office was not a public record. *Downing v. Brown*, 3 Colo. 571 (1877) (decided under former R.S. p. 208, § 69).

Incorrect information on application for college admission was not included within the offense covered by this section. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

18-8-115. Duty to report a crime - liability for disclosure.

It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

Source: L. 79: Entire section added, p. 729, § 9, effective July 1. **L. 81:** Entire section amended, p. 976, § 15, effective July 1.

ANNOTATION

The tenth circuit held no general duty exists under this section to stop or report a crime being committed, in context of defending a charge of conspiracy to commit fraud against the government. *U.S. v. Zimmermann*, 943 F.2d 1204 (10th Cir. 1991).

This section does not require the degree of certainty on the part of a citizen reporting the commission of a crime as does the probable cause standard that police officers are held to in making warrantless arrests. *Lunsford v. W. States Life Ins.*, 919 P.2d 899 (Colo. App. 1996).

18-8-116. Disarming a peace officer.

(1) A person commits disarming a peace officer if he or she knowingly, without justification and without consent, removes the firearm or self-defense electronic control device, direct-contact stun device, or other similar device of a peace officer who is acting under color of his or her official authority.

(2) Disarming a peace officer is a class 5 felony.

(3) The term "peace officer" as used in this section means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person.

Source: L. 85: Entire section added, p. 677, § 1, effective July 1. **L. 2009:** (1) amended, (HB 09-1120), ch. 305, p. 1651, § 3, effective July 1.

ANNOTATION

A police baton is not within subsection (1)'s purview. *People v. Tomaske*, 2022 COA 52, 516 P.3d 534.

Self-defense instruction required for case involving unreasonable or excessive force during an arrest when defendant charged with attempting to disarm a

peace officer. Self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

18-8-117. Unlawful sale of publicly provided services or appointments - definitions.

(1) A person commits an unlawful sale of public services if the person does any of the following with respect to a government service or an appointment to receive a government service and if a government entity makes the service or appointment publicly available without charge:

(a) The person reserves or obtains the service or appointment, and the person sells the service or appointment;

(b) The person reserves or obtains, with the intent to sell, the service or appointment;

(c) The person reserves or obtains the service or appointment, and the person appends the service or appointment to another good or service the person offers for sale; or

(d) The person falsely represents to the potential customer that the person has obtained or secured the service or appointment, and the person attempts to sell the service or appointment.

(2) This section does not apply when the person:

(a) Has consent from the government entity to sell the specific service or appointment obtained or reserved; or

(b) Is obtaining and selling or offering to sell only information.

(3) Unlawful sale of public services is a class 2 misdemeanor, as defined in section 18-1.3-501.

(4) As used in this section, "government entity" means the state of Colorado, a political subdivision of Colorado, or an agency of either the state of Colorado or a political subdivision of Colorado.

Source: L. 2016: Entire section added, (HB 16-1335), ch. 246, p. 1014, § 1, effective July 1.
L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3196, § 281, effective March 1, 2022.

18-8-118. Unlawful affiliation with a public safety radio network - penalty - definitions.

(1) (a) A person who knowingly affiliates with a public safety radio network without authorization from the network's authorizing entity commits unlawful affiliation with a public safety radio network.

(b) Unlawful affiliation with a public safety radio network is a class 2 misdemeanor.

(2) As used in this section, unless the context otherwise requires:

(a) "Affiliate" means transmitting or receiving a signal on a radio network, including through the use of cloning equipment. "Affiliate" does not include listening to radio network communications by use of a passive listening device, including a scanner, that does not transmit a signal to the public safety radio network.

(b) "Authorizing entity" means a state or local department, agency, or other entity that can authorize affiliation with a public safety radio network.

(c) "Cloning equipment" means any instrument, apparatus, equipment, computer hardware, computer software, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used, is intended to be used, or is capable of

being used to transmit or receive signals on a public safety radio network without authorization from an authorizing entity.

(d) "Public safety agency" has the same meaning as set forth in section 24-32-3501.

(e) "Public safety radio network" means a public safety communication system that facilitates communication between public safety agencies and that is operated by the department of public safety or a local government. "Public safety radio network" includes a radio frequency, radio channel, or radio talk-group that is used by a public safety agency.

Source: L. 2024: Entire section added, (SB 24-108), ch. 148, p. 598, § 1, effective August 7.

PART 2

ESCAPE AND OFFENSES RELATING TO CUSTODY

18-8-201. Aiding escape.

(1) Any person who knowingly aids, abets, or assists another person to escape or attempt to escape from custody or confinement commits the offense of aiding escape.

(2) "Escape" is deemed to be a continuing activity commencing with the conception of the design to escape and continuing until the escapee is returned to custody or the attempt to escape is thwarted or abandoned.

(3) "Assist" includes any activity characterized as "rendering assistance" in section 18-8-105.

(4) Aiding escape is a class 2 felony if the person aided was in custody or confinement as a result of conviction of a class 1 or class 2 felony.

(5) Aiding escape is a class 3 felony if the person aided was in custody or confinement and charged with or held for any felony or convicted of any felony other than a class 1 or class 2 felony.

(6) Aiding escape is a class 2 misdemeanor if the person aided was in custody or confinement and charged with, held for, or convicted of a misdemeanor or a petty offense.

Source: L. 71: R&RE, p. 457, § 1. **C.R.S. 1963:** § 40-8-201. **L. 77:** (1) amended, p. 966, § 41, effective July 1. **L. 2021:** (6) amended, (SB 21-271), ch. 462, p. 3196, § 282, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-8-201 is similar to former C.L. § 6805, a relevant case construing that provision has been included in the annotations to this section.

Acceptance of tools to effect escape not necessary to constitute crime. Under this section acceptance by a prisoner of files and saws to effect his escape was not necessary to complete defendant's statutory crime of assisting in an escape by conveying to him such tools. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Nor is the attempted escape of the prisoner. This section does not require that jail break, or attempted exodus of the prisoner or prisoners from jail, be shown in order to complete the crime. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Defense of execution of public duty held not authorized. A penitentiary guard, accused of aiding an escape, whose theory of the case is that he was attempting to apprehend an escaped criminal by using

undercover techniques is not entitled to a jury instruction on the affirmative defense of execution of public duty when his authority to make an arrest is limited to penitentiary grounds and there is no evidence he had any authorization to engage in undercover activities. *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979).

Sufficiency of information. An information under this section which charged that defendant aided a prisoner to escape, though no attempt to escape was actually made, by conveying or causing to be delivered to the prisoner instruments to facilitate his escape, held to sufficiently inform defendant of the nature and cause of the accusation. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Conviction under this section for aiding fugitive to flee warrants attorney disbarment despite lack of a prior disciplinary record. *People v. Bullock*, 882 P.2d 1390 (Colo. 1994).

18-8-201.1. Aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders.

Any person who knowingly aids the escape of a person who is an inmate of an institution for the care and treatment of persons with behavioral or mental health disorders and who knows the person aided is confined in such institution pursuant to a commitment pursuant to article 8 of title 16 commits the offense of aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders, which is a class 5 felony.

Source: L. 74: Entire section added, p. 255, § 1, effective February 13. **C.R.S. 1963:** 40-8-211. **L. 77:** Entire section amended, p. 966, § 42, effective July 1. **L. 2006:** Entire section

amended, p. 1399, § 50, effective August 7. **L. 2017:** Entire section amended, (SB 17-242), ch. 263, p. 1307, § 143, effective May 25.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

This section was not intended to apply to the situation where a patient in a state mental institution aids the escape of another patient, as opposed to the situation where an employee of the institution aids the escape of a patient. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

But the passage of section 18-8-208 (6) enabled this section to be applied to a patient of a state mental institution who aids another patient's escape. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

18-8-202. Inducing prisoners to absent selves - repeal. (Repealed)

Source: **L. 71:** R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-202. **L. 2021:** (2) added by revision, (SB 21-271), ch. 462, pp. 3196, 3331, §§ 283, 803.

Editor's note: Subsection (2) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3196, 3331.)

ANNOTATION

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-203. Introducing contraband in the first degree.

(1) A person commits introducing contraband in the first degree if he or she knowingly and unlawfully:

(a) Introduces or attempts to introduce a dangerous instrument into a detention facility or at any location where an inmate is or is likely to be located, while the inmate is in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole; or

(b) Being a person confined in a detention facility, makes any dangerous instrument.

(2) Introducing contraband in the first degree is a class 4 felony.

(3) "Detention facility" means any building, structure, enclosure, vehicle, institution, work site, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the jurisdiction of the department of corrections or under the authority of the United States, the state of Colorado, or any political subdivision of the state of Colorado.

(4) "Dangerous instrument" as used in this section and in section 18-8-204.1, means a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material, or substance which is readily capable of causing or inducing fear of death or bodily injury, the use of which is not specifically authorized.

Source: **L. 71:** R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-203. **L. 72:** p. 275, § 5. **L. 76, Ex. Sess.:** (1)(a), (1)(b), and (2) amended and (4) added, p. 12, § 1, effective September 18. **L. 77:** (2) amended, p. 878, § 45, effective July 1, 1979. **L. 81:** (1)(a) and (1)(b) amended, p. 738, § 23, effective July 1. **L. 82:** (1)(a) and (1)(b) amended, p. 319, § 3, effective March 11. **L. 2002:** IP(1), (1)(a), and (3) amended, p. 810, § 1, effective July 1. **L. 2010:** (1) amended, (HB 10-1352), ch. 259, p. 1173, § 17, effective August 11. **L. 2012:** (1)(a) amended, (HB 12-1311), ch. 281, p. 1619, § 46, effective July 1. **L. 2018:** (1)(a) amended, (HB 18-1025), ch. 152, p. 1078, § 8, effective October 1. **L. 2021:** (1) amended, (SB 21-271), ch. 462, p. 3196, § 284, effective March 1, 2022.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Defendant's conviction on two counts of introducing contraband violated double jeopardy principles. Defendant's entry into jail with three different controlled substances occurred at the same time and place, without the influence of any intervening events. This section does not create a unit of prosecution smaller than an item or items in any one of the categories in subsection (1). The language does not support creating multiple counts based on introducing more than one item within any one of those categories. *People v. Frye*, 2014 COA 141, 356 P.3d 1000.

Possession of cannabis not lesser included offense. Because proof of possession is not an essential element to the crime of introducing contraband, the crime of possession of cannabis cannot be a lesser included offense thereof. *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982).

First degree possession of contraband under § 18-8-204.1 (1) is a lesser included offense of first degree introducing contraband by making under subsection (1)(b) of this section. *People v. Jamison*, 2018 COA 121, 436 P.3d 569.

Defective bullet which will not explode does not constitute "ammunition". *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

Evidence sufficient to sustain conviction. Where the mixture of orange peels, orange, and bread floating in a mixture of milk and water which defendant

concocted was capable of producing alcohol, and the surrounding circumstance did not reveal any legitimate purpose for such concoction, defendant's actions were sufficient to support a conviction for attempting to introduce contraband in the first degree despite flaws in the sampling and testing procedures of the mixture. *People v. Chavez*, 743 P.2d 53 (Colo. App. 1987).

Any amount of marihuana sufficient to ingest will support a conviction for possession of contraband in a detention facility, where statute fails to specify an amount. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Trial court's admission of expert testimony that defendant had been previously addicted to illegal drugs was harmless error in light of court of appeals holding that the lack of an amount of marijuana sufficient to produce a psychoactive effect is not a defense to a charge of possession of contraband in the first degree. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Return by jury of verdict of guilty on charge brought pursuant to this section was not inconsistent with acquittal on remaining three charges under this section where the incidents occurred on different dates and different locations from the charge for which the defendant was convicted. *People v. Quinn*, 794 P.2d 1066 (Colo. App. 1990).

Statements made by defendant during booking process regarding possession of marijuana violated fifth amendment

privilege and therefore were inadmissible.

Because defendant made statements to booking officers denying possessing contraband without the benefit of Miranda warnings, the trial court erred in admitting those statements. The statements did not fall under the booking question exception because the questions were unrelated to basic identifying data, nor did the statements fall under the public safety exception because the officer's questions exceeded the scope by asking about items beyond weapons or dangerous instruments. *People v. Allen*, 199 P.3d 33 (Colo. App. 2007).

Defendant need only know that he or she is introducing, or attempting to introduce, contraband into detention facility, not that the action is unlawful, to fulfill requirements of section. *People v. Iversen*, 2013 COA 40, 321 P.3d 573.

Because defendant need only have knowledge that he or she is introducing, or attempting to introduce, contraband into a detention facility, there was no error in excluding evidence concerning defendant's receipt of a medical marijuana

certificate. That defendant did not know that it was unlawful for him to knowingly introduce marijuana into the detention facility was not a fact of consequence. *People v. Iversen*, 2013 COA 40, 321 P.3d 573.

To be convicted of introduction of contraband in the first degree, a defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person. Accordingly, there was no evidence of a voluntary act to support defendant's conviction because she did not voluntarily enter the jail, deny her possession of marijuana, or attempt to conceal the contraband. *People v. McClintic*, 2020 COA 120M, 484 P.3d 724.

Applied in *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978); *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Lepik*, 629 P.2d 1080 (Colo. 1981); *People v. Allen*, 636 P.2d 1329 (Colo. App. 1981); *Allen v. People*, 660 P.2d 896 (Colo. 1983).

18-8-204. Introducing contraband in the second degree - definition.

(1) A person commits introducing contraband in the second degree if he or she knowingly and unlawfully:

- (a) Introduces or attempts to introduce contraband into a detention facility; or
- (b) Being a person confined in a detention facility, makes any contraband, as defined in subsection (2) of this section.

(1.5) A person confined in a detention facility commits introducing contraband in the second degree if he or she knowingly and unlawfully introduces or attempts to introduce contraband into a detention facility or at any location where an inmate is likely to be located, while such inmate

is in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.

(2) As used in this section, "contraband" means any of the following, but does not include an article or thing referred to in section 18-8-203:

- (a) Any key, key pattern, key replica, or lock pick;
- (b) Any tool or instrument that could be used to cut fence or wire, dig, pry, or file;
- (c) Any money or coin of United States or foreign currency or any written instrument of value;
- (d) Any uncanceled postage stamp or implement of the United States postal service;
- (e) Any counterfeit or forged identification card;
- (f) Any combustible material other than safety matches;
- (g) Any drug, other than a controlled substance as defined in section 18-18-102 (5), in quantities other than those authorized by a physician;
- (h) Any mask, wig, disguise, or other means of altering normal physical appearance which could hinder ready identification;
- (i) Any drug paraphernalia as defined in section 18-18-426;
- (j) Any material which is "obscene" as defined in section 18-7-101;
- (k) Any chain, rope, or ladder;
- (l) Any article or thing that poses or may pose a threat to the security of the detention facility as determined by the administrative head of the detention facility if reasonable notice is given that such article or thing is contraband;
- (m) For purposes of a facility of the department of corrections or any private contract prison, any cigarettes or tobacco products, as defined in section 39-28.5-101 (14);
- (n) Any portable electronic communication device, including but not limited to cellular telephones; cloned cellular telephones as defined in section 18-9-309; public, private, or family-style radios; pagers; personal digital assistants; any other device capable of transmitting or intercepting cellular or radio signals between providers and users of telecommunication and data services; and portable computers; except those devices authorized by the executive director of the department of corrections or his or her designee;
- (o) A controlled substance, as defined in section 18-18-102 (5);

(p) Malt liquors, vinous liquors, or spirituous liquors, as those terms are defined in section 44-3-103, or fermented malt beverage, as defined in section 44-4-103; or

(q) Marijuana or marijuana concentrate, as those terms are defined in section 18-18-102; except that, for the purposes of this section, prescription drug products approved by the federal food and drug administration and dispensed by a pharmacy or prescription drug outlet registered by the state of Colorado are "marijuana".

(3) (a) Introducing contraband in the second degree that involves contraband described in subsection (2)(a), (2)(b), (2)(e), (2)(f), (2)(h), (2)(k), (2)(n), or (2)(o) of this section is a class 6 felony.

(b) Introducing contraband in the second degree that involves contraband described in subsection (2)(c), (2)(d), (2)(g), (2)(i), (2)(j), (2)(l), (2)(m), (2)(p), or (2)(q) of this section is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-204. **L. 76, Ex. Sess.:** (3) amended, p. 13, § 2, effective September 18. **L. 77:** (3) amended, p. 878, § 46, effective July 1, 1979. **L. 82:** (1)(b) amended and (2) R&RE, p. 318, §§ 1, 2, effective March 11. **L. 86:** (2)(j) amended, p. 784, § 5, effective April 21. **L. 89:** (3) amended, p. 839, § 78, effective July 1. **L. 92:** (2)(i) amended, p. 392, § 21, effective July 1. **L. 2000:** (2)(m) added, p. 851, § 58, effective May 24; (2)(b) amended, p. 709, § 43, effective July 1. **L. 2002:** IP(1) and (2)(m) amended and (1.5) added, p. 810, § 2, effective July 1. **L. 2005:** (2)(m) amended and (2)(n) added, p. 609, § 1, effective July 1. **L. 2012:** (2)(g) amended, (HB 12-1311), ch. 281, p. 1620, § 47, effective July 1. **L. 2021:** IP(2), (2)(m), and (3) amended and (2)(o), (2)(p), and (2)(q) added, (SB 21-271), ch. 462, p. 3197, § 285, effective March 1, 2022. **L. 2023:** (2)(m) amended, (HB 23-1015), ch. 142, p. 612, § 11, effective January 1, 2024. **L. 2026:** IP(2) and (2)(q) amended, (HB 26-1214), ch. 231, p. 1341, § 8, effective August 12.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Section deemed unconstitutional delegation of power. Prior to the 1982 amendments, this section contained no

standards to guide the administrative head of a detention facility in the exercise of his delegated discretion to declare certain items contraband and was, therefore, an unconstitutional delegation of the general assembly's power to declare an act to be a crime. *People v. Lepik*, 629 P.2d 1080 (Colo. 1981).

Section deemed constitutional delegation of power. The statute imposes adequate standards and procedural safeguards because it requires the administrative head of a detention facility to determine whether an item poses or may pose a risk prior to categorizing it as contraband, to find that there is a reasonable probability that an item would pose a threat, and to give notice of what is contraband. Allowing each detention facility to determine what is contraband based on the specific conditions present at each facility does not result in an unlawful delegation of authority. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

The notice required in this section must be sufficient to inform a visitor that an

item constitutes contraband under this section and that bringing the item into the facility therefore constitutes criminal activity. The notice requirement is not satisfied by simply informing the visitor that the item is prohibited. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

"Contraband" as used in this section has a limited meaning. It refers only to the items specified in subsection (2)(a) through (k) and any item that the administrative head of the facility has determined to be a risk or probable risk to the security of the facility. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

Any amount of marihuana sufficient to ingest will support a conviction for possession of contraband in a detention facility, where statute fails to specify an amount. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-8-204.1. Possession of contraband in the first degree.

(1) A person being confined in a detention facility commits the crime of possession of contraband in the first degree if the person knowingly obtains or has in the person's possession contraband as listed in section 18-8-203 (1)(a).

(2) Repealed.

(3) Possession of contraband in the first degree involving a dangerous instrument is a class 4 felony.

Source: **L. 76 Ex. Sess.:** Entire section added, p. 13, § 3, effective September 18. **L. 77:** (2) and (3) amended, p. 878, § 47, effective July 1, 1979. **L. 82:** Entire section amended, p. 319, § 4, effective March 11. **L. 88:** (1) amended, p. 714, § 22, effective July 1. **L. 89:** (2) amended, p. 839, § 79, effective July 1. **L. 92:** (1) amended, p. 392, § 22, effective July 1. **L. 2021:** (1) amended, (SB 21-271), ch. 462, p. 3197, § 286, effective March 1, 2022; (2)(b) added by revision, (SB 21-271), ch. 462, pp. 3197, 3331, §§ 286, 803.

Editor's note: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Subsection (2)(b) provided for the repeal of subsection (2), effective March 1, 2022. (See L. 2021, p. 3197, 3331.)

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Purpose of this statute is to control contraband in penal institutions. *People v. West*, 43 Colo. App. 246, 603 P.2d 967 (1979).

The purpose of this section is to control contraband in penal institutions. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992); *People v. Wyles*, 873 P.2d 34 (Colo. App. 1994).

Any amount of contraband sufficient to ingest will support a conviction for possession of contraband under this section. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Physical possession of contraband is not required in every instance in order to sustain a conviction under this section.

Prosecution's burden is also sustained by proof that inmate exercised knowing dominion or control over the object. *People v. Wyles*, 873 P.2d 34 (Colo. App. 1994).

Marihuana is within the scope of this section as a class of prohibited contraband since it is specifically included in § 18-8-203 and excluded from § 18-18-405. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Defendant need not have been lawfully confined. It is immaterial to the realization of the legislative purpose whether persons convicted under this section are or are not lawfully confined within a detention facility. The critical fact to be established is that the accused person was confined as a prisoner in a detention facility. *People v. West*, 43 Colo. App. 246, 603 P.2d 967 (1979); *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Fact that defendant had not yet been convicted of a crime and was not convicted of the crimes of which he was accused and which led to his incarceration, did not relieve defendant of prosecution under this statute. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Defective bullet which will not explode does not constitute "ammunition". *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

First degree possession of contraband under subsection (1) of this section is a

lesser included offense of first degree introducing contraband by making under § 18-8-203 (1)(b). *People v. Jamison*, 2018 COA 121, 436 P.3d 569.

Second degree possession of contraband is a lesser included offense of first degree possession of contraband. *People v. Oliver*, 2020 COA 97, 474 P.3d 207.

Applied in *People v. Smith*, 984 P.2d 50 (Colo. 1999); *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-8-204.2. Possession of contraband in the second degree.

(1) A person being confined in a detention facility commits the crime of possession of contraband in the second degree if he knowingly obtains or has in his possession contraband as defined in section 18-8-204 (2) unless possession is authorized by rule or regulation promulgated by the administrative head of the detention facility.

(2) (a) Possession of contraband in the second degree that involves contraband described in section 18-8-204 (2)(a), (2)(b), (2)(e), (2)(f), (2)(h), (2)(k), (2)(n), or (2)(o) is a class 6 felony.

(b) Possession of contraband in the second degree that involves contraband described in section 18-8-204 (2)(c), (2)(d), (2)(g), (2)(i), (2)(j), (2)(l), (2)(m), (2)(p), or (2)(q) is a class 2 misdemeanor.

Source: L. 82: Entire section added, p. 319, § 5, effective March 11. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3198, § 287, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Second degree possession of contraband is a lesser included offense of

first degree possession of contraband. *People v. Oliver*, 2020 COA 97, 474 P.3d 207.

18-8-205. Aiding escape from civil process - repeal. (Repealed)

Source: L. 71: R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-205. **L. 2021:** (2) added by revision, (SB 21-271), ch. 462, pp. 3198, 3331, §§ 288, 803, effective March 1, 2022.

Editor's note: Subsection (2) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3198, 3331.)

ANNOTATION

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-206. Assault during escape.

(1) Any person confined in any lawful place of confinement within the state who, while escaping or attempting to escape, commits an assault with intent to commit bodily injury upon the person of another with a deadly weapon, or by any means of force likely to produce serious bodily injury, commits:

- (a) A class 1 felony, if the person has been convicted of a class 1 felony; or
- (b) A class 2 felony, if the person has been convicted of a felony other than a class 1 felony; or
- (c) A class 3 felony, if the person was in custody or confinement and held for or charged with but not convicted of a felony; or
- (d) A class 3 felony, if the person was in custody or confinement and charged with, held for, or convicted of a misdemeanor or a petty offense.

Source: L. 71: R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-206. **L. 83:** (1)(c) amended and (1)(d) added, p. 708, § 1, effective July 1.

ANNOTATION

Defendant's act of touching a knife to the officer's person was not sufficient to establish the elements of assault-during-escape. To hold, under the present criminal code, that a threat with a deadly weapon constitutes an assault with intent to commit bodily injury would eliminate any distinction between the crimes of menacing (under § 18-3-206) and assault with intent to commit bodily injury. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Where the defendant aided and abetted an escapee's assault on an officer with intent to inflict bodily injury, there was

also sufficient evidence for a jury to find the defendant guilty of assault-during-escape. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Jury instructions adequately informed jury of the elements of assault-during-escape when read as a whole and which were not objected to and included definitions of "bodily injury", "deadly weapon," and "assault". *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-207. Holding hostages.

Any person in lawful custody or confinement within the state who, while escaping or attempting to escape, holds as hostage any person or by force or threat of force holds any person against his will commits a class 2 felony.

Source: L. 71: R&RE, p. 458, § 1. **C.R.S. 1963:** § 40-8-207. **L. 83:** Entire section amended, p. 708, § 2, effective July 1.

ANNOTATION

Crime of "holding hostages" includes as essential element general intent crime of "escape". *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Term "escape" is not specifically defined in the Colorado criminal code. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Term "escape" has same meaning for purposes of this section as section 18-8-

208. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Crime one of general intent. No additional mental state is specified for the crime of "holding hostages". That crime, as well as the crime of "escape", is one of general rather than specific intent. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-208. Escapes.

(1) A person commits a class 2 felony if, while being in custody or confinement following conviction of a class 1 or class 2 felony, he knowingly escapes from said custody or confinement.

(2) A person commits a class 3 felony if, while being in custody or confinement following conviction of a felony other than a class 1 or class 2 felony, he knowingly escapes from said custody or confinement.

(3) A person commits a class 4 felony if, while being in custody or confinement and held for or charged with but not convicted of a felony, he knowingly escapes from said custody or confinement.

(4) A person commits a class 2 misdemeanor if, while being in custody or confinement following conviction of a misdemeanor or petty offense or a violation of a municipal ordinance, he or she knowingly escapes from said place of custody or confinement.

(4.5) A person commits a class 2 misdemeanor if the person has been committed to the division of youth services in the department of human services for a delinquent act, is more than eighteen years of age, and escapes from a staff secure facility as defined in section 19-2.5-102, other than a state-operated locked facility.

(5) A person commits a petty offense if, while being in custody or confinement and held for or charged with but not convicted of a misdemeanor or petty offense or violation of a municipal ordinance, he or she knowingly escapes from said custody or confinement.

(6) A person who knowingly escapes confinement while being confined pursuant to a commitment under article 8 of title 16:

(a) Commits a class 2 misdemeanor if the person had been charged with a misdemeanor at the proceeding in which the person was committed;

(b) Commits a class 2 misdemeanor if the person had been charged with a felony at the proceeding in which the person was committed, if in the escape the person does not travel from the state of Colorado;

(c) Commits a class 5 felony if the person had been charged with a felony at the proceeding in which the person was committed, if in the escape the person travels outside of the state of Colorado.

(7) In a prosecution for an offense under subsection (6) of this section, it shall be a defense for any person who, while being confined pursuant to a commitment under article 8 of title 16, C.R.S., escapes and who voluntarily returns to the place of confinement.

(8) A person commits a class 5 felony if he knowingly escapes while in custody or confinement pursuant to the provisions of article 19 of title 16, C.R.S.

(9) The minimum sentences provided by sections 18-1.3-401, 18-1.3-501, and 18-1.3-503, respectively, for violation of the provisions of this section shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part; except that the court may grant a suspended sentence if the court is sentencing a person to the youthful offender system pursuant to section 18-1.3-407. The provisions of this subsection (9) do not apply to subsection (4.5) of this section.

(10) Repealed.

(11) If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106 (1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203 (3), is housed in a staff secure facility as defined in section 19-2.5-102, or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204 (2.2) or 18-1.3-301 (4)(b), then the person is not in custody or confinement for purposes of this section.

Source: **L. 71:** R&RE, p. 459, § 1. **C.R.S. 1963:** § 40-8-208. **L. 75:** (6) and (7) added, p. 638, § 1, effective May 22. **L. 77:** (8) added, p. 988, § 1, effective May 26; (1) to (5) and IP(6) amended, p. 966, § 43, effective July 1. **L. 78:** (8) amended, p. 263, § 50, effective May 23. **L. 81:** (1), (2), and (4) amended, p. 1008, § 1, effective June 12. **L. 95:** (9) added, p. 1255, § 16, effective July 1. **L. 96:** (9) amended, p. 1843, § 10, effective July 1; (10) added, p. 1682, § 7, effective January 1, 1997. **L. 2000:** (4) and (5) amended, p. 692, § 1, effective July 1. **L. 2002:** (9) amended, p. 1516, § 202, effective October 1. **L. 2013:** (4.5) added, (9) amended, and (10) repealed, (SB 13-229), ch. 272, p. 1430, § 9, effective July 1; (11) added, (SB 13-250), ch. 333, p. 1925, § 34, effective October 1. **L. 2017:** (4.5) amended, (HB 17-1329), ch. 381, p. 1972, § 26, effective June 6. **L. 2020:** (11) amended, (HB 20-1019), ch. 9, p. 26, § 8, effective March 6. **L. 2021:** (4.5) and (11) amended, (SB 21-059), ch. 136, p. 723, § 51, effective October 1; (4), (4.5), (5), IP(6),(6)(a), and (6)(b) amended, (SB 21-271), ch. 462, p. 3198, § 289, effective March 1, 2022.

Editor's note: Amendments to subsection (4.5) by SB 21-059 and SB 21-271 were harmonized, effective March 1, 2022.

Cross references: (1) For absence from supervision constituting escape by a defendant conditionally released after verdict of not guilty by reason of insanity or by reason of impaired mental condition, see § 16-8-115 (3)(c); for failure to remain at or return to a community correctional facility constituting escape, see § 17-27-106.

(2) For the legislative declaration contained in the 2002 act amending subsection (9), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955).

Annotator's note. Since § 18-8-208 is similar to former § 40-7-53, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

For a discussion of the legislative history of this section, see *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Purpose of statute. The fundamental purpose of the statute is to prevent the evasion of the due course of justice. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

The purpose of the felonious escape statute is to deter and punish an escape while a defendant is being held for another felony. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

Not constitutionally required that punishment based on nature of escape. There is no constitutional requirement that the classification of an escape and its

punishment be based solely or even partially on the nature of the escape. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Classifications set forth in this section are not arbitrary or unreasonable but are founded on rational distinctions. It does not deny equal protection of the law. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Section 18-8-210.1 does not reclassify adjudicated delinquents as felons for purposes of this section. Rather, § 18-8-210.1 allows the prosecution to bring felony escape charges under this section against a sub-set of juveniles who commit an act that, if committed by an adult, would be a felony. Therefore, there is no conflict with art. XVIII, § 4, of the Colorado Constitution. *People v. M.B.*, 90 P.3d 880 (Colo. 2004).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of escape under this section. *People v. Jackson*, 703 P.2d 618 (Colo. App. 1985); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985).

Subsection (9) does not legislatively overrule state supreme court holding in *People v. Andrews*, 871 P.2d 1199 (Colo. 1994), that the legislature did not intend to punish escape and attempted escape through application of the enhancement provision. *People v. Scott*, 2019 COA 174, 456 P.3d 97.

The change to subsection (11) in 2020 applies retroactively. Defendant committed the offense prior to the change in law but was not charged until after the change went into effect. The change in the law is plainly ameliorative in nature, so the defendant is entitled to the benefit of the change. *People v. Pennington*, 2021 COA 9, 481 P.3d 1186.

Court does not have the authority to amend defendant's charge from felony escape to misdemeanor unauthorized absence. The court's action violated the separation of powers between the executive and judicial branches; the court had no valid reason to interfere with the prosecution's discretion to charge the defendant. *People v. Pennington*, 2021 COA 9, 481 P.3d 1186.

Prosecution following administrative transfer not double jeopardy. Where the defendant, as a prisoner under sentence, was administratively transferred to the penitentiary after he failed to return to a minimum security facility, subsequent prosecution on the escape charge would not constitute double jeopardy. *People v. Martinez*, 656 P.2d 1317 (Colo. 1983).

Punishment for escape is not double jeopardy. Administrative disciplinary action imposed for breaking rules of the prison on prisoners who have escaped or attempted to

escape does not constitute punishment for the substantive crime interdicted by this section. Double jeopardy or double punishment for the same crime is therefore not involved. *Silva v. People*, 158 Colo. 326, 407 P.2d 38 (1965).

Crime of "holding hostages" includes as essential element general intent crime of "escape". *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Escape definition. An escape is the voluntary departure from lawful custody by a prisoner with the intent to evade the due course of justice. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966); *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

The very word "escape" connotes an attitude of mind as well as an act. One does not "escape" without desire and intent to avoid confinement. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Under Colorado law, "escape" is defined as the voluntary departure from lawful custody by a prisoner with the intent to evade the due course of justice. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

"Escape" is a continuing offense. Given the nature of the escape crime, an offense continues until the escapee has been returned to custody or the attempt to escape has been thwarted or abandoned. As such, the statute of limitations does not begin to run until the escapee has been returned to custody. *People v. Johnson*, 2013 COA 122, 327 P.3d 305.

Term "escape" has same meaning for purposes of § 18-8-207 as this section.

People v. Williams, 199 Colo. 515, 611 P.2d 973 (1980).

Defendant who broke out of a locked building but was apprehended prior to getting over two barbed wire fences could still be guilty of escape. People v. Padilla, 113 P.3d 1260 (Colo. App. 2005).

Term "escape" is not specifically defined in the Colorado criminal code. People v. Williams, 199 Colo. 515, 611 P.2d 973 (1980).

The general assembly added subsection (10) to clarify, rather than restrict, the circumstances under which a juvenile commits an escape. People ex rel. J.A.C., 25 P.3d 1269 (Colo. App. 2001).

The term felony, wherever it may occur in the constitution, or the laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other. People v. Austin, 162 Colo. 10, 424 P.2d 113 (1967).

Escape is crime of general, not specific, intent, consisting of following essential elements: (1) A voluntary act; (2) which constitutes a departure from one of the forms of lawful custody or confinement specified in this section; (3) by a prisoner; and (4) committed "knowingly", i.e., with an awareness on the part of the prisoner that his or her conduct is of the nature proscribed. People v. Williams, 199 Colo. 515, 611 P.2d 973 (1980).

Mental state of "knowingly" applies only to defendant's conduct of escaping

from custody or confinement. People v. Benzor, 100 P.3d 542 (Colo. App. 2004).

The intent of the accused to evade the due course of justice is a necessary element in the felony escape. If that was not present, there was no crime. Gallegos v. People, 159 Colo. 379, 411 P.2d 956 (1966).

Thus, a defendant is entitled to adduce evidence bearing upon his capacity to form the particular intent essential to constitute the crime of felonious escape, such as evidence to the effect that he was too drunk to form the state of mind required for the commission of the offense. Gallegos v. People, 159 Colo. 379, 411 P.2d 956 (1966).

"Conviction", for purposes of this section, includes acceptance of a guilty plea. People v. Garcia, 720 P.2d 1003 (Colo. App. 1986).

Mandatory parolees are "in custody" for purposes of application of this section. People v. Garcia, 64 P.3d 857 (Colo. App. 2002).

For the purposes of this section, a person is not "in custody" until an arrest, in the sense of establishing physical control over the arrestee, has been effected. Physical control does not necessarily require physical restraint; the officer's presence and the suspect's submission in concert may be sufficient to establish the assurance, requisite to a determination of physical control, that the suspect will not leave. People v. Thornton, 929 P.2d 729 (Colo. 1996).

The definition of "custody" found in § 16-1-104 (9), does not apply to the offense of escape under this section. People v. Thornton, 929 P.2d 729 (Colo. 1996).

Subsection (10) was not intended to restrict the type of facilities from which a juvenile could escape to only staff secure facilities. People ex rel. J.A.C., 25 P.3d 1269 (Colo. App. 2001).

Portions of this section require that the defendant must be shown to have been convicted of a felony. Schwickrath v. People, 159 Colo. 390, 411 P.2d 961 (1966).

Evidence of a prior conviction is an essential element of the crime of escape after conviction. Ruark v. People, 158 Colo. 287, 406 P.2d 91 (1965); People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

One of the essential elements of escape by a felon is that the defendant has either been convicted of a felony or that he has pled guilty to a felony. People v. Austin, 162 Colo. 10, 424 P.2d 113 (1967).

A conviction under this section requires evidence that the defendant was convicted of and is being held for a felony. Massey v. People, 649 P.2d 1070 (Colo. 1982).

Evidence of prior conviction is an essential element of the offense of escape. People v. McKnight, 626 P.2d 678 (Colo. 1981).

Evidence of prior conviction. If it be shown that an individual is the person held under a particular mittimus for the commission of a felony, the requirement of this section is necessarily fulfilled.

Schwickrath v. People, 159 Colo. 390, 411 P.2d 961 (1966).

The criminal offense of larceny, to which the defendant pled guilty, was punishable by imprisonment in the penitentiary, and this statement in the mittimus, considered with the statement of sentence of not less than two and not more than five years, is prima facie evidence of the fact the defendant was being punished for a felony for purposes of defining the term felony in the crime of escape. People v. Austin, 162 Colo. 10, 424 P.2d 113 (1967).

The district attorney may introduce a minute order and other materials to establish the defendant's previous conviction. People v. McKnight, 626 P.2d 678 (Colo. 1981).

Specific underlying offense must be shown. In addition, since the classification of the offense of escape is determined by the nature of the underlying crime for which the defendant was held, it is essential that the specific offense upon which the confinement is premised be shown. Massey v. People, 649 P.2d 1070 (Colo. 1982).

Judicial notice of class of felony for which defendant confined. The trial court may take judicial notice that the mittimus under which the defendant is confined concerned crimes which were felonies other than class 1 or 2 felonies. Massey v. People, 649 P.2d 1070 (Colo. 1982).

Requirements for conviction under subsection (3). For a conviction under subsection (3) to be sustained, there must be evidence that a felony was committed and that defendant was being held for that felony

when he escaped. *People v. Velarde*, 630 P.2d 100 (Colo. 1981), rev'd on other grounds, 657 P.2d 953 (Colo. 1983).

Plea of nolo contendere constitutes conviction within the meaning of this section. *People v. Wines*, 43 Colo. App. 8, 597 P.2d 1056 (1979).

Error in conviction no justification for escape. An alleged error or irregularity in judicial proceedings leading to conviction and confinement does not so invalidate the judgment and the confinement as to justify escape. The prisoner's remedy is to seek judicial relief from the claimed illegal incarceration. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Nor reversal of conviction subsequent to escape. It was not a defense to an escape charge that the Colorado supreme court had reversed defendant's conviction, on the merits, regarding the charge for which he was confined, and that such reversal had occurred before defendant's trial on the escape charge. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

A parolee may be convicted of escape even if there is a legal defect in the process of confinement. Such defects are to be challenged through appropriate legal means rather than through unauthorized departure from a custodial facility. *People v. Lanzieri*, 25 P.3d 1170 (Colo. 2001).

Subsection (3) conviction upheld despite acquittal on underlying felony. Even where a defendant may later be found not guilty of the underlying felony, his conviction for escape under subsection (3)

would be upheld. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

An escape by a prisoner being held for extradition does not constitute the crime of escape as that offense is defined in this section. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

The Colorado statute on escape does not apply to a prisoner held in custody for extradition pursuant to an out-of-state conviction or charge. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Failure to return to a work release facility upon the expiration of a 10-hour pass is punishable as escape under this section. *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

Person who absconds from a non-residential community corrections placement commits the crime of escape in violation of this section and § 17-27-106. By its plain language, § 17-27-106 applies to all types of community corrections placements, including non-residential community corrections programs. *People v. Forester*, 1 P.3d 758 (Colo. App. 2000).

Section applicable to person committed as result of insanity adjudication in past criminal proceeding. There is nothing in the due process clause to prohibit the application of the escape statute or other criminal statutes to those committed to a state facility as a result of a prior insanity adjudication in relation to past criminal charges. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Even though inapplicable to person committed civilly. Given the state's obvious interest in protecting the public from those who previously have engaged in overt criminal conduct but have been relieved of criminal responsibility by reason of legal insanity, there is no difficulty in finding a rational basis for legislation that proscribes as criminal a knowing escape by a person committed to an institution as a result of an insanity adjudication in a criminal case, but does not impose a similar sanction upon a person who escapes from a facility to which he has been civilly committed. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

There is no section within the escape statute pertaining to out-of-state convictions or charges. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Degree of escape dependent on degree of original crime. This section establishes a standard whereby the seriousness of the crime of escape is determined by classification of the original crime for which the defendant was in custody or confinement. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Effect of subsection (6) on application of § 18-8-201.1. The passage of subsection (6) of this section enabled § 18-8-201.1 to be applied to a patient of a state mental institution who aids another patient's escape. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

Applicability of § 18-8-210. Section 18-8-210 sets forth guidelines for the purpose of determining the grade and classification of an offense under this section where a

person is in custody or confinement for an offense which is unclassified. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Does not broaden this section. Section 18-8-210 appears to be a "catchall" for unclassified crimes under Colorado statutes and does not broaden the scope of this section. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Burden of proof of permission to leave. It is not necessary that the people call every employee of the penitentiary to testify that no permission was given the prisoner to leave. If the prisoner did receive permission, that information is peculiarly within the knowledge of the prisoner himself, and if he would raise the issue of permission he must go forward with some evidence of it. *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967).

Choice of evils and duress available as defenses. In certain cases, both choice of evils, § 18-1-702, and duress, § 18-1-708, may be relied upon as affirmative defenses to a charge of escape. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Escapee must immediately report duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Otherwise, defense not allowed. Where this requirement is not satisfied, the defenses of duress or choice of evils may be properly refused by the trial judge because they are

insufficient as a matter of law. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Prima facie evidence of punishment for felony. Sentence imposed on defendant as shown in a mittimus is prima facie evidence of the fact that defendant was being punished for a felony. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Evidence established prima facie case of escape. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Evidence of escape held sufficient. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Proof that a regularly held prisoner was found miles outside the penitentiary walls, wearing civilian clothes, and when apprehended gave a false name, is certainly sufficient evidence from which the jury, without evidence of intent, could find that the prisoner had committed the statutory crime of escape. *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967).

Separate trial of escape and substantive charges necessary. Where evidence of a prior conviction was essential to the count of an information alleging the crime of escape after conviction, but would be prejudicial to defendant when applied to the other counts alleging robbery and assault, the court abused its discretion in failing to order a separate trial of the charge of escape after conviction. *Ruark v. People*, 158 Colo. 287, 406 P.2d 91 (1965).

A person 18 years of age or older who escapes while serving a sentence imposed by the juvenile court may be convicted

under this section. Until completing the sentence, the person continues under the jurisdiction of the juvenile court and is therefore considered a "juvenile", subject to the provisions of § 18-8-210.1 and, therefore, this section. *People v. Young*, 908 P.2d 1147 (Colo. App. 1995).

For purposes of escape, there is no conflict between the home detention statute and the intensive supervision program (ISP) statute. In an escape case, the court must make a factual determination whether a defendant was placed in home detention or ISP based on the different elements of home detention and ISP. Home detention and ISP are mutually exclusive, therefore once the court determines whether the defendant was in home detention or on ISP there is no conflict. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002).

The court did not err when it instructed the jury on ISP escape without including the "extended limits" language of § 17-27.5-104. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

The undisputed record shows defendant was in custody when he tried to escape from the police, so there was no basis for a lesser included instruction for resisting arrest. *People v. Jompp*, 2018 COA 128, 440 P.3d 1166.

Applied in *Nieto v. People*, 160 Colo. 179, 415 P.2d 531 (1966); *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Billips*, 652 P.2d 1060 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

18-8-208.1. Attempt to escape.

(1) Except as otherwise provided in subsection (1.5) of this section, if a person, while in custody or confinement following conviction of a felony, knowingly attempts to escape from said custody or confinement, he or she commits a class 4 felony. The sentence imposed pursuant to this subsection (1) shall run consecutively with any sentences being served by the offender.

(1.5) If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106 (1.1), intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203 (3), is housed in a staff secure facility as defined in section 19-2.5-102, or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204 (2.2) or 18-1.3-301 (4)(b), then the person is not in custody or confinement for purposes of this section.

(2) If a person, while in custody or confinement and held for or charged with but not convicted of a felony, knowingly attempts to escape from said custody or confinement, he commits a class 5 felony. If the person is convicted of the felony or other crime for which he was originally in custody or confinement, the sentence imposed pursuant to this subsection (2) shall run consecutively with any sentences being served by the offender.

(3) If a person, while in custody or confinement following conviction of a misdemeanor or petty offense, knowingly attempts to escape from said custody or confinement, the person commits a class 2 misdemeanor. The sentence imposed pursuant to this subsection (3) shall run consecutively with any sentences being served by the offender.

(4) If a person, while in custody or confinement and held for or charged with but not convicted of a misdemeanor or petty offense, knowingly attempts to escape from said custody or confinement, he is guilty of a petty offense and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than two months nor more than four months. If the person is convicted of the misdemeanor or petty offense for which he was originally in custody or confinement, the sentence imposed pursuant to this subsection (4) shall run consecutively with any sentences being served by the offender.

(5) The sentences imposed by subsections (1), (1.5), and (2) of this section and the minimum sentences imposed by subsections (3) and (4) of this section shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part; except that the court may

grant a suspended sentence if the court is sentencing a person to the youthful offender system pursuant to section 18-1.3-407.

(6) Repealed.

(7) A person held in a staff secure facility, as defined in section 19-2.5-102, is deemed in custody or confinement for purposes of this section.

Source: **L. 76, Ex. Sess.:** Entire section added, p. 10, § 3, effective September 18. **L. 77:** (1) and (2) amended, p. 878, § 48, effective July 1, 1979. **L. 79:** (5) amended, p. 671, § 22, effective March 29. **L. 81:** (1) and (3) amended, p. 1008, § 2, effective June 12. **L. 87:** (6) amended, p. 667, § 5, effective May 16. **L. 89:** (6) amended, p. 885, § 3, effective July 1. **L. 96:** (5) amended, p. 1844, § 11, effective July 1; (7) added, p. 1682, § 8, effective January 1, 1997. **L. 2002:** (5) and (6) amended, p. 1516, § 203, effective October 1. **L. 2010:** (1) and (5) amended and (1.5) added, (HB 10-1373), ch. 260, p. 1178, § 1, effective May 25. **L. 2020:** (1.5) amended and (6) repealed, (HB 20-1019), ch. 9, p. 27, § 9, effective March 6. **L. 2021:** (1.5) and (7) amended, (SB 21-059), ch. 136, p. 723, § 52, effective October 1; (3) amended, (SB 21-271), ch. 462, p. 3198, § 290, effective March 1, 2022.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5) and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

A consecutive sentence for attempt to escape is required under subsection (2) only when a defendant is held for or charged with but not convicted of a felony and is later convicted of the felony or other crime for which he was originally in custody or confinement. *People v. Evans*, 2015 COA 156, 363 P.3d 814.

Applicability to juvenile offender. Statute requiring the mandatory imposition of consecutive sentences for attempted escape, statute applying the statute on attempted escapes to juvenile offenders, and general children's code statute on commitment of persons to the department of institutions were construed to be in accord

with each other, and the imposition of consecutive sentences was held to be an exception to the general children's code section limiting commitments of persons 18 years of age or older to a total of two years. *People in Interest of E.Z.L.*, 815 P.2d 987 (Colo. App. 1991).

Even though the trial court was correct in imposing a consecutive sentence, the sentence must be consecutive only with regard to the sentence the juvenile was then serving and not to sentences simultaneously imposed. *People in Interest of E.Z.L.*, 815 P.2d 987 (Colo. App. 1991).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of attempted escape under this section. *People v. Martinez*, 703 P.2d 619 (Colo. App. 1985).

Consecutive sentence in the aggravated range may be simultaneously imposed if the defendant escapes twice, once from custody while serving the original sentence and again during processing for the first escape. *People v. Andrews*, 855 P.2d 3 (Colo. App. 1993), *aff'd*, 871 P.2d 1199 (Colo. 1994).

Sentence enhancement provision, § 18-1-105 (9)(a)(V), did not apply to the crime of escape and attempted escape where the general assembly had provided for enhanced punishment for the crimes of escape elsewhere, specifically in this section and §

18-8-209, and where the general assembly did not amend the enhancement provision to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

Imposition of consecutive sentence for attempted escape charge is consistent with state policy goal where facts underlying the two convictions had not changed even though the sentence for one had been vacated and replaced with another sentence. *People v. Spoto*, 865 P.2d 907 (Colo. App. 1993).

Consecutive sentence held proper. When a person is reincarcerated on a parole revocation, he is no longer serving his original sentence. Therefore, when a person is sentenced for the crime of escape during a period of mandatory parole for another offense, ordering such a sentence to run consecutive with the period of incarceration for the parole revocation did not violate § 18-1.3-401 (1)(a)(V)(E). *People v. Luther*, 58 P.3d 1013 (Colo. 2002).

Subsection (2) not applicable to defendant who escaped and pled guilty to a violation of this section but was not being held for a pending felony charge and was never later convicted of a pending felony charge. *People v. Evans*, 2015 COA 156, 363 P.3d 814.

Applied in *People v. Hostetter*, 44 Colo. App. 44, 606 P.2d 80 (1980).

18-8-208.2. Unauthorized absence.

(1) A person who is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301; transitioning from the department of corrections to a community corrections program or placed in an intensive supervision program pursuant to section 17-27.5-101; participating in a work release or home detention program pursuant to section 18-1.3-106 (1.1), intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203 (3); transitioning from the department of human services to a residential facility or program pursuant to section 16-8-115 or 16-8-118; or is housed in a staff secure facility as defined in section 19-2.5-102 commits the crime of unauthorized absence if the person knowingly:

(a) Leaves or fails to return to his or her residential or facility location without permission of the supervising agency and in violation of the terms and conditions of supervision; or

(b) Removes or tampers with an electronic monitoring device required by the supervising agency to be worn by the person in order to monitor his or her location, without permission and with the intent to avoid arrest, prosecution, monitoring, or other legal process.

(2) (a) If a person commits unauthorized absence for a crime listed in section 24-4.1-302 (1) or a crime of violence as described in section 18-1.3-406, unauthorized absence is a class 6 felony and an attempt thereof is a class 6 felony.

(b) If a person commits unauthorized absence for a crime other than the crimes listed in section 24-4.1-302 (1) and the crime is not a crime of violence as described in section 18-1.3-406, unauthorized absence is a class 2 misdemeanor and an attempt thereof is a class 2 misdemeanor.

(c) A person who knowingly violates a permanent or temporary protection order issued pursuant to section 18-1-1001 (1), 13-14-103, 13-14-104.5, or 13-14-106 during the commission of unauthorized absence commits a class 3 felony.

(3) If a parolee placed in a community corrections or in an intensive supervision program pursuant to section 17-27.5-101 has an unauthorized absence, the department of corrections shall notify the appropriate community reentry program described in section 17-33-101 (7)(a) and provide contact information for the purposes of assisting the person to reengage with supervision.

Source: L. 2020: Entire section added, (HB 20-1019), ch. 9, p. 27, § 10, effective March 6. **L. 2021:** IP(1) amended, (SB 21-059), ch. 136, p. 724, § 53, effective October 1; (2)(b) amended, (SB 21-271), ch. 462, p. 3199, § 291, effective March 1, 2022. **L. 2023:** IP(1) amended, (HB 23-1293), ch. 298, p. 1788, § 27, effective October 1.

ANNOTATION

This section applies retroactively to cases being prosecuted as of its effective date. People v. Gregory, 2020 COA 162, 479 P.3d 76.

This section applies retroactively. Defendant committed the offense prior to the change in law but was not charged until after the change went into effect. The change in the law is plainly ameliorative in nature, so the defendant is entitled to the benefit of the change. People v. Pennington, 2021 COA 9, 481 P.3d 1186.

Court does not have the authority to amend the defendant's charge from felony escape to misdemeanor unauthorized absence. The court's action violated the separation of powers between the executive and judicial branches; the court had no valid reason to interfere with the prosecution's discretion to charge the defendant. People v. Pennington, 2021 COA 9, 481 P.3d 1186.

18-8-209. Concurrent and consecutive sentences.

(1) Except as otherwise provided in subsection (2) of this section, any sentence imposed following conviction of an offense under sections 18-8-201 to 18-8-208 or section 18-8-211 shall run consecutively and not concurrently with any sentence which the offender was serving at the time of the conduct prohibited by those sections.

(2) If an offender was serving a direct sentence to a community corrections program pursuant to section 18-1.3-301 or was in an intensive supervision parole program pursuant to section 17-27.5-101, C.R.S., at the time he or she committed an offense specified in section 18-8-201 or 18-8-208, the sentence imposed following a conviction of said offense may run concurrently with any sentence the offender was serving at the time he or she committed said offense.

Source: L. 71: R&RE, p. 459, § 1. **C.R.S. 1963:** § 40-8-209. **L. 76, Ex. Sess.:** Entire section amended, p. 14, § 2, effective September 18. **L. 2010:** Entire section amended, (HB 10-1373), ch. 260, p. 1179, § 2, effective May 25.

ANNOTATION

Sentence enhancement provision, § 18-1-105 (9)(a)(V), did not apply to the crime

of escape and attempted escape where the general assembly had provided for enhanced

punishment for the crimes of escape elsewhere, specifically in this section and § 18-8-208.1, and where the general assembly did not amend the enhancement provision to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

Subsection (1) of this section does not apply to convictions in violation of § 18-8-208.1 (2) because § 18-8-208.1 is not included within the stated range of statutory sections listed in subsection (1). *People v. Evans*, 2015 COA 156, 363 P.3d 814.

This section clearly and unambiguously provides that the sentence imposed for an escape conviction must be consecutive only to any sentence the defendant was serving at the time of the escape and not to a sentence subsequently imposed. *People v. Eurioste*, 12 P.3d 847 (Colo. App. 2000); *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

Thus, where defendant escaped from police custody after being arrested for child abuse, but prior to being tried, the trial court was not required to impose consecutive sentences for defendant's child abuse and escape convictions. However, the court

retained discretionary authority to impose a consecutive sentence. *People v. Eurioste*, 12 P.3d 847 (Colo. App. 2000).

A defendant, who has pleaded guilty and is awaiting sentencing, is not serving a sentence for purposes of this section, and, therefore, the court is not required to impose a consecutive sentence. A defendant cannot be serving a sentence that has not yet been imposed. However, the court has discretion to impose a consecutive or concurrent sentence. *People v. Corral*, 179 P.3d 837 (Colo. App. 2007).

Section was applicable to defendant who escaped, because defendant was punished pursuant to § 18-8-208 and subject to provisions of this section since his sentence followed a conviction of an offense under several sections. *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

Where at the time of escape the defendant was on mandatory parole, the court was required to impose a consecutive sentence for defendant's escape conviction. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002).

Applied in *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

18-8-210. Persons in custody or confinement for unclassified offenses - repeal.
(Repealed)

Source: L. 72: p. 275, § 6. **C.R.S. 1963:** § 40-8-210. **L. 2021:** (2) added by revision, (SB 21-271), ch. 462, pp. 3199, 3331, §§ 292, 803.

Editor's note: Subsection (2) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3199, 3331.)

ANNOTATION

Section not violative of ex post facto prohibition. This section does not violate the federal and state constitutional prohibitions against ex post facto laws. *People v. Billips*, 652 P.2d 1060 (Colo. 1982).

This section appears to be a "catchall" for unclassified crimes under Colorado statutes and does not broaden the scope of § 18-8-208. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

This section sets forth guidelines for the purpose of determining the grade and classification of an offense under § 18-8-208 where a person is in custody or confinement for an offense which is unclassified. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

There is no section within the escape statute pertaining to out-of-state convictions or charges. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

18-8-210.1. Persons in custody or confinement - juvenile offenders.

For the purposes of this part 2, any reference to custody, confinement, charged with, held for, convicted of, a felony, misdemeanor, or petty offense includes a juvenile who is detained or committed for the commission of an act that would constitute such a felony, misdemeanor, or petty offense if committed by an adult or who is the subject of a petition filed pursuant to article 2.5 of title 19 alleging the commission of such a delinquent act or a juvenile who has been adjudicated a juvenile delinquent pursuant to article 2.5 of title 19 for an act that would constitute a felony, misdemeanor, or petty offense if committed by an adult.

Source: **L. 83:** Entire section added, p. 708, § 3, effective July 1. **L. 87:** Entire section amended, p. 817, § 23, effective October 1. **L. 2013:** Entire section amended, (SB 13-229), ch. 272, p. 1430, § 10, effective July 1. **L. 2021:** Entire section amended, (SB 21-059), ch. 136, p. 724, § 54, effective October 1.

ANNOTATION

The provisions of this section do not violate equal protection guarantees under the Fourteenth Amendment to the United

States Constitution or under article II of section 25 of the Colorado Constitution. The section does not create two classes of

similarly situated individuals. It applies to juveniles who have been adjudicated delinquents for conduct which, if committed by an adult, would constitute felonies. Allegedly similar class, adults convicted of conduct constituting misdemeanor offenses, are not similarly situated because their conduct is different. *People v. Young*, 859 P.2d 814 (Colo. 1993).

This section does not implicate a fundamental right under the due process clauses of the United States and Colorado Constitutions, it is therefore subject to rational basis analysis as applied to an adult convicted of escape. The fact that the adult was originally incarcerated for an offense committed as a juvenile is not relevant. *People v. Young*, 859 P.2d 814 (Colo. 1993).

This section does not reclassify adjudicated delinquents as felons. Rather, the section allows the prosecution to bring felony escape charges against a sub-set of juveniles who commit an act that, if committed by an adult, would be a felony. Therefore, there is no conflict with art. XVIII, § 4, of the Colorado Constitution. *People v. M.B.*, 90 P.3d 880 (Colo. 2004).

A person 18 years of age or older who escapes while serving a sentence imposed by the juvenile court may, through this section, be convicted under § 18-8-208. Until completing the sentence, the person continues under the jurisdiction of the juvenile court and is therefore considered a "juvenile", subject to the provisions of this section and, therefore, § 18-8-208. *People v. Young*, 908 P.2d 1147 (Colo. App. 1995).

18-8-210.2. Persons in custody or confinement.

For the purposes of this part 2, any reference to custody, confinement, charged with, held for, or convicted of, a felony, misdemeanor, or petty offense shall be deemed to include any felony, misdemeanor, or petty offense under the laws of this state and any felony, misdemeanor, or petty offense having similar elements under the laws of another state, the United States, or any territory subject to the jurisdiction of the United States.

Source: L. 99: Entire section added, p. 798, § 14, effective July 1.

18-8-211. Riots in detention facilities.

(1) A person confined in any detention facility within the state commits active participation in a riot when he, with two or more other persons, actively participates in violent conduct that creates grave danger of, or does cause, damage to property or injury to persons and substantially obstructs the performance of institutional functions, or commands, induces, entreats, or otherwise attempts to persuade others to engage in such conduct.

(2) Active participation in a riot by any person while confined in any detention facility within the state:

(a) Is a class 3 felony if the participant employs in the course of such participation a deadly weapon, as defined in section 18-1-901 (3)(e), destructive device, as defined in section 18-9-101 (1), or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or if the participant, in the course of such participation, represents verbally or otherwise that he or she is armed with a deadly weapon; or

(b) Is a class 4 felony if the participant does not employ any such weapon or device in the course of such participation.

(3) A person confined in any detention facility in this state commits a class 5 felony if, during a riot or when a riot is impending, he intentionally disobeys an order of a detention officer to move, disperse, or refrain from specified activities in the immediate vicinity of the riot or impending riot.

(4) "Detention facility", as used in this section, 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.

Source: L. 76, Ex. Sess.: Entire section added, p. 14, § 1, effective September 18. **L. 77:** (4) amended, p. 949, § 12, effective July 13. **L. 79:** Entire section amended, p. 701, § 3, effective July 1; (1) amended, p. 725, § 2, effective October 1. **L. 86:** (1), IP(2), (2)(b), and (3) amended and (4) R&RE, p. 771, §§ 10, 11, effective July 1. **L. 2000:** (2)(a) amended, p. 696, § 9, effective July 1. **L. 2023:** (2)(b) amended, (HB 23-1293), ch. 298, p. 1788, § 28, effective October 1.

ANNOTATION

Engaging in a riot, § 18-9-104, is not a lesser included offense of riots in detention facilities. Each offense contains a different element. The riots in detention facilities offense requires the offender to be

confined in a detention center and the engaging in a riot offense requires causing a public disturbance. *People v. Lacallo*, 2014 COA 78, 338 P.3d 442.

18-8-212. Violation of bail bond conditions.

(1) A person who is charged with any felony and is released on bond commits a class 6 felony if the person knowingly fails to appear in the felony case for which the person is on bond with the intent to avoid prosecution.

(2) A person who is released on bond and is charged with any felony or misdemeanor arising from the conduct for which the person was arrested commits a class 2 misdemeanor if the person intentionally fails to appear in the case for any proceedings for which victims or witnesses have appeared in court.

(3) The court shall sentence any person who is convicted of a misdemeanor offense in violation of section 18-6-803.5, or a felony offense in violation of section 18-8-704, 18-8-705, 18-8-706, or 18-8-707, involving a victim or witness in the underlying offense while on bond in the underlying case to imprisonment of not less than one year for violation of subsection (1) of this section and not less than six months for violation of subsection (2) of this section. The court shall order the sentence to be served consecutively with any sentence for the offense on which the person is on bail if the underlying sentence is a sentence to incarceration.

(3.5) A person who is on bond for a sex offense as defined in section 18-1.3-1003 who is convicted under this section for a bond violation shall not be eligible for probation or a suspended sentence and shall be sentenced to imprisonment of not less than one year. Any such sentence shall be served consecutively with any sentence for the offense on which the person is on bail.

(4) A criminal action charged pursuant to this section may be tried either in the county where the offense is committed or in the county in which the court that issued the bond is located, if such court is within this state.

(5) A violation of bond appearance conditions shall not be brought against any person subject to the provisions of section 16-4-113 (2).

Source: **L. 79:** Entire section added, p. 663, § 3, effective July 1. **L. 82:** (1) and (2) amended, p. 321, § 1, effective March 22. **L. 85:** (1) and (2) amended, p. 623, § 9, effective July 1. **L. 89:** (1) amended, p. 839, § 80, effective July 1. **L. 91:** (1) and (2) amended, p. 407, § 14, effective June 6. **L. 2005:** (4) added, p. 427, § 7, effective April 29. **L. 2013:** (3) amended and (3.5) added, (HB 13-1242), ch. 308, p. 1635, § 1, effective July 1. **L. 2016:** (3) amended, (SB 16-102), ch. 181, p. 620, § 2, effective July 1. **L. 2021:** (1) and (2) amended and (5) added, (SB 21-271), ch. 462, p. 3199, § 293, effective March 1, 2022.

ANNOTATION

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This section is not unconstitutional on the grounds that it violates the prohibition against double jeopardy. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Nor is this section unconstitutionally vague and overbroad. People v. Garcia, 698 P.2d 801 (Colo. 1985).

This section, when read together with § 16-4-103 (2), is not unconstitutionally vague as applied. This section only applies to knowing violations of bail bond conditions, and the defendant was adequately apprised by the information of the manner in which he had violated those conditions. People v. Baker, 45 P.3d 753 (Colo. App. 2001).

Subsection (1) does not unconstitutionally delegate authority to the district court to define a criminal offense. People v. Baker, 45 P.3d 753 (Colo. App. 2001).

Subsection (3) is not unconstitutional as a denial of equal protection and due process of law. People v. Garcia, 698 P.2d 801 (Colo. 1985).

In order to prove that a defendant violated this section, the prosecution must prove beyond a reasonable doubt that the terms of the bond were in effect at the time of the alleged illegal conduct. People v. Luna, 2013 COA 67, 410 P.3d 471.

Evidence that the defendant intended to and attempted to flee the jurisdiction will support an inference that the defendant knowingly failed to appear in violation of this section. People v. Williamson, 839 P.2d 519 (Colo. App. 1992).

No requirement that defendant be advised that violation of a bond condition is a crime. Statute that imposes criminal liability for certain conduct requires only that defendant know what he is doing when he is doing the conduct. People v. Rester, 36 P.3d 98 (Colo. App. 2001).

The prosecution presented sufficient evidence to support defendant's conviction for violating the bail bond condition that prohibited defendant from leaving the state without permission. Evidence that the defendant signed the bond paperwork, which included the condition not to leave the state, along with other evidence and inferences was sufficient to uphold the conviction. The presence of stacked inferences is not alone dispositive of a sufficiency of the evidence claim. Rather, it is one factor that a court may consider in determining whether the evidence presented satisfied the prevailing substantial evidence test for evidence sufficiency. People v. Donald, 2020 CO 24, 461 P.3d 4.

18-8-213. Unauthorized residency by an adult offender from another state.

(1) A person commits the crime of unauthorized residency by an adult offender if the person, in order to stay in the state, is required to have the permission of the compact administrator or a designated deputy of the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and the person:

(a) Is not a resident of this state, has not been accepted by the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and is found residing in this state; or

(b) Is a resident of this state, has not been accepted by the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and is found residing in this state more than ninety days after his or her transfer from the receiving state.

(2) Unauthorized residency by a parolee or probationer is a class 5 felony.

Source: L. 2000: Entire section added, p. 234, § 2, effective July 1. **L. 2011:** (1) amended, (HB 11-1009), ch. 5, p. 10, § 2, effective March 1.

PART 3

BRIBERY AND CORRUPT INFLUENCES

18-8-301. Definitions.

The definitions contained in section 18-8-101 are applicable to this part 3, unless the context otherwise requires, and, in addition to those definitions:

(1) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(2) "Party officer" means a person who holds any position or office in a political party, whether by election, appointment, or otherwise.

(3) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(4) "Public servant", as used in sections 18-8-302 to 18-8-308, includes persons who presently occupy the position of a public servant as defined in section 18-8-101 (3) or have been elected, appointed, or designated to become a public servant although not yet occupying that position.

Source: L. 71: R&RE, p. 459, § 1. **C.R.S. 1963:** § 40-8-301.

18-8-302. Bribery.

(1) A person commits the crime of bribery, if:

(a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity; or

(b) While a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.

(2) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

(3) Bribery is a class 3 felony.

Source: L. 71: R&RE, p. 459, § 1. C.R.S. 1963: § 40-8-302.

Cross references: For bribery of persons other than a public servant, see § 18-5-401.

ANNOTATION

Legislative intent. The general assembly apparently intended to define bribery as the commission of any one of the following three acts: (1) offering to confer upon a public servant, (2) conferring upon a public servant, or (3) agreeing to confer upon a public servant. Although the statute does not specify the person with whom the agreement must be made to be guilty of the third act, under a strict construction, the agreement must be with the public servant, not a third party, while a defendant may be guilty of the first two acts even if the public official does not agree to be bribed. *People v. Bailey*, 41 Colo. App. 504, 595 P.2d 252 (1978), rev'd

on other grounds, 200 Colo. 549, 617 P.2d 549 (1980).

The substantive offense of bribery of a judge can be committed by one person. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973) (decided under former § 40-7-5, C.R.S. 1963).

Corporation or a corporate body is not included in the definition of "government" in § 18-8-101. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Definition of term "public servant" is question of law for court. *People v. Bailey*, 41 Colo. App. 504, 595 P.2d 252 (1978),

rev'd on other grounds, 200 Colo. 549, 617 P.2d 549 (1980).

Employee of the Colorado Springs urban renewal effort is not a "public

servant" performing a "governmental function" on behalf of a "government" as defined in § 18-8-101. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

18-8-303. Compensation for past official behavior.

(1) A person commits a class 4 felony if the person:

(a) Solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised a discretion in his favor, whether or not he has in so doing violated his duty; or

(b) Offers, confers, or agrees to confer compensation, acceptance of which is prohibited by this section.

Source: L. 71: R&RE, p. 460, § 1. **C.R.S. 1963:** § 40-8-303. **L. 89:** IP(1) amended, p. 840, § 81, effective July 1. **L. 2023:** IP(1) amended, (HB 23-1293), ch. 298, p. 1788, § 29, effective October 1.

18-8-304. Soliciting unlawful compensation.

A public servant commits a class 1 misdemeanor if the public servant requests a pecuniary benefit for the performance of an official action knowing that the public servant was required to perform that action without compensation or at a level of compensation lower than that requested.

Source: L. 71: R&RE, p. 460, § 1. **C.R.S. 1963:** § 40-8-304. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3200, § 294, effective March 1, 2022.

18-8-305. Trading in public office.

(1) A person commits trading in public office if:

(a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant or party officer upon an agreement or understanding that he or a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office; or

(b) While a public servant or party officer, he solicits, accepts, or agrees to accept any pecuniary benefit from another upon an agreement or understanding that a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office.

(2) It shall be an affirmative defense that the pecuniary benefit was a customary contribution to political campaign funds solicited and received by lawfully constituted political parties.

(3) Trading in public office is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-305. L. 72: p. 275, § 7. L. 73: p. 539, § 6.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-8-306. Attempt to influence a public servant.

Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by the public servant or the agency or body of which the public servant is a member, commits a class 4 felony. A violation of this section does not include providing false identifying information to law enforcement authorities pursuant to section 18-8-111.5, and a person who commits the offense of providing false identifying information to law enforcement authorities shall not be convicted for a violation of this section.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-306. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3200, § 295, effective March 1, 2022.

Cross references: For interference with the legislative process, see part 4 of article 2 of title 2; for legislative witnesses, see § 8-2.5-101.

ANNOTATION

This statute was not unconstitutionally overbroad on its face where it was narrowly tailored to enable citizens to proscribe the type of conduct that rose to a level of criminal culpability and where defendant's letter to a district court judge went beyond a mere expression of criticism and did not lie within the area of protected speech. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

This statute was not unconstitutionally overbroad as applied to defendant where the tone and language of a letter to a district court judge evinced a threatening manner and the language suggested conduct that was squarely within the statute's proscriptions and was therefore unprotected under the first amendment. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

The words "deceit" and "economic reprisal" contained in this section were not unconstitutionally vague where the statute clearly portrayed the type of conduct that subjected a person to criminal prosecution, it defined the offense with particular words to limit the scope of the offense, and the language was plain and unambiguous. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

First amendment does not require the people to prove that defendant subjectively intended to threaten public official. *People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

Criminal defendant has no first amendment privilege to threaten violence against a judge even if he does so in the context of a court proceeding. *People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

"By means of deceit" means any action taken to deceive a public servant, including deceptive acts that the offender engages a third party to commit on their behalf. *People v. Hupke*, 2024 COA 73, 557 P.3d 816.

Requisite intent can exist in case where defendant used a false written instrument prepared by another. Prosecution is not obligated to prove defendant either mailed the false instrument or explicitly directed another to do so on defendant's behalf. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

Defendant could not have intended to influence a public servant if defendant did not know of servant's involvement. Defendant filed a false report at a kiosk. There is no evidence that defendant knew that anyone would screen the information input at the kiosk and then approve the report. *People v. Tee*, 2018 COA 84, 446 P.3d 875.

This statute requires only an attempt to influence a public official, not that the public servant actually be influenced. A physician fraudulently making false representations on a physician certification for medical marijuana may constitute an attempt to influence, even though the

certification was never submitted to the department of public health and environment. *People v. Montante*, 2015 COA 40, 351 P.3d 530.

A police officer is a public servant pursuant to this section. *People v. Sena*, 2016 COA 161, 395 P.3d 1148; *People v. Knox*, 2019 COA 152, 467 P.3d 1218.

A community corrections employee working for a private entity can be a public servant pursuant to this section. A community corrections employee performing a governmental function fits under the definition of public servant. *People v. Barnett*, 2020 COA 167, 490 P.3d 1000.

Evidence supported a charge under statute where defendant gave a false name to a police officer during a traffic stop with intent to alter officer's official actions toward defendant. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

False reporting to authorities is not a specific instance of attempt to influence a public servant. The crime of false reporting penalizes those who provide untruthful information to public officials, regardless of an attempt to influence public officials. The attempted influence offense can occur without any false reporting at all. Thus, the attempted influence charge and the false

reporting charge do not differ solely by prohibiting general and specific conduct. *People v. Blue*, 253 P.3d 1273 (Colo. App. 2011).

Criminal impersonation is not a specific instance of attempt to influence a public servant. *People v. Van De Weghe*, 2012 COA 204, 312 P.3d 231.

Nothing in this section requires incorporation of the definition of criminal attempt contained in § 18-2-101. Moreover, such a requirement would be illogical because this section does not proscribe influencing a public servant; it proscribes attempting to influence a public servant. *People v. Riley*, 2015 COA 152, 380 P.3d 157.

A person may be charged with multiple offenses of attempting to influence a public servant arising from a single criminal episode when the discrete offenses were separated in time and location and comprised separate volitional departures. Defendant's report to the dispatcher, account to one police officer at the scene, and statement to another police officer during the ambulance ride constituted three discrete offenses. *People v. Knox*, 2019 COA 152, 467 P.3d 1218.

Applied in *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-8-307. Designation of supplier prohibited.

(1) No public servant shall require or direct a bidder or contractor to deal with a particular person in procuring any goods or service required in submitting a bid to or fulfilling a contract with any government.

(2) Any provision in invitations to bid or any contract documents prohibited by this section are against public policy and void.

(3) It shall be an affirmative defense that the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it does not meet bona fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

(4) Any public servant who violates the provisions of subsection (1) of this section commits a class 5 felony.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-307. L. 73: p. 539, § 7. L. 89: (4) amended, p. 840, § 82, effective July 1. L. 2023: (4) amended, (HB 23-1293), ch. 298, p. 1788, § 30, effective October 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

It is within the discretion of a public servant to accept or reject any or all bids submitted, once they have been opened and modification did not constitute a designation of supplier to fulfill a government contract, but an exercise of the

public servant's discretion in rejecting a particular subcontractor on the basis of experience. *Heritage Pools v. Foothills Metro. Recreation and Park Dist.*, 701 P.2d 1260 (Colo. App. 1985).

18-8-308. Failing to disclose a conflict of interest.

(1) A public servant commits failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employs the public servant of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he is about to act in his official capacity.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

(3) Failing to disclose a conflict of interest is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 461, § 1. **C.R.S. 1963:** § 40-8-308. **L. 79:** (1) amended, p. 744, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Director Conflicts: The Effect on Disclosure — Parts I and II", see 17 Colo. Law. 461 and 639 (1988). For article, "Conflicts of Interest in Government", see 18 Colo. Law. 595 (1989).

Section deals with formal, express contracts. Former section prohibiting

interest in contract by officer had to do with such contracts as the officer is charged with the duty of making, and with those in the awarding of which he has a voice, or vote, and clearly means formal, express contracts, which are in terms agreed upon, or awarded on bids. *People v. Brown*, 60 Colo. 276, 152 P. 1169 (1915) (decided under former R.S. 08, § 4994).

PART 4

ABUSE OF PUBLIC OFFICE

18-8-401. Definitions.

The definitions contained in sections 18-8-101 and 18-8-301 are applicable to this part 4, unless a different meaning is plainly required.

Source: L. 71: R&RE, p. 461, § 1. **C.R.S. 1963:** § 40-8-401.

18-8-402. Misuse of official information.

(1) Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he:

(a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or

- (b) Speculates or wagers on the basis of such information or official action; or
 - (c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.
- (2) Misuse of official information is a class 5 felony.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-402. L. 89: (2) amended, p. 840, § 83, effective July 1. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1789, § 31, effective October 1.

ANNOTATION

Statute as basis for jurisdiction. See People v. Heckers, 37 Colo. App. 166, 543 P.2d 1311 (1975).

18-8-403. Official oppression.

(1) A public servant, while acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity, commits official oppression if, with actual knowledge that his conduct is illegal, he:

- (a) Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, or lien; or
- (b) Has legal authority and jurisdiction of any person legally restrained of his liberty and denies the person restrained the reasonable opportunity to consult in private with a licensed attorney-at-law, if there is no danger of imminent escape and the person in custody expresses a desire to consult with such attorney.

(2) Official oppression is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-403. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3200, § 296, effective March 1, 2022.

Cross references: For the duty of officers to admit an attorney, see § 16-3-404.

18-8-404. First degree official misconduct.

(1) A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly:

(a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or

(b) Refrains from performing a duty imposed upon him by law; or

(c) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) First degree official misconduct is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-404. L. 83: (1)(b) amended, p. 710, § 1, effective June 10. L. 2000: IP(1) amended, p. 709, § 41, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3200, § 297, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-8-404 is similar to former § 40-7-46, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. The remedy for corrupt discharge of a district attorney's duties is in the criminal statutes. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

Section violated by district attorney's failure to prosecute personal friend for possession of marijuana. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Section applicable although term of office had expired when indictment was filed. Provisions of former section relating to malfeasance in office were applicable to

an official violating the terms thereof, although his term of office had expired when the indictment was filed against him. Whalen v. People, 74 Colo. 417, 222 P. 398 (1924).

Section violated when an official uses opportunities presented by his or her office to engage in improper conduct. A sheriff's deputy, while in his patrol car and in uniform, approached a person to inquire about purchasing their firearms that were stored at the sheriff's office. The only reason the deputy had access to the firearms was because they were in the evidence locker. Furthermore, the sheriff's deputy assured the person that the transaction was legal based on his status as a sheriff's deputy. People v. Berry, 2020 CO 14, 457 P.3d 597.

Definitions. Malfeasance consists of the doing of an act which is wholly wrongful and unlawful; it involves an act which the officer has no authority to do and it is readily distinguished from misfeasance or nonfeasance. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Elements of offense. Malfeasance in office cannot be charged except for breach of a positive statutory duty or for the performance of a discretionary act with an improper or corrupt motive. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Mere ownership of land by a county commissioner, which land was later subdivided, would not constitute malfeasance. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Intent may be inferred. Intent to commit embezzlement of public property, official

misconduct, and theft may be inferred from the defendants' conduct and the circumstances of the case. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

There must be some direct allegation of facts which constitute malfeasance. To charge malfeasance without more is to state a conclusion which does not afford the defendant an opportunity to know the nature of or to meet the charge against him. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Applied in *People v. Enlow*, 135 Colo. 249, 310 P.2d 539 (1957); *People v. Dilger*, 196 Colo. 414, 585 P.2d 918 (1978); *People v. Montera*, 198 Colo. 156, 596 P.2d 1198 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *Colo. Ethics Watch v. Coffman*, Indep. Ethics Comm'n 08-01.

18-8-405. Second degree official misconduct.

(1) A public servant commits second degree official misconduct if he knowingly, arbitrarily, and capriciously:

- (a) Refrains from performing a duty imposed upon him by law; or
 - (b) Violates any statute or lawfully adopted rule or regulation relating to his office.
- (2) Second degree official misconduct is a petty offense.

Source: **L. 71:** R&RE, p. 462, § 1. **C.R.S. 1963:** § 40-8-405. **L. 83:** (1)(a) amended, p. 710, § 2, effective June 10. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3200, § 298, effective March 1, 2022.

ANNOTATION

-1503-

The language "duty imposed upon him by law" is not unconstitutionally vague. People v. Beruman, 638 P.2d 789 (Colo. 1982).

But "clearly inherent" duty language in former provision was constitutionally vague. The language proscribing omissions of duty "clearly inherent in the nature of his office" was unconstitutionally vague. The vagueness present in this statutory language impermissibly infringed the constitutional safeguards of fundamental fairness and due process, and created a danger of arbitrary enforcement. People v. Beruman, 638 P.2d 789 (Colo. 1982).

Criminal responsibility based on legally imposed duty not invalidated. Since this section provides for alternative bases of liability, the first basis of criminal responsibility — refrains from performing a duty imposed by law — is not affected by the invalidity of the second basis — inherent in the nature of the office. People v. Beruman, 638 P.2d 789 (Colo. 1982).

Charge to be based on specific, mandatory duties. A charge of official misconduct must be based upon mandatory legal duties specific to a particular public office, not upon general allegations of duty. People v. Beruman, 638 P.2d 789 (Colo. 1982).

So that accused can prepare defense. An indictment under this section must set out the source of the duty imposed by law which the defendant failed to perform in addition to the specification of the facts alleged to constitute the failure of performance. It is essential that the defendant know what duties are imposed by law which have not been performed in order to allow him to prepare a defense, and further, to enable him to plead the resolution of the charge as a bar to further prosecution for the same offense. People v. Beruman, 638 P.2d 789 (Colo. 1982).

Applied in People ex rel. Losavio v. Gentry, 199 Colo. 153, 606 P.2d 57 (1980); Colo. Ethics Watch v. Coffman, Indep. Ethics Comm'n 08-01.

18-8-406. Issuing a false certificate.

A person commits a class 6 felony, if, being a public servant authorized by law to make and issue official certificates or other official written instruments, he makes and issues such an instrument containing a statement which he knows to be false.

Source: L. 71: R&RE, p. 462, § 1. **C.R.S. 1963:** § 40-8-406. **L. 89:** Entire section amended, p. 840, § 84, effective July 1.

ANNOTATION

-1504-

The language "authorized by law" is not unconstitutionally vague. People v. Buckallew, 848 P.2d 904 (Colo. 1993).

The statute is not overbroad where defendant has failed to show that it infringes any fundamental freedom, and it is "self-evident" that the statute is reasonably related to the legitimate governmental interest in protecting the public from the issuance of false documents by public officials. People v. Buckallew, 848 P.2d 904 (Colo. 1993).

The county sheriff falls within the ambit of the statute where it is clear that a

sheriff cannot fully perform his functions without the implied power to make official certificates. People v. Buckallew, 848 P.2d 904 (Colo. 1993).

Indictment need not set forth the source of county sheriff's authority to issue official certificates as long as the duty to refrain from engaging in the prohibited conduct is clear from the count. The indictment clearly stated defendant sheriff was alleged to have breached the duty not to make and issue false official certificates. People v. Buckallew, 848 P.2d 904 (Colo. 1993).

18-8-407. Embezzlement of public property.

(1) Every public servant who lawfully or unlawfully comes into possession of any public moneys or public property of whatever description, being the property of the state or of any political subdivision of the state, and who knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law is guilty of embezzlement of public property. Every person convicted under the provisions of this section shall be forever thereafter ineligible and disqualified from being a member of the general assembly of this state or from holding any office of trust or profit in this state.

(2) Embezzlement of public property is a class 5 felony.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-407. L. 77: (1) amended, p. 967, § 45, effective July 1. L. 89: (2) amended, p. 840, § 85, effective July 1.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957).

Annotator's note. Since § 18-8-407 is similar to former § 40-5-16, C.R.S. 1963, and laws antecedent thereto, relevant cases

construing those provisions have been included in the annotations to this section.

Intent of section is to prevent misapplication of public funds. The intention of the general assembly is to prevent the misapplication and use of public

funds for the benefit and profit of the officer and to strictly prohibit the use of the money by the officer for speculative purposes and for his own gain. This section is based upon and enacted for the purpose of carrying out the prohibition contained in § 13 of art. X, Colo. Const., and by reference to that, the intention becomes manifest and the limits of legislation defined. *Moulton v. McLean*, 5 Colo. App. 454, 39 P. 78 (1895); *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956); *People v. Berry*, 2017 COA 65, 459 P.3d 578, aff'd, 2020 CO 14, 457 P.3d 597.

It is the using of public money for the official's own gain that is intended to be reached by this section. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

The purpose of this section is to prevent the intentional misapplication of public funds for private gain by those officers entrusted with the responsibility for the correct disposition of the moneys. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

"Public moneys" includes federal moneys. Federal moneys deposited into the state treasury are public moneys of the state within the meaning of this section. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

"Public moneys or public property" means and is limited to money or property owned by the public, i.e., the state or one of its political subdivisions. *People v. Berry*, 2017 COA 65, 459 P.3d 578, aff'd, 2020 CO 14, 457 P.3d 597.

Considering the common law origin and purpose of the crime of embezzlement, mere custody or possession of money or property is insufficient to support an embezzlement charge under this section. *People v. Berry*, 2017 COA 65, 459 P.3d 578, aff'd, 2020 CO 14, 457 P.3d 597.

It was not the intention of the general assembly to prohibit the depositing of money in banks for convenience in safekeeping. *Davis v. Dunlevy*, 11 Colo. App. 344, 53 P. 250 (1898).

And bond covering money deposited in bank is valid. A bond given to indemnify the clerk of a county court on account of money deposited in a bank is not void as against public policy, nor in violation of this section. *Davis v. Dunlevy*, 27 Colo. 244, 60 P. 570 (1900).

An essential element of the crime of "embezzlement" or "criminal conversion" is that the property must be owned by another and the conversion thereof must be without the consent and against the will of the party to whom the property belongs, coupled with the fraudulent intent to deprive the owner of the property. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Public ownership of funds or property is a necessary element of a charge under this section. *People v. Berry*, 2017 COA 65, 459 P.3d 578, aff'd, 2020 CO 14, 457 P.3d 597.

Proof of fraudulent intent not required. In order for public official to commit crime of embezzlement, no need for proof of a

fraudulent intent. Only mens rea requirement is that actor knowingly convert the property. *People v. Morise*, 859 P.2d 247 (Colo. App. 1993).

This section has implicit within its language the requisite unlawful conversion and criminal intent. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Fraudulent intent is not an element of the offense under this section. *People v. McKnight*, 39 Colo. App. 280, 567 P.2d 811 (1977).

Intent may be inferred. Intent to commit embezzlement of public property, official misconduct, and theft may be inferred from the defendants' conduct and the circumstances of the case. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

It does not require that defendant be the custodian of the money in question or that he have exclusive control over it. *Rogers v. People*, 104 Colo. 594, 94 P.2d 453 (1939).

Qualified ownership of funds by state is sufficient to support a charge of embezzlement. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

Property was not misappropriated as a matter of law where it was used by the defendant as it was intended to be, on special order, with the knowledge of the hospital agent in charge that it was to be delivered to and used by the director himself, not for public use or at public expense. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Required particularity of description of property embezzled. The general rule is that the required particularity of description of property embezzled is the same as in case of property stolen. If, however, the court can determine from the indictment that the property therein mentioned is covered by the statute and the jury can determine that it is the property identified by the evidence, no more is mandatory. *People v. Warner*, 112 Colo. 565, 151 P.2d 975 (1944).

Indictment that sets forth multiple factual allegations, only some of which properly constitute a factual predicate for an embezzlement charge, is legally sufficient when it accurately recites the law and provides at least one factual basis to support the charge. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Purpose of indictment met where sheriff was given sufficient notice of the charged offenses and the facts to allow adequate trial preparation and protect himself from subsequent prosecution for the same offense. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment sufficient in prosecution for embezzlement of public property. *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978).

Indictment sufficient where sheriff's use of county vehicles and personnel to transport inmates to construct addition to his home satisfied the public moneys or public property element of embezzlement. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment sufficient where sheriff's use of county vehicles and personnel to transport inmates for work cutting firewood involved public moneys or public property because the vehicles were owned by the county and the personnel were county employees. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment insufficient where sheriff's use of manual labor of inmates to construct an addition to his home and cut firewood did not involve public moneys or public property because inmates are not public property. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Although sheriff benefitted from an increase in the value of his home as a result of inmate labor, this increase did not involve coming into possession of public moneys or public property because inmates are not public property, their labor is not public property, and the increased value was to sheriff's private property, not to public property. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Sheriff's profit from the sale of firewood cut by inmates did not involve public moneys or public property because the wood never belonged to the county. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Sheriff's deputy who removed firearms from an evidence locker and converted them for his own use did not violate this section because neither the sheriff's office nor any other public entity owned the firearms. *People v. Berry*, 2020 CO 14, 457 P.3d 597.

Indictment dismissed for failure to state sufficiently how embezzlement accomplished. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Statute of limitations applicable. The act averred in the indictment must appear to have been committed within the period prescribed by the statute of limitations or an exception must be set forth. If the indictment avers two dates, one of which is so remote as to be barred by the statute of limitations, it is defective. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

County commissioner held guilty of violating section. *Rogers v. People*, 104 Colo. 594, 94 P.2d 453 (1939).

Applied in *Moulton v. McLean*, 5 Colo. App. 454, 39 P. 78 (1895); *Bd. of Comm'rs v. Hall*, 9 Colo. App. 538, 49 P. 370 (1897); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

18-8-408. Designation of insurer prohibited.

(1) No public servant shall, directly or indirectly, require or direct a bidder on any public building or construction contract which is about to be or has been competitively bid to obtain from a particular insurer, agent, or broker any surety bond or contract of insurance required in such bid or contract or required by any law, ordinance, or regulation.

(2) Any such public servant who violates any of the provisions of subsection (1) of this section commits a civil infraction.

(3) Any provisions in invitations to bid or in any contract documents prohibited by this section are declared void as against the public policy of this state.

(4) Nothing in this section shall be construed to prevent any such public servant acting on behalf of the government from exercising the right to approve or reject a surety bond or contract of insurance as to its form or sufficiency or the lack of financial capability of an insurer selected by a bidder.

(5) This section shall apply only to contracts entered into on or after July 1, 1977.

Source: L. 77: Entire section added, p. 989, § 1, effective May 26. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3200, § 299, effective March 1, 2022.

18-8-409. Violation of rules and regulations of judicial nominating commissions not subject to criminal prosecution.

A person who violates a rule or regulation promulgated by any judicial nominating commission shall not be subject to criminal prosecution.

Source: L. 87: Entire section added, p. 673, § 1, effective May 16.

18-8-410. Abuse of public trust by an educator - definitions.

(1) Any educator who knowingly subjects a student to any sexual intrusion or sexual penetration commits abuse of public trust by an educator if the student is at least eighteen years of age and the educator is more than four years older than the student and is not the student's spouse.

(2) Abuse of public trust by an educator is a class 1 misdemeanor.

(3) Consent by the student to the sexual intrusion or sexual penetration does not constitute a defense to the offense.

(4) As used in this section, unless the context otherwise requires:

(a) "Consent" has the same meaning as set forth in section 18-3-401 (1.5).

(b) (I) "Educator" means a person employed at the same school the student attends at the time of the sexual contact and who:

- (A) Instructs students at that school;
- (B) Administers, directs, or supervises the educational instruction program or a portion thereof;
- (C) Provides health or educational support services directly to students of the school; or
- (D) Coaches students of the school.

(II) "Educator" does not include another student at the school where the educator is employed.

(c) "School" means any institution that instructs persons in any of grades preschool through twelve but does not include any postsecondary school.

(d) "Sexual intrusion" has the same meaning as set forth in section 18-3-401 (5).

(e) "Sexual penetration" has the same meaning as set forth in section 18-3-401 (6).

(f) "Student" means any person enrolled in a school where the educator is employed at the time of the incident, but does not include another student.

(5) Schools shall advise all educators of the prohibitions in this section.

Source: L. 2021: Entire section added, (SB 21-017), ch. 417, p. 2775, § 5, effective July 2.

PART 5

PERJURY AND RELATED OFFENSES

Cross references: For interference with the legislative process, see part 4 of article 2 of title 2; for legislative witnesses, see § 8-2.5-101.

Law reviews: For article, "Testimonial Consistency: The Hobgoblin of the Federal False Declaration Statute", see 66 Den. U.L. Rev. 135 (1989).

18-8-501. Definitions.

The definitions in sections 18-8-101 and 18-8-301 are applicable to this part 5, and, in addition to those definitions:

(1) "Materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function.

(2) (a) "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated. For the purposes of this section, written statements shall also be treated as if made under oath if:

(I) The statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or

(II) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto; or

(III) The statement is made, used, or offered with the intent that it be accepted as compliance with a statute, rule, or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement; or

(IV) The statement meets the requirements for an unsworn declaration under the "Uniform Unsworn Declarations Act", article 27 of title 13.

(b) An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute, court rule, or appropriate regulatory provision.

(3) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency, or official authorized to hear evidence under oath, including any magistrate, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceedings.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-501. L. 91: (3) amended, p. 360, § 23, effective April 9. L. 96: (1) amended, p. 738, § 11, effective July 1. L. 2009: (2) amended, (HB 09-1190), ch. 115, p. 485, § 2, effective August 5. L. 2017: (2)(a)(IV) amended, (SB 17-154), ch. 130, p. 442, § 5, effective August 9. L. 2018: (2)(a)(IV) amended, (SB 18-032), ch. 8, p. 156, § 10, effective October 1.

ANNOTATION

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981).

Not every false statement constitutes perjury. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

To be perjurious, a false statement must also be "material". People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Test of materiality is whether a witness's testimony, at the time his answers were given, could have affected the course or outcome of the investigation; where the subject of the grand jury's investigation was the heroin distribution ring operating in the Colorado Springs area, all leads were material which might have assisted the grand jury in identifying those who had at any time been members of the heroin ring. People v. Maestas, 199 Colo. 143, 606 P.2d 849 (1980).

To be material, a false declaration must have a tendency to influence, impede or hamper the grand jury from pursuing its investigation and it need not be material to the main issue or directed to the primary subject of the investigation. People v. Spomer, 631 P.2d 1156 (Colo. App. 1981).

Materiality. A false statement is material for purposes of § 18-8-502 (1) if it could have affected the outcome of the official proceeding. People v. Scott, 785 P.2d 931 (Colo. 1990); People v. Drake, 841 P.2d 364

(Colo. App. 1992); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000).

Materiality properly question of law. This section does not improperly render the element of materiality in a first degree perjury charge a question for the judge and does not violate the constitutional right to a jury trial on every element of the offense. People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979), abrogated in People v. Vance, 933 P.2d 576 (Colo. 1997).

Materiality is an element of the offense of first-degree perjury entitling a defendant to have a jury determine whether his false statement is material. People v. Vance, 933 P.2d 576 (Colo. 1997) (abrogating People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979)).

A mistrial is an "official proceeding" within the meaning of this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

Lawyer knowingly presenting perjuring witness commits subornation of perjury. A lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in the subornation of perjury. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Written as well as oral statements may be made under "oath". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part, rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

"Official proceeding", which includes judicial proceedings in the course of which depositions are given under oath, must be read as including interrogatories. *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, 880 P.2d 749 (Colo. 1994).

As a matter of law, an application for court-appointed counsel constitutes part of an official proceeding under subsection (3). *People v. Schupper*, 140 P.3d 293 (Colo. App. 2006).

Applied in *People v. Frayer*, 661 P.2d 1189 (Colo. App. 1982), *aff'd*, 684 P.2d 927 (Colo. 1984).

18-8-502. Perjury in the first degree.

(1) A person commits perjury in the first degree if in any official proceeding he knowingly makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense, although it may be considered by the court in imposing sentence.

(3) Perjury in the first degree is a class 4 felony.

Source: L. 71: R&RE, p. 463, § 1. C.R.S. 1963: § 40-8-502. L. 77: (1) amended, p. 967, § 46, effective July 1.

ANNOTATION

Annotator's note. Since § 18-8-502 is similar to former § 40-7-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Ruling of unconstitutionality disapproved. *People v. Loomis*, 698 P.2d 1320 (Colo. 1985).

The elements of perjury are the falsity of the testimony, its materiality to the issue in the contempt matter, that the oath was

administered in a proper proceeding, and the criminal intent. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957).

To convict of the crime of perjury it must appear not only that the alleged false testimony was given, and that it was false, but also that it was material. It must be shown to have had a legitimate tendency to prove or disprove some fact material to the matter being investigated. *McClelland v. People*, 49 Colo. 538, 113 P. 640 (1911).

Not every false statement constitutes perjury. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

To be perjurious, a false statement must also be "material". People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Witness may be guilty of perjury in swearing falsely to any material circumstance. A witness may be guilty of perjury, not only by swearing corruptly and falsely to the fact which is immediately in issue, but also to any material circumstance which legitimately tends to prove or disprove such fact; or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact. Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); Stonebraker v. People, 89 Colo. 550, 4 P.2d 915 (1931); Papas v. People, 98 Colo. 306, 55 P.2d 1330 (1936).

It is not necessary to prove that each and all of the answers of the defendant were false, but if the jury believes beyond a reasonable doubt that the defendant had wilfully sworn falsely to any of the material statements charged, it was their duty to find him guilty. Marrs v. People, 135 Colo. 458, 312 P.2d 505 (1957).

Probable cause existed where the evidence, taken in a light most favorable to the prosecution, showed the defendant lied to the small claims court and showed a document to the small claims court that he allegedly forged, the referee stated that someone was being dishonest, and the document presented contained certain

features consistent with a tracing attempt. People v. Scott, 785 P.2d 931 (Colo. 1990).

Materiality is question of law. The court must determine, as a matter of law, whether or not the alleged false testimony is material to the issue. Treece v. People, 96 Colo. 32, 40 P.2d 233 (1934).

In a prosecution for perjury the question of the materiality of the testimony alleged to be false is one of law for the court and not the jury. Marrs v. People, 135 Colo. 458, 312 P.2d 505 (1957).

The people have the burden of proving "materiality" of a false statement and that element may not be presumed. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Materiality. A false statement is material for purposes of subsection (1) if it could have affected the outcome of the official proceeding. People v. Scott, 785 P.2d 931 (Colo. 1990); People v. Drake, 841 P.2d 364 (Colo. App. 1992); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000).

Materiality must appear by facts or direct averment. It is not necessary that the information should set forth how or in what way the evidence alleged to be false was material to the issue. It is sufficient if its materiality appears either from the facts alleged or by direct averment. Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); Treece v. People, 96 Colo. 32, 40 P.2d 233 (1934).

Issue of materiality must be submitted to jury. People v. Vance, 933 P.2d 576 (Colo. 1997).

Knowledge of materiality is not an element of the crime of first-degree perjury. People v. Vance, 933 P.2d 576 (Colo. 1997).

Failure to submit issue of materiality to jury is structural defect and not harmless error. People v. Vance, 933 P.2d 576 (Colo. 1997) (disapproved of by Supreme Court in Griego v. People, 19 P.3d 1 (Colo. 2001)).

An incorrect jury instruction in a criminal case is not a structural error; instead, such instruction is subject only to harmless or plain error review, following the U.S. supreme court precedent in Neder v. United States, 527 U.S. 1 (1999). Therefore, if a conviction is not attributable to the incorrect instruction, a conviction shall not be overturned and all contrary precedent is disapproved of. Griego v. People, 19 P.3d 1 (Colo. 2001) (disapproving on this point Cooper v. People, 973 P.2d 1234 (Colo. 1999), Bogdanov v. People, 941 P.2d 247 (Colo. 1997), People v. Vance, 933 P.2d 576 (Colo. 1997), People v. Villa-Villa, 983 P.2d 181 (Colo. App. 1999)).

A perjury conviction may be predicated upon false statements made before a grand jury. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Statements made during a mistrial may be grounds for perjury under this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

The defendant's attempted retraction in a retrial having the same case number as the mistrial does not afford him protection from conviction of first degree

perjury under this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

Defendant must be informed of issue against him. When tried on an indictment alleging that perjury was committed before a grand jury, the defendant is entitled to be advised by the indictment what the issue is, or as to the nature of the point in question, so that he may prepare himself to show, if he can, that though the testimony be false, it was not material. Treece v. People, 96 Colo. 32, 40 P.2d 233 (1934).

Absence of warning as to privilege against self-incrimination does not protect perjury. The required warning concerning one's privilege against self-incrimination in grand jury appearance relates to admissions concerning past acts, and its absence does not grant witnesses the right to commit perjury before the grand jury. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973).

And testimony not to be suppressed in later perjury prosecution. Defendants who were not advised of their rights against self-incrimination prior to their grand jury appearance are not entitled to have their testimony before the grand jury suppressed in later perjury prosecution. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973).

Inconsistent answer relating to credibility is material. If a witness, in answering a question asked for the purpose of laying a foundation for impeachment by a showing of former inconsistent statements, testifies under oath that he did not at a designated time and place make certain

statements to officers concerning the whereabouts of the defendant on a certain day, which answers are inconsistent with his testimony on the trial, such testimony is material on the question of his credibility, and if knowingly false, constitutes perjury. *Papas v. People*, 98 Colo. 306, 55 P.2d 1330 (1936).

Necessity for record of testimony. The record of the case in which perjury is alleged to have been committed must be produced, and the people must display so much of the testimony given in that hearing as shows clearly the materiality of the testimony alleged to have been falsified. *McClelland v. People*, 49 Colo. 538 (1911).

Sufficiency of information. An information for perjury under this section which charges that it was committed in the "district court of San Miguel county, Colorado", charged with sufficient certainty before what court the alleged false oath was taken; it is not necessary to state the name of the clerk of the court by whom the oath was administered. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

An information charging perjury in a grand jury investigation should set forth the subject matter of the investigation in which the alleged false testimony was given, and facts, not conclusions, must be averred. If the information is defective in this particular, the prosecution must fail. *Treece v. People*, 96 Colo. 32, 40 P.2d 233 (1934).

An information that in substance alleges that before a certain district court, properly describing the court, upon the trial of a certain criminal case, the defendant was

duly sworn as a witness by the deputy clerk who had authority to administer the oath, sufficiently conforms to this section and by necessary implication states that the proceeding in which the oath was administered was one over which the court had jurisdiction. *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899); *Papas v. People*, 98 Colo. 306, 55 P.2d 1330 (1936).

The information charged that the defendant "feloniously, wilfully, corruptly, and falsely" swore that he did not make the statement and then charged that he did make the statement, and concludes with the further allegation "all of which he, the said A, well knew". With these allegations in the information, it is not conceivable that the defendant was not advised that he was charged with swearing falsely that a certain fact was true, with knowledge of its falsity. To hold otherwise requires so "skillful an elimination of the obvious" that it would not be attempted except by one versed in the technicalities and evasions of the criminal law. *Papas v. People*, 98 Colo. 306, 55 P.2d 1330 (1936).

Sufficiency of indictment. Indictment for perjury was not fatally defective where the indictment, by implication, indicated that the converse of defendant's testimony was the truth, and the indictment was sufficiently definite to inform the defendant of the charges against him so as to enable him to prepare a defense and to plead the judgment in bar of any further prosecutions for the same offense. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Insufficiency of indictment. The perjury charge failed to set forth with sufficient specificity the falsity of the defendant's statements before the grand jury so as to enable him to prepare his defense, where the device by which the defendant was charged with perjury in the indictment was a verbatim partial transcript of the defendant's actual testimony before the grand jury, but there was no averment of fact to demonstrate the falsity of the testimony on which the charge was based. *People v. Broncucia*, 189 Colo. 334, 540 P.2d 1101 (1975).

Joinder of counts in indictment. Two separate counts charging perjury, the first under this section and the second under the following section, were properly joined in one indictment where the two counts were admittedly based upon the same facts, and such facts would render defendants guilty under both sections. *People v. Swanson*, 109 Colo. 371, 125 P.2d 637 (1942).

Proof required to support conviction. To support a conviction for perjury, the offense must be proved by the testimony of two witnesses or the testimony of one witness and independent, corroborating evidence which is deemed of equal weight to the testimony of another witness. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Evidence of defendant's familiarity with crime about which he perjured himself. Evidence in prosecution for perjury which, if believed by the jury, demonstrated

defendant's familiarity with the alleged crime about which defendant was being interrogated by the grand jury, was relevant and material to show defendant's knowledge of the perjurious nature of his testimony and his motive for falsifying his testimony. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Jury instruction. Where jury instruction failed to include an essential part of the two-witness rule in prosecution for perjury, i.e., that the corroborating evidence must be deemed of equal weight to the testimony of another witness, this omission was harmless error inasmuch as there was direct testimony by three witnesses contradicting the defendant's grand jury testimony. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Evidence sufficient to establish guilt beyond reasonable doubt. *People v. Concialdi*, 191 Colo. 561, 554 P.2d 1094 (1976).

Written versus oral statements. The difference between first- and second-degree perjury does not turn on whether a statement is written versus oral, but rather upon whether a false statement made under oath occurs in an "official proceeding." *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, 880 P.2d 749 (Colo. 1994).

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979); *People v. Maestas*, 199 Colo. 143, 606 P.2d 849 (1980).

18-8-503. Perjury in the second degree.

(1) A person commits perjury in the second degree if, other than in an official proceeding, with an intent to mislead a public servant in the performance of his duty, he makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Perjury in the second degree is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 463, § 1. **C.R.S. 1963:** § 40-8-503. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3200, § 300, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-8-503 is similar to former § 40-7-1, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

No presumption of oath-taking is held to apply where the notary's testimony was equivocal on the issue of whether the oath was taken. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

Independent proof required where presumption fails. Although in some cases

a criminal conviction may be had upon a bare presumption, the presumption so allowed must fall where there is some evidence to counter the notion that the oath was actually taken. The courts then require independent proof of the actual oath-taking. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

Written versus oral statements. The difference between first- and second-degree perjury does not turn on whether a statement is written versus oral, but rather upon whether a false statement made under oath occurs in an "official proceeding." *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

18-8-503.5. Perjury on a motor vehicle registration application. (Repealed)

Source: L. 90: Entire section added, p. 1801, § 5, effective July 1. L. 94: Entire section repealed, p. 2541, § 5, effective January 1, 1995.

18-8-504. False swearing.

(1) A person commits false swearing if he knowingly makes a materially false statement, other than those prohibited by sections 18-8-502 and 18-8-503, which he does not believe to be true, under an oath required or authorized by law.

(2) False swearing is a petty offense.

Source: L. 71: R&RE, p. 463, § 1. C.R.S. 1963: § 40-8-504. L. 77: (1) amended, p. 968, § 47, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3200, § 301, effective March 1, 2022.

ANNOTATION

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

18-8-505. Perjury or false swearing - inconsistent statements.

(1) Where a person charged with perjury or false swearing has made inconsistent material statements under oath, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other statement was false and not believed by the defendant to be true.

(2) The highest offense of which a person may be convicted in such an instance shall be determined by hypothetically assuming each statement to be false. If the assumption establishes perjury of different degrees, the person may be convicted of the lesser degree at most. If perjury or false swearing is established by the making of the two statements, the person may be convicted of false swearing at the most.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-505. L. 73: p. 535, § 4.

18-8-506. Perjury and false swearing - proof.

In any prosecution for perjury or false swearing, except a prosecution based upon inconsistent statements pursuant to section 18-8-505, falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of a single witness.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-506.

ANNOTATION

Section requires testimony of two witnesses or witness plus corroboration of equal weight. In face of the positiveness of § 16-5-204, requiring at least two witnesses to the same fact to find an indictment for perjury, it would seem incongruous to prosecute and convict on less direct proof than is required to indict, and, therefore, if a conviction is to stand on the testimony of one witness and corroborating circumstances, such corroboratory proof must meet the strict requirement of quality equal to the weight of another witness. *Lindsay v. People*, 119 Colo. 438, 204 P.2d 878 (1949) (decided under former CSA, C. 48, § 448).

To convict one of the crime of perjury the offense must be proved by the testimony of

two witnesses, or the testimony of one witness and by other independent and corroborating circumstances which are deemed of equal weight of the testimony of another witness. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957) (decided under former § 39-3-2, CRS 53); *People v. Losinki*, 710 P.2d 1163 (Colo. App. 1985).

Requirements of "two-witness" rule can be satisfied by independent documentary evidence if that evidence is of sufficient weight. *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd in part, rev'd in part on other grounds*, 749 P.2d 952 (Colo. 1988); *People v. Ellsworth*, 15 P.3d 1111 (Colo. App. 2000).

18-8-507. Perjury and false swearing - previous criminal action.

No prosecution may be brought under section 18-8-502, 18-8-503, or 18-8-504 if the substance of the defendant's false statement is the entry of a plea of not guilty in a previous criminal action in which he or she was accused of an offense.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-507. L. 2000: Entire section amended, p. 28, § 1, effective July 1.

18-8-508. Perjury - retraction.

No person shall be convicted of perjury in the first degree if he retracted his false statement in the course of the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding. Retraction is an affirmative defense.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-508.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

The only requirement under the section is that the witness recant during the course of a single continuous trial, which may include various hearings and stages which are a part thereof. *People v. Valdez*, 39 Colo. App. 213, 568 P.2d 71 (1977).

A trial which ends in a mistrial and a retrial are "separate proceedings", rather than "separate hearings at separate stages of the same trial". *People v. Valdez*, 39 Colo. App. 213, 568 P.2d 71 (1977).

18-8-509. Perjury and false swearing - irregularities no defense.

- (1) It is no defense to a prosecution under sections 18-8-502 to 18-8-504 that:
- (a) The defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement alleged;
 - (b) The statement was inadmissible under the law of evidence;
 - (c) The oath was administered or taken in an irregular manner; or
 - (d) The person administering the oath lacked authority to do so, if the taking of the oath was required by law.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-509.

PART 6

OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

18-8-601. Definitions.

The definitions contained in sections 18-8-101, 18-8-301, and 18-8-501 are applicable to the provisions of this part 6, and, in addition to those definitions:

(1) "Juror" means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term "juror" also includes any person who has been drawn or summoned to attend as a prospective juror.

(2) "Testimony" includes oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-601.

18-8-602. Bribing a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-602. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on bribing a witness or victim, see § 18-8-703.

18-8-603. Bribe-receiving by a witness.

(1) A witness or a person believing he is to be called as a witness in any official proceeding commits a class 4 felony if he intentionally solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that:

- (a) He will testify falsely or unlawfully withhold testimony; or
- (b) He will attempt to avoid legal process summoning him to testify; or
- (c) He will attempt to absent himself from an official proceeding to which he has been legally summoned.

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-603. L. 77: IP(1) amended, p. 968, § 48, effective July 1.

18-8-604. Intimidating a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-604. L. 77: (1) amended, p. 968, § 49, effective July 1; IP(1) and (1)(c) amended and (1)(d) added, p. 991, § 1, effective July 1. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on intimidating a witness or victim, see §§ 18-8-704 and 18-8-705.

18-8-605. Tampering with a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-605. L. 77: IP(1) amended, p. 968, § 50, effective July 1. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on tampering with a witness or victim, see § 18-8-707.

18-8-606. Bribing a juror.

(1) A person commits bribing a juror if he offers, confers, or agrees to confer any benefit upon a juror with intent to influence the juror's vote, opinion, decision, or other action as a juror.

(2) Bribing a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-606.

18-8-607. Bribe-receiving by a juror.

(1) A person commits bribe-receiving by a juror if he intentionally solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, decision, or other action as a juror will thereby be influenced.

(2) Bribe-receiving by a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-607. L. 77: (1) amended, p. 968, § 51, effective July 1.

18-8-608. Intimidating a juror.

(1) A person commits intimidating a juror if he intentionally attempts by use of a threat of harm or injury to any person or property to influence a juror's vote, opinion, decision, or other action as a juror.

(2) Intimidating a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-608. L. 77: (1) amended, p. 968, § 52, effective July 1.

18-8-609. Jury-tampering.

(1) A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

(1.5) A person commits jury-tampering if he knowingly participates in the fraudulent processing or selection of jurors or prospective jurors.

(2) Jury-tampering is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-609. L. 89: (1.5) added and (2) amended, pp. 776, 840, §§ 10, 86, effective July 1. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1789, § 32, effective October 1.

ANNOTATION

Acts constituting crime must be set forth specifically. Where the acts constituting the offense are not described by the statute, as in this section, the acts which constitute the crime must be set forth with enough specificity to give notice to the defendant. *People v. Zupancic*, 192 Colo. 231, 557 P.2d 1195 (1976).

The plain language of subsection (1) limits prosecution to attempts to influence persons who have been chosen as jurors or who have been selected as part of a venire from which a jury in a particular case will be chosen. *People v. Iannicelli*, 2017 COA 150, 454 P.3d 314, *aff'd*, 2019 CO 80, 449 P.3d 387.

Although the definition of "juror" in § 18-8-601 includes persons who have merely been summoned for jury duty, this section limits the definition to jurors and prospective jurors in a specific case. *People v. Iannicelli*, 2017 COA 150, 454 P.3d 314, *aff'd*, 2019 CO 80, 449 P.3d 387.

This section's prohibition against jury tampering is limited to attempts to influence a person's vote, opinion, decision,

or other action in a specifically identifiable case. *People v. Iannicelli*, 2019 CO 80, 449 P.3d 387.

Insufficient indictment. Where the prosecution contends in an indictment that the defendant attempted to induce "a grand juror" to disclose the names of the witnesses who appeared before the grand jury and their testimony, the indictment failed to disclose the prohibited conduct. *People v. Zupancic*, 192 Colo. 231, 557 P.2d 1195 (1976).

Where defendants handed out fliers advocating jury nullification to all potential jurors entering a courthouse, no crime under this section was committed. Intent to "influence a juror's vote, opinion, decision, or other action" is required, and a person who has merely been summoned for jury duty is in no position to take any such action. *People v. Iannicelli*, 2017 COA 150, 454 P.3d 314, *aff'd*, 2019 CO 80, 449 P.3d 387.

Applied in *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978).

18-8-610. Tampering with physical evidence.

(1) A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding; or

(b) Knowingly makes, presents, or offers any false or altered physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) "Physical evidence", as used in this section, includes any article, object, document, record, or other thing of physical substance; except that "physical evidence" does not include a human body, part of a human body, or human remains subject to a violation of section 18-8-610.5.

(3) (a) Tampering with physical evidence of a felony crime is a class 6 felony.

(b) Tampering with physical evidence of a misdemeanor crime is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-610. L. 89: (3) amended, p. 840, § 87, effective July 1. L. 2016: (2) amended, (SB 16-034), ch. 72, p. 191, § 2, effective September 1. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3201, § 302, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982).

The tampering statute is intended to criminalize behavior that interferes with an official proceeding even if that behavior occurs before the proceeding is instituted. In this case, the defendant knew proceedings were "about to be instituted", because the defendant was about to be taken into custody and had a controlled substance that would have been discovered upon a search incident to arrest. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

There is no requirement that acts sufficient to support a tampering charge must occur subsequently to either a

defendant's contact with police or a defendant's discovery that the defendant is about to be arrested. *People v. Newton*, 2022 COA 59, 517 P.3d 79.

Rather, the offense of tampering with physical evidence depends, to an important degree, on the defendant's conduct and intent. *People v. Newton*, 2022 COA 59, 517 P.3d 79.

And a defendant could believe, without certainty, that an official proceeding is about to be instituted even if the police have not contacted the defendant. *People v. Newton*, 2022 COA 59, 517 P.3d 79.

This section plainly requires the jury to assess the defendant's intent at the moment the defendant acts and not whether the defendant's objectives later changed. *People v. Newton*, 2022 COA 59, 517 P.3d 79.

"Physical evidence" includes false affidavit presented to a grand jury. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

"Physical evidence" includes electronically stored documents or information. People v. Rieger, 2019 COA 14, 436 P.3d 610.

proceeding was about to be instituted against her. People v. Frayer, 661 P.2d 1189 (Colo. App. 1982), aff'd, 684 P.2d 927 (Colo. 1984).

Evidence sufficient for jury to infer that defendant believed official

18-8-610.5. Tampering with a deceased human body.

(1) A person commits tampering with a deceased human body if, believing that an official proceeding is pending, in progress, or about to be instituted and acting without legal right or authority, the person willfully destroys, mutilates, conceals, removes, or alters a human body, part of a human body, or human remains with intent to impair its or their appearance or availability in the official proceedings.

(2) Tampering with a deceased human body is a class 3 felony.

(3) (a) A defendant may not be convicted of both tampering with a deceased human body, as described in subsection (1) of this section, and abuse of a corpse, as described in section 18-13-101 (1), if the act arises out of a single incident.

(b) If a defendant is charged with both tampering with a deceased human body, as described in subsection (1) of this section, and abuse of a corpse, as described in section 18-13-101, the court shall proceed pursuant to section 18-1-408.

Source: L. 2016: Entire section added, (SB 16-034), ch. 72, p. 191, § 1, effective September 1. **L. 2020:** (3) added, (HB 20-1148), ch. 100, p. 387, § 1, effective September 14.

18-8-611. Simulating legal process.

(1) A person commits simulating legal process if he knowingly delivers or causes to be delivered to another a request for the payment of money on behalf of any creditor including himself which in form and substance simulates any legal process issued by any court of this state.

(2) Simulating legal process is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 466, § 1. **C.R.S. 1963:** § 40-8-611. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3201, § 303, effective March 1, 2022.

18-8-612. Failure to obey a juror summons.

(1) A juror commits failure to obey a juror summons if he receives a summons to serve as a trial or grand juror as provided in section 13-71-110, C.R.S., and knowingly fails to obey the summons without justifiable excuse.

(2) Failure to obey a juror summons is a petty offense.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3201, § 304, effective March 1, 2022.

18-8-613. Willful misrepresentation of material fact on juror questionnaire.

(1) A juror commits willful misrepresentation of a material fact if he willfully makes a misrepresentation of a material fact when he provides information on the juror questionnaire as provided in section 13-71-115, C.R.S.

(2) Willful misrepresentation of a material fact on a juror questionnaire is a class 2 misdemeanor.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3201, § 305, effective March 1, 2022.

18-8-614. Willful harassment of juror by employer.

(1) An employer commits willful harassment of a juror if he willfully deprives an employed juror of employment or any incidents or benefits thereof or willfully harasses, threatens, or coerces an employee because the employee receives a juror summons, responds thereto, performs any obligation or election of juror service as a trial or grand juror, or exercises any right under the "Colorado Uniform Jury Selection and Service Act", article 71 of title 13, C.R.S.

(2) Willful harassment of a juror is a class 2 misdemeanor.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1.

18-8-615. Retaliation against a judge, a judicial employee, or an elected official - definitions.

(1) (a) An individual commits retaliation against a judge if the individual makes a credible threat, as defined in section 18-3-602 (2)(b), or commits an act of harassment, as defined in section 18-9-111 (1), or an act of harm or injury upon a person or property as retaliation or retribution against a judge, which action is directed against or committed upon:

(I) A judge who has served or is serving in a legal matter assigned to the judge involving the individual or a person on whose behalf the individual is acting;

(II) A member of the judge's family;

(III) A person in close relationship to the judge; or

(IV) A person residing in the same household with the judge.

(b) An individual commits retaliation against a judge by means of a credible threat as described in paragraph (a) of this subsection (1) if the individual knowingly makes the credible threat:

(I) Directly to the judge; or

(II) To another person:

(A) If the individual intended that the communication would be relayed to the judge; or

(B) If the other person is required by statute or ethical rule to report the communication to the judge.

(1.3) (a) An individual commits retaliation against a judicial employee if the individual makes a credible threat, as defined in section 18-3-602 (2)(b), or commits an act of harassment, as defined in section 18-9-111 (1), or an act of harm or injury upon a person or property as retaliation or retribution against a judicial employee, which action is directed against or committed upon:

(I) A judicial employee who has performed duties in connection with the individual or a person on whose behalf the individual is acting;

(II) A member of the judicial employee's family;

(III) An individual in close relationship to the judicial employee; or

(IV) An individual residing in the same household with the judicial employee.

(b) An individual commits retaliation against a judicial employee by means of a credible threat as described in subsection (1.3)(a) of this section if the individual knowingly makes the credible threat:

- (I) Directly to the judicial employee; or
- (II) To another person if the individual intended that the communication would be relayed to the judicial employee.

(1.5) (a) An individual commits retaliation against an elected official if the individual knowingly makes a credible threat as retaliation or retribution against the elected official or arising out of the status of the person as an elected official and is directed against or committed upon:

- (I) An elected official;
- (II) A member of the elected official's family;
- (III) A person in close relationship to the elected official; or
- (IV) A person residing in the same household with the elected official.

(b) For purposes of this subsection (1.5):

(I) "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

(II) "Elected official" means any person who is serving in an elected position in the state of Colorado at any level of government.

(2) (a) Retaliation against a judge is a class 4 felony.

(b) Retaliation against an elected official is a class 6 felony.

(c) Retaliation against a judicial employee is a class 6 felony.

(3) As used in this section, unless the context otherwise requires:

(a) "Judge" means any justice of the supreme court, judge of the court of appeals, district court judge, juvenile court judge, probate court judge, water court judge, county court judge, district court magistrate, county court magistrate, water court referee, bond hearing officer, municipal judge, administrative law judge, or unemployment insurance hearing officer.

(b) "Judicial employee" means a current or former employee of the judicial department.

Source: L. 2008: Entire section added, p. 1028, § 1, effective July 1. **L. 2010:** IP(1)(a) amended, (HB 10-1233), ch. 88, p. 296, § 6, effective August 11. **L. 2021:** (1.5) added and (2)

amended, (SB 21-064), ch. 190, p. 1007, § 1, effective July 1. **L. 2026:** (1.3) and (2)(c) added and (3) amended, (HB 26-1422), ch. 331, p. 1943, § 16, effective June 2.

ANNOTATION

Defendant's kidnapping statement to judge is not constitutionally protected speech and is a true threat under the contextual analysis prescribed by People in Interest of R.D., 2020 CO 44, 464 P.3d 717. People v. Brown, 2022 COA 19, 510 P.3d 579.

To violate subsection (1)(b)(II)(B), a person must know that the person to whom the threat is made has a duty to report the threat. The general assembly did not intend to limit the application of the mens rea of "knowingly" to any particular element of subsection (1)(b). People v. Berry, 292 P.3d 954 (Colo. App. 2011).

18-8-616. Retaliation against a prosecutor.

(1) (a) An individual commits retaliation against a prosecutor if the individual makes a credible threat, as defined in section 18-3-602 (2)(b), or commits an act of harm or injury upon a person or property as retaliation or retribution against a prosecutor, which action is directed against or committed upon:

(I) An elected district attorney;

(II) A prosecutor who has served or is serving in a legal matter assigned to the prosecutor involving the individual or a person on whose behalf the individual is acting;

(III) A member of the prosecutor's family;

(IV) A person in close relationship to the prosecutor; or

(V) A person residing in the same household with the prosecutor.

(b) An individual commits retaliation against a prosecutor by means of a credible threat as described in paragraph (a) of this subsection (1) if the individual knowingly makes the credible threat:

(I) Directly to the prosecutor; or

(II) To another person:

(A) If the individual intended that the communication would be relayed to the prosecutor; or

(B) If the other person is required by statute or ethical rule to report the communication to the prosecutor or to the court.

(2) Retaliation against a prosecutor is a class 4 felony.

(3) As used in this section, unless the context otherwise requires, "prosecutor" means the attorney general, deputy attorney general, assistant attorney general, district attorney, deputy district attorney, assistant district attorney, appointed special prosecutor, city attorney, United States attorney, deputy United States attorney, assistant United States attorney, or special assistant United States attorney.

Source: L. 2015: Entire section added, (HB 15-1229), ch. 239, p. 884, § 1, effective May 29.

PART 7

VICTIMS AND WITNESSES PROTECTION

Cross references: For compensation to crime victims, see parts 1 and 2 of article 4.1 of title 24; for rights of victims of and witnesses to crimes, see part 3 of article 4.1 of title 24; for assistance to victims of and witnesses to crimes, see article 4.2 of title 24; for restitution to victims of crime, see article 28 of title 17; for protection orders to protect witnesses and victims, see §§ 18-1-1001 and 19-2-707.

18-8-701. Short title.

This part 7 shall be known and may be cited as the "Colorado Victim and Witness Protection Act of 1984".

Source: L. 84: Entire part added, p. 501, § 4, effective July 1.

18-8-702. Definitions.

The definitions contained in sections 18-8-301, 18-8-501, and 18-8-601 are applicable to the provisions of this part 7, and in addition to those definitions:

(1) "Victim" means any natural person against whom any crime has been perpetrated or attempted, as crime is defined under the laws of this state or of the United States.

(2) "Witness" means any natural person:

(a) Having knowledge of the existence or nonexistence of facts relating to any crime;

- (b) Whose declaration under oath is received or has been received as evidence for any purpose;
- (c) Who has reported any crime to any peace officer, correctional officer, or judicial officer;
- (d) Who has been served with a subpoena issued under the authority of any court in this state, of any other state, or of the United States; or
- (e) Who would be believed by any reasonable person to be an individual described in paragraph (a), (b), (c), or (d) of this subsection (2).

Source: L. 84: Entire part added, p. 501, § 4, effective July 1.

18-8-703. Bribing a witness or victim.

- (1) A person commits bribing a witness or victim if he or she offers, confers, or agrees to confer any benefit upon a witness, or a victim, or a person he or she believes is to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim with intent to:
 - (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or
 - (b) Induce the witness or victim to avoid legal process summoning him to testify; or
 - (c) Induce the witness or victim to absent himself or herself from an official proceeding.
- (2) Bribing a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 501, § 4, effective July 1. **L. 2004:** IP(1) and (1)(c) amended, p. 435, § 1, effective July 1.

Editor's note: This section is similar to former § 18-8-602 as it existed prior to 1984.

ANNOTATION

"Any official proceeding" does not require a bribe to occur only after official proceedings have been initiated.	Bribery occurs when a defendant offers, confers, or agrees to confer any benefit to someone the defendant believes is to be called, or who

may be called, to testify in any official proceeding, with the intent to influence the testimony. *People v. Lancaster*, 2022 COA 82, 519 P.3d 1053.

An attorney found guilty of subornation of perjury under this section will be disbarred. *People ex rel. Colo. Bar Ass'n v. McCann*, 80 Colo. 220, 249 P. 1093 (1926) (decided under former C.L. § 6777).

An agreement in which money or other valuable consideration is paid in exchange

for a crime victim's efforts to obtain leniency in connection with a criminal charge is void as against Colorado public policy. Because at least part of the consideration for execution of a settlement agreement and promissory note was given in an attempt to hinder or stifle the prosecution of the defendant's wife, the entire agreement and promissory note are void. *Rademacher v. Becker*, 2015 COA 133, 374 P.3d 499.

18-8-704. Intimidating a witness or victim.

(1) A person commits intimidating a witness or victim if:

(a) By use of a threat, act of harassment as defined in section 18-9-111, or act of harm or injury to any person or property directed to or committed upon:

(I) A witness in any criminal or civil proceeding;

(II) A victim of any crime;

(III) A person he or she believes has been or is to be called or who would have been called to testify as a witness in any criminal or civil proceeding or a victim of any crime;

(IV) A person he or she believes may have information relevant to a criminal investigation;

(V) A member of the witness's family;

(VI) A member of the victim's family;

(VII) A person in close relationship to the witness or victim;

(VIII) A person residing in the same household with the witness or victim;

(IX) A person he or she believes may be able to exert influence upon the witness or victim;
or

(X) Any person who has reported a crime or who may be called to testify or who testifies as a witness to or victim of any crime; and

(b) He or she intentionally attempts to or does:

(I) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or

- (II) Induce the witness or victim to avoid legal process summoning him or her to testify; or
- (III) Induce the witness or victim to absent himself or herself from an official proceeding; or
- (IV) Inflict such harm or injury prior to such testimony or expected testimony; or
- (V) Influence the witness, victim, or any person with knowledge of relevant information to withhold information from, or provide false information to, law enforcement, a defense attorney, or a defense investigator.

(2) Intimidating a witness or victim is a class 4 felony.

Source: **L. 84:** Entire part added, p. 501, § 4, effective July 1. **L. 88:** IP(1) amended, p. 714, § 23, effective July 1. **L. 90:** IP(1) amended, p. 987, § 11, effective April 24. **L. 91:** IP(1) amended, p. 407, § 15, effective June 6. **L. 2003:** IP(1) amended, p. 1433, § 27, effective July 1. **L. 2004:** (1)(c) amended, p. 435, § 2, effective July 1. **L. 2018:** IP(1) amended, (SB 18-169), ch. 162, p. 1127, § 1, effective July 1. **L. 2022:** (1) amended, (SB 22-024), ch. 26, p. 161, § 1, effective July 1.

Editor's note: This section is similar to former § 18-8-604 as it existed prior to 1984.

ANNOTATION

Annotator's note. Since § 18-8-704 is similar to former § 18-8-604, relevant cases construing that provision have been included in the annotations to this section.

All that is necessary to complete the crime under this section is to presently attempt, by threat of harm or injury, to influence someone to withhold testimony at a future time. *People v. Proctor*, 194 Colo. 172, 570 P.2d 540 (1977).

"Unlawfully" refers to the time when the testimony is to be actually withheld, not to the time of the contract. *People v. Proctor*, 194 Colo. 172, 570 P.2d 540 (1977).

Threats of future harm delivered before a subpoena arrives may be just as effective as those delivered after the subpoena arrives. *People v. Proctor*, 194 Colo. 172, 570 P.2d 540 (1977).

Person intimidated must have witnessed something concerning which his testimony is probative. One of the elements of intimidating a witness is that the person intimidated must have witnessed something concerning which his testimony would be probative. *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

The language of the statutes regarding retaliation against a witness and intimidation of a witness are similar, however, § 18-8-706 and this section are factually distinguishable and reasonable grounds exist to support differences in punishment provided for each. Therefore they do not violate equal protection. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

The general assembly may prescribe more severe penalties for conduct it perceives to have more severe consequences, even if the differences are only a matter of degree, so long as the classifications of criminal behavior are based on differences reasonably related to the general purpose of the legislation. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Use of the term "victim" as defined in § 18-8-702 does not require that the person being intimidated be the victim of a

predicate crime resulting in a conviction; intimidation of a victim charge is unrelated to and independent of any underlying charge. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Jury was required to find only that the victim was the victim of any crime. Defendant who was acquitted on assault and harassment charges could still be convicted of intimidating a witness, since defendant had been found guilty of violating a restraining order and of violating bond conditions. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Jury instruction defining "unlawfully" conformed with Proctor annotated above, and was necessary to clarify that the victim did not have to be under legal subpoena at the time defendant threatened her. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Applied in *People v. Jones*, 140 P.3d 325 (Colo. App. 2006).

18-8-705. Aggravated intimidation of a witness or victim.

(1) A person who commits intimidating a witness or victim commits aggravated intimidation of a witness or victim if, during the act of intimidating, he:

(a) Is armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person; or

(b) Knowingly wounds the person being intimidated or any other person with a deadly weapon, or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person being intimidated or any other person in reasonable fear of death or bodily injury.

(2) For purposes of subsection (1) of this section, possession of any article used or fashioned in a manner to lead any person reasonably to believe it to be a deadly weapon, or any verbal or other representation by the person that he is so armed, is prima facie evidence that the person is armed with a deadly weapon.

- (3) Aggravated intimidation of a witness or victim is a class 3 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1.

18-8-706. Retaliation against a witness or victim.

(1) An individual commits retaliation against a witness or victim if such person uses a threat, act of harassment as defined in section 18-9-111, or act of harm or injury upon any person or property, which action is directed to or committed upon a witness in any criminal or civil proceeding; a victim of any crime; an individual whom the person believes has been or would have been called to testify as a witness in any criminal or civil proceeding or a victim of any crime; a member of the witness' family; a member of the victim's family; an individual in close relationship to the witness or victim; an individual residing in the same household with the witness or victim, as retaliation or retribution against such witness or victim.

- (2) Retaliation against a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1. **L. 92:** (1) amended, p. 405, § 20, effective June 3. **L. 2003:** (1) amended, p. 1434, § 28, effective July 1. **L. 2018:** (1) amended, (SB 18-169), ch. 162, p. 1127, § 2, effective July 1. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1789, § 33, effective October 1.

ANNOTATION

Phrase "act of harassment" is unconstitutionally overbroad, and it is stricken from the statute. But the term "threat" is not overbroad. After partial invalidation, this section is not unconstitutionally vague or overbroad. *People v. Hickman*, 988 P.2d 628 (Colo. 1999).

Although the statute does not expressly prohibit threats delivered to third-party recipients, a person of ordinary intelligence would understand that such conduct is proscribed under the statute. Therefore, the

statute is not unconstitutionally vague as applied to defendant. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The language of the statutes regarding retaliation against a witness and intimidation of a witness are similar however, this section and § 18-8-704 are factually distinguishable and reasonable grounds exist to support differences in punishment provided for each. One is intimidation of a witness prior to testimony, the other is retaliation in response to testimony given. Therefore they do not

violate equal protection. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

The general assembly may prescribe more severe penalties for conduct it perceives to have more severe consequences, even if the differences are only a matter of degree, so long as the classifications of criminal behavior are based on differences reasonably related to the general purpose of the legislation. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Threats to kill or injure a witness in retaliation for the witness's testimony are not protected speech. Threats to injure a potential witness's family, made with the intent of discouraging testimony, are not protected speech. *People v. Hickman*, 988 P.2d 628 (Colo. 1999); *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

Whether a statement is a "true threat" or "political speech" is a question for the finder of fact. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

A threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another by the commission of an unlawful act. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The critical inquiry is whether the statements, viewed in the context in which they were spoken or written, constitute a true threat. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

A "true threat" is not merely talk or jest and is evaluated by whether those who hear or read the threat reasonably consider that an

actual threat has been made. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The threat need not be direct. A threat may be contingent or conditional if the contingency itself remains in the control of the person making the threat. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The phrase "directed to" means that a threat must be directed toward or made against a person protected by the statute, but nothing in the language of the statute requires that the threat must be directly communicated to or received by the protected person. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

This statute is a specific intent offense. *People v. Hickman*, 988 P.2d 628 (Colo. 1999); *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

Statute does not require that the victim be scheduled to testify. *People v. Trujillo*, 2025 COA 22, 568 P.3d 435.

Statute does not apply to retaliation relating to an individual's involvement in a civil proceeding. The statute refers to a witness to any crime. Although the language is ambiguous, legislative history supports its application to criminal, not civil proceedings. *People v. Johnson*, 2017 COA 11, 446 P.3d 826.

The statute does not require proof that defendant intentionally communicated the threat to the witness but only that he made the threat with the specific intent to retaliate or to seek retribution for the witness's involvement in the prior criminal

proceedings. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

18-8-706.3. Aggravated retaliation against a witness or victim.

(1) A person commits the crime of aggravated retaliation against a witness or victim if, during the act of retaliation, the person:

(a) Is armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being retaliated against or any other person; or

(b) Knowingly wounds with a deadly weapon the person being retaliated against or any other person; or

(c) By the use of force, threats, or intimidation with a deadly weapon, knowingly puts the person being retaliated against or any other person in reasonable fear of death or bodily injury.

(2) Aggravated retaliation against a witness or victim is a class 3 felony.

Source: L. 2023: Entire section added, (HB 23-1293), ch. 298, p. 1789, § 34, effective October 1.

18-8-706.5. Retaliation against a juror.

(1) An individual commits retaliation against a juror if such individual uses a threat, act of harassment as defined in section 18-9-111, or act of harm or injury upon any person or property, which action is directed to or committed upon a juror who has served for a criminal or civil trial involving the individual or a person or persons on whose behalf the individual is acting, a member of the juror's family, an individual in close relationship to the juror, or an individual residing in the same household with the juror, as retaliation or retribution against such juror.

(2) Retaliation against a juror is a class 3 felony.

Source: L. 95: Entire section added, p. 1255, § 17, effective July 1. **L. 2003:** (1) amended, p. 1434, § 29, effective July 1.

18-8-707. Tampering with a witness or victim.

(1) A person commits tampering with a witness or victim if he intentionally attempts without bribery or threats to induce a witness or victim or a person he believes is to be called to testify as

a witness or victim in any official proceeding or who may be called to testify as a witness to or victim of any crime to:

- (a) Testify falsely or unlawfully withhold any testimony; or
 - (b) Absent himself from any official proceeding to which he has been legally summoned; or
 - (c) Avoid legal process summoning him to testify.
- (2) Tampering with a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1.

Editor's note: This section is similar to former § 18-8-605 as it existed prior to 1984.

ANNOTATION

Annotator's note. Since § 18-8-707 is similar to former § 18-8-605, relevant cases construing that provision have been included with the annotations to this section.

History of statute. The tampering-with-a-witness statute defines a new statutory crime and does not have its genesis in subornation of perjury. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

The drafters of the model penal code from which former § 18-8-605 derived considered subornation of perjury to be a superfluous restatement of accomplice liability and proposed that persons accused of conduct amounting to subornation of perjury be prosecuted under the accomplice and solicitation statutes. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

Success not element of crime. Under former § 18-8-605, it was not necessary that the defendant succeed in his attempt or

actually induce the witness to do anything. *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

Statute does not require that the attempt to tamper actually be communicated to the victim or witness. *People v. Brooks*, 2017 COA 80, 454 P.3d 270, vacated by and aff'd on other grounds, 2019 CO 75M, 448 P.3d 310.

The plain language of subsection (1)(a) does not require the people to prove an attempt to interfere with actual testimony anticipated to be offered at a trial, hearing, or other sworn proceeding but only that the defendant attempted to influence a witness or victim to testify falsely or to unlawfully withhold testimony that may be offered in the future, and the witness or victim need not be under subpoena or legal summons at the time of the contact. *People v. Cunefare*, 102 P.3d 302 (Colo. 2004).

Witness or victim must be legally summoned to be a witness under subsection (1)(b). To find a defendant guilty under subsection (1)(b), the jury must have received evidence that the defendant attempted to have the victim absent herself or himself from a proceeding to which she or he had been legally summoned. The mere presence of the victim at trial does not permit the jury to conclude that she or he was legally summoned to appear at trial. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd*, 101 P.3d 1090 (Colo. 2004).

Pre-printed statement defendant gave to witnesses falls within the proscriptions of this section, and this section is not unconstitutional as applied to defendant. The pre-printed statement said that the witnesses had a constitutional right to not answer questions of the grand jury and that they should exert their constitutional right to remain silent and to not incriminate themselves. The statement is not equivalent to leafleting or public commentary. It falls within conduct proscribed by this section by intentionally attempting to interfere with a witness's testimony and to induce witnesses to unlawfully withhold testimony. *People v. Nozolino*, 2014 COA 95, 350 P.3d 940.

Defendant could not have abandoned the crime of tampering with a witness once he attempted to influence the victim, because the crime was completed when the attempt was made. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Materiality not element of offense. A trial court's instruction injecting the element of materiality into the tampering-with-a-witness statute was improper. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

Probable cause established. Where the evidence and the reasonable inferences which could be drawn from it established that the defendant told the witness that if she or 10 people testified before the grant jury, the defendant would sue the witness or any of the 10 persons for perjury and that the defendant was aware that the witness had talked with the district attorney at the time his statements were made, this evidence established probable cause to believe that the defendant committed the crime of tampering with a witness. *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

Portions of written communications between the defendant and his wife were for the purpose of aiding the crime of witness tampering and were held to be admissible and not confidential. *People v. Fox*, 862 P.2d 1000 (Colo. App. 1993).

Prosecution did not meet its burden to prove that defendant attempted to induce his family members to unlawfully withhold testimony. Defendant's e-mail to his mother and brother suggesting that they not cooperate with a police investigation is not itself sufficient evidence to convict defendant of witness tampering. *People v. Nozolino*, 2014 COA 95, 350 P.3d 940.

18-8-708. Suit for damages by victim of intimidation or retaliation.

(1) The following persons are eligible for relief pursuant to this section:

- (a) Any person who testifies as a witness or victim in any official proceeding;
- (b) Any person who may be called to testify as a witness to or victim of any crime;
- (c) Any person who is a member of the witness' or victim's family;
- (d) Any person who is in a close relationship to the witness or victim;
- (e) Any person who is residing in the same household with the witness or victim.

(2) Any person who is eligible pursuant to subsection (1) of this section who suffers any physical injury or property damage as the result of the commission of intimidating a witness or victim pursuant to section 18-8-704, aggravated intimidation of a witness or victim pursuant to section 18-8-705, or retaliation against a witness or victim pursuant to section 18-8-706 shall, in a civil proceeding to recover for such injury or property damage, be eligible for the award of treble damages and attorney fees.

(3) Nothing in this section shall limit the amount of recovery which a person specified in subsection (1) of this section may receive in a civil proceeding or in any other proceeding.

Source: L. 84: Entire part added, p. 503, § 4, effective July 1.

Cross references: For awarding of attorney fees in civil actions generally, see § 13-17-102.

ANNOTATION

To be eligible for civil damages pursuant to this section, an individual must be the victim of or a witness to a crime. Grynberg v. Ark. Okla. Gas Corp., 116 P.3d 1260 (Colo. App. 2005).

Although section provides that the amount of recovery a person may receive

in a civil or other proceeding is not limited by the recovery set forth in subsection (2), it does not authorize an amount of recovery that exceeds the exemplary damages limitation set forth in § 13-21-102. Palmer v. Diaz, 214 P.3d 546 (Colo. App. 2009).

PART 8

OFFENSES RELATING TO USE OF FORCE BY PEACE OFFICERS

18-8-801. Definitions.

As used in this part 8, unless the context otherwise requires:

- (1) "Emergency medical service provider" has the same meaning as set forth in section 25-3.5-103 (8).
- (2) "Materially false statement" has the meaning set out in section 18-8-501 (1).
- (3) "Peace officer" has the meaning set out in section 16-2.5-101.

Source: **L. 91:** Entire part added, p. 396, § 1, effective June 5. **L. 2003:** (2) amended, p. 1615, § 12, effective August 6. **L. 2021:** Entire section amended, (HB 21-1251), ch. 450, p. 2959, § 4, effective July 6.

18-8-802. Duty to report use of force by peace officers or law enforcement animals - duty to intervene.

(1) (a) A peace officer who, in pursuance of such officer's law enforcement duties, witnesses another peace officer, including a peace officer who is the handler of a law enforcement animal, in pursuance of such other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, or booking any person or in the process of crowd control or riot control, use physical force or allow the peace officer's law enforcement animal to use physical force that exceeds the degree of physical force permitted pursuant to section 18-1-707 must report such use of force to such officer's or handler's immediate supervisor.

(b) At a minimum, the report required by this section shall include the date, time, and place of the occurrence, the identity, if known, and description of the participants, and a description of the events and the force used. A copy of an arrest report or other similar report required as a part of a peace officer's duties can be substituted for the report required by this section, so long as it includes such information. The report shall be made in writing within ten days of the occurrence of the use of such force.

(c) Any peace officer who fails to report such use of force in the manner prescribed in this subsection (1) commits a class 2 misdemeanor.

(1.5) (a) A peace officer, as defined in section 24-31-901 (3), who is on duty shall intervene to prevent or stop another peace officer, including a peace officer who is the handler of a law enforcement animal, from using physical force that exceeds the degree of force permitted, if any, by section 18-1-707 in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control, without regard for chain of command.

(b) (I) A peace officer, as defined in section 24-31-901 (3), who intervenes as required by subsection (1.5)(a) of this section shall report the intervention to his or her immediate supervisor.

(II) At a minimum, the report required by this subsection (1.5)(b) must include the date, time, and place of the occurrence; the identity, if known, and description of the participants; and a description of the intervention actions taken. This report must be in writing within ten days of the occurrence of the use of such force and must be included with all other reports of the incident.

(c) A member of a law enforcement agency shall not discipline or retaliate in any way against a peace officer, as defined in section 24-31-901 (3), for intervening as required by subsection (1.5)(a) of this section, or for reporting unconstitutional conduct, or for failing to follow what the officer reasonably believes is an unconstitutional directive.

(d) Any peace officer, as defined in section 24-31-901 (3), who fails to intervene to prevent the use of unlawful force as prescribed in this subsection (1.5) commits a class 1 misdemeanor.

(e) When an administrative law judge or internal investigation finds that a peace officer, as defined in section 24-31-901 (3), failed to intervene to prevent the use of unlawful physical force as prescribed in this subsection (1.5), this finding must be presented to the district attorney so that the district attorney can determine whether charges should be filed pursuant to subsection (1.5)(d) of this section. However, nothing in this subsection (1.5)(e) prohibits or is intended to discourage the district attorney from charging an officer with failure to intervene before the conclusion of any internal investigation.

(f) (Deleted by amendment, L. 2021.)

(g) In a case in which the prosecution charges a peace officer, as defined in section 24-31-901 (3), with offenses related to and based upon the use of excessive force but does not file charges against any other peace officer or officers who were at the scene during the use of force, the district attorney shall prepare a written report explaining the district attorney's basis for the decision not to charge any other peace officer with any criminal conduct and shall publicly disclose the report to the public; except that if disclosure of the report would substantially interfere with or jeopardize an ongoing criminal investigation, the district attorney may delay public disclosure for up to forty-five days. The district attorney shall post the written report on its

website or, if it does not have a website, make it publicly available upon request. Nothing in this subsection (1.5) prohibits or discourages prosecution of any other criminal offense related to failure to intervene, including a higher charge, if supported by the evidence.

(2) Any peace officer who knowingly makes a materially false statement, which the officer does not believe to be true, in any report made pursuant to subsection (1) of this section commits false reporting to authorities pursuant to section 18-8-111 (1)(a)(III).

(3) No report filed pursuant to subsection (1) of this section shall be used as evidence against a peace officer in a criminal proceeding unless there is other credible evidence which corroborates such report or in a civil action over a claim of executive or statutory privilege without a valid court order.

Source: **L. 91:** Entire part added, p. 396, § 1, effective June 5. **L. 2018:** (2) amended, (SB 18-068), ch. 401, p. 2372, § 2, effective July 1. **L. 2020:** (1.5) added, (SB 20-217), ch. 110, p. 455, § 6, effective June 19. **L. 2021:** (1.5) amended, (HB 21-1250), ch. 458, p. 3063, § 9, effective July 6; (1)(c) amended, (SB 21-271), ch. 462, p. 3201, § 306, effective March 1, 2022. **L. 2024:** (1)(a) and (1.5)(a) amended, (HB 24-1074), ch. 69, p. 228, § 3, effective April 17.

Cross references: For the legislative declaration in SB 20-217, see section 1 of chapter 110, Session Laws of Colorado 2020.

ANNOTATION

Law reviews. For article, "Constitutional Enforcement Officers", see 33 Colo. Law. Issues in the Criminal Prosecution of Law 55 (Mar. 2004).

18-8-803. Use of excessive force.

(1) Subject to the provisions of section 18-1-707, a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

(2) As used in this section, "excessive force" means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be

presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.

Source: L. 91: Entire part added, p. 397, § 1, effective June 5.

ANNOTATION

Law reviews. For article, "Constitutional Enforcement Officers", see 33 Colo. Law. Issues in the Criminal Prosecution of Law 55 (Mar. 2004).

18-8-804. Approved policy or guidelines.

Each public entity which employs any peace officer shall adopt policies or guidelines concerning the use of force by peace officers which shall be complied with by peace officers in carrying out the duties of such officers within the jurisdiction of the public entity.

Source: L. 91: Entire part added, p. 397, § 1, effective June 5.

18-8-805. Prohibition on using or directing administration of ketamine - duty to report - duty to intervene - definition.

(1) A peace officer shall not use, direct, or unduly influence the use of ketamine upon another person.

(2) (a) (I) A peace officer shall not compel, direct, or unduly influence an emergency medical service provider to administer ketamine.

(II) An emergency medical service provider shall confidentially report any violation of this subsection (2)(a) to the P.O.S.T. board created in section 24-31-302 within ten days of the occurrence. At a minimum, the report must include the date, time, and place of the occurrence; the identity, if known, and a description of the participants; and a description of the events.

(III) A peace officer shall not retaliate in any way against an emergency medical service provider for reporting the incident pursuant to this subsection (2).

(IV) Upon receipt of the report submitted pursuant to subsection (2)(a)(II) of this section, the P.O.S.T. board shall submit the report to the peace officer's employing agency. The employing agency shall conduct an internal investigation of the alleged violation and transmit the findings

of the internal investigation to the P.O.S.T. board. If the findings show the peace officer violated subsection (1), (2)(a)(I), or (5) of this section, the P.O.S.T. board may revoke the peace officer's certification in accordance with section 24-31-904 (1)(a)(III), (1)(a)(IV), or (2)(a).

(b) A peace officer shall not unduly influence an emergency medical service provider's medical decision or diagnosis, and an emergency medical service provider shall not base its medical decision or diagnosis exclusively on information provided by a peace officer.

(c) Notwithstanding subsection (2)(b) of this section, a peace officer may provide critical medical information or any other pertinent information about the individual or the scene of the emergency that may assist the emergency medical service provider's assessment of the need to administer ketamine.

(d) Notwithstanding section 18-1-707 (1.5)(a), a peace officer who is also certified as an emergency medical service provider may administer ketamine pursuant to the restrictions set forth in section 25-3.5-209 and when the decision to administer ketamine is based on the emergency medical service provider's training and expertise.

(3) A person who is directed by a peace officer to assist the peace officer to effect an arrest, detention, restraint, transport, or punishment; to prevent an escape from custody; or to facilitate ease and convenience in law enforcement encounters shall not use ketamine to carry out the peace officer's direction or undue influence.

(4) (a) A peace officer who, in pursuance of the peace officer's law enforcement duties, witnesses another peace officer, in pursuance of the other peace officer's law enforcement duties, use or direct the use of ketamine on another person shall report such use to the P.O.S.T. board created in section 24-31-302.

(b) At a minimum, the report required by this subsection (4) must include the date, time, and place of the occurrence; the identity, if known, and a description of the participants; and a description of the events. A copy of an arrest report or other similar report required as a part of a peace officer's duties can be substituted for the report required by this subsection (4) if it includes such information. The report must be in writing and made within ten days after the occurrence of the use of ketamine.

(c) Any peace officer who fails to report the use or directed use of ketamine in the manner described in this subsection (4) commits a class 1 misdemeanor.

(d) Upon receipt of the report submitted pursuant to this subsection (4), the P.O.S.T. board shall submit the report to the peace officer's employing agency. The employing agency shall conduct an internal investigation of the alleged violation and transmit the findings of the internal investigation to the P.O.S.T. board. If the findings show the peace officer violated subsection (1), (2)(a)(I), or (5) of this section, the P.O.S.T. board may revoke the peace officer's certification in accordance with section 24-31-904 (1)(a)(III), (1)(a)(IV), (1)(a) or (2)(a).

(5) (a) A peace officer shall intervene, without regard for chain of command, to prevent or stop another peace officer from using or directing the use of ketamine in pursuance of the other peace officer's law enforcement duties to effect an arrest, detention, restraint, transport, or punishment; to prevent an escape from custody; or to facilitate ease and convenience in law enforcement encounters.

(b) (I) A peace officer who intervenes as required by subsection (5)(a) of this section shall report the intervention to the intervening peace officer's immediate supervisor.

(II) At a minimum, the report required by this subsection (5)(b) must include the date, time, and place of the occurrence; the identity, if known, and a description of the participants; and a description of the intervention actions taken. The report must be in writing and made within ten days after the occurrence of the intervention and must be included with all other reports of the incident.

(c) A member of a law enforcement agency shall not discipline or retaliate in any way against a peace officer for intervening as required by subsection (5)(a) of this section, for reporting any other violation of this section, or for failing to follow what the peace officer reasonably believes is an unconstitutional directive.

(d) Any peace officer who fails to intervene to prevent the use of or the directed use of ketamine as described in this subsection (5) commits a class 1 misdemeanor.

(e) When an administrative law judge or internal investigation finds that a peace officer failed to intervene to prevent the use of or the directed use of ketamine, the finding must be presented to the district attorney so that the district attorney can determine whether charges should be filed pursuant to subsection (5)(d) of this section. However, nothing in this subsection (5)(e) prohibits or is intended to discourage the district attorney from charging an officer with failure to intervene before the conclusion of any internal investigation.

(f) In a case in which the prosecution charges a peace officer with offenses related to and based upon the use or directed use of ketamine but does not file charges against any other peace officer or officers who were at the scene during the use of ketamine, the district attorney shall prepare a written report explaining the district attorney's basis for the decision not to charge any other peace officer with any criminal conduct and shall publicly disclose the report; except that if disclosure of the report would substantially interfere with or jeopardize an ongoing criminal investigation, the district attorney may delay public disclosure for up to forty-five days. The district attorney shall post the written report on its website or, if it does not have a website, make it publicly available.

(g) Nothing in this subsection (5) prohibits or discourages prosecution of any other criminal offense related to unlawful use or directed use of ketamine, failure to intervene, or failure to report, including a higher charge, if supported by the evidence.

(6) Any peace officer who knowingly makes a materially false statement that the officer does not believe to be true in any report made pursuant to subsection (4) of this section commits false reporting to authorities pursuant to section 18-8-111 (1)(a)(III).

(7) As used in this section, unless the context otherwise requires, "unduly influence" or "undue influence" means the improper use of power or trust in a way that deprives a person of free will and substitutes another's objective.

Source: L. 2021: Entire section added, (HB 21-1251), ch. 450, p. 2959, § 5, effective July 6.

ARTICLE 9

Offenses Against Public Peace, Order, and Decency

PART 1 PUBLIC PEACE AND ORDER		18-9-110.	Public buildings - trespass, interference - penalty.
18-9-101.	Definitions.	18-9-111.	Harassment - Kiana Arellano's Law.
18-9-102.	Inciting riot.	18-9-112.	Loitering - definition - legislative declaration.
18-9-103.	Arming rioters.	18-9-113.	Desecration of venerated objects.
18-9-104.	Engaging in a riot.	18-9-114.	Hindering transportation.
18-9-105.	Disobedience of public safety orders under riot conditions.	18-9-115.	Endangering public transportation and utility transmission.
18-9-106.	Disorderly conduct.	18-9-115.5.	Violation of a restraining order related to public conveyances.
18-9-107.	Obstructing highway or other passageway.	18-9-116.	Throwing missiles at vehicles - harassment of bicyclists.
18-9-108.	Disrupting lawful assembly.	18-9-116.5.	Vehicular eluding.
18-9-108.5.	Residential picketing - legislative declaration.	18-9-117.	Unlawful conduct on public property.
18-9-109.	Interference with staff, faculty, or students of educational institutions.		

18-9-118.	Firearms, explosives, or incendiary devices in facilities of public transportation.		enforcement animals - penalties - short title - definition.
18-9-119.	Failure or refusal to leave premises or property upon request of a peace officer - penalties - payment of costs.	18-9-202.5.	Impounded animals - costs of impoundment, provision, and care - disposition - procedures - application - definition.
18-9-120.	Terrorist training activities - penalties - exemptions.	18-9-203.	Shepherd abandoning sheep without notice. (Repealed)
18-9-121.	Bias-motivated crimes - legislative declaration.	18-9-204.	Animal fighting - penalty.
18-9-122.	Preventing passage to and from a health-care facility - engaging in prohibited activities near facility.	18-9-204.5.	Unlawful ownership of dangerous dog - legislative declaration - definitions.
18-9-123.	Bringing alcohol beverages, bottles, or cans into the major league baseball stadium.	18-9-205.	Disposition of fines.
18-9-124.	Hazing - penalties - legislative declaration.	18-9-206.	Unauthorized release of an animal - penalty - restitution.
18-9-125.	Interference with a funeral.	18-9-207.	Tampering or drugging of livestock.
		18-9-208.	Forfeiture of animals.
		18-9-209.	Immunity for reporting cruelty to animals - false report - penalty.

PART 2 CRUELTY TO ANIMALS

18-9-201.	Definitions.
18-9-201.5.	Scope of part 2.
18-9-201.7.	Animal cruelty prevention fund - control of fund - repeal. (Repealed)
18-9-202.	Cruelty and aggravated cruelty to animals, service animals, and law

PART 3 OFFENSES INVOLVING COMMUNICATIONS

18-9-301.	Definitions.
18-9-302.	Wiretapping and eavesdropping devices prohibited - penalty.

18-9-303.	Wiretapping prohibited - penalty.	18-9-311.	Automated dialing systems prohibited.
18-9-304.	Eavesdropping prohibited - penalty.	18-9-312.	Hostage, endangered person, or armed person in geographical area - telephone, electronic, cellular, or digital communications.
18-9-305.	Exceptions.		
18-9-306.	Abuse of telephone and telegraph service.		
18-9-306.5.	Obstruction of telephone or telegraph service.	18-9-313.	Personal information on the internet - victims of domestic violence, sexual assault, and stalking - other protected persons - definitions.
18-9-307.	Refusal to yield party line - repeal. (Repealed)		
18-9-308.	Telephone directories to contain notice - repeal. (Repealed)	18-9-313.5.	Personal information on the internet - election officials - definitions.
18-9-309.	Telecommunications crime.		
18-9-309.5.	Civil remedies - injunctions - forfeiture.	18-9-313.7.	Personal information on the internet - elected officials - definitions.
18-9-310.	Unlawful use of information - penalty.	18-9-314.	Interference with lawful distribution of newspapers - definitions.
18-9-310.5.	False statement to the CBI for sex offender registry information.		

PART 1

PUBLIC PEACE AND ORDER

18-9-101. Definitions.

As used in this part 1, unless the context otherwise requires:

(1) "Destructive device" means any material, substance, or mechanism capable of being used, either by itself or in combination with any other substance, material, or mechanism, to cause sudden and violent injury, damage, destruction, or death.

(1.4) "Funeral" means the ceremonies, rituals, and memorial services held in connection with the final disposition or memorial of a deceased person, including the assembly and dispersal of the mourners.

(1.5) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place where a funeral is conducted.

(2) "Riot" means a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.

(3) "Transit worker" means a bus operator, train operator, ticket inspector, conductor, station customer assistant, or a person whose official duties include the maintenance, repair, inspection, troubleshooting, testing, or cleaning of buses, trains, or facilities of a mass transportation system, as defined in section 32-9-103, or a commuter rail agency, authority, or company, public or private, whose operation is authorized by the state, whether the person is employed by a political subdivision or a private entity.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-9-101. L. 95: (2) amended, p. 1255, § 18, effective July 1. L. 2006: (1.4) and (1.5) added, p. 1198, § 2, effective May 26. L. 2021: (1.4) amended, (SB 21-006), ch. 123, p. 496, § 23, effective September 7. L. 2025: (3) added, (HB 25-1290), ch. 353, p. 1908, § 1, effective August 6.

Cross references: In 2006, subsections (1.4) and (1.5) were added by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Provisions give clear warning that participation in riot forbidden. Subsection (2) of this section and § 18-9-104 give clear warning that knowing participation in the defined conduct is forbidden and provide explicit standards to guide persons charged with their enforcement. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Engaging in a riot was a crime at common law requiring mens rea, or guilty mind, to be criminally actionable. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Mental state "knowingly" is required for the offense of engaging in a riot. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

18-9-102. Inciting riot.

- (1) A person commits inciting riot if he:
 - (a) Incites or urges a group of five or more persons to engage in a current or impending riot;
or
 - (b) Gives commands, instructions, or signals to a group of five or more persons in furtherance of a riot.
- (2) A person may be convicted under section 18-2-101, 18-2-201, or 18-2-301 of attempt, conspiracy, or solicitation to incite a riot only if he engages in the prohibited conduct with respect to a current or impending riot.
- (3) Inciting riot is a class 1 misdemeanor, but, if injury to a person or damage to property results therefrom, it is a class 5 felony.

Source: L. 71: R&RE, p. 467, § 1. **C.R.S. 1963:** § 40-9-102.

ANNOTATION

Law reviews. For note, "Comment: Colorado Flag Desecration Statute", see 48 Constitutional Law—Symbolic Speech—Den. L. J. 451 (1971).

18-9-103. Arming rioters.

- (1) A person commits arming rioters if he:
 - (a) Knowingly supplies a deadly weapon or destructive device for use in a riot; or
 - (b) Teaches another to prepare or use a deadly weapon or destructive device with intent that any such thing be used in a riot.
- (2) Arming rioters is a class 4 felony.

Source: L. 71: R&RE, p. 467, § 1. **C.R.S. 1963:** § 40-9-103.

18-9-104. Engaging in a riot.

(1) A person commits an offense if he or she engages in a riot. The offense is a class 4 felony if in the course of rioting the actor employs a deadly weapon, a destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or if in the course of rioting the actor represents verbally or otherwise that he or she is armed with a deadly weapon; otherwise, it is a class 2 misdemeanor.

(2) The provisions of section 18-9-102 (2) are applicable to attempt, solicitation, and conspiracy to commit an offense under this section.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-104. L. 2000: (1) amended, p. 696, § 10, effective July 1.

ANNOTATION

Law reviews. For article, "Mass Picketing and the Constitutional Guarantee of Freedom of Speech", see 22 Rocky Mt. L. Rev. 28 (1949).

Annotator's note. Since § 18-9-104 is similar to former CSA, C. 48, § 196, a relevant case construing that provision has been included in the annotations to this section.

Concert of action is not essential to the offense of riot, and a previous agreement or conspiracy need not be shown. *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946); *People v. Martinez*, 705 P.2d 9 (Colo. App. 1985).

All persons participating in a riot are guilty as principals. *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946).

Instruction on self-defense. It was not error to insert the words "and not participating in any riot" in an instruction to

the effect that defendant would not be guilty of riot if he acted in self-defense upon being attacked "while engaged in the lawful pursuit of his own business and not participating in any riot". *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946).

Self-defense is an affirmative defense to inciting or engaging in a riot. *People v. Mullins*, 209 P.3d 1147 (Colo. App. 2008).

Provisions give clear warning that participation in riot forbidden. Section 18-9-101 (2) and this section give clear warning that knowing participation in the defined conduct is forbidden and provide explicit standards to guide persons charged with their enforcement. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Engaging in a riot was a crime at common law requiring mens rea, or guilty mind, to be criminally actionable. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Mental state "knowingly" is required for the offense of engaging in a riot. People v. Bridges, 620 P.2d 1 (Colo. 1980).

Employing a deadly weapon is a sentence enhancing factor, not an element of the crime of engaging in a riot. The culpable mental state does not apply to sentencing enhancing factors, so the court did not need to instruct the jury that the mental state also applied to employing a deadly weapon. People v. Rivas, 77 P.3d 882 (Colo. App. 2003).

Engaging in a riot is not a lesser included offense of riots in detention facilities, § 18-8-211. Each offense contains a different element. The riots in detention facilities offense requires the offender to be confined in a detention center and the engaging in a riot offense requires causing a public disturbance. People v. Lacallo, 2014 COA 78, 338 P.3d 442.

Applied in People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Mattas, 645 P.2d 254 (Colo. 1982).

18-9-105. Disobedience of public safety orders under riot conditions.

A person commits a class 2 misdemeanor if, during a riot or when one is impending, the person knowingly disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder or promote the safety of persons or property issued by an authorized member of the police, fire, military, or other forces concerned with the riot. No such order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or other news media, unless the news reporter or other person is physically obstructing efforts by such forces to cope with the riot or impending riot. Inapplicability of the order is an affirmative defense.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-105. L. 77: Entire section amended, p. 968, § 53, effective July 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3201, § 307, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-9-106. Disorderly conduct.

(1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

(a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace; or

(b) (Deleted by amendment, L. 2000, p. 708, § 39, effective July 1, 2000.)

(c) Makes unreasonable noise in a public place or near a private residence that he has no right to occupy; or

(d) Fights with another in a public place except in an amateur or professional contest of athletic skill; or

(e) Not being a peace officer, discharges a firearm in a public place except when engaged in lawful target practice or hunting or the ritual discharge of blank ammunition cartridges as an attendee at a funeral for a deceased person who was a veteran of the armed forces of the United States; or

(f) Not being a peace officer, displays a real or simulated firearm, displays any article used or fashioned in a manner to cause a person to reasonably believe that the article is a firearm, or represents verbally or otherwise that he or she is armed with a firearm in a public place in a manner calculated to alarm and does alarm another person.

(2) Repealed.

(3) (a) An offense pursuant to subsection (1)(a) or (1)(c) of this section is a petty offense; except that, if the offense is committed with intent to disrupt, impair, or interfere with a funeral, or with intent to cause severe emotional distress to a person attending a funeral, it is a class 2 misdemeanor.

(b) An offense pursuant to subsection (1)(d) of this section is a petty offense.

(c) An offense pursuant to subsection (1)(f) of this section is a class 2 misdemeanor.

(d) An offense pursuant to subsection (1)(e) of this section is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-106. L. 72: p. 275, § 8. L. 81: (1)(a) amended, p. 1010, § 1, effective April 24. L. 2000: IP(1), (1)(b), and (1)(f) amended, pp. 696, 708, §§ 11, 39, effective July 1. L. 2006: (3) amended, p. 1198, § 3, effective May 26; (2) repealed, p. 1493, § 21, effective June 1. L. 2014: (1)(e) amended, (HB 14-1059), ch. 22, p. 153, § 1, effective March 7. L. 2021: (1)(f) and (3) amended, (SB 21-271), ch. 462, p. 3201, § 308, effective March 1, 2022.

Editor's note: In *Snyder v. Phelps*, 562 U.S. 443 (2011), the United States Supreme Court held that the first amendment shielded military funeral protesters from tort liability for their

picketing because the picketing constituted speech on matters of public concern and because the father of the deceased was not a member of a captive audience.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) In 2006, subsection (3) was amended by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Annotator's note. Since § 18-9-106 is similar to former § 40-8-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Former subsection (1)(a) was unconstitutional because it was facially overbroad and could not be restrictively construed. *Hansen v. People*, 190 Colo. 457, 548 P.2d 1278 (1976).

Subsection (1)(b) held unconstitutional. Statute facially overbroad because it may prohibit constitutionally protected speech as well as unprotected speech. *Aguilar v. People*, 886 P.2d 725 (Colo. 1994).

Subsection (1)(a) applicable to speech. Subsection (1)(a) prohibits certain types of utterances, gestures, and displays in a public place. It is clear that the statute's proscription applies to speech and "expression closely akin to speech". *Hansen v. People*, 190 Colo. 457, 548 P.2d 1278 (1976).

The statute does not prohibit utterances, gestures, or displays that inflict injury, but only those that tend to

incite an immediate breach of the peace. *People in Interest of R.C.*, 2016 COA 166, 411 P.3d 1105.

The term "public place" does not include a public building covered by the specific provisions of § 18-9-110. The court found that the Colorado legislature has excluded from the term "public place" those areas mentioned in other statutes. Therefore, the court dismissed disorderly conduct charges arising out of alleged threats made to the staff of a veteran's administrative hospital within one of the hospital buildings. *U.S. v. Wright*, 864 F. Supp. 1013 (D. Colo. 1994).

The "immediate breach of the peace" limiting clause in subsection (1)(a) is explicitly meant to limit liability to "fighting words". *Brandt v. City of Westminster*, 300 F. Supp. 3d 1259 (D. Colo. 2018).

For sufficiency of evidence, see *Flores v. City & County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950).

State statute as to disturbing the peace not superseded by nonconflicting home-

rule ordinance. *Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971).

The actus reus of felony menacing is "placing another person in fear of imminent serious bodily injury by the use of a deadly weapon", an act more specific than the actus reus of disorderly conduct with a deadly weapon, which is displaying a deadly weapon in an alarming manner in a public place. Therefore, it does not violate the equal protection clause of article II, section 25, of the Colorado constitution to subject defendants to potential criminal liability under both statutes. *People v. Torres*, 848 P.2d 911 (Colo. 1993).

No equal protection violation was found in defendant's claim that the conduct proscribed by § 18-3-206 (felony menacing),

a class 5 felony, was indistinguishable from the conduct proscribed in subsection (1)(f) of this section, a class 2 misdemeanor, in which the actus reus is less specific than the actus reus in § 18-3-206. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

It is only when the same conduct is proscribed in two statutes and different criminal sanctions apply, that problems arise under equal protection. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

Defendant's display of a crudely altered photo did not amount to fighting words because it was not likely to incite an immediate breach of the peace. *People in Interest of R.C.*, 2016 COA 166, 411 P.3d 1105.

18-9-107. Obstructing highway or other passageway.

(1) An individual or corporation commits an offense if without legal privilege such individual or corporation intentionally, knowingly, or recklessly:

(a) Obstructs a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public has access or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(b) Disobeys a reasonable request or order to move issued by a person the individual or corporation knows to be a peace officer, a firefighter, or a person with authority to control the use of the premises, to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(2) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

(3) An offense under this section is a petty offense; except that knowingly obstructing the entrance into, or exit from, a funeral or funeral site, or knowingly obstructing a highway or other passageway where a funeral procession is taking place is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 468, § 1. C.R.S. 1963: § 40-9-107. L. 97: IP(1) and (1)(b) amended, p. 1012, § 17, effective August 6. L. 2006: (3) amended, p. 1198, § 4, effective May 26. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3202, § 309, effective March 1, 2022.

Cross references: (1) For obstructing highways, see § 43-5-301.

(2) In 2006, subsection (3) was amended by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Law reviews. For article, "Mass of Freedom of Speech", see 22 Rocky Mt. L. Picketing and the Constitutional Guarantee Rev. 28 (1949).

18-9-108. Disrupting lawful assembly.

(1) A person commits disrupting lawful assembly if, intending to prevent or disrupt any lawful meeting, procession, or gathering, he significantly obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.

(2) Disrupting lawful assembly is a petty offense; except that, if the actor knows the meeting, procession, or gathering is a funeral, it is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 468, § 1. C.R.S. 1963: § 40-9-108. L. 2006: (2) amended, p. 1199, § 5, effective May 26. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3202, § 310, effective March 1, 2022.

Cross references: In 2006, subsection (2) was amended by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Statute is constitutional as applied. By focuses on punishment for actual disruption adopting an actual disruption standard that of an assembly, this section is

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constitutionally based on conduct, not content. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005).

Under the terms of this section, a defendant must intend to disrupt a meeting. That element of the offense subsumes two notions. First, the nature of the assembly or meeting defines the bounds of appropriate protest. The standard is drawn from the implicit customs and usages or

explicit rules germane to a given meeting. Once the nature of the event is clear, the second question becomes whether the defendant intended to disrupt that event or, stated otherwise, whether the defendant was aware that his or her conduct was inconsistent with the customs of the assembly and whether he or she thereby intended his or her conduct to disrupt the assembly significantly. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005).

18-9-108.5. Residential picketing - legislative declaration.

(1) (a) The general assembly hereby finds that:

(I) The protection and preservation of the home is a compelling state interest;

(II) Residents of Colorado are entitled to enjoy a feeling of well-being, tranquility, and privacy in their homes and dwellings;

(III) The practice of targeted residential picketing causes emotional disturbances and distress to the occupants and has the potential to incite breaches of the peace; and

(IV) The practice of targeted residential picketing does not seek to disseminate a message to the general public but, instead, seeks to harass and intrude on the privacy of the targeted resident.

(b) The general assembly further finds that ample alternative means of communication are available to those who would choose to engage in picketing outside a person's residence.

(2) As used in this section, unless the context otherwise requires:

(a) "Residence" means any single-family or multi-family dwelling unit that is not being used as a targeted occupant's sole place of business or as a place of public meeting.

(b) "Targeted picketing" means picketing, with or without signs, that is specifically directed toward a residence, or one or more occupants of the residence, and that takes place on that portion of a sidewalk or street in front of the residence, in front of an adjoining residence, or on either side of the residence.

(3) (a) It shall be unlawful for a person to engage in targeted picketing except when the person is engaging in picketing while marching, without stopping in front or on either side of a residence, over a route that proceeds a distance that extends beyond three adjacent structures to one side of the targeted residence along the one-way length and three adjacent structures to the

other side of the targeted residence along the one-way length or three hundred feet to one side of the targeted residence along the one-way length and three hundred feet to the other side of the targeted residence along the one-way length, whichever distance is shorter.

(b) (I) It shall be unlawful for a person while engaged in targeted picketing to hold, carry, or otherwise display on his or her person a sign or placard while he or she is on a street or sidewalk in a residential area if the person does not comply with the following restrictions:

(A) All signs or placards shall be no greater in size than six square feet;

(B) Each person may carry, hold, or otherwise display no more than one sign or placard.

(II) The restrictions specified pursuant to subparagraph (I) of this paragraph (b) shall not apply to a person while engaged in targeted picketing carrying a sign or placard temporarily while transporting the sign or placard from the person's residence or business to a vehicle.

(4) Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

(5) It shall not be a violation of subsection (3) of this section unless a person has previously been ordered by a peace officer or other law enforcement official to move, disperse, or take other appropriate action to comply with this section and the person has failed to promptly comply with the warning. The warning issued by the peace officer or other law enforcement official shall indicate the required distances the person engaging in picketing must march or other conditions necessary to comply with this section. In order to ensure that an appropriate warning has been given, the local law enforcement agency shall maintain a written record indicating the name of each warned individual, the address or addresses of the targeted residence or residences, and the date and time of the warning.

(6) A person who violates subsection (3) of this section commits a petty offense.

(7) The provisions of this section shall not prohibit a local government from adopting more restrictive provisions concerning targeted picketing or carrying in a residential area more than one sign of a certain size.

Source: L. 2008: Entire section added, p. 1509, § 1, effective August 5. **L. 2021:** (6) amended, (SB 21-271), ch. 462, p. 3202, § 311, effective March 1, 2022.

18-9-109. Interference with staff, faculty, or students of educational institutions.

(1) No person shall, on or near the premises or facilities of any educational institution, willfully deny to students, school officials, employees, and invitees:

- (a) Lawful freedom of movement on the premises;
- (b) Lawful use of the property or facilities of the institution;
- (c) The right of lawful ingress and egress to the institution's physical facilities.

(2) No person shall, on the premises of any educational institution or at or in any building or other facility being used by any educational institution, willfully impede the staff or faculty of such institution in the lawful performance of their duties or willfully impede a student of the institution in the lawful pursuit of his educational activities through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened.

(3) No person shall willfully refuse or fail to leave the property of or any building or other facility used by any educational institution upon being requested to do so by the chief administrative officer, his designee charged with maintaining order on the school premises and in its facilities, or a dean of such educational institution, if such person is committing, threatens to commit, or incites others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.

(4) It shall be an affirmative defense that the defendant was exercising his right to lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute between an educational institution and its employees, any contractor or subcontractor, or any employee thereof.

(5) (a) Any person who violates any of the provisions of this section, except subsection (1) or (6) of this section, commits a class 2 misdemeanor.

(b) A person who violates subsection (1) of this section commits a petty offense.

(6) (a) A person shall not knowingly make or convey to another person a credible threat to cause death or to cause bodily injury with a deadly weapon against:

(I) A person the actor knows or believes to be a student, school official, or employee of an educational institution; or

(II) An invitee who is on the premises of an educational institution.

(b) For purposes of this subsection (6), "credible threat" means a threat or physical action that would cause a reasonable person to be in fear of bodily injury with a deadly weapon or death.

(c) A person who violates this subsection (6) commits a class 1 misdemeanor.

(7) For purposes of this section, the premises, facilities, and buildings of an educational institution do not include the private residence of a student who is participating in online instruction, as defined in section 22-1-131 (2).

Source: **L. 71:** R&RE, p. 468, § 1. **C.R.S. 1963:** § 40-9-109. **L. 73:** p. 539, § 8. **L. 2005:** (5) amended and (6) added, p. 1499, § 4, effective July 1. **L. 2021:** (7) added, (HB 21-1059), ch. 200, p. 1061, § 3, effective May 28; (5) amended, (SB 21-271), ch. 462, p. 3202, § 312, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Subsection (2) is not unconstitutionally vague since it gives fair notice of a reasonably narrow range of prohibited conduct, in terms sufficiently precise so that persons of ordinary intelligence need not speculate as to the conduct that is proscribed. People ex rel. J.P.L., 49 P.3d 1209 (Colo. App. 2002).

The plain language of subsection (2) makes clear that the language requiring proof that the impeding was accomplished "through the use of restraint, abduction, coercion, or intimidation", or that "force and violence [were] present or threatened", applies to both the staff-faculty clause and

the student clause. People ex rel. C.A.J., 148 P.3d 436 (Colo. App. 2006).

The clause "on or near the premises or facilities of any educational institution", as used in subsections (1) and (2), refers to the location of the actor who interferes with the staff, faculty, or students, not the location of the disruption resulting from the act. The statute does not apply if the actor interferes with the staff, faculty, or students while the actor is at a different location—for example, a bomb threat phoned in to a school. People ex rel. C.F., 2012 COA 75, 279 P.3d 1231.

18-9-110. Public buildings - trespass, interference - penalty.

(1) No person shall so conduct himself at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state or at any building owned, operated, or controlled by the federal government as to willfully deny to any public official, public employee, or invitee on such premises the lawful rights of such official, employee, or invitee to enter, to use the facilities of, or to leave any such public building.

(2) No person shall, at or in any such public building, willfully impede any public official or employee in the lawful performance of duties or activities through the use of restraint, abduction, coercion, or intimidation or by force and violence or threat thereof.

(3) No person shall willfully refuse or fail to leave any such public building upon being requested to do so by the chief administrative officer or his designee charged with maintaining order in such public building, if the person has committed, is committing, threatens to commit, or incites others to commit any act which did, or would if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the public building.

(4) No person shall, at any meeting or session conducted by any judicial, legislative, or administrative body or official at or in any public building, willfully impede, disrupt, or hinder the normal proceedings of such meeting or session by any act of intrusion into the chamber or other areas designated for the use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any member of such body or official engaged in the performance of duties at such meeting or session.

(5) No person shall, by any act of intrusion into the chamber or other areas designated for the use of any executive body or official at or in any public building, willfully impede, disrupt, or hinder the normal proceedings of such body or official.

(6) No person, alone or in concert with another, shall picket inside any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, are located, or in which the legislative office of any member of the general assembly is located, or in which a legislative hearing or meeting is being or is to be conducted.

(7) The term "public building", as used in this section, includes any premises being temporarily used by a public officer or employee in the discharge of his official duties.

(8) (a) Any person who violates subsection (2) or (4) of this section commits a class 2 misdemeanor.

(b) Any person who violates subsection (1), (3), (5), or (6) of this section commits a petty offense.

Source: L. 71: R&RE, p. 469, § 1. C.R.S. 1963: § 40-9-110. L. 73: p. 683, § 2. L. 86: (1) amended, p. 771, § 12, effective July 1. L. 2021: (8) amended, (SB 21-271), ch. 462, p. 3203, § 313, effective March 1, 2022.

Cross references: For obstructing government operations, see § 18-8-102.

ANNOTATION

The term "public employee" is unambiguous and means a person who works in the service of a governmental entity under an express or implied contract of hire, under which the governmental entity has the right to control the details of the person's work performance. *People v. Rediger*, 2018 CO 32, 416 P.3d 893.

The phrase "public official or employee" applies only to a victim who is either an official or an employee of a public entity. To construe the word "employee" as

meaning anyone who is employed, regardless of whether his or her employer is a private contractor or a governmental entity, is contrary to the plain meaning of the statute. *People v. Moore*, 2013 COA 86, 338 P.3d 348; *People v. Rediger*, 2015 COA 26, 411 P.3d 907, *aff'd*, 2018 CO 32, 416 P.3d 893.

Building used by a victim who is not a public employee is not a "public building". *People v. Rediger*, 2015 COA 26, 411 P.3d 907, *aff'd in part, rev'd in part on other grounds*, 2018 CO 32, 416 P.3d 893.

18-9-111. Harassment - Kiana Arellano's Law.

(1) A person commits harassment if, with intent to harass, annoy, or alarm another person, the person:

(a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or

(b) In a public place directs obscene language or makes an obscene gesture to or at another person; or

(c) Follows a person in or about a public place; or

(d) Repealed.

(e) Directly or indirectly initiates communication with a person or directs language toward another person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, or other interactive electronic medium that is obscene; or

(f) Makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation; or

(g) Makes repeated communications at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or private residence or other private property; or

(h) Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to another in a manner likely to provoke a violent or disorderly response; or

(i) Wrongfully interferes with a transit worker performing a lawful duty.

(1.5) As used in this section, unless the context otherwise requires, "obscene" means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, anilingus, or excretory functions.

(2) (a) A person who violates subsection (1)(a), (1)(c), or (1)(i) of this section or violates subsection (1) of this section with the intent to intimidate or harass another person, in whole or in part, because of that person's actual or perceived race; color; religion; ancestry; national origin; physical or mental disability, as defined in section 18-9-121; sexual orientation, as defined in section 18-9-121; or transgender identity commits a class 1 misdemeanor.

(b) A person who violates subsection (1)(e), (1)(f), (1)(g), or (1)(h) of this section commits a class 2 misdemeanor.

(c) A person who violates subsection (1)(b) of this section commits a petty offense.

(3) Any act prohibited by paragraph (e) of subsection (1) of this section may be deemed to have occurred or to have been committed at the place at which the telephone call, electronic mail, or other electronic communication was either made or received.

(4) to (6) Repealed.

(7) Paragraph (e) of subsection (1) of this section shall be known and may be cited as "Kiana Arellano's Law".

(8) This section is not intended to infringe upon any right guaranteed to any person by the first amendment to the United States constitution or to prevent the expression of any religious, political, or philosophical views.

Source: **L. 71:** R&RE, p. 469, § 1. **C.R.S. 1963:** § 40-9-111. **L. 76:** (1)(e) R&RE and (1.5) added, p. 561, §§ 1, 2, effective May 21. **L. 81:** (1)(e) amended, p. 981, § 6, effective May 13. **L. 90:** (1)(d) repealed, p. 926, § 11, effective March 27. **L. 92:** (2) amended and (4) to (6) added, p. 413, § 1, effective July 1. **L. 93:** (5)(a) amended and (5)(a.5) added, p. 1703, § 1, effective July 1. **L. 94:** IP(1), (1)(g), and (1)(h) amended, p. 1463, § 3, effective July 1; (4) and (5) amended, p. 2018, § 1, effective July 1; (5)(b) amended, p. 1719, § 14, effective July 1. **L. 95:** (5) amended,

p. 1258, § 26, effective July 1. **L. 97:** (4)(b)(I) amended, p. 1540, § 4, effective July 1. **L. 99:** (2), (4), and (5) amended, pp. 795, 792, §§ 4, 1, effective July 1. **L. 2000:** (1)(e) and (3) amended, p. 693, § 4, effective July 1. **L. 2003:** (5)(b) amended, p. 1014, § 23, effective July 1. **L. 2004:** (5)(a.7) added, p. 636, § 11, effective August 4. **L. 2009:** (1)(e) amended, (HB 09-1132), ch. 341, p. 1793, § 4, effective July 1. **L. 2010:** (4), (5), and (6) repealed, (HB 10-1233), ch. 88, p. 295, § 2, effective August 11. **L. 2015:** (1)(e) amended, and (7) and (8) added, (HB 15-1072), ch. 120, p. 364, § 1, effective July 1. **L. 2017:** (2) amended, (HB 17-1188), ch. 185, p. 677, § 1, effective August 9. **L. 2021:** (2) amended, (SB 21-280), ch. 372, p. 2465, § 1, effective June 28; (2) amended, (SB 21-271), ch. 462, p. 3203, § 314, effective March 1, 2022. **L. 2024:** (2)(a) amended, (SB 24-189), ch. 305, p. 2068, § 2, effective July 1. **L. 2025:** IP(1), (1)(h), and (2)(a) amended and (1)(i) added, (HB 25-1290), ch. 353, p. 1908, § 2, effective August 6.

Editor's note: (1) Amendments to subsection (5) in House Bill 94-1045 and House Bill 94-1126 were harmonized.

(2) Subsections (4), (5), and (6) were relocated to part 6 of article 3 of this title in 2010.

(3) Amendments to subsection (2) by SB 21-280 and SB 21-271 were harmonized.

(4) In *People v. Moreno*, 2022 CO 15, 506 P.3d 849 (Colo. 2022), the Colorado Supreme Court held that the phrase "intended to harass" in subsection (1)(e) is unconstitutionally overbroad on its face, impermissibly encroaching on protected speech under the first amendment of the United States Constitution and article II, section 10, of the Colorado Constitution.

Cross references: For provisions concerning harassment by debt collectors or collection agencies, see § 5-16-106.

ANNOTATION

Subsection (1)(d) held unconstitutionally vague. This subsection violates the due process clause because it contains no limiting standards to define what conduct is prohibited and, conversely, what conduct is permitted. *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

The phrase "intended to harass" in subsection (1)(e) is unconstitutionally

overbroad on its face, impermissibly encroaching on protected speech. *People v. Moreno*, 2022 CO 15, 506 P.3d 849.

Former subsection (1)(e) was facially overbroad and therefore unconstitutional. *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

Subsection (1)(e) held not to be unconstitutionally vague because the

statute defined the offense with particularized standards to limit the scope of the offense and the presence in the statute of the words "annoy" and "alarm", by themselves, were not sufficient to render the statute unconstitutionally vague. *People v. McBurney*, 750 P.2d 916 (Colo. 1988).

Subsection (1)(g) is facially overbroad and unconstitutionally vague and there are no limiting constructions that will render it constitutional. *People v. Smith*, 862 P.2d 939 (Colo. 1993).

A defendant lacks standing to challenge the constitutionality of a statute as facially overbroad when the defendants alleged speech is precisely the type of activity which the telephone harassment statute was designed to regulate. *People v. McBurney*, 750 P.2d 916 (Colo. 1988).

This section and § 18-3-207, which classifies criminal extortion as a felony, address separate and distinct crimes and the classification of such offenses have a rational basis in fact and are reasonably related to legitimate government interests. *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990).

No equal protection violation for convictions for felony stalking and misdemeanor harassment by computer because the statutory provisions proscribe different although related criminal conduct. *People v. Chase*, 2013 COA 27, 411 P.3d 740.

Subsection (1)(h) is not unconstitutionally vague on its face.

People ex rel. VanMeveren v. County Court, 191 Colo. 201, 551 P.2d 716 (1976).

The limited scope of the statute brings it within permissible limitations on free expression. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

When asserted as a defense to a charge of harassment, self-defense is an element-negating traverse rather than an affirmative defense. A person who acts in self-defense cannot simultaneously act with the intent to harass, annoy, or alarm. *Roberts v. People*, 2017 CO 76, 399 P.3d 702.

A defendant may assert self-defense as an affirmative defense to the crime of harassment so long as there is some credible evidence to allow a reasonable jury to find that the defendant acted with intent to alarm as a means of self-defense. *Pearson v. People*, 2022 CO 4, 502 P.3d 1003.

Gravamen of this offense is the thrusting of an offensive and unwanted communication on one who is unable to ignore it. *People v. Weeks*, 197 Colo. 175, 591 P.2d 91 (1979).

A true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence. In determining whether a statement is a true threat, a reviewing court must examine the words used, but it must also consider the context in which the statement was made. Particularly, if the alleged threat is

communicated online, the contextual factors courts should consider include, but are not limited to, (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed; (4) the relationship between the speaker and recipient; and (5) the subjective reaction of the statement's intended or foreseeable recipient. *People in Interest of R.D.*, 2020 CO 44, 464 P.3d 717.

Harassment under subsection (1)(a) is a "crime against another person" that can serve as a predicate offense for second degree burglary. To commit harassment under subsection (1)(a), one necessarily must subject another to some form of "physical contact". *People v. Wright*, 2021 COA 106, 498 P.3d 1147.

What subsection (1)(h) prohibits. Subsection (1)(h) prohibits (1) "fighting words", as heretofore defined, addressed to another person, (2) consisting of insults, taunts, or challenges, (3) repeatedly made, and (4) with intent to harass, annoy, or alarm another person. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

Subsection (1)(h) requires an objective determination: Whether the words when directed to an average person would tend to induce an immediate breach of the peace. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

"Annoy" in this section means "to irritate with a nettling or exasperating effect". *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

"Alarm" in this section means "to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm". *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

"Repeatedly" is a word of such common understanding that its meaning is not vague. It simply means in the context of subsection (1)(h) that the defendant uses insulting, taunting, or challenging language more than one time. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

Use of "obscene" in subsection (1)(e). Although subsection (1)(e) uses the word "obscene" to describe the speech which is prohibited, that subsection is clearly not designed to regulate the purveyance of "obscenity" as that word is used in *Miller v. California*, 413 U.S. 15 (1973). Whatever the requirements of *Miller v. California* may be in a prosecution for alleged violations of law prohibiting published obscenity, those requirements are inapposite when the question is whether the state may prohibit unwanted verbal assaults on a person within the privacy of his own home. *People v. Weeks*, 197 Colo. 175, 591 P.2d 91 (1979).

Harassment is not a lesser included offense of stalking because the offenses of harassment and stalking differ in more ways than the two distinctions identified in § 18-1-408 (5)(c). *Pellegrin v. People*, 2023 CO 37, 532 P.3d 1224.

Harassment is not a lesser included offense of either second or third degree assault. Harassment contains a culpable mental state element -- intent to harass, annoy, or alarm -- that is not required by the elements of either second degree assault (intent to cause bodily injury) or third degree assault (knowingly or recklessly or with criminal negligence). *People v. Wade*, 2024 COA 13, 548 P.3d 1164.

Defendant's spitting on the tenant constituted "physical contact" within the meaning of subsection (1)(a). *People v. Peay*, 5 P.3d 398 (Colo. App. 2000).

Evidence sufficient to establish the conviction under subsection (1)(c). Although the evidence could be viewed in two ways, there was sufficient evidence to support the jury's inferences that the

defendant did follow the victim in a public place. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

Insufficient evidence to establish beyond a reasonable doubt that defendant followed victim where victim testified that defendant saw her when he was walking toward her on the street and that defendant was in the same store and approached her at the clothes rack where she was standing, and especially where there was no evidence that defendant approached the clothes rack with the intent to harass, annoy, or alarm the victim. *People v. Serra*, 2015 COA 130, 361 P.3d 1122.

Applied in *Verner v. Colo.*, 533 F. Supp. 1109 (D. Colo. 1982); *Derosier v. Balltrip*, 149 F. Supp. 3d 1286 (D. Colo. 2016).

18-9-112. Loitering - definition - legislative declaration.

(1) The word "loiter" means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.

(2) A person commits a petty offense if he or she, with intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren, loiters in a school building or on school grounds or within one hundred feet of school grounds when persons under the age of eighteen are present in the building or on the grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there, and having been asked to leave by a school administrator or the school administrator's representative or by a peace officer.

(3) It shall be an affirmative defense that the defendant's acts were lawful and he was exercising his rights of lawful assembly as a part of peaceful and orderly petition for the redress of grievances, either in the course of labor disputes or otherwise.

(4) The general assembly hereby finds and declares that the state has a special interest in the protection of children and, particularly, in protecting children who attend schools because required to do so by the "School Attendance Law of 1963", article 33 of title 22, C.R.S., and the

prohibition of loitering in subsection (2) of this section is enacted in furtherance of these interests.

Source: **L. 71:** R&RE, p. 470, § 1. **C.R.S. 1963:** § 40-9-113. **L. 73:** p. 539, § 9. **L. 81:** (2)(e) amended, p. 738, § 24, effective July 1. **L. 82:** (2)(d) amended and (4) added, p. 322, § 1, effective March 5. **L. 97:** (2) amended, p. 1547, § 22, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3203, § 315, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For article, "Mass Picketing and the Constitutional Guarantee of Freedom of Speech", see 22 Rocky Mt. L. Rev. 28 (1949). For article, "Vagrants, Criminals and the Constitution", see 40 Den. L. Ctr. J. 314 (1963). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law, 2148 (1982).

Annotator's note. Since § 18-9-112 is similar to former § 40-8-19, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Purpose of section. Measures to cope with vagrancy have as their purpose the safety and good order of the community, by seeking to nip crime in one of its formative settings. Thus, vagrancy laws find sanction in the exercise of the police power. *Dominguez v. City & County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961), overruled on other grounds in *Arnold v. City*

& County of Denver, 171 Colo. 1, 464 P.2d 517 (1970).

The term "begging" is sufficiently clear. *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969).

Subsection (2)(c) does not satisfy constitutional due process requirements. *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974).

Because it does not require loitering coupled with other overt conduct. Subsection (2)(c) violates constitutional due process because it fails to require that loitering be coupled with any other overt conduct, but rather provides the loitering need only be coupled with state of mind having "the purpose of . . . deviate sexual intercourse". *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974).

Former subsection (2)(d) was unconstitutionally vague in violation of due process of law under § 25 of art. II,

Colo. Const. People in Interest of C.M., 630 P.2d 593 (Colo. 1981).

Right of personal liberty protects travel and safe conduct. In interpreting constitutional provisions providing for the right to enjoy life and liberty, the right of personal liberty consists in the power of locomotion — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places, and while conducting themselves in a decent and orderly manner, disturbing no other and interfering with the rights of no other citizens, there they will be protected under the law, not only in their persons, but in their safe conduct. *Dominguez v. City & County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961), overruled on other grounds in

Arnold v. City & County of Denver, 171 Colo. 1, 464 P.2d 517 (1970).

Former vagrancy provision held unconstitutional under the equal protection clause of the federal constitution. The former section declaring idleness or indigency coupled with being able-bodied must be held beyond the power of the state legislative body. The statute did not require either act or behavior; it dealt with condition. Insofar as the statutory prescription seeks to legislate against status, it is in conflict with the substantive due process limitation of the fourteenth amendment of the federal constitution. Furthermore, a statute which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969).

18-9-113. Desecration of venerated objects.

(1) (a) A person commits a class 2 misdemeanor if he or she knowingly desecrates any public monument or structure or desecrates in a public place any other object of veneration by the public.

(b) Except as otherwise provided in section 24-80-1305, with respect to the disturbance of an unmarked human burial, a person commits a class 2 misdemeanor if he or she knowingly desecrates any place of worship or burial of human remains.

(c) The court shall order that any person convicted pursuant to this section make restitution to cover the costs of repairing any damages to any monument, headstone, memorial marker, structure, or place that are the result of such person's conduct. Such restitution shall be paid to any person or entity that repairs such damages, as required in article 18.5 of title 16, C.R.S.

(2) The term "desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result.

Source: L. 71: R&RE, p. 470, § 1. C.R.S. 1963: § 40-9-114. L. 77: (1) amended, p. 969, § 54, effective July 1. L. 82: (1) amended, p. 324, § 1, effective March 25. L. 90: (1)(b) amended, p. 1282, § 7, effective May 9. L. 91: (1)(c) added, p. 407, § 16, effective June 6. L. 2000: (1)(c) amended, p. 1051, § 19, effective September 1. L. 2021: (1)(a) and (1)(b) amended, (SB 21-271), ch. 462, p. 3203, § 316, effective March 1, 2022.

18-9-114. Hindering transportation.

A person commits a petty offense if the person knowingly and without lawful authority forcibly stops and hinders the operation of any vehicle used in providing transportation services of any kind to the public or to any person, association, or corporation.

Source: L. 71: R&RE, p. 471, § 1. C.R.S. 1963: § 40-9-115. L. 77: Entire section amended, p. 969, § 55, effective July 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3204, § 317, effective March 1, 2022.

18-9-115. Endangering public transportation and utility transmission.

(1) A person commits endangering public transportation if such person:

(a) Tamper with a facility of public transportation with intent to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material which would result in the creation of a substantial risk of death or serious bodily injury to anyone; or

(b) Repealed.

(c) On a public conveyance, knowingly threatens any operator, crew member, attendant, or passenger:

(I) With death or imminent serious bodily injury; or

(II) With a deadly weapon or with words or actions intended to induce belief that such person is armed with a deadly weapon.

(d) Repealed.

(1.5) A person commits endangering utility transmission if such person tampers with a facility of utility transmission with intent to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material which would:

- (a) Interrupt performance of utility transmission; or
- (b) Result in a creation of a substantial risk of death or serious bodily injury to anyone.

(2) "Public" means offered or available to the public generally, either free or upon payment of a fare, fee, rate, or tariff, or offered or made available by a school or school district to pupils regularly enrolled in public or nonpublic schools in preschool through grade twelve.

(3) "Public conveyance" includes a passenger or freight train, airplane, bus, truck, car, boat, tramway, gondola, lift, elevator, escalator, or other device intended, designed, adapted, and used for the public carriage of persons or property.

(4) "Facility of public transportation" includes a public conveyance and any area, structure, or device which is designed, adapted, and used to support, guide, control, permit, or facilitate the movement, starting, stopping, takeoff, landing, or servicing of a public conveyance or the loading or unloading of passengers, freight, or goods.

(4.5) "Facility of utility transmission" includes any area, structure, or device that is designed, adopted, or used to support, guide, control, permit, or facilitate transmission of:

- (a) Electrical energy in excess of thirty thousand volts; or
 - (b) Water, liquid fuel, or gaseous fuel by pipeline.
- (5) Endangering public transportation or endangering utility transmission is a class 3 felony.

Source: L. 71: R&RE, p. 471, § 1. C.R.S. 1963: § 40-9-116. L. 77: (1)(c) amended, p. 969, § 56, effective July 1. L. 94: (1) amended, p. 1344, § 1, effective July 1. L. 96: (2) amended, p. 1335, § 1, effective July 1. L. 2014: (1)(a), (3), (4), and (5) amended and (1.5) and (4.5) added, (SB 14-049), ch. 271, p. 1089, § 1, effective July 1. L. 2021: (1)(c)(II) amended, (SB 21-271), ch. 462, p. 3204, § 318, effective March 1, 2022; (1)(b)(II) and (1)(d)(II) added by revision, (SB 21-271), ch. 462, pp. 3204, 3331, §§ 318, 803.

Editor's note: Subsections (1)(b)(II) and (1)(d)(II) provided for the repeal of subsections (1)(b) and (1)(d), respectively, effective March 1, 2022. (See L. 2021, pp. 3204, 3331.)

18-9-115.5. Violation of a restraining order related to public conveyances.

Any violation of an order of court obtained pursuant to rule 65 of the Colorado rules of civil procedure, which order has specifically restrained a person from traveling in or on a particular public conveyance, shall be a petty offense.

Source: L. 95: Entire section added, p. 1258, § 25, effective July 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3204, § 319, effective March 1, 2022.

18-9-116. Throwing missiles at vehicles - harassment of bicyclists.

(1) Any person who knowingly projects any missile at or against any vehicle or equipment designed for the transportation of persons or property, other than a bicycle, commits a civil infraction.

(2) Any person who knowingly projects any missile at or against a bicyclist commits a class 2 misdemeanor.

(3) As used in this section, "missile" means any object or substance.

Source: L. 71: R&RE, p. 471, § 1. **C.R.S. 1963:** § 40-9-117. **L. 77:** Entire section amended, p. 969, § 57, effective July 1. **L. 2009:** Entire section amended, (SB 09-148), ch. 239, p. 1090, § 7, effective August 5. **L. 2021:** (1) amended, (SB 21-271), ch. 462, p. 3204, § 320, effective March 1, 2022.

ANNOTATION

Littering is not a lesser included offense of throwing a missile at a vehicle. A throwing a missile offense is completed once a person knowingly projects a missile, regardless of where it lands. A littering

offense is completed only if the object later lands on property. The two offenses occur sequentially and not simultaneously. *People v. Kern*, 2020 COA 96, 474 P.3d 197.

18-9-116.5. Vehicular eluding.

(1) Any person who, while operating a motor vehicle, knowingly eludes or attempts to elude a peace officer also operating a motor vehicle, and who knows or reasonably should know that he

or she is being pursued by said peace officer, and who operates his or her vehicle in a reckless manner, commits vehicular eluding.

(2) (a) Vehicular eluding is a class 5 felony; except that vehicular eluding that results in bodily injury to another person is a class 4 felony and vehicular eluding that results in death to another person is a class 3 felony.

(b) Repealed.

Source: **L. 75:** Entire section added, p. 620, § 16, effective July 21. **L. 86:** Entire section amended, p. 786, § 1, effective July 1. **L. 89:** Entire section amended, p. 840, § 88, effective July 1. **L. 2000:** Entire section amended, p. 698, § 17, effective July 1. **L. 2008:** Entire section amended, p. 2084, § 1, effective July 1. **L. 2023:** (2)(b) repealed, (HB 23-1293), ch. 298, p. 1789, § 35, effective October 1.

Cross references: For driving a motor vehicle with a wanton or a willful disregard for the safety of others, see reckless driving as contained in § 42-4-1401.

ANNOTATION

A defendant may be charged with multiple offenses of vehicular eluding arising from a single criminal episode when he or she has performed discrete acts of eluding one or more police officers, each constituting a new volitional departure in defendant's course of conduct. *People v. McMinn*, 2013 COA 94, 412 P.3d 551.

Under double jeopardy principles, defendant's four convictions for vehicular eluding do not merge with one another, and defendant's four convictions for eluding a police officer do not merge with one another because each officer was eluded during separate times at separate locations. *People v. McMinn*, 2013 COA 94, 412 P.3d 551.

Eluding a police officer, as defined in § 42-4-1512, is not a lesser included offense of vehicular eluding. *People v. Fury*, 872 P.2d 1280 (Colo. App. 1993) (decided prior to 1994 amendment relocating former § 42-4-1512 to § 42-4-1413); *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

Reckless driving is a lesser included offense of vehicular eluding. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, 282 P.3d 471 (Colo. App. 2011).

To find defendant guilty of aggravated motor vehicle theft, the jury had to find that defendant committed the crime of

vehicular eluding. Accordingly, defendant's conviction for vehicular eluding must merge into his conviction for aggravated motor vehicle theft. *People v. Ramirez-Armas*, 2026 COA 1, 586 P.3d 209.

"Wanton or willful disregard" for safety under § 42-4-1401 is essentially the same element as the "reckless" state of mind specified in this section. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997).

The portion of the statute requiring proof that eluding resulted in the death of another person is a sentence enhancing provision, not an essential element of the offense of vehicular eluding for purposes of merger. *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

Therefore, vehicular eluding is not a lesser included offense of vehicular homicide because vehicular homicide does require proof of death. *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

A child who is in utero at the time of the vehicular eluding offense who is

subsequently born alive and dies from injuries sustained due to the offense can be a victim by virtue of the plain meaning of the statute. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009), overruled in *People v. Jones*, 2020 CO 45, 464 P.3d 735.

Vehicular eluding requires only proof that the driver both eluded or attempted to elude a police officer and operated a car recklessly, but not necessarily at the same time. *People v. Sherwood*, 5 P.3d 956 (Colo. App. 2000).

The intent of the vehicular eluding statute is to protect members of the public from the dangers created by a driver attempting to elude a police officer. There is therefore no need for a prosecutor to identify a particular victim in charging a defendant. *People v. Fury*, 872 P.2d 1280 (Colo. App. 1993).

Applied in *Brutcher v. District Court*, 195 Colo. 579, 580 P.2d 396 (1978); *People v. Mascarenas*, 632 P.2d 1028 (Colo. 1981).

18-9-117. Unlawful conduct on public property.

(1) It is unlawful for any person to enter or remain in any public building or on any public property or to conduct himself or herself in or on the same in violation of any order, rule, or regulation concerning any matter prescribed in this subsection (1), limiting or prohibiting the use or activities or conduct in such public building or on such public property, issued by any officer or agency having the power of control, management, or supervision of the building or property. In addition to any authority granted by any other law, each such officer or agency may adopt such orders, rules, or regulations as are reasonably necessary for the administration, protection, and maintenance of such public buildings and property, specifically, orders, rules, and regulations upon the following matters:

(a) Preservation of property, vegetation, wildlife, signs, markers, statues, buildings and grounds, and other structures, and any object of scientific, historical, or scenic interest;

(b) Restriction or limitation of the use of such public buildings or property as to time, manner, or permitted activities;

(c) Prohibition of activities or conduct within public buildings or on public property which may be reasonably expected to substantially interfere with the use and enjoyment of such places by others or which may constitute a general nuisance or which may interfere with, impair, or disrupt a funeral or funeral procession;

(d) Necessary sanitation, health, and safety measures, consistent with section 25-13-113, C.R.S.;

(e) Camping and picnicking, public meetings and assemblages, and other individual or group usages, including the place, time, and manner in which such activities may be permitted;

(f) Use of all vehicles as to place, time, and manner of use;

(g) Control and limitation of fires, including but not limited to the prohibition, restriction, or ban on fires or other regulation of fires to avert the start of or lessen the likelihood of wildfire, and the designation of places where fires are permitted, restricted, prohibited, or banned.

(2) No conviction may be obtained under this section unless notice of such limitations or prohibitions is prominently posted at all public entrances to such building or property or unless such notice is actually first given the person by the officer or agency, including any agent thereof, or by any law enforcement officer having jurisdiction or authority to enforce this section.

(3) (a) Except as otherwise provided in subsections (3)(b) and (3)(c) of this section, any person who violates subsection (1) of this section is guilty of a petty offense.

(b) Any person who violates any order, rule, or regulation adopted pursuant to paragraph (g) of subsection (1) of this section is guilty of a class 2 misdemeanor and shall be assessed a fine of not less than two hundred fifty dollars and not greater than one thousand dollars. The fine imposed by this paragraph (b) shall be mandatory and not subject to suspension. Nothing in this paragraph (b) shall be construed to limit the court's discretion in exercising other available sentencing alternatives in addition to the mandatory fine.

(c) Any person who violates any order, rule, or regulation adopted pursuant to paragraph (c) of subsection (1) of this section concerning funerals or funeral processions is guilty of a class 2 misdemeanor.

Source: L. 72: p. 287, § 2. C.R.S. 1963: § 40-9-118. L. 2002, 3rd Ex. Sess.: IP(1), (1)(g), and (3) amended, p. 36, § 1, effective July 17. L. 2006: (1)(c) and (3)(a) amended and (3)(c) added,

p. 1199, § 6, effective May 26. **L. 2021:** (3)(a) amended, (SB 21-271), ch. 462, p. 3205, § 321, effective March 1, 2022.

Cross references: In 2006, subsections (1)(c) and (3)(a) were amended and subsection (3)(c) was added by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

18-9-118. Firearms, explosives, or incendiary devices in facilities of public transportation.

A person commits a class 6 felony if, without legal authority, he has any loaded firearm or explosive or incendiary device, as defined in section 9-7-103, C.R.S., in his possession in, or carries, brings, or causes to be carried or brought any of such items into, any facility of public transportation, as defined in section 18-9-115 (4).

Source: **L. 77:** Entire section added, p. 976, § 7, effective June 29. **L. 89:** Entire section amended, p. 841, § 89, effective July 1.

18-9-119. Failure or refusal to leave premises or property upon request of a peace officer - penalties - payment of costs.

(1) The general assembly hereby finds and declares that any individual who violates any provision of this section presents a significant threat to life and property in this state; that such violations require the use of highly trained personnel and sophisticated equipment; and that any such individual, if guilty, shall be convicted of committing a crime and be required to pay for any extraordinary expenses which are a result of said violation.

(2) Any person who barricades or refuses police entry to any premises or property through use of or threatened use of force and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace officer who has probable cause to believe a crime is occurring and that such person constitutes a danger to himself or herself or others commits a class 2 misdemeanor.

(3) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or who confines or detains such other person without that person's consent, without proper legal authority, and without the use of a deadly weapon commits a class 1 misdemeanor.

(4) Any person who violates subsection (2) or (3) of this section and who, in the same criminal episode, recklessly or knowingly causes a peace officer to believe that he possesses a deadly weapon commits a class 1 misdemeanor.

(5) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or who confines or detains such other person through the possession, use, or threatened use of a deadly weapon, without the other person's consent, and without proper legal authority commits a class 3 felony.

(6) (a) Any person convicted of a violation of this section or any person who enters a plea of guilty or nolo contendere to a violation of this section or is placed on deferred judgment and sentence for a violation of this section shall be responsible for the payment of up to a maximum of two thousand dollars for any extraordinary expenses incurred by a law enforcement agency as a result of such violation.

(b) As used in paragraph (a) of this subsection (6), "extraordinary expenses" means any cost relating to a violation of the provisions of this section, including, but not limited to, overtime wages for officers and operating expenses of any equipment utilized as a result of such violation or any damage to property occurring as a result of any violation of this section.

(7) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or confines or detains such other person by knowingly causing such other person to reasonably believe that the person possesses a deadly weapon commits a class 4 felony.

(8) As used in this section, to "hold hostage" means to seize, imprison, entice, detain, confine, or persuade another person to remain in any premises or on any property during a violation of any provision of this section in order to seek concessions from law enforcement personnel or their representatives, or to prevent their entry to property or premises. The term includes imprisoning, enticing, detaining, confining, or persuading any child to remain in said premises or on said property in an attempt to secure said concessions.

Source: **L. 83:** Entire section added, p. 666, § 10, effective July 1. **L. 85:** (2) amended, p. 624, § 10, effective July 1. **L. 2021:** (2) and (3) amended, (SB 21-271), ch. 462, p. 3205, § 322, effective March 1, 2022. **L. 2023:** (5) and (7) amended, (HB 23-1293), ch. 298, p. 1789, § 36, effective October 1.

ANNOTATION

The plain language of subsection (2) provides two ways of committing failure

to leave the premises: (1) barricading and refusing to leave the premises when asked to

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do so by law enforcement or (2) refusing police entry by using or threatening to use force and refusing to leave the premises

when asked to do so by law enforcement. People v. Montoya, 2025 COA 89, 583 P.3d 124.

18-9-120. Terrorist training activities - penalties - exemptions.

(1) As used in this section, unless the context otherwise requires:

(a) "Civil disorder" means any planned public disturbance involving acts of violence by an assemblage of two or more persons that causes an immediate danger of, or results in, damage or injury to property or to another person.

(b) "Explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb, grenade, missile, or similar device;

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which:

(A) Consists of or includes a breakable receptacle containing a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound; and

(B) Can be carried or thrown by one person acting alone.

(c) "Firearm" means any weapon which is designed to expel or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.

(d) "Law enforcement officer" means any peace officer of this state, as described in section 16-2.5-101, C.R.S., including a member of the Colorado National Guard or any peace officer of the United States, any state, any political subdivision of a state, or the District of Columbia. "Law enforcement officer" includes, but is not limited to, any member of the National Guard, as defined in 10 U.S.C. sec. 101 (9), any member of the organized militia of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia who is not included within the definition of National Guard, and any member of the armed forces of the United States.

(2) Any person who teaches or demonstrates to any person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person and who knows that the same will be unlawfully used in furtherance of a civil disorder and any person who assembles with one or more other persons for the purpose of training or practicing with, or being instructed in the use of, any firearm, explosive or incendiary

device, or technique capable of causing injury or death to any person with the intent to unlawfully use the same in furtherance of a civil disorder commits a class 5 felony.

(3) (a) Nothing in this section makes unlawful any activity pursuant to section 13 of article II of the state constitution or activity of the parks and wildlife commission, any law enforcement agency, any hunting club, or any rifle club, any activity engaged in on a rifle range, pistol range, or shooting range, or any activity undertaken pursuant to any shooting school or other program or instruction, any of which activities is intended to teach the safe handling or use of firearms, archery equipment, or other weapons or techniques and is employed in connection with lawful sports or teach the use of arms for the defense of home, person, or property, or the lawful use of force as defined in part 7 of article 1 of this title, or other lawful activities.

(b) Nothing in this section shall make unlawful any act of a law enforcement officer which is performed as a part of his official duties.

Source: **L. 84:** Entire section added, p. 555, § 1, effective July 1. **L. 95:** (1)(a) amended, p. 1255, § 19, effective July 1. **L. 2003:** (1)(d) amended, p. 1615, § 13, effective August 6. **L. 2012:** (3)(a) amended, (HB 12-1317), ch. 248, p. 1203, § 4, effective June 4.

18-9-121. Bias-motivated crimes - legislative declaration.

(1) The general assembly finds and declares that it is the right of every person, regardless of race, color, ancestry, religion, national origin, physical or mental disability, sexual orientation, or transgender identity, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of individuals and groups. The general assembly further finds that the advocacy of unlawful acts against persons or groups because of a person's or group's race, color, ancestry, religion, national origin, physical or mental disability, sexual orientation, or transgender identity for the purpose of inciting and provoking bodily injury or damage to property poses a threat to public order and safety and should be subject to criminal sanctions.

(2) A person commits a bias-motivated crime if, with the intent to intimidate or harass another person, in whole or in part, because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, sexual orientation, or transgender identity, the person:

(a) Knowingly causes bodily injury to another person;

(b) By words or conduct, knowingly places another person in fear of imminent lawless action directed at that person or that person's property and such words or conduct are likely to produce bodily injury to that person or damage to that person's property;

- (c) Knowingly causes damage to or destruction of the property of another person;
 - (d) Commits criminal possession of an identification document, as described in section 18-5-903.5; or
 - (e) Provides, or threatens to provide, an individual's government-issued identification document to federal immigration authorities, except where otherwise required or permitted under state or federal law.
- (3) Commission of a bias-motivated crime as described in subsections (2)(b) to (2)(e) of this section is a class 1 misdemeanor. Commission of a bias-motivated crime as described in subsection (2)(a) of this section is a class 5 felony; except that commission of a bias-motivated crime as described in subsection (2)(a) of this section is a class 4 felony if the offender is physically aided or abetted by one or more other persons during the commission of the offense.
- (3.5) (a) In determining the sentence for a first-time offender convicted of a bias-motivated crime, the court shall consider the following alternatives, which shall be in addition to and not in lieu of any other sentence received by the offender:
- (I) Sentencing the offender to pay for and complete a period of useful community service intended to benefit the public and enhance the offender's understanding of the impact of the offense upon the victim;
 - (II) At the request of the victim, referring the case to a restorative justice or other suitable alternative dispute resolution program established in the judicial district pursuant to section 13-22-313, C.R.S.
- (b) In considering whether to impose the alternatives described in paragraph (a) of this subsection (3.5), the court shall consider the criminal history of the offender, the impact of the offense on the victim, the availability of the alternatives, and the nature of the offense. Nothing in this section shall be construed to require the court to impose the alternatives specified in paragraph (a) of this subsection (3.5).
- (4) The criminal penalty provided in this section for commission of a bias-motivated crime does not preclude the victim of such action from seeking any other remedies otherwise available under law.
- (5) For purposes of this section:
- (a) "Physical or mental disability" refers to a disability as used in the definition of the term "person with a disability" in section 18-6.5-102 (11).
 - (b) "Sexual orientation" means a person's orientation toward sexual or emotional attraction and the behavior or social affiliation that may result from the attraction.

Source: **L. 88:** Entire section added, p. 737, § 1, effective July 1. **L. 99:** IP(2) and (3) amended, p. 795, § 5, effective July 1. **L. 2005:** Entire section amended, p. 1499, § 5, effective July 1. **L. 2013:** (5)(a) amended, (SB 13-111), ch. 233, p. 1127, § 13, effective May 16. **L. 2021:** IP(2) amended, (SB 21-280), ch. 372, p. 2465, § 2, effective June 28. **L. 2024:** (1), IP(2), and (5)(b) amended, (SB 24-189), ch. 305, p. 2067, § 1, effective July 1. **L. 2026:** (2) and (3) amended, (HB 26-1283), ch. 363, p. 2181, § 4, effective June 3.

Editor's note: Section 5 of chapter 363 (HB 26-1283), Session Laws of Colorado 2026, provides that the act changing this section applies to conduct occurring on or after June 3, 2026.

Cross references: For the legislative declaration in the 2013 act amending subsection (5)(a), see section 1 of chapter 233, Session Laws of Colorado 2013. For the legislative declaration in HB 26-1283, see section 1 of chapter 363, Session Laws of Colorado 2026.

18-9-122. Preventing passage to and from a health-care facility - engaging in prohibited activities near facility.

(1) The general assembly recognizes that access to health-care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health-care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health-care facility.

(2) A person commits a petty offense if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health-care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health-care facility. Any person who violates this subsection (3) commits a petty offense.

(4) For the purposes of this section, "health-care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health-care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Source: **L. 93:** Entire section added, p. 400, § 1, effective April 19. **L. 2021:** (2) and (3) amended, (SB 21-271), ch. 462, p. 3205, § 323, effective March 1, 2022.

ANNOTATION

Law reviews. For article, "The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand", see 79 Den. U.L. Rev. 91 (2002).

Constitutionality in light of U.S. supreme court decision. Based upon the holding of the U.S. supreme court in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), this section is a content-neutral, generally applicable statute supported by a valid governmental interest in public safety issues and is narrowly tailored to serve that interest and thus does not violate the first amendment to the federal constitution. *Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997).

Section is constitutional as a reasonable time, place, and manner restriction on free speech. This provision is sufficiently narrowly drawn to further a significant government interest. *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill v. Colo.*, 530 U.S. 703 (2000).

The eight-foot zone set forth in subsection (3) allows a speaker to communicate at a "normal conversational distance." Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. Finally, there is a "knowing" requirement that protects speakers who thought they were keeping pace with the targeted individual at the proscribed distance from inadvertently violating the statute. *Hill v. Colo.*, 530 U.S. 703 (2000).

Subsection (3) does not violate the right to free speech because it applies to areas protected by the first amendment, such as streets and public sidewalks. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995), *cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of W. N.Y.*, (519 U.S. 357 (1997)), 519 U.S. 1145 (1997), *aff'd on other grounds*, 949 P.2d 107 (Colo. App. 1997), *aff'd*, 973 P.2d 1246 (Colo. 1999),

aff'd sub nom. Hill v. Colo., 530 U.S. 703 (2000).

Subsection (3) is not improper "content based" regulation because it imposes the same restrictions on protestors, whether they be in favor of or against abortion. Hill v. City of Lakewood, 911 P.2d 670 (Colo. App. 1995), cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of W. N.Y. (519 U.S. 357 (1997)), 519 U.S. 1145, aff'd on other grounds, 949 P.2d 107 (Colo. App. 1997), aff'd, 973 P.2d 1246 (Colo. 1999), aff'd sub nom. Hill v. Colo., 530 U.S. 703 (2000).

Subsection (3) is content neutral. First, it is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur. Hill v. Colo., 530 U.S. 703 (2000).

Second, it was not adopted because of disagreement with the message being conveyed. This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the state supreme court's holding that the statute's restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech. Hill v. Colo., 530 U.S. 703 (2000).

Third, the state's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. Government regulation of expressive activity is "content neutral" if it is justified

without reference to the content of regulated speech. Hill v. Colo., 530 U.S. 703 (2000).

Subsection (3) is not unconstitutional because: It advances a significant governmental interest; it does not burden speech more than is reasonably necessary; and reasonable alternatives to oral communication are available. Hill v. City of Lakewood, 911 P.2d 670 (Colo. App. 1995), cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of W. N.Y. (519 U.S. 357 (1997)), 519 U.S. 1145 (1997), aff'd on other grounds, 949 P.2d 107 (Colo. App. 1997), aff'd, 973 P.2d 1246 (Colo. 1999), aff'd sub nom. Hill v. Colo., 530 U.S. 703 (2000).

Subsection (3) does not constitute a prior restraint on free speech. There is no authority to extend the doctrine so that a private citizen is limited with respect to her right to determine whether to permit others to confront her concerning medical care. Hill v. City of Lakewood, 911 P.2d 670 (Colo. App. 1995), cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of W. N.Y. (519 U.S. 357 (1997)), 519 U.S. 1145 (1997), aff'd on other grounds, 949 P.2d 107 (Colo. App. 1997), aff'd, 973 P.2d 1246 (Colo. 1999), aff'd sub nom. Hill v. Colo., 530 U.S. 703 (2000).

Subsection (3) allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement

imbedded within the approach restriction. *Hill v. Colo.*, 530 U.S. 703 (2000).

The regulations of subsection (3) only apply if the pedestrian does not consent to the approach. Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider. This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear. Further, the statute does not authorize the pedestrian to affect any other activity at any other location or relating to any other person. These restrictions thus do not constitute an unlawful prior restraint. *Hill v. Colo.*, 530 U.S. 703 (2000).

Subsection (3) is not overbroad. The fact that the coverage of a statute is broader than the specific concern that led to its

enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. *Hill v. Colo.*, 530 U.S. 703 (2000).

In addition, subsection (3) does not ban any messages, nor does it ban any signs, literature, or oral statements. It merely regulates the places where communications may occur. *Hill v. Colo.*, 530 U.S. 703 (2000).

Subsection (3) is not unconstitutionally vague. Subsection (3) contains a scienter requirement. The statute only applies to a person who "knowingly" approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. The likelihood that anyone would not understand any of those common words seemed quite remote to the court. *Hill v. Colo.*, 530 U.S. 703 (2000).

18-9-123. Bringing alcohol beverages, bottles, or cans into the major league baseball stadium.

(1) (a) It shall be unlawful for any person to carry or bring into the Denver metropolitan major league baseball stadium district stadium, as defined in section 32-14-103 (5) and (10), and referred to in this section as the "stadium", the following:

- (I) Any alcohol beverage as defined in section 44-3-103 (2); or
 - (II) Any bottle or can except as provided in subsection (2) of this section.
- (b) As used in this section:

(I) "Bottle" means a container that is made of nonporous material including but not limited to glass or ceramic, typically with a comparatively narrow neck or mouth, but excluding:

- (A) Containers made of cardboard, paper, or plastic; or

(B) Thermos bottles.

(II) "Can" means a container of cylindrical shape that is made of metal or metallic alloys.

(2) Nothing in this section shall be construed to prohibit a person from bringing or carrying into the stadium a beverage, bottle, or can required in connection with the person's practice of religion, the person's medical or physical condition, or food or formula for the person's infant.

(3) Any person who violates subsection (1) of this section commits a civil infraction.

(4) Nothing in this section shall be construed to prohibit a home rule municipality from enacting an ordinance that is at least as restrictive as or more restrictive than this section that prohibits a person from bringing any alcoholic beverage or alcoholic liquor, any bottle, or any can into the stadium.

Source: **L. 95:** Entire section added, p. 737, § 1, effective May 23. **L. 97:** (1)(a)(I) amended, p. 302, § 13, effective July 1. **L. 2001:** (1)(a)(I) amended, p. 1271, § 22, effective June 5. **L. 2018:** IP(1)(a) and (1)(a)(I) amended, (HB 18-1025), ch. 152, p. 1078, § 9, effective October 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3205, § 324, effective March 1, 2022.

18-9-124. Hazing - penalties - legislative declaration.

(1) (a) The general assembly finds that, while some forms of initiation constitute acceptable behavior, hazing sometimes degenerates into a dangerous form of intimidation and degradation. The general assembly also recognizes that although certain criminal statutes cover the more egregious hazing activities, other activities that may not be covered by existing criminal statutes may threaten the health of students or, if not stopped early enough, may escalate into serious injury.

(b) In enacting this section, it is not the intent of the general assembly to change the penalty for any activity that is covered by any other criminal statute. It is rather the intent of the general assembly to define hazing activities not covered by any other criminal statute.

(2) As used in this section, unless the context otherwise requires:

(a) "Hazing" means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that "hazing" does not include customary athletic events or other similar contests or competitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

(b) "Hazing" includes but is not limited to:

- (I) Forced and prolonged physical activity;
- (II) Forced consumption of any food, beverage, medication or controlled substance, whether or not prescribed, in excess of the usual amounts for human consumption or forced consumption of any substance not generally intended for human consumption;
- (III) Prolonged deprivation of sleep, food, or drink.
- (3) It shall be unlawful for any person to engage in hazing.
- (4) Any person who violates subsection (3) of this section commits a class 2 misdemeanor.

Source: L. 99: Entire section added, p. 352, § 1, effective July 1. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3205, § 325, effective March 1, 2022.

18-9-125. Interference with a funeral.

- (1) A person commits interference with a funeral if he or she, knowing a funeral is being conducted:
 - (a) Refuses to leave any private property within one hundred feet of the funeral site upon the request of the owner of the private property or the owner's agent; or
 - (b) Refuses to leave any public property within one hundred feet of the funeral site upon the request of a public official with authority over the property or upon the request of a peace officer, and the public official or peace officer making the request has reasonable grounds to believe the person has violated a rule or regulation applicable to that property or a statute or local ordinance.
- (2) Interference with a funeral is a class 2 misdemeanor. The minimum fine prescribed by section 18-1.3-501 (1) for the offense shall be mandatory and may not be suspended in whole or in part.
- (3) Each violation of subsection (1) of this section shall constitute a separate offense for which an offender may be separately convicted and sentenced.
- (4) Any person who violates any provision of this section may also be proceeded against for violation of any other provision of law.

Source: L. 2006: Entire section added, p. 1199, § 7, effective May 26.

Cross references: In 2006, this section was added by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

PART 2

CRUELTY TO ANIMALS

18-9-201. Definitions.

As used in this part 2, unless the context otherwise requires:

(1) "Abandon" means the leaving of an animal without adequate provisions for the animal's proper care by its owner, the person responsible for the animal's care or custody, or any other person having possession of such animal.

(2) "Animal" means any living dumb creature, including a certified police working dog, a police working horse, and a service animal as those terms are defined, respectively, in subsections (2.3), (2.4), and (4.7) of this section.

(2.3) "Certified police working dog" means a dog that has current certification from a state or national agency or an association that certifies police working dogs, and that is part of a working law enforcement team.

(2.4) "Police working horse" means a horse that is currently working full time or part time as part of a working law enforcement team and has met the standards of the law enforcement team to work in such capacity.

(2.5) "Disposal" or "disposition" means adoption of an animal; return of an animal to the owner; sale of an animal under section 18-9-202.5 (4); release of an animal to a rescue group licensed pursuant to article 80 of title 35, C.R.S.; release of an animal to another pet animal facility licensed pursuant to article 80 of title 35, C.R.S.; or release of an animal to a rehabilitator licensed by the parks and wildlife division or the United States fish and wildlife service; or euthanasia.

(2.7) "Euthanasia" means to produce a humane death by techniques accepted by the American veterinary medical association.

(2.8) "Law enforcement animal" means a certified working dog or a police working horse.

(2.9) "Livestock" means bovine, camelids, caprine, equine, ovine, porcine, and poultry.

(3) "Mistreatment" means every act or omission that causes or unreasonably permits the continuation of unnecessary or unjustifiable pain or suffering.

(4) "Neglect" means failure to provide food, water, protection from the elements, or other care generally considered to be normal, usual, and accepted for an animal's health and well-being consistent with the species, breed, and type of animal.

(4.5) "Serious physical harm", as used in section 18-9-202, means any of the following:

- (a) Any physical harm that carries a substantial risk of death;
- (b) Any physical harm that causes permanent maiming or that involves some temporary, substantial maiming; or
- (c) Any physical harm that causes acute pain of a duration that results in substantial suffering.

(4.7) "Service animal" means any animal, the services of which are used to aid the performance of official duties by a fire department, fire protection district, or governmental search and rescue agency. Unless otherwise specified, "service animal" does not include a "certified police working dog" or a "police working horse" as defined in subsections (2.3) and (2.4) of this section.

(5) "Sexual act with an animal" means an act between a person and an animal involving direct physical contact between the genitals of one and the mouth, anus, or genitals of the other. A sexual act with an animal may be proven without allegation or proof of penetration. Nothing in this subsection (5) shall be construed to prohibit accepted animal husbandry practices.

Source: L. 71: R&RE, p. 471, § 1. C.R.S. 1963: § 40-9-201. L. 90: (1), (3), and (4) amended, p. 1611, § 3, effective July 1. L. 99: Entire section amended, p. 357, § 3, effective August 4. L. 2006: (2.5) amended, p. 893, § 1, effective August 7. L. 2007: IP amended and (2.9) and (5) added, p. 725, § 4, effective July 1. L. 2011: IP and (2) amended, (HB 11-1151), ch. 81, p. 219, § 1, effective August 10. L. 2012: (2.5) amended, (HB 12-1125), ch. 102, p. 345, § 2, effective September 1. L. 2016: IP and (2) amended and (2.3), (4.5), and (4.7) added, (HB 16-1348), ch. 236, p. 952, § 1, effective June 6. L. 2018: (2) and (4.7) amended and (2.4) added, (HB 18-1041), ch. 19, p. 266, § 1, effective March 7. L. 2019: (2), (2.4), and (4.7) amended, (HB 19-1180), ch. 75, p. 276, § 1, effective April 4. L. 2024: (2.8) added, (HB 24-1074), ch. 69, p. 226, § 1, effective April 17.

ANNOTATION

Applied in McCausland v. People, 58 Colo. 303, 145 P. 685 (1914) (decided under former R.S. 08, § 1910); People v. Allen, 657 P.2d 447 (Colo. 1983).

18-9-201.5. Scope of part 2.

(1) Nothing in this part 2 shall affect accepted animal husbandry practices utilized by any person in the care of companion or livestock animals or in the extermination of undesirable pests as defined in articles 7, 10, and 43 of title 35, C.R.S.

(2) In case of any conflict between this part 2 or section 35-43-126, C.R.S., and the wildlife statutes of the state, said wildlife statutes shall control.

(3) Nothing in this part 2 shall affect animal care otherwise authorized by law.

(4) Nothing in this part 2 shall affect facilities licensed under the provisions of the federal "Animal Welfare Act of 1970", 7 U.S.C. sec. 2131 et seq., as amended.

Source: L. 90: Entire section added, p. 1612, § 4, effective July 1.

18-9-201.7. Animal cruelty prevention fund - control of fund - repeal. (Repealed)

Source: L. 97: Entire section added, p. 1568, § 1, effective July 1. **L. 2000:** (4) and (6) amended, p. 1375, § 1, effective September 1. **L. 2003:** (1) and (4) amended, p. 2093, § 1, effective July 1.

Editor's note: Subsection (6) provided for the repeal of this section, effective July 1, 2005. (See L. 2000, p. 1375.)

18-9-202. Cruelty and aggravated cruelty to animals, service animals, and law enforcement animals - penalties - short title - definition.

(1) (a) A person commits cruelty to animals if he or she knowingly, recklessly, or with criminal negligence overdrives, overloads, overworks, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, allows to be housed in a manner that results in chronic or repeated serious physical harm, carries or confines in or upon any vehicles in a cruel or reckless manner, engages in a sexual act with an animal, or otherwise mistreats or neglects any animal, or causes or procures it to be done, or, having the charge or custody of any animal, fails to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandons an animal.

(b) Any person who intentionally abandons a dog or cat commits the offense of cruelty to animals.

(1.5) (a) A person commits cruelty to animals if the person recklessly or with criminal negligence tortures, needlessly mutilates, or needlessly kills an animal.

(b) A person commits aggravated cruelty to animals if the person:

(I) Knowingly tortures, needlessly mutilates, or needlessly kills an animal; or

(II) Knowingly kills or causes serious bodily injury that results in the death of a law enforcement animal, whether the law enforcement animal is on duty or not on duty. For the purposes of this subsection (1.5)(b)(II), "serious bodily injury" means bodily injury that involves a substantial risk of death, a substantial risk of permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, breaks, fractures, a penetrating wound from a knife or a penetrating gunshot wound, or burns of the second or third degree.

(c) A person commits cruelty to a service animal or a law enforcement animal if the person violates subsection (1) of this section with respect to a service animal or a law enforcement animal, as those terms are defined in section 18-9-201, whether the service animal or law enforcement animal is on duty or not on duty.

(1.6) Repealed.

(1.8) (a) A peace officer having authority to act pursuant to this section may take possession of and impound an animal that the peace officer has probable cause to believe is a victim of a violation of subsection (1) or (1.5) of this section or is a victim of a violation of section 18-9-204 and as a result of the violation is endangered if it remains with the owner or custodian. If, in the opinion of a licensed veterinarian, an animal impounded pursuant to this subsection (1.8) is experiencing extreme pain or suffering, or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(b) (I) A licensed veterinarian is immune from criminal liability and is not in violation of the provisions of section (1.5)(b)(II) of this section if:

(A) The licensed veterinarian provides veterinary treatment for an injured law enforcement animal; or

(B) The licensed veterinarian euthanizes the law enforcement animal after determining that the law enforcement animal, due to a critical injury, is experiencing extreme pain or suffering, or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery.

(II) A person who owns or who is charged with the care of a law enforcement animal is immune from criminal liability and is not in violation of the provisions of section (1.5)(b)(II) of this section if such person is able to reasonably determine that the law enforcement animal, due to a critical injury, is experiencing extreme pain or suffering, or is severely injured past recovery.

(2) (a) Except as otherwise provided in subsection (2)(b) of this section, cruelty to animals, or cruelty to a service animal or a law enforcement animal pursuant to subsection (1.5)(c) of this section, is a class 1 misdemeanor.

(a.5) (I) Repealed.

(II) In addition to any other sentence imposed for a violation of this section, the court may order an offender to complete an anger management treatment program, a mental health treatment program, or any other appropriate treatment program designed to address the underlying causative factors for the violation.

(III) The court shall order an evaluation to be conducted prior to sentencing to assist the court in determining an appropriate sentence. If the violation is a felony offense in violation of subsection (1.5) of this section, a felony offense in violation of subsection (2)(b)(II) of this section, or any other violation of this section demonstrating knowing torture or torment of an animal that needlessly injured, mutilated, or killed the animal, the court shall require a comprehensive evaluation to help determine the causative factors. The person ordered to undergo an evaluation shall be required to pay the cost of the evaluation, unless the person qualifies for a public defender, then the cost will be paid by the judicial district. If the evaluation results in a recommendation of treatment and if the court so finds, the person must be ordered to complete, as a condition of any sentence to probation or a deferred judgment or sentence, an anger management treatment program, a mental health treatment program, or any other appropriate treatment program designed to address the underlying causative factors for the violation.

(IV) Upon successful completion of an anger management treatment program, a mental health treatment program, or any other appropriate treatment program, the court may suspend any fine imposed; except for a five-hundred-dollar mandatory minimum fine which shall be imposed at the time of sentencing.

(V) (A) In addition to any other sentence imposed upon a person for a violation of any criminal law under this title 18, any person convicted of a second or subsequent conviction for any crime, the underlying factual basis of which has been found by the court to include an act of cruelty to animals pursuant to subsection (1) of this section or aggravated cruelty to animals pursuant to subsection (1.5)(b) of this section, is required to pay a mandatory minimum fine of one thousand dollars and is required to complete an anger management treatment program or any other appropriate treatment program.

(B) In addition to any other sentence imposed upon a person for a violation of any criminal law pursuant to this title 18, a person convicted of a second or subsequent conviction for any crime, the underlying factual basis of which has been found by the court to include cruelty to a service animal or a law enforcement animal pursuant to subsection (1.5)(c) of this section or aggravated cruelty to a service animal or aggravated cruelty to a law enforcement animal pursuant to subsection (1.5)(b) of this section, is required to pay a mandatory minimum fine of two thousand dollars and is required to complete an anger management treatment program or any other appropriate treatment program.

(V.5) In addition to any other sentence imposed for a felony conviction pursuant to this section, the court shall enter an order prohibiting the defendant from owning, possessing, or caring for a pet animal as defined in section 35-80-102 (10) as a condition of the sentence for a period of three to five years, unless the defendant's treatment provider makes a specific recommendation not to impose the ban and the court agrees with the recommendation.

(VI) Nothing in this paragraph (a.5) shall preclude the court from ordering treatment in any appropriate case.

(VII) This subsection (2)(a.5) does not apply to the treatment of pack or draft animals by negligently overdriving, overloading, or overworking them, or the treatment of livestock and other animals used in the farm or ranch production of food, fiber, or other agricultural products when the treatment is in accordance with accepted agricultural animal husbandry practices, the treatment of animals involved in activities regulated pursuant to article 32 of title 44, the treatment of animals involved in research if the research facility is operating under rules set forth by the state or federal government, the treatment of animals involved in rodeos, the treatment of dogs used for legal hunting activities, wildlife nuisances, or to statutes regulating activities concerning wildlife and predator control in the state, including trapping.

(b) (I) A second or subsequent conviction under the provisions of paragraph (a) of subsection (1) of this section is a class 6 felony. A plea of nolo contendere accepted by the court shall be considered a conviction for the purposes of this section.

(II) In any case where the court sentences a person convicted of a class 6 felony under the provisions of this paragraph (b) to probation, the court shall, in addition to any other condition of probation imposed, order that:

(A) The offender, pursuant to section 18-1.3-202 (1), be committed to the county jail for ninety days; or

(B) The offender, pursuant to section 18-1.3-105 (3), be subject to home detention for no fewer than ninety days.

(III) In any case where an offender is committed to the county jail or placed in home detention pursuant to subparagraph (II) of this paragraph (b), the court shall enter judgment

against the offender for all costs assessed pursuant to section 18-1.3-701, including, but not limited to, the cost of care.

(c) Aggravated cruelty to animals, as described in subsection (1.5)(b) of this section, is a class 4 felony.

(d) (I) If a person is convicted of cruelty to a service animal pursuant to paragraph (c) of subsection (1.5) of this section, the court shall order him or her to make restitution to the agency or individual owning the service animal for any veterinary bills and replacement costs of the service animal if it is disabled or killed as a result of the cruelty to animals incident.

(II) If a person is convicted of cruelty or aggravated cruelty to a service animal or a law enforcement animal pursuant to subsection (1.5)(b) or (1.5)(c) of this section, the court shall order the person to make restitution to the agency or individual owning the service animal or law enforcement animal for all expenses, including any immediate and ongoing veterinary expenses related to the incident, and replacement costs for the service animal or law enforcement animal if it is permanently disabled or killed as a result of the cruelty or aggravated cruelty incident. If the court finds that the person who is convicted of cruelty or aggravated cruelty to a service animal or law enforcement animal pursuant to subsection (1.5)(b) or (1.5)(c) of this section did so with malicious intent, the person shall additionally make restitution to the agency or individual owning the service animal or law enforcement animal for all training and certification costs related to the service animal or law enforcement animal.

(2.5) (a) It is an affirmative defense to a charge brought pursuant to this section involving injury or death to a dog that the dog was found running, worrying, or injuring sheep, cattle, or other livestock.

(b) A person is justified in using physical force upon a law enforcement animal to defend their own person or a third person when the person reasonably believes that a law enforcement animal is an application of unreasonable or excessive force, in violation of section 18-1-707. This is an affirmative defense to a charge brought pursuant to this section that involves injury or death to a law enforcement animal.

(3) Nothing in this part 2 modifies in any manner the authority of the parks and wildlife commission, as established in title 33, C.R.S., or prohibits any conduct authorized or permitted under title 33, C.R.S.

(4) The short title of this section is "Punky's Law".

Source: L. 71: R&RE, p. 472, § 1. C.R.S. 1963: § 40-9-202. L. 73: p. 381, § 5. L. 77: (1) amended, p. 969, § 58, effective July 1. L. 90: (1) amended, p. 1612, § 5, effective July 1. L. 92: (1) amended, p. 412, § 1, effective April 29. L. 97: (2)(a.5) added, p. 1569, § 2, effective July 1.

L. 2000: (2) amended, p. 1509, § 1, effective September 1; (2)(a.5)(I) amended, p. 1375, § 2, effective September 1. **L. 2002:** (1.5) and (2)(c) added and (2)(a), (2)(a.5)(I)(A), (2)(a.5)(II), and (2)(b) amended, pp. 1589, 1588, 1587, §§ 26, 25, 22, effective July 1; (2)(b) amended, p. 1517, § 204, effective October 1. **L. 2003:** (2)(b)(I) amended, p. 974, § 9, effective April 17; (1)(a) amended and (1.6) and (1.8) added, p. 2093, § 2, effective July 1; (1)(a), (1.5), (2)(a.5)(I)(A), (2)(a.5)(II), (2)(b)(II), and (2)(b)(III) amended, p. 1434, § 30, effective July 1. **L. 2004:** (2.5) added, p. 509, § 2, effective April 21. **L. 2007:** (1)(a) and (1.8) amended, p. 725, § 5, effective July 1. **L. 2011:** (1.5)(c) and (2)(d) added, (HB 11-1151), ch. 81, p. 219, §§ 2, 3, effective August 10. **L. 2012:** (3) amended, (HB 12-1317), ch. 248, p. 1203, § 5, effective June 4. **L. 2016:** (1.5)(c), (2)(a), (2)(a.5)(V), and (2)(d) amended and (1.6) repealed, (HB 16-1348), ch. 236, p. 953, § 2, effective June 6. **L. 2018:** (1.5)(c), (2)(a), (2)(a.5)(V), and (2)(d)(II) amended, (HB 18-1041), ch. 19, p. 267, § 2, effective March 7; (2)(a.5)(VII) amended, (HB 18-1024), ch. 26, p. 322, § 12, effective October 1. **L. 2019:** (1.5)(c), (2)(a), (2)(a.5)(V), and (2)(d)(II) amended, (HB 19-1180), ch. 75, p. 276, § 2, effective April 4; (2)(a.5)(II), (2)(a.5)(III), and (2)(a.5)(IV) amended and (2)(a.5)(V.5) and (4) added, (HB 19-1092), ch. 137, p. 1736, § 1, effective August 2. **L. 2023:** (2)(a.5)(V) and (2)(d)(II) amended, (HB 23-1286), ch. 341, p. 2048, § 1, effective June 2; (2)(c) amended, (HB 23-1293), ch. 298, p. 1790, § 37, effective October 1. **L. 2024:** (1.5), (1.8), (2)(a), (2)(a.5)(V)(B), (2)(c), (2)(d)(II), and (2.5) amended, (HB 24-1074), ch. 69, p. 226, § 2, effective April 17.

Editor's note: (1) Amendments to subsection (2)(a.5)(I) by House Bill 00-1330 and House Bill 00-1422 were harmonized. Amendments to subsection (2)(b) by House Bill 02-1237 and House Bill 02-1046 were harmonized. Amendments to subsection (1)(a) by House Bill 03-1236 and Senate Bill 03-065 were harmonized.

(2) Subsection (2)(a.5)(I)(B) provided for the repeal of subsection (2)(a.5)(I), effective July 1, 2005. (See L. 2000, p. 1375.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Animal-Related Legal Disputes: Litigation, ADR, and Court Appointments", see 42 Colo. Law. 43 (Dec. 2013).

Annotator's note. Since § 18-9-202 is similar to former § CSA, C. 48, § 404, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Object of section is protection of animals and conservation of public morals. The aim of this section is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

This section and preceding similar legislation was enacted to prevent cruelty to animals. It was not the legislative intent that the prohibition in this section against needlessly killing animals should apply where the undisputed facts show authorization. *Failing v. People*, 105 Colo. 399, 98 P.2d 865 (1940).

It changes the common law. At common law the acts prohibited in this section would not be a crime or misdemeanor. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

Section comes within police power. In the exercise of the police power, the general assembly may enact laws for the prevention of cruelty to animals and designate officers charged with the execution thereof. *Jenks v. Stump*, 41 Colo. 281, 93 P. 17 (1907).

This section is not unconstitutionally vague. *People v. Allen*, 657 P.2d 447 (Colo. 1983).

Nor unconstitutional on equal protection grounds. *People v. Wilhelm*, 676 P.2d 702 (Colo. 1984).

The plain language of this section suggests that the unit of prosecution is "an animal". The phrases "any animal" and "an animal" suggest that a person commits a separate offense for each animal that is

mistreated or neglected, deprived of adequate sustenance, or killed. The language of the statute demonstrates that the legislature perceived animal cruelty not as an offense against property but as an offense against the individual animal. The unit of prosecution permits the charging of multiple offenses. *People v. Harris*, 2016 COA 159, 405 P.3d 361.

Cruelty to each identified animal constitutes a separate offense. *People v. Harris*, 2016 COA 159, 405 P.3d 361.

Not every act that causes pain and suffering to animals is prohibited by this section. Where the end or object is reasonable and adequate, the act resulting in pain is, in the sense of the statute, necessary or justifiable, as where a surgical operation is performed to save life, or where the act is done to protect life or property, or to minister to some of the necessities of man. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

It applies to killing doves released from traps and shot for sport. The killing of doves as they are released from a trap merely to improve skill in marksmanship or for sport and amusement, though without specific intent to inflict pain or torture, is within the inhibition of this section and punishable. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

But the shooting of wild animals in the forest and fishing in the streams do not come within this section. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

"Torture" encompasses every act whereby unnecessary or unjustifiable pain or suffering is caused. Waters v. People, 46 P. 112, 115 (Colo. 1896); People v. Gillespie, 2024 COA 98, 559 P.3d 1163.

Malice is not an essential ingredient. This section embraces separate and distinct offenses. The offense denounced was not a crime or misdemeanor at common law, and therefore malice is not a necessary ingredient since not expressly made so by statute. McCausland v. People, 58 Colo. 303, 145 P. 685 (1914).

Test was whether acts done intentionally. It was immaterial where the poisoning took place or what other means were used, in addition to the poison, to bring about the injurious result. Neither invitation nor trespass was essential. The important test was that the acts were done intentionally, and that the cattle were killed or injured as a result thereof. Holt v. Mundell, 107 Colo. 373, 112 P.2d 1039 (1941).

Maliciously, as used in former provision, means a wrongful act done intentionally, without just cause or excuse. Richards v. Sanderson, 39 Colo. 270, 89 P. 769 (1907); Holt v. Mundell, 107 Colo. 373, 112 P.2d 1039 (1941).

Prosecution presented evidence sufficient to support a conclusion that defendant knowingly tortured a dog because there was substantial evidence that defendant was practically certain defendant's treatment of the dog would cause the dog unnecessary pain and suffering. People v. Gillespie, 2024 COA 98, 559 P.3d 1163.

But the prosecution failed to present sufficient evidence to support the conclusion that defendant knowingly needlessly killed the dog. None of the prosecution's evidence supported a reasonable inference that the defendant knew use of a single tie-out system was practically certain to lead to the dog's death. People v. Gillespie, 2024 COA 98, 559 P.3d 1163.

Sufficiency of information. An information charging that the accused did "unnecessarily and cruelly beat and needlessly mutilate an animal" is sufficient under this section. McCausland v. People, 58 Colo. 303, 145 P. 685 (1914).

Admissibility of evidence. In an action under this section for the poisoning of cattle, it was held that no error was committed in the refusal to admit in evidence an unsigned form used by the government in the distribution of grasshopper poison. By signing the form the recipient of poison assumed all responsibility for any damage resulting from its use. It had no evidentiary value in the determination of the issues involved. Holt v. Mundell, 107 Colo. 373, 112 P.2d 1039 (1941).

Sufficiency of evidence of required criminal intent to warrant its submission to the jury. Holt v. Mundell, 107 Colo. 373, 112 P.2d 1039 (1941).

Prior convictions under this section constitute penalty enhancers. People v. Caswell, 2021 COA 111, 499 P.3d 361, aff'd, 2023 CO 50, 536 P.3d 323.

18-9-202.5. Impounded animals - costs of impoundment, provision, and care - disposition - procedures - application - definition.

(1) (a) (I) The owner or custodian of an animal that has been impounded by an impound agency because of alleged neglect or abuse or because of investigation of charges of cruelty to animals pursuant to section 18-9-202; animal fighting pursuant to section 18-9-204; mistreatment, neglect, or abandonment under article 42 of title 35, C.R.S.; or unlawful ownership of a dangerous dog as described in section 18-9-204.5, may prevent disposition of the animal by an impound agency by filing a payment for impoundment, care, and provision costs with the court in an amount determined by the impound agency to be sufficient to provide for the animal's care and provision at the impound agency for at least thirty days, including the day on which the animal was taken into custody.

(II) To the extent practicable, within seventy-two hours after an impoundment described under subparagraph (I) of this paragraph (a), upon request from the owner or custodian of the impounded animal, the impound agency shall allow a licensed veterinarian of the owner's or custodian's choosing and at his or her expense to examine the animal at a time and place selected by the impound agency, which examination may include taking photographs of the animal and taking biological samples for the purpose of diagnostic testing.

(b) The owner or custodian must file the payment:

(I) Within ten days after the animal is impounded; or

(II) If the owner or custodian requests a hearing pursuant to subparagraph (I) of paragraph (c) of this subsection (1), in accordance with subparagraph (IV) of paragraph (c) of this subsection (1).

(c) (I) Within ten days after the date of impoundment, the owner or custodian may request a hearing in a criminal court of competent jurisdiction. The owner or custodian must provide notice to the district attorney of his or her request for a hearing. If the owner or custodian requests a hearing, the court shall hold the hearing within ten days after the request is made.

(II) At the hearing, the court shall determine, as appropriate:

(A) Whether costs associated with the impoundment, care, and provision, as determined by the impound agency, are fair and reasonable and necessary, which costs shall be specifically itemized by the impound agency prior to the date of the hearing and shall include, at a minimum, an accounting of the costs of upkeep and veterinary services;

(B) Whether there was sufficient probable cause for the impoundment; and

(C) If the court finds probable cause for impoundment existed and the owner or custodian elects not to pay the reasonable impoundment, care, or provision costs to prevent disposition, release of the animal to the impound agency for disposition.

(III) A warrant issued in accordance with C.R.C.P. 41 (b) authorizing seizure of the impounded animal constitutes prima facie evidence of sufficient cause for impoundment.

(IV) If probable cause is found at a hearing conducted under this paragraph (c), the owner or custodian shall file payment for costs at the hearing.

(d) At the end of the time for which expenses are covered by an initial or any subsequent impoundment, care, and provision payment:

(I) If the owner or custodian desires to prevent disposition of the animal, the owner or custodian must file a new payment with the court within ten days prior to the previous payment's expiration.

(II) If the owner or custodian has not timely filed an additional payment for impoundment, care, and provision costs, the impound agency may determine disposition of the animal unless there is a court order prohibiting disposition. Unless subsection (4) of this section applies, the owner or custodian is liable for any additional costs for the care of, provision for, or disposal of the animal.

(2) (a) Failure to pay the impoundment, care, and provision costs pursuant to subsection (1) of this section results in the forfeiture of the right to contest those costs and any ownership rights to the animal in question.

(b) A dog that is not claimed by its owner within five days after being eligible for release from impoundment for investigation of a charge of unlawful ownership of a dangerous dog as described in section 18-9-204.5 is deemed abandoned and may be disposed of as the impound agency deems proper.

(c) If, in the opinion of a licensed veterinarian, an impounded animal is experiencing extreme pain or suffering or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(3) The court shall order an impound agency to refund to the owner or custodian all impoundment, care, and provision payments made for the animal if, after trial, a judge or jury enters or returns in favor of the owner or custodian a verdict of not guilty for all charges related to the original impoundment of the animal.

(4) (a) With respect to the sale of an animal, the proceeds are first applied to the costs of the sale and then to the expenses for the care of and provision for the animal during impoundment and the pendency of the sale, including expenses incurred by the impound agency that have not been paid by the owner or custodian. If the owner of the animal is convicted of cruelty to animals

under section 18-9-202, animal fighting under section 18-9-204, or unlawful ownership of a dangerous dog under section 18-9-204.5 or is found by court order to have mistreated, neglected, or abandoned the animal under article 42 of title 35, C.R.S., the remaining proceeds, if any, are paid to the impound agency. If the owner of the animal is not convicted of such charges or is not found by court order to have mistreated, neglected, or abandoned the animal, the impound agency shall pay over the remaining proceeds, if any, to the owner of the animal.

(b) If the impound agency is the department of agriculture, the department shall transmit the moneys credited for expenses to the state treasurer, who shall credit them to the animal protection fund created in section 35-42-113, C.R.S.

(c) If the owner of the animal cannot be found, the court shall pay any remaining proceeds after all other expenses have been paid to the impound agency into the animal protection fund or, if the impound agency is not the department of agriculture, to such other impound agency as the court orders. An owner claiming the remaining proceeds must make the claim within one year after the payment of the proceeds to the impound agency. A claim not so presented to the court is forever barred unless the court, by proper order made in any case, otherwise decrees. An impound agency shall pay to the claimant any refund ordered by court decree.

(d) At least six days prior to sale of the animal, the impound agency shall provide written notice to the owner, at the owner's last-known address, of the time and place of the sale of the animal.

(e) If the owner of the animal is unknown, the impound agency shall publish for one week, in a newspaper of general circulation in the jurisdiction in which the animal was found, notice of sale of the animal and shall further post notice of the sale of the animal at a place provided for public notices in the jurisdiction in which the sale will take place, at least five days prior to the sale.

(f) This subsection (4) does not apply to the disposition of an animal for a fee by:

(I) Adoption of an animal;

(II) Release of an animal to a rescue group licensed pursuant to article 80 of title 35, C.R.S.;

(III) Release of an animal to another pet animal facility licensed pursuant to article 80 of title 35, C.R.S.; or

(IV) Release of an animal to a rehabilitator licensed by the parks and wildlife division or the United States fish and wildlife service.

(5) For purposes of this section, "impound agency" means an animal shelter as defined in section 35-80-102 (1), C.R.S., the department of agriculture, created in section 24-1-123, C.R.S., or any other agency that impounds an animal pursuant to paragraph (a) of subsection (1) of this section or section 18-9-202 (1.8).

(6) This section does not apply to animals impounded solely under article 42 of title 35, C.R.S.

Source: L. 99: Entire section added, p. 358, § 4, effective August 4. **L. 2001:** Entire section amended, p. 87, § 1, effective July 1. **L. 2003:** Entire section amended, p. 2094, § 3, effective July 1. **L. 2004:** (1) amended, p. 1760, § 1, effective July 1; (2) amended, p. 1198, § 51, effective August 4. **L. 2006:** (1)(a) and (2) amended and (1)(c) added, p. 893, § 2, effective August 7. **L. 2007:** (1)(a) amended, p. 723, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1125), ch. 102, p. 342, § 1, effective September 1.

18-9-203. Shepherd abandoning sheep without notice. (Repealed)

Source: L. 71: R&RE, p. 472, § 1. **C.R.S. 1963:** § 40-9-203. **L. 95:** Entire section repealed, p. 199, § 12, effective April 13.

18-9-204. Animal fighting - penalty.

(1) (a) No person shall cause, sponsor, arrange, hold, or encourage a fight between animals for the purpose of monetary gain or entertainment.

(b) For the purposes of this section, a person encourages a fight between animals for the purpose of monetary gain or entertainment if he or she:

(I) Is knowingly present at or wagers on such a fight;

(II) Owns, trains, transports, possesses, breeds, sells, transfers, or equips an animal with the intent that such animal will be engaged in such a fight;

(III) Knowingly allows any such fight to occur on any property owned or controlled by him;

(IV) Knowingly allows any animal used for such a fight to be kept, boarded, housed, or trained on, or transported in, any property owned or controlled by him;

(V) Knowingly uses any means of communication for the purpose of promoting such a fight; or

(VI) Knowingly possesses any animal used for such a fight or any device intended to enhance the animal's fighting ability.

(2) (a) A person who violates the provisions of this section commits a class 5 felony and, in addition to the punishment provided in section 18-1.3-401, the court shall impose upon the person a mandatory fine of at least one thousand dollars.

(b) (Deleted by amendment, L. 2023.)

(3) Nothing in this section shall prohibit normal hunting practices as approved by the division of parks and wildlife.

(4) Nothing in this section shall be construed to prohibit the training of animals or the use of equipment in the training of animals for any purpose not prohibited by law.

Source: L. 71: R&RE, p. 472, § 1. C.R.S. 1963: § 40-9-204. L. 79: Entire section repealed, p. 1223, § 29, effective June 21. L. 81: Entire section RC&RE, p. 972, § 16, effective July 1. L. 85: Entire section R&RE, p. 678, § 1, effective July 1. L. 90: (1)(a), IP(1)(b), (1)(b)(I), (1)(b)(II), and (4) amended and (1)(b)(IV) to (1)(b)(VI) added, p. 1612, § 6, effective July 1. L. 2002: (2) amended, p. 1517, § 205, effective October 1. L. 2003: IP(1)(b) and (1)(b)(II) amended, p. 2095, § 4, effective July 1. L. 2015: (2) amended, (HB 15-1062), ch. 31, p. 75, § 1, effective August 5. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1790, § 38, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

The press has no right to engage in activities that are otherwise illegal for the purpose of reporting the news. People v. Bergen, 883 P.2d 532 (Colo. App. 1994).

Dogfight "for the purpose" of entertainment or monetary gain is distinguished from the type of confrontation that happens unintentionally because of a chance encounter between two or more uncontrolled dogs. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

Term "knowingly" in subsection (1)(b)(I) distinguishes guilty parties from those who inadvertently find themselves at a dogfight and those who are at the scene but unaware that a dogfight is taking place. There is no requirement that the attendee be at the scene for the purpose of fun or profit. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

"Knowing presence" mental state requirement for spectators is constitutional. No more specific mental

state need be required, given legislative purpose to discourage dogfights by prohibiting attendance by spectators regardless of whether the spectators are enthusiastic, neutral, or disgusted observers. People v. Bergen, 883 P.2d 532 (Colo. App.

1994) (decided under section as it existed prior to 1990 amendment).

Muzzling of dogs is irrelevant under this section. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

18-9-204.5. Unlawful ownership of dangerous dog - legislative declaration - definitions.

(1) The general assembly hereby finds, determines, and declares that:

(a) Dangerous dogs are a serious and widespread threat to the safety and welfare of citizens throughout the state because of the number and serious nature of attacks by such dogs; and

(b) The regulation and control of dangerous dogs is a matter of statewide concern.

(2) As used in this section, unless the context otherwise requires:

(a) "Bodily injury" means any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.

(a.5) "Bureau" means the bureau of animal protection in the division of animal welfare, created pursuant to section 35-42-105, in the department of agriculture.

(b) "Dangerous dog" means any dog that:

(I) Inflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal; or

(II) Demonstrates tendencies that would cause a reasonable person to believe that the dog may inflict bodily or serious bodily injury upon or cause the death of any person or domestic animal; or

(III) Engages in or is trained for animal fighting as described and prohibited in section 18-9-204.

(c) "Dog" means any domesticated animal related to the fox, wolf, coyote, or jackal.

(d) "Domestic animal" means any dog, cat, any animal kept as a household pet, or livestock.

(e) "Owner" or "owns" means any person, firm, corporation, or organization owning, possessing, harboring, keeping, having financial or property interest in, or having control or custody of a domestic animal, as the term is defined in paragraph (d) of this subsection (2), including a dangerous dog as the term is defined in paragraph (b) of this subsection (2).

(f) "Serious bodily injury" has the same meaning as such term is defined in section 18-1-901 (3)(p).

(3) (a) A person commits ownership of a dangerous dog if such person owns, possesses, harbors, keeps, has a financial or property interest in, or has custody or control over a dangerous dog.

(b) Any owner who violates subsection (3)(a) of this section whose dog inflicts bodily injury upon any person commits a class 2 misdemeanor.

(c) Any owner who violates paragraph (a) of this subsection (3) whose dog inflicts serious bodily injury to a person commits a class 1 misdemeanor. Any owner involved in a second or subsequent violation under this paragraph (c) commits a class 6 felony.

(d) Any owner who violates paragraph (a) of this subsection (3) whose dog causes the death of a person commits a class 5 felony.

(e) (I) Any owner who violates subsection (3)(a) of this section whose dog injures or causes the death of any domestic animal commits a class 2 misdemeanor.

(II) Repealed.

(III) (A) The court shall order the convicted owner and any owner who enters into a deferred judgment or deferred prosecution to make restitution to the injured or dead domestic animal's owner pursuant to applicable provisions of title 16, C.R.S., governing restitution.

(B) Restitution shall be equal to the greater of the fair market value or the replacement cost of the domestic animal on the date, but before the time, the animal was injured or destroyed plus any reasonable and necessary medical expenses incurred in treating the animal and any actual costs incurred in replacing the injured or destroyed animal.

(B.5) An owner who violates paragraph (a) of this subsection (3) and whose dog damages or destroys the property of another person commits a class 1 petty offense.

(C) Any owner whose dog damages or destroys property shall make restitution to the owner of such property in an amount equal to the greater of the fair market value or the replacement cost of such property before its destruction plus any actual costs incurred in replacing such property.

(e.5) The court shall order any owner of a dangerous dog who has been convicted of a violation of this section to:

(I) Confine the dangerous dog in a building or enclosure designed to be escape-proof and, whenever the dog is outside of the building or enclosure, keep the dog under the owner's control by use of a leash. The owner shall post a conspicuous warning sign on the building or enclosure notifying others that a dangerous dog is housed in the building or enclosure. In addition, if the

conviction is for a second or subsequent offense, the dangerous dog shall also be muzzled whenever it is outside of the building or enclosure.

(II) Immediately report to the bureau in writing any material change in the dangerous dog's situation, including but not limited to a change, transfer, or termination of ownership, change of address, escape, or death;

(III) At the owner's expense, permanently identify the dangerous dog through the implantation of a microchip by a licensed veterinarian or a licensed shelter. A veterinarian or licensed shelter that implants a microchip in a dangerous dog shall report the microchipping information to the bureau within ten days after implantation of the microchip, pursuant to section 35-42-115 (2), C.R.S.

(IV) Prior to the implantation of the microchip, pay a nonrefundable dangerous dog microchip license fee of fifty dollars to the bureau;

(V) Prior to the dangerous dog receiving any service or treatment, disclose in writing to any provider of the service or treatment, including but not limited to a veterinary health-care worker, dog groomer, humane agency staff person, pet animal care facility staff person, professional dog handler, or dog trainer, each acting in the performance of his or her respective duties, that the dangerous dog has been the subject of a conviction of a violation of this section;

(VI) Prior to a change, transfer, or termination of ownership of a dangerous dog, disclose in writing to the prospective owner that the dangerous dog has been the subject of a conviction of a violation of this section.

(f) In addition to any other penalty set forth in this subsection (3), upon an owner's entry of a guilty plea or the return of a verdict of guilty by a judge or jury or a deferred judgment or deferred prosecution for a violation that results in bodily injury, serious bodily injury, or death to a person, the court, pursuant to applicable provisions of title 16, C.R.S., governing restitution, shall order the defendant to make restitution in accordance with said provisions.

(g) (I) In addition to the penalties set forth in paragraphs (b) to (e) of this subsection (3), upon an owner's entry of a guilty plea or the return of a verdict of guilty by a judge or jury or a deferred judgment or deferred prosecution for a violation that results in serious bodily injury to a person or death to a person or domestic animal or for a second or subsequent violation of paragraph (b) or (e) of this subsection (3) resulting in a conviction or a deferred judgment or a deferred prosecution involving the same dog of the same owner, the court shall order that the dangerous dog be immediately confiscated and placed in a public animal shelter and shall order that, upon exhaustion of any right an owner has to appeal a conviction based on a violation of this subsection (3), the owner's dangerous dog be destroyed by euthanasia administered by a licensed veterinarian.

(II) In addition to any penalty set forth in paragraphs (b) to (e) of this subsection (3), for a second or subsequent violation of paragraph (b) or (e) of this subsection (3) resulting in a conviction or a deferred judgment or a deferred prosecution involving the same dog of a different owner, the court may order that the dangerous dog be immediately confiscated and placed in a public animal shelter and that, upon exhaustion of any right an owner has to appeal a conviction based on a violation of this subsection (3), the owner's dangerous dog be destroyed by euthanasia administered by a licensed veterinarian.

(h) (I) An affirmative defense to the violation of this subsection (3) shall be:

(A) That, at the time of the attack by the dangerous dog which causes injury to or the death of a domestic animal, the domestic animal was at large, was an estray, and entered upon the property of the owner and the attack began, but did not necessarily end, upon such property;

(B) That, at the time of the attack by the dangerous dog which causes injury to or the death of a domestic animal, said animal was biting or otherwise attacking the dangerous dog or its owner;

(C) That, at the time of the attack by the dangerous dog which causes injury to or the death of a person, the victim of the attack was committing or attempting to commit a criminal offense, other than a petty offense, against the dog's owner, and the attack did not occur on the owner's property;

(D) That, at the time of the attack by the dangerous dog which causes injury to or the death of a person, the victim of the attack was committing or attempting to commit a criminal offense, other than a petty offense, against a person on the owner's property or the property itself and the attack began, but did not necessarily end, upon such property; or

(E) That the person who was the victim of the attack by the dangerous dog tormented, provoked, abused, or inflicted injury upon the dog in such an extreme manner which resulted in the attack.

(II) The affirmative defenses set forth in subparagraph (I) of this paragraph (h) shall not apply to any dog that has engaged in or been trained for animal fighting as said term is described in section 18-9-204.

(4) Upon taking an owner into custody for an alleged violation of this section or the issuing of a summons and complaint to the owner, pursuant to the Colorado rules of criminal procedure and part 1 of article 4 of title 16, C.R.S., the owner's dangerous dog may be taken into custody and placed in a public animal shelter, at the owner's expense, pending final disposition of the charge against the owner. In addition, in the event the court, pursuant to the Colorado rules of criminal procedure and part 1 of article 4 of title 16, C.R.S., sets bail for an owner's release from custody pending final disposition, the court may require, as a condition of bond, that the owner's dangerous dog be placed by an impound agency, as defined in section 18-9-202.5 (5), at the

owner's expense in a location selected by the impound agency including a public animal shelter, licensed boarding facility, or veterinarian's clinic, pending final disposition of the alleged violation of this section. The owner is liable for the total cost of board and care for a dog placed pursuant to this subsection (4).

(5) (a) Nothing in this section shall be construed to prohibit a municipality from adopting any rule or law for the control of dangerous dogs; except that any such rule or law shall not regulate dangerous dogs in a manner that is specific to breed.

(b) Nothing in this section shall be construed to abrogate a county's authority under part 1 of article 15 of title 30, C.R.S., to adopt dog control and licensing resolutions and to impose the penalties set forth in section 30-15-102, C.R.S.; except that any such resolution shall not regulate dangerous dogs in a manner that is specific to breed.

(c) No municipality or county may destroy or dispose of a dog that is awaiting destruction or disposition as of April 21, 2004, in connection with a violation or charged violation of a municipal or county ban on one or more specific dog breeds.

(6) This section does not apply to the following:

(a) To any dog that is used by a peace officer while the officer is engaged in the performance of peace officer duties;

(b) A dog that inflicts bodily injury to a veterinary health-care worker, dog groomer, humane agency personnel, professional dog handler, or trainer, each acting in the performance of the person's respective duties, unless the dog's owner is subject to a court order issued pursuant to subsection (3)(e.5) of this section and the owner has failed to comply with subsection (3)(e.5)(V) of this section; or

(c) To any dog that inflicts injury upon or causes the death of a domestic animal while the dog was working as a hunting dog, herding dog, or predator control dog on the property of or under the control of the dog's owner and the injury or death was to a domestic animal naturally associated with the work of such dog.

Source: **L. 91:** Entire section added, p. 413, § 1, effective July 1. **L. 99:** (2)(a) amended, p. 797, § 10, effective July 1; (3)(e) amended and (3)(e.5) added, p. 274, § 1, effective July 1. **L. 2002:** (3)(e)(II) amended, p. 1517, § 206, effective October 1. **L. 2004:** (1) and (5) amended, p. 509, § 3, effective April 21; (2)(a.5) added and (3)(e.5) and (4) amended, p. 1761, §§ 2, 3, effective July 1. **L. 2006:** (2)(b), (3)(e)(II), (3)(e.5), (3)(g), (4), and (6)(b) amended, p. 717, § 1, effective July 1. **L. 2007:** (2)(d), (3)(e)(I), (3)(e)(III)(C), and (3)(g) amended and (3)(e)(III)(B.5) added, p. 724, § 2, effective July 1. **L. 2012:** (4) amended, (HB 12-1125), ch. 102, p. 346, § 3, effective September 1. **L. 2021:** (3)(b) and (3)(e)(I) amended, (SB 21-271), ch. 462, p. 3206, §

326, effective March 1, 2022; (3)(e)(II)(B) added by revision, (SB 21-271), ch. 462, pp. 3206, 3331, §§ 326, 803. **L. 2024:** (2)(a.5) amended, (HB 24-1458), ch. 288, p. 1929, § 6, effective August 7. **L. 2025:** IP(6) and (6)(b) amended, (HB 25-1034), ch. 13, p. 35, § 1, effective August 6.

Editor's note: Subsection (3)(e)(II)(B) provided for the repeal of subsection (3)(e)(II), effective March 1, 2022. (See L. 2021, pp. 3206, 3331.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3)(e)(II), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Animal-Related Legal Disputes: Litigation, ADR, and Court Appointments", see 42 Colo. Law.	43 (Dec. 2013). For article, "Colorado Breed-Specific Legislation and Criminal Defense", 49 Colo. Law. 33 (Oct. 2020).

18-9-205. Disposition of fines.

Any fines collected pursuant to section 18-9-204 shall be transmitted to the state treasurer, who shall then transmit the same to the county where the offense occurred for deposit in the general fund to be used for the care of the animals involved in the offense, if required, or, if not required, for any other lawful purpose.

Source: **L. 85:** Entire section added, p. 679, § 2, effective July 1. **L. 90:** Entire section amended, p. 1613, § 7, effective July 1.

18-9-206. Unauthorized release of an animal - penalty - restitution.

(1) Any person who intentionally releases any animal which is lawfully confined for scientific, research, commercial, legal sporting, or educational purposes or for public safety purposes because the animal has been determined to be dangerous to people, has an infectious disease, or is quarantined to determine whether or not it has an infectious disease without the consent of the owner or custodian of such animal commits the offense of unauthorized release of an animal.

(2) Unauthorized release of an animal is a class 2 misdemeanor.

(3) Any person who is convicted of unauthorized release of an animal shall be ordered to pay restitution for any damages resulting from such release, including the cost of restoring any animal to confinement, the cost of restoring the health of any animal which is released, the cost of any damage to real or personal property which is caused by a released animal, or any cost which results if the release causes the failure of an experiment, including the costs of repeating the experiment, replacement of any animal released, and the cost of labor and materials associated with such experiment.

Source: L. 92: Entire section added, p. 319, § 1, effective July 1.

18-9-207. Tampering or drugging of livestock.

(1) As used in this section, unless the context otherwise requires:

(a) "Exhibition" means a show or sale of livestock at a fair or elsewhere in this state that is sponsored by or under the authority of the state or any unit of local government or any agricultural, horticultural, or livestock society, association, or corporation.

(b) "Livestock" means any domestic animal generally used for food or in the production of food, including, but not limited to, cattle, sheep, goats, poultry, swine, or llamas.

(c) "Sabotage" means intentionally tampering with an animal belonging to or owned by another person that has been registered, entered, or exhibited in any exhibition or raised for the apparent purpose of being entered in an exhibition.

(d) (I) "Tamper" means any of the following:

(A) Treatment of livestock in such a manner that food derived from the livestock would be considered adulterated under the "Colorado Food and Drug Act", part 4 of article 5 of title 25, C.R.S.;

(B) The injection, use, or administration of any drug that is prohibited by any federal, state, or local law or any drug that is used in a manner prohibited by federal law or the law of this state or any locality thereof;

(C) The injection or other internal or external administration of any product or material, whether gas, solid, or liquid, to an animal for the purposes of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(D) The use or administration for cosmetic purposes of steroids, growth stimulants, or internal artificial filling, including paraffin, silicone injection, or any other substance;

(E) The use or application of any drug or feed additive affecting the central nervous system of the animal;

(F) The use or administration of diuretics for cosmetic purposes;

(G) The manipulation or removal of tissue, by surgery or otherwise, so as to change, transform, or enhance the true conformation or configuration of the animal;

(H) Subjecting the animal to inhumane conditions or procedures for the purpose of concealing, enhancing, or transforming the true conformation, configuration, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(I) Attaching to the animal's hide foreign objects, including hair or hair substitutes, cloth, and fibers, for the purpose of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(J) Substituting a different animal for the animal registered or entered in the exhibition without the permission of a responsible official of the exhibition.

(II) "Tamper" does not include any action taken or activity performed or administered by a licensed veterinarian or in accordance with instructions of a licensed veterinarian if the action or activity was undertaken for accepted medical purposes during the course of a valid veterinarian-client-patient relationship or any action taken as part of accepted grooming, ranching, commercial, or medical practices. "Tampering" shall not be construed to include normal ranching practices.

(2) (a) No person shall commit any act in this state that would constitute tampering with or sabotaging any livestock that has been registered, entered, or exhibited in any exhibition in this state.

(b) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug to or for livestock unless such drug is approved by the United States food and drug administration or the United States department of agriculture; except that, if either agency has approved an application submitted for investigational use in accordance with the "Federal Food, Drug, and Cosmetic Act", the drug may be used only for the approved investigational use.

(c) No person shall administer, distribute, possess, sell, or use any dangerous drug to or for livestock unless the drug is accompanied by a prescription issued by a licensed veterinarian entitled to practice in this state.

(3) Any person who violates the provisions of this section commits a class 2 misdemeanor. However, in lieu of the fine provided in section 18-1.3-501, the court may impose a fine of not less than one thousand dollars or more than one hundred thousand dollars.

(4) The name and photograph of any person convicted of violating the provisions of this section shall be made available for publication in newspapers of general circulation and trade journals.

Source: **L. 95:** Entire section added, p. 1196, § 1, effective May 31. **L. 2002:** (3) amended, p. 1517, § 207, effective October 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3206, § 327, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-9-208. Forfeiture of animals.

(1) Upon the motion of the prosecuting attorney or upon the court's own motion, after the conviction of a defendant for cruelty to animals as described in section 18-9-202, or for animal fighting as described in section 18-9-204, the court may order the forfeiture of any animal owned by or in the custody of the defendant that:

(a) Was abused, neglected, mistreated, injured, or used by the defendant during the course of the criminal episode that gave rise to such conviction;

(b) Participated in or was affected by any act set forth in section 18-9-204 (1).

(2) (a) If an animal is the subject of a motion made under subsection (1) of this section and is not owned by the defendant, the court may nevertheless enter an order of forfeiture of the animal if the court finds that:

(I) The animal was abandoned prior to the criminal episode described in subsection (1) of this section;

(II) The owner of the animal is unknown; or

(III) The owner of the animal is known but cannot be located.

(b) Any person who contests a motion brought under this section shall establish such person's standing as a true owner of the animal. The factors to be considered by the court in determining whether such person is a true owner shall include, but shall not be limited to, the following:

- (I) Whether the person was the primary user, custodian, or possessor of the animal;
- (II) Whether there is evidence that ownership of the animal is vested in the person;
- (III) Whether consideration was paid for the purchase of the animal, and, if so, how much of the consideration was furnished by the person.

(c) If the court determines that a person other than the defendant is the true owner of the animal, the court may not enter an order forfeiting the animal under this section unless the court finds:

(I) The true owner was involved in the criminal episode described in subsection (1) of this section;

(II) The true owner knew or reasonably should have known of the criminal episode described in subsection (1) of this section and failed to take all reasonable steps available to him or her to prevent it; or

(III) Ownership of the animal was conveyed to the true owner in order to avoid a forfeiture.

(3) An order of forfeiture entered pursuant to this section shall provide for the immediate disposition of the forfeited animal by any means described in section 18-9-201 (2.5) other than return to the owner. If, in the opinion of a licensed veterinarian, the animal is experiencing extreme pain or suffering, or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(4) The owner or custodian of an animal that is the subject of a motion brought under this section shall be liable for the cost of the care, keeping, transport, or disposal of the animal. In no event shall the prosecuting attorney or the office of the prosecuting attorney be liable for such cost.

(5) The court in its discretion may order a forfeiture authorized by this section as an element of sentencing, as a condition of probation, or as a condition of a deferred sentence.

Source: L. 2001: Entire section added, p. 87, § 2, effective July 1. **L. 2007:** (3) amended, p. 724, § 3, effective July 1.

18-9-209. Immunity for reporting cruelty to animals - false report - penalty.

(1) Except as otherwise provided in subsection (2) of this section, a person who, in good faith, reports a suspected incident of cruelty to animals, service animals, or certified police working dogs or police working horses, as described in section 18-9-202, to a local law

enforcement agency or to the state bureau of animal protection is immune from civil liability for reporting the incident.

(2) The provisions of subsection (1) of this section shall not apply to a person who knowingly makes a false report of animal cruelty.

(3) A person who knowingly makes a false report of animal cruelty to a local law enforcement agency or to the state bureau of animal protection commits a civil infraction.

Source: **L. 2005:** Entire section added, p. 355, § 2, effective July 1. **L. 2016:** (1) amended, (HB 16-1348), ch. 236, p. 954, § 3, effective June 6. **L. 2018:** (1) amended, (HB 18-1041), ch. 19, p. 267, § 3, effective March 7. **L. 2019:** (1) amended, (HB 19-1180), ch. 75, p. 277, § 3, effective April 4. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3206, § 328, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2005 act enacting this section, see section 1 of chapter 102, Session Laws of Colorado 2005.

PART 3

OFFENSES INVOLVING COMMUNICATIONS

18-9-301. Definitions.

As used in sections 18-9-301 to 18-9-305, unless the context otherwise requires:

(1) "Aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(1.5) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(2) "Common carrier" means any person engaged as a common carrier for hire in intrastate, interstate, or foreign communication by wire or radio or in intrastate, interstate, or foreign radio transmission of energy.

(3) "Contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.

(3.3) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,

electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include:

- (a) (Deleted by amendment, L. 97, p. 602, § 2, effective August 6, 1997.)
- (b) Any wire or oral communication;
- (c) Any communication made through a tone-only paging device; or
- (d) Any communication from a tracking device.

(3.5) "Electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(3.7) "Electronic communications system" means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of electronic communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication, other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and being used in the ordinary course of its business, or being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal hearing.

(4.5) "Electronic storage" means:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(b) Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

(5) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(6) "Investigative or law enforcement officer" means any officer of the United States or of the state of Colorado or a political subdivision thereof who is empowered by law to conduct

investigations of, or to make arrests for, offenses enumerated in this part 3, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(7) "Judge of competent jurisdiction" means any justice of the supreme court or a judge of any district court of the state of Colorado.

(8) "Oral communication" means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief, but does not include any electronic communication.

(8.3) "Pen register" means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached but shall not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(8.5) "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

- (a) Scrambled or encrypted;
- (b) Transmitted using modulation techniques having essential parameters withheld from the public with the intention of preserving the privacy of such communication;
- (c) Carried on a subcarrier or other signal subsidiary to a radio transmission;
- (d) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or
- (e) Transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the rules of the federal communications commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(8.7) "Trap and trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(8.9) "User" means any person or entity which uses an electronic communication service and is duly authorized by the provider of such service to engage in such use.

(9) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like

connection, including the use of such connection in a switching station, between the point of origin and the point of reception, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and includes any electronic storage of such communication.

Source: L. 71: R&RE, p. 472, § 1. C.R.S. 1963: § 40-9-301. L. 88: (1), (3), IP(4), (4)(a), (5), (8), and (9) amended and (1.5), (3.3), (3.5), (3.7), (4.5), (8.3), (8.5), (8.7), and (8.9) added, p. 691, § 5, effective May 29. L. 97: (3.3) and (9) amended, p. 602, § 2, effective August 6.

ANNOTATION

Terms "conversation or discussion" in § 18-9-304 are synonymous with term "oral communication" as defined in subsection (8). People v. Blehm, 44 Colo. App. 472, 623 P.2d 411 (1980).

Terms "telephone or telegraph communication" in § 18-9-303 are synonymous with "wire communication" as defined in subsection (9). People v. Blehm, 44 Colo. App. 472, 623 P.2d 411 (1980).

Monitoring conversations between husband and wife in jail not wiretapping or eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping or eavesdropping because such conversations are not within the statutory definitions of "wire communication" and "oral communication". People v. Blehm, 44 Colo. App. 472, 623 P.2d 411 (1980).

18-9-302. Wiretapping and eavesdropping devices prohibited - penalty.

Any person who manufactures, buys, sells, or knowingly has in the person's possession any instrument, device, contrivance, machine, or apparatus designed or commonly used for wiretapping or eavesdropping, as prohibited in sections 18-9-303 and 18-9-304, with the intent to unlawfully use or employ or allow the same to be so used or employed, or who knowingly aids, authorizes, agrees with, employs, permits, or conspires with any other person to unlawfully manufacture, buy, sell, or have the same in the person's possession is guilty of a petty offense.

Source: L. 71: R&RE, p. 473, § 1. C.R.S. 1963: § 40-9-302. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3206, § 329, effective March 1, 2022. L. 2023: Entire section amended, (HB 23-1293), ch. 298, p. 1790, § 39, effective October 1.

18-9-303. Wiretapping prohibited - penalty.

(1) Any person not a sender or intended receiver of a telephone or telegraph communication commits wiretapping if he:

(a) Knowingly overhears, reads, takes, copies, or records a telephone, telegraph, or electronic communication without the consent of either a sender or a receiver thereof or attempts to do so; or

(b) Intentionally overhears, reads, takes, copies, or records a telephone, telegraph, or electronic communication for the purpose of committing or aiding or abetting the commission of an unlawful act; or

(c) Knowingly uses for any purpose or discloses to any person the contents of any such communication, or attempts to do so, while knowing or having reason to know the information was obtained in violation of this section; or

(d) Knowingly taps or makes any connection with any telephone or telegraph line, wire, cable, or instrument belonging to another or with any electronic, mechanical, or other device belonging to another or installs any device whether connected or not which permits the interception of messages; or

(e) Repealed.

(f) Knowingly uses any apparatus to unlawfully do, or cause to be done, any act prohibited by this section or aids, authorizes, agrees with, employs, permits, or intentionally conspires with any person to violate the provisions of this section.

(2) Wiretapping is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 473, § 1. C.R.S. 1963: § 40-9-303. L. 77: (1)(a), (1)(c), (1)(d), (1)(e), and (1)(f) amended, p. 969, § 59, effective July 1. L. 88: (1)(a), (1)(b), (1)(d), and (1)(e) amended, p. 693, § 6, effective May 29. L. 89: (2) amended, p. 841, § 90, effective July 1. L. 97: (2) amended, p. 602, § 3, effective August 6. L. 2002: (1)(e) repealed, p. 1588, § 23, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3206, § 330, effective March 1, 2022. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1790, § 40, effective October 1.

ANNOTATION

Law reviews. For article, "Interspousal Wiretapping and Eavesdropping: An Update — Part I", see 24 Colo. Law. 2343 (1995). For article, "Interspousal Wiretapping and

Eavesdropping: An Update — Part II", see Colo. Law. 2569 (1995).

Paragraph (1)(e) is not unconstitutionally overbroad as infringing on fundamental or express rights. Although the paragraph might prohibit a parent from hanging up or disconnecting a child's telephone call, such a proscription is not real and substantial when compared to the statute's prohibition of a whole range of easily identifiable and constitutionally proscribable conduct. *People v. Shepard*, 983 P.2d 1 (Colo. 1999).

Subsection (2) does not violate the equal protection clause. Because there is less of a privacy expectation when using a cordless telephone and because such calls may be more easily intercepted, the general assembly may impose a lesser penalty for wiretapping involving a cordless telephone. *People v. Richardson*, 983 P.2d 5 (Colo. 1999).

Section 16-15-102 (10) inapplicable. Since § 18-9-304 and this section do not prohibit or make unlawful consensual recorded eavesdropping, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of § 16-15-102 (10). That section is, therefore, not applicable, and the evidence should not be suppressed. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975).

18-9-304. Eavesdropping prohibited - penalty.

(1) Any person not visibly present during a conversation or discussion commits eavesdropping if he:

Terms "telephone or telegraph communication" in this section are synonymous with "wire communication" as defined in § 18-9-301 (9). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

And monitoring conversations between husband and wife in jail not wiretapping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping because such conversations are not within the statutory definition of "wire communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Recording played on telephone handset before every telephone call placed by a prisoner using that telephone stating that the call would be recorded, and the short jail orientation at which prisoners agreed to read and abide by rules contained in a handbook, which stated that outgoing telephone calls would be recorded, provided notice to the defendant that his calls would be recorded. When a prison inmate is required to permit monitoring of telephone calls as a condition of using prison telephones, the prisoner impliedly consents if he or she has notice of monitoring and still places calls on prison telephones. *People v. Mares*, 263 P.3d 699 (Colo. App. 2011).

- (a) Knowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto, or attempts to do so; or
 - (b) Intentionally overhears or records such conversation or discussion for the purpose of committing, aiding, or abetting the commission of an unlawful act; or
 - (c) Knowingly uses for any purpose, discloses, or attempts to use or disclose to any other person the contents of any such conversation or discussion while knowing or having reason to know the information was obtained in violation of this section; or
 - (d) Knowingly aids, authorizes, agrees with, employs, permits, or intentionally conspires with any person to violate the provisions of this section.
- (2) Eavesdropping is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 474, § 1. **C.R.S. 1963:** § 40-9-304. **L. 77:** (1)(a), (1)(c), and (1)(d) amended, p. 970, § 60, effective July 1. **L. 89:** (2) amended, p. 841, § 91, effective July 1. **L. 2010:** (2) amended, (SB 10-128), ch. 415, p. 2046, § 4, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3207, § 331, effective March 1, 2022.

ANNOTATION

Law reviews. For note, "Legislation: The Statutory Right of Privacy in Colorado — Section 33 of the Eavesdropping Act: Should It be Narrowly Construed?", see 41 U. Colo. L. Rev. 174 (1969). For article, "Discovery and Admissibility of Sound Recordings and Their Transcripts", see 14 Colo. Law. 999 (1985).

Section recognizes right of privacy. The supreme court specifically recognizes the theory of tortious conduct designated as the invasion of the right of privacy, noting that the general assembly gave legislative recognition of the right of privacy by the enactment of this section. *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970) (decided under former § 40-4-33, C.R.S.).

Eavesdropping statutes require use of subjective and objective tests to determine whether a person's conversation qualifies as protected oral communications. *People v. Hart*, 787 P.2d 186 (Colo. App. 1989).

Section 16-15-102 (10) inapplicable. Since § 18-9-303 and this section do not prohibit or make unlawful consensual recorded eavesdropping, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of § 16-15-102 (10). That section is, therefore, not applicable, and the evidence should not be suppressed. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975).

Terms "conversation or discussion" in this section are synonymous with term "oral communication" as defined in § 18-9-301 (8). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

And monitoring conversations between husband and wife in jail not eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not eavesdropping because such conversations are not within the statutory definition of "oral communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Consensually overheard conversation not eavesdropping. By the terms of subsection (1)(a), a consensually overheard conversation is not eavesdropping. *People v. Palmer*, 652 P.2d 1092 (Colo. App. 1982).

Consent of one party to recording supports summary judgment. Where plaintiff claimed that certain telephone conversations were illegally recorded, but admitted that the other party to the conversations had consented, there was no genuine issue of fact and summary judgment was proper. *Abrahamsen v. Mtn. States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287

(1972) (decided under former § 40-4-28, C.R.S.).

For "consent" to be valid, it must be voluntary and uncoerced. Generally, it is sufficient for the prosecution, who has the burden of proving consent, to show that an informant had knowledge of the monitoring setup; however, when coercion is alleged, the prosecution must show that there was no undue pressure, threats or improper inducements. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

Whether the circumstances of a communication justify a belief that it is not subject to interception is analyzed in the same manner as the question of whether an investigative activity amounts to a search: whether there is a justifiable expectation of privacy at the time and place of the communication. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Occupants of bar restroom had an objectively reasonable expectation of privacy from surveillance with a police transmitter despite the fact that police or others might hear a conversation unaided. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

18-9-305. Exceptions.

(1) Nothing in sections 18-9-302 to 18-9-304 shall be interpreted to prevent a news agency, or an employee thereof, from using the accepted tools and equipment of that news medium in the course of reporting or investigating a public and newsworthy event; nor shall said sections prevent any person from using wiretapping or eavesdropping devices on his own premises for security or business purposes if reasonable notice of the use of such devices is given to the public.

(2) No part of sections 18-9-302 to 18-9-304 shall apply to the normal use of services, facilities, and equipment provided by a provider of wire or electronic communication service pursuant to its tariffs on file with the public utilities commission of the state of Colorado and with the federal communications commission; and said sections shall not apply to the normal functions of any operator of a switchboard nor to any officer, agent, or employee of a provider of wire or electronic communication service or other person engaged in the business of providing service, equipment, and facilities for communication who performs an otherwise prohibited act if such act is necessary to provide the communication services, equipment, or facilities or is necessary in the construction, maintenance, repair, operations, or use of the same, including the obtaining of billing and accounting information, the protecting of the communication services, equipment, and facilities from illegal use in violation of the tariffs referred to in this subsection (2), the protecting of the provider of wire or electronic communication service from the commission of fraud against it, and the providing of requested information in response to a subpoena or court order issued by a court of competent jurisdiction or on demand of other lawful authority.

(3) It shall not be unlawful under sections 18-9-302 to 18-9-304 for an officer, employee, or agent of any provider of wire or electronic communication service or other person to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to section 16-15-102, C.R.S., is authorized to intercept a wire, oral, or electronic communication for that purpose.

(4) A good faith reliance on a court order or the provisions of article 15 of title 16, C.R.S., shall constitute a complete defense to any criminal action brought under provision of sections 18-9-302 to 18-9-304 or any civil action brought under any other law of the state of Colorado. This section shall not be construed in any manner which would allow an investigative or law enforcement officer of the state of Colorado to engage in any wiretapping or eavesdropping without prior authorization by a court of competent jurisdiction under the provisions of article 15 of title 16, C.R.S., except as provided in section 16-15-102 (18), C.R.S.

(4.3) It shall not be unlawful under sections 18-9-302 to 18-9-304 for any person:

(a) To intercept or access an electronic communication made through an electronic communications system that is configured so that such electronic communication is readily accessible to the general public;

(b) To intercept any radio communication which is transmitted by:

(I) Any station for the use of the general public or that relates to ships, aircraft, vehicles, or persons in distress;

(II) Any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) A station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) Any marine or aeronautical communications system;

(c) To engage in any conduct which is:

(I) Prohibited by section 633 of the federal "Communications Act of 1934", as amended; or

(II) Excepted from the application of section 705 (a) of the federal "Communications Act of 1934", as amended, by section 705 (b) of said act;

(d) To intercept any wire or electronic communication, the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(e) For other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(4.5) It shall not be unlawful under sections 18-9-302 to 18-9-304:

(a) To use a pen register or a trap and trace device; or

(b) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service from fraudulent, unlawful, or abusive use of such service.

(4.7) A person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication other than a communication to such person or entity, or an agent thereof, while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; except that a person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(a) As otherwise authorized in section 16-15-102 (12), (13), (14), and (16), C.R.S., and subsections (2) and (3) of this section;

(b) With the lawful consent of the originator or any addressee or intended recipient of such communication;

(c) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(d) Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4.9) It shall not be unlawful for a district attorney or law enforcement officer to listen to a recording of or to read a transcription of the contents of an electronic communication involving a cordless telephone when the district attorney or law enforcement officer has come into possession of such materials from a third party. In order to use such materials as evidence in a prosecution for a crime other than wiretapping or eavesdropping, the district attorney or law enforcement officer shall have a reasonable basis for believing that the recording or transcription is reliable and shall also have separate probable cause based on corroborating evidence to support a reasonable belief that the crime was committed. Nothing in this subsection (4.9) shall preclude a district attorney from prosecuting a person for a violation of section 18-9-303 or 18-9-304.

(5) The exceptions in this section shall be affirmative defenses.

Source: L. 71: R&RE, p. 474, § 1. C.R.S. 1963: § 40-9-305. L. 72: p. 272, § 4. L. 73: p. 539, § 10. L. 88: (2) and (3) amended and (4.3), (4.5), and (4.7) added, p. 693, § 7, effective May 29. L. 91: (4) amended, p. 435, § 2, effective May 18. L. 97: (4.9) added, p. 602, § 4, effective August 6.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

This section is not unconstitutionally vague in that it fails to delineate who has the responsibility of giving notice and does not state "how notice is to be given". People v. McCauley, 192 Colo. 545, 561 P.2d 335 (1977).

The affirmative "security or business purpose" defense does not take effect until reasonable notice is given to the public by the agent, the owner, or some third party. People v. McCauley, 192 Colo. 545, 561 P.2d 335 (1977).

The burden of giving "reasonable notice" to the public can be placed upon the

party who installed the wiretap. People v. McCauley, 192 Colo. 545, 561 P.2d 335 (1977).

Monitoring conversations between husband and wife in jail not wiretapping or eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping or eavesdropping because such conversations are not within § 18-9-301's definitions of "wire communication" and "oral communication". People v. Blehm, 44 Colo. App. 472, 623 P.2d 411 (1980).

18-9-306. Abuse of telephone and telegraph service.

(1) A person commits abuse of telephone and telegraph service, if:

(a) As an employee of a telegraph or telephone company he knowingly divulges the contents or the purport of any message or part thereof sent or intended to be sent to any person other than one to whom said message is sent or person authorized to receive the same; or

(b) He knowingly sends or delivers a false message or furnishes or conspires to furnish such message to an operator to be sent or delivered with intent to injure, deceive, or defraud any person, corporation, or the public; or

(c) He knowingly and without authorization opens any sealed envelope enclosing a message with the purpose of learning the contents; or

(d) He impersonates another, and thereby procures the delivery to himself of the message directed to such person, with the intent to use, destroy, or detain the same; or

(e) He knowingly and without authorization reads or learns the contents or meaning of a message on its transit and uses or communicates to another any information so obtained; or

(f) He knowingly bribes a telegraph or telephone operator or employee of a telegraph or telephone company to disclose any private message or the purport of the same received by him by reason of his trust as agent of the company or uses such information when thus obtained.

(2) Abuse of telephone and telegraph service is a civil infraction.

Source: L. 71: R&RE, p. 475, § 1. **C.R.S. 1963:** § 40-9-306. **L. 77:** (1)(a), (1)(c), (1)(e), and (1)(f) amended, p. 970, § 61, effective July 1. **L. 2021:** IP(1) amended and (2) added, (SB 21-271), ch. 462, p. 3207, § 332, effective March 1, 2022.

18-9-306.5. Obstruction of telephone or telegraph service.

(1) A person commits obstruction of telephone or telegraph service if the person knowingly prevents, obstructs, or delays, by any means whatsoever, the sending, transmission, conveyance, or delivery in this state of any message, communication, or report by or through any telegraph or telephone line, wire, cable, or other facility or any cordless, wireless, electronic, mechanical, or other device.

(2) Obstruction of telephone or telegraph service is a class 1 misdemeanor.

Source: L. 2002: Entire section added, p. 1588, § 24, effective July 1.

18-9-307. Refusal to yield party line - repeal. (Repealed)

Source: L. 71: R&RE, p. 475, § 1. **C.R.S. 1963:** § 40-9-307. **L. 2021:** (4) added by revision, (SB 21-271), ch. 462, pp. 3207, 3331, §§ 333, 803.

Editor's note: Subsection (4) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3207, 3331.)

18-9-308. Telephone directories to contain notice - repeal. (Repealed)

Source: L. 71: R&RE, p. 476, § 1. **C.R.S. 1963:** § 40-9-308. **L. 2021:** (2) added by revision, (SB 21-271), ch. 462, pp. 3207, 3331, §§ 334, 803.

Editor's note: Subsection (2) provided for the repeal of this section, effective March 1, 2022. (See L. 2021, pp. 3207, 3331.)

18-9-309. Telecommunications crime.

(1) As used in this section and section 18-9-309.5:

(a) "Access device" means any card, plate, code, account number, or other means of access that can be used, alone or in conjunction with another access device, to obtain telecommunications service.

(a.5) "Cellular phone" means a radio telecommunications device that may be used to obtain telecommunications services and that is programmed with an electronic serial number by or with the consent of the cellular phone manufacturer.

(a.7) "Cloned cellular phone" means a cellular phone, the electronic serial number of which has been altered without the consent of the cellular phone's manufacturer.

(a.8) "Cloning equipment" means any instrument, apparatus, equipment, computer hardware, computer software, operating procedure or code, or device, whether used separately or in

combination, that is designed or adapted and is used, is intended to be used, or is capable of being used:

(I) To intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or

(II) To create cloned cellular phones.

(b) "Credit card number" means the card number appearing on a credit card which is an identification card or plate issued to a person by any supplier of telecommunications service which permits the person to whom the card has been issued to obtain telecommunications service on credit. The term includes the number or description of the card or plate even if the card or plate itself is not produced at the time of obtaining telecommunications service.

(b.7) "Electronic serial number" means an electronic number that is programmed into a cellular phone by or with the consent of the manufacturer, transmitted by the cellular phone, and used by cellular phone telecommunications providers to validate radio transmissions as having been made by cellular phones authorized or approved by telecommunications providers.

(c) "Illegal telecommunications equipment" means any instrument, apparatus, equipment, computer hardware, computer software, mechanism, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used or is intended to be used to evade the lawful charges for any telecommunications service or for concealing from any telecommunications provider or lawful authority the existence, place of origin, or destination of any telecommunication. Illegal telecommunications equipment includes cloned cellular phones.

(c.5) To "intercept signals" means to electronically capture, record, reveal, or otherwise access signals, including data, electronic serial numbers, and mobile identification numbers, that are emitted, transmitted, or received by a telecommunications provider without consent of the telecommunications provider or the person receiving or initiating the signal.

(c.7) "Mobile identification number" means the cellular phone number assigned to a cellular phone by the cellular phone telecommunications provider.

(d) "Telecommunications device" means any instrument, apparatus, method, system, or equipment which controls, measures, directs, or facilitates telecommunications service. The term includes, but is not limited to, computer hardware, software, programs, electronic mail systems, voice mail systems, identification validation systems, and private branch exchanges.

(e) "Telecommunications provider" means any person, firm, association, or any corporation, private or municipal, owning, operating, or managing any facilities used to provide telecommunications service.

(f) "Telecommunications service" means a service which, in exchange for a pecuniary consideration, provides or offers to provide transmission of messages, signals, facsimiles, or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire, or the projection of energy without physical connection.

(g) "Telephone company" means any telecommunications provider which provides local exchange telecommunications service.

(2) A person commits a civil infraction if he or she knowingly:

(a) Accesses, uses, manipulates, or damages any telecommunications device without the authority of the owner or person who has the lawful possession or use thereof;

(b) Makes, possesses, or uses illegal telecommunications equipment; except that a person who knowingly uses cloning equipment to create a cloned cellular phone commits a class 4 felony as provided in subsection (4) of this section;

(c) Sells, gives, or furnishes to another or advertises or offer for sale illegal telecommunications equipment;

(d) Sells, gives, or furnishes to another or advertises or offers for sale any plans or instructions for making, assembling, or using illegal telecommunications equipment; or

(e) Sells, rents, lends, gives, publishes, or otherwise transfers or discloses to another or offers or advertises for sale or rental the number or code of a counterfeited, canceled, expired, revoked, or nonexistent telephone number or credit card number or method of numbering or coding which is employed in the issuance of telephone numbers access devices or credit card numbers or an existing number or code or method of numbering or coding without the authority of the owner or person who has the lawful possession or use thereof.

(2.5) Repealed.

(3) A person commits theft as defined in section 18-4-401 and shall be subject to the penalties as set forth in that section if he knowingly:

(a) Obtains any telecommunications service by charging such service to or causing such service to be charged to an existing telephone number, access device, or credit card number without the authority of the person to whom issued or of the subscriber thereto or of the lawful holder thereof or to a nonexistent, counterfeit, expired, revoked, or canceled credit card number, or by any method of code calling, or by installing, rearranging, or tampering with any equipment, physically or electronically, or by the use of any other fraudulent means, method, trick, or device or scheme;

(b) Obtains telecommunications service with fraudulent intent through the use of a false or fictitious name, telephone number, address, or credit information or through the unauthorized use of the name, telephone number, address, or credit information of another.

(4) (a) A person commits a class 2 misdemeanor if the person knowingly uses cloning equipment to:

(I) Intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or

(II) Create a cloned cellular phone.

(b) A person commits a class 2 misdemeanor if the person aids, abets, advises, or encourages one or more persons who engage in the activities described in subsection (4)(a) of this section.

(c) Each violation of this subsection (4), including each instance of intercepting signals or of creating a cloned cellular phone, shall be a separate offense.

(5) The provisions of this section do not apply to:

(a) Officers, employees, or agents of telecommunications providers who engage in conduct prohibited by this section for the purpose of constructing, maintaining, or conducting telecommunications services or for law enforcement purposes;

(b) Law enforcement officers and public officials in charge of jails, police premises, sheriffs' offices, department of corrections' institutions, or other penal or correctional institutions or any other person under the color of law who engages in conduct prohibited by this section for the purpose of law enforcement or in the normal course of the officer's or official's employment activities or duties; or

(c) Officers, employees, or agents of federal or state agencies who are authorized to monitor or intercept cellular telephone service in the normal course of the officer's, employee's, or agent's employment.

(6) Prosecution under this section does not preclude civil liability under any applicable provision of law.

Source: **L. 71:** R&RE, p. 476, § 1. **C.R.S. 1963:** § 40-9-309. **L. 89:** (3) amended, p. 841, § 92, effective July 1. **L. 90:** Entire section R&RE, p. 993, § 1, effective April 3. **L. 97:** (1)(a.5), (1)(a.7), (1)(a.8), (1)(b.7), (1)(c.5), (1)(c.7), (2.5), and (4) to (6) added and (1)(c), IP(2), and (2)(b) amended, pp. 989, 990, §§ 1, 2, effective July 1. **L. 2021:** IP(2) amended, (SB 21-271), ch. 462, p. 3207, § 335, effective March 1, 2022. **L. 2023:** (2.5) repealed and IP(4)(a) and (4)(b) amended, (HB 23-1293), ch. 298, p. 1791, § 41, effective October 1.

ANNOTATION

An intent to steal a communications service is a necessary element of the criminal offense proscribed by this section.

Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982).

18-9-309.5. Civil remedies - injunctions - forfeiture.

(1) Whenever it appears that any person is engaged in or about to engage in any act which constitutes or will constitute a violation of section 18-9-309 (2) or (3), the attorney general, the district attorney, a representative of a telecommunications provider, or any person or company harmed by such alleged violation may initiate a civil proceeding in a district court to enjoin such violation and may petition the court to issue an order for the discontinuance of telecommunications service, used in violation of section 18-9-309 (2) or (3).

(2) An action under this section shall be brought in the county in which the subject matter of the action, or some part thereof, is located or found and shall be commenced by the filing of a complaint, which shall be verified by affidavit.

(3) If it is shown to the satisfaction of the court, either by verified complaint or affidavit, that a person is engaged in or about to engage in any act which constitutes a violation of section 18-9-309 (2) or (3), the court shall issue a temporary restraining order to abate and prevent the continuance or recurrence of such act. The court shall direct the sheriff to seize and retain until further order of the court any device which is being used in violation of section 18-9-309 (2) or (3). While the temporary restraining order remains in effect, all property seized pursuant to the order of the court shall remain in the custody of the court. Within fourteen days following the filing of a motion of any person adversely affected by a temporary restraining order, the court shall conduct a hearing and determine whether such temporary restraining order shall be continued pending final determination of the action. Until such hearing takes place, the temporary restraining order shall remain in full force and effect.

(4) The court may issue a permanent injunction to restrain, abate, or prevent the continuance or recurrence of the violation of section 18-9-309 (2) or (3). The court may grant declaratory relief, mandatory orders, or any other relief deemed necessary to accomplish the purposes of the injunction. The court may retain jurisdiction of the case for the purpose of enforcing its orders.

(5) If it is shown to the satisfaction of the court, either by verified complaint or affidavit, that a person is engaged in or is about to engage in any act which constitutes a violation of section 18-9-309 (2) or (3), the court may issue an order which shall be promptly served upon the person in whose name the illegal telecommunications equipment is listed, requiring the party, within a reasonable time to be fixed by the court but not exceeding forty-eight hours from the time of

service of the petition on said party, to show cause before the judge why telecommunications service should not promptly be discontinued. At the hearing the burden of proof shall be on the complainant.

(6) Upon a finding by the court that the illegal telecommunications equipment is being used or has been used in violation of section 18-9-309 (2) or (3), the court shall issue an order requiring the telephone company which is rendering service over the device to disconnect such service. Upon receipt of such order, which shall be served upon an officer of the telephone company by the sheriff of the county in which the illegal telecommunications equipment is installed or by a duly authorized deputy, the telephone company shall proceed promptly to disconnect and remove such device and discontinue all telecommunications service until further order of the court.

(7) The telecommunications provider who petitions the court for the removal of any illegal telecommunications equipment under this section shall be a necessary party to any proceeding or action arising out of or under section 18-9-309 (2) or (3).

(8) No telephone company shall be liable for any damages, penalty, or forfeiture, whether civil or criminal, for any act performed in good faith and in compliance with any order issued by the court.

(9) Property seized pursuant to the direction of the court which the court has determined to have been used in violation of section 18-9-309 (2) or (3) shall be forfeited to the state. Prior to the disposition of the seized property, a petition for the remission or mitigation of forfeiture may be filed. The court may remit or mitigate the forfeiture upon terms and conditions as the court deems reasonable if it finds that such forfeiture was incurred without willful negligence or without any intention on the petitioner to violate the law or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of the forfeiture. In determining whether to remit or mitigate forfeiture, the court shall consider losses which may have been suffered by victims as the result of the use of the forfeited property.

Source: L. 90: Entire section added, p. 995, § 2, effective April 3. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 873, § 131, effective July 1.

18-9-310. Unlawful use of information - penalty.

Any person who, having obtained information pursuant to a court order for wiretapping or eavesdropping, knowingly uses, publishes, or divulges the information to any person or in any manner not authorized by this part 3 commits a class 6 felony.

Source: L. 72: p. 272, § 5. C.R.S. 1963: § 40-9-310. L. 89: Entire section amended, p. 841, § 93, effective July 1.

Cross references: For court orders for wiretapping or eavesdropping, see § 16-15-102.

18-9-310.5. False statement to the CBI for sex offender registry information.

A person who violates section 16-22-110 (6) or who submits a false statement to the Colorado bureau of investigation to obtain information from the sex offender registry pursuant to section 16-22-110 (6)(g) or (6)(h) commits an unclassified misdemeanor punishable by a fine of up to one thousand dollars for each violation.

Source: L. 2021: Entire section added, (HB 21-1064), ch. 320, p. 1969, § 9, effective September 1.

18-9-311. Automated dialing systems prohibited.

(1) No person shall utilize an automated dialing system with a prerecorded message for the purpose of soliciting another person to purchase goods or services, whether such solicitation occurs or is intended to occur during the prerecorded message or during some further communication initiated by or resulting from the prerecorded message, unless there is an existing business relationship between such persons and the person being called then consents to hear the prerecorded message.

(2) Any person who violates this section commits a petty offense.

Source: L. 79: Entire section added, p. 745, § 1, effective July 1. L. 88: (1) amended, p. 348, § 15, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3208, § 336, effective March 1, 2022.

18-9-312. Hostage, endangered person, or armed person in geographical area - telephone, electronic, cellular, or digital communications.

(1) (a) Notwithstanding the provisions of sections 18-9-302 to 18-9-311, any supervising representative of a law enforcement agency shall have the authority to order a previously

designated security employee of a communications or internet access provider to arrange, to the extent the necessary technology is reasonably available to the provider, to cut, reroute, or divert telephone lines or cellular or digital communications signals if the supervising representative has probable cause to believe that:

(I) A person has taken one or more other persons hostage and is holding the hostages in the geographical area in which the supervising representative has jurisdiction; or

(II) A person has barricaded himself or herself in a structure or a motor vehicle within the geographical area in which the supervising representative has jurisdiction and the supervising representative has a reasonable belief that the person is armed with a deadly weapon or explosive device and poses a danger to himself or herself or others.

(b) The supervising representative of a law enforcement agency may order the cutting, rerouting, or diverting of telephone lines or cellular or digital communications signals pursuant to paragraph (a) of this subsection (1) only for the purpose of preventing telephone or other electronic, cellular, or digital communication by the hostage holder or the armed person with any person other than a peace officer or a person authorized by the peace officer. The communications or internet access provider shall restore the normal operations of the telephone lines or cellular or digital communications signals as soon as practicable following resolution of the exigent circumstances.

(1.5) (a) Notwithstanding the provisions of sections 18-9-302 to 18-9-311, any supervising representative of a law enforcement agency may order a previously designated security employee of a wireless telecommunications provider to provide to the law enforcement agency, without requiring the agency to obtain a court order, location information concerning the telecommunications device of a named person if the supervising representative has probable cause to believe that:

(I) An emergency situation exists that involves the risk of death or serious bodily injury to the named person or to another person who is in the named person's company; and

(II) The time required to obtain a search warrant or other court order authorizing the acquisition of the information would increase such risk.

(b) A wireless telecommunications provider may establish protocols by which the provider discloses location information, provided that such protocols shall include keeping a record of:

(I) The name of the supervising representative of a law enforcement agency that requested the location information; and

(II) The time and date when the request was made.

(c) With regard to compliance with the requirements of this subsection (1.5), no cause of action may be brought against any wireless telecommunications provider, its officers, employees,

agents, or other specified persons for providing location information in response to a request from a law enforcement agent with actual or apparent authority to act as a supervising representative under this subsection (1.5).

(d) A law enforcement agency that acquires information pursuant to this subsection (1.5) shall not divulge the acquired information to any person other than to another law enforcement agency, or an employee thereof, unless the law enforcement agency has obtained a court order stating that the information was lawfully obtained and authorizing the law enforcement agency to retain the information, as described in subparagraph (I) of paragraph (d) of this subsection (1.5).

(e) (I) Not more than forty-eight hours after ordering a previously designated security employee of a wireless telecommunications provider to provide information as described in paragraph (a) of this subsection (1.5), a law enforcement agency shall request a court order stating whether:

(A) At the time that the supervising representative of a law enforcement agency ordered the previously designated security employee of a wireless telecommunications provider to provide the information, the supervising representative had probable cause to believe that the conditions described in paragraph (a) of this subsection (1.5) existed; and

(B) The law enforcement agency may retain the information for a bona fide investigative purpose.

(II) Unless a court orders that the law enforcement agency may retain the information for a bona fide investigative purpose, as described in sub-subparagraph (B) of subparagraph (I) of this paragraph (e), the law enforcement agency shall destroy the information and not retain any copy of the information for any purpose.

(III) If the court issues an order stating that the supervising representative of the law enforcement agency did not have probable cause to believe that the conditions described in paragraph (a) of this subsection (1.5) existed and that the information was not lawfully obtained, then neither the information nor any other evidence that is obtained as a result of the law enforcement agency's acquisition of the information may be admitted in any subsequent criminal proceeding unless the information or other evidence was also acquired independently in a lawful manner.

(IV) Any ruling by a court that the information obtained may be retained for a bona fide investigative purpose shall not be considered a ruling on the admissibility of the evidence in any criminal proceeding under the constitutional and statutory provisions of the United States or Colorado.

(2) The serving communications or internet access provider within the geographical area of a law enforcement agency shall designate a security official employed by the provider and an

alternate to provide all required assistance to law enforcement officials to carry out the purposes of this section.

(3) Good faith reliance on an order by any supervising representative of a law enforcement agency shall constitute a complete defense to any action brought against a communications or internet access provider or any of its employees or agents in connection with actions taken under this section. A communications or internet access provider and its employees or agents shall not be liable in any civil action to any person or entity for injuries, death, or loss to any person or property incurred as a result of any act or omission resulting from, connected with, or incidental to compliance with this section.

Source: L. 81: Entire section added, p. 976, § 17, effective July 1. **L. 2009:** Entire section amended, (SB 09-284), ch. 337, p. 1781, § 1, effective June 1. **L. 2013:** (1.5) added, (HB 13-1308), ch. 214, p. 892, § 1, effective May 13.

18-9-313. Personal information on the internet - victims of domestic violence, sexual assault, and stalking - other protected persons - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Child representative" means:

(I) An employee of or contractor with the office of the child's representative created in section 13-91-104; or

(II) The staff of contractors with the office of the child's representative who are members of an attorney's legal team who assist with the attorney's legal representation of children, youth, and juveniles.

(b) "Code enforcement officer" means a municipal, county, or city and county employee or contractor who is responsible for the administration and enforcement of land use, zoning regulations, building codes, health codes, floodplain regulations, and other similar health and safety codes.

(b.5) "Educator" means a teacher, principal, administrator, special services provider, and an education support professional, as defined in section 22-2-502 (1.5).

(c) "Exempt party" means any party to the record, a settlement service, a title insurance company, a title insurance agency, a mortgage servicer or a mortgage servicer's qualified agent, or an attorney licensed and in good standing in the state of Colorado to practice law and who is engaged in a real estate matter.

(c.5) "Firefighter" has the same meaning as set forth in section 18-3-201 (1.5).

(d) "Health-care worker" means a licensed health-care provider, or an employee, contracted health-care provider, or individual serving in a governance capacity of a health-care facility licensed pursuant to section 25-1.5-103.

(e) "Human services worker" means:

(I) A state or county employee, or an attorney representing the state or county, who is engaged in investigating or taking legal action regarding allegations of child abuse or neglect pursuant to article 3 of title 19, and a state or county support staff person who has contact with the public relating to these allegations;

(II) A state or county employee, or an attorney representing the state or county, who is engaged in investigating or taking legal action regarding allegations of mistreatment of an at-risk adult pursuant to article 3.1 of title 26, and a state or county support staff person who has contact with the public relating to these allegations;

(III) A state or county employee, including a county attorney or an employee of a person under contract with a state or county, who is engaged in establishing, modifying, and enforcing child support orders pursuant to article 13 of title 26, and a state or county support staff person who has contact with the public relating to these duties;

(IV) A state or county employee, including a county attorney, who is engaged in determining eligibility for or investigating fraud in public programs established in article 2 of title 26, and who has contact with the public relating to these duties; or

(V) An employee of a juvenile detention facility established and operated pursuant to section 19-2.5-1502 or an employee of the division of youth services within the department of human services, including an employee under contract with the division of youth services, who has contact with juveniles involved with youth services.

(f) "Immediate family" means a protected person's spouse, child, or parent or any other person who lives in the same residence as the protected person.

(g) "Judge" has the same meaning as defined by section 18-8-615 (3).

(g.3) "Judicial employee" means a current or former employee of the judicial department.

(h) "Mortgage servicer" has the same meaning as set forth in section 5-21-103 (4).

(i) "Office of the respondent parents' counsel staff member or contractor" means:

(I) An employee of the office of the respondent parents' counsel created in section 13-92-103;

(II) An attorney licensed and in good standing in the state of Colorado to practice law who contracts with the office of the respondent parents' counsel to represent indigent parents who are respondents in dependency and neglect cases brought pursuant to title 19; or

(III) A social worker, family advocate, or peer advocate who contracts with the office of the respondent parents' counsel to assist attorneys in the representation of indigent parents who are respondents in dependency and neglect cases brought pursuant to title 19.

(j) "Participant in the address confidentiality program" means an individual accepted into the address confidentiality program in accordance with part 21 of article 30 of title 24.

(k) "Peace officer" has the same meaning as described in section 16-2.5-101.

(l) "Personal information" means the home address, home telephone number, personal mobile telephone number, pager number, personal email address, social security number, driver's license number, federal tax identification number, bank account number, credit or debit card number, or a personal photograph of a participant in the address confidentiality program or protected person; directions to the home of a participant in the address confidentiality program or protected person; or photographs of the home or vehicle of a participant in the address confidentiality program or protected person.

(m) "Prosecutor" has the same meaning as defined in section 18-8-616 (3).

(n) "Protected person" means an educator, a code enforcement officer, a human services worker, a public health worker, a child representative, a health-care worker, a reproductive health-care services worker, an officer or agent of the state bureau of animal protection, an animal control officer, an office of the respondent parents' counsel staff member or contractor, a current or former judge, a judicial employee, an elected official, staff of the general assembly, a peace officer, a prosecutor, a public defender, a public safety worker, or a firefighter.

(o) "Public defender" means an attorney employed by the office of the state public defender created in section 21-1-101, or an attorney employed by the office of alternate defense counsel created in section 21-2-101.

(p) "Public health worker" means:

(I) An employee, a contractor, or an employee of a contractor of the department of public health and environment, created in section 25-1-102, who is engaged in public health duties, as described in section 25-1.5-101;

(II) An employee, a contractor, or an employee of a contractor of a county or district public health agency, as defined in section 25-1-502, who is engaged in public health duties, as described in section 25-1-506; or

(III) A member of a county or district board of health, other than an elected county commissioner.

(q) "Public safety worker" means:

(I) An employee, a contractor, or an employee of a contractor of the department of corrections who has contact with persons in the custody of the department of corrections or with the family or associates of such persons;

(II) A noncertified deputy sheriff or detention officer, as described in section 16-2.5-103 (2), who has contact with inmates; or

(III) An employee, a contractor, or an employee of a contractor of a community corrections program, as defined in section 17-27-102, who has contact with offenders in a community corrections program.

(q.5) "Reproductive health-care services worker" means a patient who relocated to Colorado, a provider, or an employee of an organization that provides or assists individuals in accessing a legally protected health-care activity, as defined in section 12-30-121 (1)(d).

(r) "Settlement service" has the same meaning as set forth in section 10-11-102 (6.7)(a) to (6.7)(f).

(r.5) "Staff of the general assembly" means a current employee of the general assembly.

(s) "Title insurance agency" has the same meaning as set forth in section 10-11-102 (8.5).

(t) "Title insurance company" has the same meaning as set forth in section 10-11-102 (10).

(2) Repealed.

(2.5) An address confidentiality program participant may submit a written request to a state or local government official and follow the process in section 24-30-2108, C.R.S., including the presentation of a valid address confidentiality program authorization card. If a state or local government official has received the above information, then the state or local government official shall not knowingly make available on the internet personal information about such participant in the address confidentiality program or the actual address, as defined in section 24-30-2103 (1), C.R.S., of such participant in the address confidentiality program.

(2.7) (a) It is unlawful for a person to knowingly make available on the internet personal information about a protected person or the protected person's immediate family if the dissemination of personal information poses an imminent and serious threat to the protected person's safety or the safety of the protected person's immediate family and the person making the information available on the internet knows or reasonably should know of the imminent and serious threat.

(b) A violation of this subsection (2.7) is a class 1 misdemeanor.

(c) This subsection (2.7) does not apply to a person who is a state or local government official or employee who is acting in the course and scope of their duties.

(2.8) (a) A protected person may submit a written request pursuant to subsection (2.8)(b) of this section to a state or local government official to refrain from publishing the protected person's personal information or to remove personal information from records that the state or local government official makes available on the internet. If a state or local government official receives the written request to refrain from publishing personal information from records that are available on the internet, then the state or local government official shall take steps to reasonably ensure that personal information about the protected person or the protected person's immediate family is not made available on the internet.

(b) A protected person's written request to a state or local government official to remove personal information from records that the official makes available on the internet must include:

(I) The protected person's full name and home address;

(II) Evidence that the person submitting the request is a protected person; and

(III) An affirmation stating under penalty of perjury that the person submitting the request has reason to believe that the dissemination of the personal information contained in the records that the official makes available on the internet poses an imminent and serious threat to the person's safety or the safety of the person's immediate family.

(c) An exempt party may access a record that includes information otherwise subject to redaction pursuant to subsection (2.8)(b) of this section, and that is maintained by the county recorder, county assessor, or county treasurer, if the person seeking access to the record provides evidence and an affirmation under penalty of perjury that they are an exempt party.

(d) Each county recorder, county assessor, or county treasurer shall grant an exempt party access to the record based on its existing processes or shall adopt a process to grant access if one is not already in place. Each county recorder, county assessor, or county treasurer may assess administrative costs related to granting access to the exempt party requesting the record.

(2.9) (a) A protected person may request that a person who is not a state or local government official and who has published the protected person's personal information remove the protected person's personal information from publication.

(b) A request made pursuant to this subsection (2.9) must:

(I) Be in writing;

(II) Be sent by certified mail or by electronic mail;

- (III) Provide sufficient information to confirm that the requester is a protected person; and
 - (IV) Adequately identify the document, posting, or other publication containing the personal information.
- (c) The person to whom the request is made shall:
- (I) Remove the personal information within seventy-two hours after receipt of the request; and
 - (II) Notify the protected person by certified mail or by electronic mail of the removal.
- (d) A protected person may bring an action for a violation of this subsection against a person for:
- (I) Declaratory relief;
 - (II) Injunctive relief;
 - (III) Damages incurred as the result of a violation of this subsection (2.9); and
 - (IV) Reasonable attorney's fees.
- (e) If a court finds that a person willfully refused to provide for the removal of personal information knowing that the individual on behalf of whom the request was made was a protected person, the court may award punitive damages.
- (3) Repealed.

Source: **L. 2002:** Entire section added, p. 1139, § 1, effective July 1. **L. 2003:** (2) amended, p. 1616, § 14, effective August 6. **L. 2009:** (1) and (2) amended, (HB 09-1316), ch. 313, p. 1696, § 1, effective May 21. **L. 2015:** (1)(a.9) and (2.5) added and (1)(b) amended, (HB 15-1174), ch. 42, p. 103, § 1, effective March 20; (1)(a.5) amended, (HB 15-1229), ch. 239, p. 885, § 2, effective May 29. **L. 2019:** (1) and (3) amended and (2.7) and (2.8) added, (HB 19-1197), ch. 95, p. 349, § 1, effective April 11. **L. 2020:** (1)(a), (1)(b), (1)(e), (2.7), and (2.8) amended, (HB 20-1052), ch. 77, p. 315, § 1, effective September 14. **L. 2021:** IP(1), (1)(b) (1)(e), (2.7), and (2.8) amended and (1)(f) and (1)(g) added, (HB 21-1107), ch. 153, p. 876, § 1, effective May 18; IP(1), (1)(b), (1)(e), (2.7), (2.8), and (3) amended, (1)(b.5), (1)(d.5), (1)(e.5), (1)(f), (1)(f.6), and (1)(h) added, and (1)(c) and (2) repealed, (HB 21-1015), ch. 311, p. 1899, § 1, effective June 24; (1)(a)(V) amended, (SB21-059), ch. 136, p. 724, § 55, effective October 1. **L. 2022:** (1) and (2.8)(b) amended and (2.8)(c) and (2.8)(d) added, (HB 22-1041), ch. 39, p. 207, § 1, effective March 24; (1)(b.5) added and (1)(n) amended, (SB 22-171), ch. 240, p. 1781, § 1, effective May 26. **L. 2023:** (1)(d) and (1)(n) amended and (1)(q.5) added, (SB 23-188), ch. 68, p. 247, § 15, effective April 14. **L. 2024:** (1)(c.5) added and (1)(n) amended, (HB 24-1104), ch. 64, p. 214, §

1, effective August 7. **L. 2026:** (1)(f), (1)(l), (1)(n), (2.7), and (2.8)(a) amended, (1)(g.3), (1)(r.5), and (2.9) added, and (3) repealed, (HB 26-1422), ch. 331, p. 1944, § 17, effective June 2.

Editor's note: Amendments to subsections (1)(b), (1)(e), and (1)(f) by HB 21-1107 and HB 21-1015 were harmonized.

Cross references: For the legislative declaration in SB 23-188, see section 1 of chapter 68, Session Laws of Colorado 2023.

18-9-313.5. Personal information on the internet - election officials - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Election duties" means activities required or authorized by law to conduct public elections pursuant to the "Uniform Election Code of 1992", articles 1 to 13 of title 1; the "Colorado Local Government Election Code", article 13.5 of title 1; the "Colorado Municipal Election Code of 1965", article 10 of title 31; or parts 8 and 9 of article 1 of title 32.

(b) "Election official" means a county clerk and recorder, a municipal clerk, an election judge, a member of a canvassing board, a member of a board of county commissioners, a member or secretary of a board of directors authorized to conduct public elections, a representative of a governing body, or any other person contracting for or engaged in the performance of election duties. "Election official" includes any person who is an election worker.

(c) "Election worker" means a county clerk and recorder, a person currently employed by a county to perform election duties, a municipal clerk, a person currently employed by a municipal government to perform election duties, the secretary of state, and a person currently employed by the secretary of state to perform election duties. "Election worker" does not include an election judge or a temporary employee of a county, municipal government, or the secretary of state.

(d) "Exempt party" means any party to the record, a settlement service, a title insurance company, a title insurance agency, a mortgage servicer or a mortgage servicer's qualified agent, or an attorney licensed and in good standing in the state of Colorado to practice law and who is engaged in a real estate matter.

(e) "Immediate family" means:

(I) An election official's spouse, child, or parent; or

(II) Any other person who lives in the same residence as the election official.

(f) "Mortgage servicer" has the same meaning as set forth in section 5-21-103 (4).

(g) "Personal information" means a person's home address, home telephone number, personal mobile telephone number, pager number, or personal email address; a photograph of a person; directions to a person's home; or a photograph or description of a person's home, vehicle, or vehicle license plate.

(h) "Settlement service" means a service listed in section 10-11-102 (6.7)(a) to (6.7)(f).

(i) "Title insurance agency" has the same meaning as set forth in section 10-11-102 (8.5).

(j) "Title insurance company" has the same meaning as set forth in section 10-11-102 (10).

(2) (a) It is unlawful for a person to knowingly make available on the internet personal information about an election official or an election official's immediate family if the dissemination of personal information poses an imminent and serious threat to the safety of the election official or the election official's immediate family and the person making the information available on the internet knows or reasonably should know of the imminent and serious threat.

(b) A violation of this subsection (2) is a class 1 misdemeanor.

(3) (a) An election worker may submit a written request pursuant to subsection (3)(b) of this section to a state or local government official to remove the election worker's personal information from records that are available on the internet. If a state or local government official receives the written request, then the state or local government official shall not knowingly make available on the internet personal information about the election worker.

(b) An election worker's written request to a state or local government official to remove personal information from records that the official makes available on the internet must include:

(I) The election worker's full name and home address;

(II) Evidence that the person submitting the request is an election worker; and

(III) An affirmation stating under penalty of perjury that the election worker submitting the request has reason to believe that the dissemination of the personal information contained in the records that the official makes available on the internet poses an imminent and serious threat to the safety of the election worker.

(c) An exempt party may access a record that includes information otherwise subject to redaction pursuant to subsection (3)(b) of this section and that is maintained by the county recorder, county assessor, or county treasurer if the person seeking access to the record provides evidence and an affirmation under penalty of perjury that they are an exempt party.

(d) Each county recorder, county assessor, or county treasurer shall grant an exempt party access to the record based on its existing processes or shall adopt a process to grant access if one is not already in place. Each county recorder, county assessor, or county treasurer may assess administrative costs related to granting access to the exempt party requesting the record.

Source: L. 2022: Entire section added, (HB 22-1273), ch. 324, p. 2292, § 2, effective June 2.

18-9-313.7. Personal information on the internet - elected officials - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) (I) "Elected official" means the governor, the lieutenant governor, the attorney general, the secretary of state, the state treasurer, a member of the general assembly, a school district director, and an elected or appointed official of a local government.

(II) "Elected official" does not include an individual who is a candidate for the office of any elected official.

(III) "Elected official" includes:

(A) An individual who holds an office specified in subsection (1)(a)(I) of this section, whether the individual was elected or appointed by a vacancy committee; and

(B) An individual who has held an office specified in subsection (1)(a)(I) of this section within the last four years.

(b) "Exempt party" means any party to the record, a settlement service, a title insurance company, a title insurance agency, a mortgage servicer or a mortgage servicer's qualified agent, an attorney licensed and in good standing in the state of Colorado to practice law and who is engaged in a real estate matter, and any other individual who provides identifying information and certifies that the information will not be used for the purpose of harassment, intimidation, or commercial purposes, including the sale or resale of information.

(c) "Immediate family" means:

(I) An elected official's spouse, child, or parent; or

(II) Any other person who lives in the same residence as the elected official.

(d) "Mortgage servicer" has the meaning set forth in section 5-21-103 (4).

(e) "Personal information" means a person's home address, home telephone number, personal mobile telephone number, pager number, or personal email address; directions to a person's home; or a photograph or description of a person's home, vehicle, or vehicle license plate.

(f) "Settlement service" means a service listed in section 10-11-102 (6.7)(a) to (6.7)(f).

(g) "Title insurance agency" has the meaning set forth in section 10-11-102 (8.5).

(h) "Title insurance company" has the meaning set forth in section 10-11-102 (10).

(2) (a) It is unlawful for a person to knowingly make available on the internet personal information about an elected official or an elected official's immediate family if the dissemination of personal information poses an imminent and serious threat to the safety of the elected official or the elected official's immediate family and the person making the information available on the internet knows or reasonably should know of the imminent and serious threat.

(b) A violation of this subsection (2) is a class 1 misdemeanor; except that this subsection (2)(b) does not apply to a person who is a state or local government official who is acting in the course and scope of their duties.

(3) (a) An elected official may submit a written request pursuant to subsection (3)(b) of this section to a state or local government official to redact the elected official's personal information from records that the state or local government official makes available on the internet. If a state or local government official receives the written request, the state or local government official shall not knowingly make available on the internet personal information about the elected official.

(b) An elected official's written request to a state or local government official to redact personal information from records that the state or local government official makes available on the internet must include:

(I) The elected official's full name and home address;

(II) The specific personal information that the elected official is requesting be redacted and the location of the records that include the personal information;

(III) Evidence that the person submitting the request is an elected official; and

(IV) An affirmation stating that the elected official submitting the request has reason to believe that the dissemination of the personal information contained in the records that the state or local government official makes available on the internet poses an imminent and serious threat to the safety of the elected official.

(c) An exempt party may access a record that includes information otherwise subject to redaction pursuant to this subsection (3) and that is maintained by a state or local government official if the person seeking access to the record provides evidence and an affirmation under penalty of perjury that they are an exempt party.

(d) Each state or local government official shall grant an exempt party access to the record based on existing processes or shall adopt a process to grant access if one is not already in place.

Each state or local government official may assess administrative costs related to granting access to the exempt party requesting the record.

Source: L. 2026: Entire section added, (HB 26-1422), ch. 331, p. 1946, § 18, effective June 2.

18-9-314. Interference with lawful distribution of newspapers - definitions.

(1) A person commits the offense of interference with lawful distribution of newspapers when that person obtains or exerts unauthorized control over more than five copies of an edition of a newspaper from a newspaper distribution container owned or leased by the newspaper publisher with the intent to prevent other individuals from reading that edition of the newspaper. Control is unauthorized if there is a notice on the newspaper or on the newspaper distribution container that possession of more than five copies with intent to prevent other individuals from reading that edition of the newspaper is illegal.

(2) Interference with lawful distribution of newspapers is a civil infraction and shall be punished by a fine of:

(a) Up to one thousand dollars if the number of newspapers involved was one hundred or fewer or the number of newspapers involved was not determined;

(b) Up to two thousand five hundred dollars if the number of newspapers involved was more than one hundred and fewer than five hundred;

(c) Up to five thousand dollars if the number of newspapers involved was five hundred or more.

(3) As used in this section:

(a) "Edition of a newspaper" means a single press run of a newspaper.

(b) "Newspaper" means a periodical that includes news, editorials, opinion, features, or other matters of public interest distributed on a complimentary basis. "Newspaper" includes any student periodical distributed at any institution of higher education.

(c) "Periodical" means a publication produced on a regular interval.

(4) Notwithstanding any other remedies provided under this section, the newspaper publisher who is the victim of interference with lawful distribution of newspapers, an advertiser who placed an advertisement in the newspaper, or a newspaper reader who regularly reads the newspaper shall have a private civil right of action as provided in section 13-21-123, C.R.S., against the person or persons who acted in violation of subsection (1) of this section.

(5) This section shall not apply to a person who, with the authority or permission of the person who possesses real or personal property, removes or disposes of newspapers that have been deposited in or left on that property without the authority or permission of the person who possesses the real or personal property.

Source: L. 2013: Entire section added, (HB 13-1014), ch. 7, p. 17, § 2, effective August 7. **L. 2021:** IP(2) amended, (SB 21-271), ch. 462, p. 3208, § 337, effective March 1, 2022.

ARTICLE 10

Gambling

18-10-101.	Legislative declaration - construction.	18-10-105.	Possession of a gambling device or record.
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18-10-101. Legislative declaration - construction.

(1) It is declared to be the policy of the general assembly, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling activities in this state; to restrain all persons from patronizing such activities when conducted for the profit of any person; to safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press and to avoid restricting participation by individuals in sport and social pastimes which are not for profit, do not affect the public, and do not breach the peace.

(2) All the provisions of this article shall be liberally construed to achieve these ends and administered and enforced with a view to carrying out the declaration of policy stated in subsection (1) of this section.

Source: L. 71: R&RE, p. 477, § 1. **C.R.S. 1963:** § 40-10-101.

ANNOTATION

Annotator's note. Since § 18-10-101 is similar to former § 40-10-3, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This article prohibits gambling, the keeping of a place where gambling is commonly carried on, the keeping at such place, and exhibiting of gambling devices, and the betting of money or other property upon the results of any game. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

The legislative intent of this section is to prevent public gambling, and includes the risking of money or anything of value between two or more persons, on a contest of either chance, skill, or hazard, where one must be the loser and the other the gainer. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

The declaration of this section evidences a continuation of the policy against gambling for profit in Colorado. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

Golf match not "gambling". A golf match, participated in and bet on by four golfers, in which each of the four, by his playing, had control over the outcome did not constitute "gambling" as defined in § 18-10-102 (2). *Berckefeldt v. Hammer*, 44 Colo. App. 320, 616 P.2d 183 (1980).

"Social gambling" specifically allowed.

This section changed the common law and specifically exempted "social gambling" from the ambit of forbidden conduct. *Houston v. Younghans*, 196 Colo. 53, 580 P.2d 801 (1978).

"Social gambling" is game incidental to bona fide social relationship, participated in by natural persons in no way connected to professional gambling. *Houston v. Younghans*, 196 Colo. 53, 580 P.2d 801 (1978).

Gambling debts owed to a for-profit gambling business are still unenforceable in this state, despite the repeal of former C.R.S. 1963, section 40-10-13. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

The declaration of this section does not support the contention that, although gambling is illegal and against public policy when it occurs in Colorado, it would not be contrary to public policy to enforce gambling debts incurred where gambling is legal. To the contrary, in the above legislative declaration there is a policy restraining any activities related to gambling conducted for profit, when not specifically sanctioned by statute, including collection of any gambling debts. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

This section commands that the act be liberally construed. *Bridge v. People*, 63 Colo. 319, 165 P. 778 (1917).

Because of this section, care need be exercised that neither by illogical construction nor by loose language this article be so circumscribed as to defeat its purpose and usefulness. *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952); *Patterson v. People*, 138 Colo. 368, 333 P.2d 1047 (1959).

This section declares that the definitive statute shall be liberally construed for the detection and punishment of offenders. *Fischer v. People*, 138 Colo. 559, 335 P.2d

871 (1959); *Patterson v. People*, 138 Colo. 368, 333 P.2d 1047 (1959).

State gambling legislation did not preempt municipal ordinance. *Woolverton v. City & County of Denver*, 146 Colo. 247, 361 P.2d 982 (1961), overruled insofar as it invalidated the theory of mutual exclusion where it related to matters of both state-wide and local interest in *Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971), which held that in strictly local and municipal matters ordinances of home rule cities apply to the exclusion of state statutes.

18-10-102. Definitions.

As used in this article 10, unless the context otherwise requires:

(1) "Gain" means the direct realization of winnings; "profit" means any other realized or unrealized benefit, direct or indirect, including without limitation benefits from proprietorship, management, or unequal advantage in a series of transactions.

(2) "Gambling" means risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control, but does not include:

(a) Bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries;

(b) Bona fide business transactions which are valid under the law of contracts;

(c) Other acts or transactions now or hereafter expressly authorized by law;

(d) Any game, wager, or transaction that is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling;

(e) Repealed.

(f) Any use of or transaction involving a crane game, as defined in section 44-30-103 (9); or

(g) Sports betting conducted in accordance with part 15 of article 30 of title 44 and applicable rules of the limited gaming control commission.

(3) "Gambling device" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any professional gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine; except that the term does not include a crane game, as defined in section 44-30-103 (9).

(4) "Gambling information" means a communication with respect to any wager made in the course of, and any information intended to be used for, professional gambling. In the application of this definition the following shall be presumed to be intended for use in professional gambling: Information as to wagers, betting odds, or changes in betting odds. Legitimate news reporting of an event for public dissemination is not gambling information within the meaning of this article.

(5) "Gambling premises" means any building, room, enclosure, vehicle, vessel, or other place, whether open or enclosed, used or intended to be used for professional gambling. In the application of this definition, any place where a gambling device is found is presumed to be intended to be used for professional gambling.

(6) "Gambling proceeds" means all money or other things of value at stake or displayed in or in connection with professional gambling.

(7) "Gambling record" means any record, receipt, ticket, certificate, token, slip, or notation given, made, used, or intended to be used in connection with professional gambling.

(8) "Professional gambling" means:

(a) Aiding or inducing another to engage in gambling, with the intent to derive a profit therefrom; or

(b) Participating in gambling and having, other than by virtue of skill or luck, a lesser chance of losing or a greater chance of winning than one or more of the other participants.

(9) "Repeating gambling offender" means any person who is convicted of an offense under section 18-10-103 (2) or sections 18-10-105 to 18-10-107 or sections 18-20-103 to 18-20-114 or sections 44-30-809 to 44-30-811 or 44-30-818 to 44-30-831 or 44-30-837, within five years after a previous misdemeanor conviction under these sections or a former statute prohibiting gambling activities, or at any time after a previous felony conviction under any of the mentioned sections. A conviction in any jurisdiction of the United States of an offense which, if committed in this state, would be professional gambling shall warrant a prosecution in this state as a repeating gambling offender.

(10) "Vintage slot machine" means any model slot machine, as defined in section 44-30-103 (30), that was introduced on the market prior to January 1, 1984.

Source: L. 71: R&RE, p. 477, § 1. C.R.S. 1963: § 40-10-102. L. 79: (2)(e) added, p. 557, § 3, effective July 1. L. 84: (2)(e) repealed, p. 437, § 2, effective April 30. L. 91: (9) amended, p. 1582, § 8, effective June 4. L. 92: (9) amended, p. 2174, § 26, effective June 2. L. 94: (10) added, p. 19, § 1, effective March 2. L. 95: (2) and (3) amended, p. 44, § 1, effective March 17. L. 2018: IP, (2)(f), (3), (9), and (10) amended, (SB 18-034), ch. 14, p. 239, § 13, effective October 1. L. 2019: (2)(d) and (2)(f) amended and (2)(g) added, (HB 19-1327), ch. 347, p. 3232, § 13, effective (see editor's note).

Editor's note: Section 16(2) of chapter 347 (HB 19-1327), Session Laws of Colorado 2019, provides that changes to this section take effect May 1, 2020, only if, at the November 2019 statewide election, a majority of voters approve the ballot question submitted pursuant to § 44-30-1514. That ballot question, referred to the registered electors as proposition DD, was approved on November 5, 2019, and was proclaimed by the Governor on December 20, 2019. The vote count for the measure was as follows:

FOR: 800,745

AGAINST: 756,712

ANNOTATION

Annotator's note. Since § 18-10-102 is similar to former CSA, C. 48, § 234, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The language of this section is plain and unambiguous. The statute does not prohibit the playing of games. It is only when they are made instruments of winning or losing money or property that a criminal character attaches to them. There being no enumeration of specific games, subjects or things, the general words used must be ascribed their ordinary meaning. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

Gambling defined. Gambling includes physical contests whether of man or beast, when practiced for the purpose of deciding wagers, as well as games of hazard or skill by means of instruments or devices. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

Golf match not "gambling". A golf match, participated in and bet on by four golfers, in which each of the four, by his playing, had control over the outcome did not constitute "gambling" as defined in subsection (2). *Berckefeldt v. Hammer*, 44 Colo. App. 320, 616 P.2d 183 (1980).

Definition of gambling devices pertains to use. The words "gambling device or

apparatus" do not mean literally instrumentalities with appliances adapted and essential to particular games, but include any species of device or apparatus kept and used for gambling, winning, betting, or gaining money or other property. It is the use to which the article or thing is appropriated which renders the keeping or exhibition thereof unlawful within the meaning of the sections here involved. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

"Pinball" machines held gambling devices. Approximately Fifty-Nine *Gambling Devices v. People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Paper tickets that contain a coupon on one side and a cash prize game on the other and the machine that dispenses them are gambling devices. The coupon is merely incidental to the game portion of the ticket, and it does not eliminate the element of risk. *Snizek v. Dept. of Rev.*, 113 P.3d 1280 (Colo. App. 2005).

Video games that had been used in gambling by liquor licensee were "usable in professional gambling activities" so that the games were subject to destruction and the proceeds of such games were subject to forfeiture pursuant to statute, even if the owner did not have actual or constructive knowledge of the use of the games for gambling. *State Dept. of Rev. v. Grooms Music Co.*, 721 P.2d 1225 (Colo. App. 1986).

Nonprofit corporation's fundraising which involved casino-type gambling with play money did not qualify for the

permissible social gambling exemption of this section because participants were risking a thing of value for gain contingent in whole or in part upon chance and the gambling, although incidental to a social relationship, was participated in by persons other than natural persons and was conducted under circumstances in which persons participated in professional gambling as intended by the statute. *Charnes v. Central City Opera House*, 773 P.2d 546 (Colo. 1989).

To determine whether a game is incidental to a bona fide social relationship and thus excluded from the definition of gambling, the critical inquiry is whether the participants came together for any shared purpose other than gambling; where a basketball pool was entered into only by devoted patrons of a neighborhood bar and liquor authority inspectors, it was incidental to a bona fide social relationship. *Leichliter v. State Liquor Licensing Auth.*, 9 P.3d 1153 (Colo. 1999).

Cheating is not an essential element of the offense. Previous legislation was directed against games and bets thereon in which an element of cheating, trickery, or fraud entered, and to places wherein such games and bets continuously occurred; whereas this act, being the law as it now is, is directed against all places used or occupied for gambling, the keeping or exhibiting of gaming tables, establishments, devices, etc., to win or gain money or other property, the practice of gambling for a sum of money or other thing of value, and betting and wagering upon the result thereof.

Everhart v. People, 54 Colo. 272, 130 P. 1076 (1913).

Nor is payment of winnings. While a gaming device may "pay nothing", it nevertheless may be used or kept for the purpose of gambling. Walker v. Begole, 99 Colo. 471, 63 P.2d 1224 (1936); MacArthur v. Wycaver, 120 Colo. 525, 211 P.2d 556 (1949).

The activity reached by this section could not be characterized as free expression or involving any right to privacy as that right has previously been defined. People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

The definition of "profit" in subsection (1) is not unconstitutionally vague. People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

Nor is phrase "aiding or inducing". The phrase "aiding or inducing" as employed in subsection (8)(a) is not unconstitutionally vague. People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

The general definition of "to aid" in § 18-1-901 (3)(a) is applicable to the definition of professional gambling in subsection (8). People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

The term "to induce", while not statutorily defined, may be ascribed its ordinary dictionary definition. People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

Active participation in gambling process not required. It is not necessary in this state that someone actively participate in the gambling process in order to be engaged in professional gambling. People v. Wheatridge Poker Club, 194 Colo. 15, 569 P.2d 324 (1977).

Applied in Houston v. Youngmans, 196 Colo. 53, 580 P.2d 801 (1978); People v. Miller, 199 Colo. 32, 604 P.2d 36 (1979); United States v. McNulty, 729 F.2d 1243 (10th Cir. 1983).

18-10-103. Gambling - professional gambling - offenses.

- (1) A person who engages in gambling commits a petty offense.
- (2) A person who engages in professional gambling commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 478, § 1. **C.R.S. 1963:** § 40-10-103. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3208, § 338, effective March 1, 2022. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1791, § 42, effective October 1.

ANNOTATION

-1653-

Annotator's note. Since § 18-10-103 is similar to former § 40-10-8, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Construction of section. The offense punished by this section was not a crime at common law, and under ordinary circumstances the statute would be subjected to strict construction. The general assembly, however, specifically provided to the contrary in § 18-10-101. Care, therefore, need be exercised that neither by illogical construction nor by loose language be it so circumscribed as to defeat its purpose and usefulness. *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952).

Constitutionality of section. The fact that certain types of gambling were allowed by statute did not deny the petitioner, who was charged with gambling violations, equal protection of the law, especially where § 18-10-107 and this section, under which charges of gambling were issued against the petitioner, applied equally to all persons and made no classifications or distinctions. *Smaldone v. People*, 173 Colo. 385, 479 P.2d 973 (1971).

Playing for purpose of gain violates section. Under a charge of gambling, whether defendants played at a game for a wager with each other or with others is immaterial. If they played for the purpose of gain, whether against each other or with others, they violated the statute. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Question of residence not material under section. An information which

charges in the language of the statute that defendants engaged in gambling for a livelihood is not insufficient because it does not further allege that they were without any fixed residence, gambling for a livelihood being a violation of the statute irrespective of the question of residence. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Two persons may be tried jointly for gambling for a livelihood although the intent of each to secure a livelihood was personal to himself. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Introduction of reputation evidence not reversible error. Where evidence of the defendant's reputation of gambling for a livelihood is corroborative of other evidence, which is sufficient in itself to support the conviction, the introduction of reputation evidence does not constitute reversible error and the holding is limited to the offense of gambling for a livelihood. *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

For purposes of determining the legality of an ex parte order for wiretapping under section 16-15-102, the proposed intervention must involve a person who has previously been convicted of professional gambling twice within 5 years, so that a felony is authorized upon conviction. *United States v. McNulty*, 729 F.2d 1243 (10th Cir. 1983).

Nonprofit corporation's fundraising which involved casino-type gambling with play money violated this section because participants were risking a thing of value for gain contingent in whole or in part upon

chance and the gambling, although incidental to a social relationship, was participated in by persons other than natural persons and was conducted under circumstances in which persons participated in professional gambling as intended by the

statute. *Charnes v. Central City Opera House*, 773 P.2d 546 (Colo. 1989).

Applied in *People ex rel. Brown v. District Court*, 196 Colo. 359, 585 P.2d 593 (1978); *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979).

18-10-104. Gambling devices - gambling records - gambling proceeds.

(1) Except as provided in subsection (2) of this section, all gambling devices, gambling records, and gambling proceeds are subject to seizure by any peace officer and may be confiscated and destroyed by order of a court acquiring jurisdiction. Gambling proceeds shall be forfeited to the state and shall be transmitted by court order to the general fund of the state.

(2) If a gambling device is a vintage slot machine and is not operated for gambling purposes for profit or for business purposes, it shall not be confiscated or destroyed pursuant to subsection (1) of this section. If a gambling device is confiscated and the owner shows that such gambling device is a vintage slot machine and is not used for gambling purposes, the court acquiring jurisdiction shall order such vintage slot machine returned to the person from whom it was confiscated.

Source: L. 71: R&RE, p. 478, § 1. **C.R.S. 1963:** § 40-10-104. **L. 79:** Entire section amended, p. 746, § 1, effective May 25. **L. 88:** (2) amended, p. 739, § 1, effective April 29. **L. 94:** (2) amended, p. 19, § 2, effective March 2.

ANNOTATION

Annotator's note. Since § 18-10-104 is similar to former §§ 40-10-13, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section does not deny due process. *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936).

This section is not in violation of § 25 of art. II, Colo. Const., providing that no

person shall be deprived of life, liberty, or property without due process of law in the respect that no provision is made for jury trial. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); *Stanley-Thompson Liquor Co. v. People*, 63 Colo. 456, 168 P. 750 (1917).

And right to jury trial does not exist. A proceeding under this section is a proceeding in rem, and the constitutional right of trial by jury does not apply to such

proceeding. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); *Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Gambling apparatus and implements are treated by this section as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence, not merely to punish the owner for an unlawful use. This section strikes at the thing itself, and not at any act or intent of its owner. *Newman v. People*, 23 Colo. 300, 47 P. 278 (1896); *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936); *MacArthur v. Wycaver*, 120 Colo. 525, 211 P.2d 556 (1949).

They may be lawfully destroyed by the officers authorized thereunto, even though not used nor kept for use by the one having them in possession. *Stanley-Thompson Liquor Co. v. People*, 63 Colo. 456, 168 P. 750 (1917).

Gambling devices may legally be destroyed whether they are actually used for gambling or not. *Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

If done pursuant to court order. This section provides a means for the destruction of gambling paraphernalia, but even in such case it is to be accomplished in an orderly manner and upon the order of a court of competent jurisdiction. *Houston v. Walton*, 23 Colo. App. 282, 129 P. 263 (1913).

Whether machines were kept for gambling is question for court. In a

proceeding to procure the destruction of gambling devices, the issue of whether the machines were kept for gambling purposes was a question of fact to be determined by the trial court. *Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Statute providing that gambling devices are subject to seizure and may be confiscated and destroyed by court order does not require that the owner of the machine have knowledge, actual or constructive, that such machines are being used for gambling. *State Dept. of Rev. v. Grooms Music Co.*, 721 P.2d 1225 (Colo. App. 1986).

Destruction of devices is not illegal as to person holding mortgage thereon. The destruction of gambling devices on which there was a chattel mortgage under this section is not illegal as to the mortgagee where the devices were left in the possession of the mortgagor to be used as he saw fit, the mortgagee knowing that the only reasonable use they could be put to was for gambling purposes, although the mortgagee did not actually give his consent to or know of such use by the mortgagor. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903).

Injunction probably does not lie to restrain seizing gaming devices used for gambling. *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936).

And they cannot be recovered in replevin nor damages given for injury to them. Gambling devices are things capable of no lawful use and are not the subject of property. They cannot be recovered in

replevin, nor will damages be given for their loss or injury. Stanley-Thompson Liquor Co. v. People, 63 Colo. 456, 168 P. 750 (1917).

Applied in Sullivan v. Modern Music Co., 137 Colo. 292, 324 P.2d 374 (1958).

18-10-105. Possession of a gambling device or record.

(1) Except as provided in subsection (1.5) of this section, a person who owns, manufactures, sells, transports, possesses, or engages in any transaction designed to affect the ownership, custody, or use of a gambling device or gambling record, knowing that it is to be used in professional gambling, commits possession of a gambling device or record.

(1.5) The sale, transportation, manufacture, and remanufacture of gambling devices, including the acquisition of essential parts therefor and the assembly of such parts, is permitted if such devices are sold, transported, manufactured, and remanufactured only for transportation in interstate or foreign commerce when such transportation is not prohibited by any applicable foreign, state, or federal law. Storage of gambling devices is also permitted but only for purposes of manufacturing, remanufacturing, and transporting such devices in interstate or foreign commerce when their transportation is not prohibited. Such activities may be conducted only by persons who have registered with the United States government pursuant to the provisions of chapter 24 of Title XV of the United States Code, as amended. Such gambling devices shall not be openly displayed, except to legal buyers, or sold for use in Colorado regardless of where purchased, nor manufactured, remanufactured, or stored for purposes of manufacture, remanufacture, and transportation in violation of any applicable state or federal law. For purposes of this subsection (1.5), "legal buyer" means a buyer who resides in another state or country which does not restrict the possession of the specific gambling device in question.

(2) Possession of a gambling device or record or violation of subsection (1.5) of this section is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 478, § 1. **C.R.S. 1963:** § 40-10-105. **L. 88:** Entire section amended, p. 739, § 2, effective April 29. **L. 89:** (2) amended, p. 841, § 94, effective July 1. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1791, § 43, effective October 1.

ANNOTATION

The offenses described in this section and section 18-10-107 each require proof of a different element and are not duplicitous. McNulty v. People, 180 Colo.

246, 504 P.2d 335 (1972) (decided under former § 40-10-8, C.R.S. 1963).

Applied in *Paulino v. People*, 113 Colo. 180, 155 P.2d 609 (1945) (decided under former CSA, C. 48, § 230).

18-10-106. Gambling information.

(1) Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or other means or knowingly installs or maintains equipment for the transmission or receipt of gambling information commits a class 2 misdemeanor.

(2) Facilities and equipment furnished by a public utility in the regular course of business, and which remain the property of the utility while so furnished, shall not be seized except in connection with an alleged violation of this article by the public utility and shall be forfeited only upon conviction of the public utility therefor.

Source: **L. 71:** R&RE, p. 478, § 1. **C.R.S. 1963:** § 40-10-106. **L. 89:** (1) amended, p. 841, § 95, effective July 1. **L. 2021:** (1) amended, (SB 21-271), ch. 462, p. 3208, § 339, effective March 1, 2022. **L. 2023:** (1) amended, (HB 23-1293), ch. 298, p. 1791, § 44, effective October 1.

ANNOTATION

Subsection (1) held constitutional. U.S. v. Pinelli, 890 F.2d 1461 (10th Cir. 1989).

18-10-107. Gambling premises.

(1) Whoever as owner, lessee, agent, employee, operator, or occupant knowingly maintains, aids, or permits the maintaining of gambling premises commits maintaining gambling premises.

(2) All gambling premises are common nuisances which shall be subject to abatement as provided by law.

(3) Maintaining gambling premises is a class 2 misdemeanor. If the offender is a repeating gambling offender, it is a class 6 felony.

Source: **L. 71:** R&RE, p. 479, § 1. **C.R.S. 1963:** § 40-10-107. **L. 89:** (3) amended, p. 842, § 96, effective July 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3208, § 340, effective March 1, 2022.

ANNOTATION

Annotator's note. Since § 18-10-107 is similar to former § 40-10-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section does not deny equal protection. The fact that certain types of gambling were allowed pursuant to statute did not deny the petitioner, who was charged with gambling violations, equal protection of the law, especially where this section and § 18-10-103, under which charges of gambling were issued against the petitioner, applied equally to all persons and made no classifications or distinctions. *Smaldone v. People*, 173 Colo. 385, 479 P.2d 973 (1971).

The offenses described in section 18-10-105 and this section each require proof of a different element and are not duplicitous. *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

Intent is to prohibit all gambling places. It is clear that the law intends to, and does, prohibit every place commonly used or occupied for gambling of any character whatsoever, and the keeping and exhibiting of any instrumentality to be used for gambling and winning, betting, or gaining money or other property upon the result of any game, and likewise the practice of gambling. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

And section includes pool halls. The keeper of a pool hall licensed by a city who knowingly permitted several games for money to be played in his hall was held liable to conviction under this section. *Koucles v. People*, 64 Colo. 595, 173 P. 400 (1918).

Information need not name persons who played. In an information under this section for keeping a room to be used and occupied for gambling, it is not necessary to set forth the names of persons who played at games in such room. *Chase v. People*, 2 Colo. 509 (1875).

Evidence held sufficient. *Paulino v. People*, 113 Colo. 180, 155 P.2d 609 (1945).

In a prosecution for keeping a gambling house and gaming devices, evidence of a room and desk, of posted odds on athletic contests, and betting in the establishment occupied by a corporation in the business of which defendant was active was held sufficient to go to the jury and to sustain a verdict of guilty, such facts being uncontradicted. *Wolfe v. People*, 90 Colo. 102, 6 P.2d 927 (1932).

Ordinance licensing casino not valid city ordinance. *Vick v. People*, 166 Colo. 565, 445 P.2d 220 (1968).

18-10-108. Exceptions.

Nothing contained in this article 10 shall be construed to modify, amend, or otherwise affect the validity of any provisions contained in part 6 of article 21 of title 24 and articles 30 and 32 of title 44.

Source: L. 71: R&RE, p. 479, § 1. **C.R.S. 1963:** § 40-10-108. **L. 91:** Entire section amended, p. 1582, § 9, effective June 4. **L. 2018:** Entire section amended, (HB 18-1024), ch. 26, p. 322, § 13, effective October 1; entire section amended, (HB 18-1375), ch. 274, p. 1726, § 94, effective October 1.

18-10.5 ARTICLE 10.5

Simulated Gambling Devices

18-10.5-101. Legislative declaration.

18-10.5-103. Prohibition - penalties -
exemptions.

18-10.5-102. Definitions.

18-10.5-101. Legislative declaration.

(1) The general assembly finds, determines, and declares that:

(a) Recently, certain individuals and companies have developed electronic machines, systems, and devices to enable gambling through pretextual sweepstakes relationships predicated on the sale of internet services, telephone cards, and other products at business locations that are or may be commonly known as internet sweepstakes cafes. These machines, systems, and devices, as more fully described in this article, appear designed to evade the existing constitutional and statutory regulations on gambling activity in Colorado and therefore are declared to be contrary to the public policy of this state.

(b) The gambling occurring at internet sweepstakes cafes has none of the protections that are afforded to players at legal gaming sites in Colorado. This absence of uniform regulation and ongoing, governmental oversight presents a danger to consumers throughout the state of Colorado. These sites comply with none of the regulatory requirements, such as surveillance and tracking of wagers and payouts, to assure consumers that gambling is being conducted fairly and honestly. The general assembly finds that these dangers are profound, putting at risk the financial resources of vulnerable persons and customers who are used to wagering based on clear regulatory standards and who have official lines of authority to which they may appeal when there are questionable or illegal practices used by a licensed gaming operator.

(c) The proliferation of internet sweepstakes cafes presents an increasing risk to consumers, particularly as these sweepstakes cafes have spread to sites throughout the state and are capable of operating without facing adverse consequences for their illegal, unfair, or unregulated acts;

(d) The diversion of consumer dollars to these untaxed gambling activities not only presents the opportunity for theft but also undermines state and local programs that are funded by revenue derived from legalized gambling, including parks and recreation, historic preservation, and the state's general fund;

(e) There is no adequate local or federal regulation of internet sweepstakes cafes, and the ability of the owners of those facilities to operate in any community in the state or to move their operations from one part of the state to another without notifying any regulatory body makes this an issue of statewide concern, appropriate for action by the general assembly;

(f) The voters of Colorado have carefully chosen the forms of gambling to which to give their approval and the conditions under which those forms of gambling may be conducted. At no time has the question of legalization of internet sweepstakes cafes been presented to the voters of this state. Without a vote of the people, the state of Colorado cannot permit the operation of unauthorized, unregulated, and unsupervised gambling or lotteries in violation of section 2 or 9 of article XVIII of the Colorado constitution.

Source: L. 2015: Entire article added, (HB 15-1047), ch. 24, p. 57, § 1, effective March 13.

18-10.5-102. Definitions.

As used in this article 10.5, unless the context otherwise requires:

(1) "Electronic gaming machine" means an electrically or electronically operated machine or device that is used by a sweepstakes entrant and that displays the results of a game entry or game outcome to a participant on a screen or other mechanism at a business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person conducting the sweepstakes or by that person's partners, affiliates, subsidiaries, agents, or contractors. The term includes a machine or device that:

(a) Uses a simulated game terminal as a representation of the prizes associated with the results of the sweepstakes entries;

(b) Uses software that simulates a game that influences or determines the winning or value of the prize, or appears to influence or determine the winning or value of the prize;

(c) Selects prizes from a predetermined, finite pool of entries;

- (d) Uses a mechanism that reveals the content of a predetermined sweepstakes entry;
 - (e) Predetermines the prize results and stores those results for delivery when the sweepstakes entry is revealed;
 - (f) Uses software to create a game result;
 - (g) Requires a deposit of any currency or token or the use of any credit card, debit card, prepaid card, or other method of payment to activate the machine or device;
 - (h) Requires direct payment into the machine or device or remote activation of the machine or device upon payment to the person offering the sweepstakes game;
 - (i) Requires the purchase of a related product at additional cost in order to participate in the sweepstakes game or makes a related product available for no cost but under restrictive conditions;
 - (j) Reveals a sweepstakes prize incrementally even though the progress of the images on the screen does not influence whether a prize is awarded or the value of any prize awarded; or
 - (k) Determines and associates the prize with an entry or entries at the time the sweepstakes is entered.
- (2) "Enter" or "entry" means the act or process by which a person becomes eligible to receive a prize offered in a sweepstakes.
- (3) "Entrant" means a person who is or seeks to become eligible to receive a prize offered in a sweepstakes.
- (3.5) "Gambling", whether used alone or as part of the phrase "simulated gambling" or "simulated gambling device", has the meaning set forth in section 18-10-102 (2); except that, for purposes of this article 10.5, the exception set forth in section 18-10-102 (2)(a) does not apply.
- (4) "Local jurisdiction" means a town, city, city and county, or the unincorporated area of a county.
- (5) (a) "Prize" means a gift, award, gratuity, good, service, credit, or anything else of value, including a thing of value for a "gain" as defined in section 18-10-102 (1), that may be transferred to an entrant, whether or not possession of the prize is actually transferred or placed on an account or other record as evidence of the intent to transfer the prize.
- (b) "Prize" does not include:
- (I) Free or additional play;
 - (II) Any intangible or virtual award that cannot be converted into money, goods, or services;
- or

(III) A paper or electronic coupon, whether issued to a player as a single ticket or token or as multiple tickets or tokens, that is won in return for a single play of a device; has a value that does not exceed the equivalent of twenty-five dollars; cannot be exchanged or returned for money, monetary credits, or any financial consideration; and cannot be used to acquire or exchanged for any product that is, contains, or can be used as a constituent part of or accessory for:

- (A) Alcohol beverages;
- (B) Tobacco, tobacco products, marijuana, or smoking; or
- (C) Firearms or ammunition.

(6) (a) "Simulated gambling device" means a mechanically or electronically operated machine, network, system, program, or device that is used by an entrant and that displays simulated gambling displays on a screen or other mechanism at a business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person conducting the game or by that person's partners, affiliates, subsidiaries, agents, or contractors; except that the term does not include bona fide amusement devices, as authorized in section 44-3-103 (47), that pay nothing of value, cannot be adjusted to pay anything of value, and are not used for gambling. "Simulated gambling device" includes:

- (I) A video poker game or any other kind of video card game;
- (II) A video bingo game;
- (III) A video craps game;
- (IV) A video keno game;
- (V) A video lotto game;
- (VI) A video roulette game;
- (VII) A pot-of-gold;
- (VIII) An eight-liner;
- (IX) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols;
- (X) An electronic gaming machine, including a personal computer of any size or configuration that performs any of the functions of an electronic gaming machine;
- (XI) A slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both, as provided by section 9 (4)(c) of article XVIII of the Colorado constitution; and

(XII) A device that functions as, or simulates the play of, a slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both, as provided by section 9 (4)(c) of article XVIII of the Colorado constitution.

(b) "Simulated gambling device" does not include any pari-mutuel totalisator equipment that is used for pari-mutuel wagering on live or simulcast racing events and that has been approved by the director of the division of racing events for entities authorized and licensed under article 32 of title 44.

(7) "Sweepstakes" means any game, advertising scheme or plan, or other promotion that, with or without payment of any consideration, allows a person to enter to win or become eligible to receive a prize.

Source: L. 2015: Entire article added, (HB 15-1047), ch. 24, p. 58, § 1, effective March 13. **L. 2018:** IP, (5), and (6) amended and (3.5) added, (HB 18-1234), ch. 381, p. 2298, § 3, effective June 6. **L. 2019:** IP(6)(a) and (6)(b) amended, (SB 19-241), ch. 390, p. 3465, § 13, effective August 2.

18-10.5-103. Prohibition - penalties - exemptions.

(1) A person commits unlawful offering of a simulated gambling device if the person offers, facilitates, contracts for, or otherwise makes available to or for members of the public or members of an organization or club any simulated gambling device where:

(a) The person receives, directly or indirectly, a payment or transfer of consideration in connection with an entrant's use of the simulated gambling device, admission to premises on which the simulated gambling device is located, or the purchase of any product or service associated with access to or use of the simulated gambling device, regardless of whether consideration in connection with such use, admission, or purchase is monetary or nonmonetary and regardless of whether it is paid or transferred before the simulated gambling device is used by an entrant; and

(b) As a consequence of, in connection with, or after the play of the simulated gambling device, an award of a prize is expressly or implicitly made to a person using the device.

(2) Unlawful offering of a simulated gambling device is a class 2 misdemeanor.

(3) Without regard to any penalty imposed under subsection (2) of this section, the attorney general and each district attorney may apply to the district court of a district in which a person who violates subsection (1) of this section is located, advertises for entrants, or does business for appropriate additional relief, including:

(a) Injunctive relief, including a temporary restraining order or preliminary or permanent injunction, to restrain and enjoin violations of this section;

(b) Damages, up to and including three times the total dollar amount of business transacted or facilitated by any person who violates subsection (1) of this section, payable to the local jurisdiction in which the person is located, advertises for entrants, or does business; and

(c) Other relief the district court deems appropriate.

(4) A person who suffers any ascertainable loss of money or of any tangible or intangible personal property as a result of a violation of this section and who also holds a license to offer gambling services under Colorado law may apply to the district court of any district where the person who violates subsection (1) of this section is or was located, advertises for entrants, or does business for appropriate additional relief, including:

(a) Injunctive relief, including a temporary restraining order or preliminary or permanent injunction, to restrain and enjoin violations of this section;

(b) Damages up to and including three times the actual damages sustained as a result of violations of this section;

(c) Reasonable attorney fees and costs; and

(d) Other relief the district court deems appropriate.

(5) The court may award reasonable attorney fees and costs to a defendant for any action filed pursuant to subsection (4) of this section that was substantially groundless, frivolous, or vexatious.

(6) A criminal conviction against a named defendant under subsection (2) of this section is prima facie evidence of the liability of that named defendant in an action brought under subsection (3) or (4) of this section.

(7) A civil action under this section must be filed within one year after the act or transaction giving rise to the cause of action.

(8) Conducting or assisting in the conduct of gaming wagering activities and live or simulcast racing and pari-mutuel wagering activities otherwise authorized by Colorado law is not a violation of this section.

(9) Nothing in this section:

(a) Prohibits, limits, or otherwise affects any purchase, sale, exchange, or other transaction related to stocks, bonds, futures, options, commodities, or other similar instruments or transactions occurring on a stock or commodities exchange, brokerage house, or similar entity; or

(b) Limits or alters the application of the requirements for sweepstakes, contests, and similar activities that are otherwise established under the laws of this state.

(10) The provision of internet or other online access, transmission, routing, storage, or other communication-related services or website design, development, storage, maintenance, billing, advertising, hypertext linking, transaction processing, or other site-related services by a telephone company, internet service provider, software developer or licensor, or other party providing similar services to customers in the normal course of its business does not violate this section even if those customers use the services to conduct a prohibited game, contest, lottery, or other activity in violation of this article; except that this subsection (10) does not exempt from criminal prosecution or civil liability a software developer, licensor, or other party whose primary purpose in providing such service is to support the offering of simulated gambling devices.

(11) This section does not apply to an owner, operator, employee, or customer of a simulated gambling device, or of a business offering simulated gambling devices, who:

(a) Ceased participating in such activity on or before July 1, 2018; and

(b) Provides clear documentation to the district attorney that:

(I) A lawful contract has been entered into for the sale or transfer of all simulated gambling devices connected with the activity to a person by whom, or into a jurisdiction where, the activity is lawful; and

(II) Consummates the contract by actually selling or transferring the simulated gambling devices within one hundred eighty days after the contract was entered into or after any simulated gambling devices that were seized, confiscated, or forfeited by law enforcement authorities have been returned, whichever occurs later.

Source: L. 2015: Entire article added, (HB 15-1047), ch. 24, p. 60, § 1, effective March 13. **L. 2018:** (1)(a) amended and (11) added, (HB 18-1234), ch. 381, p. 2300, § 4, effective June 6. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3208, § 341, effective March 1, 2022.

ARTICLE 11

Offenses Involving Disloyalty

PART 1

18-11-102. Insurrection.

TREASON AND RELATED OFFENSES

18-11-101. Treason.

PART 2
ANARCHY - SEDITION

18-11-201.	Advocating overthrow of government.	18-11-203.	Membership in anarchistic and seditious associations.
18-11-202.	Inciting destruction of life or property.	18-11-204.	Mutilation - contempt of flag - penalty.
		18-11-205.	Unlawful to display flag - exceptions.

PART 1
TREASON AND RELATED OFFENSES

18-11-101. Treason.

(1) A person commits treason if he levies war against the state of Colorado or adheres to its enemies, giving them aid and comfort. No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

(2) Treason is a class 1 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-101.

18-11-102. Insurrection.

(1) Any person who, with the intent by force of arms to obstruct, retard, or resist the execution of any law of this state, engages, cooperates, or participates with any armed force or with an armed force invades any portion of this state commits insurrection.

(2) Insurrection is a class 5 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-102. L. 89: (2) amended, p. 842, § 97, effective July 1.

PART 2

ANARCHY - SEDITION

18-11-201. Advocating overthrow of government.

(1) Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, or otherwise, shall advocate, teach, incite, propose, aid, abet, encourage, or advise resistance by physical force to, or the destruction or overthrow by physical force of, constituted government in general, or of the government or laws of the United States, or of this state, under circumstances constituting a clear and present danger that violent action will result therefrom, commits sedition.

(2) Sedition is a class 5 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-201. L. 89: (2) amended, p. 842, § 98, effective July 1.

18-11-202. Inciting destruction of life or property.

Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, shall advocate, teach, incite, propose, aid, abet, encourage, or advise the unlawful injury or destruction of private or public property by the use of physical force, violence, or bodily injury, or the unlawful injury by the use of physical force or violence of any person, or the unlawful taking of human life, as a policy or course of conduct, under circumstances constituting a clear and present danger that violent action will result therefrom, commits a class 6 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-202. L. 81: Entire section amended, p. 981, § 7, effective May 13. L. 89: Entire section amended, p. 842, § 99, effective July 1.

18-11-203. Membership in anarchistic and seditious associations.

(1) Any association, organization, society, or corporation, one of whose purposes or professed purposes is to bring about any governmental, social, industrial, or economic change in this state or in the United States by the use of sabotage, terrorism, physical force, violence, or bodily injury, or which teaches, advocates, advises, or defends the use of sabotage, terrorism, physical force, violence, or bodily injury to person or property, or threats of such injury, to

accomplish such change, and which shall, by any such means, prosecute or pursue such purpose or professed purpose is declared to be anarchistic and seditious in character and to be an unlawful association.

(2) Any person who, in this state, shall act or profess to act as an officer of any such unlawful association, or shall speak, write, or publish as a representative or professed representative of any such unlawful association, or, knowing the purpose, teachings, and doctrine of such association, shall become or continue to be a member thereof or contribute dues, money, or other things of value to it or to anyone for it commits a class 5 felony.

Source: L. 71: R&RE, p. 480, § 1. C.R.S. 1963: § 40-11-203. L. 81: (1) amended, p. 981, § 8, effective May 13. L. 89: (2) amended, p. 842, § 100, effective July 1.

18-11-204. Mutilation - contempt of flag - penalty.

(1) It is unlawful for any person to mutilate, deface, defile, trample upon, burn, cut, or tear any flag in public:

- (a) With intent to cast contempt or ridicule upon the flag; or
- (b) With intent to outrage the sensibilities of persons liable to observe or discover the action or its results; or
- (c) With intent to cause a breach of the peace or incitement to riot; or
- (d) Under such circumstances that it may cause a breach of the peace or incitement to riot.

(2) "Flag", as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the state of Colorado.

(3) Any person violating the provisions of this section commits a petty offense.

Source: L. 71: R&RE, p. 480, § 1. C.R.S. 1963: § 40-11-204. L. 2021: (3) amended, (SB 21-271), ch. 462, p. 3208, § 342, effective March 1, 2022.

ANNOTATION

Law reviews. For note, "Comment: Colorado Flag Desecration Statute", see 48 Constitutional Law — Symbolic Speech — Den. L. J. 451 (1971). For article, "The

Flag-Burning Episode: An Essay on the Constitution", see 61 U. Colo. L. Rev. 39 (1990).

Subsection (1)(a) unconstitutional. Provision of this section making it unlawful to mutilate, deface, and defile a flag of the United States with intent to cast contempt thereupon is unconstitutional upon its face because the interests it seeks to promote are contrary to the fundamental values protected by the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Statute was not designed to proscribe mutilating or misusing flag per se. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Specific intent required. A violation of this section occurs only when the surrounding circumstances manifest the

exercise of the intellect in such a manner that inferences may be drawn therefrom that the acts or conduct were done with the specific intent of casting contempt on the flag. There is no violation of this section where the proscribed acts are the result of thoughtlessness, inadvertence, accident, or the like. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Symbolic speech protected. Conduct, which consisted of wearing a pair of blue jeans on the seat of which a portion of the American flag had been sewn, manifested an expressive intent and a communicative content such as to be considered "symbolic speech" and consequently was protected "speech" under the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

18-11-205. Unlawful to display flag - exceptions.

(1) Any person who displays any flag other than the flag of the United States of America or the state of Colorado or any of its subdivisions, agencies, or institutions on a permanent flagstaff located on a state, county, municipal, or other public building or on its grounds within this state commits a petty offense.

(2) (Deleted by amendment, L. 2007, p. 423, § 1, effective August 3, 2007.)

(3) "Flag", as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of a particular nation, state, movement, cause, or organization.

(4) (a) This section does not apply to:

(I) The display of the flag of the United Nations or the flag of a foreign nation displayed to identify persons officially representing such foreign nation or the property or premises of the person or nation;

(II) The display of an appropriate flag upon ceremonial or commemorative occasions proclaimed by the president of the United States, the governor of the state of Colorado, the board

of county commissioners of any county, or the mayor or other chief executive officer of a city or town within this state;

(III) The display of the flag of any adjacent state with the flag of the state of Colorado at the ports of entry weigh stations, in recognition of the joint state port operation; or

(IV) (Deleted by amendment, L. 2007, p. 423, § 1, effective August 3, 2007.)

(V) The display of a prisoners of war and missing in action flag or other appropriate veteran commemorative, United States or state armed forces, or military commemorative flag when displayed in accordance with 4 U.S.C. sec. 7;

(VI) The display of flags of foreign nations for special, occasional, ceremonial purposes when displayed in accordance with 4 U.S.C. sec. 7; or

(VII) The display of a flag for educational, cultural, or historical purposes with the prior permission of the chief administrative officer of the state, county, municipal, or other public building or grounds.

(b) This subsection (4) shall be an affirmative defense.

Source: L. 71: R&RE, p. 480, § 1. C.R.S. 1963: § 40-11-205. L. 73: p. 540, § 11. L. 93: (4) amended, p. 39, § 3, effective July 1. L. 2002: (4) amended, p. 317, § 2, effective August 7. L. 2007: (1), (2), and (4)(a)(IV) amended and (4)(a)(V), (4)(a)(VI), and (4)(a)(VII) added, p. 423, § 1, effective August 3. L. 2021: (1) amended, (SB 21-271), ch. 462, p. 3209, § 343, effective March 1, 2022.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for requirement that the flag be displayed in certain state institutions, see § 27-91-108.

ANNOTATION

Law reviews. For article, "Red Flags and the Flag", see 13 Rocky Mt. L. Rev. 47 (1940).

ARTICLE 12

Offenses Relating to Firearms and Weapons

PART 1
FIREARMS AND WEAPONS - GENERAL

18-12-101.	Peace officer affirmative defense - definitions.	18-12-106.	Prohibited use of weapons - definitions.
18-12-102.	Possessing a dangerous or illegal weapon - affirmative defense - definition.	18-12-106.5.	Use of stun guns.
18-12-103.	Possession of a defaced firearm.	18-12-107.	Penalty for second offense.
18-12-103.5.	Defaced firearms - contraband - destruction.	18-12-107.5.	Illegal discharge of a firearm - penalty.
18-12-104.	Defacing a firearm.	18-12-108.	Possession of weapons by previous offenders.
18-12-105.	Unlawfully carrying a concealed weapon - unlawful possession of weapons.	18-12-108.5.	Possession of handguns by juveniles - prohibited - exceptions - penalty.
18-12-105.1.	Permits for concealed weapons - liability. (Repealed)	18-12-108.7.	Unlawfully providing or permitting a juvenile to possess a handgun - penalty - unlawfully providing a firearm other than a handgun to a juvenile - penalty.
18-12-105.3.	Unlawful carrying of a firearm in government buildings - penalty - definitions.	18-12-109.	Possession, use, or removal of explosives or incendiary devices - possession of components thereof - chemical, biological, and nuclear weapons - persons exempt - hoaxes.
18-12-105.5.	Unlawfully carrying a weapon - unlawful possession of weapons - school, college, or university grounds - definition.	18-12-110.	Forfeiture of firearms.
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18-12-112.	Private firearms transfers - sale and purchase - background check required - penalty - definitions.	18-12-118.	Unlawful three-dimensional printing of a firearm or firearm component - penalties - definitions.
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18-12-114.	Secure firearm storage required - penalty - exceptions.	18-12-202.	Definitions.
18-12-114.5.	Secure firearm storage in a vehicle - penalty - definition.	18-12-202.5.	Concealed handgun training class - refresher class - rules.
18-12-115.	Waiting period for firearms sales - background check required - penalty - exceptions.	18-12-202.7.	Concealed handgun training class - instructor verification.
18-12-116.	Enforcement of large-capacity magazine ban by regulating the manufacture, distribution, transfer, sale, and purchase of specified semiautomatic firearms - penalties - definitions.	18-12-203.	Criteria for obtaining a permit.
		18-12-204.	Permit contents - validity - carrying requirements.
		18-12-205.	Sheriff - application - procedure - background check.
		18-12-206.	Sheriff - issuance or denial of permits - report.
		18-12-207.	Judicial review - permit denial - permit suspension - permit revocation - denial,

	suspension, or revocation of instructor verification.	18-12-401.5.	Permit required - issuing agency - cash fund - inspections - penalty - report - rules.
18-12-208.	Colorado bureau of investigation - duties.		
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18-12-506. Background checks at gun
shows - records - fees -

notice posted by promoter
- penalties - definition.

PART 1

FIREARMS AND WEAPONS - GENERAL

18-12-101. Peace officer affirmative defense - definitions.

(1) As used in this article 12, unless the context otherwise requires:

(a) "Adult" means any person eighteen years of age or older.

(a.2) "Ammunition" means an ammunition or cartridge case, primer, bullet, or propellant powder designed for use in a firearm. The term "ammunition" does not include:

(I) A shotgun shot or pellet not designed for use as the single, complete projectile load for one shotgun hull or casing; or

(II) An unloaded, nonmetallic shotgun hull or casing that does not have a primer.

(b) "Ballistic knife" means any knife that has a blade that is forcefully projected from the handle by means of a spring-loaded device or explosive charge.

(c) "Blackjack" includes any billy, sand club, sandbag, or other hand-operated striking weapon consisting, at the striking end, of an encased piece of lead or other heavy substance and, at the handle end, a strap or springy shaft that increases the force of impact.

(d) "Bomb" means any explosive or incendiary device or molotov cocktail, as defined in section 9-7-103, or any chemical device that causes or can cause an explosion, that is not specifically designed for lawful and legitimate use in the hands of its possessor.

(e) "Bureau" means the Colorado bureau of investigation created in section 24-33.5-401.

(f) "Federal firearms licensee" means a federally licensed firearm dealer, federally licensed firearm importer, and federally licensed firearm manufacturer.

(g) "Federally licensed firearm dealer" means a licensed dealer as defined in 18 U.S.C. sec. 921 (a)(11).

(h) "Federally licensed firearm importer" means a licensed importer as defined in 18 U.S.C. sec. 921 (a)(9).

(i) "Federally licensed firearm manufacturer" means a licensed manufacturer as defined in 18 U.S.C. sec. 921 (a)(10).

(j) "Firearm" means any weapon, including a starter gun, that can, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of a firearm; or a firearm silencer. "Firearm" does not include an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16). In the case of a licensed collector, "firearm" means only curios and relics. "Firearm" includes a weapons parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. "Firearm" does not include a weapon, including a weapons parts kit, in which the frame or receiver of the firearm, as defined in subsection (1)(m) of this section, or the weapon, is destroyed.

(k) "Firearm silencer" means any instrument, attachment, weapon, or appliance for causing the firing of any gun, revolver, pistol, or other firearm to be silent or intended to lessen or muffle the noise of the firing of any such weapon.

(l) "Fire control component" means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails.

(m) "Frame or receiver of a firearm" means a part of a firearm that, when the complete firearm is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect the fire control components. Any part of a firearm imprinted with a serial number is presumed to be a frame or receiver of a firearm, unless the federal bureau of alcohol, tobacco, firearms, and explosives makes an official determination otherwise or there is other reliable evidence to the contrary.

(n) "Gas gun" means a device designed for projecting gas-filled projectiles that release their contents after having been projected from the device and includes projectiles designed for use in such a device.

(o) "Handgun" means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable, or magazine breech, does not exceed twelve inches.

(p) "Juvenile" means any person under the age of eighteen years.

(q) "Knife" means any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, but does not include a hunting or fishing knife carried for sports use. The issue that a knife is a hunting or fishing knife must be raised as an affirmative defense.

(r) "Locking device" means a device that prohibits the operation or discharge of a firearm and that can only be disabled with the use of a key, combination, or biometric data.

(s) "Machine gun" means any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger.

(t) Repealed.

(u) "Personalized firearm" means a firearm that has, as part of its original manufacture, incorporated design technology that allows the firearm to be fired only by the authorized user and prevents any of the safety characteristics of the firearm from being readily deactivated by anyone other than the authorized user. The technology limiting the firearm's operational use may include, but is not limited to, fingerprint verification, magnetic encoding, radio frequency tagging, and other automatic user identification systems utilizing biometric, mechanical, or electronic systems.

(u.3) "Rapid-fire device" means any device, part, kit, tool, accessory, or combination of parts that has the effect of increasing the rate of fire of a semiautomatic firearm above the standard rate of fire for the semiautomatic firearm that is not otherwise equipped with that device, part, or combination of parts.

(u.7) "Semiautomatic firearm" means a firearm that is not a machine gun and that, upon initiating the firing sequence, fires the first chambered cartridge and uses a portion of the energy of the firing cartridge to extract the expended cartridge case, chamber the next round, and prepare the firing mechanism to fire again, and requires a separate pull, release, push, or initiation of the trigger to fire each cartridge. "Semiautomatic firearm" includes a semiautomatic rifle, semiautomatic shotgun, or semiautomatic handgun.

(v) "Short rifle" means a rifle having a barrel less than sixteen inches long or an overall length of less than twenty-six inches.

(w) "Short shotgun" means a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches.

(x) "Stun gun" means a device capable of temporarily immobilizing a person by the infliction of an electrical charge.

(y) "Three-dimensional printer" or "3-D printer" means a computer-aided manufacturing device capable of producing a three-dimensional object from a three-dimensional digital model through an additive manufacturing process that involves the layering of two-dimensional cross sections formed of a resin or similar material that are fused together to form a three-dimensional object.

(z) "Unfinished frame or receiver" means any forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture when it may readily be completed, assembled, or converted to be used as the frame or receiver of a functional firearm; or

that is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed, assembled, or converted.

(2) It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties.

Source: **L. 71:** R&RE, p. 481, § 1. **C.R.S. 1963:** § 40-12-101. **L. 73:** p. 540, § 12. **L. 87:** (1)(a) R&RE and (1)(a.5) and (1)(i.5) added, p. 674, §§ 1, 2, effective May 16. **L. 91:** (1)(b) amended, p. 407, § 17, effective June 6. **L. 93, 1st Ex. Sess.:** (1)(a) amended and (1)(a.3), (1)(e.5), and (1)(e.7) added, p. 1, § 1, effective September 13. **L. 2007:** (1)(e) amended, p. 1688, § 6, effective July 1. **L. 2013:** (1)(b.5) added, (HB 13-1229), ch. 47, p. 137, § 6, effective March 20. **L. 2017:** IP(1) amended and (1)(e) and (1)(j) repealed, (SB 17-008), ch. 74, p. 234, § 1, effective August 9. **L. 2021:** (1)(f.5) and (1)(g.5) added, (HB 21-1106), ch. 39, p. 146, § 3, effective July 1. **L. 2023:** (1)(b.4), (1)(b.6), (1)(b.8), (1)(b.9), (1)(c.3), (1)(c.5), (1)(g.2), (1)(k), and (1)(l) added, (SB 23-279), ch. 311, p. 1893, § 1, effective June 2; (1)(b.7) and (1)(c.5) added, (SB 23-169), ch. 123, p. 458, § 1, effective August 7. **L. 2025:** (1)(g.2) repealed and (1)(g.7) and (1)(g.8) added, (SB 25-003), ch. 68, p. 288, § 1, effective April 10; (1) amended, (SB 25-300), ch. 428, p. 2443, § 17, effective August 6; (1)(a.2) added, (HB 25-1133), ch. 89, p. 368, § 1, effective July 1, 2026.

Editor's note: (1) Amendments to subsection (1)(c.5) by SB 23-169 and SB 23-279 were harmonized.

(2) Amendments to subsection (1) by SB 25-300 and HB 25-1133 were harmonized, effective July 1, 2026.

(3) Amendments to subsection (1) by SB 25-003 and SB 25-300 were harmonized resulting in the relocation of subsection (1)(g.2), as repealed by SB 25-003, to (1)(t) and subsections (1)(g.7) and (1)(g.8), as added by SB 25-003, to (1)(u.3) and (1)(u.7), respectively.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) For the short title ("Promoting Child Safety Through Responsible Firearm Storage Act") and the legislative declaration in HB 21-1106, see sections 1 and 2 of chapter 39, Session Laws of Colorado 2021.

ANNOTATION

-1678-

Definition of "knife" in subsection (1)(f) is not void for vagueness or overbreadth. Where defendant possessed a screwdriver with specific intent to use it as a weapon, elements of crime defined in § 18-12-108 were present. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

Defendant's intent to use an object as a weapon is not established by the object's appearance alone, even if the appearance demonstrates that its primary use is as a weapon; this test does not follow *Gross* and is contrary to the plain language of the concealed weapons statute. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

The definition of "knife" in subsection (1)(f) is sufficiently specific to give fair warning of the proscribed conduct and is therefore constitutional. In applying the definition under § 18-12-108, the prosecution must prove that one of the

intended uses of the instrument by the defendant was as a weapon. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

As the term "knife" is not specifically defined in the deadly weapons statute, the meaning of "knife" anywhere it is used in this article is specifically limited by the definition contained in subsection (1)(f) regardless of cross reference to the broader deadly weapons statute. *People ex rel. J.W.T.*, 93 P.3d 580 (Colo. App. 2004).

The definition of "knife" is expressly limited to the word as it is used in this article. It does not define what a knife is for purposes of the menacing statute, § 18-3-206. *People v. Romero*, 2025 COA 91, 583 P.3d 449.

Applied in *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

18-12-102. Possessing a dangerous or illegal weapon - affirmative defense - definition.

(1) As used in this section, the term "dangerous weapon" means a firearm silencer, machine gun, rapid-fire device, short shotgun, or short rifle.

(2) As used in this section, the term "illegal weapon" means a blackjack, gas gun, ballistic knife, or metallic knuckles.

(3) A person who knowingly possesses a dangerous weapon commits a class 5 felony.

(4) A person who knowingly possesses an illegal weapon commits a class 1 misdemeanor.

(5) It shall be an affirmative defense to the charge of possessing a dangerous weapon, or to the charge of possessing an illegal weapon, that the person so accused was a peace officer or member of the armed forces of the United States or Colorado National Guard acting in the lawful discharge of his duties, or that said person has a valid permit and license for possession of such weapon.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-102. L. 72: p. 276, § 9. L. 73: p. 540, § 13. L. 79: Entire section R&RE, p. 729, § 10, effective July 1. L. 87: (1) amended, p. 674, § 3, effective May 16. L. 2017: (2) amended, (SB 17-008), ch. 74, p. 234, § 2, effective August 9. L. 2023: (1) amended, (SB 23-279), ch. 311, p. 1898, § 6, effective June 2; (1), (2), and (3) amended, (HB 23-1293), ch. 298, p. 1791, § 45, effective October 1. L. 2025: (1) amended, (SB 25-003), ch. 68, p. 300, § 9, effective April 10.

Editor's note: Amendments to subsection (1) by SB 23-279 and HB 23-1293 were harmonized.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to unloaded guns as dangerous weapons, see 15 Colo. Law. 1612 (1986).

Prohibition on short shotguns does not violate constitutional right to bear arms. Section 13 of article II of the state constitution does not protect an individual's right to possess a short shotgun for self-defense. The prohibition in this section is a reasonable exercise of the state's police power. *People v. Sandoval*, 2016 COA 14, 409 P.3d 425.

The prohibition against possession of illegal weapons in subsection (4) is neither facially void for vagueness as to the prohibition of possession of "metallic

knuckles", nor unconstitutionally vague as applied to the defendant. *People ex rel. A.P.E.*, 988 P.2d 172 (Colo. App. 1999), rev'd on other grounds, 20 P.3d 1179 (Colo. 2001).

Possession of an illegal weapon under subsection (4) is a lesser included offense of possession of weapon by a previous offender under § 18-12-108 (1) when the same weapon is alleged in each charge. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Whether inoperable weapon is a dangerous one is question of fact. When a prosecution under this section involves a weapon that is inoperable for some reason, whether the weapon is a dangerous one is a question of fact. In considering this question, the trier of fact must weigh a variety of factors, including the time required, the changes that have to be made

in the weapon, the parts which have to be inserted, and all the other attendant factors and circumstances. *People v. Vigil*, 758 P.2d 670 (Colo. 1988).

"A firecracker in a beer bottle" could constitute a molotov cocktail, ergo a bomb, which under former section was an illegal weapon. *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

Defendant could not be convicted of carrying a concealed weapon without the prosecution proving that defendant

intended to use a short-bladed knife as a weapon. While the characteristics of an instrument may be an important factor in determining the intended purpose of an instrument, the language of the concealed weapons statute and established precedent establishes that a knife's design does not, by itself, prove that the person carrying it intended to use it as a weapon. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

Applied in *People v. Taylor*, 647 P.2d 682 (Colo. 1982).

18-12-103. Possession of a defaced firearm.

A person commits a class 1 misdemeanor if he knowingly and unlawfully possesses a firearm, the manufacturer's serial number of which, or other distinguishing number or identification mark, has been removed, defaced, altered, or destroyed, except by normal wear and tear.

Source: L. 71: R&RE, p. 482, § 1. **C.R.S. 1963:** § 40-12-103. **L. 81:** Entire section amended, p. 976, § 18, effective July 1.

ANNOTATION

Statute as basis for jurisdiction. See *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

18-12-103.5. Defaced firearms - contraband - destruction.

(1) After a judgment of conviction under section 18-12-103 or 18-12-104 has become final, any defaced firearm upon which the judgment was based shall be deemed to be contraband, the possession of which is contrary to the public peace, health, and safety.

(2) Defaced firearms that are deemed to be contraband shall be placed in the possession of the bureau or of a local law enforcement agency designated by the bureau and shall be destroyed or rendered permanently inoperable.

Source: L. 81: Entire section added, p. 977, § 19, effective July 1. **L. 2013:** (2) amended, (HB 13-1229), ch. 47, p. 137, § 8, effective March 20.

18-12-104. Defacing a firearm.

A person commits a class 1 misdemeanor if such person knowingly removes, defaces, covers, alters, or destroys the manufacturer's serial number or any other distinguishing number or identification mark of a firearm.

Source: L. 71: R&RE, p. 482, § 1. **C.R.S. 1963:** § 40-12-104. **L. 77:** Entire section amended, p. 970, § 62, effective July 1. **L. 81:** Entire section amended, p. 977, § 20, effective July 1. **L. 89:** Entire section amended, p. 842, § 101, effective July 1. **L. 93:** Entire section amended, p. 968, § 2, effective July 1.

18-12-105. Unlawfully carrying a concealed weapon - unlawful possession of weapons.

(1) A person commits a class 1 misdemeanor if the person knowingly and unlawfully:

(a) Carries a knife concealed on or about his or her person; or

(b) Carries a firearm concealed on or about his or her person; or

(c) Without legal authority, carries, brings, or has in the person's possession any explosive, incendiary, or other dangerous device on the property of or within any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, are located, or in which a legislative hearing or meeting is being or is to be conducted, or in which the official office of any member, officer, or employee of the general assembly is located.

(d) (Deleted by amendment, L. 93, p. 964, § 1, effective July 1, 1993.)

(2) It is not an offense pursuant to this section if the defendant was:

(a) A person in his or her own dwelling or place of business or on property owned or under his or her control at the time of the act of carrying; or

(b) A person in a private automobile or other private means of conveyance who carries a weapon for lawful protection of such person's or another's person or property while traveling; or

(b.5) Carrying a concealed firearm at a specific location in violation of section 1-13-724, 18-12-105.3, or 18-12-105.5; or

(c) A person who, at the time of carrying a concealed weapon, held a valid written permit to carry a concealed weapon issued pursuant to section 18-12-105.1, as it existed prior to its repeal, or, if the weapon involved was a handgun, held a valid permit to carry a concealed handgun or a temporary emergency permit issued pursuant to part 2 of this article; except that it shall be an offense under this section if the person was carrying a concealed handgun in violation of the provisions of section 18-12-214; or

(d) A peace officer, as described in section 16-2.5-101, C.R.S., when carrying a weapon in conformance with the policy of the employing agency as provided in section 16-2.5-101 (2), C.R.S.; or

(e) (Deleted by amendment, L. 2003, p. 1624, § 46, effective August 6, 2003.)

(f) A United States probation officer or a United States pretrial services officer while on duty and serving in the state of Colorado under the authority of rules and regulations promulgated by the judicial conference of the United States.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-105. L. 73: p. 683, § 3. L. 77: (2)(c) amended and (2)(d) added, p. 976, § 8, effective July 1. L. 81: (2)(c) amended, p. 1437, § 3, effective June 8. L. 86: (2)(d) amended and (2)(e) added, p. 774, § 2, effective July 1. L. 89: (1)(d) added, p. 911, § 1, effective April 15. L. 93: Entire section amended, p. 964, § 1, effective July 1. L. 94: (2)(e) amended and (2)(f) added, p. 647, § 1, effective July 1. L. 2000: IP(2) amended, p. 1009, § 1, effective August 2. L. 2003: (2)(c) amended, p. 648, § 3, effective May 17; (2)(d) and (2)(e) amended, p. 1624, § 46, effective August 6. L. 2021: IP(1) amended, (SB 21-271), ch. 462, p. 3209, § 344, effective March 1, 2022. L. 2024: IP(1), (1)(c), and IP(2) amended and (2)(b.5) added, (SB 24-131), ch. 301, p. 2049, § 5, effective July 1.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) For the legislative declaration in SB 24-131, see section 1 of chapter 301, Session Laws of Colorado 2024.

ANNOTATION

Recognition of § 13 of art. II, Colo. Const. Section 13 of art. II, Colo. Const., has limiting language dealing with defense of home, person, and property. These

limitations have been recognized by the general assembly in the enactment of this section, which restricts the right to bear arms in certain circumstances, while permitting in

other circumstances the carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Statute is not unconstitutionally vague regarding knives. Because a person must carry a knife unlawfully for the statute to apply, it does not invite arbitrary or discriminatory enforcement. *People in Interest of L.C.*, 2017 COA 82, 486 P.3d 1168.

The words "about the person" means sufficiently close to the person to be readily accessible for immediate use. *People in Interest of R.J.A.*, 38 Colo. App. 346, 556 P.2d 491 (1976).

"Concealed" means placed out of sight so as not to be discernible or apparent by ordinary observation. *People ex rel. O.R.*, 220 P.3d 949 (Colo. App. 2008).

The scope of subsection (2)(b) is clarified in § 18-12-105.6, which indicates the general assembly's intent that local ordinances on carrying weapons in private vehicles be preempted only insofar as they conflict with the provisions of § 18-12-105.6. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

The local ordinance concerning carrying a weapon in a private vehicle is not preempted since it can be harmonized with subsection (2)(b). *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

Pistol tucked under edge of car seat. Where uncontested evidence established that pistol was tucked under the edge of a car seat on which petitioner was sitting, where it was within his easy reach, these circumstances constitute carrying a "firearm concealed on or about his person". *People in Interest of R.J.A.*, 38 Colo. App. 346, 556 P.2d 491 (1976).

Question of whether weapon is concealed is question of fact for the jury which should not be summarily determined by the trial judge at the time that he rules on the defendant's motion to suppress. *People v. Vincent*, 628 P.2d 107 (Colo. 1981).

Former subsection (2)(c) did not confer power to issue permits for carrying concealed weapons to police chiefs and sheriffs. *Douglass v. Kelton*, 199 Colo. 446, 610 P.2d 1067 (1980).

Person receiving permit to carry concealed weapon cannot be convicted. Once a person receives a permit to carry a concealed weapon in a county or city, he may not be convicted under subsection (2)(c). *Douglass v. Kelton*, 199 Colo. 446, 610 P.2d 1067 (1980).

Statute as basis for jurisdiction. See *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977).

Defendant could not be convicted of carrying a concealed weapon without the prosecution proving that defendant intended to use this short-bladed knife as a weapon. While the characteristics of an instrument may be an important factor in determining the intended purpose of an

instrument, the language of the concealed weapons statute and established precedent establishes that a knife's design does not, by itself, prove that the person carrying it intended to use it as a weapon. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

Applied in *People v. Velasquez*, 641 P.2d 943 (Colo. 1982); *People v. Deschamp*, 662 P.2d 171 (Colo. 1983).

18-12-105.1. Permits for concealed weapons - liability. (Repealed)

Source: **L. 81:** Entire section added, p. 1437, § 4, effective June 8. **L. 83:** Entire section amended, p. 711, § 1, effective July 1. **L. 96:** (2) amended, p. 1024, § 1, effective May 23. **L. 98:** (2) amended, p. 949, § 12, effective May 27. **L. 2003:** Entire section repealed, p. 648, § 2, effective May 17.

18-12-105.3. Unlawful carrying of a firearm in government buildings - penalty - definitions.

(1) A person shall not knowingly carry a firearm, whether loaded or not loaded, in any of the following locations, including their adjacent parking areas:

(a) On the property of or within any building in which:

(I) The chambers, galleries, or offices of the general assembly, or either house thereof, are located;

(II) A legislative hearing or meeting of the general assembly is being conducted; or

(III) The official office of any member, officer, or employee of the general assembly is located;

(b) Unless permitted by a local government, as described in subsection (4)(b) of this section, on the property or within any building in which:

(I) The chambers or galleries of a local government's governing body are located;

(II) A meeting of a local government's governing body is being conducted; or

(III) The official office of any elected member of a local government's governing body or of the chief executive officer of a local government is located; or

(c) A courthouse or any other building or portion of a building used for court proceedings.

- (2) This section does not apply to:
- (a) A peace officer carrying a firearm pursuant to the authority granted in section 16-2.5-101 (2);
 - (b) A member of the United States armed forces or Colorado National Guard when engaged in the lawful discharge of the member's official duties;
 - (c) Security personnel employed or retained by an entity that controls or operates a place described in this section and security personnel described in section 24-33.5-216.7 (5) while engaged in the security personnel's official duties;
 - (d) Law enforcement personnel, defense counsel personnel, and court personnel carrying or possessing a firearm in the performance of their official duties as part of the lawful and common practices of a legal proceeding; and
 - (e) A person who holds a valid permit to carry a concealed handgun or a temporary emergency permit issued pursuant to part 2 of this article 12 who is carrying a concealed handgun in the adjacent parking area of a location listed in subsection (1) of this section.
- (2.3) Repealed.
- (3) A person commits unlawful carrying of a firearm in a government building if the person violates subsection (1) of this section. Unlawful carrying of a firearm in a government building is a class 1 misdemeanor.
- (4) (a) This section does not prohibit a local government from enacting an ordinance, regulation, or other law pursuant to section 18-12-214 or 29-11.7-104 that prohibits a person from carrying a firearm in a specified place.
- (b) A local government may enact an ordinance, regulation, or other law that permits a person to carry a firearm at a place described in subsection (1)(b) of this section.
- (5) Nothing in this section prohibits a person from securely storing a firearm in a vehicle, as required by state law, that is at a location described in this section.
- (6) As used in this section, unless the context otherwise requires:
- (a) "Governing body" has the same meaning set forth in section 29-1-102.
 - (b) "Local government" means any city, county, city and county, special district, or other political subdivision of this state, or any department, agency, or instrumentality thereof.

Source: L. 2024: Entire section added, (SB 24-131), ch. 301, p. 2044, § 2, effective July 1.

Editor's note: Subsection (2.3)(b) provided for the repeal of subsection (2.3), effective January 5, 2025. (See L. 2024, p. 2044.)

Cross references: For the legislative declaration in SB 24-131, see section 1 of chapter 301, Session Laws of Colorado 2024.

18-12-105.5. Unlawfully carrying a weapon - unlawful possession of weapons - school, college, or university grounds - definition.

(1) (a) A person shall not knowingly and unlawfully and without legal authority carry, bring, or have in the person's possession a deadly weapon as defined in section 18-1-901 (3)(e) that is not a firearm in or on the real estate and all improvements erected thereon of any public or private elementary, middle, junior high, high, or vocational school or any public or private college, university, or seminary; except for the purpose of presenting an authorized public demonstration or exhibition pursuant to instruction in conjunction with an organized school or class, for the purpose of carrying out the necessary duties and functions of an employee of an educational institution that require the use of a deadly weapon that is not a firearm, or for the purpose of participation in an authorized extracurricular activity or on an athletic team.

(a.5) A person shall not knowingly carry a firearm, either openly or concealed, in or on the real estate and all improvements erected thereon of any licensed child care center; public or private elementary, middle, junior high, high, or vocational school; or any public or private college, university, or seminary; except for the purpose of presenting an authorized public demonstration or exhibition pursuant to instruction in conjunction with an organized school or class, for the purpose of carrying out the necessary duties and functions of an employee of an educational institution that require the use of a firearm, or for the purpose of participation in an authorized extracurricular activity or on an athletic team.

(b) (I) A person who violates subsection (1)(a) of this section commits a class 6 felony if the weapon involved is a deadly weapon other than a firearm, as defined in section 18-1-901.

(II) A person who violates subsection (1)(a.5) of this section commits a class 1 misdemeanor.

(2) (Deleted by amendment, L. 2000, p. 709, § 45, effective July 1, 2000.)

(3) It is not an offense under this section if:

(a) The weapon is unloaded and remains inside a motor vehicle while upon the real estate of any public or private college, university, or seminary; or

(b) The person is in that person's own dwelling or place of business or on property owned or under that person's control at the time of the act of carrying; or

(c) The person is in a private automobile or other private means of conveyance and is carrying a weapon for lawful protection of that person's or another's person or property while traveling; or

(d) Repealed.

(d.5) The weapon involved was a handgun, the person held a valid permit to carry a concealed handgun or a temporary emergency permit issued pursuant to part 2 of this article 12, and the person is carrying the concealed handgun:

(I) On the real property, or into any improvements erected thereon, of a public elementary, middle, junior high, or high school in accordance with the authority granted pursuant to section 18-12-214 (3); or

(II) In a parking area of a licensed child care center or a public or private college, university, or seminary; or

(e) The person is a school resource officer, as defined in section 22-32-109.1 (1)(g.5), C.R.S., or a peace officer, as described in section 16-2.5-101, C.R.S., when carrying a weapon in conformance with the policy of the employing agency as provided in section 16-2.5-101 (2), C.R.S.; or

(f) and (g) (Deleted by amendment, L. 2003, p. 1626, § 51, effective August 6, 2003.)

(h) The person has possession of the weapon for use in an educational program approved by a school, which program includes, but is not limited to, any course designed for the repair or maintenance of weapons; or

(i) The weapon involved is a firearm; the person carrying the firearm is employed or retained as security personnel by a licensed child care center or a public or private college, university, or seminary; and the person is carrying the firearm while engaged in the person's official duties as security personnel; or

(j) A licensed child care center is on the same real estate as another building or improvement that is not a school and that is open to the public and the person is carrying a firearm on an area of real estate or any improvement thereon that is not designated as a licensed child care center.

(4) As used in this section, unless the context otherwise requires, "licensed child care center" means a child care center, as defined in section 26.5-5-303 (3), that is licensed by the department of early childhood or is exempt from licensing pursuant to section 26.5-5-304 (1)(b), and that operates with stated educational purposes. "Licensed child care center" does not include a family child care home, as defined in section 26.5-5-303 (7).

Source: **L. 93:** Entire section added, p. 965, § 2, effective July 1. **L. 94:** (1) and (2) amended, p. 1721, § 19, effective July 1. **L. 2000:** Entire section amended, p. 709, § 45, effective July 1. **L. 2003:** (3)(d) amended and (3)(d.5) added, p. 649, § 4, effective May 17; (3)(e), (3)(f), and (3)(g) amended, p. 1626, § 51, effective August 6. **L. 2013:** (3)(e) amended, (SB 13-138), ch. 253, p. 1341, § 2, effective May 23. **L. 2023:** (1) amended, (HB 23-1293), ch. 298, p. 1792, § 46, effective October 1. **L. 2024:** (1)(a), (1)(b)(II), IP(3), (3)(d.5), and (3)(h) amended, (1)(a.5), (3)(i), (3)(j), and (4) added, and (3)(d) repealed, (SB 24-131), ch. 301, p. 2046, § 3, effective July 1.

Cross references: For the legislative declaration in the 2013 act amending subsection (3)(e), see section 1 of chapter 253, Session Laws of Colorado 2013. For the legislative declaration in SB 24-131, see section 1 of chapter 301, Session Laws of Colorado 2024.

ANNOTATION

Unless the prosecution can also establish that the person used or intended to use the knife as a weapon, a person cannot be prosecuted under subsection (1) for carrying a knife with a blade less than three and one-half inches in length on school grounds. Even though subsection (1) references the deadly weapons statute, that statute does not specifically define "knife". The term "knife" is, however, specifically limited to a weapon with a blade longer than three and one-half inches in length by § 18-12-101 (1), as applicable to this article. Thus, reading and harmonizing these provisions together, the plain language of both provisions establishes that, for purposes of this section, where the deadly weapon is a knife, it must qualify as a knife under § 18-

12-101 (1)(f). *People ex rel. J.W.T.*, 93 P.3d 580 (Colo. App. 2004).

Evidence of defendant's sanity as to one of eleven counts against him, unlawful possession of a weapon on school grounds, was substantial and sufficient to permit a reasonable juror to find that defendant was sane. The issue is whether defendant was capable, at the time he committed the acts, of distinguishing right from wrong with respect to the criminal acts. *People v. Eastwood*, 2015 COA 150, 363 P.3d 799.

Defendant was not acting unlawfully, as required by this section, when defendant pulled over into a school parking lot in response to a police officer's directive. *People v. Procasky*, 2019 COA 181, 467 P.3d 1252.

18-12-105.6. Limitation on local ordinances regarding firearms in private vehicles.

(1) The general assembly hereby finds that:

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(a) A person carrying a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of such person's or another's person or property, as permitted in sections 18-12-105 (2)(b) and 18-12-105.5 (3)(c), may tend to travel within a county, city and county, or municipal jurisdiction or in or through different county, city and county, and municipal jurisdictions, en route to the person's destination;

(b) Inconsistent laws exist in local jurisdictions with regard to the circumstances under which weapons may be carried in automobiles and other private means of conveyance;

(c) This inconsistency creates a confusing patchwork of laws that unfairly subjects a person who lawfully travels with a weapon to criminal penalties because he or she travels within a jurisdiction or into or through another jurisdiction;

(d) This inconsistency places citizens in the position of not knowing when they may be violating local laws while traveling within a jurisdiction or in, through, or between different jurisdictions, and therefore being unable to avoid committing a crime.

(2) (a) Based on the findings specified in subsection (1) of this section, the general assembly concludes that the carrying of weapons in private automobiles or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into, through, or within, a municipal, county, or city and county jurisdiction, regardless of the number of times the person stops in a jurisdiction, is a matter of statewide concern and, except as described in section 18-12-114.5, is not an offense.

(b) Notwithstanding any other provision of law, no municipality, county, or city and county shall have the authority to enact or enforce any ordinance or resolution that would restrict a person's ability to travel with a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into, through, or within, a municipal, county, or city and county jurisdiction, regardless of the number of times the person stops in a jurisdiction.

Source: **L. 2000:** Entire section added, p. 1009, § 2, effective August 2. **L. 2003:** Entire section amended, p. 651, § 1, effective March 18. **L. 2024:** (2)(a) amended, (HB 24-1348), ch. 178, p. 970, § 3, effective January 1, 2025.

ANNOTATION

Law reviews: For article, "In the Crosshairs: Colorado's New Gun Laws", see 33 Colo. Law. 11 (Jan. 2004).

This section clarifies the scope of § 18-12-105 (2)(b) and indicates the general assembly's intent that local ordinances on carrying weapons in private vehicles be

preempted only insofar as they conflict with the provisions of this section. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

The use of the limiting language "into or through" in subsection (2) reflects the

general assembly's intent not to restrict local weapons ordinances insofar as they apply to travel wholly within local jurisdictions. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002). (Decided under law as it existed prior to the 2003 amendments to subsection (2)).

18-12-106. Prohibited use of weapons - definitions.

(1) A person commits a class 1 misdemeanor if:

(a) He knowingly and unlawfully aims a firearm at another person; or

(b) Recklessly or with criminal negligence he discharges a firearm or shoots a bow and arrow; or

(c) He knowingly sets a loaded gun, trap, or device designed to cause an explosion upon being tripped or approached, and leaves it unattended by a competent person immediately present; or

(d) The person has in his or her possession a firearm while the person is under the influence of intoxicating liquor or of a controlled substance, as defined in section 18-18-102 (5). Possession of a permit issued under section 18-12-105.1, as it existed prior to its repeal, or possession of a permit or a temporary emergency permit issued pursuant to part 2 of this article is no defense to a violation of this subsection (1).

(2) (a) A person commits a class 2 misdemeanor if the person knowingly aims, swings, or throws a throwing star or nunchaku as defined in subsection (2)(b) of this section at another person, or the person knowingly possesses a throwing star or nunchaku in a public place, except for the purpose of presenting an authorized public demonstration or exhibition or pursuant to instruction in conjunction with an organized school or class. When transporting throwing stars or nunchaku for a public demonstration or exhibition or for a school or class, they shall be transported in a closed, nonaccessible container.

(b) For purposes of this subsection (2), "nunchaku" means an instrument consisting of two sticks, clubs, bars, or rods to be used as handles, connected by a rope, cord, wire, or chain, which is in the design of a weapon used in connection with the practice of a system of self-defense, and "throwing star" means a disk having sharp radiating points or any disk-shaped bladed object which is hand-held and thrown and which is in the design of a weapon used in connection with the practice of a system of self-defense.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-106. L. 77: (1)(a) and (1)(c) amended, p. 971, § 63, effective July 1. L. 81: (1)(d) amended, p. 738, § 25, effective July 1. L. 82: (1)(d) amended, p. 623, § 18, effective April 2. L. 84: (1)(e) added, p. 539, § 17, effective July 1. L. 2003: (1)(d) amended, p. 649, § 5, effective May 17. L. 2012: (1)(d) amended, (HB 12-1311), ch. 281, p. 1620, § 48, effective July 1. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3209, § 345, effective March 1, 2022.

ANNOTATION

This section is neither unconstitutionally overbroad nor unconstitutionally vague. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Right to bear arms is not absolute, and it can be restricted by the state's valid exercise of its police power. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Common sense definition of "possession", as it is used in subsection (1)(d) is the actual or physical control of a firearm. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Failure to define "under the influence of intoxicating liquor", if error, was harmless, where defendant, charged with violation of this section, testified that he was too drunk to drive. People v. Beckett, 782 P.2d 812 (Colo. App. 1989), aff'd, 800 P.2d 74 (Colo. 1990).

Trial court did not err in rejecting defendant's jury instructions and expert testimony regarding blood alcohol content inferences and presumptions that are not incorporated under the prohibited possession of a firearm statute. People v. Koper, 2018 COA 137, 488 P.3d 409.

Possession of a firearm while intoxicated is a strict liability offense, therefore, the trial court did not err in refusing to instruct the jury that "knowingly" was an element of the offense. People v. Wilson, 972 P.2d 701 (Colo. App. 1998).

Self-defense is not a valid defense to the crime of prohibited use of weapons. People v. Beckett, 782 P.2d 812 (Colo. App. 1989), aff'd, 800 P.2d 74 (Colo. 1990).

Applied in People v. McPherson, 200 Colo. 429, 619 P.2d 38 (1980).

18-12-106.5. Use of stun guns.

A person commits a class 5 felony if he knowingly and unlawfully uses a stun gun in the commission of a criminal offense.

Source: L. 87: Entire section added, p. 675, § 4, effective May 16.

ANNOTATION

Section unambiguously creates a separate crime whenever a stun gun facilitates commission of the predicate offense, regardless of whether it is discharged. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

Attempted robbery is not a lesser included offense of use of a stun gun.

People v. Bass, 155 P.3d 547 (Colo. App. 2006).

Misdemeanor menacing is not a lesser included offense of use of a stun gun. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

18-12-107. Penalty for second offense.

Any person who has within five years previously been convicted of a violation under section 18-12-103, 18-12-105, or 18-12-106 shall, upon conviction for a second or subsequent offense under the same section, be guilty of a class 5 felony.

Source: L. 71: R&RE, p. 483, § 1. **C.R.S. 1963:** § 40-12-107. **L. 87:** Entire section amended, p. 616, § 7, effective July 1.

18-12-107.5. Illegal discharge of a firearm - penalty.

(1) Any person who knowingly or recklessly discharges a firearm into any dwelling or any other building or occupied structure, or into any motor vehicle occupied by any person, commits the offense of illegal discharge of a firearm.

(2) It shall not be an offense under this section if the person who discharges a firearm in violation of subsection (1) of this section is a peace officer as described in section 16-2.5-101, C.R.S., acting within the scope of such officer's authority and in the performance of such officer's duties.

(3) Illegal discharge of a firearm is a class 5 felony.

Source: L. 93: Entire section added, p. 968, § 1, effective July 1. **L. 2003:** (2) amended, p. 1616, § 15, effective August 6.

ANNOTATION

This section was intended to punish random drive-by and walk-by gunfire directed at occupied structures or vehicles from outside such premises or vehicles. People v. Simpson, 93 P.3d 551 (Colo. App. 2003).

The plain language of this section does not require that a bullet actually end up inside a house. The court of appeals held that firing a bullet into materials of which the house is built, in this case the shingles on the roof, violates this section. There is no requirement in the section that the bullet pierce the exterior of the building and enter the interior of the house. People v. Serpa, 992 P.2d 682 (Colo. App. 1999).

The second clause of subsection (1) does not require proof that a bullet actually entered the passenger compartment of the vehicle and the absence of such a requirement is consistent

with the general assembly's clear intention to criminalize the discharge of a firearm into an occupied vehicle irrespective of whether an occupant is endangered. People v. White, 55 P.3d 220 (Colo. App. 2002).

Illegal discharge of a firearm is not a lesser included offense of attempted first degree murder after deliberation. Discharge of a firearm is not an element of attempted first degree murder after deliberation. People v. Beatty, 80 P.3d 847 (Colo. App. 2003).

Court erred by failing to instruct on self-defense. Illegal discharge of a firearm is a general intent offense to the extent that it involves a defendant who acts "knowingly", and self-defense is an affirmative defense to a general intent crime. People v. Taylor, 230 P.3d 1227 (Colo. App. 2009), overruled on other grounds in People v. Pickering, 276 P.3d 553 (Colo. 2011).

18-12-108. Possession of weapons by previous offenders.

(1) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to the provisions of this article 12 subsequent to the person's conviction for a felony crime as defined in section 24-4.1-302 (1) or listed in subsection (7) of this section, or subsequent to the person's conviction for attempt or conspiracy to commit a crime as defined in section 24-4.1-302 (1) that is a felony, pursuant to Colorado or any other state's law or pursuant to federal law.

(2) A person commits a class 5 felony if the person violates subsection (1) or (3) of this section. A person who violates subsection (1) or (3) of this section and used or threatened the use of the firearm in the commission of another crime is not eligible for probation or any other alternative sentence and shall be sentenced to the department of corrections.

(3) (a) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to the provisions of this article 12 subsequent to the person's adjudication for an act which, if committed by an adult, would constitute a felony crime as defined in section 24-4.1-302 (1) or listed in subsection (7) of this section, or subsequent to the person's adjudication for attempt or conspiracy to commit a crime as defined in section 24-4.1-302 (1) that is a felony, pursuant to Colorado or any other state's law or pursuant to federal law in the previous ten years from the completion of the person's sentence for the adjudication of a felony crime as defined in section 24-4.1-302 (1).

(b) If a person completes a sentence for the adjudication of a felony crime as defined in section 24-4.1-302 (1) or listed in subsection (7) of this section, or subsequent to the person's adjudication for attempt or conspiracy to commit a crime as defined in section 24-4.1-302 (1) or listed in subsection (7) of this section that is a felony pursuant to Colorado or any other state's law or under federal law, and the person has good cause for possessing, using, or carrying a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to this article 12, the person may petition the court for an order determining that subsection (3)(a) of this section does not apply to the person if the person otherwise legally possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to this article 12. A court shall enter an order determining that subsection (3)(a) of this section does not apply to the person if the court finds, upon request of the person and by a preponderance of the evidence, there is good cause for the person to possess, use, or carry a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to this article 12.

(3.5) (a) If at least ten years have passed since the date of the final disposition of all criminal proceedings against the person for the conviction of motor vehicle theft in the first degree in violation of section 18-4-409 (2) or the conviction of attempt or conspiracy to commit motor vehicle theft in the first degree, or since the release of the person from supervision for the conviction of motor vehicle theft in the first degree in violation of section 18-4-409 (2) or the release of the person from supervision for the conviction of attempt or conspiracy to commit a motor vehicle theft in the first degree, whichever is later, then the person may petition the court for an order determining that subsection (1) of this section does not apply to the person if the person legally possesses, uses, or carries upon their person a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to this article 12.

(b) A court shall enter an order determining that subsection (1) of this section does not apply to a person described in subsection (3.5)(a) of this section upon the proper request of the person pursuant to subsection (3.5)(a) of this section.

(4) and (5) (Deleted by amendment, L. 2021.)

(6) (a) Upon the discharge of any inmate from the custody of the department of corrections, the department shall provide a written advisement to such inmate of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in subsection (6)(c) of this section.

(b) Any written stipulation for deferred judgment and sentence entered into by a defendant pursuant to section 18-1.3-102 shall contain a written advisement of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in subsection (6)(c) of this section.

(c) The written statement shall provide that:

(I) (A) A person commits the crime of possession of a weapon by a previous offender in violation of this section if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901 (3)(h), or any other weapon that is subject to the provisions of this title subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, or subsequent to the person's conviction for a misdemeanor crime of domestic violence as defined in 18 U.S.C. sec. 921 (a)(33)(A), or subsequent to the person's conviction for attempt or conspiracy to commit such misdemeanor crime of domestic violence; and

(B) As used in this subsection (6)(c), "felony" means any felony under Colorado law, federal law, or the laws of any other state; and

(II) A violation of this section may result in a sentence of imprisonment or fine, or both.

(d) The act of providing the written advisement described in this subsection (6) or the failure to provide such advisement may not be used as a defense to any crime charged and may not provide any basis for collateral attack on, or for appellate relief concerning, any conviction.

(7) In addition to a conviction for felony crime as defined in section 24-4.1-302 (1), a felony conviction or adjudication for one of the following felonies prohibits a person from possessing, using, or carrying upon the person a firearm as defined in section 18-1-901 (3)(h) or any other weapon that is subject to this article 12 pursuant to subsection (1) or (3) of this section:

(a) An offense subject to sentencing pursuant to section 18-1.3-1004;

(b) First degree murder of a peace officer, firefighter, or emergency medical service provider in violation of section 18-3-107;

(c) Criminal extortion in violation of section 18-3-207;

(d) False imprisonment in violation of section 18-3-303;

(e) Enticement of a child in violation of section 18-3-305;

- (f) Internet luring of a child in violation of section 18-3-306;
- (g) Internet sexual exploitation of a child in violation of section 18-3-405.4;
- (h) Unlawful sexual conduct by a peace officer in violation of section 18-3-405.7;
- (i) Unlawful termination of a pregnancy in the first degree in violation of section 18-3.5-103;
- (j) Unlawful termination of a pregnancy in the second degree in violation of section 18-3.5-104;
- (k) First degree arson in violation of section 18-4-102;
- (l) Second degree arson in violation of section 18-4-103;
- (m) Third degree arson in violation of section 18-4-104;
- (n) Fourth degree arson in violation of section 18-4-105;
- (n.5) Motor vehicle theft in the first degree in violation of section 18-4-409;
- (o) Habitual child abuse in violation of section 18-6-401.2;
- (p) Contributing to the delinquency of a minor in violation of section 18-6-701;
- (q) Pandering in violation of section 18-7-203;
- (r) Pimping in violation of section 18-7-206;
- (s) Pandering of a child in violation of section 18-7-403;
- (t) Procurement of a child in violation of section 18-7-403.5;
- (u) Keeping a place of commercial sexual activity with a child, in violation of section 18-7-404, and keeping a place of child prostitution in violation of section 18-7-404, as it existed prior to July 1, 2026;
- (v) Impersonating a peace officer in violation of section 18-8-112;
- (w) Disarming a peace officer in violation of section 18-8-116;
- (x) Aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders in violation of section 18-8-201.1;
- (y) Assault during escape in violation of section 18-8-206;
- (z) Holding hostages in violation of section 18-8-207;
- (aa) Escape in violation of section 18-8-208;
- (bb) Attempt to escape in violation of section 18-8-208.1;

- (cc) Participation in a riot in detention facilities in violation of section 18-8-211;
- (dd) Intimidating a juror in violation of section 18-8-608;
- (ee) Inciting a riot in violation of section 18-9-102;
- (ff) Arming a rioter in violation of section 18-9-103;
- (gg) Engaging in a riot in violation of section 18-9-104;
- (hh) Vehicular eluding in violation of section 18-9-116.5;
- (ii) Firearms, explosives, or incendiary devices in facilities of public transportation in violation of section 18-9-118;
- (jj) Failure or refusal to leave premises or property upon request of a peace officer in violation of section 18-9-119;
- (kk) Terrorist training activities in violation of section 18-9-120;
- (ll) Aggravated cruelty to animals in violation of section 18-9-202;
- (mm) Treason in violation of section 18-11-101;
- (nn) Insurrection in violation of section 18-11-102;
- (oo) Advocating the overthrow of the government in violation of section 18-11-201;
- (pp) Inciting destruction of life or property in violation of section 18-11-202;
- (qq) Membership in anarchist and seditious associations in violation of section 18-11-203;
- (rr) Possessing a dangerous or illegal weapon in violation of section 18-12-102;
- (ss) Unlawfully carrying a weapon in violation of section 18-12-105.5;
- (tt) Use of a stun gun in violation of section 18-12-106.5;
- (uu) Illegal discharge of a firearm in violation of section 18-12-107.5;
- (vv) Possession of a weapon by a previous offender in violation of section 18-12-108 if committed on or after March 1, 2022;
- (ww) Possession of a handgun by a juvenile in violation of section 18-12-108.5;
- (xx) Unlawfully providing or permitting a juvenile to possess a handgun in violation of section 18-12-108.7;
- (yy) Possession, use, or removal of explosives or incendiary devices in violation of section 18-12-109;

- (zz) Unlawful purchase of a firearm in violation of section 18-12-111;
- (aaa) Possessing a large-capacity magazine during the commission of a crime of violence in violation of section 18-12-302 (1)(c);
- (bbb) Dueling in violation of section 18-13-104 if committed on or before October 1, 2023;
- (ccc) Intentionally setting a wildfire in violation of section 18-13-109.5;
- (ddd) Unlawful administration of ketamine in violation of section 18-13-123;
- (eee) Repealed.
- (fff) Organized crime in violation of section 18-17-104;
- (ggg) A special offender in violation of section 18-18-407 (1)(d)(II);
- (hhh) A criminal attempt, complicity, or conspiracy to commit any of the offenses listed in this subsection (7);
- (iii) Unlawful conduct involving an unserialized firearm, frame, or receiver, as described in section 18-12-111.5; and
- (jjj) Unlawful manufacture, distribution, transfer, sale, or purchase of a specified semiautomatic firearm, as described in section 18-12-116.

Source: **L. 71:** R&RE, p. 483, § 1. **C.R.S. 1963:** § 40-12-108. **L. 73:** p. 542, § 1. **L. 75:** Entire section amended, p. 621, § 17, effective July 21. **L. 93, 1st Ex. Sess.:** Entire section added, p. 4, § 3, effective September 13. **L. 94:** Entire section R&RE, p. 1464, § 6, effective July 1. **L. 2000:** (2)(a) and (4)(a) amended and (2)(d), (4)(d), and (6) added, pp. 632, 633, §§ 1, 2, 3, effective July 1. **L. 2002:** (6)(b) amended, p. 1517, § 208, effective October 1. **L. 2003:** (4)(b) amended, p. 1432, § 19, effective April 29. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3210, § 346, effective March 1, 2022. **L. 2022:** (1) and (3) amended and (7) added, (HB 22-1257), ch. 69, p. 358, § 11, effective April 7. **L. 2023:** (7)(ggg) and (7)(hhh) amended and (7)(iii) added, (SB 23-279), ch. 311, p. 1897, § 5, effective June 2; IP(7) and (7)(bbb) amended and (7)(eee) repealed, (HB 23-1293), ch. 298, p. 1792, § 47, effective October 1. **L. 2025:** (7)(hhh) and (7)(iii) amended and (7)(jjj) added, (SB 25-003), ch. 68, p. 299, § 4, effective April 10; (3.5) and (7)(n.5) added, (HB 25-1171), ch. 208, p. 938, § 1, effective May 19. **L. 2026:** (7)(u) amended, (SB 26-015), ch. 335, p. 2042, § 23, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (6)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the

legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

Annotator's note. The following annotations include cases decided prior to the 2021 amendment of this section.

The purpose of this section is to limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities. *People v. Gallegos*, 193 Colo. 263, 563 P.2d 937 (1977); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

This section does not deny defendant equal protection, even though it may permit using a prior burglary conviction in another jurisdiction as the "previous offense" when the same conduct might not have resulted in a burglary conviction if committed in this state. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Constitutionality of section upheld. *People v. Marques*, 179 Colo. 86, 498 P.2d 929 (1972).

The classification which prohibits certain previous offenders from carrying a weapon is not unreasonable in its relationship to the evil sought to be cured. To limit the possession of firearms by those who by their past conduct have demonstrated an unfitness to be entrusted with such dangerous

instrumentalities is clearly in the interest of the public health, safety, and welfare and within the scope of the general assembly's police power, and, accordingly, the statute in question is not subject to constitutional attack on an equal protection basis. *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1 (1972).

The felon with a gun statute is not unconstitutional. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

This section as amended in 1994 and as applied to defendant does not violate the prohibition against ex post facto laws because defendant's possession of a firearm occurred in 2009, well after the 1994 amendment. It does not matter that defendant's predicate felonies occurred before the change in the law, because defendant was punished for conduct occurring after the change. There is no ex post facto violation where one or some of the elements of an offense are committed prior to the effective date of a new statute, but where the crime is not completed until after the effective date. *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

"Involving" not constitutionally imprecise. "Involving" is a common, readily understood word, and whatever imprecision its use may entail does not rise to the level of constitutional infirmity. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Nor is "use of force or violence" extremely vague, though this phrase is not specifically defined by the Colorado criminal code, there can be little doubt that most persons would readily comprehend its import. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The time computation provision of this section is not too vague. Notwithstanding the fact that the wording of the time provision of this section might require more than a quick glance for full comprehension, its meaning is plain. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is not an attempt to subvert the intent of § 13 of art. II, Colo. Const. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is legitimate and constitutional means of accomplishing the general assembly's obvious purpose. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Limitations of § 13, art. II, Colo. Const., superimposed on section. In spite of the flat prohibition contained in this section, the specific limitations of § 13 of art. II, Colo. Const. must be superimposed on the section's otherwise valid language. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Because the right to bear arms is not absolute, nor is this section vague or

overbroad. *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975).

The right to bear arms is not absolute as that right is limited to the defense of one's home, person, and property. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Affirmative defense under § 13, art. II, Colo. Const. A defendant charged under this section who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property as recognized by § 13 of art. II, Colo. Const., thereby raises an affirmative defense. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977); *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

***People v. Carbajal*, 2014 CO 60, 328 P.3d 104, implicitly overruled *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011)**, to the extent that *DeWitt* stands for the proposition that a defendant charged under this section is entitled to assert the affirmative defense of choice of evils based solely on a showing that the defendant possessed a firearm while walking in a high-crime neighborhood. *Carbajal's* requirement to show a threat of imminent harm applies. *People v. Hasadinratana*, 2021 COA 66, 493 P.3d 925.

Trial court did not err in modifying jury instruction to state that it is an affirmative defense that the defendant possessed a firearm for the purpose of defending himself, home, or property "from what he reasonably believed to be a threat of imminent harm". Without reasonableness or imminence requirements, the instruction eradicates any distinction

between this section's defendants and ordinary citizens, effectively nullifying this section. *People v. Carbajal*, 2014 CO 60, 328 P.3d 104.

Purpose in keeping weapons is question of fact which must be submitted to jury. The question of the defendant's purpose in keeping the weapons in order to establish the affirmative defense based on his constitutional right to keep and bear arms under § 13 of art. II, Colo. Const., is one for the fact finder to determine at trial. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

But burden of proof is still on prosecution. After the defendant by competent evidence has raised the affirmative defense under § 13 of art. II, Colo. Const., the prosecution will still have the overall burden of proving its case. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Trial court properly excluded affirmative defense based on § 13 of art. II, Colo. Const., and a proposed jury instruction where the defendant's offer of proof was insufficient to support the proposed affirmative defense. *People v. Barger*, 732 P.2d 1225 (Colo. App. 1986).

Trial court's instruction to jury that second degree assault involved force or violence as a matter of law was proper for conviction under this statute notwithstanding fact that second degree assault could involve injury to another resulting from the administration of drug or other substance. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

Possession of a weapon by a previous offender is not a per se grave or serious crime. *People v. Wright*, 2021 COA 106, 498 P.3d 1147.

Jury must find "knowing" possession to convict. To convict a previous offender of possessing a weapon, the jury must find, not mere possession, but that the defendant "knowingly" possessed the weapon and that he understood that the object possessed was a weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

To convict under this section, the prosecution must prove that one of the defendant's intended uses for the instrument was as a weapon. As so construed, the section is not overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

The mental state of "knowingly" applies only to the possession element of subsection (1), not to the prior felony conviction element. *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

This section is not void for vagueness in regard to the definitions of weapon cited therein. "Weapon" has a commonly understood meaning and the definition of "knife" cited in this section is sufficiently specific to give fair warning of the proscribed conduct. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

Broad definition of "knife", incorporated into this section by reference to § 18-12-101, is constitutional. Where defendant possessed a screwdriver with specific intent to use it as a weapon, elements of crime were present. But this

section does not prohibit possession of such an instrument for an innocent purpose, so prohibition is neither unconstitutionally vague nor overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

"Possession" means actual or physical control over a firearm and is a question of fact for the jury. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

"Previously convicted" element satisfied by proof of a guilty plea and deferred judgment; judgment of conviction and sentencing are not required. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

The term "adjudication" in subsection (3) does not include a deferred adjudication. A juvenile defendant's prior deferred adjudication does not serve as a predicate felony offense for the purposes of this section. *People in Interest of A.B.*, 2016 COA 170, 411 P.3d 1116.

The term "possession" in this section is a common term which is to be given its generally accepted meaning. Where court imposed the requirement of exclusive control, the generally accepted meaning was altered, making it both unduly restrictive and a potential source of confusion for jurors. *People v. Martinez*, 780 P.2d 560 (Colo. 1989).

"Involve" has been defined as "to have within or as part of itself: contain, include"; "to require as a necessary accompaniment". *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The word "force" in this section includes more than actual, applied physical

force. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Valid exercise of police power. The use, concealment, or possession of weapons specified in this section by a felon who has previously been convicted of one of the crimes itemized in this section may be validly prohibited under the police power. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Balancing of rights. The conflicting rights of the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people prohibits granting an absolute right to bear arms under all situations. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The felon with a gun statute, this section, must be read in pari materia with § 18-1-702. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Statute may be violated by either concealing or using any of the specified weapons. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Prior conviction element of offense. Under this section, the prior conviction does not go merely to the punishment to be imposed, but rather is an element of the substantive offense charged and this distinction is critical. *People v. Fullerton*, 186 Colo. 97, 525 P.2d 1166 (1974); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

To prove a defendant's identity as the perpetrator of a prior offense, the

prosecution must establish an essential link between the prior conviction and the defendant. This requires the prosecution to present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction. *Gorostieta v. People*, 2022 CO 41, 516 P.3d 902.

Evidence sufficient to establish an essential link between the prior conviction and the defendant where the prosecution introduced evidence that the defendant had the same name and date of birth as the prior defendant as well as self-authenticating court records of the prior conviction that included a physical description of the defendant in the prior case, which the jury would have been able to compare to the defendant's appearance at trial. In addition, the court records from the prior case showed that the prior felony occurred in the same county as the instant case, which arguably made it less likely that the defendant in the prior case was a different person than the defendant currently on trial. *Gorostieta v. People*, 2022 CO 41, 516 P.3d 902.

Defendant in a possession of weapon by prior offender trial may request limiting instruction or stipulate to the fact of conviction of another offense rather than requiring prosecution to agree to waive a trial by jury. *People v. District Court*, 953 P.2d 184 (Colo. 1998).

A prior conviction obtained in violation of a defendant's constitutional rights cannot be used as the underlying conviction

in a prosecution under this section. *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

Reference by name or description to crimes committed in other jurisdictions is a proper means for the general assembly to define which prior crimes satisfy the "previous offender" element of this statute and such references to crimes committed elsewhere do not constitute delegation of this state's legislative power. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Conviction being challenged on appeal may be used as a predicate offense under statute prohibiting possession of firearms by previous offenders since a conviction becomes final and is valid for purposes of appeal when sentencing occurs. *People v. Tramaglino*, 791 P.2d 1171 (Colo. App. 1989).

Showing necessary for conviction under conspiracy provision. A conviction under the conspiracy provision of this section does not require a showing that the overt act of the conspiracy was an act of force or violence, but rather that, the crime which is the object of the conspiracy was one of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Where one is charged under this section with possession of a weapon, having previously been convicted of conspiracy to commit the crime of robbery, it is unnecessary to prove that the underlying robbery which was the object of the conspiracy did in fact involve the use of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Defendant to invoke procedural safeguards where substantive offense also charged. While procedural safeguards such as separate trials or a bifurcated procedure should be available to ensure a fair trial for a defendant charged with a substantive offense and with violation of this section, it is the defendant who must make a tactical decision whether to invoke such procedures, and the defendant must exercise the right to these procedures by means of a timely, pretrial motion. *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Prior Colorado conviction not predicate felony for purposes of federal prohibition of possession of firearm by felon. Defendant was wrongly charged for possession of gun by felon, because at the time of his arrest he was once again entitled to possess a gun. Under this statute defendant's civil rights had been restored ten years after he served time on his prior conviction, such rights encompassing his ability to possess a firearm. *U.S. v. Hall*, 20 F.3d 1066 (10th Cir. 1994).

Plaintiff whose felony conviction in another state was set aside under that state's law and who was entitled to possess a handgun under that state's law was entitled to possess a handgun under this section. *Seguna v. Maketa*, 181 P.3d 399 (Colo. App. 2008).

The fact that defendant assisted in purchase of firearm and was within "arm's reach" of firearm at time of arrest constituted prima facie evidence of illegal possession of a firearm, which precluded defendant from judgment of acquittal.

People v. Rivera, 765 P.2d 624 (Colo. App. 1988).

Evidence sufficient in prosecution for possession of weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Evidence including retrieval of gun from house where defendant arrested, witnesses' identifications of gun as belonging to defendant, and defendant's use of gun during previous threats provided ample support for verdict. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

An attempted robbery by threat is a felony involving the use of force under this section. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Robbery is crime involving use of "force or violence". The offense of robbery, whether committed by actual force or by constructive force, i.e., threats or intimidation, is a crime involving the use of "force or violence" for the purposes of this section. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

When the same weapon is alleged in each charge, possession of an illegal weapon under § 18-12-102 (4) is a lesser included offense of possession of a weapon by a previous offender under subsection (1) of this section. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Possession of ammunition in violation of federal law does not "facilitate", "make easier", or "embolden" one's possession of a firearm in violation of state law for purposes of applying the four-level enhancement to the base offense level

under § 2K2.1(b)(6)(B) of the federal sentencing guidelines. *United States v. Eddington*, 65 F.4th 1231 (10th Cir. 2023).

18-12-108.5. Possession of handguns by juveniles - prohibited - exceptions - penalty.

(1) (a) Except as provided in this section, it is unlawful for any person who has not attained the age of eighteen years knowingly to have any handgun in such person's possession.

(b) Any person possessing any handgun in violation of paragraph (a) of this subsection (1) commits the offense of illegal possession of a handgun by a juvenile.

(c) (I) Illegal possession of a handgun by a juvenile is a class 2 misdemeanor.

(II) For any second or subsequent offense, illegal possession of a handgun by a juvenile is a class 5 felony.

(d) A person under the age of eighteen years who is taken into custody by a law enforcement officer for an offense pursuant to this section must be taken into temporary custody in the manner described in section 19-2.5-305.

(2) This section shall not apply to:

(a) Any person under the age of eighteen years who is:

(I) In attendance at a hunter's safety course or a firearms safety course; or

(II) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited; or

(III) Engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by an organized group under 501 (c)(3) as determined by the federal internal revenue service which uses firearms as a part of such performance; or

(IV) Hunting or trapping pursuant to a valid license issued to such person pursuant to article 4 of title 33, C.R.S.; or

(V) Traveling with any handgun in such person's possession being unloaded to or from any activity described in subparagraph (I), (II), (III), or (IV) of this paragraph (a);

(b) Any person under the age of eighteen years who is on real property under the control of such person's parent, legal guardian, or grandparent and who has the permission of such person's parent or legal guardian to possess a handgun;

(c) Any person under the age of eighteen years who is at such person's residence and who, with the permission of such person's parent or legal guardian, possesses a handgun for the purpose of exercising the rights contained in section 18-1-704 or section 18-1-704.5.

(3) For the purposes of subsection (2) of this section, a handgun is "loaded" if:

(a) There is a cartridge in the chamber of the handgun; or

(b) There is a cartridge in the cylinder of the handgun, if the handgun is a revolver; or

(c) The handgun, and the ammunition for such handgun, is carried on the person of a person under the age of eighteen years or is in such close proximity to such person that such person could readily gain access to the handgun and the ammunition and load the handgun.

(4) Repealed.

Source: L. 93, 1st Ex. Sess.: Entire section added, p. 2, § 2, effective September 13. L. 96: (1)(d) amended, p. 1693, § 28, effective January 1, 1997. L. 98: (4) repealed, p. 729, § 15, effective May 18. L. 2021: (1)(d) amended, (SB 21-059), ch. 136, p. 725, § 56, effective October 1.

ANNOTATION

Possession of a handgun by a juvenile is a "status" offense, an offense consisting of conduct that would not constitute an offense if engaged in by an adult. *People v. Juvenile Court*, 893 P.2d 81 (Colo. 1995).

This section and the presumption statute (§ 19-2-204) were adopted to secure the safety of juveniles and the communities in which they reside. The

Children's Code has consistently evidenced a legislative intent to accomplish both such purposes. *People v. Juvenile Court*, 893 P.2d 81 (Colo. 1995).

The parental permission language in subsection (2)(b) is an affirmative defense to the offense of unlawful possession of a handgun by a juvenile. *People ex rel. L.M.*, 17 P.3d 829 (Colo. App. 2000).

18-12-108.7. Unlawfully providing or permitting a juvenile to possess a handgun - penalty - unlawfully providing a firearm other than a handgun to a juvenile - penalty.

(1) (a) Any person who intentionally, knowingly, or recklessly provides a handgun with or without remuneration to any person under the age of eighteen years in violation of section 18-12-108.5 or any person who knows of such juvenile's conduct which violates section 18-12-108.5

and fails to make reasonable efforts to prevent such violation commits the crime of unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun.

(b) Unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun in violation of this subsection (1) is a class 4 felony.

(2) (a) Any person who intentionally, knowingly, or recklessly provides a handgun to a juvenile or permits a juvenile to possess a handgun, even though such person is aware of a substantial risk that such juvenile will use a handgun to commit a felony offense, or who, being aware of such substantial risk, fails to make reasonable efforts to prevent the commission of the offense, commits the crime of unlawfully providing or permitting a juvenile to possess a handgun. A person shall be deemed to have violated this paragraph (a) if such person provides a handgun to or permits the possession of a handgun by any juvenile who has been convicted of a crime of violence, as defined in section 18-1.3-406, or any juvenile who has been adjudicated a juvenile delinquent for an offense which would constitute a crime of violence, as defined in section 18-1.3-406, if such juvenile were an adult.

(b) Unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun in violation of this subsection (2) is a class 4 felony.

(3) With regard to firearms other than handguns, no person shall sell, rent, or transfer ownership or allow unsupervised possession of a firearm with or without remuneration to any juvenile without the consent of the juvenile's parent or legal guardian. Unlawfully providing a firearm other than a handgun to a juvenile in violation of this subsection (3) is a class 1 misdemeanor.

(4) It shall not be an offense under this section if a person believes that a juvenile will physically harm the person if the person attempts to disarm the juvenile or prevent the juvenile from committing a violation of section 18-12-108.5.

Source: L. 93, 1st Ex. Sess.: Entire section added, p. 3, § 2, effective September 13. L. 2000: Entire section amended, p. 642, § 1, effective July 1; (4) added, p. 641, § 1, effective July 1. L. 2002: (2)(a) amended, p. 1518, § 209, effective October 1.

Editor's note: Amendments to this section by House Bill 00-1247 and House Bill 00-1243 were harmonized by renumbering (3) from House Bill 00-1247 as (4).

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-12-109. Possession, use, or removal of explosives or incendiary devices - possession of components thereof - chemical, biological, and nuclear weapons - persons exempt - hoaxes.

(1) As used in this section:

(a) (I) "Explosive or incendiary device" means:

(A) Dynamite and all other forms of high explosives, including, but not limited to, water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures;

(B) Any explosive bomb, grenade, missile, or similar device; and

(C) Any incendiary bomb or grenade, fire bomb, or similar device, including any device, except kerosene lamps, which consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

(II) "Explosive or incendiary device" shall not include rifle, pistol, or shotgun ammunition, or the components for handloading rifle, pistol, or shotgun ammunition.

(b) (I) "Explosive or incendiary parts" means any substances or materials or combinations thereof which have been prepared or altered for use in the creation of an explosive or incendiary device. Such substances or materials may include, but shall not be limited to, any:

(A) Timing device, clock, or watch which has been altered in such a manner as to be used as the arming device in an explosive;

(B) Pipe, end caps, or metal tubing which has been prepared for a pipe bomb;

(C) Mechanical timers, mechanical triggers, chemical time delays, electronic time delays, or commercially made or improvised items which, when used singly or in combination, may be used in the construction of a timing delay mechanism, booby trap, or activating mechanism for any explosive or incendiary device.

(II) "Explosive or incendiary parts" shall not include rifle, pistol, or shotgun ammunition, or the components for handloading rifle, pistol, or shotgun ammunition, or any signaling device customarily used in operation of railroad equipment.

(2) (a) Any person who knowingly possesses or controls an explosive or incendiary device commits a class 5 felony.

(b) Any person who knowingly manufactures, gives, mails, sends, or causes to be sent an explosive or incendiary device commits a class 4 felony.

(2.5) (a) Any person who knowingly possesses or controls a chemical, biological, or radiological weapon commits a class 4 felony.

(b) Any person who knowingly manufactures, gives, mails, sends, or causes to be sent a chemical, biological, or nuclear weapon commits a class 3 felony.

(3) Subsection (2) of this section shall not apply to the following persons:

(a) A peace officer while acting in his official capacity transporting or otherwise handling explosives or incendiary devices;

(b) A member of the armed forces of the United States or Colorado National Guard while acting in his official capacity;

(c) An authorized employee of the office of active and inactive mines in the division of reclamation, mining, and safety while acting within the scope of his or her employment;

(d) A person possessing a valid permit issued under the provisions of article 7 of title 9, C.R.S., or an employee of such permittee acting within the scope of his employment;

(e) A person who is exempt from the necessity of possessing a permit under the provisions of section 9-7-106 (5), C.R.S., or an employee of such exempt person acting within the scope of his employment;

(f) A person or entity authorized to use chemical, biological, or radiological materials in their lawful business operations while using the chemical, biological, or radiological materials in the course of legitimate business activities. Authorized users shall include clinical, environmental, veterinary, agricultural, public health, or radiological laboratories and entities otherwise licensed to possess radiological materials.

(4) Any person who knowingly uses or causes to be used or gives, mails, sends, or causes to be sent an explosive or incendiary device or a chemical, biological, or radiological weapon or materials in the commission of or in an attempt to commit a felony commits a class 2 felony.

(5) Any person who removes or causes to be removed or carries away any explosive or incendiary device from the premises where the explosive or incendiary device is kept by the lawful user, vendor, transporter, or manufacturer thereof, without the consent or direction of the lawful possessor, commits a class 4 felony.

(5.5) Any person who removes or causes to be removed or carries away any chemical, biological, or radiological weapon from the premises where the chemical, biological, or radiological weapon is kept by the lawful user, vendor, transporter, or manufacturer thereof, without the consent or direction of the lawful possessor, commits a class 3 felony.

(6) Any person who possesses any explosive or incendiary parts commits a class 5 felony.

(6.5) Any person who possesses any chemical weapon, biological weapon, or nuclear weapon parts commits a class 4 felony.

(7) Any person who manufactures or possesses or who gives, mails, sends, or causes to be sent any false, facsimile, or hoax explosive or incendiary device or chemical, biological, or radiological weapon to another person or places any such purported explosive or incendiary device or chemical, biological, or radiological weapon in or upon any real or personal property commits a class 5 felony.

(8) Any person possessing a valid permit issued under the provisions of article 7 of title 9, C.R.S., or an employee of such permittee acting within the scope of his employment, who knowingly dispenses, distributes, or sells explosive or incendiary devices to a person who is not authorized to possess or control such explosive or incendiary device commits a class 4 felony.

Source: **L. 74:** Entire section added, p. 256, § 1, effective March 21. **L. 77:** (4) amended, p. 971, § 64, effective July 1; entire section R&RE, p. 992, § 1, effective July 1. **L. 81:** (1)(a)(I)(A) and (7) amended, p. 977, § 21, effective July 1. **L. 84:** (8) added, p. 539, § 18, effective July 1. **L. 92:** (3)(c) amended, p. 1970, § 72, effective July 1. **L. 2001:** (2) amended, p. 857, § 1, effective July 1. **L. 2002:** (2.5), (3)(f), (5.5), and (6.5) added and (4) and (7) amended, pp. 1195, 1196, §§ 1, 2, effective June 3. **L. 2003:** (5) and (5.5) amended, p. 1428, § 11, effective April 29; (5.5) amended, p. 1433, § 26, effective July 1. **L. 2006:** (3)(c) amended, p. 213, § 3, effective August 7. **L. 2023:** (2), (2.5), (5), (5.5), (6), and (6.5) amended, (HB 23-1293), ch. 298, p. 1792, § 48, effective October 1.

Editor's note: Amendments to subsection (5.5) by sections 11 and 26 of HB 03-1236 were harmonized.

ANNOTATION

This section is not unconstitutionally vague or overbroad. The prohibition of the possession of incendiary devices is reasonably related to the legitimate governmental interest of preventing harm to the public and such prohibition is within the

state's police power. As a result, defendant's argument that the statute is unconstitutionally overbroad is without merit. The defendant's vagueness argument also fails because the statute provides reasonable notice of the prohibited conduct. *People v. Rowerdink*, 756 P.2d 986 (Colo. 1988).

1977 amendments harmonized. Two 1977 amendments were not irreconcilable and revisor of statute properly harmonized the amendments by adding "knowingly" and "or attempts to commit" in subsection (4); and defendant, who would not have been convicted under the language of either amendment as passed by the legislature, was properly convicted under the harmonized language. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

The existence of a wick is not only material, but essential, to a charge under this section. *People v. Brown*, 194 Colo. 553, 574 P.2d 92 (1978).

Incendiary device without a wick may be prosecuted despite any apparent language to the contrary in *People v. Brown*, (194 Colo. 553, 574 P.2d 92 (1978)). *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

The prosecution's inability to produce the wick remnant does not require suppression of testimony regarding its existence where a good faith effort was made to preserve it pursuant to standard fire department procedures and the investigator who observed the wick remnant is available for examination. *People v. Brown*, 194 Colo. 553, 574 P.2d 92 (1978).

The "or" in the definition of "explosive or incendiary device" means "and/or". The consequences of violating this section do not depend on whether the conviction is connected to an explosive or an incendiary device -- they are treated the same. Because violations of the section are treated as one and the same regardless of whether an explosive or incendiary device is used, interpreting the "or" as disjunctive would lead to an absurd or illogical result. *People v. Rodriguez-Ortiz*, 2025 COA 61, 574 P.3d 1196.

"Explosive or incendiary" includes items which in themselves are not explosive or incendiary, but which have been prepared or altered for use in the creation of an explosive or incendiary device. *People v. Lovato*, 630 P.2d 597 (Colo. 1981).

Blasting cap within ambit of "other forms of high explosives". The material in a blasting cap is classified as a high explosive and, thus, falls within the ambit of "other forms of high explosives" which are expressly included in this section's definition of explosive or incendiary devices. *People v. Lovato*, 630 P.2d 597 (Colo. 1981).

Phrase "including any device" defined. The phrase "which consists of or includes a breakable container including a flammable liquid or compound and a wick" is not a limitation on all devices proscribed by this section, but instead defines the phrase "including any device". The statute thus proscribes the use of any incendiary bomb or grenade, including one with a wick and a

breakable container. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

Proscribed conduct unlike fourth degree arson. This section does not deny equal protection by proscribing the same conduct as the fourth degree arson statute yet carrying a substantially greater penalty;

the elements of each offense and the mental states required are different. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

Applied in *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981).

18-12-110. Forfeiture of firearms.

Upon the motion of the prosecuting attorney after the conviction of a defendant, the court may order the forfeiture of any firearms which were used by the defendant during the course of the criminal episode which gave rise to said conviction as an element of sentencing or as a condition of probation or of a deferred sentence. Firearms forfeited under this section shall be disposed of pursuant to section 16-13-311, C.R.S.

Source: L. 83: Entire section added, p. 667, § 11, effective July 1.

18-12-111. Unlawful purchase of firearms - report to law enforcement - unlawful attempted purchase while subject to a voluntary waiver - penalties.

(1) Any person who knowingly purchases or otherwise obtains a firearm on behalf of or for transfer to a person who the transferor knows or reasonably should know is ineligible to possess a firearm pursuant to federal or state law commits a class 4 felony.

(2) (a) Any person who is a licensed dealer, as defined in 18 U.S.C. sec. 921 (a)(11), shall post a sign displaying the provisions of subsection (1) of this section in a manner that is easily readable. The person shall post such sign in an area that is visible to the public at each location from which the person sells firearms to the general public.

(b) Any person who violates any provision of this subsection (2) commits a civil infraction.

(3) (a) If a firearms dealer who holds a state permit to deal firearms pursuant to section 18-12-401.5 reasonably believes, knows or should know, or becomes aware after a transfer, that a person, including an employee, purchased or attempted to purchase a firearm in violation of subsection (1) of this section, the dealer shall report that information to a law enforcement agency with jurisdiction over the dealer's place of business.

(b) Failure to make the report required by this subsection (3) within forty-eight hours after the dealer becomes aware of an unlawful firearm purchase or attempted firearm purchase is a

violation of state law concerning the sale of firearms and is subject to the penalties described in section 18-12-401.5 (7).

(4) [Editor's note: Subsection (4) is effective (see editor's note following this section)]

(a) A person who attempts to purchase a firearm while subject to a voluntary waiver of the right to purchase a firearm described in section 24-33.5-424.7 commits unlawful attempted firearm purchase while subject to a voluntary waiver. Unlawful attempted firearm purchase while subject to a voluntary waiver is a civil infraction and shall be punished by a fine of up to twenty-five dollars.

(b) Section 18-2-101 does not apply to conduct that constitutes a civil infraction pursuant to this subsection (4).

Source: **L. 2000:** Entire section added, p. 638, § 1, effective July 1. **L. 2021:** (2)(b) amended, (SB 21-271), ch. 462, p. 3212, § 347, effective March 1, 2022. **L. 2024:** (3) added, (HB 24-1353), ch. 492, p. 3458, § 5, effective July 1, 2025. **L. 2025:** (3)(a) amended, (SB 25-034), ch. 340, p. 1842, § 4, effective August 6; (4) added, (SB 25-034), ch. 340, p. 1842, § 4, effective (see editor's note).

Editor's note: Section 6(2) of chapter 340 (SB 25-034), Session Laws of Colorado 2025, provides that the act adding subsection (4) takes effect upon receipt of the notice to the revisor of statutes required by § 24-33.5-424.7 (8). As of publication date, the revisor of statutes had not received notice.

Cross references: For the short title ("Colorado Voluntary Do-Not-Sell Act") and the legislative declaration in SB 25-034, see sections 1 and 2 of chapter 340, Session Laws of Colorado 2025.

ANNOTATION

As used in subsection (1), the term "transfer" includes shared use of firearms and other types of temporary changes in possession. *Johnson v. People*, 2023 CO 7, 524 P.3d 36.

As used in subsection (1), the term "transfer" applies to temporary transfers. Other statutory sections show the general assembly did not carve out from the scope of subsection (1) temporary transfers of a firearm in the form of shared use, and the dictionary definition includes temporary

transfers that occur when a shared item is conveyed, moved, or shifted between the users. *People v. Johnson*, 2021 COA 102, 498 P.3d 157, *aff'd*, 2023 CO 7, 524 P.3d 36.

Transfer of the firearm occurred when defendant kept the firearm at a location where both defendant and the person ineligible to possess a firearm could access

it and the ineligible person picked it up from where defendant had left it. Defendant and the ineligible person shared possession of the firearm. Defendant and the ineligible person transferred the firearm by conveying, moving, and shifting it between themselves. *People v. Johnson*, 2021 COA 102, 497 P.3d 157, *aff'd* on other grounds, 2023 CO 7, 524 P.3d 36.

18-12-111.5. Unlawful conduct involving an unserialized firearm, frame, or receiver - exceptions - penalties - authority to serialize a firearm.

(1) (a) A person shall not knowingly possess or transport an unfinished frame or receiver; except that it is not an offense if the unfinished frame or receiver is required by federal law to be imprinted with a serial number and has been imprinted with a serial number by a federal firearms licensee pursuant to federal law or subsection (7) of this section.

(b) This subsection (1) does not apply to a federally licensed firearm importer or federally licensed firearm manufacturer acting within the scope of the importer's or manufacturer's license.

(2) (a) A person shall not knowingly sell, offer to sell, transfer, or purchase an unfinished frame or receiver; except that it is not an offense if the unfinished frame or receiver is required by federal law to be imprinted with a serial number and has been imprinted with a serial number by a federal firearms licensee pursuant to federal law or subsection (7) of this section.

(b) This subsection (2) does not apply to:

(I) A sale, offer to sell, transfer, or purchase if the purchaser is a federal firearms licensee; or

(II) A temporary transfer to a federal firearms licensee for the purpose of having the firearm or frame or receiver of a firearm imprinted with a serial number pursuant to subsection (7) of this section.

(3) (a) A person shall not knowingly possess, purchase, transport, or receive a firearm or frame or receiver of a firearm that is not imprinted with a serial number by a federal firearms licensee authorized to imprint a serial number on a firearm, frame, or receiver pursuant to federal law or subsection (7) of this section.

(b) This subsection (3) does not apply if:

(I) The person possessing, purchasing, transporting, or receiving the firearm or the frame or receiver of a firearm is a federally licensed firearm importer or federally licensed firearm manufacturer; or

(II) The firearm involved has been rendered permanently inoperable; is a defaced firearm, as described in section 18-12-103; is an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16); or was manufactured before October 22, 1968.

(4) (a) A person shall not knowingly sell, offer to sell, or transfer a firearm or frame or receiver of a firearm that is not imprinted with a serial number by a federal firearms licensee authorized to imprint a serial number on a firearm pursuant to federal law or subsection (7) of this section.

(b) This subsection (4) does not apply if:

(I) The person selling, offering to sell, or transferring the firearm or frame or receiver of a firearm is a federally licensed firearm importer or federally licensed firearm manufacturer, and the person purchasing or receiving the firearm or frame or receiver of a firearm is a federally licensed firearm importer or federally licensed firearm manufacturer;

(II) The firearm involved has been rendered permanently inoperable; is a defaced firearm, as described in section 18-12-103; is an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16); or was manufactured before October 22, 1968; or

(III) The transfer is a temporary transfer to a federal firearms licensee for the purpose of having the firearm or frame or receiver of a firearm imprinted with a serial number pursuant to subsection (7) of this section.

(5) (a) (I) A person shall not manufacture or cause to be manufactured, including through the use of a three-dimensional printer, a frame or receiver of a firearm.

(II) This subsection (5)(a) does not apply to a federally licensed firearm manufacturer.

(b) (I) A person who owns, on the day before June 2, 2023, a firearm or a frame or receiver of a firearm that the person manufactured and that is not imprinted with a serial number by a federal firearms licensee shall, no later than January 1, 2024, have the firearm or the frame or receiver of a firearm imprinted with a serial number by a federal firearms licensee authorized to imprint a serial number on a firearm, frame, or receiver pursuant to federal law or subsection (7) of this section.

(II) This subsection (5)(b) does not apply to a federal firearms licensee.

(6) (a) A person who violates subsection (1), (2), (3), (4), or (5)(a) of this section commits unlawful conduct involving an unserialized firearm, frame, or receiver.

(b) Unlawful conduct involving an unserialized firearm, frame, or receiver is a class 1 misdemeanor; except that a second or subsequent offense is a class 5 felony.

(7) (a) A federal firearms licensee may serialize a firearm or frame or receiver of a firearm, including a finished or unfinished frame or receiver, by imprinting a serial number on the

firearm, frame, or receiver. To serialize a firearm, frame, or receiver, the dealer or other licensee must imprint on the firearm, frame, or receiver a serial number beginning with the dealer's or licensee's abbreviated federal firearms license number, which is the first three and last five digits of the license number, followed by a hyphen, before a unique identification number. The serial number must not be duplicated on any other firearm, frame, or receiver serialized by the licensee, and must be imprinted in a manner that complies with the requirements in federal law for imprinting a serial number on a firearm, including the minimum size and depth of the serial number and that the serial number is not susceptible to being readily obliterated, altered, or removed.

(b) The licensee must retain a record concerning a firearm, frame, or receiver serialized by the licensee that complies with the requirements under federal law for the sale of a firearm. In addition to any record required by federal law, a federal firearms licensee that imprints a unique serial number on a firearm, frame, or receiver pursuant to this subsection (7) shall make a record at the time of the transaction of each transaction involving serializing a firearm, frame, or receiver and keep that record. The record must include the following information: The date, name, age, and residence of any person to whom the item is transferred; and the unique serial number imprinted on the firearm, frame, or receiver. A licensee that fails to make and retain a record required in this subsection (7)(b) shall be punished as provided in section 18-12-403.

(c) Returning a newly serialized firearm, frame, or receiver to a person after serializing the firearm, frame, or receiver pursuant to federal law or this subsection (7) is a transfer of a firearm, and a federal firearms licensee that imprints a unique serial number on the firearm, frame, or receiver pursuant to this subsection (7) shall conduct a background check on the transferee pursuant to section 18-12-112.5 before returning the firearm to the transferee. If the transfer is denied, the licensee shall surrender the firearm, frame, or receiver to a law enforcement agency.

Source: L. 2023: Entire section added, (SB 23-279), ch. 311, p. 1894, § 2, effective June 2; (1) and (3) added, (SB 23-279), ch. 311, p. 1894, § 2, effective January 1, 2024.

18-12-112. Private firearms transfers - sale and purchase - background check required - penalty - definitions.

(1) (a) On and after July 1, 2013, except as described in subsection (6) of this section, before any person who is not a licensed gun dealer, as defined in section 18-12-506 (6), transfers or attempts to transfer possession of a firearm to a transferee, he or she shall:

(I) Require that a background check, in accordance with section 24-33.5-424, C.R.S., be conducted of the prospective transferee; and

(II) Obtain approval of a transfer from the bureau after a background check has been requested by a licensed gun dealer, in accordance with section 24-33.5-424, C.R.S.

(b) As used in this section, unless the context requires otherwise, "transferee" means a person who desires to receive or acquire a firearm from a transferor. If a transferee is not a natural person, then each natural person who is authorized by the transferee to possess the firearm after the transfer shall undergo a background check, as described in paragraph (a) of this subsection (1), before taking possession of the firearm.

(2) (a) A prospective firearm transferor who is not a licensed gun dealer shall arrange for a licensed gun dealer to obtain the background check required by this section.

(b) A licensed gun dealer who obtains a background check on a prospective transferee shall record the transfer, as provided in section 18-12-402, and retain the records, as provided in section 18-12-403, in the same manner as when conducting a sale, rental, or exchange at retail. The licensed gun dealer shall comply with all state and federal laws, including 18 U.S.C. sec. 922, as if he or she were transferring the firearm from his or her inventory to the prospective transferee.

(c) A licensed gun dealer who obtains a background check for a prospective firearm transferor pursuant to this section shall provide the firearm transferor and transferee a copy of the results of the background check, including the bureau's approval or disapproval of the transfer.

(d) A licensed gun dealer may charge a fee for services rendered pursuant to this section, which fee shall not exceed ten dollars.

(e) A person who is not a licensed gun dealer shall not make or facilitate the sale of a firearm to a person who is less than twenty-one years of age.

(f) It is unlawful for a person who is less than twenty-one years of age to purchase a firearm.

(g) Subsections (2)(e) and (2)(f) of this section do not apply if:

(I) The person is an active member of the United States armed forces while on duty and serving in conformance with the policies of the United States armed forces; or

(II) The person is a peace officer, as described in section 16-2.5-101, while on duty and serving in conformance with the policies of the employing agency, as set forth in section 16-2.5-101 and section 16-2.5-135; or

(III) The person is certified by the P.O.S.T. board pursuant to section 16-2.5-102.

(3) (a) A prospective firearm transferee under this section shall not accept possession of the firearm unless the prospective firearm transferor has obtained approval of the transfer from the bureau after a background check has been requested by a licensed gun dealer, as described in paragraph (b) of subsection (1) of this section.

(b) A prospective firearm transferee shall not knowingly provide false information to a prospective firearm transferor or to a licensed gun dealer for the purpose of acquiring a firearm.

(4) If the bureau approves a transfer of a firearm pursuant to this section, the approval shall be valid for thirty calendar days, during which time the transferor and transferee may complete the transfer.

(5) A person who transfers a firearm in violation of the provisions of this section may be jointly and severally liable for any civil damages proximately caused by the transferee's subsequent use of the firearm.

(6) The provisions of this section do not apply to:

(a) A transfer of an antique firearm, as defined in 18 U.S.C. sec. 921(a)(16), as amended, or a curio or relic, as defined in 27 CFR 478.11, as amended;

(b) A transfer that is a bona fide gift or loan between immediate family members, which are limited to spouses, parents, children, siblings, grandparents, grandchildren, nieces, nephews, first cousins, aunts, and uncles;

(c) A transfer that occurs by operation of law or because of the death of a person for whom the prospective transferor is an executor or administrator of an estate or a trustee of a trust created in a will;

(d) A transfer that is temporary and occurs while in the home of the unlicensed transferee if:

(I) The unlicensed transferee is not prohibited from possessing firearms; and

(II) The unlicensed transferee reasonably believes that possession of the firearm is necessary to prevent imminent death or serious bodily injury to the unlicensed transferee;

(e) A temporary transfer of possession without transfer of ownership or a title to ownership, which transfer takes place:

(I) At a shooting range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms;

(II) At a target firearm shooting competition under the auspices of, or approved by, a state agency or a nonprofit organization; or

(III) While hunting, fishing, target shooting, or trapping if:

(A) The hunting, fishing, target shooting, or trapping is legal in all places where the unlicensed transferee possesses the firearm; and

(B) The unlicensed transferee holds any license or permit that is required for such hunting, fishing, target shooting, or trapping;

(f) A transfer of a firearm that is made to facilitate the repair or maintenance of the firearm; except that this paragraph (f) does not apply unless all parties who possess the firearm as a result of the transfer may legally possess a firearm;

(g) Any temporary transfer that occurs while in the continuous presence of the owner of the firearm;

(h) A temporary transfer for not more than seventy-two hours. A person who transfers a firearm pursuant to this paragraph (h) may be jointly and severally liable for damages proximately caused by the transferee's subsequent unlawful use of the firearm; or

(i) A transfer of a firearm from a person serving in the armed forces of the United States who will be deployed outside of the United States within the next thirty days to any immediate family member, which is limited to a spouse, parent, child, sibling, grandparent, grandchild, niece, nephew, first cousin, aunt, and uncle of the person.

(7) For purposes of paragraph (f) of subsection (6) of this section:

(a) An owner, manager, or employee of a business that repairs or maintains firearms may rely upon a transferor's statement that he or she may legally possess a firearm unless the owner, manager, or employee has actual knowledge to the contrary and may return possession of the firearm to the transferor upon completion of the repairs or maintenance without a background check;

(b) Unless a transferor of a firearm has actual knowledge to the contrary, the transferor may rely upon the statement of an owner, manager, or employee of a business that repairs or maintains firearms that no owner, manager, or employee of the business is prohibited from possessing a firearm.

(8) Nothing in subsection (6) of this section shall be interpreted to limit or otherwise alter the applicability of section 18-12-111 concerning the unlawful purchase or transfer of firearms.

(9) (a) A person who violates a provision of this section commits a class 2 misdemeanor and shall be punished in accordance with section 18-1.3-501. The person shall also be prohibited from possessing a firearm for two years, beginning on the date of his or her conviction.

(b) When a person is convicted of violating a provision of this section, the state court administrator shall report the conviction to the bureau and to the national instant criminal background check system created by the federal "Brady Handgun Violence Prevention Act", Pub.L. 103-159, the relevant portion of which is codified at 18 U.S.C. sec. 922 (t). The report shall include information indicating that the person is prohibited from possessing a firearm for two years, beginning on the date of his or her conviction.

Source: L. 2013: Entire section added, (HB 13-1229), ch. 47, p. 128, § 1, effective March 20. **L. 2018:** IP(1)(a) and (2)(b) amended, (SB 18-032), ch. 8, p. 153, § 6, effective October 1. **L. 2021:** (9)(a) amended, (SB 21-271), ch. 462, p. 3212, § 348, effective March 1, 2022. **L. 2023:** (2)(e), (2)(f), and (2)(g) added, (SB 23-169), ch. 123, p. 459, § 2, effective August 7.

ANNOTATION

This section does not infringe upon the right to bear arms. Because this section only expands the reach of the background check requirements already in place in Colorado, it does not infringe on individuals' right to keep and bear arms for a lawful purpose. *Rocky Mtn. Gun Owners v. Hickenlooper*, 2016 COA 45M, 371 P.3d 768.

This section does not unlawfully delegate legislative or executive power. The fact that licensed gun dealers are not legally obligated to facilitate sales between private parties is not a delegation of legislative power. Likewise, this section does not charge licensed gun dealers with enforcing the law and therefore does not designate executive power. *Rocky Mtn. Gun Owners v. Hickenlooper*, 2016 COA 45M, 371 P.3d 761.

Subsections (2)(e), (2)(f), and (2)(g) are presumptively lawful because the age-based condition or qualification on the conduct they proscribe falls outside the scope of the plain text of the second amendment to the United States Constitution's right to keep and bear arms. *Rocky Mt. Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024).

Subsections (2)(e), (2)(f), and (2)(g) are designed to ensure only that those who keep and bear arms in the state are, in fact, law-abiding, responsible persons, that the subsections are objectively applied, and thus are not being put toward abusive ends. *Rocky Mt. Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024).

18-12-112.5. Firearms transfers by licensed dealers - sale and purchase - background check required - penalty - definitions.

(1) (a) It is unlawful for a licensed gun dealer to transfer a firearm to a transferee until the dealer has obtained approval for the firearms transfer from the bureau after the bureau has completed any background check required by state or federal law.

(a.3) A person who is a licensed gun dealer shall not make or facilitate the sale of a firearm to a person who is less than twenty-one years of age.

(a.5) It is unlawful for a person who is less than twenty-one years of age to purchase a firearm. This subsection (1)(a.5) and subsection (1)(a.3) of this section do not apply if:

(I) The person is an active member of the United States armed forces while on duty and serving in conformance with the policies of the United States armed forces; or

(II) The person is a peace officer, as described in section 16-2.5-101, while on duty and serving in conformance with the policies of the employing agency, as set forth in section 16-2.5-101 and section 16-2.5-135; or

(III) An individual certified by the P.O.S.T. board pursuant to section 16-2.5-102.

(b) Transferring or selling a firearm in violation of this subsection (1) is a class 1 misdemeanor.

(c) Purchasing a firearm in violation of this subsection (1) is a class 2 misdemeanor.

(2) This section does not apply to the sale of an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), as amended, or a curio or relic, as defined in 27 CFR 478.11, as amended.

(3) As used in this section, unless the context otherwise requires:

(a) "Licensed gun dealer" has the same meaning set forth in section 18-12-506.

(b) "Transfer" has the same meaning set forth in section 24-33.5-424.

Source: L. 2021: Entire section added, (HB 21-1298), ch. 268, p. 1552, § 1, effective June 19.
L. 2023: (1) amended, (SB 23-169), ch. 123, p. 459, § 3, effective August 7.

ANNOTATION

Subsection (1) is presumptively lawful because the aged-based condition or qualification on the conduct it proscribes falls outside the scope of the plain text of the second amendment to the United States Constitution's right to keep and bear arms. Rocky Mt. Gun Owners v. Polis, 121 F.4th 96 (10th Cir. 2024).

Subsection (1) is designed to ensure only that those who keep and bear arms in the state are, in fact, law-abiding, responsible persons, that it is objectively applied, and thus is not being put toward abusive ends. Rocky Mt. Gun Owners v. Polis, 121 F.4th 96 (10th Cir. 2024).

18-12-113. Failure to report a lost or stolen firearm - exception.

(1) (a) (I) A person who owns a firearm and who has reasonable cause to believe that the firearm has been lost or stolen shall report such fact to a law enforcement agency not more than five days after discovering that the firearm has been lost or stolen. A report of a lost or stolen

firearm must include, and the law enforcement agency receiving the report shall request, an accurate and detailed description of the firearm, including, to the extent known, the manufacturer, model, serial number, caliber, and any other identification number or distinguishing mark of the firearm being reported.

(II) A person other than the owner of a lost or stolen firearm who is a member of the owner's family or who resides with the owner may report the loss or theft to a law enforcement agency. If a person who is not the owner of a lost or stolen firearm makes the report, the owner is not required to report pursuant to subsection (1)(a)(I) of this section. Making a report pursuant to this subsection (1)(a)(II) does not constitute acknowledgment of ownership of the firearm for the purposes of any other provision of law.

(b) A person who previously reported a lost or stolen firearm pursuant to this section who has found or otherwise recovered the firearm, or any other person who has found or recovered the firearm, shall report to the law enforcement agency that received the report that the firearm has been recovered.

(c) Except as provided in subsection (3) of this section, a person who knowingly violates subsection (1)(a)(I) of this section commits failure to report a lost or stolen firearm.

(2) Failure to report a lost or stolen firearm is a civil infraction, punishable by a twenty-five dollar fine; except that a second or subsequent offense is an unclassified misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.

(3) This section does not apply to a licensed gun dealer, as defined in section 18-12-506.

(4) Within five days after receiving a report of a lost or stolen firearm pursuant to this section, the law enforcement agency that receives the report shall enter any available descriptive information related to the lost or stolen firearm into the Colorado bureau of investigation crime information center database.

(5) A person who reports a lost or stolen firearm pursuant to subsection (1) of this section is immune from criminal prosecution for an offense in this part 1 related to the storage of firearms and from prosecution for the civil infraction of unlawful storage of a firearm in a vehicle as described in section 18-12-114.5.

(6) This section is known and may be cited as the "Isabella Joy Thallas Act".

Source: L. 2021: Entire section added, (SB 21-078), ch. 38, p. 144, § 1, effective September 7.
L. 2024: (5) amended, (HB 24-1348), ch. 178, p. 970, § 2, effective January 1, 2025.

18-12-114. Secure firearm storage required - penalty - exceptions.

(1) Firearms must be responsibly and securely stored when they are not in use to prevent access by unsupervised juveniles and other unauthorized users. A person responsibly and securely stores a firearm when:

(a) The person carries the firearm on his or her person or within such close proximity thereto that the person can readily retrieve and use the firearm as if the person carried the firearm on his or her person;

(b) The firearm is kept in a locked gun safe or other secure container or in a manner that a reasonable person would believe to be secure and a juvenile or resident of the premises who is ineligible to possess a firearm does not have access to the key, combination, or other unlocking mechanism necessary to open the safe or container;

(c) The person properly installs a locking device on the firearm and a juvenile or resident of the premises who is ineligible to possess a firearm does not have access to the key, combination, or other unlocking mechanism necessary to remove the locking device; or

(d) The firearm is a personalized firearm and the safety characteristics of the firearm are activated.

(2) (a) A person commits unlawful storage of a firearm when the person fails to responsibly and securely store a firearm, as described in subsection (1) of this section, upon any premises that the person owns or controls and the person knows or reasonably should know that:

(I) A juvenile can gain access to the firearm without the permission of the juvenile's parent or guardian; or

(II) A resident of the premises is ineligible to possess a firearm pursuant to state or federal law.

(b) Unlawful storage of a firearm is a class 2 misdemeanor.

(c) It is an affirmative defense to the offense of unlawful storage of a firearm that a juvenile gained possession of, and used, the firearm for the purpose of exercising the rights contained in section 18-1-704 or 18-1-704.5 or in defense of livestock.

(3) This section does not apply to storing an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), as amended, or a curio or relic, as defined in 27 CFR 478.11, as amended.

Source: L. 2021: Entire section added, (HB 21-1106), ch. 39, p. 147, § 4, effective July 1.

Cross references: For the short title ("Promoting Child Safety Through Responsible Firearm Storage Act") and the legislative declaration in HB 21-1106, see sections 1 and 2 of chapter 39, Session Laws of Colorado 2021.

18-12-114.5. Secure firearm storage in a vehicle - penalty - definition.

(1) (a) A person shall not knowingly leave a handgun in an unattended vehicle unless the handgun is in a locked hard-sided container that is placed out of plain view, including a locked container that is permanently affixed to the vehicle's interior, and the container is in any of the following:

- (I) A locked vehicle;
- (II) The locked trunk of a locked vehicle; or
- (III) A locked recreational vehicle, as defined in section 24-32-902.

(b) A person shall not knowingly leave a firearm that is not a handgun in an unattended vehicle unless the firearm is in a locked hard-sided or locked soft-sided container, including a locked container that is permanently affixed to the vehicle's interior, and the container is in any of the following:

- (I) A locked vehicle;
- (II) The locked trunk of a locked vehicle; or
- (III) A locked recreational vehicle, as defined in section 24-32-902.

(c) A firearm that is not a handgun that is stored in a soft-sided container must have a locking device installed on the firearm while the firearm is stored in the soft-sided container.

(d) For the purposes of this subsection (1), a locked glove compartment or the locked center console of a vehicle is a locked hard-sided container.

(2) A person who violates subsection (1) of this section commits unlawful storage of a firearm in a vehicle. Unlawful storage of a firearm in a vehicle is a civil infraction.

(3) This section does not apply to:

(a) Storing an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), as amended;

(b) Storing a firearm that is not a handgun in a vehicle that is being used for farm or ranch operations that is on the person's private farm or ranch, including a leased farm or ranch. As used in this subsection (3)(b), "farm" and "ranch" have the same meanings as set forth in section 39-1-102.

(c) A person who lives in a vehicle or in a recreational vehicle, as defined in section 24-32-902, in which the firearm is stored. A person who lives in a vehicle or recreational vehicle must store firearms in the vehicle or recreational vehicle in accordance with the storage requirement described in section 18-12-114.

(d) A peace officer;

(e) A person who holds a valid resident or out-of-state hunting license who is engaged in lawful hunting activities;

(f) A person engaged in the instruction of hunter education courses and outreach offered by the division of parks and wildlife; and

(g) An active member of the United States armed forces while on duty.

(4) Notwithstanding the requirement in subsection (1) of this section to store a firearm in a locked hard-sided container, a person who is considered to have a disability, as defined in 42 U.S.C. sec. 12102, who stores a firearm in a locked soft-sided container does not violate this section with respect to the storage of the firearm that is in the locked soft-sided container.

(5) As used in this section, unless the context otherwise requires, "vehicle" has the same meaning as set forth in section 42-1-102.

Source: L. 2024: Entire section added, (HB 24-1348), ch. 178, p. 968, § 1, effective January 1, 2025.

18-12-115. Waiting period for firearms sales - background check required - penalty - exceptions.

(1) (a) It is unlawful for any person who sells a firearm, including a licensed gun dealer as defined in section 18-12-506 (6), to deliver the firearm to the purchaser until the later in time occurs:

(I) Three days after a licensed gun dealer has initiated a background check of the purchaser that is required pursuant to state or federal law; or

(II) The seller has obtained approval for the firearm transfer from the bureau after it has completed any background check required by state or federal law.

(b) A person who violates this subsection (1) commits a civil infraction and, upon conviction thereof, shall be punished by a fine of five hundred dollars; except that for a second or subsequent offense, the fine shall be not less than five hundred dollars and not more than five thousand dollars.

(2) This section does not apply to:

(a) The sale of an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), as amended, or a curio or relic, as defined in 27 CFR 478.11, as amended;

(b) The sale of a firearm by a person serving in the armed forces of the United States who will be deployed outside of the United States within the next thirty days to any family member, including:

(I) Regardless of age, a biological, adopted, or foster child; a stepchild or legal ward; a child of a domestic partner; a child to whom the seller stands in loco parentis; or a person to whom the seller stood in loco parentis when the person was a minor;

(II) A biological, adoptive, or foster parent; a stepparent or legal guardian of the seller or seller's spouse or domestic partner; or a person who stood in loco parentis when the seller or seller's spouse or domestic partner was a minor child;

(III) A person to whom the seller is legally married under the laws of any state or a domestic partner of a seller;

(IV) A grandparent, grandchild, or sibling, whether a biological, foster, adoptive, or step relationship, of the seller or seller's spouse or domestic partner; or

(V) As shown by the seller, any other individual with whom the seller has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship; or

(c) A firearm transfer for which a background check is not required pursuant to state or federal law.

(3) Pursuant to the authority granted in section 29-11.7-103, a local government may enact an ordinance, regulation, or other law concerning a waiting period.

Source: L. 2023: Entire section added, (HB 23-1219), ch. 125, p. 485, § 2, effective October 1.

Cross references: For the legislative declaration in HB 23-1219, see section 1 of chapter 125, Session Laws of Colorado 2023.

ANNOTATION

The three-day minimum between initiating a background check and delivering a firearm to a purchaser under subsection (1)(a) is not covered by the plain text of the second amendment to the United States Constitution. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023).

The plain text of the second amendment does not cover the waiting period required by this section such that the constitution presumptively provides protection. The words "keep" and "bear" in the second amendment are not implicated by the waiting period. Under *District of Columbia v. Heller*, 554 U.S. 570 (2008), the most natural reading of "keep Arms" in the second amendment is to "have weapons". The word "bear" means to "carry". When "bear" is used with "arms", however, the term has a meaning that refers to carrying for a particular purpose -- confrontation. Putting all the pieces together, the text of the second amendment guarantees the individual right to possess and carry weapons in case of confrontation. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023).

From the reading of the plain text of the second amendment, it is clear that the relevant conduct impacted by the waiting

period -- the receipt of a paid-for firearm without delay -- is not covered. To "keep", under the definitions provided in *Heller*, meant to retain an object one already possessed. It did not mean to receive a newly paid-for item, and it certainly did not mean to receive that item without delay. Likewise, having weapons indicates the weapons are already in one's possession, not that one is receiving them. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023).

The purchase and delivery of an object, here, a firearm, is not an integral element of keeping (this is, having) or bearing (that is, carrying) that object. Rather, purchase and delivery are one means of creating the opportunity to have weapons. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023).

The waiting-period provision regulates only the sale, and specifically sellers, of firearms. It does not apply to anyone who does not sell a firearm. Commercial regulations that apply only to manufacturers and sellers do not implicate an individual's right of possession. *Rocky Mt. Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023).

18-12-116. Enforcement of large-capacity magazine ban by regulating the manufacture, distribution, transfer, sale, and purchase of specified semiautomatic firearms - penalties - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Cycle the action" means to extract the fired cartridge case, chamber the next cartridge, and prepare the firing mechanism to fire again.

(b) "Detachable magazine" means an ammunition feeding device that is not permanently attached to a firearm and may be removed from the firearm without rendering the firearm incapable of accepting any magazine. "Detachable magazine" does not include an attached tubular magazine located under the barrel of a firearm.

(c) "Gas-operated semiautomatic handgun" means any semiautomatic handgun that harnesses or traps a portion of the high-pressure gas from a fired cartridge to cycle the action using any of the following:

(I) A long-stroke piston system in which gas is vented from the barrel to a piston that is mechanically fixed to the bolt group and moves to cycle the action;

(II) A short-stroke piston system in which gas is vented from the barrel to a piston that moves separately from the bolt group so that the energy is imparted through a gas piston to cycle the action;

(III) A system that traps and vents gas from either the barrel or the chamber to directly strike or impinge the bolt, bolt carrier, or slide assembly, to unlock and cycle the action;

(IV) A hybrid system that combines elements of a system described in subsection (1)(c)(I) of this section with a system described in subsection (1)(c)(II) or (1)(c)(III) of this section to capture gas vented from the barrel to cycle the action; or

(V) A blowback-operated system that directly utilizes the expanding gasses of the ignited propellant powder acting on the cartridge case to drive the breechblock or breech bolt rearward.

(d) (I) "Specified semiautomatic firearm" means any of the following, except as provided in subsection (1)(d)(II) of this section:

(A) A semiautomatic rifle or semiautomatic shotgun with a detachable magazine; or

(B) A gas-operated semiautomatic handgun with a detachable magazine.

(II) "Specified semiautomatic firearm" does not include:

(A) A firearm designed to accept, and capable of operating only with, .22 or lower caliber rimfire ammunition, unless the firearm has a separate upper and lower receiver;

(B) A firearm that is manually operated by bolt, pump, lever, or slide action;

(C) A firearm that has a permanently fixed magazine that cannot accept more than fifteen rounds of ammunition, including a semiautomatic firearm that has been converted to have a permanently fixed magazine that cannot accept more than fifteen rounds of ammunition;

(D) A single or double action semiautomatic handgun that uses recoil to cycle the action of the handgun;

(E) The following models of firearms, as they exist and are configured on April 10, 2025: AG42 Ljungman; Benelli Argo E Pro; Benelli R1 Big-Game Rifle; Browning BAR MK 3; Browning BAR LongTrac Rifle; Browning BAR ShortTrac Rifle; Fabrique Nationale Model 49, commonly known as FN49; Fusil Automatique Modele 1917, also known as RSC M1917; Gewehr 43; Globco Mohawk; Hakim Rifle; HK SL6; HK SL7; M1 Carbine; M1941 Johnson Rifle; Marlin Camp Carbine; MAS49; Remington Model 4; Remington Model 8; Remington Model 740; Remington Model 742; Remington Model 750; Remington 7400; Ruger Deerfield Carbine; Ruger Mini-14 Ranch Rifle; Ruger Mini Thirty Rifle; Ruger Model 44; Springfield Armory M1A Standard Issue Rifle; SVT 40; Valmet Hunter M88; VZ.52; Winchester Model 100; Winchester Model 1905; Winchester Model 1907; and Winchester Model 1910;

(F) A firearm that has been made permanently inoperable; or

(G) An antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), or a curio or relic, as defined in 27 CFR 478.11.

(2) On or after August 1, 2026, it is unlawful for any person to knowingly manufacture, distribute, transfer, sell, or purchase a specified semiautomatic firearm; except that a person may sell or transfer a specified semiautomatic firearm to an individual residing in another state or a federally licensed firearm dealer.

(3) Subsection (2) of this section does not apply to:

(a) The manufacture for, transfer or sale of a specified semiautomatic firearm to, or receipt or purchase of a specified semiautomatic firearm by:

(I) A federal, state, local, or tribal law enforcement agency for the purpose of equipping the agency's peace officers;

(II) A peace officer, as described in section 16-2.5-101, who is certified by the peace officer standards and training board created in section 24-31-302, if the agency that employs the peace officer requires or permits the peace officer to carry a specified semiautomatic firearm for use in the peace officer's official capacity;

(III) The department of corrections, the warden of a prison, the superintendent of a facility in which a person has been placed by transfer from a correctional facility pursuant to section 17-23-101, the keeper of a jail, or the head of any other institution for the detention of people accused or convicted of an offense, in order to equip staff for the performance of their official duties;

(IV) An entity that operates an armored vehicle business for use by an authorized employee of the entity while in the course and scope of the employee's duties; or

(V) An instructor of an accredited gunsmithing course in a state-authorized institution of higher education or an institution regulated by the Colorado division of private occupational

schools for the purposes of educational instruction or manufacture, repair, or maintenance of a specified semiautomatic firearm during the course of educational instruction;

(b) The manufacture for, transfer or sale of a specified semiautomatic firearm to, or receipt or purchase of a specified semiautomatic firearm for use by, members of the armed services or reserve forces of the United States or of the Colorado National Guard, in the performance of their official duties;

(c) The transfer of a specified semiautomatic firearm to, and receipt of a specified semiautomatic firearm by:

(I) A federally licensed firearm dealer for temporary storage or permanent disposal;

(II) A gunsmith for the purposes of maintenance, repair, or modification and the subsequent return of the specified semiautomatic firearm to the lawful owner, unless the gunsmith has reason to believe that the lawful owner is prohibited by law from possessing the specified semiautomatic firearm; or

(III) A student of an accredited gunsmithing course in a state-authorized institution of higher education or an institution regulated by the Colorado division of private occupational schools for the purposes of educational instruction or manufacture, repair, or maintenance of a specified semiautomatic firearm during the course of the student's educational instruction;

(d) The sale of a specified semiautomatic firearm to, and purchase of a specified semiautomatic firearm by, an institution of higher education that operates, or an instructor of, an educational program approved by the governing board of a public institution of higher education or the Colorado division of private occupational schools, for use and storage at the location of the educational program;

(e) The transfer or sale of a specified semiautomatic firearm to, and receipt or purchase of a specified semiautomatic firearm by:

(I) A person who:

(A) Completed a hunter education course certified by the division of parks and wildlife, as described in section 33-6-107 (8), and, within five years before making the purchase, completed a basic firearms safety course described in subsection (5) of this section;

(B) Within five years before making the purchase, completed an extended firearms safety course described in subsection (5) of this section; or

(C) Completed an extended firearms safety course more than five years before making the purchase and completed a basic firearms safety course within five years before making the purchase;

(II) A federal, state, or local historical society, museum, or institutional collection that is open to the public, if the specified semiautomatic firearm is rendered permanently inoperable prior to the sale or transfer; and

(III) A forensic laboratory, or any authorized agent or employee of the laboratory, for use exclusively in the course and scope of forensic analysis;

(f) A transfer that occurs by operation of law or because of the death of a person for whom the prospective transferor is an executor or administrator of an estate or a trustee of a trust created in a will; and

(g) The manufacture, distribution, transfer, sale, or rental of a specified semiautomatic firearm capable of only firing blanks by, or receipt or purchase of a specified semiautomatic firearm capable of only firing blanks from, a federally licensed firearm dealer, for use solely as a prop for a film, as defined in section 24-48.5-114.

(4) (a) A person who violates subsection (2) of this section commits unlawful manufacture, distribution, transfer, sale, or purchase of a specified semiautomatic firearm.

(b) Unlawful manufacture, distribution, transfer, sale, or purchase of a specified semiautomatic firearm is a class 2 misdemeanor; except that a second or subsequent offense is a class 6 felony.

(5) (a) (I) A basic firearms safety course and an extended firearms safety course must be taught by an instructor verified by a sheriff as a firearms instructor pursuant to section 18-12-202.7. A basic or extended firearms safety course must be held in person with the instructor of the class at the same location as the students, and no part of the class may be conducted via the internet.

(II) In order to enroll in a basic or extended firearms safety course, a person must hold a valid firearms safety course eligibility card, as described in subsection (5)(b) of this section. Before allowing a student to attend a course, the instructor shall verify that the student holds a valid firearms safety course eligibility card by requesting information from the firearms training and safety course record system created in section 33-9-115.

(III) (A) A basic firearms safety course must provide a minimum of four hours of instruction.

(B) An extended firearms safety course must provide a minimum of twelve hours of instruction, which must be provided on at least two different days.

(IV) A basic or extended firearms safety course must satisfy the course requirements adopted by the division and include, but is not limited to including, instruction on safe handling of semiautomatic firearms and ammunition magazines, safe storage of firearms and child safety, firearm deaths associated with mental illness, extreme risk protection orders described in article 14.5 of title 13, and victim awareness and empathy.

(V) At the conclusion of a basic or extended firearms safety course, the instructor shall administer an exam that tests a student's knowledge of the subjects taught in the course and requires the student to demonstrate the ability to safely handle firearms and a mastery of gun safety. To complete a basic firearms safety course, a student must achieve a score of at least ninety percent on the exam.

(VI) Within three business days after a student's completion of a basic or extended firearms safety course, the instructor shall report the student's course completion to the firearms training and safety course record system described in section 33-9-115.

(b) (I) Each sheriff shall issue firearms safety course eligibility cards pursuant to this subsection (5)(b). A card is valid for five years after the date of issuance.

(II) To obtain a firearms safety course eligibility card, an applicant must submit an application to the sheriff on a form created by the division of parks and wildlife and submit to the sheriff the materials described in subsection (5)(b)(III) of this section. The application form must require the applicant to provide their full name and date of birth and make the following attestations:

(A) The applicant does not have a state or federal conviction that would prohibit them from purchasing or possessing a firearm;

(B) The applicant will not violate relevant state law related to the purchase, possession, storage, and lawful use of firearms; and

(C) The applicant will only transfer a firearm pursuant to section 18-12-112 and this section and not allow another person who the applicant believes would be a danger to themselves or others access to a firearm in the applicant's possession.

(III) An applicant must also submit to the sheriff:

(A) Government-issued photographic identification issued to the applicant; and

(B) The results of a completed name-based background check of national and Colorado public criminal history and judicial databases completed by a third-party vendor that conducts those checks as a normal part of the vendor's business, and an attestation from the vendor that the background check was performed by the vendor.

(IV) A person who knowingly makes a false or misleading statement on a firearms safety course eligibility card application or deliberately omits any material information requested on the application commits perjury in the second degree, as described in section 18-8-503. In addition to any criminal penalties, if a person is convicted of perjury for making a false or misleading statement on a firearms safety course eligibility card application, the sheriff shall revoke the person's card if issued prior to conviction.

(V) The applicant must submit a firearms safety course eligibility card fee to the sheriff. The firearms safety course eligibility card fee includes the sheriff's processing fee and the firearms training and safety course record fee established pursuant to section 33-9-115 (5)(a). The firearms safety course eligibility card fee is not refundable if the sheriff denies the applicant's application. Each sheriff may establish a processing fee. The amount of the fee must reflect the actual direct and indirect costs to the sheriff for issuing a firearms safety course eligibility card. The sheriff shall remit the firearms training and safety course record fee collected from each applicant to the division of parks and wildlife.

(VI) (A) A sheriff shall review each submitted application for a firearms safety course eligibility card.

(B) Except as otherwise provided in this subsection (5)(b)(VI), a sheriff shall issue a firearms safety course eligibility card to an applicant who submits to the sheriff the application, information, and fee required in this subsection (5)(b).

(C) A sheriff shall deny an application for a firearms safety course eligibility card if the applicant cannot lawfully possess a firearm under state or federal law or the sheriff cannot positively identify the applicant. The sheriff may deny an application if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to themselves or others if the applicant holds a firearms safety course eligibility card.

(D) The sheriff shall revoke an issued firearms safety course eligibility card if the sheriff knows that the cardholder cannot lawfully possess a firearm under state or federal law. The sheriff may revoke an issued firearms safety course eligibility card if the sheriff has a reasonable belief that documented previous behavior by the cardholder makes it likely the cardholder will present a danger to themselves or others if the cardholder continues holding a firearms safety course eligibility card.

(E) If a sheriff denies a person's firearms safety course card application or revokes a person's firearms safety course eligibility card, the sheriff shall notify the person in writing, stating the grounds for denial or revocation and informing the person of the right to seek judicial review pursuant to subsection (5)(b)(X) of this section.

(VII) A sheriff shall report information required by the division of parks and wildlife about the card to the firearms training and safety course record system created in section 33-9-115.

(VIII) A firearms safety course eligibility card must include the firearms safety course eligibility cardholder's full name; the county of issuance and the signature of the sheriff who issued the card; and the issuance and expiration dates of the card.

(IX) A sheriff is not liable for any damages that may result from good faith compliance with the provisions of this subsection (5)(b), including damages that may result from issuance or denial of a firearms safety course eligibility card.

(X) (A) If a sheriff denies a person's firearms safety course eligibility card application or revokes a person's firearms safety course eligibility card, the person may seek judicial review of the sheriff's decision.

(B) The procedures specified in rule 106 (a)(4) and (b) of the Colorado rules of civil procedure govern the procedure and timelines for filing a complaint, an answer, and briefs for judicial review pursuant to this subsection (5)(b)(X). At a judicial review sought pursuant to this subsection (5)(b)(X), the sheriff has the burden of proving by a preponderance of the evidence that the person is ineligible for a firearms safety course eligibility card; except that if the denial or revocation is because the sheriff has determined that the applicant will present a danger to themselves or others pursuant to subsection (5)(b)(VI) of this section, the sheriff has the burden of proving that determination by clear and convincing evidence.

(C) Following completion of the review, the court may award attorney fees to the prevailing party.

Source: L. 2025: Entire section added, (SB 25-003), ch. 68, p. 289, § 2, effective April 10.

18-12-117. Ammunition sales - sales requirements - minimum purchase age - exceptions - ammunition delivery requirements - penalties - definitions - repeal.

(1) (a) A retail ammunition vendor shall not sell, offer for sale, or display for sale or transfer ammunition in a manner that allows the ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or an employee of the vendor. Ammunition displayed in an enclosed display case or behind a counter or other customer access prevention device is not considered accessible for the purposes of this subsection (1)(a).

(b) (I) A retail ammunition vendor shall not sell ammunition to a person who is under twenty-one years of age. Prior to completing a sale of ammunition at an in-person transaction, the retail ammunition vendor, or an employee of the vendor, shall verify that the purchaser is at least twenty-one years of age by requiring the purchaser to produce a valid government-issued photo identification.

(II) (A) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b)(I) of this section, a retail ammunition vendor is not prohibited from selling ammunition to a person eighteen years of age or older but under twenty-one years of age who was born on or before January 28, 2007.

(B) This subsection (1)(b)(II) is repealed, effective January 28, 2028.

(c) (I) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b) of this section, the operator of a shooting range that provides opportunities for the public to engage in shooting sports or education may sell ammunition to a person who is eighteen years of age or older but under twenty-one years of age for use only at the shooting range. Prior to completing the sale of ammunition, the seller shall verify that the purchaser is at least eighteen years of age by requiring the purchaser to produce a valid government-issued photo identification.

(II) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b) of this section, a retail ammunition vendor may sell ammunition to a member or veteran of the United States military or Colorado National Guard who is eighteen years of age or older but under twenty-one years of age. Prior to completing the sale of ammunition during an in-person transaction to a member or veteran of the United States military or Colorado National Guard who is under twenty-one years of age, the retail ammunition vendor, or an employee of the vendor, shall verify that the purchaser is a member or veteran by requiring the purchaser to produce a valid military identification card that demonstrates that the person is a member or veteran of the United States military or Colorado National Guard.

(III) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b) of this section, a retail ammunition vendor may sell ammunition to a person who is eighteen years of age or older but under twenty-one years of age who demonstrates having obtained hunter education certification by presenting:

(A) A valid hunter education certificate recognized by the division of parks and wildlife; or

(B) An expired or unexpired hunting license issued by the division of parks and wildlife that has a verified hunter education certification.

(IV) (A) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b) of this section, a retail ammunition vendor may sell ammunition to a person who is eighteen years of age or older but under twenty-one years of age and who is identified as a protected person in a protection order that is in effect. Prior to completing the sale of ammunition to a protected person, the retail ammunition vendor, or an employee of the vendor, shall verify that the purchaser is a protected person by requiring the purchaser to produce a copy of the protection order identifying the purchaser as a protected person and requiring the person to attest that the protection order is in effect.

(B) As used in this subsection (1)(c)(IV), "protected person" means a person identified in a protection order, as described in section 18-6-803.5 (1.5)(a.5), as a person for whose benefit the protection order was issued.

(V) Notwithstanding the prohibition on selling ammunition to a person who is under twenty-one years of age described in subsection (1)(b) of this section, a retail ammunition vendor may sell ammunition to a person who is a peace officer, as described in section 16-2.5-101, while the officer is on duty and serving in conformance with the policies of the officer's employing agency, as set forth in sections 16-2.5-101 and 16-2.5-135.

(d) The provisions in subsection (1)(c) of this section that permit the sale of ammunition to a person eighteen years of age or older but under twenty-one years of age only apply to the sale of ammunition during an in-person transaction at which the sale is completed and the ammunition is delivered to the purchaser.

(e) This subsection (1) does not apply to the sale of rimfire ammunition.

(f) A retail ammunition vendor that violates this subsection (1) commits unlawful sale of ammunition. Unlawful sale of ammunition is a civil infraction; except that a second or subsequent offense is a class 1 misdemeanor.

(2) (a) A retail ammunition vendor delivering a package containing ammunition to a retail ammunition deliverer for purposes of transport shall use a delivery service that ensures that the person receiving the ammunition is twenty-one years of age or older through age verification.

(b) A retail ammunition deliverer must comply with 49 CFR 173.63 (b)(1)(i) related to the labeling and packaging for delivery of ammunition.

(3) (a) When delivering a package containing ammunition sold at retail, a retail ammunition deliverer shall:

(I) Verify that the person receiving the ammunition delivery is twenty-one years of age or older by requiring the person to present a valid government-issued photographic identification to the person making the delivery; and

(II) Obtain written acknowledgment of receipt of the ammunition delivery from the recipient of the delivery.

(b) (I) Notwithstanding the requirement to verify that the person receiving ammunition is twenty-one years of age or older described in subsection (3)(a)(I) of this section, a retail ammunition deliverer shall verify that the person receiving ammunition was born on or before January 28, 2007.

(II) This subsection (3)(b) is repealed, effective January 28, 2028.

(c) This section does not apply to a retail ammunition deliverer that does not know that the package contains ammunition because the sender failed to notify the deliverer that the package contains ammunition.

(4) This section does not apply to the sale or offer to sell ammunition at wholesale or the delivery of ammunition sold at wholesale.

(5) As used in this section, unless the context otherwise requires:

(a) "Retail ammunition deliverer" means an entity that delivers, by motor vehicle, ammunition sold at retail to the purchaser at a location in this state. "Retail ammunition deliverer" includes a retail ammunition vendor that delivers to a location other than the vendor's place of business ammunition sold by the vendor at retail to the purchaser.

(b) "Retail ammunition vendor" means a person who sells ammunition at retail. "Retail ammunition vendor" includes a vendor not located in Colorado when the vendor sells or offers to sell ammunition at retail for delivery to a purchaser located in Colorado.

Source: L. 2025: Entire section added, (HB 25-1133), ch. 89, p. 368, § 2, effective July 1, 2026.

18-12-118. Unlawful three-dimensional printing of a firearm or firearm component - penalties - definitions.

(1) (a) A person shall not knowingly manufacture or produce a firearm or firearm component by means of three-dimensional printing using a three-dimensional printer, CNC milling machine, or similar device.

(b) A person who violates this subsection (1) commits unlawful three-dimensional printing of a firearm or firearm component. Unlawful three-dimensional printing of a firearm or firearm component is a class 1 misdemeanor; except that a second or subsequent offense is a class 5 felony.

(c) This subsection (1) does not apply to:

(I) A federally licensed firearm manufacturer;

(II) An instructor or student of an accredited gunsmithing program, or an institution that operates an accredited gunsmithing program, when the manufacture is solely for purposes of educational instruction within the accredited gunsmithing program.

(2) This section only applies to potentially functional firearms and firearm components and does not apply to the three-dimensional printing of any other components or components that could be used to make a non-functioning or prop firearm.

(3) As used in this section, unless the context otherwise requires:

- (a) "CNC milling machine" means a computer numerical control milling machine.
- (b) "Firearm component" means an unfinished frame or receiver, large-capacity magazine, or rapid-fire device.
- (c) "Gunsmithing program" means a gunsmithing program operated by an institution.
- (d) "Institution" means a state-authorized institution of higher education or institution regulated by the Colorado division of private occupational schools.
- (e) "Large-capacity magazine" has the same meaning set forth in section 18-12-301.
- (f) "Three-dimensional printing" or "3-D printing" means additive manufacturing that builds three-dimensional objects by use of a three-dimensional printer or similar device and subtractive manufacturing that creates objects by removing material from a workpiece by use of a CNC milling machine or similar device.

Source: L. 2026: Entire section added, (HB 26-1144), ch. 94, p. 378, § 1, effective July 1.

Editor's note: (1) Section 3 of chapter 94 (HB 26-1144), Session Laws of Colorado 2026, provides that the act adding this section applies to offenses committed on or after July 1, 2026.

(2) This section was numbered as § 18-12-119 in HB 26-1144 but was renumbered on revision for ease of location.

PART 2

PERMITS TO CARRY CONCEALED HANDGUNS

Law reviews: For article, "In the Crosshairs: Colorado's New Gun Laws", see 33 Colo. Law. 11 (Jan. 2004).

18-12-201. Legislative declaration.

- (1) The general assembly finds that:
 - (a) There exists a widespread inconsistency among jurisdictions within the state with regard to the issuance of permits to carry concealed handguns;
 - (b) (Deleted by amendment, L. 2021.)

(c) Inconsistency regarding issuance of permits results in the arbitrary and capricious denial of permits to carry concealed handguns based on the jurisdiction of residence rather than the qualifications for obtaining a permit;

(d) Officials of local governments are uniquely equipped to make determinations as to where concealed handguns can be carried in their local jurisdictions; and

(e) It is necessary that the state occupy the field of regulation of issuing concealed handgun permits because there is a prevailing state interest in ensuring that no citizen is arbitrarily denied a concealed handgun permit.

(2) Based on the findings specified in subsection (1) of this section, the general assembly concludes that:

(a) The criteria and procedures for issuing permits to carry concealed handguns is a matter of statewide concern;

(b) It is necessary to provide statewide uniform standards for issuing permits to carry concealed handguns for self-defense; and

(c) Whether concealed handguns can be carried in a specific area is a matter of state and local concern.

(3) In accordance with the findings and conclusions specified in subsections (1) and (2) of this section, the general assembly hereby instructs each sheriff to implement and administer the provisions of this part 2. The general assembly does not delegate to the sheriffs the authority to regulate or restrict the issuance of permits provided for in this part 2 beyond the provisions of this part 2. An action or rule that encumbers the permit process by placing burdens on the applicant beyond those sworn statements and specified documents detailed in this part 2 or that creates restrictions beyond those specified in this part 2 is in conflict with the intent of this part 2 and is prohibited.

Source: **L. 2003:** Entire part added, p. 635, § 1, effective May 17. **L. 2021:** (1) and (2) amended, (SB 21-256), ch. 269, p. 1557, § 4, effective June 19.

18-12-202. Definitions.

As used in this part 2, unless the context otherwise requires:

(1) and (2) Repealed.

(3) "Chronically and habitually uses alcoholic beverages to the extent that the applicant's normal faculties are impaired" means:

(a) The applicant has at any time been committed as a person with an alcohol use disorder pursuant to section 27-81-111 or 27-81-112; or

(b) Within the ten-year period immediately preceding the date on which the permit application is submitted, the applicant:

(I) Has been committed as a person with an alcohol use disorder pursuant to section 27-81-109 or 27-81-110; or

(II) Has had two or more alcohol-related convictions under section 42-4-1301 (1) or (2), C.R.S., or a law of another state that has similar elements, or revocations related to misdemeanor, alcohol-related convictions under section 42-2-126, C.R.S., or a law of another state that has similar elements.

(3.5) "Concealed handgun training class" means a concealed handgun training class as described in section 18-12-202.5 and does not include a refresher class.

(4) "Handgun" means a handgun as defined in section 18-12-101 (1)(o); except that the term does not include a machine gun as defined in section 18-12-101 (1)(s).

(5) Repealed.

(6) "Permit" means a permit to carry a concealed handgun issued pursuant to the provisions of this part 2; except that "permit" does not include a temporary emergency permit issued pursuant to section 18-12-209.

(6.5) "Refresher class" means a concealed handgun refresher class as described in section 18-12-202.5 (4).

(7) "Sheriff" means the sheriff of a county, or his or her designee, or the official who has the duties of a sheriff in a city and county, or his or her designee.

(8) "Training certificate" means a certificate issued by a verified instructor who conducts a concealed handgun training class or a refresher class that evidences an applicant's successful completion of the class requirements.

(9) "Verified instructor" means an instructor for a firearms safety course verified as a firearms instructor by a sheriff pursuant to section 18-12-202.7.

Source: L. 2003: Entire part added, p. 636, § 1, effective May 17. **L. 2010:** (3)(a) and (3)(b)(I) amended, (SB 10-175), ch. 188, p. 787, § 32, effective April 29. **L. 2013:** (1) repealed, (HB 13-1229), ch. 47, p. 137, § 7, effective March 20; (5) amended, (SB 13-195), ch. 278, p. 1450, § 1, effective May 24. **L. 2018:** (3)(a) and (3)(b)(I) amended, (SB 18-091), ch. 35, p. 386, § 19, effective August 8. **L. 2024:** (2)(e) and (5)(c) added by revision, (HB 24-1174), ch. 388, pp.

2684, 2691, §§ 1, 9; (3.5), (6.5), and (9) added and (8) amended, (HB 24-1174), ch. 388, p. 2684, § 1, effective July 1, 2025. **L. 2025:** (4) amended, (SB 25-300), ch. 428, p. 2446, § 18, effective August 6.

Editor's note: Subsections (2)(e) and (5)(c) provided for the repeal of subsections (2) and (5), respectively, effective July 1, 2025. (See L. 2024, pp. 2684, 2691.)

Cross references: For the legislative declaration in SB 18-091, see section 1 of chapter 35, Session Laws of Colorado 2018.

18-12-202.5. Concealed handgun training class - refresher class - rules.

(1) A concealed handgun training class is any of the following:

(a) A law enforcement training firearms safety course; or

(b) A firearms safety course taught by a verified instructor and offered by a law enforcement agency; an institution of higher education; or a public or private institution, organization, or firearms training school, that is open to the general public and is taught by a verified instructor.

(2) A concealed handgun training class must be held in person with the instructor of the class at the same location as the students, and no part of the class may be conducted via the internet. A concealed handgun training class must provide a minimum of eight hours of instruction, including the live-fire shooting exercise described in subsection (3)(g) of this section and the written concealed handgun competency exam described in subsection (3)(h) of this section. The eight hours of instruction in a course do not need to be consecutive.

(3) A concealed handgun training class must include the following elements:

(a) Instruction regarding knowledge and safe handling of firearms and ammunition;

(b) Instruction regarding safe storage of firearms and child safety;

(c) Instruction regarding safe firearms shooting fundamentals;

(d) Instruction regarding federal and state laws pertaining to the lawful purchase, ownership, transportation, use, and possession of firearms, including instruction on extreme risk protection orders described in article 14.5 of title 13, requirements for reporting lost or stolen firearms described in section 18-12-113, secure firearms storage requirements described in section 18-12-114, and any other state law enacted within five years before the class that pertains to the purchase, ownership, transportation, use, and possession of firearms;

- (e) Instruction regarding state law pertaining to the use of deadly force for self-defense;
 - (e.5) Instruction regarding best practices to ensure concealed handgun permit holders safely interact with law enforcement personnel who are responding to an emergency;
 - (f) Instruction regarding techniques for avoiding a criminal attack and how to manage a violent confrontation, including conflict resolution and judgmental use of lethal force;
 - (g) A requirement that a student achieve a minimum seventy percent accuracy score, as determined by the instructor, in a live-fire shooting exercise conducted on a range, which requires discharging at least fifty rounds of ammunition and which does not need to be conducted in a single day; and
 - (h) A requirement that a student achieve a passing score of at least eighty percent on a written concealed handgun competency exam that tests a student's knowledge of the subjects described in subsections (3)(a) to (3)(f) of this section. The exam must be administered as an open book exam.
- (4) (a) A concealed handgun refresher class requires a student to demonstrate safety and competence with a handgun. A refresher class must be taught by a verified instructor and must include instruction on changes to federal and state laws related to firearms enacted within five years before the refresher class; a live-fire shooting exercise conducted on a range, which requires discharging at least fifty rounds of ammunition; and a written concealed handgun competency exam that tests a student's knowledge of the subjects described in subsections (3)(a) to (3)(f) of this section.
- (b) A refresher class must be held in person with the instructor of the class at the same location as the students, and no part of the class may be conducted via the internet. A refresher class must include at least two hours of instruction, including the live-fire exercise and the written exam. In order to complete a refresher class, a student must achieve a minimum seventy percent accuracy score, as determined by the instructor, in the live-fire shooting exercise and a passing score of at least eighty percent on the written exam. The exam must be administered as an open book exam.
- (c) A training certificate issued for the completion of a refresher class is valid for renewal of a permit to carry a concealed handgun pursuant to section 18-12-211, but is not valid for an initial application for a permit to carry a concealed handgun pursuant to section 18-12-203 (1)(h)(VI).
- (5) A verified instructor shall provide a training certificate that includes the printed name and original signature of the class instructor to any student who completes a concealed handgun training class or a refresher class so that the student may submit the certificate to a sheriff as part of an initial application for, or an application for renewal of, a permit to carry a concealed

handgun. The training certificate must clearly indicate whether the student completed a concealed handgun training class or a refresher class.

(6) A concealed handgun training class and a refresher class is subject to the requirements of the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq.

Source: L. 2024: Entire section added, (HB 24-1174), ch. 388, p. 2685, § 2, effective August 7.

18-12-202.7. Concealed handgun training class - instructor verification.

(1) Each sheriff shall verify as a firearms instructor a person whose principal place to conduct firearms training is in the sheriff's county and who:

- (a) Satisfies the requirements for verification described in this section; and
- (b) Pays any fee required pursuant to subsection (5) of this section.

(2) To become a verified instructor, an applicant must:

(a) Hold a valid permit to carry a concealed handgun issued pursuant this part 2 that is not a temporary emergency permit issued pursuant to section 18-12-209; and

(b) Be certified as a firearms instructor by one of the following entities that has instructors certified by a nationally recognized organization that customarily offers firearms training:

- (I) A federal, state, county, or municipal law enforcement agency;
- (II) A college or university;
- (III) A nationally recognized organization that customarily offers firearms training; or
- (IV) A firearms training school.

(3) (a) An instructor verification issued pursuant to this section is valid for ten years and may be renewed at any time prior to expiration.

(b) A sheriff shall issue evidence of verification to a verified instructor. The evidence of verification must include the date of expiration of the verification.

(c) Each sheriff shall maintain a record of firearms instructors verified by the sheriff and shall post a list of verified instructors on the sheriff's website. The list must include the expiration date of an instructor's verification.

(4) (a) A sheriff shall revoke a verification issued pursuant to this section if the verified instructor ceases to meet the requirements for verification.

(b) A sheriff may revoke or suspend a verification issued pursuant to this section if the verified instructor provides instruction in a concealed handgun training class or refresher class that fails to meet the requirements for the class pursuant to this part 2 and that results in the issuance of a training certificate. A person who has had a verification suspended pursuant to this subsection (4)(b) may apply for reinstatement no earlier than thirty days following suspension.

(c) If a sheriff denies a person's application for verification as a firearms instructor or suspends or revokes a person's firearms instructor verification, the sheriff shall notify the person in writing. The notice must state the grounds for denial, suspension, or revocation and inform the person of the right to seek judicial review pursuant to section 18-12-207.

(5) A sheriff may establish and impose a fee to cover the actual direct and indirect costs of processing applications and issuing and renewing verifications pursuant to this section.

Source: L. 2024: Entire section added, (HB 24-1174), ch. 388, p. 2687, § 3, effective August 7.

18-12-203. Criteria for obtaining a permit.

(1) Beginning May 17, 2003, except as set forth in this section, a sheriff shall issue a permit to carry a concealed handgun to an applicant who:

(a) Is a legal resident of the state of Colorado. For purposes of this part 2, a person who is a member of the armed forces and is stationed pursuant to permanent duty station orders at a military installation in this state, and a member of the person's immediate family living in Colorado, shall be deemed to be a legal resident of the state of Colorado.

(b) Is twenty-one years of age or older;

(c) Is not ineligible to possess a firearm pursuant to section 18-12-108 or federal law;

(c.5) Has not been convicted of any of the offenses described in section 24-33.5-424 (3)(b.3) committed on or after July 1, 2025, if the offense is classified as a misdemeanor, and the applicant has not been convicted in another state or jurisdiction, including a military or federal jurisdiction, of an offense that, if committed in Colorado, would constitute any of the offenses described in section 24-33.5-424 (3)(b.3) classified as a misdemeanor offense, within five years prior to filing the permit application;

(d) Has not been convicted of perjury under section 18-8-503, in relation to information provided or deliberately omitted on a permit application submitted pursuant to this part 2;

(e) (I) Does not chronically and habitually use alcoholic beverages to the extent that the applicant's normal faculties are impaired.

(II) The prohibition specified in this subsection (1)(e) shall not apply to an applicant who provides an affidavit, signed by a professional counselor or addiction counselor who is licensed pursuant to article 245 of title 12 and specializes in alcohol addiction, stating that the applicant has been evaluated by the counselor and has been determined to be a recovering alcoholic who has refrained from using alcohol for at least three years.

(f) Is not an unlawful user of or addicted to a controlled substance as defined in section 18-18-102 (5). Whether an applicant is an unlawful user of or addicted to a controlled substance shall be determined as provided in federal law and regulations.

(g) Is not subject to:

(I) A protection order issued pursuant to section 18-1-1001 or section 19-2.5-607 that is in effect at the time the application is submitted; or

(II) A permanent protection order issued pursuant to article 14 of title 13;

(III) A temporary protection order issued pursuant to article 14 of title 13 that is in effect at the time the application is submitted; or

(IV) A temporary extreme risk protection order issued pursuant to section 13-14.5-103 (3) or an extreme risk protection order issued pursuant to section 13-14.5-105 (2);

(h) Demonstrates competence with a handgun by submitting:

(I) Evidence of experience with a firearm through participation in organized shooting competitions, current military service, or current certification as a peace officer pursuant to article 2.5 of title 16;

(II) Evidence that, at the time the application is submitted, the applicant is a certified instructor;

(III) Proof of honorable discharge from a branch of the United States armed forces within the three years preceding submittal of the application;

(IV) Proof of honorable discharge from a branch of the United States armed forces that reflects pistol qualifications obtained within the ten years preceding submittal of the application;

(V) A certificate showing retirement from a Colorado law enforcement agency that reflects pistol qualifications obtained within the ten years preceding submittal of the application; or

(VI) A training certificate from a concealed handgun training class obtained within the one year preceding submittal of the application. The applicant shall submit the original training certificate that includes the printed name and original signature of the verified instructor. To the extent permitted by section 18-12-202.5, in obtaining a training certificate from a concealed handgun training class, the applicant has discretion in selecting which concealed handgun training class to complete.

(2) Regardless of whether an applicant meets the criteria specified in subsection (1) of this section, if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit.

(3) (a) The sheriff shall deny, revoke, or refuse to renew a permit if an applicant or a permittee fails to meet one of the criteria listed in subsection (1) of this section and may deny, revoke, or refuse to renew a permit on the grounds specified in subsection (2) of this section.

(b) Following issuance of a permit, if the issuing sheriff has a reasonable belief that a permittee no longer meets the criteria specified in subsection (1) of this section or that the permittee presents a danger as described in subsection (2) of this section, the sheriff shall suspend the permit until such time as the matter is resolved and the issuing sheriff determines that the permittee is eligible to possess a permit as provided in this section.

(c) If the sheriff suspends or revokes a permit, the sheriff shall notify the permittee in writing, stating the grounds for suspension or revocation and informing the permittee of the right to seek a second review by the sheriff, to submit additional information for the record, and to seek judicial review pursuant to section 18-12-207.

Source: L. 2003: Entire part added, p. 638, § 1, effective May 17. **L. 2004:** (1)(g) amended, p. 1198, § 52, effective August 4. **L. 2008:** (1)(e)(II) amended, p. 426, § 27, effective August 5. **L. 2013:** (1)(h)(VI) amended, (SB 13-195), ch. 278, p. 1451, § 2, effective May 24. **L. 2019:** (1)(g)(II) and (1)(g)(III) amended and (1)(g)(IV) added, (HB 19-1177), ch. 108, p. 399, § 4, effective April 12; (1)(e)(II) amended, (HB 19-1172), ch. 136, p. 1676, § 98, effective October 1. **L. 2021:** IP(1) and (1)(g)(I) amended, (SB 21-059), ch. 136, p. 725, § 57, effective October 1. **L. 2023:** (1)(g)(IV) R&RE, (SB 23-170), ch. 124, p. 482, § 6, effective April 28. **L. 2024:** (1)(c.5) added and (1)(h)(I) and (1)(h)(VI) amended, (HB 24-1174), ch. 388, p. 2689, § 4, effective July 1, 2025.

ANNOTATION

Limiting issuance of concealed handgun permits to only state residents does not violate the second amendment or the privileges and immunities clause of article IV of the U.S. constitution. The second amendment does not confer a right to carry concealed weapons, and carrying a concealed weapon is not a privilege or immunity protected under article IV. *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

Plaintiff whose felony conviction in another state was set aside under that state's law and who was entitled to possess a handgun under that state's law was entitled to possess a handgun under § 18-12-108 and was entitled to a concealed handgun permit under this section. *Seguna v. Maketa*, 181 P.3d 399 (Colo. App. 2008).

Sheriff's decision not to reissue concealed handgun permit was a quasi-judicial decision. *Copley v. Robinson*, 224 P.3d 431 (Colo. App. 2009).

Sheriff's refusal to reissue concealed handgun permit was based on

proceedings and procedures that violated applicant's procedural due process rights. *Copley v. Robinson*, 224 P.3d 431 (Colo. App. 2009).

Applicant was denied due process because he was not apprised of or allowed to review adverse evidence or given the opportunity to confront adverse evidence and witnesses. *Copley v. Robinson*, 224 P.3d 431 (Colo. App. 2009).

Sheriff's findings of fact and conclusions of law, prepared on remand from the district court, did not satisfy statutory requirement for a written statement of the grounds for suspension or revocation. By the time case proceeded to district court, it was too late for sheriff to inform applicant of the evidence against him and the grounds for sheriff's decision in order to provide applicant with a reasonable opportunity to exercise his statutory rights to supplement the record or request a second review to confront such evidence. *Copley v. Robinson*, 224 P.3d 431 (Colo. App. 2009).

18-12-204. Permit contents - validity - carrying requirements.

(1) (a) Each permit shall bear a color photograph of the permittee and shall display the signature of the sheriff who issues the permit. In addition, the sheriffs of this state shall ensure that all permits issued pursuant to this part 2 contain the same items of information and are the same size and the same color.

(b) A permit is valid for a period of five years after the date of issuance and may be renewed as provided in section 18-12-211. A permit issued pursuant to this part 2, including a temporary emergency permit issued pursuant to section 18-12-209, is effective in all areas of the state, except as otherwise provided in section 18-12-214.

(2) (a) A permittee, in compliance with the terms of a permit, may carry a concealed handgun as allowed by state law. The permittee shall carry the permit, together with valid photo identification, at all times during which the permittee is in actual possession of a concealed handgun and shall produce both documents upon demand by a law enforcement officer. Failure to produce a permit upon demand by a law enforcement officer raises a rebuttable presumption that the person does not have a permit. Failure to carry and produce a permit and valid photo identification upon demand as required in this subsection (2) is a petty offense. A charge of failure to carry and produce a permit and valid photo identification upon demand pursuant to this subsection (2) shall be dismissed by the court if, at or before the permittee's scheduled court appearance, the permittee exhibits to the court a valid permit and valid photo identification, both of which were issued to the permittee prior to the date on which the permittee was charged with failure to carry and produce a permit and valid photo identification upon demand.

(b) The provisions of paragraph (a) of this subsection (2) apply to temporary emergency permits issued pursuant to section 18-12-209.

(3) (a) A person who may lawfully possess a handgun may carry a handgun under the following circumstances without obtaining a permit and the handgun shall not be considered concealed:

(I) The handgun is in the possession of a person who is in a private automobile or in some other private means of conveyance and who carries the handgun for a legal use, including self-defense; or

(II) The handgun is in the possession of a person who is legally engaged in hunting activities within the state.

(b) The provisions of this subsection (3) shall not be construed to authorize the carrying of a handgun in violation of the provisions of section 18-12-105 or 18-12-105.5.

Source: L. 2003: Entire part added, p. 639, § 1, effective May 17. **L. 2021:** (2)(a) amended, (SB 21-271), ch. 462, p. 3212, § 349, effective March 1, 2022.

18-12-205. Sheriff - application - procedure - background check.

(1) (a) To obtain a permit, a person shall submit a permit application on a statewide standardized form developed by the sheriffs and available from each sheriff. The permit application form shall solicit only the following information from the applicant:

(I) The applicant's full name, date of birth, and address;

(II) The applicant's birth name, if different from the name provided pursuant to subparagraph (I) of this paragraph (a), and any other names the applicant may have used or by which the applicant may have been known;

(III) The applicant's home address or addresses for the ten-year period immediately preceding submittal of the application;

(IV) Whether the applicant is a resident of this state as of the date of application and whether the applicant has a valid driver's license or other state-issued photo identification or military order proving residence; and

(V) Whether the applicant meets the criteria for obtaining a permit specified in section 18-12-203 (1).

(b) The permit application form shall not require the applicant to waive or release a right or privilege, including but not limited to waiver or release of privileged or confidential information contained in medical records.

(2) (a) An applicant shall complete the permit application form and return it, in person, to the sheriff of the county or city and county in which the applicant resides or to the sheriff of the county or city and county in which the applicant maintains a secondary residence or owns or leases real property used by the applicant in a business. The applicant shall sign the completed permit application form in person before the sheriff. The applicant shall provide his or her signature voluntarily upon a sworn oath that the applicant knows the contents of the permit application and that the information contained in the permit application is true and correct. An applicant who knowingly and intentionally makes a false or misleading statement on a permit application or deliberately omits any material information requested on the application commits perjury as described in section 18-8-503. Upon conviction, the applicant shall be punished as provided in section 18-1.3-501. In addition, the applicant shall be denied the right to obtain or possess a permit, and the sheriff shall revoke the applicant's permit if issued prior to conviction.

(b) An applicant shall also submit to the sheriff a permit fee not to exceed one hundred dollars for processing the permit application. The sheriff shall set the amount of the permit fee as provided in subsection (5) of this section. In addition, the applicant shall submit an amount specified by the director of the bureau, pursuant to section 24-72-306, C.R.S., for processing the applicant's fingerprints through the bureau and through the federal bureau of investigation. Neither the permit fee nor the fingerprint processing fee shall be refundable in the event the sheriff denies the applicant's permit application or suspends or revokes the permit subsequent to issuance.

(3) In addition to the items specified in subsection (2) of this section, an applicant, when submitting the completed permit application, shall submit the following items to the sheriff:

(a) Documentary evidence demonstrating competence with a handgun as specified in section 18-12-203 (1)(h); and

(b) A full frontal view color photograph of the applicant's head taken within the thirty days immediately preceding submittal of the permit application; except that the applicant need not submit a photograph if the sheriff photographs the applicant for purposes of issuing a permit. Any photograph submitted shall show the applicant's full head, including hair and facial features, and the depiction of the applicant's head shall measure one and one-eighth inches wide and one and one-fourth inches high.

(4) (a) The sheriff shall witness an applicant's signature on the permit application as provided in subsection (2) of this section and verify that the person making application for a permit is the same person who appears in any photograph submitted and the same person who signed the permit application form. To verify the applicant's identity, the applicant shall present to the sheriff the applicant's valid Colorado driver's license or valid Colorado or military photo identification.

(b) After verifying the applicant's identity, the sheriff shall take two complete sets of the applicant's fingerprints. The sheriff shall submit both sets of fingerprints to the bureau, and the sheriff shall not retain a set of the applicant's fingerprints.

(c) After receipt of a permit application and the items specified in this section, the sheriff shall verify that the applicant meets the criteria specified in section 18-12-203 (1) and is not a danger as described in section 18-12-203 (2). The verification at a minimum shall include requesting the bureau to conduct a search of the national instant criminal background check system and a search of the state integrated criminal justice information system to determine whether the applicant meets the criteria specified in section 18-12-203 (1). In addition, if the applicant resides in a municipality or town, the sheriff shall consult with the police department of the municipality or town in which the applicant resides, and the sheriff may consult with other local law enforcement agencies.

(5) The sheriff in each county or city and county in the state shall establish the amount of the new and renewal permit fees within his or her jurisdiction. The amount of the new and renewal permit fees shall comply with the limits specified in paragraph (b) of subsection (2) of this section and section 18-12-211 (1), respectively. The fee amounts shall reflect the actual direct and indirect costs to the sheriff of processing permit applications and renewal applications pursuant to this part 2.

Source: L. 2003: Entire part added, p. 640, § 1, effective May 17. **L. 2014:** (2)(a) amended, (HB 14-1166), ch. 27, p. 168, § 1, effective March 14.

18-12-206. Sheriff - issuance or denial of permits - report.

(1) Within ninety days after the date of receipt of the items specified in section 18-12-205, a sheriff shall:

(a) Approve the permit application and issue the permit; or

(b) Deny the permit application based solely on the ground that the applicant fails to qualify under the criteria listed in section 18-12-203 (1) or that the applicant would be a danger as described in section 18-12-203 (2). If the sheriff denies the permit application, he or she shall notify the applicant in writing, stating the grounds for denial and informing the applicant of the right to seek a second review of the application by the sheriff, to submit additional information for the record, and to seek judicial review pursuant to section 18-12-207.

(2) If the sheriff does not receive the results of the fingerprint checks conducted by the bureau and by the federal bureau of investigation within ninety days after receiving a permit application, the sheriff shall determine whether to grant or deny the permit application without considering the fingerprint check information. If, upon receipt of the information, the sheriff finds that the permit was issued or denied erroneously, based on the criteria specified in section 18-12-203 (1) and (2), the sheriff shall either revoke or issue the permit, whichever is appropriate.

(3) (a) Each sheriff shall maintain a list of the persons to whom he or she issues permits pursuant to this part 2. Upon request by another criminal justice agency for law enforcement purposes, the sheriff may, at his or her discretion, share information from the list of permittees with a law enforcement agency for the purpose of determining the validity of a permit. A database maintained pursuant to this subsection (3) and any database operated by a state agency that includes permittees shall be searchable only by name.

(b) (I) Notwithstanding the provisions of paragraph (a) of this subsection (3), on and after July 1, 2011, a sheriff shall not share information from the list of permittees with a law enforcement agency for the purpose of creating a statewide database of permittees, and any law enforcement agency that receives information concerning permittees from a sheriff shall not use the information to create or maintain a statewide database of permittees. Any information concerning a permittee that is included in a statewide database pursuant to paragraph (a) of this subsection (3) shall be removed from the database no later than July 1, 2011.

(II) Repealed.

(c) Except for suspected violations of sections 18-12-105 and 18-12-105.5, a peace officer may not use or search a database of permittees maintained by a law enforcement agency to establish reasonable suspicion for a traffic stop, or when contacting an individual, to justify probable cause for a search or seizure of a person or a person's vehicle or property.

(4) Each sheriff shall annually prepare a report specifying, at a minimum, the number of permit applications received during the year for which the report was prepared, the number of permits issued during the year, the number of permits denied during the year, the reasons for denial, the number of revocations during the year, and the reasons for the revocations. The report shall not include the name of a person who applies for a permit, regardless of whether the person receives or is denied a permit. Each sheriff shall submit the report on or before March 1, 2004, and on or before March 1 each year thereafter, to the members of the general assembly. In addition, each sheriff shall provide a copy of the annual report prepared pursuant to this subsection (4) to a member of the public upon request.

Source: L. 2003: Entire part added, p. 642, § 1, effective May 17. L. 2007: (3)(b) amended and (3)(c) added, p. 777, §§ 1, 2, effective May 14. L. 2017: (3)(b)(II) repealed, (SB 17-294), ch. 264, p. 1393, § 39, effective May 25.

ANNOTATION

Sheriff's decision not to reissue concealed handgun permit was a quasi-judicial decision. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's refusal to reissue concealed handgun permit was based on proceedings and procedures that violated applicant's procedural due process rights. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Applicant was denied due process because he was not apprised of or allowed to review adverse evidence or given the opportunity to confront adverse evidence and witnesses. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's findings of fact and conclusions of law, prepared on remand from the district court, did not satisfy statutory requirement for a written statement stating the grounds for suspension or revocation. By the time case proceeded to district court, it was too late for sheriff to inform applicant of the evidence against him and the grounds for sheriff's decision in order to provide applicant with a reasonable opportunity to exercise his statutory rights to supplement the record or request a second review to confront such evidence. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

18-12-207. Judicial review - permit denial - permit suspension - permit revocation - denial, suspension, or revocation of instructor verification.

(1) If a sheriff denies a permit application, refuses to renew a permit, or suspends or revokes a permit, the applicant or permittee may seek judicial review of the sheriff's decision. The applicant or permittee may seek judicial review either in lieu of or subsequent to the sheriff's second review.

(2) The procedure and time lines for filing a complaint, an answer, and briefs for judicial review pursuant to this section shall be in accordance with the procedures specified in rule 106 (a)(4) and (b) of the Colorado rules of civil procedure.

(3) Notwithstanding any other provision of law to the contrary, at a judicial review sought pursuant to subsection (1) of this section, the sheriff shall have the burden of proving by a preponderance of the evidence that the applicant or permittee is ineligible to possess a permit under the criteria listed in section 18-12-203 (1) or, if the denial, suspension, or revocation was based on the sheriff's determination that the person would be a danger as provided in section 18-12-203 (2), the sheriff shall have the burden of proving the determination by clear and convincing evidence. Following completion of the review, the court may award attorney fees to the prevailing party.

(4) (a) If a sheriff denies a person's application for verification as a firearms instructor or suspends or revokes a person's firearms instructor verification, the person may seek judicial review of the sheriff's decision. The procedure and timelines described in subsection (2) of this section apply to judicial review of a sheriff's decision pursuant to this subsection (4).

(b) Notwithstanding any other provision of law to the contrary, at a judicial review sought pursuant to this subsection (4), the sheriff has the burden of proving by a preponderance of the evidence that the person does not meet the requirements to be verified as a firearms instructor or satisfies the criteria for suspension or revocation of a firearms instructor verification.

Source: **L. 2003:** Entire part added, p. 644, § 1, effective May 17. **L. 2024:** (3) amended and (4) added, (HB 24-1174), ch. 388, p. 2689, § 5, effective August 7.

18-12-208. Colorado bureau of investigation - duties.

(1) Upon receipt of a permit applicant's fingerprints from a sheriff pursuant to section 18-12-205 (4) or upon a sheriff's request pursuant to section 18-12-211 (1), the bureau shall process the full set of fingerprints to obtain any available state criminal justice information or federal information pursuant to section 16-21-103 (5), C.R.S., and shall report any information received to the sheriff. In addition, within ten days after receiving the fingerprints, the bureau shall

forward one set of the fingerprints to the federal bureau of investigation for processing to obtain any available state criminal justice information or federal information.

(2) The bureau shall use the fingerprints received pursuant to this part 2 solely for the purposes of:

(a) Obtaining information for the issuance or renewal of permits; and

(b) Notifying an issuing sheriff that a permittee has been arrested for or charged with an offense that would require revocation or suspension of the permit or that a permittee has been convicted of such an offense.

(3) On or before January 15, 2004, and on or before January 15 each year thereafter until January 15, 2007, the bureau shall provide to the general assembly a list of the jurisdictions in which the sheriff provides to the bureau the names of persons to whom the sheriff issues permits.

Source: L. 2003: Entire part added, p. 644, § 1, effective May 17.

18-12-209. Issuance by sheriffs of temporary emergency permits.

(1) Notwithstanding any provisions of this part 2 to the contrary, a sheriff, as provided in this section, may issue a temporary emergency permit to carry a concealed handgun to a person whom the sheriff has reason to believe may be in immediate danger.

(2) (a) To receive a temporary emergency permit, a person shall submit to the sheriff of the county or city and county in which the person resides or in which the circumstances giving rise to the emergency exist the items specified in section 18-12-205; except that an applicant for a temporary emergency permit need not submit documentary evidence demonstrating competence with a handgun as required under section 18-12-205 (3)(a), and the applicant shall submit a temporary permit fee not to exceed twenty-five dollars, as set by the sheriff. Upon receipt of the documents and fee, the sheriff shall request that the bureau conduct a criminal history record check of the bureau files and a search of the national instant criminal background check system. The sheriff may issue a temporary emergency permit to the applicant if the sheriff determines the person may be in immediate danger and the criminal history record check shows that the applicant meets the criteria specified in section 18-12-203; except that the applicant need not demonstrate competence with a handgun and the applicant may be eighteen years of age or older.

(b) (I) A temporary emergency permit issued pursuant to this section is valid for a period of ninety days after the date of issuance. Prior to or within ten days after expiration of a temporary emergency permit, the permittee may apply to the sheriff of the county or city and county in which the person resides or in which the circumstances giving rise to the emergency exist for

renewal of the permit. The sheriff may renew a temporary emergency permit once for an additional ninety-day period; except that, if the permittee is younger than twenty-one years of age, the sheriff may renew the temporary emergency permit for subsequent ninety-day periods until the permittee reaches twenty-one years of age.

(II) If the sheriff is not the same sheriff who issued the temporary emergency permit to the permittee:

(A) The permittee shall submit to the renewing sheriff, in addition to the materials described in section 18-12-205, a legible photocopy of the temporary emergency permit; and

(B) The renewing sheriff shall contact the office of the sheriff who issued the temporary emergency permit and confirm that the issuing sheriff has not revoked or suspended the temporary emergency permit.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17. **L. 2014:** (2) amended, (HB 14-1166), ch. 27, p. 168, § 2, effective March 14.

18-12-210. Maintenance of permit - address change - invalidity of permit.

(1) Within thirty days after a permittee changes the address specified on his or her permit or within three business days after his or her permit is lost, stolen, or destroyed, the permittee shall notify the issuing sheriff of the change of address or permit loss, theft, or destruction. Failure to notify the sheriff pursuant to this subsection (1) is a civil infraction.

(2) If a permit is lost, stolen, or destroyed, the permit is automatically invalid. The person to whom the permit was issued may obtain a duplicate or substitute therefor upon payment of fifteen dollars to the issuing sheriff and upon submission of a notarized statement to the issuing sheriff that the permit has been lost, stolen, or destroyed.

(3) The provisions of this section apply to temporary emergency permits issued pursuant to section 18-12-209.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17. **L. 2021:** (1) amended, (SB 21-271), ch. 462, p. 3212, § 350, effective March 1, 2022.

18-12-211. Renewal of permits.

(1) (a) Within one hundred twenty days prior to expiration of a permit, the permittee may obtain a renewal form from the sheriff of the county or city and county in which the permittee resides or from the sheriff of the county or city and county in which the permittee maintains a secondary residence or owns or leases real property used by the permittee in a business and renew the permit by demonstrating competence with a handgun, as described in subsection (3) of this section, and submitting to the sheriff a completed renewal form; an affidavit stating that the permittee remains qualified pursuant to the criteria specified in section 18-12-203 (1)(a) to (1)(g); and the required renewal fee not to exceed fifty dollars, as set by the sheriff pursuant to section 18-12-205 (5). The renewal form must meet the requirements specified in section 18-12-205 (1) for an application.

(b) If the sheriff is not the same sheriff who issued the permit to the permittee:

(I) The permittee shall submit to the renewing sheriff, in addition to the materials described in paragraph (a) of this subsection (1), a legible photocopy of the permit; and

(II) The renewing sheriff shall contact the office of the sheriff who issued the permit and confirm that the issuing sheriff has not revoked or suspended the permit.

(c) The sheriff shall verify pursuant to section 18-12-205 (4) that the permittee meets the criteria specified in section 18-12-203 (1)(a) to (1)(g) and is not a danger as described in section 18-12-203 (2) and shall either renew or deny the renewal of the permit in accordance with the provisions of section 18-12-206 (1). If the sheriff denies renewal of a permit, the permittee may seek a second review of the renewal application by the sheriff and may submit additional information for the record. The permittee may also seek judicial review as provided in section 18-12-207.

(2) A permittee who fails to file a renewal form on or before the permit expiration date may renew the permit by paying a late fee of fifteen dollars in addition to the renewal fee established pursuant to subsection (1) of this section. No permit shall be renewed six months or more after its expiration date, and the permit shall be deemed to have permanently expired. A person whose permit has permanently expired may reapply for a permit, but the person shall submit an application for a permit and the fee required pursuant to section 18-12-205. A person who knowingly and intentionally files false or misleading information or deliberately omits material information required under this section is subject to criminal prosecution for perjury under section 18-8-503.

(3) A permittee seeking renewal pursuant to this section may demonstrate competence with a handgun by submitting:

(a) Evidence of demonstrating competence with firearms through participation in organized shooting competitions, current military service, or current certification as a peace officer pursuant to article 2.5 of title 16;

(b) Evidence that, at the time the application is submitted, the applicant is a verified instructor;

(c) Proof of honorable discharge from a branch of the United States armed forces that reflects pistol qualifications obtained within the ten years preceding submittal of the renewal form;

(d) A certificate showing retirement from a Colorado law enforcement agency that reflects pistol qualifications obtained within the ten years preceding submittal of the renewal form; or

(e) A training certificate that includes the original signature of the class instructor from a concealed handgun training class or a refresher class, described in section 18-12-202.5, obtained within six months prior to submitting a renewal form.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17. **L. 2014:** (1) amended, (HB 14-1166), ch. 27, p. 169, § 3, effective March 14. **L. 2024:** (1)(a) amended and (3) added, (HB 24-1174), ch. 388, p. 2690, § 6, effective July 1, 2025.

18-12-212. Exemption.

(1) This part 2 shall not apply to law enforcement officers employed by jurisdictions outside this state, so long as the foreign employing jurisdiction exempts peace officers employed by jurisdictions within Colorado from any concealed handgun or concealed weapons laws in effect in the foreign employing jurisdiction.

(2) Notwithstanding any provision of this part 2 to the contrary, a retired peace officer, level I or Ia, as defined in section 18-1-901 (3)(I)(I) and (3)(I)(II), as said section existed prior to its repeal in 2003, within the first five years after retirement may obtain a permit by submitting to the sheriff of the jurisdiction in which the retired peace officer resides a letter signed by the sheriff or chief of police of the jurisdiction by which the peace officer was employed immediately prior to retirement attesting that the retired officer meets the criteria specified in section 18-12-203 (1). A retired peace officer who submits a letter pursuant to this subsection (2) is not subject to the fingerprint or criminal history check requirements specified in this part 2 and is not required to pay the permit application fee. Upon receipt of a letter submitted pursuant to this subsection (2), the sheriff shall issue the permit. A permit issued pursuant to this subsection (2) may not be renewed. Upon expiration of the permit, the permittee may apply for a new permit as provided in this part 2.

Source: L. 2003: Entire part added, p. 646, § 1, effective May 17. **L. 2004:** (2) amended, p. 1198, § 53, effective August 4.

Cross references: For additional provisions relating to peace officers, see article 2.5 of title 16.

18-12-213. Reciprocity.

(1) A permit to carry a concealed handgun or a concealed weapon that is issued by a state that recognizes the validity of permits issued pursuant to this part 2 shall be valid in this state in all respects as a permit issued pursuant to this part 2 if the permit is issued to a person who is:

(a) Twenty-one years of age or older; and

(b) (I) A resident of the state that issued the permit, as demonstrated by the address stated on a valid picture identification that is issued by the state that issued the permit and is carried by the permit holder; or

(II) A resident of Colorado for no more than ninety days, as determined by the date of issuance on a valid picture identification issued by Colorado and carried by the permit holder.

(2) For purposes of this section, a "valid picture identification" means a driver's license or a state identification issued in lieu of a driver's license.

Source: L. 2003: Entire part added, p. 646, § 1, effective May 17. **L. 2007:** Entire section amended, p. 956, § 1, effective May 17.

18-12-214. Authority granted by permit - carrying restrictions - local authority.

(1) (a) A permit to carry a concealed handgun authorizes the permittee to carry a concealed handgun in all areas of the state, except as specifically limited in this section. A permit does not authorize the permittee to use a handgun in a manner that would violate a provision of state law.

(b) A peace officer may temporarily disarm a permittee, incident to a lawful stop of the permittee. The peace officer shall return the handgun to the permittee prior to discharging the permittee from the scene.

(c) (I) A local government, including a special district, or the governing board of an institution of higher education, including the board of directors of the Auraria higher education center, may enact an ordinance, resolution, rule, or other regulation that prohibits a permittee from carrying a concealed handgun in a building or specific area within the local government's or governing board's jurisdiction, or for a special district, in a building or specific area under the direct control or management of the district, including a building or facility managed pursuant to an agreement between the district and a contractor. An ordinance, resolution, or other regulation prohibiting a permittee from carrying a concealed handgun may only impose a civil penalty for a violation and require the person to leave the premises. For a first offense, the ordinance, resolution, or other regulation may not impose a fine that exceeds fifty dollars and may not impose a sentence of incarceration. A person who does not leave the premises when required may be subject to criminal penalties.

(II) If a local government or governing board prohibits carrying a concealed handgun in a building or specific area, the local government or governing board shall post signs at the public entrances to the building or specific area informing persons that carrying a concealed handgun is prohibited in the building or specific area. The notice required by this section may be included on a sign describing open carry restrictions posted in accordance with section 29-11.7-104.

(2) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a place where the carrying of firearms is prohibited by federal law.

(2.5) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a place where the carrying of concealed handguns is prohibited by a local ordinance, resolution, rule, or other regulation.

(3) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun onto the real property, or into any improvements erected thereon, of a public elementary, middle, junior high, or high school; except that:

(a) A permittee may have a handgun on the real property of the public school so long as the handgun remains in the permittee's vehicle and, if the permittee leaves the vehicle unattended, the permittee stores the firearm pursuant to section 18-12-114.5;

(b) A permittee who is employed or retained by contract by a school district or charter school as a school security officer may carry a concealed handgun onto the real property, or into any improvement erected thereon, of a public elementary, middle, junior high, or high school while the permittee is on duty;

(c) A permittee may carry a concealed handgun on undeveloped real property owned by a school district that is used for hunting or other shooting sports.

(3.5) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun:

(a) Onto the real property, or into any improvements erected thereon, of a licensed child care center, as defined in section 18-12-105.5, or a public or private college, university, or seminary in violation of section 18-12-105.5;

(b) In a government building in violation of section 18-12-105.3; or

(c) At a polling location, drop box, or central count facility, in violation of section 1-13-724.

(4) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a public building at which:

(a) Security personnel and electronic weapons screening devices are permanently in place at each entrance to the building;

(b) Security personnel electronically screen each person who enters the building to determine whether the person is carrying a weapon of any kind; and

(c) Security personnel require each person who is carrying a weapon of any kind to leave the weapon in possession of security personnel while the person is in the building.

(5) Nothing in this part 2 shall be construed to limit, restrict, or prohibit in any manner the existing rights of a private property owner, private tenant, private employer, or private business entity.

(6) The provisions of this section apply to temporary emergency permits issued pursuant to section 18-12-209.

Source: **L. 2003:** Entire part added, p. 647, § 1, effective May 17. **L. 2014:** (3)(b) amended, (HB 14-1291), ch. 165, p. 579, § 1, effective May 9. **L. 2021:** (1)(a) amended and (1)(c), (2.5), and (3.5) added, (SB 21-256), ch. 269, p. 1557, § 5, effective June 19. **L. 2024:** (3.5) amended, (SB 24-131), ch. 301, p. 2049, § 6, effective July 1; (3)(a) amended, (HB 24-1348), ch. 178, p. 970, § 4, effective January 1, 2025.

Cross references: For the legislative declaration in SB 24-131, see section 1 of chapter 301, Session Laws of Colorado 2024.

ANNOTATION

Law reviews. For article, "Gun Violence on Campus", see 44 Colo. Law. 37 (Oct. 2015).

Institutions of higher education not exempt from the express authorization of permittees to carry concealed handguns

"in all areas of the state". The concealed carry act, §§ 18-12-201 to 18-12-216, satisfies the "unless otherwise [provided] by law" provision of article VIII, section 5(2), of the state constitution by manifesting a clear and unmistakable intent to subject the

entire state to a single statutory scheme regulating concealed handgun carry, subject to specified exceptions. *Students for Con. Carry on Camp. v. Regents*, 280 P.3d 18 (Colo. App. 2010), *aff'd*, 2012 CO 17, 271 P.3d 496.

18-12-215. Immunity.

(1) The bureau and a local law enforcement agency and an individual employed by the bureau or a local law enforcement agency shall not be liable for any damages that may result from good faith compliance with the provisions of this part 2.

(2) A law enforcement officer or agency, medical personnel, and an organization that offers concealed handgun training classes or refresher classes and its personnel who in good faith provide information regarding an applicant are not liable for any damages that may result from issuance or denial of a permit.

Source: L. 2003: Entire part added, p. 648, § 1, effective May 17. **L. 2024:** (2) amended, (HB 24-1174), ch. 388, p. 2690, § 7, effective July 1, 2025.

18-12-216. Permits issued prior to May 17, 2003. (Repealed)

Source: L. 2003: Entire part added, p. 648, § 1, effective May 17. **L. 2018:** Entire section repealed, (HB 18-1375), ch. 274, p. 1703, § 28, effective May 29.

PART 3

LARGE-CAPACITY AMMUNITION MAGAZINES

18-12-301. Definitions.

As used in this part 3, unless the context otherwise requires:

(1) "Bureau" means the Colorado bureau of investigation created and existing pursuant to section 24-33.5-401, C.R.S.

(2) (a) "Large-capacity magazine" means:

(I) A fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is designed to be readily converted to accept, more than fifteen rounds of ammunition;

(II) A fixed, tubular shotgun magazine that holds more than twenty-eight inches of shotgun shells, including any extension device that is attached to the magazine and holds additional shotgun shells; or

(III) A nontubular, detachable magazine, box, drum, feed strip, or similar device that is capable of accepting more than eight shotgun shells when combined with a fixed magazine.

(b) "Large-capacity magazine" does not mean:

(I) A feeding device that has been permanently altered so that it cannot accommodate more than fifteen rounds of ammunition;

(II) An attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition; or

(III) A tubular magazine that is contained in a lever-action firearm.

Source: L. 2013: Entire part added, (HB 13-1224), ch. 48, p. 144, § 1, effective July 1.

ANNOTATION

This section and §§ 18-12-302 and 18-12-303 represent a reasonable exercise of the state's police power and thus are constitutional because the discrete legislative purpose in enacting the statutes, to reduce the number of people who are killed or shot in mass shootings, lies within the state's police power; the statutes are reasonably related to the legitimate governmental purpose of reducing deaths from mass shootings; and limiting magazine size to fifteen rounds of ammunition does not unreasonably burden the right to self-defense. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, 467 P.3d 314.

A magazine "designed to be readily converted to accept" more than fifteen rounds, as defined in subsection (2)(a)(I), is one that would be objectively understood as purposely created or intended for the purpose of being converted to accept more than fifteen rounds. The phrase "designed to be" must mean something other than merely "capable of". A magazine "designed" to be readily converted to accept more than fifteen rounds requires an intent or purpose that a magazine merely "capable" of being so converted does not. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, 467 P.3d 314.

18-12-302. Large-capacity magazines prohibited - penalties - exceptions.

(1) (a) Except as otherwise provided in this section, a person who sells, transfers, or possesses a large-capacity magazine commits a class 1 misdemeanor.

(b) Repealed.

(c) Any person who violates this subsection (1) commits a class 6 felony if the person possessed a large-capacity magazine during the commission of a felony or any crime of violence, as defined in section 18-1.3-406.

(2) (a) A person may possess a large-capacity magazine if he or she:

(I) Owns the large-capacity magazine on July 1, 2013; and

(II) Maintains continuous possession of the large-capacity magazine.

(b) If a person who is alleged to have violated subsection (1) of this section asserts that he or she is permitted to legally possess a large-capacity magazine pursuant to paragraph (a) of this subsection (2), the prosecution has the burden of proof to refute the assertion.

(3) The offense described in subsection (1) of this section shall not apply to:

(a) An entity, or any employee thereof engaged in his or her employment duties, that manufactures large-capacity magazines within Colorado exclusively for transfer to, or any licensed gun dealer, as defined in section 18-12-506 (6), or any employee thereof engaged in his or her official employment duties, that sells large-capacity magazines exclusively to:

(I) A branch of the armed forces of the United States;

(II) A department, agency, or political subdivision of the state of Colorado, or of any other state, or of the United States government;

(III) A firearms retailer for the purpose of firearms sales conducted outside the state;

(IV) A foreign national government that has been approved for such transfers by the United States government; or

(V) An out-of-state transferee who may legally possess a large-capacity magazine; or

(b) An employee of any of the following agencies who bears a firearm in the course of his or her official duties:

(I) A branch of the armed forces of the United States; or

(II) A department, agency, or political subdivision of the state of Colorado, or of any other state, or of the United States government; or

(c) A person who possesses the magazine for the sole purpose of transporting the magazine to an out-of-state entity on behalf of a manufacturer of large-capacity magazines within Colorado.

Source: **L. 2013:** Entire part added, (HB 13-1224), ch. 48, p. 145, § 1, effective July 1. **L. 2018:** IP(3)(a) amended, (SB 18-032), ch. 8, p. 153, § 7, effective October 1. **L. 2021:** (1)(b)(II) added by revision, (SB 21-271), ch. 462, pp. 3213, 3331, §§ 351, 803. **L. 2025:** (1)(a) amended, (SB 25-003), ch. 68, p. 300, § 8, effective April 10.

Editor's note: Subsection (1)(b)(II) provided for the repeal of subsection (1)(b), effective March 1, 2022. (See L. 2021, pp. 3213, 3331.)

ANNOTATION

This section and §§ 18-12-301 and 18-12-303 represent a reasonable exercise of the state's police power and thus are constitutional because the discrete legislative purpose in enacting the statutes, to reduce the number of people who are killed or shot in mass shootings, lies within the state's police power; the statutes are

reasonably related to the legitimate governmental purpose of reducing deaths from mass shootings; and limiting magazine size to fifteen rounds of ammunition does not unreasonably burden the right to self-defense. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, 467 P.3d 314.

18-12-303. Identification markings for large-capacity magazines - rules.

(1) A large-capacity magazine that is manufactured in Colorado on or after July 1, 2013, must include a permanent stamp or marking indicating that the large-capacity magazine was manufactured or assembled after July 1, 2013. The stamp or marking must be legibly and conspicuously engraved or cast upon the outer surface of the large-capacity magazine.

(2) The bureau may promulgate such rules as may be necessary for the implementation of this section, including but not limited to rules requiring a large-capacity magazine that is manufactured on or after July 1, 2013, to bear identifying information in addition to the identifying information described in subsection (1) of this section.

(3) A person who manufactures a large-capacity magazine in Colorado in violation of subsection (1) of this section commits a class 2 misdemeanor and shall be punished in accordance with section 18-1.3-501.

Source: L. 2013: Entire part added, (HB 13-1224), ch. 48, p. 146, § 1, effective July 1.

ANNOTATION

This section and §§ 18-12-301 and 18-12-302 represent a reasonable exercise of the state's police power and thus are constitutional because the discrete legislative purpose in enacting the statutes, to reduce the number of people who are killed or shot in mass shootings, lies within the state's police power; the statutes are

reasonably related to the legitimate governmental purpose of reducing deaths from mass shootings; and limiting magazine size to fifteen rounds of ammunition does not unreasonably burden the right to self-defense. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, 467 P.3d 314.

PART 4

FIREARMS - DEALERS

Editor's note: This part 4 was added with relocations in 2018. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

18-12-401. Definitions.

As used in this part 4, unless the context otherwise requires:

(1) "Dealer" means:

(a) A federally licensed firearm dealer as defined in section 18-12-101; and

(b) Any other federal firearms licensee who, within the scope of the licensee's license, sells firearms at retail to the public or transfers firearms to members of the public as part of a retail transaction, including a sale or transfer conducted by the licensee pursuant to section 18-12-112, 18-12-112.5, or 18-12-506.

(2) "Department" means the department of revenue created pursuant to section 24-35-101.

(3) "Destructive device" has the same meaning set forth in 18 U.S.C. sec. 921 (a)(4).

(3.5) (a) "Employee" means an employee of a dealer who, in the course of the employee's duties, handles firearms; processes the sale, loan, or transfer of firearms; or otherwise has access to firearms under the dealer's control.

(b) "Employee" includes an individual, including an independent contractor under the terms of a contract with a dealer, who engages in the conduct described in subsection (3.5)(a) of this section, whether paid or unpaid.

(c) "Employee" does not include an individual who does not have authority to unlock the dealer's firearm storage rooms, containers, cases, or other devices used to secure the dealer's firearms in a manner that prevents unauthorized use of the firearms.

(4) "Engaged in the business" has the same meaning set forth in 18 U.S.C. sec. 921 (a)(21) and any federal regulations promulgated thereunder.

(5) "Federal firearms license" means a license to import, manufacture, or deal in firearms issued pursuant to 18 U.S.C. sec. 923.

(5.4) "Large-capacity magazine" has the meaning set forth in section 18-12-301.

(5.7) "Responsible person" has the meaning set forth in 27 CFR 478.11.

(6) "State permit" means the state firearms dealer permit required pursuant to section 18-12-401.5.

(7) "Transfer" has the meaning set forth in section 24-33.5-424 (1)(d).

Source: L. 2018: Entire part added with relocations, (SB 18-032), ch. 8, p. 150, § 4, effective October 1. **L. 2024:** Entire section amended, (HB 24-1353), ch. 492, p. 3448, § 1, effective June 7. **L. 2026:** (1) amended and (3.5), (5.4), (5.7), and (7) added, (HB 26-1126), ch. 324, p. 1883, § 1, effective June 2.

Editor's note: This section is similar to former § 12-26-101 as it existed prior to 2018.

ANNOTATION

Law reviews. For article on martial law in Colorado, see 5 Den. B. Ass'n Rec. 10 (No. 219).

The definition of firearms in this section, which regulates the sale of firearms, is limited by its terms to matters

relating to the sale of firearms and is not applicable to the concealed weapons statute. *Cokley v. People*, 168 Colo. 280, 450 P.2d 1013 (1969) (decided prior to 2018 amendments relocating article 26 of title 12 to this title).

18-12-401.5. Permit required - issuing agency - cash fund - inspections - penalty - report - rules.

(1) (a) Every dealer must obtain a state permit in order to engage in the business of dealing in firearms other than destructive devices in this state or to transfer firearms other than destructive devices into or out of this state.

(b) A state permit issued pursuant to this section is not transferrable.

(c) (I) A person who engages in the business of dealing in firearms other than destructive devices without a state permit is guilty of an unclassified felony and, upon conviction thereof, shall be punished by a fine of not more than two hundred fifty thousand dollars.

(II) An employee of a dealer shall not be charged for committing the offense described in this subsection (1)(c) for conduct committed while the employee was acting within the scope of the employee's employment.

(d) A dealer who only deals in destructive devices is not required to obtain a state permit to engage in the business of dealing in destructive devices.

(2) (a) The department shall issue state permits pursuant to this section.

(b) (I) The department shall promulgate rules necessary for the implementation of this section, including establishing the process for applying for and obtaining a state permit. The department shall not promulgate rules that alter the eligibility criteria for obtaining a permit, but the department may collect any information it deems necessary to verify an applicant's eligibility. The department may develop a simplified application for permit renewals.

(II) Repealed.

(c) (I) The fee for a state permit issued on or before June 30, 2026, is four hundred dollars. The department shall annually review the fee and, for permits issued on and after July 1, 2026, may annually adjust the fee based on the costs for administering this section. The department shall not adjust the fee more than once each year and shall not adjust the fee by more than twenty-five dollars each year.

(II) The department shall transmit the fees collected pursuant to this subsection (2)(c) to the state treasurer, who shall deposit the money in the firearm dealer permit cash fund, created in subsection (2)(d) of this section.

(d) The firearm dealer permit cash fund is created in the state treasury. The fund consists of money credited to the fund pursuant to subsection (2)(c) of this section and any other money that the general assembly may appropriate or transfer to the fund. The state treasurer shall credit all interest and income derived from the deposit and investment of money in the firearm dealer

permit cash fund to the fund. Money in the fund is continuously appropriated to the department for the costs of issuing permits and conducting inspections pursuant to this section.

(3) In order for a dealer to be issued a state permit:

(a) The dealer must hold a valid federal firearms license;

(b) The dealer and each responsible person of the dealer must not have had a license or permit to sell, lease, transfer, purchase, or possess a firearm or ammunition from the federal government, any state, or a subdivision of any state, revoked, suspended, or denied for good cause within three years before submitting an application; and

(c) A dealer and each responsible person of the dealer must not have been convicted for a violation of any provision of this article 12; any Colorado or any other state's law concerning the possession, purchase, or sale of firearms; or any federal law concerning the possession or sale of firearms in the three years before submitting an application for a state permit.

(4) (a) A person applying for a state permit pursuant to this section must complete an application as provided by department rule and pay the application fee established by the department.

(b) A person who has applied for a federal firearms license may apply for a state permit prior to being issued a federal firearms license. The department shall not issue a state permit to the person until the person holds a valid federal firearms license, as required pursuant to subsection (3)(a) of this section.

(c) (I) The department shall act upon a state permit application made pursuant to this section no later than sixty days after the date the application is received; except that:

(A) For good cause, the department may extend the deadline to act for an additional sixty days; and

(B) If a person applies for a state permit while the person's application for a federal firearms license is pending, and in addition to any other deadline described in this subsection (4), the department may extend the deadline to act until fourteen days after the person notifies the department that the person has been issued and holds a valid federal firearms license.

(II) Repealed.

(d) The department shall issue a state permit unless the applicant does not meet the eligibility requirements described in subsection (3) of this section or the applicant has made a false statement on the application.

(e) A state permit issued pursuant to this section is valid for three years.

(5) (a) A dealer may apply for renewal of the dealer's state permit at any time in the ninety days prior to the expiration of the permit. The department shall not accept a renewal application submitted after the expiration of the dealer's permit.

(b) Ninety days prior to the expiration of a state permit, the department shall notify the dealer of the permit expiration date.

(c) A dealer who submits a timely and sufficient renewal application may continue to engage in the business of dealing in firearms pursuant to state law until the department has acted upon the renewal application. For the purposes of this subsection (5)(c), a renewal application is sufficient if it includes on its face information necessary to show that the applicant is eligible for state permit renewal.

(d) The department shall act upon a renewal application made pursuant to this subsection (5) no later than sixty days after the date the application is received.

(6) (a) Subject to available appropriations, the department shall conduct an on-site inspection of a random selection of ten percent of state permit holders each year, including inspecting a selected permit holder's place of business, to ensure that the permit holder is complying with the requirements to hold a state permit.

(b) In addition to the inspections required in subsection (6)(a) of this section, the department may conduct periodic unannounced inspections of a dealer and the dealer's place of business during the dealer's regular business hours to ensure that the dealer is complying with the requirements to hold a state permit.

(7) (a) Except as provided in subsection (8) of this section, if the department finds that a dealer failed to post the required notice or make a report concerning unlawful purchases in violation of section 18-12-111; failed to make a record required pursuant to section 18-12-402; transferred a firearm without a locking device or failed to post the required notice concerning locking devices, in violation of section 18-12-405; failed to comply with any of the requirements of section 18-12-406; failed to comply with any of the requirements of section 29-11.7-105 (5); violated any other provision of this article 12 or any other state or local law concerning the sale of firearms; or violated any federal law or rule concerning the sale of firearms or firearm components for which the penalty includes potential revocation of the person's federal firearms license, the department shall:

(I) For a first offense, issue a warning to the dealer that includes a description of the offense and the possible penalties for subsequent offenses; and

(II) For a second or subsequent offense:

(A) Issue a warning to the dealer that includes a description of the offense and the penalty for subsequent offenses;

(B) For a second or subsequent offense committed on or after January 1, 2027, impose a fine of up to seventy-five thousand dollars in accordance with the rules adopted pursuant to subsection (7.5) of this section;

(C) Suspend the dealer's state permit for a period of time determined by the department; or

(D) Revoke the dealer's state permit.

(b) A dealer who has had a state permit revoked pursuant to this subsection (7) may apply for a new permit no sooner than three years after the revocation.

(7.5) (a) The department shall adopt rules governing the imposition of fines pursuant to subsection (7)(a)(II)(B) of this section. The rules must include categories of violations based on the severity of the offense, fine ranges associated with each category, and aggravating and mitigating factors the department shall consider when determining fine amounts.

(b) The department shall transmit all fines collected pursuant to this section to the state treasurer, who shall credit the money to the firearm dealer permit cash fund created in subsection (2)(d) of this section.

(8) (a) Notwithstanding subsection (7) of this section, the department shall revoke a state permit if the state permit holder:

(I) No longer holds a valid federal firearms license;

(II) Refuses to allow the department to conduct an on-site inspection pursuant to subsection (6) of this section;

(III) Refuses to permit an officer to inspect a record as required in section 18-12-402; or

(IV) Is convicted of any of the following:

(A) Purchasing or otherwise obtaining a firearm on behalf of, or for transfer to, a person who is ineligible to possess a firearm pursuant to section 18-12-111 or 18 U.S.C. sec. 932;

(B) Transferring a firearm prior to receiving the results of a background check pursuant to section 18-12-112.5;

(C) Trafficking in firearms pursuant to 18 U.S.C. sec. 933, or aiding and abetting trafficking in firearms;

(D) Selling or otherwise transferring a firearm to a person who is ineligible to possess the firearm pursuant to state or federal law;

(E) Selling or otherwise transferring a firearm component or accessory, as defined in section 29-11.7-101.5, to another person in violation of federal, state, or local law; or

(F) Manufacturing, distributing, transferring, selling, or purchasing a specified semiautomatic firearm in violation of section 18-12-116.

(b) (I) A person whose state permit is revoked solely because the person no longer holds a valid federal firearms license, pursuant to subsection (8)(a)(I) of this section, may apply for a new state permit any time after the person obtains a valid federal firearms license.

(II) A person whose state permit is revoked pursuant to subsections (8)(a)(II) to (8)(a)(IV) of this section may apply for a new permit no sooner than three years after the revocation.

(9) If the department revokes a dealer's state permit, the department must notify the United States bureau of alcohol, tobacco, firearms, and explosives of the revocation and the reason for the revocation.

(10) The denial or revocation of a state permit pursuant to this section is subject to the requirements described in sections 24-4-104 and 24-4-105, and judicial review pursuant to section 24-4-106.

(11) A person who is a former state permit holder, including a person whose state permit was revoked or whose state permit renewal was denied, is subject to the prohibition on engaging in the business of dealing firearms without a state permit described in subsection (1)(c) of this section. A person who is a former state permit holder who wishes to dispose of inventory shall dispose of inventory in a manner that does not constitute being engaged in the business of dealing in firearms.

(12) (a) No later than August 1, 2026, and no later than August 1 of each year thereafter, the department shall submit a report to the joint budget committee about firearm dealer permitting in the prior state fiscal year. The report must include, at a minimum, the number of permit applications received, granted, and denied; the number of permits revoked and the basis for the revocation; the number of dealer inspections conducted; the amount of fee money collected and deposited into the firearm dealer permit cash fund and the amount of money spent from the fund; and the total amounts spent on permitting costs and inspection costs. The next report made following an increase in the permit fee pursuant to subsection (2)(c)(I) of this section must include an explanation of the fee increase. The report may include information about the race, gender, and geographic location of persons who applied for a permit, including whether the application was granted or denied, and persons whose permits were revoked.

(b) Notwithstanding section 24-1-136 (11)(a)(I), the requirement to submit the report described in this subsection (12) continues indefinitely.

Source: L. 2024: Entire section added, (HB 24-1353), ch. 492, p. 3449, § 2, effective June 7.
L. 2025: (8)(a)(IV)(D) and (8)(a)(IV)(E) amended and (8)(a)(IV)(F) added, (SB 25-003), ch. 68,

p. 300, § 6, effective April 10; IP(7)(a) amended, (SB 25-205), ch. 356, p. 1919, § 2, effective August 6. **L. 2026:** (1)(a), (3), and (7)(a)(II) amended and (7.5) added, (HB 26-1126), ch. 324, p. 1884, § 2, effective June 2.

Editor's note: (1) Subsection (2)(b)(II)(B) provided for the repeal of subsection (2)(b)(II), effective July 31, 2025. (See L. 2024, p. 3449.)

(2) Subsection (4)(c)(II)(B) provided for the repeal of subsection (4)(c)(II), effective June 30, 2026. (See L. 2024, p. 3449.)

(3) Section 7(1) of chapter 324 (HB 26-1126), Session Laws of Colorado 2026, provides that the act changing subsection (3) applies to applications submitted on or after June 2, 2026.

18-12-402. Retail dealers - record - inspection.

(1) Every dealer engaged, within this state, in retail transactions, including the sale, rental, exchange, or transfer, of firearms other than destructive devices shall keep a record of each firearm transaction conducted by the dealer, other than transactions solely involving destructive devices. The record must be made at the time of the transaction in a book or electronic record kept for that purpose.

(2) The record required in this section must include:

(a) The name of the person that received the firearm and the recipient's age and address;

(b) The make, caliber, and finish of the firearm;

(c) The firearm's number and serial letter, if any;

(d) The date of the transaction; and

(e) The name of the employee or other person that conducted the transaction.

(3) The dealer shall make the records described in this section available at all times for inspection by a duly authorized peace officer.

(4) The department and any other state agency shall not use the information obtained from dealer records to create or maintain a registry identifying firearm ownership.

Source: **L. 2018:** Entire part added with relocations, (SB 18-032), ch. 8, p. 151, § 4, effective October 1. **L. 2026:** Entire section amended, (HB 26-1126), ch. 324, p. 1885, § 3, effective June 2.

Editor's note: (1) This section is similar to former § 12-26-102 as it existed prior to 2018.

(2) Section 7(2) of chapter 324 (HB 26-1126), Session Laws of Colorado 2026, provides that the act changing this section applies to transactions conducted on or after June 2, 2026.

18-12-403. Record - failure to make - penalty.

A dealer who fails to keep the record required pursuant to section 18-12-402 or section 18-12-111.5 (7)(b), or who refuses to exhibit the record when requested by a peace officer, and any purchaser, lessee, or exchanger of a firearm who, in connection with the making of the record, gives false information, commits a class 2 misdemeanor.

Source: L. 2018: Entire part added with relocations, (SB 18-032), ch. 8, p. 151, § 4, effective October 1. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3213, § 352, effective March 1, 2022. **L. 2023:** Entire section amended, (SB 23-279), ch. 311, p. 1897, § 3, effective June 2. **L. 2026:** Entire section amended, (HB 26-1126), ch. 324, p. 1886, § 4, effective June 2.

Editor's note: This section is similar to former § 12-26-103 as it existed prior to 2018.

18-12-404. Jurisdiction - county courts.

County courts, within their respective counties, have jurisdiction to hear and determine all cases arising under the provisions of this part 4, and appeal from judgment is to the district courts in the respective counties in the same manner as is now provided by law for appeals from judgments of the county courts in the cases of misdemeanors.

Source: L. 2018: Entire part added with relocations, (SB 18-032), ch. 8, p. 151, § 4, effective October 1.

Editor's note: This section is similar to former § 12-26-104 as it existed prior to 2018.

18-12-405. Locking device required - penalty.

(1) (a) Every licensed gun dealer, as defined in section 18-12-506, shall provide with each firearm sold or otherwise transferred a locking device capable of securing the firearm.

(b) This subsection (1) does not apply to the transfer of an antique firearm, as defined in 18 U.S.C. sec. 921 (a)(16), as amended, or a curio or relic, as defined in 27 CFR 478.11, as amended.

(2) Every licensed gun dealer shall post, in a conspicuous location on its premises and at any other location at which the dealer sells a firearm, either the notice developed as part of the firearms safe storage education campaign described in section 25-1-131 (2) or the following notice, in writing, on a printed card, with each letter at a minimum of one inch in height:

NOTICE

Unlawful storage of a firearm on premises you own or control may result in imprisonment or fine. Unlawful storage of a firearm in a vehicle may result in a fine.

(3) A licensed gun dealer that violates this section is guilty of an unclassified misdemeanor punishable by a fine of not more than five hundred dollars.

Source: L. 2021: Entire section added, (HB 21-1106), ch. 39, p. 148, § 5, effective July 1. **L. 2024:** (2) amended, (HB 24-1348), ch. 178, p. 970, § 5, effective January 1, 2025.

Cross references: For the short title ("Promoting Child Safety Through Responsible Firearm Storage Act") and the legislative declaration in HB 21-1106, see sections 1 and 2 of chapter 39, Session Laws of Colorado 2021.

18-12-406. Requirements for firearms dealers - training - securing firearms - sale outside of business hours prohibited - rules - penalty.

(1) (a) The department shall develop training or approve training courses provided by other entities for dealers, responsible persons, and dealers' employees. The training must be available in an online format and include an examination with at least twenty questions derived from the

course material and intended to confirm that a course participant understands the information covered in the course. The department, or other trainer conducting the training, shall give a course participant who answers at least seventy percent of the examination questions correctly a printable certificate of completion that is valid for one year after the date of completion. The training must include instruction regarding the following:

- (I) Federal and state laws governing the sale and transfer of firearms and ammunition;
- (II) Recognizing and identifying straw purchasers and fraudulent activity;
- (III) Indicators that a person is attempting to purchase a firearm illegally;
- (IV) Recognizing and identifying indicators that an individual intends to use a firearm for unlawful purposes;
- (V) Recognizing and identifying indicators that an individual intends to use a firearm for self-harm;
- (VI) Preventing theft or burglary of firearms and ammunition;
- (VII) Responding to circumstances described in subsections (1)(a)(I) to (1)(a)(VI) of this section, and any applicable reporting requirements;
- (VIII) Teaching consumers rules of firearm safety, including the safe handling and storage of firearms; and
- (IX) Any other reasonable business practices that the department determines will deter firearm trafficking or the unlawful use of firearms.

(b) A dealer, and each responsible person of the dealer who, in the course of their duties, handles firearms; processes the sale, loan, or transfer of firearms; or otherwise has access to firearms, shall, within thirty days after the date the permit is issued and annually thereafter, complete a training course developed or approved by the department pursuant to this subsection (1).

(c) (I) An employee of a dealer shall, within thirty days after the employee's first day of work for the dealer and annually thereafter, complete a training course developed or approved by the department pursuant to this subsection (1).

(II) A dealer shall maintain the training records of each responsible person of the dealer and each employee and shall make the records available to the department during an on-site inspection of the dealer's place of business.

(2) A dealer shall not conduct business or store firearms at the dealer's place of business unless:

(a) The dealer secures each firearm, except when the firearm is being shown to a customer, repaired, or otherwise worked on, in a manner that prevents unauthorized use of the firearm. Securing a firearm may include keeping the firearm in a locked container, including a locked display case; properly installing a locking device on the firearm; or, if the firearm is a personalized firearm, activating the safety characteristics of the firearm.

(b) The dealer secures each large-capacity magazine in the dealer's possession behind a counter, in an enclosed and locked display case, or in a locked room inaccessible to the public, except when the large-capacity magazine is being shown to a customer permitted to purchase a large-capacity magazine pursuant to section 18-12-302 or is being repaired or otherwise worked on; and

(c) Beginning October 1, 2027, the dealer has implemented security measures in compliance with the department's rules adopted pursuant to subsection (2.5)(a) of this section and as set forth in the dealer's comprehensive security plan submitted to the department pursuant to subsection (2.5)(b) of this section.

(2.5) (a) On or before January 1, 2027, the department shall adopt rules requiring security measures for a dealer's place of business to protect personnel, customers, firearms, and ammunition, and to prevent unauthorized entry. The department may consider, and set different standards based on, the characteristics of a place of business.

(b) A dealer shall submit a comprehensive security plan to the department that demonstrates the security measures that the dealer will implement to comply with the rules adopted pursuant to this subsection (2.5). The department may provide feedback to a dealer on a submitted plan. If a dealer updates its plan at any time, the dealer shall submit the updated plan to the department.

(3) A dealer shall not sell or transfer a firearm:

(a) Outside of the dealer's posted business hours; except that a dealer may sell or transfer a firearm at a gun show, as defined in section 18-12-501, outside of the dealer's posted business hours; or

(b) To a person the dealer knows or suspects is under the influence of intoxicating liquor or of a controlled substance, as defined in section 18-18-102 (5).

(4) If a dealer knows or suspects that an employee of the dealer is involved in the theft of a firearm from the dealer's business, the dealer shall report the theft within forty-eight hours after learning of the theft to a law enforcement agency with jurisdiction over the dealer's place of business.

(4.5) A dealer shall report the theft or loss of a firearm from the dealer's inventory to the department within forty-eight hours after learning of the theft or loss.

(5) The department may promulgate rules necessary to implement this section.

(6) A violation of any provision of this section is a violation of state law concerning the sale of firearms and is subject to the penalties described in section 18-12-401.5 (7).

Source: **L. 2024:** Entire section added, (HB 24-1353), ch. 492, p. 3454, § 3, effective July 1, 2025. **L. 2025:** (3)(a) amended, (HB 25-1238), ch. 93, p. 424, § 3, effective January 1, 2026. **L. 2026:** IP(1)(a), (1)(a)(VIII), (1)(b), (1)(c), (2), and (6) amended and (2.5) and (4.5) added, (HB 26-1126), ch. 324, p. 1886, § 5, effective June 2.

Cross references: For the legislative declaration in HB 25-1238, see section 1 of chapter 93, Session Laws of Colorado 2025.

18-12-407. Dealer employee requirements - background check - penalty.

(1) A dealer shall not employ or contract with a person who, in the course of the person's duties as an employee or contractor, handles firearms; processes the sale, loan, or transfer of firearms; or otherwise has access to firearms, and who:

(a) Has been convicted of an offense that prohibits the person from possessing a weapon pursuant to section 18-12-108;

(b) Has been convicted of a misdemeanor offense described in section 24-33.5-424 (3)(b.3) within five years before the date of the person's employment application; or

(c) Is prohibited from possessing a firearm pursuant to 18 U.S.C. sec. 922 (g).

(2) In order to determine whether the dealer may employ a person consistent with this section, the dealer shall require a prospective employee to submit to a criminal history record check as described in subsection (3) of this section. A dealer shall only accept the results of a criminal history record check completed within seven days before the employee's first day of work.

(3) (a) Before a person begins work for the dealer in a position in which the person will handle firearms; process the sale, loan, or transfer of firearms; or otherwise have access to firearms, the person shall submit to a fingerprint-based criminal history record check. The person shall pay the costs associated with the fingerprint-based criminal history record check.

(b) The person shall have the person's fingerprints taken by a local law enforcement agency or any third party approved by the Colorado bureau of investigation for the purpose of obtaining a fingerprint-based criminal history record check. The person shall authorize the entity taking the person's fingerprints to submit, and the entity shall submit, the complete set of the person's

fingerprints to the Colorado bureau of investigation for the purpose of conducting a fingerprint-based criminal history record check.

(c) If an approved third party takes the person's fingerprints, the fingerprints may be electronically captured using Colorado bureau of investigation-approved livescan equipment. Third-party vendors shall not keep the person's information for more than thirty days.

(d) The Colorado bureau of investigation shall use the person's fingerprints to conduct a criminal history record check using the bureau's records. The Colorado bureau of investigation shall also forward the fingerprints to the federal bureau of investigation for the purpose of conducting a fingerprint-based criminal history record check. The Colorado bureau of investigation, the person, the department, and the entity taking fingerprints shall comply with the federal bureau of investigation's requirements to conduct a criminal history record check.

(e) The Colorado bureau of investigation shall return the results of its criminal history record check to the department, and the department is authorized to receive the results of the federal bureau of investigation's criminal history record check. The department shall use the information resulting from the criminal history record checks to investigate and determine whether a person is qualified for employment pursuant to this section.

(f) When the federal bureau of investigation is unable to complete a fingerprint-based criminal history record check of a person, the Colorado bureau of investigation shall inform the department, and the department may conduct a name-based criminal history record check of the person using Colorado bureau of investigation's records as a substitute for the fingerprint-based criminal history record check required in this section.

(g) When the results of a criminal history record check of a person performed pursuant to this subsection (3) reveal a record of arrest without a disposition, the department shall require the person to submit to a name-based judicial record check, as defined in section 22-2-119.3 (6)(d).

(h) An employee of a dealer shall submit to a fingerprint-based criminal history record check once every three years in the manner described in this subsection (3).

(4) A dealer shall maintain a copy of the notice from the department following each background check conducted pursuant to subsection (3) of this section indicating that a person is qualified for employment. The dealer shall maintain a copy of the notice for the duration of the person's employment and shall make the notice available to the department during an on-site inspection of the dealer's place of business.

(5) Repealed.

(6) If a dealer knowingly employs a person in violation of this section, the department shall:

(a) For a first offense, issue a warning to the dealer that includes a description of the offense and the penalty for subsequent offenses; and

(b) For a second or subsequent offense, revoke the dealer's state permit. A dealer who has had a state permit revoked pursuant to this subsection (6)(b) may apply for a new permit no sooner than three years after the revocation.

Source: L. 2024: Entire section added, (HB 24-1353), ch. 492, p. 3456, § 4, effective July 1, 2025. **L. 2026:** IP(1) amended, (HB 26-1126), ch. 324, p. 1888, § 6, effective June 2.

Editor's note: Subsection (5)(b) provided for the repeal of subsection (5), effective December 31, 2025. (See L. 2024, p. 3456.)

PART 5

GUN SHOWS

Editor's note: (1) This part 5 was added with relocations in 2018. It was repealed and reenacted in 2025, resulting in the addition, relocation, or elimination of sections as well as subject matter. For amendments to this part 5 prior to 2025, consult the 2024 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume. Former C.R.S. section numbers prior to 2025 are shown in editor's notes following those sections that were relocated. For a detailed comparison of this part 5, see the comparative tables located in the back of the index.

(2) (a) Prior to its repeal and reenactment in 2025, this part 5 was originally numbered as article 26.1 of title 12. It was added as an initiated measure that was adopted by the people at the general election held November 7, 2000. The measure enacting the original article 26.1 was effective upon the proclamation of the Governor, December 28, 2000; however, section 12-26.1-108 provided that the effective date of article 26.1 is March 31, 2001.

(b) The vote count on the measure at the general election held November 7, 2000, was as follows:

FOR: 1,197,593

AGAINST: 512,084

Cross references: For the legislative declaration in HB 25-1238, see section 1 of chapter 93, Session Laws of Colorado 2025.

18-12-501. Definitions.

As used in this part 5, unless the context otherwise requires:

- (1) "Collection" means a trade, barter, or in-kind exchange for one or more firearms.
- (2) "Gun collectors show" means an event or function that is sponsored to facilitate the purchase, sale, offer for sale, or collection of only curios or relics, as defined in 27 CFR 478.11, or antique firearms, as defined in 18 U.S.C. sec. 921 (a)(16), and not any other type of firearm. A gun collectors show may also include vendors that sell products that are not firearms.
- (3) (a) "Gun show" means the entire premises provided for an event or function, including, but not limited to, parking areas for the event or function, except for adjacent street parking, that is sponsored to facilitate, in whole or in part, the purchase, sale, offer for sale, or collection of firearms at which:
 - (I) Twenty-five or more firearms are offered or publicly exhibited for sale, transfer, or exchange; or
 - (II) Not less than three gun show vendors publicly exhibit or sell, offer for sale, transfer, or exchange firearms.
- (b) "Gun show" does not include a gun collectors show.
- (4) "Gun show parking area" means the parking area that is on the same property as the gun show venue or that is adjacent to the venue and under control of the company that owns or operates the venue. "Gun show parking area" does not include adjacent street parking.
- (5) "Gun show promoter" means a person who organizes or operates a gun show.
- (6) (a) "Gun show vendor" means any person who publicly exhibits or sells, offers for sale, transfers, or exchanges any firearm at a gun show, regardless of whether the person arranges with a gun show promoter for a fixed location from which to publicly exhibit or sell, offer for sale, transfer, or exchange any firearm.
- (b) "Gun show vendor" does not include a person who is not a federal firearms licensee who sells, offers for sale, or transfers a firearm to, or exchanges a firearm with, a gun show vendor who is a federal firearms licensee at a gun show, including transferring a firearm to a gun show vendor who is a federal firearms licensee for sale on consignment or to facilitate a private firearm transfer.
- (7) "Local law enforcement agency with jurisdiction over the gun show" means a town marshal's office, police department, or sheriff's office whose jurisdiction includes the area in which a gun show occurs.

(8) "State firearms dealer permit" means a state firearms dealer permit described in section 18-12-401.5.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 417, § 2, effective January 1, 2026.

Editor's note: (1) Prior to its repeal and reenactment, this section was similar to former § 12-26.1-101 as it existed prior to 2018.

(2) Several provisions of this section are similar to several former provisions of § 18-12-506 as they existed prior to 2025. For a detailed comparison, see the comparative tables located in the back of the index.

18-12-502. Gun show promoters - requirements - penalties.

(1) (a) For each gun show organized and operated by a gun show promoter, the promoter shall prepare a security plan. The security plan must include:

(I) A list of gun show vendors who will participate in the gun show;

(II) The estimated number of attendees;

(III) The number of security personnel retained by the gun show promoter to provide security at the gun show, including the number of security personnel who are certified by the peace officer standards and training board created in section 24-31-302; and

(IV) A floor plan or layout of the event that includes information about the location of the entrances and exits and the location of video cameras that provide video surveillance of the gun show.

(b) Pursuant to subsection (2)(a)(II) of this section, a gun show promoter shall submit the security plan to each local law enforcement agency with jurisdiction over the gun show.

(2) (a) For each gun show organized and operated by a promoter, the promoter shall:

(I) Have in full force and effect a liability insurance policy that covers losses or damages of at least one million dollars to all persons, arising from an incident that results in injury to a person other than the insured, while the person is in attendance at the gun show. The liability insurance policy must be from an insurer authorized to do business in Colorado or a nonadmitted insurer, as defined in section 10-5-101.2.

(II) No later than fourteen days before the gun show, submit the security plan required by subsection (1) of this section to each local law enforcement agency with jurisdiction over the gun show;

(III) Obtain, at least three days before the gun show, and retain for six months after the gun show a certification from each gun show vendor that complies with the requirements of section 18-12-504;

(IV) Ensure that all entrances and exits, including fire exits, are either guarded by security personnel or equipped with an alarm system;

(V) Provide video surveillance of the gun show parking area and of the main entrance and main exit during the entire time a gun show promoter has access to the venue, including during vendor setup and takedown, and maintain recordings of the surveillance for six months after the gun show. If the venue conducts video surveillance of the gun show parking area, the gun show promoter is not required to provide additional video surveillance, but the promoter must retain the video surveillance recordings for six months after the gun show as required in this subsection (2)(a)(V).

(VI) Ensure that each firearm brought into the gun show by a person other than a gun show vendor, security personnel, or the gun show promoter is checked and tagged. The tag must state that all firearm transfers between private parties at the show must be conducted through a licensed dealer. In order to bring a firearm into a gun show, a person must sign the tag and the tag must remain on the firearm for the entire time the firearm is at the gun show.

(VII) Prohibit a person under the age of eighteen from entering the gun show unless the person is accompanied by a parent, grandparent, or guardian; except that a promoter may allow a member of the United States armed forces or Colorado National Guard who is on active duty and who is under eighteen years of age to enter the gun show without a parent, grandparent, or guardian upon the member presenting a valid military identification card that demonstrates that the person is a member of the United States armed forces or Colorado National Guard;

(VIII) For each customer who leaves the gun show with a purchased firearm, check that the firearm was delivered in compliance with the waiting period required in section 18-12-115 by requiring a person leaving the gun show with a purchased firearm to demonstrate that the waiting period was complied with or that an exception applies; and

(IX) Post the following notices at each entrance and conspicuously at locations throughout the gun show:

(A) A notice that states: "No one may transfer a firearm without first obtaining a background check through a licensed gun dealer if any part of the transaction occurs on these premises, including the parking facilities. Section 18-12-506, Colorado Revised Statutes"; and

(B) A notice that a firearm left in an unattended vehicle is required to be secured in the vehicle in accordance with section 18-12-114.5.

(b) A gun show promoter who violates a requirement described in subsection (2)(a) of this section commits unlawful gun show management. Unlawful gun show management is a class 2 misdemeanor; except that a second or subsequent offense is a class 1 misdemeanor and, in addition to a penalty imposed in accordance with section 18-1.3-501, the promoter is also prohibited from acting as a gun show promoter for five years, beginning on the date of the conviction for the second or subsequent offense.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 418, § 2, effective January 1, 2026.

Editor's note: Prior to its repeal and reenactment, this section was similar to former § 12-26.1-102 as it existed prior to 2018.

18-12-503. Gun show vendors - federal firearms license and state firearms dealer permit required - penalty.

(1) (a) A gun show vendor must be a federal firearms licensee and hold a valid state firearms dealer permit. A person who is not a federal firearms licensee and does not hold a valid state firearms dealer permit shall not participate in a gun show as a gun show vendor.

(b) A person who has been convicted of a second offense of unlawful gun show vendor activity described in section 18-12-505 shall not participate in a gun show as a gun show vendor.

(c) A person who has not completed the certification to the gun show promoter described in section 18-12-504, including attaching a copy of the vendor's federal firearms license and state firearms dealer permit to the certification, shall not participate in a gun show as a gun show vendor.

(2) A person who violates this section commits unlawful participation in a gun show as a gun show vendor. Unlawful participation in a gun show as a gun show vendor is a class 2 misdemeanor; except that a second or subsequent offense is a class 1 misdemeanor.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 420, § 2, effective January 1, 2026.

Editor's note: Prior to its repeal and reenactment, this section was similar to former § 12-26.1-103 as it existed prior to 2018.

18-12-504. Gun show vendor certification.

(1) A gun show vendor shall certify the following to a gun show promoter, in a form determined by the gun show promoter:

Gun Show Vendor

Certification of Compliance

As a vendor of firearms or firearm components at the gun show operated by [promoter's name] to be held [date or dates of gun show] in [city or town, if applicable], _____ county, Colorado, I certify to the promoter of the gun show that:

I am a federal firearms licensee and I am permitted by the state of Colorado to sell firearms at retail.

I will display a copy of the federal license and state permit at my booth at the gun show.

I have never been convicted of illegal activity involving firearms.

I will ensure that all firearms and frames or receivers of firearms sold by me at the gun show will be preceded by a background check of the purchaser and comply with the three-day waiting period required in state law.

I will display and offer for sale or transfer ammunition in compliance with any applicable state or federal law.

I will not sell or transfer any weapons or ammunition that I am prohibited from selling pursuant to federal or state law, including, but not limited to:

Ammunition magazines that allow for more than 15 rounds of ammunition;

Firearms that have fixed magazines that allow for more than 15 rounds of ammunition;

Firearms or frames or receivers of a firearm, including unfinished frames or receivers, that are unserialized; and

Dangerous weapons, as defined in section 18-12-102, C.R.S., and illegal weapons, as defined in section 18-12-102, C.R.S., unless the transferee presents a valid permit for possession of the weapon.

Furthermore, I am aware of additional prohibited items in the city or town and county in which the gun show will be held, and I will not engage in the sale of those items.

I understand that if I sell prohibited items or conduct sales in dangerous or illegal weapons without the transferee presenting a valid permit, I may be subject to criminal penalties under federal, state, or local laws and may be prohibited from participating in future gun shows in the state of Colorado.

Vendor Printed Name: _____

Vendor Signature: _____

Date: _____

(2) A gun show vendor shall attach a copy of the vendor's federal firearms license and state firearms dealer permit to the certification.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 420, § 2, effective January 1, 2026.

Editor's note: Prior to its repeal and reenactment, this section was similar to former § 12-26.1-104 as it existed prior to 2018.

18-12-505. Gun show vendors - requirements - penalties.

- (1) While participating in a gun show, a gun show vendor shall:
 - (a) Prominently display a copy of the vendor's federal firearms license and a copy of the vendor's state firearms dealer permit at the vendor's primary place of business at the gun show;
 - (b) Keep all firearms in the vendor's possession unloaded and securely affixed to the vendor's countertop or wall by use of a plastic tie or electronically monitored wire;
 - (c) Display and offer for sale or transfer ammunition in compliance with any applicable state or federal law; and

- (d) Include with each sold firearm the following information, in writing:

Firearms storage and reporting requirements:

Firearms must be responsibly and securely stored when they are not in use to prevent access by unsupervised juveniles and other unauthorized users. Section 18-12-114, C.R.S.

Firearms left in an unattended vehicle must be stored in accordance with state law. Section 18-12-114.5, C.R.S.

If a firearm is lost or stolen, the owner of the firearm must report the loss or theft to a law enforcement agency not more than five days after discovering that the firearm has been lost or stolen. Section 18-12-113, C.R.S.

(2) A gun show vendor who violates this section commits unlawful gun show vendor activity. Unlawful gun show vendor activity is a class 2 misdemeanor; except that a second or subsequent offense is a class 1 misdemeanor and, pursuant to section 18-12-503 (1)(b), the person who has committed a second or subsequent offense of unlawful gun show vendor activity is prohibited from participating as a vendor at a gun show.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 422, § 2, effective January 1, 2026.

Editor's note: Prior to its repeal and reenactment, this section was similar to former § 12-26.1-105 as it existed prior to 2018.

18-12-506. Background checks at gun shows - records - fees - notice posted by promoter - penalties - definition.

(1) (a) Before a gun show vendor transfers or attempts to transfer a firearm at a gun show, the vendor shall:

(I) Require that a background check, in accordance with section 24-33.5-424, be conducted of the prospective transferee; and

(II) Obtain approval of a transfer from the Colorado bureau of investigation after a background check has been requested by a licensed gun dealer, in accordance with section 24-33.5-424.

(b) A gun show promoter shall arrange for the services of one or more licensed gun dealers on the premises of the gun show to obtain the background checks required by this section.

(c) If any part of a firearm transaction takes place at a gun show, the transferor shall not transfer the firearm unless a background check has been obtained by a licensed gun dealer.

(d) A person who violates this subsection (1) commits a class 1 misdemeanor.

(2) (a) A licensed gun dealer who obtains a background check on a prospective transferee shall record the transfer, as required by section 18-12-402, and retain the records, as required by section 18-12-403, in the same manner as when conducting a sale, rental, or exchange at retail.

(b) Any individual who knowingly gives false information in connection with the making of the records described in this subsection (2) commits a class 1 misdemeanor.

(3) Reserved.

(4) (a) A gun show promoter shall prominently post a notice, in a form to be prescribed by the executive director of the department of public safety or the executive director's designee, setting forth the requirement for a background check required in this section.

(b) A gun show promoter who violates this subsection (4) commits a class 2 misdemeanor.

(5) This section does not apply to the transfer of an antique firearm, as defined in 18 U.S.C. sec. 921(a)(16), or a curio or relic, as defined in 27 CFR 478.11.

(6) As used in this section, unless the context otherwise requires, "licensed gun dealer" means any person who is a licensed importer, licensed manufacturer, or dealer licensed pursuant to 18 U.S.C. sec. 923, as a federally licensed firearms dealer.

(7) The general assembly shall appropriate money as necessary to implement this section.

Source: L. 2025: Entire part R&RE, (HB 25-1238), ch. 93, p. 422, § 2, effective January 1, 2026.

Editor's note: (1) Prior to its repeal and reenactment, this section was similar to former § 12-26.1-106 as it existed prior to 2018.

(2) The provisions of this section are similar to provisions of several former sections of this part 5 as they existed prior to 2025. For a detailed comparison, see the comparative tables located in the back of the index.

ARTICLE 13

Miscellaneous Offenses

18-13-101.	Abuse of a corpse - penalty - repeal.	18-13-109.	Firing woods or prairie.
18-13-102.	Endurance contests. (Repealed)	18-13-109.5.	Intentionally setting wildfire.
18-13-103.	Endangering the welfare of an incompetent person. (Repealed)	18-13-110.	Air pollution violations. (Repealed)
18-13-104.	Fighting by agreement - dueling.	18-13-111.	Purchases of commodity metals, critical infrastructure material, or detached catalytic converters - violations - creation - composition - reports - legislative declaration - definitions.
18-13-105.	Criminal libel. (Repealed)	18-13-112.	Hazardous waste violations.
18-13-106.	Unlawful to discard or abandon iceboxes or motor vehicles and similar items.	18-13-113.	Unlawful to sell metal beverage containers with detachable opening devices.
18-13-107.	Interference with persons with disabilities.	18-13-114.	Sale of secondhand property - record - inspection - false information - penalties - definitions.
18-13-107.3.	Intentional misrepresentation of entitlement to an assistance animal - penalty - definitions.	18-13-114.5.	Sale of secondhand property - proof of ownership required - penalty - definitions.
18-13-107.7.	Intentional misrepresentation of a service animal for a person with a disability - penalty - definitions.	18-13-115.	Secondhand dealers - notice posting required - penalty.
18-13-108.	Removal of timber from state lands.		

18-13-116.	Secondhand dealers - sales tax license - penalty.	18-13-123.	Unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.
18-13-117.	Sales at nonpermanent locations - secondhand dealers - record of sales - penalty.	18-13-124.	Dissemination of false information to obtain hospital admittance or care.
18-13-118.	Secondhand dealers - local regulation.	18-13-125.	Telephone records - sale or purchase.
18-13-119.	Health-care providers - abuse of health insurance.	18-13-126.	Locating protected persons.
18-13-119.5.	Abuse of property insurance.	18-13-127.	Trafficking in adults. (Repealed)
18-13-120.	Use, transportation, and storage of drip gasoline.	18-13-128.	Smuggling of humans. (Repealed)
18-13-121.	Furnishing cigarettes, tobacco products, or nicotine products to persons under twenty-one years of age.	18-13-129.	Coercion of involuntary servitude. (Repealed)
18-13-122.	Illegal possession or consumption of ethyl alcohol or marijuana by an underage person - illegal possession of marijuana paraphernalia by an underage person - adolescent substance abuse prevention and treatment fund - legislative declaration - definitions.	18-13-130.	Bail bond - prohibited activities - penalties.
		18-13-131.	Misuse of gametes - definitions.
		18-13-132.	Furnishing kratom products to persons under twenty-one years of age - definition.
		18-13-133.	Prohibition on prosecuting health-care providers - patient ingests abortifacient in another state.

18-13-101. Abuse of a corpse - penalty - repeal.

(1) A person commits abuse of a corpse if, without statutory or court-ordered authority, the person:

(a) Removes the body or remains of any person from a grave or other place of sepulcher without the consent of the person who has the right to dispose of the remains pursuant to section 15-19-106; or

(b) Treats the body or remains of any person in a way that would outrage normal family sensibilities, including by:

(I) Dismembering or mutilating a body;

(II) Hiding or concealing a body;

(III) Improperly allowing a body to decompose;

(IV) Improperly disposing of a body, including by throwing the body in the trash, burning the body, or abandoning the body on public or private property;

(V) Removing an organ from a body without permission, except as permitted by industry standards pursuant to article 135 of title 12;

(VI) Selling a body or human remains; or

(VII) Transporting or storing a body in a degrading manner, which may include the piling or stacking of human bodies:

(A) In a manner that does not align with recognized industry standards and methods accepted by individuals licensed pursuant to article 135 of title 12; or

(B) Without storing the bodies in proper containers.

(2) (a) (I) Abuse of a corpse committed before January 1, 2027, is a class 6 felony.

(II) This subsection (2)(a) is repealed, effective January 1, 2028.

(b) Abuse of a corpse committed on or after January 1, 2027, is a class 5 felony.

(3) (a) A defendant may not be convicted of both abuse of a corpse, as described in subsection (1) of this section, and tampering with a deceased human body, as described in section 18-8-610.5 (1), if the act arises out of a single incident.

(b) If a defendant is charged with both abuse of a corpse, as described in subsection (1) of this section, and tampering with a deceased human body, as described in section 18-8-610.5 (1), the court shall proceed pursuant to section 18-1-408.

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-13-101. L. 2005: Entire section amended, p. 206, § 1, effective July 1. L. 2020: IP(1), (1)(a), and (2) amended and (3) added,

(HB 20-1148), ch. 100, p. 387, § 2, effective September 14. **L. 2026:** (1) and (2) amended, (HB 26-1258), ch. 383, p. 2403, § 30, effective August 12.

Editor's note: Section 33(2) of chapter 383 (HB 26-1258), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed; license and registration applications filed; certificates of death initiated, completed, responded to, or filed; and contracts entered into or renewed on or after August 12, 2026.

ANNOTATION

Applied in *People v. Bookman*, 646 P.2d 924 (Colo. 1982).

18-13-102. Endurance contests. (Repealed)

Source: **L. 71:** R&RE, p. 483, § 1. **C.R.S. 1963:** § 40-13-102. **L. 85:** Entire section repealed, p. 624, § 11, effective July 1.

18-13-103. Endangering the welfare of an incompetent person. (Repealed)

Source: **L. 71:** R&RE, p. 483, § 1. **C.R.S. 1963:** § 40-13-103. **L. 91:** Entire section repealed, p. 1784, § 16, effective July 1.

18-13-104. Fighting by agreement - dueling.

(1) If two or more persons shall fight by agreement in a public place, except in a sporting event authorized by law, the persons so fighting commit a petty offense.

(2) Persons who by agreement engage in a fight with deadly weapons, whether in a public or private place, commit dueling. Dueling is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-104. L. 2021: (1) amended, (SB 21-271), ch. 462, p. 3213, § 355, effective March 1, 2022. L. 2023: (2) amended, (HB 23-1293), ch. 298, p. 1793, § 49, effective October 1.

18-13-105. Criminal libel. (Repealed)

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-105. L. 73: p. 540, § 14. L. 77: (1) amended, p. 971, § 65, effective July 1. L. 89: (3) amended, p. 842, § 102, effective July 1. L. 2012: Entire section repealed, (SB 12-102), ch. 113, p. 391, § 1, effective September 1.

18-13-106. Unlawful to discard or abandon iceboxes or motor vehicles and similar items.

Any person abandoning or discarding, in any public or private place accessible to children, any chest, closet, piece of furniture, refrigerator, icebox, motor vehicle, or other article, having a compartment of a capacity of one and one-half cubic feet or more and having a door or lid which when closed cannot be opened easily from the inside, or who, being the owner, lessee, or manager of such place, knowingly permits such abandoned or discarded article to remain in such condition commits a petty offense.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-106. L. 2021: Entire section amended, (SB 21-271), ch. 462, p. 3213, § 356, effective March 1, 2022.

18-13-107. Interference with persons with disabilities.

(1) A person shall not falsely impersonate an individual with a disability, as that term is defined in section 24-34-301.

(2) Repealed.

(3) A person shall not knowingly deny an individual with a disability, as defined in section 24-34-301, any right or privilege protected in section 24-34-502, 24-34-502.2, 24-34-601, 24-34-802, or 24-34-803.

(4) Violation of the provisions of this section is a petty offense.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-107. L. 72: p. 276, § 10. L. 82: (2) repealed and (4) amended, pp. 593, 592, §§ 4, 2, effective April 9. L. 93: (3) amended, p. 1637, § 22, effective July 1. L. 95: (3) and (4) amended, p. 325, § 4, effective August 7. L. 2014: (1) and (3) amended, (SB 14-118), ch. 250, p. 983, § 14, effective August 6. L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3214, § 357, effective March 1, 2022. L. 2023: (1) and (3) amended, (HB 23-1296), ch. 269, p. 1599, § 3, effective May 25.

18-13-107.3. Intentional misrepresentation of entitlement to an assistance animal - penalty - definitions.

- (1) A person commits intentional misrepresentation of entitlement to an assistance animal if:
 - (a) The person intentionally misrepresents entitlement to an animal in his or her possession as an assistance animal for the purpose of obtaining any of the rights or privileges set forth in state or federal law for an individual with a disability as a reasonable accommodation in housing;
 - (b) The person was previously given a written or verbal warning regarding the fact that it is illegal to intentionally misrepresent entitlement to an assistance animal; and
 - (c) The person knows that:
 - (I) The animal is not an assistance animal with regard to that person; or
 - (II) The person does not have a disability.
- (2) A person who violates subsection (1) of this section commits a civil infraction and, upon conviction, notwithstanding the provisions of section 18-1.3-503, shall be punished as follows:
 - (a) For a first offense, a fine of twenty-five dollars;
 - (b) For a second offense, a fine of not less than fifty dollars but not more than two hundred dollars; and
 - (c) For a third or subsequent offense, a fine of not less than one hundred dollars but not more than five hundred dollars.
- (3) Repealed.
- (4) A written finding made pursuant to section 12-240-144 (1)(a), 12-245-229 (1)(a), or 12-255-133 (1)(a) is an affirmative defense to the offense established by this section. The lack of such a finding is not proof of the offense established by this section, and nothing in this section or in section 12-240-144, 12-245-229, or 12-255-133 limits the means by which a person with a disability may demonstrate, pursuant to state or federal law, that the person has a disability or that the person has a disability-related need for an assistance animal.

(5) As used in this section, unless the context otherwise requires:

(a) "Assistance animal" means an animal that qualifies as a reasonable accommodation under the federal "Fair Housing Act", 42 U.S.C. sec. 3601 et seq., as amended or section 504 of the federal "Rehabilitation Act of 1973", 29 U.S.C. sec. 794, as amended.

(b) "Disability" has the same meaning as set forth in the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations and includes a handicap as that term is defined in the federal "Fair Housing Act", 42 U.S.C. sec. 3601 et seq., as amended, and 24 CFR 100.201.

(c) "Service animal" has the same meaning as set forth in the implementing regulations of Title II and Title III of the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq.

(d) "State and federal law" includes section 24-34-803, C.R.S., the federal laws specified in paragraph (a) of this subsection (5), and rules and regulations implementing those laws.

Source: **L. 2016:** Entire section added, (HB 16-1426), ch. 309, p. 1246, § 5, effective January 1, 2017. **L. 2019:** (4) amended, (HB 19-1172), ch. 136, p. 1677, § 99, effective October 1. **L. 2021:** IP(2) amended, (SB 21-271), ch. 462, p. 3214, § 358, effective March 1, 2022. **L. 2022:** (3) repealed, (SB 22-099), ch. 276, p. 1985, § 6, effective August 10.

Cross references: For the legislative declaration in HB 16-1426, see section 1 of chapter 309, Session Laws of Colorado 2016.

18-13-107.7. Intentional misrepresentation of a service animal for a person with a disability - penalty - definitions.

(1) A person commits intentional misrepresentation of a service animal if:

(a) The person intentionally misrepresents an animal in his or her possession as his or her service animal or service-animal-in-training for the purpose of obtaining any of the rights or privileges set forth in section 24-34-803, C.R.S.;

(b) The person was previously given a written or verbal warning regarding the fact that it is illegal to intentionally misrepresent a service animal; and

(c) The person knows that the animal in question is not a service animal or service-animal-in-training.

(2) A person who violates subsection (1) of this section commits a petty offense and, upon conviction, notwithstanding section 18-1.3-503, shall be punished as follows:

- (a) For a first offense, a fine of twenty-five dollars;
- (b) For a second offense, a fine of not less than fifty dollars but not more than two hundred dollars; and
- (c) For a third or subsequent offense, a fine of not less than one hundred dollars but not more than five hundred dollars.

(3) Repealed.

(4) As used in this section, unless the context otherwise requires:

(a) "Disability" has the same meaning as set forth in the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations.

(b) "Qualified individual with a disability" has the same meaning as set forth in the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations.

(c) "Service animal" has the same meaning as set forth in the implementing regulations of Title II and Title III of the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq.

(d) "Service-animal-in-training" means a dog or miniature horse that is being individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.

(e) "Trainer of a service animal" means a person who is individually training a service animal to do work or perform tasks for the benefit of a qualified individual with a disability.

Source: L. 2016: Entire section added, (HB 16-1426), ch. 309, p. 1246, § 5, effective January 1, 2017. L. 2021: IP(2) amended, (SB 21-271), ch. 462, p. 3214, § 359, effective March 1, 2022. L. 2022: (3) repealed, (SB 22-099), ch. 276, p. 1986, § 7, effective August 10.

Cross references: For the legislative declaration in HB 16-1426, see section 1 of chapter 309, Session Laws of Colorado 2016.

18-13-108. Removal of timber from state lands.

Any person who cuts or removes any timber from any state land without lawful authority commits a petty offense.

Source: L. 71: R&RE, p. 484, § 1. **C.R.S. 1963:** § 40-13-108. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3214, § 360, effective March 1, 2022.

18-13-109. Firing woods or prairie.

(1) (a) Except as otherwise provided in subsection (2) of this section, any person who, without lawful authority and knowingly, recklessly, or with criminal negligence, sets on fire, or causes to be set on fire, any woods, prairie, or grounds of any description, other than his or her own, or who, knowingly, recklessly, or with criminal negligence, permits a fire, set or caused to be set by such person, to pass from his or her own grounds to the injury of any other person commits a petty offense.

(b) Any person convicted under paragraph (a) of this subsection (1) shall be assessed a fine of not less than two hundred fifty dollars and not greater than one thousand dollars. The fine imposed by this paragraph (b) shall be mandatory and not subject to suspension. Nothing in this paragraph (b) shall be construed to limit the court's discretion in exercising other available sentencing alternatives in addition to the mandatory fine.

(2) (a) Any person who knowingly violates paragraph (a) of subsection (1) of this section and who knows or reasonably should know that he or she violates any applicable order, rule, or regulation lawfully issued by a governmental authority that prohibits, bans, restricts, or otherwise regulates fires during periods of extreme fire hazard and that is designed to promote the safety of persons and property, commits a class 6 felony.

(b) The following activities do not constitute offenses under this subsection (2):

- (I) Open burning lawfully conducted in the course of agricultural operations;
- (II) State, municipality, or county fire management operations;
- (III) Lawfully conducted prescribed or controlled burns;
- (IV) Lawful activities conducted pursuant to rules, regulations, or policies adopted by the relevant state, tribal, or federal regulatory agency or agencies.

Source: **L. 71:** R&RE, p. 484, § 1. **C.R.S. 1963:** § 40-13-109. **L. 75:** Entire section amended, p. 211, § 29, effective July 16. **L. 77:** Entire section amended, p. 971, § 66, effective July 1. **L. 2002, 3rd Ex. Sess.:** Entire section amended, p. 37, § 2, effective July 17. **L. 2013:** IP(2)(b) and (2)(b)(III) amended, (SB 13-083), ch. 249, p. 1308, § 9, effective May 23. **L. 2021:** (1)(a) amended, (SB 21-271), ch. 462, p. 3214, § 361, effective March 1, 2022.

Cross references: (1) For a civil action for damages from fire set in woods or prairie, see § 13-21-105.

(2) In 2013, the introductory portion to subsection (2)(b) and subsection (2)(b)(III) were amended by the "Colorado Prescribed Burning Act". For the short title and the legislative declaration, see sections 1 and 2 of chapter 249, Session Laws of Colorado 2013.

ANNOTATION

An action for strict liability for violation of this section may not lie. King v. U.S., 53 F. Supp. 2d 1056 (D. Colo. 1999).

18-13-109.5. Intentionally setting wildfire.

(1) A person commits the crime of intentionally setting a wildfire if he or she:

(a) (I) Intentionally and without lawful authority sets on fire, or causes to be set on fire, any woods, prairie, or grounds of any description, other than his or her own; or

(II) Intentionally permits a fire, set or caused to be set by such person, to pass from his or her own grounds to the grounds of another; and

(b) By so doing, places another in danger of death or serious bodily injury or places any building or occupied structure of another in danger of damage.

(2) Intentionally setting a wildfire is a class 3 felony.

(3) For purposes of this section, "building" shall have the same meaning as set forth in section 18-4-101 (1) and "occupied structure" shall have the same meaning as set forth in section 18-4-101 (2).

Source: **L. 2002, 3rd Ex. Sess.:** Entire section added, p. 38, § 3, effective July 17.

18-13-110. Air pollution violations. (Repealed)

Source: L. 73: p. 744, § 5. C.R.S. 1963: § 40-13-110. L. 79: Entire section R&RE, p. 1552, § 16, effective June 20; (1)(a)(I) to (1)(a)(III), (1)(b), and (2)(a) amended, p. 1057, § 2, effective June 20. L. 81: (4)(a) and (4)(b) amended, p. 2025, § 19, effective July 14. L. 84: (2)(a) and (3) amended, p. 1084, § 1, effective July 1; (2)(b)(I) amended, p. 677, § 1, effective July 1. L. 86: (2)(a) and (3)(b) amended, p. 1185, § 16, effective July 1, 1987. L. 89: (2)(a) amended and (4)(d) added, pp. 1161, 1160, §§ 9, 6, effective May 26. L. 93: (3) amended, p. 1922, § 1, effective July 1. L. 94: (2)(b)(II) amended, p. 2735, § 359, effective July 1; entire section repealed, p. 2541, § 5, effective January 1, 1995.

18-13-111. Purchases of commodity metals, critical infrastructure material, or detached catalytic converters - violations - creation - composition - reports - legislative declaration - definitions.

(1) (a) Except as otherwise provided in subsection (3) of this section, every owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle and every collector of or dealer in junk, salvage, or other secondhand property shall keep a book or register detailing all transactions involving commodity metals, critical infrastructure material, or detached catalytic converters.

(b) The owner, keeper, proprietor, collector, or dealer shall record the identification of a seller of commodity metals, critical infrastructure materials, or detached catalytic converters in the book or register and the method by which the seller verified the seller's identity. The seller shall verify the seller's identity by one of the following:

- (I) A valid Colorado driver's license;
- (II) A valid identification card issued in accordance with section 42-2-302;
- (III) A valid driver's license from another state that contains a picture identification;
- (IV) A valid military identification card;
- (V) A valid United States passport; or
- (VI) A valid alien registration card.
- (VII) (Deleted by amendment, L. 2011, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13, 2011.)

(c) The owner, keeper, proprietor, collector, or dealer shall require the seller of a commodity metal, critical infrastructure material, or detached catalytic converter to provide for the book or register:

(I) A signed affidavit, sworn and affirmed under penalty of law, that the seller is the owner of the commodity metal, critical infrastructure material, or detached catalytic converter or is otherwise entitled to sell the commodity metal, critical infrastructure material, or detached catalytic converter. The owner, keeper, proprietor, collector, or dealer shall provide the affidavit form to the seller.

(II) The license plate number and description of the vehicle or conveyance, if any, in which the commodity metal or detached catalytic converter was delivered.

(d) The owner, keeper, proprietor, collector, or dealer shall include the following in the book or register:

(I) The date and place of each purchase of the commodity metal, critical infrastructure material, or detached catalytic converter; and

(II) The description and quantity of the commodity metal, critical infrastructure material, or detached catalytic converter purchased.

(e) The book or register shall be made available to a law enforcement agency or municipal code enforcement agency for inspection upon request.

(1.3) (a) A purchaser of commodity metals, critical infrastructure materials, or detached catalytic converters shall:

(I) Sign up with the scrap theft alert system maintained by the Institute of Scrap Recycling Industries, Incorporated, or its successor organization, to receive alerts regarding thefts of commodity metals, critical infrastructure materials, or detached catalytic converters in the purchaser's geographic area;

(II) Download and maintain the scrap metal theft alerts generated by the scrap theft alert system;

(III) Use the alerts to identify potentially stolen commodity metals, critical infrastructure materials, or detached catalytic converters, including training the purchaser's employees to use the alerts during the purchaser's daily operations.

(b) A purchaser of commodity metals, critical infrastructure materials, or detached catalytic converters shall maintain for ninety days copies of any theft alerts received and downloaded pursuant to subsection (1.3)(a) of this section. A purchaser shall also maintain documentation that the purchaser educates employees about, and provides to employees, scrap theft alerts.

(1.5) (a) An owner, keeper, proprietor, collector, or dealer is permitted to pay a seller in cash for any commodity metal, critical infrastructure material, or detached catalytic converter transaction of three hundred dollars or less.

(b) If the transaction costs more than three hundred dollars or involves critical infrastructure material that the paying party knows or should have known was part of critical infrastructure, the owner, keeper, proprietor, collector, or dealer shall pay the seller of a commodity metal or detached catalytic converter by check unless the seller is paid by means of any process in which a picture of the seller is taken when the money is paid. For the purposes of this subsection (1.5)(b), the paying party should have known the commodity metals were part of critical infrastructure if evidence exists that the insulating casing of the commodity metal was burned or smoldered off.

(1.6) (a) An owner, keeper, proprietor, collector, or dealer who knowingly possesses critical infrastructure material in violation of this section commits unlawful possession of critical infrastructure materials.

(b) (I) An owner, keeper, proprietor, collector, or dealer who takes possession of critical infrastructure material as part of a load of otherwise noncritical infrastructure materials with an affidavit stating that the transferor may lawfully transfer the noncritical infrastructure material has a duty to notify the appropriate law enforcement agency or municipal code enforcement agency by the end of the next business day after discovering the critical infrastructure materials. The critical infrastructure material must be set aside and must not be sold, pending a determination as to its legal status made by a law enforcement agency or municipal code enforcement agency.

(II) An owner, keeper, proprietor, collector, or dealer does not violate this subsection (1.6) if the owner, keeper, proprietor, collector, or dealer has an affidavit stating that the transferor may lawfully transfer the critical infrastructure material.

(III) An owner, keeper, proprietor, collector, or dealer who unknowingly takes possession of critical infrastructure material as part of a load of otherwise noncritical infrastructure materials with an affidavit stating that the transferor may lawfully transfer the noncritical infrastructure material and knowingly does not notify the appropriate law enforcement agency or municipal code enforcement agency by the end of the next business day after becoming aware they are in possession of critical infrastructure materials in violation of this subsection (1.6)(b) commits failure to report stolen critical infrastructure materials.

(2) Except as otherwise provided in subsection (3) of this section, the owner, keeper, proprietor, collector, or dealer of any commodity metal, critical infrastructure material, or detached catalytic converter shall make a digital photographic record, video record, or other record that identifies the seller and the commodity metal, critical infrastructure material, or detached catalytic converter that the seller is selling. The digital photographic record, video

record, or other record format shall be retained for one hundred eighty days, and the owner shall permit a law enforcement officer or municipal code enforcement officer to make inspections of the record.

(3) The following transactions and materials are exempt from the requirements specified in subsections (1), (1.6), and (2) of this section:

(a) Any materials purchased from a regulated public utility or an original manufacturer of scrap or industrially generated scrap;

(b) The purchase of recyclable food and beverage containers from any source; except that, for purposes of this exemption, a metal beer keg suitable for reuse shall not be considered a recyclable beverage container;

(c) Any scrap that is involved in a transaction between dealers or governmental entities;

(d) (Deleted by amendment, L. 2007, p. 759, §1, effective July 1, 2007.)

(e) (Deleted by amendment, L. 2011, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13, 2011.)

(f) The purchase of critical infrastructure materials when the owner, keeper, proprietor, collector, or dealer has a written contract with the original source company that claims and affirms that the critical infrastructure material belongs to the owner, keeper, proprietor, collector, or dealer.

(4) The information entered in the book or register, as provided in subsection (1) of this section, need not be kept for a period longer than three years after the date of purchase of the commodity metal, critical infrastructure material, or detached catalytic converter.

(5) A person who violates subsection (1) of this section by failing to keep a book or register, a person who knowingly gives false information with respect to the information required to be maintained in the book or register provided for in subsection (1) of this section, and a person who violates subsection (1.3), (1.5), or (2) of this section commits:

(a) A petty offense if the amount is less than three hundred dollars;

(b) A class 2 misdemeanor if the amount is three hundred dollars or more but less than one thousand dollars;

(c) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars; and

(d) A class 6 felony if the amount is two thousand dollars or more.

(e) to (h) Repealed.

(5.5) (a) Unlawful possession of critical infrastructure materials, as described in subsection (1.6)(a) of this section, is:

- (I) A class 2 misdemeanor if the amount is less than one thousand dollars;
- (II) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars; and
- (III) A class 6 felony if the amount is two thousand dollars or more.

(b) Failure to report stolen critical infrastructure materials, as described in subsection (1.6)(b) of this section, is:

- (I) A class 2 misdemeanor if the amount is less than one thousand dollars;
- (II) A class 1 misdemeanor if the amount is one thousand dollars or more but less than two thousand dollars; and
- (III) A class 6 felony if the amount is two thousand dollars or more.

(6) There is a permissive inference that metal purchased by a dealer for the purpose of recycling is a commodity metal if the commodity metal has a value of fifty cents per pound or greater for purposes of recycling the commodity metal.

(7) This section shall not apply to a person or entity that does not provide remuneration for commodity metals collected in drop-off curbside containers or at materials recovery sites.

(8) and (9) Repealed.

(10) (a) The general assembly hereby finds, determines, and declares that:

(I) Thefts of commodity metals and detached catalytic converters jeopardize the safety and welfare of the public, financially burden taxpayers and industry, and exhaust law enforcement resources;

(II) The thefts impact every community in Colorado;

(III) The regulation of commodity metal or detached catalytic converter purchases is a matter of statewide concern; and

(IV) Thefts of commodity metals that make up critical infrastructure materials represent a significant threat to Colorado citizens.

(b) In order to continue the ability of the state to identify causes of commodity metal and detached catalytic converter theft and provide realistic solutions to the theft problem, the general assembly encourages law enforcement authorities in the state to join the scrap theft alert system maintained by the Institute of Scrap Recycling Industries, Incorporated, or its successor organization, and to report thefts of commodity metals and detached catalytic converters

occurring within their jurisdictions to this system. The general assembly also encourages commercial stakeholders affected by commodity metal and detached catalytic converter theft to sign up for and participate in the scrap theft alert system.

(11) This section does not apply to detached catalytic converters acquired as part of a whole motor vehicle transaction in which an auto parts recycler, as defined in section 42-4-2201 (1), reports the motor vehicle acquisition into the national motor vehicle title information system, as described in 49 U.S.C. sec. 30504.

(12) (a) The Colorado state patrol shall develop an assessment report for applicable facilities to identify the level of conformance with the provisions of subsections (1) to (4) of this section.

(b) On or before July 1, 2023, and each July 1 thereafter, the Colorado state patrol shall distribute and make available an assessment report for all applicable facilities. The assessment report must encourage voluntary compliance and provide education to applicable facilities on the requirements of this section. If an applicable facility does not comply with the assessment reporting requirements described in this section, the Colorado state patrol may prompt a law enforcement inspection. The assessment report must include, at a minimum:

(I) Applicable facility information, such as the type of facility, name, physical address, mailing address, business contact name, and contact information;

(II) Purchases of commodity metals information, to include the type of book or register used, forms of seller identity verification, seller documentation used in the book or register, whether the book or register provides for the date and place of purchase, description and quantity and availability or actual inspection by a peace officer; and

(III) Applicable facility recording of commodity metal transactions, to include the type of metal commodity transaction, use of and employee training on the scrap theft alert system, maintenance of scrap theft alerts, payment forms to seller, and form of records kept, including digital, photographic, video, or other records;

(c) On or before August 1, 2023, and each August 1 thereafter, every applicable facility shall complete and submit the assessment report to the Colorado state patrol.

(d) Repealed.

(13) (a) The Colorado state patrol shall develop an inspection form for use by state, county, and local authorities to use when inspecting applicable facilities to provide statewide documentation, consistent with the provisions in subsections (1) to (4) of this section. The inspection form must include elements contained in the assessment report, but may further provide information to be used in criminal investigations.

(b) The Colorado state patrol shall provide standardized training for use by law enforcement agencies in conducting inspections. This training may be in person, via video, or using a written manual.

(c) Upon completion of a law enforcement inspection, the law enforcement agency shall submit a copy of the inspection form to the Colorado state patrol within two weeks after completing the inspection.

(d) Repealed.

(14) As used in this section, unless the context otherwise requires:

(a) "Applicable facility" means a junk shop, junk store, salvage yard, or other secondhand property operated by a dealer, owner, keeper, or proprietor.

(b) "Book or register" means any written or electronic record of transactions kept by an owner, keeper, proprietor, collector, or dealer, including sequentially numbered receipts containing the information required by subsection (1) of this section.

(c) "Commodity metal" means copper; a copper alloy, such as bronze or brass; or aluminum. "Commodity metal" does not include precious metals, such as gold, silver, or platinum.

(d) "Covered infrastructure" means:

(I) Communication infrastructure, including fiber-optic cables and other infrastructure used for:

(A) Internet, including broadband internet service;

(B) Cable communications;

(C) Wireless communications;

(D) Telecommunications; and

(E) A public safety answering point, as defined in section 29-11-101;

(II) Transportation infrastructure, including infrastructure used for:

(A) Light rail, as defined in section 29-35-103;

(B) Passenger rail;

(C) Freight rail;

(D) A public roadway system; and

(E) Bridges;

(III) Housing infrastructure;

(IV) An electric vehicle charging station; and

(V) Public utility infrastructure.

(e) "Critical infrastructure material" means any component or part used in covered infrastructure that is made of or contains a commodity metal, the theft of which poses an imminent threat to life or the physical safety of a person, including through serious harm to the basic supply of covered infrastructure to the population or to the exercise of a core function of covered infrastructure.

(f) "Dealer" means any person, business, or entity that buys, sells, or distributes, for the purpose of recycling, processing, or smelting, any commodity metal or detached catalytic converter on a wholesale basis. For the purposes of this subsection (14)(f), a transaction between a dealer and a motor vehicle dealer is not a wholesale sale.

(g) "Detached catalytic converter" means a post-combustion device that:

(I) Oxidizes hydrocarbons and carbon monoxide gases or reduces oxides of nitrogen;

(II) Is designed or intended for use as part of an emission control system; and

(III) Was previously installed on a motor vehicle and subsequently removed.

Source: **L. 75:** Entire section added, p. 641, § 1, effective June 20. **L. 90:** Entire section amended, p. 997, § 1, effective April 3. **L. 2007:** Entire section amended, p. 759, § 1, effective July 1. **L. 2011:** (1)(b)(V), (1)(b)(VI), (1)(b)(VII), (2), (3)(e), (5), (8)(b.5), and (8)(e) amended and (1.3), (1.5), (9), and (10) added, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13. **L. 2016:** (8)(b.5), (9)(f), and (10)(b) amended, (HB 16-1182), ch. 74, p. 195, § 1, effective April 12. **L. 2021:** (5) amended, (SB 21-271), ch. 462, p. 3214, § 362, effective March 1, 2022. **L. 2022:** (1)(a), IP(1)(b), (1)(b)(II), (1)(b)(IV), (1)(b)(VI), (1)(c), (1)(d), IP (1.3)(a), (1.3)(a)(I), (1.3)(a)(III), (1.3)(b), (1.5), (2), (4), (5), IP(8), (8)(b.5), (8)(d), (9)(c), (10)(a)(I), (10)(a)(III), and (10)(b) amended and (8)(f) and (11) added, (SB 22-009), ch. 418, p. 2954, § 1, effective June 7; IP(8) amended and (8)(a.5), (12), and (13) added, (HB 22-1217), ch. 417, p. 2950, § 1, effective June 7. **L. 2025:** (9), (12)(d), and (13)(d) repealed, (SB 25-171), ch. 75, p. 320, § 2, effective August 6. **L. 2026:** (1)(a), IP(1)(b), IP(1)(c), (1)(c)(I), (1)(d)(I), (1)(d)(II), (1)(e), IP(1.3)(a), (1.3)(a)(I), (1.3)(a)(III), (1.3)(b), (1.5)(a), (1.5)(b), (2), IP(3), (4), IP(5), (5)(c), (5)(d), (6), (10)(a)(II), and (10)(a)(III) amended, (1.6), (3)(f), (5.5), (10)(a)(IV), and (14) added, and (5)(e), (5)(f), (5)(g), (5)(h), and (8) repealed, (HB 26-1101), ch. 128, p. 557, § 1, effective May 7.

Editor's note: Section 2 of chapter 128 (HB 26-1101), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after July 1, 2026.

18-13-112. Hazardous waste violations.

(1) No person shall abandon any vehicle containing any hazardous waste or intentionally spill hazardous waste upon a street, highway, right-of-way, or any other public property or upon any private property without the express consent of the owner or person in lawful charge of that private property.

(2) As used in this section:

(a) (I) "Abandon" means to leave a thing with the intention not to retain possession of or assert ownership or control over it. The intent need not coincide with the act of leaving.

(II) It is prima facie evidence of the necessary intent that:

(A) The vehicle has been left for more than three days unattended and unmoved; or

(B) License plates or other identifying marks have been removed from the vehicle; or

(C) The vehicle has been damaged or is deteriorated so extensively that it has value only for junk or salvage; or

(D) The owner has been notified by a law enforcement agency to remove the vehicle and it has not been removed within twenty-four hours after notification.

(b) (I) "Hazardous waste" means any waste or other material, alone, mixed with, or in combination with other wastes or materials, which because of its quantity, concentration, or physical or chemical characteristics:

(A) Causes, or significantly contributes to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) Poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise improperly managed.

(II) "Hazardous waste" also means any waste or other material defined as a hazardous waste in the rules and regulations promulgated pursuant to the federal "Solid Waste Disposal Act" (42 U.S.C. 3251 et seq.), as amended by the federal "Resource Conservation and Recovery Act of 1976", as amended (42 U.S.C. 6905, 6912 (a), 6921-6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260-265 on July 1, 1981.

(c) "Hazardous waste" does not include:

(I) Discharges which are point sources subject to permits under section 402 of the "Federal Water Pollution Control Act", as amended;

(II) Source, special nuclear, or byproduct material as defined by the federal "Atomic Energy Act of 1954", as amended;

(III) Agricultural waste;

(IV) Domestic sewage which includes final use for beneficial purposes, including fertilizer, soil conditioner, fuel, and livestock feed, of sludge from wastewater treatment plants if such sludge meets all applicable standards of the department;

(V) Irrigation return flows;

(VI) Inert materials deposited for construction fill or topsoil placement in connection with actual or contemplated construction at such location or for changes in land contour for agricultural purposes; or

(VII) Any waste or other materials exempted or otherwise not regulated as a hazardous waste in the rules and regulations promulgated pursuant to the federal "Solid Waste Disposal Act" (42 U.S.C. 3251 et seq.), as amended by the federal "Resource Conservation and Recovery Act of 1976", as amended (42 U.S.C. 6905, 6912 (a), 6921-6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260-265 on July 1, 1981.

(d) "Inert material" means non-water-soluble and nondecomposable inert solids together with such minor amounts and types of other materials as will not significantly affect the inert nature of such solids. The term includes but is not limited to earth, sand, gravel, rock, concrete which has been in a hardened state for at least sixty days, masonry, asphalt paving fragments, and such other non-water-soluble and nondecomposable inert solids.

(e) "Vehicle" means any device which is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. The term includes but is not limited to any motor vehicle, trailer, or semitrailer.

(3) (a) A person who violates this section by intentionally spilling hazardous waste commits a class 4 felony.

(b) A person who violates this section by abandoning a vehicle containing hazardous waste commits a class 5 felony.

Source: L. 81: Entire section added, p. 977, § 22, effective July 1. **L. 92:** IP(2)(b)(I) amended, p. 1258, § 15, effective August 1. **L. 2023:** (3) amended, (HB 23-1293), ch. 298, p. 1793, § 50, effective October 1.

Cross references: For the penalty for other hazardous waste violations, see § 25-15-310; for the penalty for causing or contributing to the occurrence of a hazardous substance incident, see § 29-22-108; for penalties for violations of the "Hazardous Materials Transportation Act of 1987", see §§ 42-20-109, 42-20-111, 42-20-204, and 42-20-305.

ANNOTATION

Law reviews. For article, "Using Local Police Powers to Protect the Environment", see 24 Colo. Law. 1063 (1995).

18-13-113. Unlawful to sell metal beverage containers with detachable opening devices.

(1) As used in this section:

(a) "Beverage" means each of the following forms of liquid refreshment intended for human consumption:

(I) Fermented malt beverages, malt liquors, beers, or any beverages obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product, or any combination thereof, in water;

(II) Alcoholic beverages obtained by distillation, and mixed with water or other substances in solution;

(III) Alcoholic beverages obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar;

(IV) Mineral or soda waters;

(V) Carbonated or noncarbonated soft drinks; or

(VI) Fruit juices or vegetable juices or fruitades.

(b) "Beverage container" means an individual, sealed metal can which contains a beverage.

(c) "Within Colorado" means within the exterior limits of Colorado and includes all territory within these limits owned or ceded to the United States of America.

(2) No person shall sell or offer for sale at retail within Colorado any metal beverage container with a detachable opening device designed to detach from the beverage container when a user opens the beverage container in a manner reasonably calculated to gain access to its contents.

(3) Subsection (2) of this section shall not apply to metal beverage containers with opening devices consisting of sensitized adhesive tape.

(4) Any person who violates subsection (2) of this section commits a civil infraction and, upon conviction thereof, shall be fined not less than fifty dollars nor more than one hundred dollars.

Source: L. 82: Entire section added, p. 325, § 1, effective January 1, 1983. L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3215, § 363, effective March 1, 2022.

18-13-114. Sale of secondhand property - record - inspection - false information - penalties - definitions.

(1) Every secondhand dealer, as defined in subsection (5) of this section, shall make a record, as provided in subsection (2) of this section, of each sale or trade of secondhand property made by him, his agent, or any person acting on his behalf, which sale or trade equals or exceeds thirty dollars in value for each item. Such record shall be made available to any peace officer for inspection at any reasonable time. The secondhand dealer shall mail or deliver the record of the sale or trade to the local law enforcement agency within three days of the date of such sale or trade. The secondhand dealer shall keep a copy of the record of the sale or trade for at least one year after the date of the sale or trade.

(2) The record required by this section shall be made in writing on forms designed by the Colorado bureau of investigation or a reasonable facsimile thereof as provided in subsection (3) or (4) of this section and shall consist of the following:

- (a) The name, address, and date of birth of the seller or trader;
- (b) The date, time, and place of the sale or trade;
- (c) An accurate and detailed account and description of the item sold or traded, including, but not limited to, any trademark, identification number, serial number, model number, brand name, or other identifying mark on such item;
- (d) The identification number from any of the following forms of identification of the seller or trader:
 - (I) A valid Colorado driver's license;
 - (II) An identification card issued in accordance with section 42-2-302, C.R.S.;
 - (III) A valid driver's license, containing a picture, issued by another state;

- (IV) A military identification card;
 - (V) A valid passport;
 - (VI) An alien registration card; or
 - (VII) A nonpicture identification document issued by a state or federal government entity;
 - (e) The signature of the seller or trader;
 - (f) A declaration by the secondhand dealer that he is the rightful owner of the secondhand property and a description of how he obtained the property, including the serial number of such property if available or a copy of the bill of sale of such property; and
 - (g) A declaration by the secondhand dealer that he has knowledge of the requirement that he mail or deliver a record of the sale or trade to the local law enforcement agency, as required by subsection (1) of this section.
- (3) Any city, municipality, city and county, or county which regulates secondhand dealers and assesses a fee as provided in section 18-13-118 shall print and provide the forms for reporting required pursuant to subsection (2) of this section.
- (4) In cities, municipalities, city and counties, and counties which do not license secondhand dealers and assess a fee as provided in section 18-13-118, the secondhand dealer shall report all the information required pursuant to subsection (2) of this section in a form acceptable to the local law enforcement agency.
- (5) As used in this section and sections 18-13-115 to 18-13-118, unless the context otherwise requires:
- (a) "Local law enforcement agency" means any marshal's office, police department, or sheriff's office with jurisdiction in the locality in which the sale or trade occurs.
 - (b) "Peace officer" means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summonses and civil process, police officer, Colorado state patrol officer, town marshal, or investigator for a district attorney or the attorney general who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.
 - (c) "Secondhand dealer" means any person whose principal business is that of engaging in selling or trading secondhand property. The term also includes the following: Any person whose principal business is not that of engaging in selling or trading secondhand property but who sells or trades secondhand property through means commonly known as flea markets or any similar facilities in which secondhand property is offered for sale or trade; any person who sells or trades secondhand property from a nonpermanent location; and any person who purchases for resale

any secondhand property which carries a manufacturer or serial number. The term does not include:

(I) A person selling or trading secondhand property so long as such property was not originally purchased for resale and so long as such person does not sell or trade secondhand property more than five weekend periods in any one calendar year, as verified by a declaration to be prepared by the seller. For the purposes of this subparagraph (I), "weekend period" means Friday through the immediately following Monday.

(II) A person who is a retailer as defined in section 39-26-102 (8), C.R.S., or a wholesaler as defined in section 39-26-102 (18), C.R.S., and who is selling or trading secondhand property in a location which is a permanent storefront location, unless such property carries a manufacturer or serial number;

(III) A person or organization selling or trading secondhand property at an exhibition or show which is intended to display and advertise a particular commodity or class of products, including, but not limited to, antique exhibitions, firearm exhibitions, home and garden shows, and recreational vehicle shows;

(IV) A person or organization which is charitable, nonprofit, recreational, fraternal, or political in nature or which is exempt from taxation pursuant to section 501 (c)(3) of the federal "Internal Revenue Code of 1986", as amended;

(V) A person selling or trading firewood, Christmas trees, plants, food products, agricultural products, fungible goods, pets, livestock, or arts and crafts, excluding jewelry and items crafted of gold or silver, if sold or traded by the artist or craftsman, his immediate family, or regular employees;

(VI) A person who sells new goods exclusively, is in the business of selling such goods, is in all respects a retailer of such goods, and holds a retail license and a sales tax license in the city, county, or city and county in which the sale occurs;

(VII) An antique dealer who sells antiques, has a retail license and sales tax license in the city, county, or city and county in which the sale occurs, and sells such antiques from a permanent storefront location.

(d) "Secondhand property" means the following items of tangible personal property sold or traded by a secondhand dealer:

(I) Cameras, camera lenses, slide or movie projectors, projector screens, flashguns, enlargers, tripods, binoculars, telescopes, and microscopes;

(II) Televisions, phonographs, tape recorders, video recorders, radios, tuners, speakers, turntables, amplifiers, record changers, citizens' band broadcasting units and receivers, and video games;

(III) Skis, ski poles, ski boots, ski bindings, golf clubs, guns, jewelry, coins, luggage, boots, and furs;

(IV) Typewriters, adding machines, calculators, computers, portable air conditioners, cash registers, copying machines, dictating machines, automatic telephone answering machines, and sewing machines;

(V) Bicycles, bicycle frames, bicycle derailleur assemblies, bicycle hand brake assemblies, and other bicycle components; and

(VI) Any item of tangible personal property which is marked with a serial or identification number and the selling price of which is thirty dollars or more, except motor vehicles, off-highway vehicles as defined in section 42-1-102 (63), C.R.S., snowmobiles, ranges, stoves, dishwashers, refrigerators, garbage disposals, boats, airplanes, clothes washers, clothes driers, freezers, mobile homes, and nonprecious scrap metal.

(6) (a) Any secondhand dealer who violates subsection (1) or (2) of this section commits a petty offense.

(b) Any buyer or person who trades with a secondhand dealer or any secondhand dealer who knowingly gives false information with respect to the information required by subsection (2) of this section commits a class 2 misdemeanor.

(7) (a) Local law enforcement agencies who print and provide forms as designed by the Colorado bureau of investigation for recording the information required by subsection (2) of this section may charge a reasonable fee for each form to defray the cost of providing such form.

(b) Each local law enforcement agency may establish rules or policies requiring that secondhand dealers provide it with copies of such records. The local law enforcement agency may set forth how often such copies shall be provided to it. Each local law enforcement agency shall forward copies of records received by it to the law enforcement agency having jurisdiction in the area in which the buyer or trader resides.

(8) In the case of flea markets and similar facilities in which secondhand property is offered for sale or trade, the operator thereof shall inform each secondhand dealer of the requirements of this section and shall provide the forms for recording the information required by subsection (2) of this section. Any person who violates the provisions of this subsection (8) commits a petty offense.

(9) In the case of flea markets and similar facilities in which secondhand property is offered for sale or trade, the operator thereof shall record the name and address of each secondhand dealer operating at the flea market or similar facility and the identification number of such dealer as obtained from any of the forms of identification enumerated in paragraph (d) of subsection (2) of this section. Such record shall be mailed or delivered by the operator to the local law

enforcement agency within three days of the date the secondhand dealer offered secondhand property for sale or trade at the flea market or similar facility. A copy of such record shall be retained by the operator for at least one year after the date the secondhand dealer offered secondhand property for sale or trade at the flea market or similar facility.

Source: **L. 83:** Entire section added, p. 713, § 1, effective July 1. **L. 89:** IP(5)(c), (5)(c)(II), and (5)(d)(VI) amended, p. 912, § 1, effective July 1. **L. 94:** (2)(d)(II) and (5)(d)(VI) amended, p. 2553, § 43, effective January 1, 1995. **L. 2000:** (5)(c)(IV) amended, p. 1848, § 37, effective August 2. **L. 2021:** (6) and (8) amended, (SB 21-271), ch. 462, p. 3215, § 364, effective March 1, 2022. **L. 2023:** (6)(a) amended, (HB 23-1293), ch. 298, p. 1793, § 51, effective October 1.

18-13-114.5. Sale of secondhand property - proof of ownership required - penalty - definitions.

(1) A person who is a secondhand dealer or a dealer and retailer of new goods and who sells goods at a flea market or similar facility shall not sell or offer for sale any of the following property items without proof of ownership:

- (a) Baby food of a type usually consumed by children under three years of age;
- (b) Cosmetics;
- (c) Devices;
- (d) Drugs;
- (e) Infant formula;
- (f) Batteries; or
- (g) Razor blades.

(2) A person required to have proof of ownership under subsection (1) of this section shall make such proof of ownership available to any peace officer for inspection at any reasonable time.

(3) For purposes of this section:

(a) "Cosmetic" means an article, or its components, intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to, the human body, or any part of the human body, for cleansing, beautifying, promoting attractiveness, or altering appearance. "Cosmetic" does not include soap.

(b) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component, part, or accessory, that is:

(I) Recognized in the official national formulary or the United States pharmacopoeia, or any supplement to them;

(II) Intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease in humans or animals; or

(III) Intended to affect the structure or any function of the body of humans or animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or animals and that is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

(c) "Drug" means:

(I) Any article recognized in an official compendium of drugs;

(II) An article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(III) An article, other than food, that is used or intended to affect the structure or any function of the body of humans or animals; or

(IV) An article intended for use as a component of an article specified in subparagraph (I), (II), or (III) of this paragraph (c).

(d) "Infant formula" means a food that purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(e) "Proof of ownership" shall include:

(I) The name, address, telephone number, and signature of the seller or the seller's authorized representative;

(II) The name and address of the buyer or consignee if not sold; and

(III) A description and quantity of the product.

(4) A violation of this section is a petty offense.

Source: L. 2006: Entire section added, p.1276, § 1, effective July 1. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3216, § 365, effective March 1, 2022.

18-13-115. Secondhand dealers - notice posting required - penalty.

(1) Except in the case of flea markets and similar facilities as provided in this subsection (1), every secondhand dealer shall conspicuously post a notice in a place clearly visible to all buyers and traders which sets forth the provisions of this section and of sections 18-13-114 and 18-13-116 and which sets forth the penalties for violating such sections and for violating section 18-4-401, concerning theft. Such notification shall include information to the effect that stolen property may be confiscated by any peace officer and returned to the rightful owner without compensation to the buyer. In the case of flea markets and similar facilities, the operator thereof shall post the notice required in this subsection (1) in such a manner as to be obvious to all persons who enter the flea market or similar facility.

(2) Each city, municipality, city and county, and county which regulates secondhand dealers as provided in section 18-13-118 shall print and provide the notices required by subsection (1) of this section to the secondhand dealers within their jurisdiction who are licensed pursuant to section 18-13-116. In any city, municipality, city and county, and county, which does not regulate secondhand dealers as provided in section 18-13-118, the secondhand dealers shall construct a notification containing the information required by subsection (1) of this section.

(3) Any secondhand dealer or operator of a flea market or similar facility who violates any of the provisions of subsection (1) of this section commits a petty offense.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1. **L. 2013:** (1) amended, (HB 13-1160), ch. 373, p. 2200, § 10, effective June 5. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3216, § 366, effective March 1, 2022.

18-13-116. Secondhand dealers - sales tax license - penalty.

(1) Every secondhand dealer shall obtain a sales tax license as provided in section 39-26-103, C.R.S.; except that secondhand dealers and other persons operating at a flea market or similar facility shall not be required to obtain a sales tax license, but they shall be required to collect the sales tax and to remit the proceeds to the operator of the flea market or similar facility, as provided in this section. The operator shall obtain a sales tax license which is applicable to all sales occurring at the flea market or similar facility, shall collect the sales tax from each secondhand dealer operating therein who does not have his own sales tax license, and shall remit such proceeds as provided by law for the remittance of sales taxes.

(2) Any person who violates any of the provisions of subsection (1) of this section commits a petty offense.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3216, § 367, effective March 1, 2022.

18-13-117. Sales at nonpermanent locations - secondhand dealers - record of sales - penalty.

(1) (a) Every secondhand dealer or any person who is a dealer of new goods who is a retailer and sells such goods at a flea market or similar facility or any nonpermanent location shall keep and preserve suitable records of sales made by him or her and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he or she is liable under part 1 of article 26 of title 39. It is the duty of every such person to keep and preserve for a period of three years all invoices of goods and merchandise purchased for resale, including a store credit, gift card, or merchandise card, and all such books, invoices, and other records shall be open for examination at any time by the executive director of the department of revenue, his or her duly authorized agent, or any peace officer.

(b) Every secondhand dealer or any person who is a dealer of new goods who is a retailer and sells such goods at a flea market or similar facility or any nonpermanent location shall record the purchase of a store credit, gift card, or merchandise card for resale in a register, as described in section 18-16-105, that is accessible to law enforcement.

(2) (a) Any person who violates any of the provisions of subsection (1)(a) of this section commits a petty offense.

(b) Any person who violates the provisions of subsection (1)(b) of this section commits a petty offense if the value of the store credit, gift card, or merchandise card is thirty dollars or greater or if the value of store credits, gift cards, or merchandise cards purchased in one transaction is thirty dollars or greater. Any other violation of the provisions of subsection (1)(b) of this section is a petty offense.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1. **L. 2019:** Entire section amended, (SB 19-014), ch. 87, p. 322, § 1, effective August 2. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3216, § 368, effective March 1, 2022.

18-13-118. Secondhand dealers - local regulation.

Any city, municipality, city and county, or county may enact ordinances or resolutions regulating secondhand dealers, including license requirements and assessment of fees to cover

costs of administration and enforcement of such regulation; however, such ordinances may not be less stringent than the provisions of sections 18-13-114 to 18-13-117.

Source: L. 83: Entire section added, p. 718, § 1, effective July 1.

18-13-119. Health-care providers - abuse of health insurance.

(1) The general assembly hereby finds, determines, and declares that:

(a) Business practices that have the effect of eliminating the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans interfere with contractual obligations entered into between the insured and the insurer relating to such payments;

(b) Such interference is not in the public interest when it is conducted as a regular business practice because it has the effect of increasing health-care costs by removing the incentive that copayments and deductibles create in making the consumer a cost-conscious purchaser of health care; and

(c) Advertising of such practices may aggravate the adverse financial and other impacts upon recipients of health care.

(2) Therefore, the general assembly declares that such business practices are illegal and that violation thereof or the advertising thereof shall be grounds for disciplinary actions. The general assembly further declares that nothing contained in this section shall be construed to otherwise prohibit advertising by health-care providers.

(3) Except as otherwise provided in subsections (5), (6), and (8) of this section, if the effect is to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan, a person who provides health care commits abuse of health insurance if the person knowingly:

(a) Accepts from any third-party payer, as payment in full for services rendered, the amount the third-party payer covers; or

(b) Submits a fee to a third-party payer which is higher than the fee he has agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment.

(4) Abuse of health insurance is a petty offense.

(5) (a) Reimbursements made pursuant to articles 3 to 6 of title 25.5, C.R.S., federal medicare laws for inpatient hospitalization, and mental health services purchased in accordance with article 66 of title 27, C.R.S., are exempt from the provisions of this section.

(b) Health-care services are exempt from the provisions of this section if such health-care services are provided:

(I) In accordance with a contract or agreement between an employer and an employee or employees and the contract includes, as a part of an employee's salary or employment benefits, terms that authorize a practice that would otherwise be prohibited by subsection (3) of this section; or

(II) In accordance with a contract or agreement between a town, city, city and county, or municipality or a special health assurance district pursuant to section 31-15-302 (1), C.R.S., under terms that authorize a practice that would otherwise be prohibited by subsection (3) of this section.

(6) (a) The waiver of any required deductible or copayment for charitable purposes is exempt from the provisions of subsection (3) of this section if:

(I) The person who provides the health care determines that the services are necessary for the immediate health and welfare of the patient; and

(II) The waiver is made on a case-by-case basis and the person who provides the health care determines that payment of the deductible or copayment would create a substantial financial hardship for the patient; and

(III) The waiver is not a regular business practice of the person who provides the health care.

(b) Any person who provides health care and who waives the deductible or copayment for more than one-fourth of his patients during any calendar year, excluding patients covered by subsection (5) of this section, or who advertises through newspapers, magazines, circulars, direct mail, directories, radio, television, or otherwise that he will accept from any third-party payer, as payment in full for services rendered, the amount the third-party payer covers shall be presumed to be engaged in waiving the deductible or copayment as a regular business practice.

(7) Repealed.

(8) The waiver of a required deductible or copayment for health-care services provided by a school-based health center, as defined in section 25-20.5-502, C.R.S., is exempt from the provisions of this section.

Source: **L. 85:** Entire section added, p. 680, § 1, effective July 1. **L. 2001:** (5)(b) amended, p. 1164, § 12, effective June 5. **L. 2002:** (7) added, p. 384, § 1, effective April 25. **L. 2006:** (7) repealed, p. 1493, § 22, effective June 1. **L. 2010:** (5)(a) amended, (SB 10-175), ch. 188, p. 787, § 33, effective April 29. **L. 2011:** IP(3) amended and (8) added, (HB 11-1019), ch. 27, p. 67, § 1,

effective March 17; (5)(a) amended, (HB 11-1303), ch. 264, p. 1157, § 34, effective August 10.
L. 2021: (4) amended, (SB 21-271), ch. 462, p. 3216, § 369, effective March 1, 2022.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (5)(b), see section 1 of chapter 300, Session Laws of Colorado 2001.

ANNOTATION

Law reviews. For article, "Professional Courtesy Discounts Under Siege-Part I", see 28 Colo. Law. 51 (Dec. 1999).

This section is constitutional because the legislature may regulate or ban entirely commercial speech related to illegal activity since such speech does not rise to the level

of a fundamental right. Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988).

There is no civil cause of action for a violation of this section. Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 171 F. Supp. 3d 1092 (D. Colo. 2016).

18-13-119.5. Abuse of property insurance.

(1) The general assembly hereby finds, determines, and declares that:

(a) (I) Business practices that have the effect of reducing or eliminating the need for actual payment of required copayments and deductibles by an insured for property damages interfere with contractual obligations entered into by the insured and insurer relating to such payments;

(II) Interference described in subparagraph (I) of this paragraph (a) is not in the public interest because it has the effect of increasing insurance costs by removing the incentives that copayments and deductibles create in making the consumer a cost-conscious purchaser; and

(b) (I) Business practices that have the effect of providing rebates or something of value to an insured to attract business relating to property damages when the costs of the rebate or thing of value is passed on to an insurer interfere with contractual obligations entered into by the insured and insurer relating to such property damages;

(II) Interference described in subparagraph (I) of this paragraph (b) is not in the public interest because it has the effect of increasing insurance costs by including items unrelated to the property damage in the costs paid by insurers; and

(c) Advertising of practices described in paragraphs (a) and (b) of this subsection (1) may aggravate the impact of such practices.

(2) (a) The general assembly further declares that business practices described in subsection (1) of this section are illegal and that such practices or the advertising thereof shall be grounds for disciplinary actions by any governmental body which is responsible for licensing or regulating persons who engage in such practices.

(b) The general assembly further declares that this section shall create a private right of action in courts of the state of Colorado, including an action for injunctive relief.

(3) Any person who provides repairs, goods, or services commits abuse of property insurance if such person knowingly:

(a) Submits a fee to an insurer which is higher than a fee estimate such person provided to the insured or which is higher than the fee such person has agreed to accept from the insured if the effect is to provide the insured a rebate or something of value to attract the insured to do business with such person and the cost of providing the rebate or thing of value is passed on to the insurer as a part of the higher fee; or

(b) Provides a rebate or a gift, cash, or thing of value to an insurance company or its representative, agent, employee, or others acting on behalf of the insurance company, in connection with any claim under an insurance policy which insures for property damage.

(4) Any insurance company, or its agent, employee, representative, or other person acting on behalf of the insurance company, commits abuse of property insurance if such company or person knowingly: Accepts a rebate or a gift, cash, or thing of value from any person who provides repairs, goods, or services in connection with any claim under an insurance policy which insures for property damage.

(5) Abuse of property insurance is a petty offense.

Source: **L. 92:** Entire section added, p. 409, § 1, effective July 1. **L. 96:** (2)(b) amended, p. 1846, § 17, effective July 1. **L. 2021:** (5) amended, (SB 21-271), ch. 462, p. 3216, § 370, effective March 1, 2022.

18-13-120. Use, transportation, and storage of drip gasoline.

(1) As used in this section, "drip gasoline" means a combustible hydrocarbon liquid formed as a product of condensation from either associated or nonassociated natural or casing-head gas which remains a liquid at the existing atmospheric temperature and pressure.

(2) Every person, other than a producer, refiner, pipeline company, or owner or operator of a natural gas processing plant or their authorized agents, who transports or stores drip gasoline in this state shall have in his possession a written instrument issued and signed by a licensed seller

of gasoline, stating the names and addresses of the seller and purchaser, the date of sale, and the amount sold and paid for such drip gasoline, or a copy of a contract authorizing the loading and transportation of the drip gasoline.

(3) The use of drip gasoline in a motor vehicle operated on the highways of this state is prohibited.

(4) Any person who violates subsection (2) or (3) of this section commits a petty offense.

Source: L. 86: Entire section added, p. 787, § 1, effective April 18. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3216, § 371, effective March 1, 2022.

18-13-121. Furnishing cigarettes, tobacco products, or nicotine products to persons under twenty-one years of age.

(1) (a) A person shall not give, sell, distribute, dispense, or offer for sale a cigarette, tobacco product, or nicotine product to any person who is under twenty-one years of age.

(b) Before giving, selling, distributing, dispensing, or offering to sell to an individual any cigarette, tobacco product, or nicotine product, a person shall request from the individual and examine a government-issued photographic identification that establishes that the individual is twenty-one years of age or older.

(c) A person who violates subsection (1)(a) or (1)(b) of this section commits a civil infraction and, upon conviction thereof, shall be punished by a fine of two hundred dollars, notwithstanding the provisions of section 18-1.3-503.

(d) It is an affirmative defense to a prosecution under subsection (1)(a) of this section that the person furnishing the cigarette, tobacco product, or nicotine product was presented with and reasonably relied upon a government-issued photographic identification that identified the individual receiving the cigarette, tobacco product, or nicotine product as being twenty-one years of age or older.

(2) Repealed.

(3) (a) Nothing in this section prohibits a statutory or home rule municipality, county, or city and county from enacting an ordinance or resolution that prohibits the sale of any cigarettes, tobacco products, or nicotine products to persons under twenty-one years of age or imposes requirements more stringent than provided in this section.

(b) A statutory or home rule municipality, county, or city and county shall not enact an ordinance or resolution that establishes a minimum age to purchase cigarettes, tobacco products, or nicotine products that is under twenty-one years of age.

(3.5) Nothing in this section affects federal laws concerning cigarettes, tobacco products, or nicotine products, as they apply to military bases and Indian reservations within the state.

(4) (Deleted by amendment, L. 98, p. 1185, § 2, effective July 1, 1998.)

(5) (a) As used in this section, "cigarette, tobacco product, or nicotine product" means:

(I) A product that contains nicotine or tobacco or is derived from tobacco and is intended to be ingested or inhaled by or applied to the skin of an individual; or

(II) Any device that can be used to deliver tobacco or nicotine to the person inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe.

(b) Notwithstanding any provision of paragraph (a) of this subsection (5) to the contrary, "cigarette, tobacco product, or nicotine product" does not mean a product that the food and drug administration of the United States department of health and human services has approved as a tobacco use cessation product.

Source: L. 87: Entire section added, p. 676, § 1, effective July 1. L. 91: Entire section amended, p. 410, § 1, effective April 19. L. 97: (4)(a) amended, p. 794, § 1, effective May 16; L. 98: (2) and (4) amended, p. 1185, § 2, effective July 1. L. 2001: (2)(a) amended, p. 581, § 6, effective July 1. L. 2008: (1), (2)(a), and (3) amended and (5) added, p. 886, § 1, effective July 1. L. 2011: (5) amended, (HB 11-1016), ch. 60, p. 157, § 1, effective March 25. L. 2014: Entire section amended, (SB 14-018), ch. 113, p. 406, § 1, effective April 11. L. 2019: (3) amended, (HB 19-1033), ch. 53, p. 184, § 1, effective July 1. L. 2020: (1)(a), (1)(b), (1)(d), and (3) amended and (2) repealed, (HB 20-1001), ch. 302, p. 1502, § 1, effective July 14. L. 2021: (1)(c) amended, (SB 21-271), ch. 462, p. 3217, § 372, effective March 1, 2022.

18-13-122. Illegal possession or consumption of ethyl alcohol or marijuana by an underage person - illegal possession of marijuana paraphernalia by an underage person - adolescent substance abuse prevention and treatment fund - legislative declaration - definitions.

(1) (a) The general assembly finds and declares that it is necessary for the state of Colorado to educate Colorado youth about the dangers of early use of alcohol and marijuana, to actively promote programs that prevent the illegal use of alcohol and marijuana, and to teach Colorado

youth about responsible use and the healthy choices available to an adult once he or she is able to legally consume alcohol or marijuana.

(b) The Colorado general assembly finds it is necessary for the state of Colorado to provide more adolescent substance abuse education and treatment in a developmentally, intellectually, and socially appropriate manner. Therefore, it is necessary to create the adolescent substance abuse prevention and treatment fund for that purpose.

(2) As used in this section, unless the context otherwise requires:

(a) "Establishment" means a business, firm, enterprise, service or fraternal organization, club, institution, entity, group, or residence; any real property, including buildings and improvements, connected therewith; and any members, employees, and occupants associated therewith.

(b) "Ethyl alcohol" means any substance which is or contains ethyl alcohol.

(c) "Marijuana" has the same meaning as in section 16 (2)(f) of article XVIII of the Colorado constitution.

(d) "Marijuana paraphernalia" has the same meaning as marijuana accessories in section 16 (2)(g) of article XVIII of the Colorado constitution.

(e) "Possession of ethyl alcohol" means that a person has or holds any amount of ethyl alcohol anywhere on his or her person or that a person owns or has custody of ethyl alcohol or has ethyl alcohol within his or her immediate presence and control.

(f) "Possession of marijuana" means that a person has or holds any amount of marijuana anywhere on his or her person or that a person owns or has custody of marijuana or has marijuana within his or her immediate presence and control.

(g) "Private property" means any dwelling and its curtilage which is being used by a natural person or natural persons for habitation and which is not open to the public and privately owned real property which is not open to the public. "Private property" shall not include:

(I) Any establishment that has or is required to have a license pursuant to article 3, 4, or 5 of title 44;

(II) Any establishment which sells ethyl alcohol or upon which ethyl alcohol is sold; or

(III) Any establishment which leases, rents, or provides accommodations to members of the public generally.

(3) (a) Except as described by section 18-1-711 and subsection (6) of this section, a person under twenty-one years of age who possesses or consumes ethyl alcohol anywhere in the state of Colorado commits illegal possession or consumption of ethyl alcohol by an underage person.

Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense.

(b) Except as described by section 14 of article XVIII of the Colorado constitution and section 18-18-406.3, a person under twenty-one years of age who possesses two ounces or less of marijuana or consumes marijuana anywhere in the state of Colorado commits illegal possession or consumption of marijuana by an underage person. Illegal possession or consumption of marijuana by an underage person is a strict liability offense.

(c) Except as described by section 14 of article XVIII of the Colorado constitution and section 18-18-406.3, a person under twenty-one years of age who possesses marijuana paraphernalia anywhere in the state of Colorado and knows or reasonably should know that the drug paraphernalia could be used in circumstances in violation of the laws of this state commits illegal possession of marijuana paraphernalia by an underage person. Illegal possession of marijuana paraphernalia by an underage person is a strict liability offense.

(d) A violation of this subsection (3) is an unclassified petty offense.

(4) (a) Upon conviction of a first offense of subsection (3) of this section, the court shall sentence the underage person to a fine of not more than one hundred dollars, or the court shall order that the underage person complete a substance abuse education program approved by the behavioral health administration in the department of human services, or both.

(b) Upon conviction of a second offense of subsection (3) of this section, the court shall sentence the underage person to a fine of not more than one hundred dollars, and the court shall order the underage person to:

(I) Complete a substance abuse education program approved by the behavioral health administration in the department of human services;

(II) If determined necessary and appropriate, submit to a substance abuse assessment approved by the behavioral health administration in the department of human services and complete any treatment recommended by the assessment; and

(III) Perform up to twenty-four hours of useful public service, subject to the conditions and restrictions specified in section 18-1.3-507.

(c) Upon conviction of a third or subsequent offense of subsection (3) of this section, the court shall sentence the defendant to a fine of up to two hundred fifty dollars, and the court shall order the underage person to:

(I) Submit to a substance abuse assessment approved by the behavioral health administration in the department of human services and complete any treatment recommended by the assessment; and

(II) Perform up to thirty-six hours of useful public service, subject to the conditions and restrictions specified in section 18-1.3-507.

(d) Nothing in this section prohibits a prosecutor from entering into a diversion or deferred judgment agreement with any underage person for any offense under this section, and prosecutors are encouraged to enter into those agreements when they are consistent with the legislative declaration of this section and in the interests of justice.

(e) A person convicted of a violation of this section is subject to an additional penalty surcharge of twenty-five dollars, which may be waived by the court upon a showing of indigency, that shall be transferred to the adolescent substance abuse prevention and treatment fund created pursuant to subsection (18) of this section.

(5) It is an affirmative defense to the offense described in subsection (3)(a) of this section that the ethyl alcohol was possessed or consumed by a person under twenty-one years of age under the following circumstances:

(a) While such person was legally upon private property with the knowledge and consent of the owner or legal possessor of such private property and the ethyl alcohol was possessed or consumed with the consent of his or her parent or legal guardian who was present during such possession or consumption;

(b) When the existence of ethyl alcohol in a person's body was due solely to the ingestion of a confectionery which contained ethyl alcohol within the limits prescribed by section 25-5-410 (1)(i)(II), C.R.S.; or the ingestion of any substance which was manufactured, designed, or intended primarily for a purpose other than oral human ingestion; or the ingestion of any substance which was manufactured, designed, or intended solely for medicinal or hygienic purposes; or solely from the ingestion of a beverage which contained less than one-half of one percent of ethyl alcohol by weight; or

(c) The person is a student who:

(I) Tastes but does not imbibe an alcohol beverage only while under the direct supervision of an instructor who is at least twenty-one years of age and employed by a post-secondary school;

(II) Is enrolled in a university or a post-secondary school accredited or certified by an agency recognized by the United States department of education, a nationally recognized accrediting agency or association, or the "Private Occupational Education Act of 1981", article 64 of title 23;

(III) Is participating in a culinary arts, food service, or restaurant management degree program; and

(IV) Tastes but does not imbibe the alcohol beverage for instructional purposes as a part of a required course in which the alcohol beverage, except the portion the student tastes, remains under the control of the instructor.

(6) The possession or consumption of ethyl alcohol or marijuana shall not constitute a violation of this section if such possession or consumption takes place for religious purposes protected by the first amendment to the United States constitution.

(7) (a) An underage person is immune from arrest and prosecution under this section if he or she establishes the following:

(I) The underage person called 911 and reported in good faith that another underage person was in need of medical assistance due to alcohol or marijuana consumption;

(II) The underage person who called 911 provided his or her name to the 911 operator;

(III) The underage person was the first person to make the 911 report; and

(IV) The underage person who made the 911 call remained on the scene with the underage person in need of medical assistance until assistance arrived and cooperated with medical assistance or law enforcement personnel on the scene.

(b) The immunity described in paragraph (a) of this subsection (7) also extends to the underage person who was in need of medical assistance due to alcohol or marijuana consumption if the conditions of said paragraph (a) are satisfied.

(8) Prima facie evidence of a violation of subsection (3) of this section shall consist of:

(a) Evidence that the defendant was under twenty-one years of age and possessed or consumed ethyl alcohol or marijuana or possessed marijuana paraphernalia anywhere in this state; or

(b) Evidence that the defendant was under the age of twenty-one years and manifested any of the characteristics commonly associated with ethyl alcohol intoxication or impairment or marijuana impairment while present anywhere in this state.

(9) During any trial for a violation of subsection (3) of this section, any bottle, can, or any other container with labeling indicating the contents of such bottle, can, or container shall be admissible into evidence, and the information contained on any label on such bottle, can, or other container shall be admissible into evidence and shall not constitute hearsay. A jury or a judge, whichever is appropriate, may consider the information upon such label in determining whether the contents of the bottle, can, or other container were composed in whole or in part of ethyl alcohol or marijuana. A label which identifies the contents of any bottle, can, or other container as "beer", "ale", "malt beverage", "fermented malt beverage", "malt liquor", "wine", "champagne", "whiskey" or "whisky", "gin", "vodka", "tequila", "schnapps", "brandy", "cognac", "liqueur", "cordial", "alcohol", or "liquor" shall constitute prima facie evidence that the contents of the bottle, can, or other container was composed in whole or in part of ethyl alcohol.

(10) A parent or legal guardian of a person under twenty-one years of age or any natural person who has the permission of such parent or legal guardian may give or permit the possession and consumption of ethyl alcohol to or by a person under twenty-one years of age under the conditions described in subsection (5)(a) of this section. This subsection (10) shall not be construed to permit any establishment that is licensed or is required to be licensed pursuant to article 3, 4, or 5 of title 44, or any members, employees, or occupants of any such establishment, to give, provide, make available, or sell ethyl alcohol to a person under twenty-one years of age.

(11) Nothing in this section shall be construed to prohibit any statutory or home rule municipality from enacting any ordinance which prohibits persons under twenty-one years of age from possessing or consuming ethyl alcohol or marijuana or possessing marijuana paraphernalia, which ordinance is at least as restrictive or more restrictive than this section.

(12) Nothing in this section shall be construed to limit or preclude prosecution for any offense pursuant to article 3, 4, or 5 of title 44, except as provided in such articles.

(13) **Sealing of record.** Upon completion of the court-ordered substance abuse education for a first conviction of subsection (3) of this section, the court shall immediately order the case sealed pursuant to section 24-72-704 and provide to the underage person and the prosecutor a copy of the order sealing the case for distribution by the appropriate party to all law enforcement agencies in the case.

(14) The qualitative result of an alcohol or marijuana test or tests shall be admissible at the trial of any person charged with a violation of subsection (3) of this section upon a showing that the device or devices used to conduct such test or tests have been approved as accurate in detecting alcohol or marijuana by the executive director of the department of public health and environment.

(15) Official records of the department of public health and environment relating to the certification of breath test instruments, certification of operators and operator instructors of breath test instruments, certification of standard solutions, and certification of laboratories shall be official records of the state. Copies of such records, attested by the executive director of the department of public health and environment or his or her designee and accompanied by a certificate bearing the official seal for said department, which state that the executive director of the department has custody of such records, shall be admissible in all courts of record and shall constitute prima facie evidence of the information contained in such records. The official seal of the department described in this subsection (15) may consist of a watermark of the state seal within the document.

(16) In any judicial proceeding in any court of this state concerning a charge under subsection (3) of this section, the court shall take judicial notice of methods of testing a person's blood, breath, saliva, or urine for the presence of alcohol or marijuana and of the design and operation of devices certified by the department of public health and environment for testing a

person's blood, breath, saliva, or urine for the presence of alcohol or marijuana. This subsection (16) shall not prevent the necessity of establishing during a trial that the testing devices were working properly and that such testing devices were properly operated. Nothing in this subsection (16) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(17) A law enforcement officer may not enter upon any private property to investigate any violation of this section without probable cause.

(18) **Cash fund.** The surcharge collected pursuant to subsection (4)(e) of this section must be transmitted to the state treasurer, who shall credit the money to the adolescent substance abuse prevention and treatment fund, which is created and referred to in this section as the "fund". Money in the fund is subject to annual appropriation by the general assembly to the behavioral health administration in the department of human services for adolescent substance abuse prevention and treatment programs. The behavioral health administration is authorized to seek and accept gifts, grants, or donations from private or public sources for the purposes of this section. All private and public money received through gifts, grants, or donations must be transmitted to the state treasurer, who shall credit the money to the fund. Any unexpended money in the fund may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of money in the fund must be credited to the fund. Any unexpended and unencumbered money remaining in the fund at the end of a fiscal year remains in the fund and must not be credited or transferred to the general fund or another fund.

Source: **L. 90:** Entire section added, p. 1000, § 1, effective May 22. **L. 93:** (15) repealed, p. 1735, § 28, effective July 1. **L. 94:** (11) and (13) amended, p. 2736, § 360, effective July 1. **L. 99:** (2)(b) amended, p. 795, § 7, effective July 1. **L. 2002:** (2)(b) amended, p. 1518, § 210, effective October 1. **L. 2004:** (3)(c) added, p. 1096, § 1, effective July 1. **L. 2005:** (2) amended and (4.5) added, pp. 1244, 1245, §§ 5, 7, effective July 1. **L. 2006:** (2)(b)(IV) and (16) added, pp. 1537, 1536, §§ 2, 1, effective July 1. **L. 2010:** (16)(b) amended, (SB 10-175), ch. 188, p. 787, § 34, effective April 29. **L. 2012:** (2)(a), IP(4.5), (4.5)(a), (4.5)(b), and (4.5)(d) amended, (SB 12-020), ch. 225, p. 989, § 8, effective May 29; (10) amended, (HB 12-1310), ch. 268, p. 1398, § 16, effective June 7. **L. 2014:** Entire section R&RE, (SB 14-129), ch. 387, p. 1930, § 1, effective June 6. **L. 2016:** (7) amended, (HB 16-1390), ch. 184, p. 649, § 2, effective August 10. **L. 2017:** (4)(a), (4)(b)(I), (4)(b)(II), (4)(c)(I), and (18) amended, (SB 17-242), ch. 263, p. 1255, § 15, effective May 25; IP(5) and (5)(c)(II) amended, (HB 17-1239), ch. 261, p. 1204, § 7, effective August 9. **L. 2019:** (2)(g)(I), (10), and (12) amended, (SB 19-241), ch. 390, p. 3465, § 14, effective August 2. **L. 2021:** (3)(b) amended, (HB 21-1090), ch. 157, p. 900, § 2, effective May 20. **L. 2022:** (4)(a), (4)(b)(I), (4)(b)(II), (4)(c)(I), and (18) amended, (HB 22-1278), ch. 222, p. 1498, § 30, effective July 1; (13) amended, (SB 22-099), ch. 276, p. 1986, § 8, effective August 10.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2005 act amending subsection (2) and enacting subsection (4.5), see section 1 of chapter 282, Session Laws of Colorado 2005. For the legislative declaration in the 2012 act amending subsection (2)(a), the introductory portion to subsection (4.5), and subsections (4.5)(a), (4.5)(b), and (4.5)(d), see section 1 of chapter 225, Session Laws of Colorado 2012. For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

General assembly's reenactment of criminal code provisions do not supersede provisions of the liquor code, and person violating liquor code must be prosecuted for

those violations and not provisions of the criminal code. *People v. O'Donnell*, 926 P.2d 114 (Colo. App. 1996).

18-13-123. Unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.

(1) and (2) (Deleted by amendment, L. 2001, p. 858, § 4, effective July 1, 2001.)

(3) Except as otherwise provided in subsection (4) of this section, it shall be unlawful for any person to knowingly cause or attempt to cause any other person to unknowingly consume or receive the direct administration of gamma hydroxybutyrate (GHB) or ketamine or the immediate chemical precursors or chemical analogs for either of such substances.

(4) (a) It shall not be a violation of this section if gamma hydroxybutyrate (GHB) or ketamine is distributed or dispensed for bona fide medical needs by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense such substances.

(b) It is not a violation of this section if ketamine is distributed or dispensed by or under the direction of a person authorized as described in subsection (4)(a) of this section for use by an animal shelter, as defined in section 35-80-102, that is duly registered with the secretary of state and has been in existence and in business for at least five years in this state as a nonprofit corporation or by an animal control agency that is operated by a unit of government to control animals and to euthanize injured, sick, homeless, or unwanted pets or animals if the animal shelter or animal control agency is registered pursuant to section 12-280-119 (12).

(5) Violation of subsection (3) of this section is a class 3 felony.

Source: **L. 99:** Entire section added, p. 1093, § 2, effective July 1. **L. 2000:** (1), (2), and (4) amended, p. 697, § 15, effective July 1. **L. 2001:** Entire section amended, p. 858, § 4, effective July 1. **L. 2004:** (4) amended, p. 799, § 2, effective July 1. **L. 2012:** (4)(b) amended, (HB 12-1311), ch. 281, p. 1620, § 49, effective July 1. **L. 2019:** (4)(b) amended, (HB 19-1172), ch. 136, p. 1677, § 100, effective October 1. **L. 2022:** (4)(b) amended, (HB 22-1235), ch. 442, p. 3119, § 26, effective August 10. **L. 2023:** (5) amended, (HB 23-1293), ch. 298, p. 1794, § 52, effective October 1.

18-13-124. Dissemination of false information to obtain hospital admittance or care.

(1) Any person commits the offense of dissemination of false information to obtain hospital admittance or care where such person knowingly provides false identifying information for the purpose of either obtaining admittance to, or health services from, a hospital or evading an obligation by the person to make payment to the hospital for services provided at the person's request. For purposes of this section, "identifying information" includes, without limitation, a name, address, or telephone number, or health coverage information.

(2) Any person who commits the offense of dissemination of false information to obtain hospital admittance or care commits a petty offense and, upon conviction thereof, shall be punished as provided in section 18-1.3-501.

Source: **L. 2002:** Entire section added, p. 1809, § 1, effective July 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3217, § 373, effective March 1, 2022.

18-13-125. Telephone records - sale or purchase.

(1) A person commits unauthorized trading in telephone records if the person, without lawful authorization:

- (a) Knowingly procures or attempts to procure a telephone record;
- (b) Knowingly sells, buys, offers to sell, or offers to buy a telephone record;
- (c) Possesses a telephone record with the intent to use such record, or information contained in such record, to harm another person; or
- (d) Receives a telephone record of a resident of Colorado knowing that such record was obtained without lawful authorization or by fraud or deception.

(2) For the purposes of this section:

(a) "Lawful authorization" means authorization from the person or the agent of the person to whom the telephone number is assigned or from the person or the agent of the person who purchases the telephone service.

(b) "Procure" means to obtain by any means, with or without consideration.

(c) "Telecommunications provider" means a company and its affiliates that provide commercial telephone service to a customer, irrespective of the technology employed, including, without limitation, wired, wireless, cable, broadband, satellite, or voice-over-internet protocol.

(d) (I) "Telephone record" means information retained by a telecommunications provider that relates to the number dialed by the customer or subscriber, to the number of a person who dialed the customer, or to other data that are typically contained on a customer's telephone bill for either wired or wireless telephone service, including, without limitation, the time a call was made, the duration of a call, or the charges for a call.

(II) "Telephone record" shall not include a directory listing or information collected and retained by customers utilizing caller identification technology or similar technology.

(3) (a) This section shall not prohibit a peace officer, a law enforcement agency, or an employee or agent of a law enforcement agency from obtaining telephone records in the performance of their duties or as authorized by law.

(b) This section shall not prohibit a telecommunications provider from obtaining, using, disclosing, or permitting access to a telephone record when such access:

(I) Is otherwise authorized by Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission;

(II) Is necessary to operations of the telecommunications provider, or to provide services or products, or to protect the rights and property of the telecommunications provider;

(III) Protects users of the service and other telecommunications providers from fraudulent, abusive, or unlawful use of or subscription to such service;

(IV) Is made to a government entity if the telecommunications provider reasonably believes that an emergency involving immediate danger of serious physical injury to any person justifies disclosure of the information;

(V) Is made to the national center for missing and exploited children or its successor entity and concerns a report submitted under 18 U.S.C. sec. 2258A;

(VI) Is in connection with the sale, purchase, or transfer of all or part of a telecommunications provider's business; or

(VII) Is in connection with the migration of a customer from one telecommunications provider to another.

(c) This section shall not be construed to imply that telephone records belong to a person other than the telecommunications provider that maintains them.

(4) Unauthorized trading in telephone records is a petty offense.

(5) This section shall not apply to a telecommunications provider or its agents or representatives who reasonably and in good faith act pursuant to Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission, notwithstanding a later determination that the act was not authorized by such law.

Source: L. 2006: Entire section added, p. 584, § 1, effective July 1. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3217, § 374, effective March 1, 2022. **L. 2022:** (3)(b)(V) amended, (SB 22-212), ch. 421, p. 2970, § 30, effective August 10.

18-13-126. Locating protected persons.

(1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), a person shall not accept money or other form of compensation to assist a restrained person from discovering the location of a protected person when the person knows or reasonably should know that the restrained person is subject to a court order prohibiting contact with the protected person.

(b) The provisions of paragraph (a) of this subsection (1) shall not apply to a person who is working pursuant to an agreement with counsel for a restrained person or with the restrained person if he or she is representing himself or herself, if:

(I) (A) The restrained person seeks discovery of the location of the protected person for a lawful purpose as specified in a written agreement between the person and the restrained person or his or her counsel; and

(B) The written agreement states that the location of the protected person shall not be disclosed by the person or by counsel for the restrained person to the restrained person unless the protected person has agreed to the disclosure in writing or the restrained person obtains court permission to obtain disclosure of the location for the stated lawful purpose; or

(II) (A) The restrained person is a defendant in a criminal case or a party to a civil case, an action for dissolution of marriage, or other legal proceeding; and

(B) The agreement states that the lawful purpose for locating the protected person is to interview or issue a lawful subpoena or summons to the protected person or for any other lawful purpose relating to the proper investigation of the case.

(2) A violation of subsection (1) of this section is a class 2 misdemeanor offense.

(3) It shall be an affirmative defense to a charge under subsection (1) of this section if the person:

(a) Within seventy-two hours prior to disclosing the location of the protected person to the restrained person, verified that there was not a protection order relating to the protected person; and

(b) Prior to disclosing the location of the protected person to the restrained person, obtained from the restrained person a signed affidavit verifying that the restrained person was not aware of any protection order related to the protected person.

(4) As used in this section, unless the context otherwise requires:

(a) "Protected person" means the person or persons identified in a protection order as the person or persons for whose benefit the protection order was issued.

(b) "Protection order" means an order as described in section 18-6-803.5 (1.5)(a.5) that prohibits a restrained person from contacting a protected person.

(c) "Restrained person" means the person identified in the protection order as the person prohibited from doing the specified act or acts.

Source: L. 2006: Entire section added, p. 1056, § 1, effective July 1. L. 2021: (2) amended, (SB 21-271), ch. 462, p. 3217, § 375, effective March 1, 2022.

18-13-127. Trafficking in adults. (Repealed)

Source: L. 2006: Entire section added, p. 1307, § 1, effective May 30. L. 2009: (2) amended, (HB 09-1123), ch. 306, p. 1652, § 2, effective May 21. L. 2010: Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-501 in 2010.

18-13-128. Smuggling of humans. (Repealed)

Source: **L. 2006:** Entire section added, p. 1301, § 1, effective May 30. **L. 2023:** Entire section repealed, (HB 23-1293), ch. 298, p. 1794, § 53, effective October 1.

Editor's note: In *Fuentes-Espinoza v. People*, 2017 CO 98, 408 P.3d 445, the Colorado Supreme Court held that the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101 to 1537, preempts this section under the doctrines of both field and conflict preemption.

ANNOTATION

Law reviews. For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (Oct. 2006). For comment, "Interstate Instability: Why Colorado's Alien Smuggling Statute is Preempted by Federal Immigration Laws", see 79 U. Colo. L. Rev. 237 (2008).

This section is preempted by the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101 to 1537, under the doctrines of both field and conflict preemption. *Fuentes-Espinoza v. People*, 2017 CO 98, 408 P.3d 445.

18-13-129. Coercion of involuntary servitude. (Repealed)

Source: **L. 2006, 1st Ex. Sess.:** Entire section added, p. 15, § 1, effective July 31. **L. 2009:** (1) amended, (HB 09-1123), ch. 306, p. 1652, § 3, effective May 21. **L. 2010:** Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-503 in 2010.

18-13-130. Bail bond - prohibited activities - penalties.

(1) It is unlawful for any person who engages in the business of writing bail bonds to engage in any of the following activities related to a bail bond transaction:

(a) Specify, suggest, or advise the employment of a particular attorney to represent the licensee's principal;

(b) Pay a fee or rebate or give or promise anything of value to a jailer, peace officer, clerk, deputy clerk, an employee of a court, district attorney or district attorney's employees, or any person who has power to arrest or to hold a person in custody;

(c) Pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond or as counsel to represent the person who wrote or posted the bond or the person's representative or employees;

(d) Pay a fee or rebate or give or promise to give anything of value to the person on whose bond the person is surety;

(e) Accept anything of value from a person on whose bond the person in the business of writing bail bonds is surety or from others on behalf of the person except the fee or premium on the bond, but the producer or agent may accept collateral security or other indemnity if:

(I) No collateral or security in tangible property is taken by pledge or debt instrument that allows retention, sale, or other disposition of the property upon default except in accordance with article 9 of title 4, C.R.S.;

(II) No collateral or security interest in real property is taken by deed or any other instrument unless the interest in the property is limited to the amount of the bond and the interest is recorded in the name of the bail insurance company or insurance producer, cash-bonding agent, or professional cash-bail agent who posted the bond with the court;

(III) The collateral or security is not pledged directly to any court as security for any appearance bond; and

(IV) The person from whom the collateral or security is taken is issued a receipt describing the condition of the collateral at the time it is taken into custody;

(f) Coerce, suggest, aid and abet, offer promise of favor, or threaten any person on whose bail bond the person is surety or offers to become surety to induce that person to commit any crime;

(g) Post a bail bond in any court of record in this state while the name of the person is on the board under section 16-4-114 (5)(e), C.R.S., or under any circumstance where the person has failed to pay a bail forfeiture judgment after all applicable stays of execution have expired and the bond has not been exonerated or discharged;

(h) Except for the bond fee, to fail to return any nonforfeited collateral or security within fourteen days after receipt of a copy of the court order that results in a release of the bond by the court, or if the defendant fails to appear and the surety is exonerated, fails to return the collateral to the indemnitor upon request within fourteen days after the three-year period, unless:

(I) The collateral also secures another obligation, premium payment plan, or bail recovery fee; or

(II) The later of three years or, if the court grants an extension, six years have elapsed from the date the bond was posted.

(i) Accept anything of value from a person on whose bond the person in the business of writing bail bonds is indemnitor or from another on behalf of the principal except the premium, except as authorized by title 10, C.R.S., or any rule of the division of insurance promulgated under title 10, C.R.S.;

(j) Sign or countersign blank bail bonds;

(k) To have more than one bond posted at one time in one case on behalf of one person;

(l) Fail to issue to the person from whom collateral or security is taken a receipt that includes a description of the collateral or security when it is taken into custody.

(2) A person who violates subsection (1) of this section commits a class 2 misdemeanor. Any criminal penalty prescribed in this section for a violation of this article 13 is in addition to, and not exclusive of, any other applicable penalty prescribed by law.

Source: L. 2012: Entire section added, (HB 12-1266), ch. 280, p. 1526, § 46, effective July 1. **L. 2013:** (1)(g) amended, (HB 13-1236), ch. 202, p. 843, § 10, effective May 11. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3217, § 376, effective March 1, 2022.

Editor's note: This section is similar to former § 12-7-109 (1) and (2) as it existed prior to 2012.

ANNOTATION

Annotator's note. Since § 18-13-130 is similar to § 12-7-109 as it existed prior to its 2012 relocation with amendments to this section, a relevant case construing that provision has been included in the annotations to this section.

A constitutional challenge on the basis of vagueness to this section is without merit since this section is definite that gifts

shall not be made to court employees by professional bondsmen. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

It is generally recognized that the bail bond business is a matter of public concern, and hence, is subject to reasonable regulation under the police power of the state. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

Where the general assembly has proscribed the making of a gift to certain specified officials with whom bail bondsmen must deal in the normal course of their licensed activities, and has not required that such act be done with an evil

purpose, guilty knowledge, scienter, or mens rea, held, under such circumstances, the constitutional challenge to this section on the basis of lack of mens rea or criminal intent is without merit. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

18-13-131. Misuse of gametes - definitions.

(1) A health care provider commits misuse of gametes if the health care provider knowingly treats or assists in the treatment of a patient through assisted reproduction by using gametes from a donor that the patient did not expressly consent to the use of that donor's gametes.

(2) Misuse of gametes is a class 6 felony.

(3) As used in this section, unless the context otherwise requires:

(a) "Assisted reproduction" means a method of causing pregnancy through means other than by sexual intercourse. "Assisted reproduction" includes, but is not limited to:

(I) Intrauterine or intracervical insemination;

(II) Donation of eggs or sperm;

(III) Donation of embryos;

(IV) In vitro fertilization and embryo transfer; and

(V) Intracytoplasmic sperm injection.

(b) "Donor" means an individual who expressly provides consent to provide donated eggs, sperm, or embryos for a patient for assisted reproduction.

(c) "Gametes" means one or more cells containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete. Sperm and eggs are gametes. A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.

(d) "Health care provider" means any individual who is authorized to practice some component of the healing arts by license, certificate, or registration pursuant to title 12.

Source: L. 2020: Entire section added, (HB 20-1014), ch. 238, p. 1155, § 3, effective September 14.

18-13-132. Furnishing kratom products to persons under twenty-one years of age - definition.

(1) (a) A person shall not give, sell, distribute, dispense, or offer for sale a kratom product to any person who is under twenty-one years of age.

(b) Before giving, selling, distributing, dispensing, or offering to sell to an individual any kratom product, a person shall request from the individual and examine a government-issued photographic identification that establishes that the individual is twenty-one years of age or older.

(c) A person who violates subsection (1)(a) or (1)(b) of this section commits a civil infraction and, upon conviction thereof, shall be punished by a fine of two hundred dollars, notwithstanding the provisions of section 18-1.3-503.

(d) It is an affirmative defense to a prosecution under subsection (1)(a) of this section that the person furnishing the kratom product was presented with and reasonably relied upon a government-issued photographic identification that identified the individual receiving the kratom product as being twenty-one years of age or older.

(2) (a) Nothing in this section prohibits a statutory or home rule municipality, county, or city and county from enacting an ordinance or resolution that prohibits the sale of any kratom products to persons under twenty-one years of age or imposes requirements more stringent than provided in this section.

(b) A statutory or home rule municipality, county, or city and county shall not enact an ordinance or resolution that establishes a minimum age to purchase kratom products that is under twenty-one years of age.

(3) As used in this section, "kratom product" means any product or ingredient containing:

(a) Any part of the leaf of the *Mitragyna speciosa* plant if the plant contains the alkaloid mitragynine or 7-hydroxymitragynine; or

(b) A synthetic material that contains the alkaloid mitragynine or 7-hydroxymitragynine.

Source: L. 2022: Entire section added, (SB 22-120), ch. 251, p. 1840, § 3, effective August 10. L. 2025: (3) amended, (SB 25-072), ch. 283, p. 1466, § 3, effective May 29.

Cross references: (1) For the legislative declaration in SB 22-120, see section 1 of chapter 251, Session Laws of Colorado 2022.

(2) For the short title ("Daniel Bregger Act") in SB 25-072, see section 1 of chapter 283, Session Laws of Colorado 2025.

18-13-133. Prohibition on prosecuting health-care providers - patient ingests abortifacient in another state.

A licensed health-care provider shall not be prosecuted, investigated, or subjected to any penalty if the health-care provider prescribes an abortifacient to a patient and the patient ingests the abortifacient in another state so long as the abortifacient was prescribed or administered consistent with accepted standards of practice under Colorado law and did not otherwise violate Colorado law.

Source: L. 2023: Entire section added, (SB 23-188), ch. 68, p. 247, § 16, effective April 14.

Cross references: For the legislative declaration in SB 23-188, see section 1 of chapter 68, Session Laws of Colorado 2023.

ARTICLE 14

Hotel Facility Rates: Posting - Notice

18-14-101.	Definitions.	18-14-103.	Advertising prohibited - when.
18-14-102.	Accommodations and rates posted.	18-14-104.	Violations - penalty.

18-14-101. Definitions.

"Hotel facility" means an establishment engaged in the business of furnishing overnight room accommodations primarily for transient persons.

Source: L. 72: p. 593, § 70. **C.R.S. 1963:** § 40-14-101.

18-14-102. Accommodations and rates posted.

(1) There shall be displayed at each hotel facility in its office or place of guest registration, in a conspicuous place, a sign which includes, in letters and figures of the same size and prominence, the following information: The number of apartments, rooms, or units in the hotel facility and the rates charged for each; whether the rates quoted are for single or multiple occupancy where such fact affects the rates charged; and the dates during which rates are in effect.

(2) There shall be posted in a plainly legible fashion, in a conspicuous place in, or at, each room, unit, and apartment of every hotel facility, the rates at which such room or apartment is rented. Such posting shall be in the form of a sign showing the maximum amount charged for occupancy and the maximum amount per person if the rate varies with the number of occupants. The sign shall also show the amount charged for extra conveniences, more complete accommodations, or additional furnishings and shall show the dates during the year when such charges prevail.

Source: L. 72: p. 593, § 70. C.R.S. 1963: § 40-14-102.

18-14-103. Advertising prohibited - when.

(1) No person shall display or cause to be displayed any sign which may be seen from a public highway or street, which sign includes in dollars and cents a statement relating to the rates charged at a hotel facility unless accommodations are available at the rates quoted at all times such sign is posted.

(2) No person shall publish or cause to be published an advertisement which includes in dollars and cents a statement relating to rates charged at a hotel facility unless such advertisement includes in letters or figures of similar size and prominence: The number of apartments or rooms in said hotel facility at the published rates; whether the rates quoted are for single or multiple occupancy where such fact affects the rates charged; the dates during which such rates are in effect; and an indication as to whether there are other rates in effect in said hotel facility. Advertisements or listings in guides or directories which are published by nonprofit hotel, motel, motor court, or apartment organizations or similar associations are excepted from this subsection (2).

(3) There shall not be published or displayed any sign with regard to any hotel facility which may be seen from a public highway or street and which contains any advertisement that contains false or misleading statements as to any matter whatsoever.

Source: L. 72: p. 593, § 70. **C.R.S. 1963:** § 40-14-103.

18-14-104. Violations - penalty.

Any owner, agent, lessee, or manager of any hotel facility who violates, or causes to be violated, any of the provisions of this article 14 commits a civil infraction.

Source: L. 72: p. 593, § 70. **C.R.S. 1963:** § 40-14-104. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3217, § 377, effective March 1, 2022.

ARTICLE 15

Offenses - Making, Financing, or Collection of Loans

18-15-101.	Definitions.	18-15-106.	Financing criminal usury.
18-15-102.	Extortionate extension of credit - penalty.	18-15-107.	Collection of extensions of credit by extortionate means.
18-15-103.	Presumption that extension of credit is extortionate.	18-15-108.	Possession or concealment of records of criminal usury.
18-15-104.	Engaging in criminal usury.	18-15-109.	Loan finder - definitions - prohibited fees.
18-15-105.	Financing extortionate extensions of credit.		

18-15-101. Definitions.

As used in this article, unless the context otherwise requires:

(1) To "collect" an extension of credit means to induce in any way any person to make repayment thereof.

(2) "Creditor" means any person who extends credit or any person claiming by, under, or through any such person.

(3) "Debtor" means any person who receives an extension of credit or any person who guarantees the repayment of an extension of credit or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person who receives an extension of credit to repay the same.

(4) To "extend credit" means to make or renew any loan or to enter into any agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(5) An "extortionate means" is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(6) (a) "Loan finance charge" means the sum of all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to or as a condition of the extension of credit, whether paid or payable by the debtor, the lender, or any other person on behalf of the debtor to the lender or to a third party, including, but not limited to, any of the following types of charges that are applicable:

(I) Interest or any amount payable under a point, discount, or other system of charges, however denominated;

(II) Premium or other charge for any guarantee of insurance protecting the lender against the debtor's default or other credit loss;

(III) Charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit.

(b) The term does not include the charges as a result of additional charges as defined in section 5-2-202, C.R.S., delinquency charges as defined in section 5-2-203, C.R.S., deferral charges as defined in section 5-2-204, C.R.S., similar charges specifically authorized by law, or additional interest charges permitted by section 5-12-107 (3), C.R.S.

(7) "Repayment" of an extension of credit includes the repayment, satisfaction, or discharge, in whole or in part, of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

Source: L. 72: p. 288, § 3. C.R.S. 1963: § 40-15-101. L. 94: (6) amended, p. 1613, § 14, effective July 1. L. 96: (6) amended, p. 412, § 14, effective July 1. L. 2000: (6)(b) amended, p. 1872, § 109, effective August 2.

18-15-102. Extortionate extension of credit - penalty.

Any person who makes any extension of credit in any amount regardless of the loan finance charge with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment will result in the use of

extortionate means of collection is guilty of extortionate extension of credit, which is a class 4 felony.

Source: L. 72: p. 289, § 3. C.R.S. 1963: § 40-15-102.

18-15-103. Presumption that extension of credit is extortionate.

(1) The provisions of this section are nonexclusive and in no way limit the effect or applicability of section 18-15-102.

(2) In any prosecution under section 18-15-102, if it is shown that the factors enumerated in paragraphs (a), (b), and (c) of this subsection (2) were present in connection with the making of the extension of credit in question, there shall arise a presumption that the extension of credit was extortionate:

(a) The extension of credit was made with a loan finance charge in excess of that established for criminal usury.

(b) At the time credit was extended, the debtor reasonably believed that one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means or the nonrepayment thereof had been punished by extortionate means.

(c) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars.

(3) In any prosecution under section 18-15-102, evidence of similar offenses tending to establish the existence of a plan, scheme, or design on the part of the defendant to produce a result of which the act charged is a part shall be admissible in evidence against the defendant. Such evidence of similar offenses, if known to the debtor, shall also be admissible in evidence for the purpose of establishing the reasonable belief of the debtor referred to in paragraph (b) of subsection (2) of this section.

(4) Whether evidence introduced under the provisions of subsection (2) of this section giving rise to the presumption that the extension of credit was extortionate is sufficient to establish the guilt of the defendant beyond a reasonable doubt, if such evidence is not disputed, is a question to be determined by the jury under proper instructions or by the court if no jury trial is had. Where there is evidence tending to show the innocence of the transaction, the issue of whether the extension of credit was extortionate shall be submitted to the jury, if trial is to a jury, unless the court is satisfied that the evidence as a whole clearly negates the presumed offense.

Source: L. 72: p. 289, § 3. C.R.S. 1963: § 40-15-103.

18-15-104. Engaging in criminal usury.

(1) Any person who knowingly charges, takes, or receives any money or other property as a loan finance charge where the charge exceeds an annual percentage rate of forty-five percent or the equivalent for a longer or shorter period commits the crime of criminal usury, which is a class 6 felony.

(2) It is an affirmative defense to criminal usury for a person, or his agent or assignee, who charges, takes, or receives money or property as a loan finance charge in excess of an annual percentage rate of forty-five percent in either of the following circumstances:

(a) That at the time of making the loan finance charge it could not have been determined by a mathematical computation that the annual percentage rate would exceed an annual percentage rate of forty-five percent;

(b) That the loan finance charge was not in excess of an annual percentage rate of forty-five percent when the rate of the finance charge was calculated on the unpaid balance of the debt on the assumption that the debt is to be paid according to its terms and is not paid before the end of the agreed term.

(3) The affirmative defenses referred to in subsection (2) of this section shall only apply when the provisions relating to the loan finance charge are set forth in a written agreement signed by all the parties and such written agreement is submitted to the court and the district attorney at least ten days prior to trial.

(4) This section shall not apply to:

(a) Charges and fees permitted by articles 1 to 6 of title 5, C.R.S., or charges and fees that are similar to such charges and fees and are specifically authorized by law;

(b) Credit card charges and fees not exceeding those permitted for consumer transactions under articles 1 to 6 of title 5, C.R.S., when imposed upon or collected from a person or in a transaction not subject to said provisions;

(c) A reverse mortgage as defined in section 11-38-102, C.R.S.; and

(d) Additional interest charges permitted by section 5-12-107 (3), C.R.S.

Source: L. 72: p. 290, § 3. C.R.S. 1963: § 40-15-104. L. 89: (1) amended, p. 843, § 103, effective July 1. L. 92: (4) amended, p. 944, § 3, effective April 23. L. 94: (4)(a) amended, p.

1613, § 15, effective July 1. **L. 96:** (4)(b) and (4)(c) amended and (4)(d) added, p. 412, § 15, effective July 1.

Cross references: For penalties for charges under forty-five percent, see § 5-5-301.

ANNOTATION

Applied in *Haugen v. Western Fed. Sav. & Loan Ass'n*, 633 P.2d 497 (Colo. App. 1981).

18-15-105. Financing extortionate extensions of credit.

Any person who knowingly advances money or property, whether as a gift, a loan, or an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of the person to whom the advance is made to use the money or property, directly or indirectly, for the purpose of making an extortionate extension of credit, commits financing extortionate extensions of credit, which is a class 5 felony.

Source: **L. 72:** p. 290, § 3. **C.R.S. 1963:** § 40-15-105. **L. 89:** Entire section amended, p. 843, § 104, effective July 1.

18-15-106. Financing criminal usury.

Any person who knowingly advances money or property, whether as a gift, a loan, or an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of the person to whom the advance is made to use the money or property, directly or indirectly, for the purpose of engaging in criminal usury, commits financing criminal usury, which is a class 6 felony.

Source: **L. 72:** p. 291, § 3. **C.R.S. 1963:** § 40-15-106. **L. 89:** Entire section amended, p. 843, § 105, effective July 1.

18-15-107. Collection of extensions of credit by extortionate means.

(1) It is unlawful for any person knowingly to participate in any way, or to conspire to do so, in the use of any extortionate means to collect or to attempt to collect any extension of credit or to punish any person for the nonrepayment of any extension of credit.

(2) Any person who violates the provisions of subsection (1) of this section commits collection of extensions of credit by extortionate means, which is a class 4 felony.

(3) In any prosecution under this section for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment of an extension of credit was punished by extortionate means.

Source: L. 72: p. 291, § 3. C.R.S. 1963: § 40-15-107.

18-15-108. Possession or concealment of records of criminal usury.

(1) Any person who possesses or conceals any writing, paper, instrument, or article used to record criminally usurious transactions, and who knows or has reasonable grounds to know that the contents have been used, are being used, or are intended to be used to conduct a criminally usurious transaction, or who possesses or conceals such instruments with intent to aid, assist, or facilitate criminal usury commits possession or concealment of records of criminal usury, which is a class 6 felony.

(2) This section is not applicable to any person who may take possession of any such documents while acting on behalf of another as attorney or in a related capacity with respect to judicial proceedings already commenced.

Source: L. 72: p. 291, § 3. C.R.S. 1963: § 40-15-108. L. 89: (1) amended, p. 843, § 106, effective July 1.

18-15-109. Loan finder - definitions - prohibited fees.

(1) As used in this section, unless the context otherwise requires:

(a) "Borrower" means any person seeking to obtain a loan through the services of a loan finder.

(b) "Loan" has the same meaning as set forth in section 5-1-301 (25), C.R.S.

(c) "Loan finder" means any person who, directly or indirectly, serves or offers to serve as a lender or as an agent to obtain a loan or who holds himself or herself out as capable of obtaining a loan for any person; except that the following persons shall be exempt from the provisions of this section:

(I) A supervised financial organization, as defined in section 5-1-301 (45), C.R.S., and its employees, when acting within the scope of their employment;

(II) A person duly licensed to make supervised loans pursuant to part 3 of article 2 of title 5, C.R.S.;

(III) A business development corporation, created pursuant to article 48 of title 7, C.R.S.;

(IV) A pawnbroker licensed pursuant to article 11.9 of title 29, acting as such;

(V) Any governmental entity or employee thereof, acting in his official capacity;

(VI) A mortgage broker, as defined in paragraph (d) of this subsection (1), acting as such.

(d) "Mortgage broker" means any person who, directly or indirectly, serves or offers to serve as an agent for any person to obtain a loan secured by a mortgage, deed of trust, or lien on real property.

(2) A loan finder shall not charge or collect any fee from a borrower until a borrower actually receives the agreed-upon loan; except that nothing in this section shall preclude a borrower from paying for a credit check or for an appraisal of security for the loan where such payment is by check or money order made payable to a party independent of the loan finder.

(3) In any proceeding brought pursuant to this section, the burden of production with respect to an exemption from its provisions shall be upon the person claiming the exemption, and said claim of exemption shall constitute an affirmative defense.

(4) Any person who violates this section commits a petty offense. A violation of this section shall also constitute a class 1 public nuisance subject to the provisions of part 3 of article 13 of title 16.

Source: L. 90: Entire section added, p. 382, § 3, effective July 1. **L. 2000:** (1)(b), (1)(c)(I), and (1)(c)(II) amended, p. 1873, § 110, effective August 2. **L. 2017:** IP(1)(c) and (1)(c)(IV) amended, (SB 17-228), ch. 246, p. 1041, § 5, effective August 9. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3217, § 378, effective March 1, 2022.

ARTICLE 16

Purchasers of Valuable Articles

18-16-101.	Legislative declaration.	18-16-106.	Holding period.
18-16-102.	Definitions.	18-16-107.	Reports required.
18-16-103.	Purchaser to identify seller.	18-16-108.	Penalty.
18-16-104.	Purchases prohibited.	18-16-109.	Applicability.
18-16-105.	Purchaser to maintain register and obtain declaration of seller's ownership.	18-16-110.	Severability.

18-16-101. Legislative declaration.

The general assembly hereby finds and determines that illicit traffic in stolen valuable articles is encouraged by the absence of any required record-keeping system by persons purchasing such valuable articles. The general assembly further finds that law enforcement officials are hindered in the identification and recovery of stolen valuable articles, and that law enforcement officials are hindered in the discovery and identification of persons selling stolen valuable articles due to the absence of such a required record-keeping system. Accordingly, it is the intent of the general assembly, by enacting this article, to aid law enforcement officials in the discovery and identification of sellers of stolen valuable articles and in the identification and recovery of stolen valuable articles by providing a mandatory record-keeping and reporting system by purchasers and by providing a holding period during which time such articles shall not be disposed of or altered in any manner. Local governments may adopt ordinances more strict than the provisions of this article.

Source: L. 81: Entire article added, p. 1011, § 1, effective May 22.

ANNOTATION

Applied in Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

18-16-102. Definitions.

As used in this article 16, unless the context otherwise requires:

(1) "Local law enforcement agency" means any marshal's office, police department, or sheriff's office with jurisdiction in the locality in which the purchaser makes the purchase.

(2) "Peace officer" means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summonses and civil process, police officer, state patrol officer, town marshal, or investigator for a district attorney or the attorney general who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.

(3) "Precious or semiprecious metals or stones" means such metals as, but not limited to, gold, silver, platinum, and pewter and such stones as, but not limited to, alexandrite, diamonds, emeralds, garnets, opals, rubies, sapphires, and topaz. For the purposes of this article, ivory, coral, pearls, jade, and such other minerals, stones, or gems as are customarily regarded as precious or semiprecious are deemed to be precious or semiprecious stones.

(4) "Purchase" means giving money to acquire any valuable article, taking valuable articles in full or part satisfaction of a debt, taking valuable articles for resale for the purpose of full or part satisfaction of a debt, or taking valuable articles for sale on consignment.

(5) "Purchaser" means any person holding himself out to the public as being engaged in the business of buying valuable articles or any person who purchases five or more valuable articles during any thirty-day period. "Purchaser" does not include a person purchasing valuable articles from an estate or from a retail or wholesale merchant.

(6) "Seller" means any person offering a valuable article for money to any purchaser, offering a valuable article in full or part satisfaction of a debt, or offering a valuable article for resale for the purpose of full or part satisfaction of a debt.

(7) (a) "Valuable article" means any tangible personal property consisting, in whole or in part, of precious or semiprecious metals or stones, whether solid, plated, or overlaid, including, but not limited to, household goods, jewelry, United States commemorative medals or tokens, and gold and silver bullion.

(b) "Valuable article" shall also include foreign currency when purchased for more than its face value or foreign currency exchange value.

(c) "Valuable article" also includes a store credit, gift card, or merchandise card of any value not issued by the person.

Source: L. 81: Entire article added, p. 1011, § 1, effective May 22. **L. 83:** (4) amended, p. 668, § 12, effective July 1. **L. 2019:** IP amended and (7)(c) added, (SB 19-014), ch. 87, p. 323, § 2, effective August 2.

ANNOTATION

Constitutionality of terms. The following terms were found not to be unconstitutionally vague: Valuable article, purchaser, precious and semi-precious metals or stones, bullion, law enforcement

agency, and peace officer. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1986).

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-103. Purchaser to identify seller.

(1) No purchaser shall purchase any valuable article without first securing adequate identification from the seller. The type and kind of identification shall be limited to the following:

- (a) A valid Colorado driver's license;
- (b) An identification card issued in accordance with section 42-2-302, C.R.S.;
- (c) A valid driver's license, containing a picture, issued by another state;
- (d) A military identification card;
- (e) A valid passport;
- (f) An alien registration card; or
- (g) A nonpicture identification document issued by a state or federal government entity if the purchaser also obtains a clear imprint of the seller's right index finger.

Source: L. 81: Entire article added, p. 1012, § 1, effective May 22. **L. 94:** (1)(b) amended, p. 2553, § 44, effective January 1, 1995.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-104. Purchases prohibited.

No purchaser shall purchase any valuable article from any person under the age of eighteen years.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-105. Purchaser to maintain register and obtain declaration of seller's ownership.

(1) Every purchaser of valuable articles shall keep a register, in a permanent, well-bound book, in which he shall record the following information: The name, address, and date of birth of the seller and his driver's license number or other I.D. number from any other allowed form of identification pursuant to section 18-16-103; the date, time, and place of the purchase; an accurate and detailed account and description of each valuable article being purchased, including, but not limited to, any trademark, identification number, serial number, model number, brand name, or other identifying marks on such articles and a description by weight and design of such articles. The purchaser shall also obtain a written declaration of the seller's ownership which shall state whether the valuable article is totally owned by the seller, how long the seller has owned the article, whether the seller or someone else found the article, and, if the article was found, the details of its finding.

(2) The seller shall sign his name in such register and on the declaration of ownership.

(3) Such register shall be made available to any peace officer for inspection at any reasonable time.

(4) The purchaser shall keep each register for at least three years after the last date of purchase of valuable articles described therein.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Constitutionality of the maintenance and inspection of the register. Allowing the inspection of the register without a warrant is not inconsistent with the constitutional protections against unreasonable search and seizure. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985).

Evidence sufficient to sustain defendant's conviction for giving false information. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-106. Holding period.

(1) Except as provided in subsection (2) of this section, a purchaser shall hold all valuable articles within the jurisdiction of purchase for a period of thirty days from the date of purchase, during which time the valuable articles shall be held separate and apart from any other transaction and shall not be changed in form or altered in any way. The purchaser shall permit any requesting law enforcement officer to inspect the valuable articles during the thirty-day period.

(2) Stamped and assayed gold and silver bullion and gold coins shall not be subject to the holding requirement imposed by subsection (1) of this section. In lieu of such requirement, the purchaser shall be required to record the identity of any person to whom he transfers any such bullion or coins and the date, time, and place of such transfer.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-107. Reports required.

(1) Every purchaser of valuable articles shall provide the local law enforcement agency, on a weekly basis, with two records, on a form to be provided by the local law enforcement agency, of all valuable articles purchased during the preceding week and one copy of the seller's declaration of ownership. The form for recording such purchases shall contain the information required to be recorded in the purchaser's register pursuant to section 18-16-105 and shall also include a physical description of the seller and the dollar amount of the purchase. Said form shall be signed, at the time of the purchase, by the seller and by the individual purchaser or his agent who

participated in the purchase. The local law enforcement agency shall designate the day of the week on which the records and declarations shall be submitted.

(2) A copy of such record and the seller's declaration of ownership shall also be forwarded to the local law enforcement agency having jurisdiction in the area where the seller resides.

(3) The local law enforcement agency shall forward copies of such records and declarations of sellers' ownership, upon request, to any other law enforcement agency.

Source: **L. 81:** Entire article added, p. 1013, § 1, effective May 22. **L. 83:** (1) amended, p. 668, § 13, effective July 1.

ANNOTATION

Constitutionality of reporting requirements. The requirement that purchasers provide the local law enforcement agency on a weekly basis, two records regarding valuable articles purchased does not constitute a violation of the purchaser's fifth amendment privilege against self-incrimination. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985).

Jeweler's failure to comply with record-keeping requirement does not constitute defense to criminal charge under § 18-16-108, and the prosecution's failure to introduce proof of jeweler's compliance with this section was not fatal to defendant's conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-108. Penalty.

Any person who violates any of the provisions of this article commits a class 6 felony. Any person who knowingly gives false information with respect to the information required by sections 18-16-103 and 18-16-105 commits a class 6 felony.

Source: **L. 81:** Entire article added, p. 1014, § 1, effective May 22. **L. 89:** Entire section amended, p. 843, § 107, effective July 1.

ANNOTATION

Act does not create a strict liability crime. The second sentence of this provision requires a "knowing" violation. This mental state applies to the first sentence as well. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985).

Jeweler's failure to comply with record-keeping requirement under § 18-16-107 does not constitute defense to criminal

charge under this section and the prosecution's failure to introduce proof of jeweler's compliance with § 18-16-107 was not fatal to defendant's conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Evidence sufficient to sustain defendant's conviction for giving false information. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

18-16-109. Applicability.

The provisions of this article shall not apply to private collectors purchasing collectors' items from other private collectors or businesses engaged in selling valuable articles exclusively as collectors' items, and who pay for such purchases by check, nor shall the provisions of sections 18-16-101 to 18-16-108 apply to valuable articles purchased exclusively in interstate commerce and paid for by check mailed to the seller in another state, if a record of the check by which payment was made and the name and address of the seller is maintained for a period of three years, or a retail merchant who, in a retail transaction involving the sale of a valuable article, receives another valuable article as a trade-in and credits the retail purchaser with the value thereof if the retail purchaser provides proof satisfactory to the retailer that the valuable article was originally purchased from that retailer. For the purpose of this section, a "private collector" is an individual, business, or corporation who purchases an item for a price based on the value of the article as a historical item rather than the prevailing market price of the item's metallic or stone composition; who has an interest in preserving the item in its unique or historical form and who does not alter the form of the article; and whose primary purpose is to keep the article in a collection or to sell to another collector.

Source: L. 81: Entire article added, p. 1014, § 1, effective May 22.

ANNOTATION

Constitutionality of exclusions. The exclusions from the act's application are not

unconstitutionally vague. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985).

18-16-110. Severability.

If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this article which may be given effect without the invalid provision or application, and, to this end, the provisions of this article are declared to be severable.

Source: L. 81: Entire article added, p. 1014, § 1, effective May 22.

ARTICLE 17

Colorado Organized Crime Control Act

18-17-101.	Short title.	18-17-106.	Civil remedies.
18-17-102.	Legislative declaration.	18-17-107.	Civil investigative demand.
18-17-103.	Definitions.	18-17-108.	Construction of article.
18-17-104.	Prohibited activities.	18-17-109.	Severability.
18-17-105.	Criminal penalties.		

18-17-101. Short title.

This article shall be known and may be cited as the "Colorado Organized Crime Control Act".

Source: L. 81: Entire article added, p. 1015, § 1, effective July 1.

18-17-102. Legislative declaration.

The general assembly hereby finds that organized crime in the state of Colorado, as well as nationwide, is a highly sophisticated, diversified, and widespread activity that annually consumes millions of dollars locally and billions of dollars nationally from this state's and the nation's economy through unlawful conduct and the illegal use of force, fraud, and corruption. Organized crime derives a major portion of its power through money procured from such illegal endeavors as syndicated and organized gambling, loan-sharking, the theft of property and fencing of stolen property, the illegal importation, manufacture, and distribution of drugs and other controlled substances, and other forms of social exploitation. This money and power are increasingly being

used to infiltrate and corrupt legitimate business and labor organizations and to subvert and corrupt our democratic processes. Organized crime activities within this state weaken the stability of this state's and the nation's economy, harm innocent investors and competing organizations, impede free competition, threaten the peace and health of the public, endanger the domestic security, and undermine the general welfare of the state and its citizens. The general assembly further finds that organized crime continues to grow and flourish because of defects in the evidence-gathering process of the law which inhibits the development and use of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies presently available to the state are unnecessarily limited in scope and impact. Therefore, the general assembly declares that it is the purpose of this article to seek the eradication of organized crime in this state by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Source: L. 81: Entire article added, p. 1015, § 1, effective July 1; entire section amended, p. 2032, § 47, effective July 14.

ANNOTATION

Law reviews. For article, "State and Criminal Activity", see 11 Colo. Law. 2597 Federal Forfeiture of Property Used in (1982).

18-17-103. Definitions.

As used in this article 17, unless the context otherwise requires:

(1) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other functionally similar tangible item.

(2) "Enterprise" means any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.

(3) "Pattern of racketeering activity" means engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred in

this state after July 1, 1981, and if the last of such acts occurred within ten years (excluding any period of imprisonment) after a prior act of racketeering activity.

(4) "Person" means any individual or entity holding or capable of holding a legal or beneficial interest in property.

(5) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any conduct defined as "racketeering activity" under 18 U.S.C. 1961 (1)(A), (1)(B), (1)(C), and (1)(D); or

(b) Any violation of the following Colorado statutes or any criminal act committed in any jurisdiction of the United States that, if committed in this state, would be a crime under the following Colorado statutes:

(I) Offenses against the person, as defined in sections 18-3-102 (first degree murder), 18-3-103 (second degree murder), 18-3-104 (manslaughter), 18-3-202 (first degree assault), 18-3-203 (second degree assault), 18-3-204 (third degree assault), 18-3-206 (menacing), 18-3-207 (criminal extortion), 18-3-301 (first degree kidnapping), 18-3-302 (second degree kidnapping), 18-3-503 (human trafficking for involuntary servitude), and 18-3-504 (human trafficking for sexual servitude);

(II) Offenses against property, as defined in sections 18-4-102 (first degree arson), 18-4-103 (second degree arson), 18-4-104 (third degree arson), 18-4-105 (fourth degree arson), 18-4-202 (first degree burglary), 18-4-203 (second degree burglary), 18-4-301 (robbery), 18-4-302 (aggravated robbery), 18-4-401 (theft), 18-4-409 (motor vehicle theft), 18-4-409.5 (unauthorized use of a motor vehicle), and 18-4-501 (criminal mischief);

(III) Offenses involving cybercrime, as defined in article 5.5 of this title 18;

(IV) Offenses involving fraud, as defined in sections 18-5-102 (forgery), 18-5-104 (second degree forgery), 18-5-105 (criminal possession of forged instrument), 18-5-109 (criminal possession of forgery devices), 18-5-110.5 (trademark counterfeiting), 6-16-111, C.R.S., (felony charitable fraud), 18-5-206 (defrauding a secured creditor or debtor), 18- 5-309 (money laundering), 18-5-403 (bribery in sports), 18-5-113 (criminal impersonation), 18-5-114 (offering a false document for recording), 18-5-702 (unauthorized use of a financial transaction device), 18-5-705 (criminal possession or sale of a blank financial transaction device), 18-5-706 (criminal possession of forgery devices), 18-5-707 (unlawful manufacture of a financial transaction device), 18-5-902 (identity theft), 18-5-903 (criminal possession of a financial device), 18-5-903.5 (criminal possession of an identification document), 18-5-904 (gathering identity information by deception), and 18-5-905 (possession of identity theft tools);

(V) Offenses involving the family relation, as defined in section 18-6-403 (sexual exploitation of children);

(VI) Offenses relating to morals, as defined in sections 18-7-102 (wholesale promotion of obscenity or promotion of obscenity), 18-7-203 (pandering), 18-7-206 (pimping), 18-7-402 (soliciting for commercial sexual activity with a child), 18-7-403 (pandering of a child), 18-7-404 (keeping a place of commercial sexual activity with a child), 18-7-405 (pimping of a child), and the offenses in sections 18-7-402, 18-7-404, and 18-7-405, as those sections existed before July 1, 2026;

(VII) Offenses involving governmental operations, as defined in sections 18-8-302 (bribery), 18-8-303 (compensation for past official behavior), 18-8-306 (attempt to influence a public servant), 18-8-402 (misuse of official information), 18-8-502 (first degree perjury), 18-8-503 (second degree perjury), 18-8-603 (bribe-receiving by a witness), 18-8-606 (bribing a juror), 18-8-608 (intimidating a juror), 18-8-609 (jury-tampering), 18-8-610 (tampering with physical evidence), 18-8-703 (bribing a witness or victim), 18-8-704 (intimidating a witness or victim), and 18-8-707 (tampering with a witness or victim);

(VIII) Offenses against public peace, order, and decency, as defined in sections 18-9-303 (prohibited wiretapping) and 18-9-304 (prohibited eavesdropping);

(IX) Gambling, as defined in sections 18-10-103 (2) (professional gambling), 18-10-105 (possession of a gambling device or record), 18-10-106 (transmission of receipt of gambling information), and 18-10-107 (maintaining gambling premises);

(X) Offenses relating to firearms and weapons, as defined in sections 18-12-102 (possessing an illegal weapon or a dangerous weapon), 18-12-107.5 (illegal discharge of a firearm), and 18-12-109 (possession, use, or removal of explosives or incendiary devices or the possession of components thereof);

(XI) Offenses involving the making, financing, or collection of loans, as defined in sections 18-15-102 (extortionate extension of credit), 18-15-104 (engaging in criminal usury), 18-15-105 (financing extortionate extensions of credit), 18-15-106 (financing criminal usury), 18-15-107 (collection of extensions of credit by extortionate means), and 18-15-108 (possession or concealment of records of criminal usury);

(XII) Fraud upon the department of revenue, as defined in section 39-21-118, C.R.S.;

(XIII) Securities offenses, as defined in sections 11-51-401 and 11-51-603 (registration of brokers and dealers), 11-51-301 and 11-51-603 (registration of securities), and 11-51-501 and 11-51-603 (fraud and other prohibited practices), C.R.S.;

(XIV) Offenses relating to controlled substances (part 1 of article 280 of title 12, part 2 of article 80 of title 27, and article 18 of this title 18);

(XV) Offenses relating to taxation, as defined in section 39-22-621, C.R.S.;

(XVI) Offenses relating to limited gaming, as defined in article 20 of this title 18 or article 30 of title 44; and

(XVII) Offenses relating to telecommunications crime as set forth in section 18-9-309.

(6) "Unlawful debt" means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury.

Source: **L. 81:** Entire article added, p. 1015, § 1, effective July 1; (5)(b)(XIV) amended, p. 2032, § 48, effective July 14. **L. 82:** (5)(b)(XIII) amended, p. 623, § 19, effective April 2; (5)(b)(II) amended, p. 254, § 11, effective May 3. **L. 83:** (5)(b)(VI) and (5)(b)(X) amended, p. 2048, §§5, 6, effective October 14. **L. 84:** (5)(b)(VII) amended, p. 503, § 6, effective July 1. **L. 88:** (5)(b)(IV) amended, p. 358, § 2, effective July 1. **L. 90:** (5)(b)(II) amended, p. 987, § 12, effective April 24; (5)(b)(XIII) amended, p. 740, § 4, effective July 1. **L. 91:** (5)(b)(XVI) added, p. 1582, § 10, effective June 4. **L. 93:** (5)(b)(X) amended, p. 969, § 3, effective July 1. **L. 95:** (5)(b)(IV) amended, p. 1256, § 21, effective July 1. **L. 97:** (5)(b)(XVII) added, p. 991, § 3, effective July 1. **L. 2000:** (5)(b)(IV) amended, p. 692, § 2, effective July 1. **L. 2001:** (5)(b)(IV) amended, p. 769, § 4, effective August 8. **L. 2006:** (5)(b)(IV) amended, p. 1323, § 9, effective July 1. **L. 2009:** (5)(b)(IV) amended, (SB 09-093), ch. 326, p. 1738, § 4, effective July 1, 2011. **L. 2010:** (5)(b)(I) amended, (SB 10-140), ch. 156, p. 536, § 2, effective April 21; (5)(b)(IV) amended, (HB 10-1081), ch. 256, p. 1140, §§ 2, 3, effective August 11. **L. 2012:** (5)(b)(XIV) amended, (HB 12-1311), ch. 281, p. 1620, § 50, effective July 1. **L. 2013:** (5)(b)(II), (HB 13-1160), ch. 373, p. 2200, § 11, effective June 5. **L. 2014:** (5)(b)(I) amended, (HB 14-1273), ch. 282, p. 1156, § 19, effective July 1. **L. 2018:** IP and (5)(b)(III) amended, (HB 18-1200), ch. 379, p. 2293, § 6, effective August 8; IP and (5)(b)(XVI) amended, (SB 18-034), ch. 14, p. 240, § 14, effective October 1. **L. 2019:** (5)(b)(XIV) amended, (HB 19-1172), ch. 136, p. 1677, § 101, effective October 1. **L. 2023:** (5)(b)(II) amended, (SB 23-097), ch. 309, p. 1888, § 3, effective July 1; IP(5)(b) and (5)(b)(II) amended, (HB 23-1293), ch. 298, p. 1794, § 54, effective October 1. **L. 2026:** IP(5)(b) and (5)(b)(VI) amended, (SB 26-015), ch. 335, p. 2042, § 24, effective July 1.

Editor's note: Amendments to subsection (5)(b)(II) by SB 23-097 and HB 23-1293 were harmonized.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (5)(b)(IV), see section 1 of chapter 224, Session Laws of Colorado 2001. For the legislative declaration in SB 26-015, see section 1 of chapter 335, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Civil RICO Update: The Evolving 'Pattern' Requirement — Parts I and II", see 16 Colo. Law. 806 and 1004 (1987).

Neither the federal Racketeer Influenced and Corrupt Organization Act (RICO) nor this act require that the plaintiff in a civil action aver and prove that the conduct described as racketeering activity is connected to organized crime. *Plains Res., Inc. v. Gable*, 782 F.2d 883 (10th Cir. 1986).

Federal case law under RICO is instructive in determining existence of a pattern of racketeering activity, in absence of prior interpretation by state courts, because Colorado Organized Crime Control Act (COCCA) was modeled after the federal act. *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, 880 P.2d 749 (Colo. 1994).

In order to establish "pattern of racketeering activity" under COCCA, it was not necessary to prove that the criminal acts meet standards of continuity or of relatedness to one another as those requirements have been established by judicial construction under RICO. *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

"Pattern of racketeering activity" under subsection (3) can be established by proving at least two acts of "racketeering", as defined in subsection (5), that are related to the conduct of the enterprise. *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

"Pattern of racketeering activity", as defined in subsection (3), found to exist. *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, 880 P.2d 749 (Colo. 1994).

As long as one act included in the pattern of racketeering activity occurred within its respective statute of limitations, evidence of other prior acts may be presented to establish a pattern, even if they could not give rise to a separate prosecution due to their own statutes of limitation, provided that the acts occurred within 10 years of the final charged act. *People v. Davis*, 2012 COA 56, 296 P.3d 219.

Alleged perjury and forgery in court proceedings arising from fraudulent scheme were not part of a "pattern of racketeering activity". *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part, rev'd in part on other grounds*, 880 P.2d 749 (Colo. 1994).

Acts intended solely to avoid personal liability after the enterprise has

disbanded or ended cannot be predicate acts under COCCA. *People v. Randell*, 2012 COA 108, 297 P.3d 989.

Definition of "enterprise" not unconstitutionally impermissibly vague. Although the definition is broad, it is not so vague that a person of common intelligence must necessarily guess at its meaning. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

Defendant fit within the definition of "enterprise" where indictment defined "enterprise" as "a group of individuals..." and where alleged prostitution ring qualified as "a group of individuals associated in fact although not a legal entity". *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

COCCA requires an "associated-in-fact enterprise" to have (1) a minimum amount of structure — namely, a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise's purpose and (2) an ongoing organization of associates, functioning as a continuing unit, that exists separate and apart from the pattern of racketeering activity in which it engages. *McDonald v. People*, 2021 CO 64, 494 P.3d 1123 (overruling in part *People v. James*, 40 P.3d 36 (Colo. App. 2001)).

Evidence failed to show an ongoing organization of associates functioning as a continuing unit that existed apart from the pattern of racketeering activity itself, as required to prove an "associated-in-fact

enterprise", where the prosecution only presented evidence that the defendant was "close to" and "lived together" with certain of his associates and had "strong connections" with others. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Where the prosecution's proof of an "associated-in-fact enterprise" was sufficient to sustain the defendant's COCCA convictions under the law at the time of trial, the prosecution is not precluded by the double jeopardy bar from retrying the defendant on the COCCA charges. *People v. Woodyard*, 2023 COA 78, 540 P.3d 278.

Enterprise need not be separate and distinct from the racketeering activity. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

Defendant can be both the "person" and the "enterprise" defined in the statute. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

Vicarious liability claim against mortgage brokerage firm that employed licensed securities broker who violated this section survives motion to dismiss. *Dolin v. Contemporary Fin. Sols., Inc.*, 622 F. Supp. 2d 1077 (D. Colo. 2009).

Defendant's physical absence from any given illegal purchase by money launderer does not negate his culpability for a "pattern of racketeering activity" as a complicitor. Sufficient evidence was presented at trial that defendant intentionally aided, abetted, or encouraged illegal activity

with knowledge of the circumstances surrounding money laundering and is therefore a complicitor in money laundering activity. *People v. Butler*, 2017 COA 98, 454

P.3d 280, *aff'd* on other grounds, 2019 CO 87, 450 P.3d 714.

Applied in *Niemi v. Burgess*, 874 F. Supp. 2d 1048 (D. Colo. 2012).

18-17-104. Prohibited activities.

(1) (a) It is unlawful for any person who knowingly has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(b) A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection (1) if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), (2), or (3) of this section.

Source: L. 81: Entire article added, p. 1018, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Civil RICO in Colorado: New Twists in the Road to Treble Damages", see 15 Colo. Law. 9 (1986). For

article, "The Potential Application of RICO in the Natural Resources/Environmental Law Context", see 63 Den. U.L. Rev. 535

(1986). For article, "Civil RICO Update: The Evolving 'Pattern' Requirement — Parts I and II", see 16 Colo. Law. 806 and 1004 (1987).

Federal case law under the federal Racketeer Influenced and Corrupt Organization Act (RICO) is instructive upon similar issues arising under the Colorado Organized Crime Control Act (COCCA), because COCCA was modeled after the federal act. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997).

The absence of knowledge of the underlying fraudulent activity defeats liability under subsection (1)(a). Sender v. Mann, 423 F. Supp. 2d 1155 (D. Colo. 2006).

Trial court properly dismissed claim brought under this section where employee did not allege that employer received proceeds from pattern of racketeering and engaged in the laundering of proceeds from such activity. Ferris v. Local 26, 867 P.2d 38 (Colo. App. 1993).

Enterprise and person cannot be the same entity for purpose of alleged violation of this article. Ferris v. Local 26, 867 P.2d 38 (Colo. App. 1993).

When instructing the jury on a COCCA charge, the court should include a definition of enterprise that defines an enterprise as consisting of at least one individual and the defendant. The addition of such a definition eliminates any confusion regarding a COCCA charge against an

individual defendant and the fact the enterprise must include the defendant and at least one other individual. People v. James, 40 P.3d 36 (Colo. App. 2001), overruled in part in McDonald v. People, 2021 CO 64, 494 P.3d 1123.

When a separate entity is formed by incorporation, the corporation constitutes an enterprise within the meaning of the statutory definition, separate from the person engaged in the pattern of racketeering activity. People v. Pollard, 3 P.3d 473 (Colo. App. 2000).

Enterprise need not be separate and distinct from the racketeering activity. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993).

In order to establish "pattern of racketeering activity" under COCCA, it was not necessary to prove that the criminal acts meet standards of continuity or of relatedness to one another as those requirements have been established by judicial construction under RICO. People v. Chaussee, 880 P.2d 749 (Colo. 1994); Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995); Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

"Pattern of racketeering activity", as defined in § 18-17-103 (3), can be established by proving at least two acts of "racketeering", as defined in § 18-17-103 (5), that are related to the conduct of the enterprise. People v. Chaussee, 880 P.2d 749 (Colo. 1994); Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995); Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

Pattern of racketeering activity construed. Manufacturer's single scheme of efforts to market mortar and brick bonding compound for use in construction industry was not "pattern of racketeering activity". Behunin v. Dow Chemical Co., 650 F. Supp. 1387 (D. Colo. 1986).

Multiple predicate acts allegedly committed in the course of perpetration of fraud on more than one victim using the same modus operandi, and which apparently would have continued but for the institution of legal proceedings, formed a "pattern of racketeering activity". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part, rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

Alleged perjury and forgery in court proceedings arising from fraudulent scheme were not part of a "pattern of racketeering activity". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part, rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

A "close-ended" pattern of racketeering refers to a series of related predicate acts extending over a substantial period of time concluded by the time the RICO action is brought. A period of six to seven months is not a long enough period to state a close-ended RICO claim. Alter v. DBLKM, Inc., 840 F. Supp. 799 (D. Colo. 1993).

An "open-ended" pattern of racketeering involves a series of predicate acts that by their nature indicate the likelihood of continuing criminal activity. Bare allegations that defendants will engage

in future similar conduct, without specific facts, will not suffice to state a RICO claim. Alter v. DBLKM, 840 F. Supp. 799 (D. Colo. 1993).

As long as one act included in the pattern of racketeering activity occurred within its respective statute of limitations, evidence of other prior acts may be presented to establish a pattern, even if they could not give rise to a separate prosecution due to their own statutes of limitation, provided that the acts occurred within 10 years of the final charged act. People v. Davis, 2012 COA 56, 296 P.3d 219.

Plaintiff must show at least one injury resulting from each of the predicate acts, but it is not necessary to establish that an injury resulted from a pattern of racketeering. New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363 (Colo. App. 1993); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997).

To state a claim under RICO and its state law correlate COCCA, plaintiffs must allege a "pattern of racketeering activity" of sufficient relatedness and that poses a sufficient threat of continuity. Alter v. DBLKM, Inc., 840 F. Supp. 199 (D. Colo. 1993).

Predicate acts are of sufficient relatedness if they have same or similar purposes, results, participants, victims, or methods of commission, otherwise are interrelated by distinguishing characteristics and are not isolated events. Alter v. DBLKM, Inc., 840 F. Supp. 199 (D. Colo. 1993).

The continuity requirement involves an examination of the temporal aspect of the alleged predicate acts. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); *Alter v. DBLKM, Inc.*, 840 F. Supp. 199 (D. Colo. 1993).

To state a claim under subsection (1)(a), a plaintiff must plead that an injury flowed from defendant's use or investment of racketeering income, not the predicate acts themselves. *Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995).

A violation of subsection (1) is stated when at least one predicate acts results in the production of proceeds that are invested in or used to operate a separate enterprise. *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993).

Investors in an alleged Ponzi scheme adequately alleged the bank into which the defendant deposited funds from the scheme used or invested income derived from defendant's pattern of racketeering in itself and defendant in violation of subsection (1)(a). Therefore, the filing of claims for relief in an amended complaint would not be futile. *Brooks v. Bank of Boulder*, 911 F. Supp. 470 (D. Colo. 1996).

Allegations adequate so that filing claims for relief in an amended complaint would not be futile where investors in an alleged Ponzi scheme alleged the bank into which the defendant deposited funds from the scheme participated in directing defendant's affairs through the commission of criminal predicate acts. *Brooks v. Bank of Boulder*, 911 F. Supp. 470 (D. Colo. 1996).

The required nexus between racketeering activities and the affairs of an enterprise is shown if the predicate acts are carried out in the conduct of the enterprise's affairs. *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993).

Legal advice and representation is, by itself, insufficient to justify liability under subsection (3). *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

No conspiracy is required to establish a violation of subsection (4); an endeavor or attempt by a single person is sufficient. *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993).

To state a claim under subsection (4), a plaintiff must plead with particularity an agreement to a pattern of racketeering activity and an agreement to the statutorily proscribed conduct. A conspiracy claim must fail where plaintiffs fail to allege any agreement or concerted action. *Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995).

Mere association with conspirators, even with knowledge of their involvement in a crime, is insufficient to prove participation in a conspiracy. *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

Filing an allegedly false police report cannot be a predicate racketeering act. *Free v. Kramer*, 624 F. Supp. 3d 1227 (D. Colo. 2022).

Indictment sufficiently alleged a violation of the act where it gives the

defendant notice of the crime allegedly committed and defines the acts which formed the basis for the crime with sufficient particularity. People v. Edebohls, 944 P.2d 552 (Colo. App. 1996).

Information sufficiently alleged a violation of the act because, although the charge under the act failed to allege other crimes, the information contained separate charges of such other crimes. People v. Pollard, 3 P.3d 473 (Colo. App. 2000).

The allegation of a completed act under subsection (1), (2), or (3) includes an allegation of an attempt to violate

subsection (4). New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363 (Colo. App. 1993).

Allegations of secondary liability through aiding and abetting state a viable claim under the COCCA. F.D.I.C. v. First Interstate Bank of Denver, N.A., 937 F. Supp. 1461 (D. Colo. 1996).

Allegations of secondary liability based on principles of respondeat superior state a viable claim under the COCCA. F.D.I.C. v. First Interstate Bank of Denver, N.A., 937 F. Supp. 1461 (D. Colo. 1996).

18-17-105. Criminal penalties.

(1) Any person convicted of engaging in activity in violation of the provisions of section 18-17-104 commits a class 2 felony and, upon conviction thereof, shall, in addition to the penalty provided for in section 18-1.3-401:

(a) Be fined not more than twenty-five thousand dollars; and

(b) Forfeit to the state any interest, including proceeds, he has acquired or maintained in violation of section 18-17-104 and any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has established, operated, controlled, conducted, or participated in the conduct of in violation of section 18-17-104.

(2) In lieu of the fine authorized by paragraph (a) of subsection (1) of this section, any person convicted of engaging in conduct in violation of the provisions of section 18-17-104, through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2) of this section.

(4) For the purposes of subsection (2) of this section, "pecuniary value" means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of one hundred dollars.

(5) In any action brought under this section, the district court may, at any time, enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as the court may deem proper.

(6) Upon conviction of a person under this section, the district court shall authorize the district attorney or the attorney general to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. The state shall dispose of all property or other interest seized under this section as soon as feasible, making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the state, it shall expire and shall not revert to the convicted person. The disposition of seized property shall be as follows:

(a) Any personal property which is required by law to be destroyed, or the possession of which is illegal, or which, in the opinion of the court is not properly the subject of a sale may be destroyed pursuant to a warrant for the destruction of personal property, issued by the district court, directed to the sheriff, and returned by the sheriff upon execution thereof. The district court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

(b) Any personal property seized and forfeited under the provisions of this section shall be sold by the sheriff in the manner provided for sales on execution. In lieu of ordering the sale of such property, the court may, if it finds that it can be used by a law enforcement agency, order it delivered to a law enforcement agency for such use.

(c) As to any real property, the district court shall enter a permanent order of abatement. The order of abatement shall direct the sheriff to sell such building or place and the ground upon which it is situated, to the extent of the interest, direct or indirect, of such person convicted under this section, at public sale in the manner provided for sales of property upon execution.

(d) The proceeds realized from such sales shall be applied as follows:

(I) To the fees and costs of sale;

(II) All costs and expenses of investigation and prosecution, including, but not limited to, costs of resources and manpower incurred in investigation and prosecution;

(III) The balance, if any, to the general fund of the state.

Source: **L. 81:** Entire article added, p. 1018, § 1, effective July 1. **L. 87:** IP(6) and (6)(c) amended, p. 645, § 25, effective July 1. **L. 2002:** IP(1) amended, p. 1518, § 211, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

No violation of equal protection because the Colorado Organized Crime Control Act (COCCA) punishes defendant with a class 2 felony when the two underlying predicate crimes are misdemeanors. The additional requirement that the offense be conducted as a part of an enterprise satisfies the related legislative purpose of deterring organized crime. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

No double jeopardy. Separate convictions for a violation of the Colorado Organized Crime Control Act (COCCA) and underlying predicate offenses, which convictions were based upon the same activity, do not constitute double jeopardy. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

The general assembly intended the provisions of COCCA to deter specific criminal activities using the threat of multiple or cumulative sentences to be imposed in conjunction with other punishments. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

18-17-106. Civil remedies.

(1) Any district court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of section 18-17-104 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property;

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same

type of endeavor as the enterprise in which he was engaged in violation of the provisions of section 18-17-104;

(c) Ordering the dissolution or reorganization of any enterprise;

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of section 18-17-104 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the provisions of section 18-17-104 is subject to civil forfeiture to the state. The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The disposition of seized property shall be as follows:

(a) Any personal property which is required by law to be destroyed, or the possession of which is illegal, or which, in the opinion of the court is not properly the subject of a sale may be destroyed pursuant to a warrant for the destruction of personal property, issued by the district court, directed to the sheriff, and returned by the sheriff upon execution thereof. The district court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

(b) Any personal property seized and forfeited under the provisions of this section shall be sold by the sheriff in the manner provided for sales on execution.

(c) As to any real property, the district court shall enter a permanent order of abatement. The order of abatement shall direct the sheriff to sell such building or place and the ground upon which it is situated, to the extent of the interest, direct or indirect, of such person found to be in violation of the provisions of section 18-17-104, at public sale in the manner provided for sales of property upon execution.

(d) The proceeds realized from such sales shall be applied pursuant to section 16-13-311 (3)(a), C.R.S.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3) of this section, a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin but is deemed to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

(a) Place the property under seal;

(b) Remove the property to a place designated by court;

(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The attorney general or district attorney may institute civil proceedings under this section. Any action instituted under this section shall conform to the procedures set forth in part 3 or part 5 of article 13 of title 16, C.R.S. In any action brought under this section, the district court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the district court may, at any time, enter such injunctions, prohibitions, or restraining orders or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1) of this section. In such proceeding, relief shall be granted in conformity with the principles that govern that granting of injunctive relief from threatened loss or damage in other civil cases; except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) Any person injured by reason of any violation of the provisions of section 18-17-104 shall have a cause of action for threefold the actual damages sustained. Such person shall also recover attorney fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred; except that:

(a) The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this section; and

(b) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(8) A final judgment or decree rendered in favor of the people in any criminal proceeding under this article shall estop the defendant in any subsequent civil action or proceeding as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The application of one civil remedy under any provision of this article shall not preclude the application of any other remedy, civil or criminal, under this article or any other provision of law. Civil remedies under this article are supplemental and not mutually exclusive.

(10) Whenever it is established in an action brought pursuant to this section that a person has received proceeds derived from activities prohibited by section 18-17-104, the court shall, upon request, award to the plaintiff a money judgment of forfeiture for the amount of such proceeds. The person subjected to such a money judgment may claim a setoff in an amount equal to the fair market value of other property forfeited if he shows that said property is traceable to a pattern of racketeering activity.

(11) The burden of proof in an action brought pursuant to this section shall be by clear and convincing evidence.

(12) (Deleted by amendment, L. 2002, p. 931, § 14, effective July 1, 2002.)

Source: **L. 81:** Entire article added, p. 1020, § 1, effective July 1. **L. 87:** (2)(c) amended and (10) to (12) added, p. 645, § 26, effective July 1. **L. 2002:** (2)(b), (2)(d), (5), (11), and (12) amended, p. 931, § 14, effective July 1.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982). For article, "The Potential Application of RICO in the Natural Resources/Environmental Law Context", see 63 Den. U.L. Rev. 535 (1986).

The Colorado Organized Crime Control Act does not interdict the court's

authority to order a stay, but the requirement in subsection (5) that a court proceed to the merits "as soon as practicable" is a factor that the court should consider in deciding whether to grant a stay. In re Kozeny, 236 F.3d 615 (10th Cir. 2000).

Subsection (6) concerning the granting of injunctive relief is applied in Federal

Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352 (D. Colo. 1986).

Court has authority under this statute to freeze assets which are not related to the illegal conduct in order to ensure availability of assets to satisfy monetary judgments. Federal Deposit Ins. Corp. v. Antonio, 843 F.2d 1311 (10th Cir. 1988).

Federal cases construing RICO may be instructive. However, where there exists appropriate Colorado authority on an issue, that authority is controlling. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Method for determining an award of attorney fees described, and appropriate factors enumerated, in Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

No "rule of proportionality" for attorney fees. Purpose of this statute to encourage "private attorneys general" would be defeated if the fees to be awarded were limited according to the amount recovered in damages. However, this does not preclude a trial court's review of the success achieved and the results obtained when setting a reasonable fee. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Plaintiff claiming injury "by reason of any violation" of § 18-17-104 has standing under this section only if plaintiff has been injured by the conduct constituting the violation and can recover only for harm caused by one or more of the predicate acts under COCCA. Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997).

Applied in Niemi v. Burgess, 874 F. Supp. 2d 1048 (D. Colo. 2012).

18-17-107. Civil investigative demand.

(1) Whenever the attorney general or the district attorney has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he or she may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(2) Each such demand shall:

(a) State the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(b) Describe the class or classes of documentary material demanded thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(c) State that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction;

- (d) Identify the custodian to whom such material shall be made available; and
 - (e) State an advisement of rights, available under the provisions of this article, in addition to any appropriate constitutional rights advisement.
- (3) No such demand shall:
- (a) Contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the state in aid of a grand jury investigation of such alleged racketeering violation; or
 - (b) Require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the state in aid of a grand jury investigation of such alleged racketeering violation.
- (4) Service of such demand or any petition filed under this section may be made upon a person by:
- (a) Delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person or upon any individual person;
 - (b) Delivering a duly executed copy thereof to the residence, principal office, or place of business of the person to be served; or
 - (c) Depositing such copy in the United States mail, by registered or certified mail, duly addressed to such person at its residence, principal office, or place of business.
- (5) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post-office receipt of delivery of such demand.
- (6) (a) The attorney general or district attorney shall designate an investigator to serve as racketeer document custodian and such racketeering investigators as he or she shall determine to be necessary to serve as deputies to such officer.
- (b) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section, on the return date specified in such demand or on such later date as such custodian may prescribe in writing. Such person may, upon written agreement between such person and the custodian, substitute for copies of all or any part of such material originals thereof.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof and shall be responsible for the use made thereof and for the return thereof pursuant to this article. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the attorney general or the district attorney. Under such reasonable terms and conditions as the attorney general or district attorney shall prescribe, documentary material, while in the possession of the custodian, shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(d) Whenever any attorney has been designated to appear on behalf of the state before any court or grand jury in any case or proceeding involving any alleged violation of this article, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the state. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of the racketeering investigation for which any documentary material was produced under this article or in any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the attorney general or the district attorney pursuant to this subsection (6) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the attorney general or district attorney, to the return of all documentary material other than copies thereof made pursuant to this subsection (6) so produced by such person.

(g) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the attorney general or district attorney shall promptly designate another racketeering investigator to serve as custodian thereof and transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto; except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(7) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general or a district attorney may file, in the district court of the state for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section.

(8) Within twenty-one days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the state for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(9) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the state for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(10) Whenever any petition is filed in any district court of the state under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section.

Source: L. 81: Entire article added, p. 1022, § 1, effective July 1. **L. 2012:** (8) amended, (SB 12-175), ch. 208, p. 873, § 132, effective July 1. **L. 2016:** (1) and (6)(a) amended, (HB 16-1094), ch. 94, p. 270, § 23, effective August 10.

ANNOTATION

Constitutionality. This section does not violate the prohibition against unreasonable searches and seizures if the investigation is for a lawfully authorized purpose; the information sought is relevant to the inquiry; and the demand is sufficiently specific and

spans a reasonable period of time. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

Nor does it violate due process because the procedural protections it affords are as complete as those afforded persons served

with a grand jury subpoena. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

Demand need not be specific. A civil investigative demand complies with this

section if it adequately notifies the recipient of the pending investigation and states the general nature of the conduct being investigated. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

18-17-108. Construction of article.

To effectuate the intent and purpose of this article, the provisions of this article shall be liberally construed.

Source: L. 81: Entire article added, p. 1025, § 1, effective July 1.

ANNOTATION

Section 18-17-107, used in the civil context, is remedial and not penal in nature. Thus, statute of limitation for bringing an action under that section may be

tolled until the time of reasonable discovery of injurious act as provided by § 13-80-101. *Todd Holding Co. v. Super Valu Stores*, 874 P.2d 402 (Colo. App. 1993).

18-17-109. Severability.

If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this article which may be given effect without the invalid provision or application, and, to this end, the provisions of this article are declared to be severable.

Source: L. 81: Entire article added, p. 1025, § 1, effective July 1.

ARTICLE 18

Uniform Controlled Substances Act of 2013

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PART 1
DEFINITIONS

18-18-101. Short title.

This article shall be known and may be cited as the "Uniform Controlled Substances Act of 2013".

Source: L. 92: Entire article R&RE, p. 324, § 1, effective July 1. L. 2013: Entire section amended, (SB 13-250), ch. 333, p. 1907, § 6, effective October 1.

ANNOTATION

The Uniform Controlled Substances Act is intended to control the illegal manufacture and distribution of substances that may have legitimate medical purposes but are subject to abuse

and have a detrimental effect. Drugs are divided into schedules based on their common characteristics. People v. Moran, 983 P.2d 143 (Colo. App. 1999); People v. Frantz, 114 P.3d 34 (Colo. App. 2004).

18-18-102. Definitions.

As used in this article 18, unless the context otherwise requires:

(1) "Administer", unless the context otherwise requires, means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

- (a) A practitioner (or, in the practitioner's presence, by the practitioner's authorized agent); or
- (b) The patient or research subject at the direction and in the presence of the practitioner.

(2) "Agent" means an authorized person who acts on behalf of or at the direction of a person licensed or otherwise authorized under this article or under part 2 of article 80 of title 27, C.R.S. "Agent" does not include a common or contract carrier, a public warehouseman, or an employee of a carrier or warehouseman.

(3) (a) "Anabolic steroid" means any material, drug, hormonal compound, salt, isomer or salts of isomers of testosterone, or synthetic or natural derivatives of testosterone having pronounced anabolic properties which is used primarily to promote growth of muscle tissue, which includes, but is not limited to, any of the following:

- (I) Boldenone;
- (II) Chlorotestosterone;
- (III) Clostebol;
- (IV) Dehydrochlormethyltestosterone;
- (V) Dihydrotestosterone;
- (VI) Drostanolone;
- (VII) Ethylestrenol;
- (VIII) Fluoxymesterone;
- (IX) Formebolone;
- (X) Human chorionic gonadotropin;
- (XI) Human growth hormone;
- (XII) Mesterolone;
- (XIII) Methandienone;
- (XIV) Methandranone;
- (XV) Methandriol;
- (XVI) Methandrostenolone;
- (XVII) Methenolone;
- (XVIII) Methyltestosterone;
- (XIX) Mibolerone;
- (XX) Nandrolone;
- (XXI) Norethandrolone;
- (XXII) Oxandrolone;
- (XXIII) Oxymesterone;
- (XXIV) Oxymetholone;
- (XXV) Stanolone;
- (XXVI) Stanozolol;
- (XXVII) Testolactone;

(XXVIII) Testosterone;

(XXIX) Trenbolone;

(XXX) Any salt, ester, or isomer of a drug or substance described or listed in this paragraph (a) if that salt, ester, or isomer promotes muscle growth.

(b) (I) Except as provided in subsection (3)(b)(II) of this section, "anabolic steroid" does not include human chorionic gonadotropin licensed for animal use only that is expressly intended for administration through implants or injection into cattle or other nonhuman species and that has been approved by the secretary of health and human services for such administration.

(II) If any person prescribes, dispenses, or distributes human chorionic gonadotropin licensed for animal use only, as described in subsection (3)(b)(I) of this section for human use, such person is considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of subsection (3)(a) of this section.

(3.2) "Behavioral health administration" or "BHA" means the behavioral health administration established in section 27-50-102.

(3.5) (a) "Cathinones" means any synthetic or natural material containing any quantity of a cathinone chemical structure, including any analogs, salts, isomers, or salts of isomers of any synthetic or natural material containing a cathinone chemical structure, including but not limited to the following substances and any analogs, salts, isomers, or salts of isomers of any of the following substances:

- (I) alpha-Phthalimidopropiophenone;
- (II) N, N-Dimethylcathinone (Metamfepramone);
- (III) N-Ethylcathinone (Ethcathinone);
- (IV) alpha-Pyrrolidinopropiophenone (α -PPP);
- (V) 2-Methylamino-1-phenylbutan-1-one (Buphedrone);
- (VI) alpha-Pyrrolidinobutiophenone (α -PBP);
- (VII) alpha-Pyrrolidinovalerophenone (α -PVP, PVP);
- (VIII) 4-Methylmethcathinone (4-MMC, Mephedrone);
- (IX) 4'-Methyl-alpha-pyrrolidinopropiophenone (MePPP);
- (X) 4'-Methyl-alpha-pyrrolidinobutiophenone (MPBP);
- (XI) 4'-Methyl-alpha-pyrrolidinohexiophenone (MPHP);
- (XII) 4-Methoxymethcathinone (PMMC, Methedrone, bk-PMMA);

- (XIII) 4'-Methoxy-alpha-pyrrolidinopropiophenone (MOPPP);
- (XIV) Fluoromethcathinone (4-FMC, Flephedrone, 3-FMC);
- (XV) 3,4-Methylenedioxyethcathinone (methydone, bk-MDMA);
- (XVI) 3,4-Methylenedioxyethcathinone (Ethylone, bk-MDEA);
- (XVII) 3',4'-Methylenedioxy-alpha-pyrrolidinopropiophenone (MDPPP);
- (XVIII) 2-Methylamino-1-(3,4-methylenedioxyphenyl)-1-butanone (Butylone, bk-MDBD);
- (XIX) 3',4'-Methylenedioxy-alpha-pyrrolidinobutiophenone (MDPBP);
- (XX) 2-Methylamino-1-(3,4-methylenedioxyphenyl)-1-pentanone (bk-MBDP);
- (XXI) 3,4-Methylenedioxypropylone (MDPV);
- (XXII) Naphthylpyrrolone (Naphyrone);
- (XXIII) 2-(Methylamino)-1-phenyl-1-pentanone Pentadone);
- (XXIV) N-methylethcathinone (4-MEC); and
- (XXV) (S)-2-Amino-1-phenyl-1-propanone (cathinone).

(b) "Cathinones" does not include diethylpropion or bupropion.

(c) As used in this subsection (3.5), "analog" means any chemical that is substantially similar in chemical structure to the chemical structure of any cathinones.

(4) "Cocaine" means coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this subsection (4).

(4.5) "Colorimetric field drug test" means a presumptive chemical screening method performed outside of a forensic laboratory by someone other than a forensic chemist that uses one or more reagent substances that, when brought into physical contact with an unknown substance, produce a visible color change intended to indicate the possible presence of a controlled substance.

(5) "Controlled substance" means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum.

(6) (a) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in or added to schedule I or II and:

(I) Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

(II) With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

(b) The term does not include:

(I) A controlled substance;

(II) A substance for which there is an approved drug application, so long as such substance is in its intended and unconverted form;

(III) A substance with respect to which an exemption is in effect for investigational use by a particular person under section 505 of the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. sec. 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(IV) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(7) "Deliver" or "delivery", unless the context otherwise requires, means to transfer or attempt to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

(8) Repealed.

(9) "Dispense" means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(10) "Dispenser" means a practitioner who dispenses.

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance, with or without remuneration.

(12) "Distributor" means a person who distributes.

(13) (a) "Drug" means:

(I) Substances recognized as drugs in the official United States pharmacopoeia, national formulary, or the official homeopathic pharmacopoeia of the United States, or any supplement to any of them;

(II) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals;

(III) Substances (other than food) intended to affect the structure or any function of the body of individuals or animals; and

(IV) Substances intended for use as a component of any substance specified in subparagraph (I), (II), or (III) of this paragraph (a).

(b) The term does not include devices or their components, parts, or accessories.

(14) "Drug enforcement administration" means the drug enforcement administration in the United States department of justice, or its successor agency.

(14.5) "Enclosed" means a permanent or semi-permanent area covered and surrounded on all sides. Temporary opening of windows or doors or the temporary removal of wall or ceiling panels does not convert the area into an unenclosed space.

(15) "Immediate precursor" means a substance which is a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used, or likely to be used, in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(16) "Isomer" means an optical isomer, but in paragraph (e) of subsection (20) of this section and sections 18-18-203 (2)(a)(XII) and (2)(a)(XXXIV) and 18-18-204 (2)(a)(IV) the term includes a geometric isomer; in sections 18-18-203 (2)(a)(VIII) and (2)(a)(XLII) and 18-18-206 (2)(c) the term includes a positional isomer; and in sections 18-18-206 (2)(b)(XXXV) and (2)(c) and 18-18-205 (2)(a) the term includes any positional or geometric isomer.

(16.5) "Locked space" means secured at all points of ingress or egress with a locking mechanism designed to limit access such as with a key or combination lock.

(17) "Manufacture" means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance:

(a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(18) (a) "Marijuana" means all parts of the plant *cannabis sativa* L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, or sterilized seed of the plant which is incapable of germination if these items exist apart from any other item defined as "marijuana" in this subsection (18). "Marijuana" does not include marijuana concentrate as defined in subsection (19) of this section or prescription drug products approved by the federal food and drug administration and dispensed by a pharmacy or prescription drug outlet registered by the state of Colorado.

(b) Nothing in this subsection (18) or any other provision of law shall restrict or otherwise affect regulation of or access to:

(I) Marijuana that is authorized under sections 14 and 16 of article XVIII of the Colorado constitution and articles 11 and 12 of title 44; or

(II) Industrial hemp and derivatives therefrom, as authorized by section 16 of article XVIII of the Colorado constitution and article 61 of title 35.

(c) House Bill 18-1295, enacted in 2018, does not allow an entity with federal drug administration approval or its agent to initiate criminal, civil, or administrative proceedings to prevent the nonpharmaceutical production, sale, or distribution of naturally occurring cannabinoid or cannabinoid extracts or restrict the nonpharmaceutical production, sale, or distribution of naturally occurring cannabinoid or cannabinoid extracts.

(19) "Marijuana concentrate" means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols.

(20) "Narcotic drug" means any of the following, however manufactured:

(a) Opium, opium derivative, and any derivative of either including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation, but not isoquinoline alkaloids of opium;

(b) Synthetic opiate and any derivative of synthetic opiate, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, of them that are theoretically possible within the specific chemical designation;

(c) Poppy straw and concentrate of poppy straw;

(d) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(e) Cocaine, or any salt, isomer, or salt of isomer of cocaine;

(f) Cocaine base;

(g) Ecgonine, or any derivative, salt, isomer, or salt of isomer of ecgonine;

(h) Any compound, mixture, or preparation containing any quantity of a substance listed in this subsection (20).

(20.3) (a) "Open" or "openly" means observable by the public or a substantial number of the public.

(b) "Public" or "publicly" means a place to which the public or a substantial number of the public has access without restriction, including but not limited to streets and highways, transportation facilities, places of amusement, parks, playgrounds, and the common areas of buildings and other facilities.

(c) "Open and public" or "openly and publicly" does not include any activity occurring on private residential property by the occupant or his or her guests.

(21) "Opiate" means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term includes opium, opium derivatives, and synthetic opiates. The term does not include, unless specifically scheduled as a controlled substance under section 18-18-201, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). The term includes the racemic and levorotatory forms of dextromethorphan.

(22) "Opium poppy" means the plant of the species *Papaver somniferum* L., except its seeds.

(23) "Order" means:

(a) A prescription order which is any order, other than a chart order, authorizing the dispensing of drugs or devices that is written, mechanically produced, computer generated, transmitted electronically or by facsimile, or produced by other means of communication by a practitioner and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient's authorization, and sufficient information for compounding, dispensing, and labeling; or

(b) A chart order which is an order for inpatient drugs or medications to be dispensed by a pharmacist, or pharmacy intern under the direct supervision of a pharmacist, which is to be administered by an authorized person only during the patient's stay in a hospital facility. It shall contain the name of the patient and of the medicine ordered and such directions as the practitioner may prescribe concerning strength, dosage, frequency, and route of administration.

- (24) "Peace officer" shall have the same meaning as set forth in section 16-2.5-101, C.R.S.
- (25) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.
- (26) "Peyote" means all parts of the plant presently classified botanically as *lophophora williamsii* lemaire, whether growing or not, the seeds thereof, any extraction from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or extracts.
- (27) "Pharmacy" means a prescription drug outlet as defined in section 12-280-103 (43).
- (28) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.
- (29) "Practitioner" means a physician, podiatrist, dentist, optometrist, veterinarian, researcher, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this state, to distribute, dispense, conduct research with respect to, administer, or to use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.
- (30) "Production", unless the context otherwise requires, includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.
- (31) "Remuneration" means anything of value, including money, real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or employment or promises or agreements connected therewith.
- (32) "Researcher" means any person licensed by the BHA pursuant to this article 18 to experiment with, study, or test any controlled substance within this state and includes analytical laboratories.
- (33) "Sale" means a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee.
- (33.5) "Salvia divinorum" means salvia divinorum, salvinorin A, and any part of the plant classified as salvia divinorum, whether growing or not, including the seeds thereof, any extract from any part of the plant, and any compound, manufacture, salts, derivative, mixture, or preparation of the plant, its seeds, or its extracts.
- (34) "State", unless the context otherwise requires, means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(34.5) (a) "Synthetic cannabinoid" means any chemical compound that is chemically synthesized and either:

- (I) Has been demonstrated to have binding activity at one or more cannabinoid receptors; or
- (II) Is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.

(b) "Synthetic cannabinoid" includes but is not limited to the following substances:

- (I) HU-210: (6aR, 10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;
- (II) HU-211: dexamabinol, (6aS, 10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a, 7, 10, 10a-tetrahydrobenzo[c]chromen-1-ol;
- (III) JWH-018: 1-pentyl-3-(1-naphthoyl)indole;
- (IV) JWH-073: 1-butyl-3-(1-naphthoyl)indole;
- (V) JWH-081: 1-pentyl-3-(4-methoxy-1-naphthoyl)indole, also known as 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone;
- (VI) JWH-200: 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;
- (VII) JWH-250: 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as 2-(2-methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone; and
- (VIII) CP 47, 497, and homologues: 2-[(1R, 3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol.

(c) "Synthetic cannabinoid" does not mean:

- (I) Any tetrahydrocannabinols, as defined in subsection (35) of this section; or
- (II) Nabilone.

(d) As used in this subsection (34.5), "analog" means any chemical that is substantially similar in chemical structure to a chemical compound that has been determined to have binding activity at one or more cannabinoid receptors.

(35) (a) "Tetrahydrocannabinols" means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as the following:

- (I) ¹Cis or trans tetrahydrocannabinol, and their optical isomers;
- (II) ⁶Cis or trans tetrahydrocannabinol, and their optical isomers;

(III) ^{3,4}Cis or trans tetrahydrocannabinol, and their optical isomers.

(b) Since the nomenclature of the substances listed in paragraph (a) of this subsection (35) is not internationally standardized, compounds of these structures, regardless of the numerical designation of atomic positions, are included in this definition.

(36) "Ultimate user" means an individual who lawfully possesses a controlled substance for the individual's own use or for the use of a member of the individual's household or for administering to an animal owned by the individual or by a member of the individual's household.

Source: **L. 92:** Entire article R&RE, p. 324, § 1, effective July 1. **L. 93:** (16) amended, p. 1776, § 39, effective June 6. **L. 94:** (8) amended, p. 2736, § 361, effective July 1. **L. 96:** (23)(a) amended, p. 1426, § 15, effective July 1. **L. 2002:** (8) amended, p. 664, § 5, effective May 28. **L. 2003:** (23)(a) amended, p. 764, § 3, effective March 25; (24) amended, p. 1616, § 16, effective August 6. **L. 2010:** (5), (18), and (19) amended, (HB 10-1352), ch. 259, p. 1173, § 18, effective August 11. **L. 2011:** (5) amended and (33.5) and (34.5) added, (SB 11-134), ch. 261, p. 1138, § 1, effective July 1. **L. 2012:** (3.5) added and (5) amended, (HB 12-1310), ch. 268, p. 1404, § 29, effective June 7; (2) and (27) amended, (HB 12-1311), ch. 281, p. 1621, § 51, effective July 1. **L. 2013:** (34.5)(b)(VII) amended, (HB 13-1300), ch. 316, p. 1677, § 40, effective August 7. **L. 2014:** (14.5) and (16.5) added, (HB 14-1122), ch. 39, p. 201, § 4, effective March 17; (3.5)(a)(IX), (3.5)(a)(XXIII), (3.5)(a)(XXIV), and (5) amended and (3.5)(a)(XXV) added, (SB 14-163), ch. 391, p. 1975, § 16, effective July 1. **L. 2017:** (3)(b) amended, (SB 17-030), ch. 48, p. 151, § 1, effective August 9. **L. 2018:** IP and (18) amended, (HB 18-1187), ch. 367, p. 2211, § 2, effective August 8; IP and (18) amended, (HB 18-1295), ch. 341, p. 2033, § 3, effective August 8. **L. 2019:** (20.3) added, (SB 19-224), ch. 315, p. 2824, § 4, effective August 2; (27) amended, (HB 19-1172), ch. 136, p. 1678, § 102, effective October 1. **L. 2022:** (3.2) added, (8) repealed, and (32) amended, (HB 22-1278), ch. 222, p. 1499, § 31, effective July 1. **L. 2026:** IP amended and (4.5) added, (HB 26-1020), ch. 12, p. 54, § 1, effective March 26.

Editor's note: (1) This section is similar to former §§ 12-22-102 and 12-22-303 as they existed prior to 1992.

(2) Amendments to subsection (18) by HB 18-1187 and HB 18-1295 were harmonized.

(3) Section 6 of chapter 12 (HB 26-1020), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after March 26, 2026.

Cross references: For the legislative declaration in HB 18-1187, see section 1 of chapter 367, Session Laws of Colorado 2018.

ANNOTATION

Crime of simple possession is lesser included offense of the crime of possession with the intent to distribute. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

The definition of "controlled substance analog" as applied to pseudoephedrine is not unconstitutionally vague. People v. Frantz, 114 P.3d 34 (Colo. App. 2004).

The definition of "cocaine" in subsection (4), by its plain language, includes a mixture that includes any amount of cocaine. Therefore, the amount of cocaine involved in a transaction is determined by the total amount of the

mixture containing the cocaine, not just the amount of cocaine in the mixture. People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999).

The definition of "marijuana" does not include industrial hemp. People v. Cox, 2018 CO 88, 429 P.3d 75; People v. Cox, 2021 COA 68, 493 P.3d 914.

It is evident that one who "manufactures" a controlled substance also possesses the substance in the course of manufacturing it. Patton v. People, 35 P.3d 124 (Colo. 2001).

18-18-103. Special definition - board.

As used in parts 1 and 2 of this article 18, "board" means the state board of pharmacy. As used in parts 3, 4, 5, and 6 of this article 18, "board" means the respective licensing board responsible for licensing and registering practitioners or other persons who are subject to registration pursuant to part 3 of this article 18. For physicians the respective board is the Colorado medical board; for podiatrists the respective board is the Colorado podiatry board; for dentists the respective board is the Colorado dental board; for optometrists the respective board is the state board of optometry; for pharmacists and pharmacies the respective board is the state board of pharmacy; for veterinarians the respective board is the state board of veterinary medicine; and for manufacturers, distributors, and animal shelters, as defined in section 35-80-102, the respective board is the state board of pharmacy.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1. **L. 2010:** Entire section amended, (HB 10-1260), ch. 403, p. 1987, § 78, effective July 1. **L. 2011:** Entire section amended, (SB 11-094), ch. 129, p. 451, § 30, effective April 22. **L. 2014:** Entire section

amended, (HB 14-1227), ch. 363, p. 1737, § 44, effective July 1. **L. 2022:** Entire section amended, (HB 22-1235), ch. 442, p. 3119, § 27, effective August 10.

PART 2

STANDARDS AND SCHEDULES

18-18-201. Authority to control.

The board shall administer this part 2 and the general assembly, by bill, may add substances to or delete or reschedule substances listed in section 18-18-203, 18-18-204, 18-18-205, 18-18-206, or 18-18-207.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-103 as it existed prior to 1992.

18-18-202. Nomenclature.

The controlled substances listed in or to be added to the schedules in sections 18-18-203, 18-18-204, 18-18-205, 18-18-206, and 18-18-207 are listed or added by any official, common, usual, chemical, or trade name used.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1.

18-18-203. Schedule I - definitions.

- (1) A substance shall be added to schedule I by the general assembly when:
 - (a) The substance has high potential for abuse;
 - (b) The substance has no currently accepted medical use in treatment in the United States;
and
 - (c) The substance lacks accepted safety for use under medical supervision.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule I:

(a) Any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(I) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl] -N-phenylacetamide);

(II) Acetylmethadol;

(III) Allylprodine;

(IV) Alphacetylmethadol;

(V) Alphameprodine;

(VI) Alphamethadol;

(VII) Alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)- 4-(N-propanilido) piperidine);

(VIII) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidinyl]-N-phenylpropanamide);

(IX) Benzethidine;

(X) Betacetylmethadol;

(XI) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4- piperidinyl]-N-phenylpropanamide);

(XII) Beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-] N-phenylpropanamide);

(XIII) Betameprodine;

(XIV) Betamethadol;

(XV) Betaprodine;

(XVI) Clonitazene;

(XVII) Dextromoramide;

(XVIII) Diampromide;

(XIX) Diethylthiambutene;

- (XX) Difenoxin;
- (XXI) Dimenoxadol;
- (XXII) Dimepheptanol;
- (XXIII) Dimethylthiambutene;
- (XXIV) Dioxaphetyl butyrate;
- (XXV) Dipipanone;
- (XXVI) Ethylmethylthiambutene;
- (XXVII) Etonitazene;
- (XXVIII) Etoxidine;
- (XXIX) Furethidine;
- (XXX) Hydroxypethidine;
- (XXXI) Ketobemidone;
- (XXXII) Levomoramide;
- (XXXIII) Levophenacilmorphan;
- (XXXIV) 3-methylfentanyl (N-[3-methyl-1-(2- phenylethyl)-4-piperidyl]-N-phenylpropanamide);
- (XXXV) 3-methylthiofentanyl (N-[3-methyl-1-(2- thienyl)ethyl-4-piperidyl]-N-phenylpropanamide);
- (XXXVI) Morpheridine;
- (XXXVII) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);
- (XXXVIII) Noracymethadol;
- (XXXIX) Norlevorphanol;
- (XL) Normethadone;
- (XLI) Norpipanone;
- (XLII) Para-fluorofentanyl (N-(4-fluorophenyl)-N- [1-(2-phenethyl) -4-piperidinyl]-propanamide);
- (XLIII) PEPAP (1-(-2-phenethyl)-4-phenyl- 4-acetoxypiperidine);
- (XLIV) Phenadoxone;

- (XLV) Phenampromide;
- (XLVI) Phenomorphan;
- (XLVII) Phenoperidine;
- (XLVIII) Piritramide;
- (XLIX) Proheptazine;
- (L) Properidine;
- (LI) Propiram;
- (LII) Racemoramide;
- (LIII) Thiofentanyl (N-phenyl-N-[1-(2- thienyl) ethyl-4-piperidiny]-propanamide);
- (LIV) Tilidine;
- (LV) Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (I) Acetorphine;
- (II) Acetyldihydrocodeine;
- (III) Benzylmorphine;
- (IV) Codeine methylbromide;
- (V) Codeine-N-Oxide;
- (VI) Cyprenorphine;
- (VII) Desomorphine;
- (VIII) Dihydromorphine;
- (IX) Drotebanol;
- (X) Etorphine, except hydrochloride salt;
- (XI) Heroin;
- (XII) Hydromorphanol;
- (XIII) Methyldesorphine;
- (XIV) Methyldihydromorphine;

- (XV) Morphine methylbromide;
- (XVI) Morphine methylsulfonate;
- (XVII) Morphine-N-Oxide;
- (XVIII) Myrophine;
- (XIX) Nicocodeine;
- (XX) Nicomorphine;
- (XXI) Normorphine;
- (XXII) Pholcodine;
- (XXIII) Thebacon.

(c) Any material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) 4-bromo-2, 5-dimethoxy-amphetamine (Some trade or other names: 4-bromo-2, 5-dimethoxy-alpha- methylphenethylamine; 4-bromo-2, 5-DMA.);

(II) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA.);

(II.5) 2,5-Dimethoxy-4-ethylamphetamine (DOET);

(III) 4-methoxyamphetamine (Some trade or other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine, PMA.);

(IV) 5-methoxy-3,4-methylenedioxy amphetamine;

(IV.5) 5-methoxy-N, N-diisopropyltryptamine (5-MeO-DiPT);

(V) 4-methyl-2,5-dimethoxy-amphetamine (Some trade and other names: 4-methyl-2,5-dimethoxy-alpha- methylphenethylamine; DOM; and STP.);

(VI) 3,4-methylenedioxy amphetamine;

(VII) 3,4-methylenedioxymethamphetamine (MDMA); except that 3,4-methylenedioxymethamphetamine (MDMA) does not include a prescription drug product containing 3,4-methylenedioxymethamphetamine (MDMA) approved by the federal food and drug administration and placed on a schedule of the federal "Controlled Substances Act", 21 U.S.C. sec. 801 et seq., as amended, other than schedule I, or has been exempted from one or more provisions of such act, and that is intended for prescribed use and dispensed by a pharmacy or prescription drug outlet registered by the state of Colorado and only possessed by a person

authorized to possess a controlled substance pursuant to section 18-18-302. Any such drug product containing MDMA that is approved by the federal food and drug administration must be controlled in Colorado in the same manner as required by any federal control designation pursuant to the federal "Controlled Substances Act", or any exemption from one or more provisions of that act, and subject to the provisions set forth in part 1 of article 280 of title 12 and part 3 of this article 18. Nothing in this section exempts a person from any violation of part 4 of this article 18.

(VIII) 3,4,5-trimethoxy amphetamine;

(VIII.5) Alpha-methyltryptamine (AMT);

(IX) Bufotenine (Some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2- dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine.);

(X) Diethyltryptamine (Some trade or other names: N,N-Diethyltryptamine; DET.);

(XI) Dimethyltryptamine (Some trade or other names: DMT.);

(XII) Ibogaine (Some trade and other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4- b] indole; Tabernanthe iboga.);

(XIII) Lysergic acid diethylamide;

(XIV) Mescaline;

(XV) Parahexyl (Some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; Synhexyl.);

(XVI) Peyote (Meaning all parts of the plant classified botanically as *Lophophora williamsii* Lemaire, whether growing or not, its seeds, any extract from any part of the plant, and every compound, salt, derivative, mixture, or preparation of the plant, or its seeds or extracts);

(XVII) N-ethyl MDA;

(XVIII) N-ethyl-3-piperidyl benzilate;

(XIX) N-hydroxy MDA;

(XX) N-methyl-3-piperidyl benzilate;

(XXI) Psilocybin; except that psilocybin does not include a prescription drug product containing crystalline polymorph psilocybin approved by the federal food and drug administration and placed on a schedule of the federal "Controlled Substances Act", 21 U.S.C. sec. 801 et seq., other than schedule I, or exempt from one or more provisions of that act, and that is intended for prescribed use and dispensed by a pharmacy or prescription drug outlet

registered by the state of Colorado and only possessed by a person authorized to possess a controlled substance pursuant to section 18-18-302. Any prescription drug product containing crystalline polymorph psilocybin that is approved by the federal food and drug administration must be controlled in Colorado in the same manner as required by any federal control designation pursuant to the federal "Controlled Substances Act", or any exemption from one or more provisions of that act; and is subject to the provisions set forth in part 1 of article 280 of title 12 and part 3 of this article 18. Nothing in this subsection (2)(c)(XXI) exempts a person from any violation of part 4 of this article 18.

(XXII) Psilocyn;

(XXIII) Tetrahydrocannabinols;

(XXIV) Ethylamine analog of phencyclidine (Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.);

(XXV) Pyrrolidine analog of phencyclidine (Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.);

(XXVI) Thiophene analog of phencyclidine (Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.);

(XXVII) TCPy.

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Mecloqualone;

(II) Methaqualone.

(e) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(I) Repealed.

(II) Fenethylline;

(III) Methcathinone;

(IV) N-ethylamphetamine;

(V) ($\pm$) Cis-4-methylaminorex;

(VI) N,N-dimethylamphetamine.

(f) Any material, compound, mixture, or preparation containing any quantity of gamma hydroxybutyrate [GHB], including its salts, isomers, and salts of isomers.

(g) Any material, compound, mixture, or preparation which is a controlled substance analog, the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in this subsection (2) or that was specifically designed to produce an effect substantially similar to or greater than the effect of a controlled substance listed in this subsection (2), all or part of which is intended for human consumption.

(h) Any material, compound, mixture, or preparation containing any quantity of N-benzylpiperazine (BZP), including its salts, isomers, and salts of isomers.

(3) (a) Notwithstanding subsection (1) or (2) of this section, a controlled substance listed on schedule I pursuant to this section does not include a prescription drug product containing the schedule I controlled substance if the prescription drug product is:

(I) Approved for prescription use by the federal food and drug administration and designated or rescheduled by the federal drug enforcement administration on a schedule other than schedule I, pursuant to 21 U.S.C. sec. 812 and 21 CFR 1308, or is exempt pursuant to 21 CFR 1308;

(II) Dispensed by a pharmacy or prescription drug outlet registered by the state of Colorado, or administered by a practitioner, as defined in section 18-18-102 (29); and

(III) Possessed only by a person authorized to possess a controlled substance pursuant to section 18-18-302.

(b) A prescription drug product containing a schedule I controlled substance that is approved for prescription use by the federal food and drug administration must be controlled in Colorado in the same manner as the product is controlled by the federal drug enforcement administration pursuant to 21 U.S.C. sec. 812 and 21 CFR 1308, or is exempt pursuant to 21 CFR 1308, the provisions set forth in part 1 of article 280 of title 12, and part 3 of this article 18. Nothing in this section exempts a person from any violation of part 4 of this article 18.

(c) The designation or rescheduling of a prescription drug product in Colorado is automatically and immediately effective upon the effective date of the federal drug enforcement administration's designation or rescheduling pursuant to 21 U.S.C. sec. 812 and 21 CFR 1308, or is exempt pursuant to 21 CFR 1308.

(d) (I) This subsection (3) does not apply to, or affect the regulation of or lawful actions or conduct concerning:

(A) Natural medicine or natural medicine product;

(B) The regulation of or lawful actions or conduct pursuant to article 170 of title 12; or

- (C) The regulation of or lawful actions or conduct pursuant to article 50 of title 44.
- (II) As used in this subsection (3), unless the context otherwise requires:
 - (A) "Natural medicine" has the meaning set forth in section 18-18-434 (12)(b).
 - (B) "Natural medicine product" has the meaning set forth in section 18-18-434 (12)(c).
- (e) (I) Nothing in this subsection (3) restricts or otherwise affects the regulation of or access to marijuana or marijuana concentrate that is authorized pursuant to sections 14 and 16 of article XVIII of the state constitution.
- (II) As used in this subsection (3)(e), unless the context otherwise requires:
 - (A) "Marijuana" has the meaning set forth in section 18-18-102 (18).
 - (B) "Marijuana concentrate" has the meaning set forth in section 18-18-102 (19).

Source: **L. 92:** Entire article R&RE, p. 332, § 1, effective July 1. **L. 94:** (2)(c)(II.5) added and (2)(e) amended, pp. 1721, 1722, §§ 20, 21, effective July 1. **L. 96:** (2)(e)(I), (2)(e)(III), and (2)(e)(V) amended, p. 1843, § 8, effective July 1. **L. 2001:** (2)(f) and (2)(g) added, pp. 858, 860, §§ 3, 9, effective July 1. **L. 2005:** (2)(c)(IV.5) and (2)(c)(VIII.5) added, p. 1501, § 7, effective July 1, 2006. **L. 2009:** (2)(h) added, (HB 09-1157), ch. 342, p. 1795, § 1, effective July 1. **L. 2012:** (2)(e)(I) repealed, (HB 12-1310), ch. 268, p. 1405, § 30, effective June 7. **L. 2022:** (2)(c)(VII) amended, (HB 22-1344), ch. 461, p. 3273, § 2, effective August 10. **L. 2025:** (2)(c)(XXI) amended, (HB 25-1063), ch. 46, p. 212, § 2, effective August 6. **L. 2026:** (3) added, (SB 26-031), ch. 59, p. 246, § 2, effective August 12.

Editor's note: This section is similar to former § 12-22-309 as it existed prior to 1992.

Cross references: For the legislative declaration in HB 22-1344, see section 1 of chapter 461, Session Laws of Colorado 2022. For the legislative declaration in HB 25-1063, see section 1 of chapter 46, Session Laws of Colorado 2025. For the legislative declaration in SB 26-031, see section 1 of chapter 59, Session Laws of Colorado 2026.

ANNOTATION

Annotator's note. Since § 18-18-203 is similar to § 12-22-309 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Applied in People v. Donald, 637 P.2d 392 (Colo. 1981); People v. Deschamp, 662

P.2d 171 (Colo. 1983); People v. Holmberg, 992 P.2d 705 (Colo. App. 1999).

18-18-204. Schedule II.

(1) A substance shall be added to schedule II by the general assembly when:

- (a) The substance has high potential for abuse;
- (b) The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and
- (c) The abuse of the substance may lead to severe psychological or physical dependence.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule II:

(a) Any of the following substances, however manufactured:

(I) Opium and opium derivative, and any salt, compound, derivative, or preparation of opium or opium derivative, excluding apomorphine, dextrophan, nalbuphine, butorphanol, nalmeferine, naloxone, and naltrexone, but including:

- (A) Raw opium;
- (B) Opium extracts;
- (C) Opium fluid;
- (D) Powdered opium;
- (E) Granulated opium;
- (F) Tincture of opium;
- (G) Codeine;
- (H) Ethylmorphine;
- (I) Etorphine hydrochloride;
- (J) Hydrocodone;
- (K) Hydromorphone;
- (L) Metopon;
- (M) Morphine;

(N) Oxycodone;

(O) Oxymorphone;

(P) Thebaine.

(II) Any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in subparagraph (I) of this paragraph (a), but not isoquinoline alkaloids of opium;

(III) Opium poppy and poppy straw;

(IV) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine;

(V) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy).

(b) Any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

(I) Alfentanil;

(II) Alphaprodine;

(III) Anileridine;

(IV) Benztiramide;

(V) Carfentanil;

(VI) Dihydrocodeine;

(VII) Diphenoxylate;

(VIII) Fentanyl;

(IX) Isomethadone;

(IX.5) Levo-alphacetylmethadol;

(X) Levomethorphan;

(XI) Levorphanol;

(XII) Metazocine;

- (XIII) Methadone;
- (XIV) Methadone - Intermediate, 4-cyano-2- dimethylamino-4, 4-diphenyl butane;
- (XV) Moramide - Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;
- (XVI) Pethidine (meperidine);
- (XVII) Pethidine - Intermediate-A, 4-cyano-1- methyl-4-phenylpiperidine;
- (XVIII) Pethidine - Intermediate-B, ethyl-4- phenylpiperidine-4-carboxylate;
- (XIX) Pethidine - Intermediate-C, 1-methyl- 4-phenylpiperidine-4-carboxylic acid;
- (XX) Phenazocine;
- (XXI) Piminodine;
- (XXII) Propoxyphene (non-dosage forms);
- (XXIII) Racemethorphan;
- (XXIV) Racemorphan;
- (XXV) Sufentanil.

(c) Any material, compound, mixture, or preparation containing any quantity of the following substances, their salts, isomers, or salts of isomers, having a stimulant effect on the central nervous system:

- (I) Amphetamine;
- (II) Methamphetamine;
- (III) Phenmetrazine;
- (IV) Methylphenidate.

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (I) Amobarbital;
- (II) Pentobarbital;
- (III) Phencyclidine;
- (IV) Secobarbital;

(V) Glutethimide.

(e) (I) Repealed.

(II) Nabilone [Another name for nabilone: (+) trans-3-(1,1-demethylheptyl)-6,6a,7,8,10, 10a-hexahydro-1-hydroxy-6,6-dimethyl-9Hdibenzo [b,d] pyran-9-one].

(f) Any material, compound, mixture, or preparation containing any quantity of the following substances:

(I) Immediate precursor to amphetamine and methamphetamine: phenylacetone (Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.), ephedrine, alpha-phenylacetoacetonitrile, phenylacetic acid, and 1-phenyl-2-nitropropene;

(II) Immediate precursors to phencyclidine:

(A) 1-phenylcyclohexylamine;

(B) 1-piperidinocyclohexanecarbonitrile (PCC);

(C) Piperidine;

(D) Morpholine;

(E) Pyrrolidine;

(III) Remifentanil hydrochloride.

(g) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which is a controlled substance analog, as defined in section 18-18-102 (6), the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule II of this part 2 or that was specifically designed to produce an effect substantially similar to or greater than the effect of a controlled substance in schedule II of this part 2, all or part of which is intended for human consumption, shall be treated for the purposes of this article as a controlled substance in schedule II of this part 2.

Source: **L. 92:** Entire article R&RE, p. 337, § 1, effective July 1. **L. 94:** (2)(b)(IX.5) added, p. 1722, § 22, effective July 1. **L. 96:** (2)(f)(I) amended, p. 1843, § 9, effective July 1. **L. 99:** (2)(f)(III) added, p. 797, § 12, effective July 1. **L. 2000:** (2)(e)(I) repealed, p. 697, § 13, effective July 1. **L. 2022:** (2)(b)(V) amended, (HB 22-1326), ch. 225, p. 1662, § 40, effective July 1.

Editor's note: This section is similar to former § 12-22-310 as it existed prior to 1992.

Cross references: For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Annotator's note. Since § 18-18-204 is similar to § 12-22-310 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

The statutory language of the Uniform Controlled Substance Act of 1992 does not convey an intention by the Colorado general assembly to limit its application solely to designer drugs. Thus, the argument that pseudoephedrine is not a designer drug and therefore outside the jurisdiction of this act is invalid. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Coca leaves, including cocaine, included. It is the legislative intent that any derivative of coca leaves, including cocaine, be included as a "Schedule II" controlled substance. *People v. Root*, 650 P.2d 562 (Colo. 1982).

The description, "having a stimulant effect on the central nervous system", does not create a separate element of proof. It provides guidance as to the category into which any new substance should be placed. *People v. Moran*, 983 P.2d 143 (Colo. App. 1999).

The definition of "controlled substance analog" as applied to pseudoephedrine is not unconstitutionally vague. Thus, pseudoephedrine is a controlled substance analog and enforceable under subsection (2)(g). *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Applied in *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Chase*, 675 P.2d 315 (Colo. 1984).

18-18-205. Schedule III.

- (1) A substance shall be added to schedule III by the general assembly when:
 - (a) The substance has a potential for abuse less than the substances included in schedules I and II;
 - (b) The substance has currently accepted medical use in treatment in the United States; and
 - (c) The abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(2) Unless specifically excepted by Colorado or federal law, or Colorado or federal regulation, or more specifically included in another schedule, the following controlled substances are listed in schedule III:

(a) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Any compound, mixture, or preparation in dosage unit form containing any stimulant substance included in schedule II and which was listed as an excepted compound on August 25, 1971, pursuant to the federal "Controlled Substances Act", and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

(II) Benzphetamine;

(III) Chlorphentermine;

(IV) Clortermine;

(V) Phendimetrazine.

(b) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system:

(I) Any compound, mixture, or preparation containing any of the following drugs or their salts and one or more other active medicinal ingredients not included in any schedule:

(A) Amobarbital;

(B) Secobarbital;

(C) Pentobarbital;

(II) Any of the following drugs, or their salts, in suppository dosage form, approved by the federal food and drug administration for marketing only as a suppository:

(A) Amobarbital;

(B) Secobarbital;

(C) Pentobarbital;

(III) Any substance containing any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid;

(IV) Chlorhexadol;

- (V) Lysergic acid;
- (VI) Lysergic acid amide;
- (VII) Methypylon;
- (VIII) Sulfondiethylmethane;
- (IX) Sulfonethylmethane;
- (X) Sulfonmethane;

(XI) Tiletamine and zolazepam or any of their salts (Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e] [1,4]-diazepin-7(1H)-one. flupyrzapon.).

(c) Nalorphine;

(d) Any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as follows:

(I) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(II) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(III) Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(IV) Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(V) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VI) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VII) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VIII) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids.

(f) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product [Other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d] pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol];

(g) Ketamine, its salts, isomers, and salts of isomers [Other names for ketamine: (+)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone].

(3) The board may exempt by rule a compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraph (a) or (b) of subsection (2) of this section from the application of all or part of this article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a stimulant or depressant effect on the central nervous system.

Source: L. 92: Entire article R&RE, p. 341, § 1, effective July 1. L. 2000: (2)(f) and (2)(g) added, p. 697, §§ 12, 14, effective July 1. L. 2014: (2)(d)(III) and (2)(d)(IV) amended, (SB 14-163), ch. 391, p. 1976, § 17, effective July 1.

Editor's note: This section is similar to former § 12-22-311 as it existed prior to 1992.

18-18-206. Schedule IV.

(1) A substance shall be added to schedule IV by the general assembly when:

(a) The substance has a low potential for abuse relative to substances included in schedule III;

(b) The substance has currently accepted medical use in treatment in the United States; and

(c) The abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in schedule III.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule IV:

(a) Any material, compound, mixture, isomers or salts or isomers, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as follows:

(I) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(II) Propoxyphene (dosage forms);

(III) Butorphanol;

(b) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Alprazolam;

(II) Barbitol;

(III) Bromazepam;

(IV) Camazepam;

(V) Chloral betaine;

(VI) Chloral hydrate;

(VII) Chlordiazepoxide;

(VIII) Clobazam;

(IX) Clonazepam;

(X) Clorazepate;

(XI) Clotiazepam;

(XII) Cloxazolam;

(XIII) Delorazepam;

(XIV) Diazepam;

- (XV) Estazolam;
- (XVI) Ethchlorvynol;
- (XVII) Ethinamate;
- (XVIII) Ethyl loflazepate;
- (XIX) Fludiazepam;
- (XX) Flunitrazepam;
- (XXI) Flurazepam;
- (XXII) Halazepam;
- (XXIII) Haloxazolam;
- (XXIV) Ketazolam;
- (XXV) Loprazolam;
- (XXVI) Lorazepam;
- (XXVII) Lormetazepam;
- (XXVIII) Mebutamate;
- (XXIX) Medazepam;
- (XXX) Meprobamate;
- (XXXI) Methohexital;
- (XXXII) Methylphenobarbital (mephobarbital);
- (XXXIII) Midazolam;
- (XXXIV) Nimetazepam;
- (XXXV) Nitrazepam;
- (XXXVI) Nordiazepam;
- (XXXVII) Oxazepam;
- (XXXVIII) Oxazolam;
- (XXXIX) Paraldehyde;
- (XL) Petrichloral;
- (XLI) Phenobarbital;

(XLII) Pinazepam;

(XLIII) Prazepam;

(XLIV) Quazepam;

(XLV) Temazepam;

(XLVI) Tetrazepam;

(XLVII) Triazolam;

(XLVIII) Zolpidem;

(c) Repealed.

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(I) Cathine;

(II) Diethylpropion;

(III) Fencamfamin;

(IV) Fenpropore;

(V) Mazindol;

(VI) Pemoline (including organometallic complexes and chelates thereof);

(VII) Phentermine;

(VIII) Pipradrol;

(IX) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

(e) Any material, compound, mixture, or preparation containing any quantity of the following substances, including their salts and isomers:

(I) Modafinil;

(II) Pentazocine;

(III) Sibutramine;

(IV) Stadol (butorphanol tartrate);

(f) Zaleplon.

(3) The board may exempt by rule any compound, mixture, or preparation containing any depressant substance listed in paragraph (b) of subsection (2) of this section from the application of all or any part of this article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant effect on the central nervous system.

Source: **L. 92:** Entire article R&RE, p. 344, § 1, effective July 1. **L. 94:** (2)(b)(XLVIII) added, p. 1722, § 23, effective July 1. **L. 96:** (2)(c) amended, p. 1427, § 16, effective July 1. **L. 98:** (2)(a)(III) added, p. 1445, § 36, effective July 1. **L. 99:** (2)(e) amended, p. 797, § 13, effective July 1. **L. 2000:** (2)(f) added, p. 708, § 38, effective July 1.

Editor's note: (1) This section is similar to former § 12-22-312 as it existed prior to 1992.

(2) Subsection (2)(c)(II) provided for the repeal of subsection (2)(c), effective upon removal of fenfluramine and its salts and isomers from schedule IV of the federal "Controlled Substances Act" (21 U.S.C. § 812; 21 CFR 1308.14). The drug enforcement administration removed fenfluramine, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, from the schedules of the "Controlled Substances Act", effective December 23, 2022 (87 Fed. Reg. 78857).

ANNOTATION

Applied in *People v. Deschamp*, 662 P.2d 171 (Colo. 1983) (decided under § 12-22-312 as it existed prior to its repeal in 1992).

18-18-207. Schedule V.

- (1) A substance shall be added to schedule V by the general assembly when:
 - (a) The substance has a low potential for abuse relative to substances included in schedule IV;
 - (b) The substance has currently accepted medical use in treatment in the United States; and
 - (c) The abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in schedule IV.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule V:

(a) Any material, compound, mixture, or preparation containing any of the following narcotic drug and its salts: Buprenorphine;

(b) Any compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth in this paragraph (b), which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(I) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(II) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(III) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(IV) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(V) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(VI) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(c) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers: Pyrovalerone.

Source: L. 92: Entire article R&RE, p. 347, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-313 as it existed prior to 1992.

PART 3

REGULATION OF MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES

Editor's note: For combination drugs exempted by regulation of the attorney general of the United States department of justice, see § 27-80-209 (2).

18-18-301. Rules.

The board or the BHA may adopt rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state.

Source: L. 92: Entire article R&RE, p. 348, § 1, effective July 1. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1499, § 32, effective July 1.

Editor's note: This section is similar to former § 12-22-108 as it existed prior to 1992.

18-18-302. Registration requirements - definitions.

(1) Every person who manufactures, distributes, or dispenses any controlled substance within this state, or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this state, shall obtain annually or biannually, if applicable, a registration, issued by the respective licensing board or the BHA in accordance with rules adopted by such board or by the BHA. For purposes of this section and this article 18, "registration" or "registered" means the registering of manufacturers, pharmacists, pharmacies, and animal shelters, as defined in section 35-80-102, located in this state, and distributors located in or doing business in this state, by the state board of pharmacy, as set forth in article 280 of title 12, the licensing of physicians by the Colorado medical board, as set forth in article 240 of title 12, the licensing of podiatrists by the Colorado podiatry board, as set forth in article 290 of title 12, the licensing of dentists by the Colorado dental board, as set forth in article 220 of title 12, the licensing of optometrists by the state board of optometry, as set forth in article 275 of title 12, the licensing of veterinarians by the state board of veterinary medicine, as set forth in article 315 of title 12, and the licensing of researchers and certified addiction counselors by the BHA, as set forth in part 2 of article 80 of title 27.

(2) A person registered by the board or the BHA under this part 3 to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by the registration and in conformity with this article 18 and with article 280 of title 12.

(3) The following persons need not register and may lawfully possess controlled substances under this article:

(a) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if the agent or employee is acting in the usual course of business or employment;

(b) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment;

(c) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner.

(4) The board or BHA may waive by rule the requirement for registration of certain manufacturers, distributors, or dispensers upon finding it consistent with the public health and safety.

(5) The board or BHA may inspect the establishment of a registrant or applicant for registration of those persons they are authorized to register under this part 3 in accordance with rules adopted by the board or BHA.

Source: **L. 92:** Entire article R&RE, p. 348, § 1, effective July 1. **L. 94:** (1) amended, p. 2605, § 4, effective July 1. **L. 2010:** (1) amended, (HB 10-1260), ch. 403, p. 1988, § 79, effective July 1. **L. 2011:** (1) amended, (SB 11-094), ch. 129, p. 451, § 31, effective April 22. **L. 2012:** (1) and (2) amended, (HB 12-1311), ch. 281, p. 1621, § 52, effective July 1. **L. 2014:** (1) amended, (HB 14-1227), ch. 363, p. 1737, § 45, effective July 1. **L. 2019:** (1) and (2) amended, (HB 19-1172), ch. 136, p. 1678, § 103, effective October 1. **L. 2022:** (1), (2), (4), and (5) amended, (HB 22-1278), ch. 222, p. 1499, § 33, effective July 1; (1) amended, (HB 22-1235), ch. 442, p. 3119, § 28, effective August 10.

Editor's note: (1) This section is similar to former § 12-22-304 as it existed prior to 1992.

(2) Amendments to subsection (1) by HB 22-1235 and HB 22-1278 were harmonized.

18-18-303. Registration.

(1) The board or BHA shall register an applicant to manufacture or distribute substances included in schedules I through V unless the board or BHA determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board or BHA shall consider the following factors:

(a) Maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

- (b) Compliance with applicable state and local law;
 - (c) Promotion of technical advances in the art of manufacturing controlled substances and the development of new substances;
 - (d) Any convictions of the applicant under any laws of another country or federal or state laws relating to any controlled substance;
 - (e) Past experience of the applicant in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;
 - (f) Furnishing by the applicant of false or fraudulent material in any application filed under this article;
 - (g) Suspension or revocation of the applicant's federal registration or the applicant's registration of another state to manufacture, distribute, or dispense controlled substances as authorized by federal law; and
 - (h) Any other factors relevant to and consistent with the public health and safety.
- (2) Registration under subsection (1) of this section entitles a registrant to manufacture or distribute a substance included in schedule I or II only if it is specified in the registration.
- (3) A practitioner must be registered with the board or BHA before dispensing a controlled substance or conducting research with respect to a controlled substance included in schedules II through V. The BHA need not require separate registration under this article 18 for practitioners engaging in research with nonnarcotic substances included in schedules II through V where the registrant is already registered under this article 18 in another capacity. Practitioners registered under federal law to conduct research with substances included in schedule I may conduct research with substances included in schedule I within this state upon furnishing the BHA evidence of that federal registration.
- (4) A manufacturer or distributor registered under the federal "Controlled Substances Act", 21 U.S.C. sec. 801 et seq., may submit a copy of the federal application as an application for registration as a manufacturer or distributor under this section. The board may require a manufacturer or distributor to submit information in addition to the application for registration under the federal act.
- (5) Persons licensed or registered under article 280 of title 12 or article 220, 240, 275, 290, or 315 of title 12 need not be licensed separately to distribute or dispense controlled substances to the extent provided under law if they are registered or are exempt from registration by the federal drug enforcement administration, provided that such persons indicate on any initial application or renewal application the schedules of controlled substances that the persons are

authorized to use under Public Law 91-513, known as the federal "Comprehensive Drug Abuse Prevention and Control Act of 1970".

Source: **L. 92:** Entire article R&RE, p. 349, § 1, effective July 1. **L. 2012:** (5) amended, (HB 12-1311), ch. 281, p. 1622, § 53, effective July 1. **L. 2019:** (5) amended, (HB 19-1172), ch. 136, p. 1678, § 104, effective October 1. **L. 2022:** IP(1) and (3) amended, (HB 22-1278), ch. 222, p. 1500, § 34, effective July 1.

Editor's note: This section is similar to former § 12-22-305 as it existed prior to 1992.

18-18-304. Suspension or revocation of registration.

(1) The board or BHA may suspend or revoke a registration under section 18-18-303 to manufacture, distribute, or dispense a controlled substance upon finding that the registrant has:

(a) Furnished false or fraudulent material information in any application filed under this part 3;

(b) Been convicted of a felony under any state or federal law relating to any controlled substance;

(c) Had the registrant's federal registration suspended or revoked and is no longer authorized by federal law to manufacture, distribute, or dispense controlled substances; or

(d) Committed acts that would render registration under section 18-18-303 inconsistent with the public interest as determined under that section.

(2) The board or BHA may deny, suspend, revoke, or take other authorized disciplinary action to limit the authority of any registrant to prescribe, distribute, dispense, or administer controlled substances, or any classification thereof, within this state if grounds for denial, suspension, or revocation exist. These proceedings must be conducted in accordance with the provisions of article 4 of title 24.

(3) If a registration is suspended or revoked, the board or BHA may place under seal all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. When a revocation order becomes final, the court may order the controlled substances forfeited to the state.

(4) The board or BHA may seize or place under seal any controlled substance owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by the registration. The controlled substance must be held for the benefit of the registrant or the registrant's successor in interest. The board or BHA shall notify a registrant, or the registrant's successor in interest, whose controlled substance is seized or placed under seal, of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The board or BHA may not dispose of any controlled substance seized or placed under seal under this subsection (4) until the expiration of one hundred eighty days after the controlled substance was seized or placed under seal. The costs incurred by the board or BHA in seizing, placing under seal, maintaining custody, and disposing of any controlled substance under this subsection (4) may be recovered from the registrant, any proceeds obtained from the disposition of the controlled substance, or from both. Any balance remaining after the costs have been recovered from the proceeds of any disposition must be delivered to the registrant or the registrant's successor in interest.

(5) The board or BHA shall promptly notify the drug enforcement administration of all orders restricting, suspending, or revoking registration and all forfeitures of controlled substances.

Source: L. 92: Entire article R&RE, p. 351, § 1, effective July 1. L. 2022: Entire section amended, (HB 22-1278), ch. 222, p. 1501, § 35, effective July 1.

Editor's note: This section is similar to former § 12-22-308 as it existed prior to 1992.

18-18-305. Order to show cause.

(1) Before denying, suspending, or revoking a registration, or refusing a renewal of registration, the board or BHA shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or the renewal refused. The order must state its grounds and direct the applicant or registrant to appear before the board or BHA at a specified time and place not less than thirty days after the date of service of the order. In case of a refusal to renew a registration, the order must be served not later than thirty days before the expiration of the registration. These proceedings must be conducted in accordance with section 24-4-105. The proceedings do not preclude any criminal prosecution or other proceeding. A proceeding to refuse to renew a registration does not affect the existing registration, which remains in effect until completion of the proceeding.

(2) The board or BHA may suspend, without an order to show cause, any registration simultaneously with the institution of proceedings under section 18-18-304, or where renewal of registration is refused, upon finding that there is an imminent danger to the public health or safety that warrants this action. The suspension continues in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the board or BHA or dissolved by a court of competent jurisdiction.

Source: L. 92: Entire article R&RE, p. 352, § 1, effective July 1. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1502, § 36, effective July 1.

18-18-306. Records of registrants.

Persons registered to manufacture, distribute, or dispense controlled substances under this part 3 shall keep records and maintain inventories in conformance with the record keeping and inventory requirements of federal law and with any additional rules adopted by the board or BHA.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1502, § 37, effective July 1.

Editor's note: This section is similar to former § 12-22-318 as it existed prior to 1992.

18-18-307. Order forms.

A substance included in schedule I or II may be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of federal law respecting order forms constitutes compliance with this section.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-318 as it existed prior to 1992.

18-18-308. Prescriptions.

(1) As used in this section, "medical treatment" includes dispensing or administering a narcotic drug for pain, including intractable pain.

(2) Except as provided in section 18-18-414, a person may dispense a controlled substance only as provided in this section.

(3) (a) Except as provided in paragraph (b) of this subsection (3), a person shall not dispense a substance included in schedule II to an ultimate user of the substance without:

(I) The written prescription of a practitioner; or

(II) An electronic prescription drug order for a schedule II substance that is created and transmitted in accordance with 21 CFR 1311.

(b) A practitioner, other than a pharmacy, may dispense a schedule II substance directly to the ultimate user without a written prescription.

(4) (a) Except as provided in paragraph (b) of this subsection (4), a person shall not dispense a substance included in schedule III, IV, or V to an ultimate user of the substance without:

(I) A written or oral prescription order of a practitioner; or

(II) An electronic prescription drug order for a schedule III, IV, or V substance that is created and transmitted in accordance with 21 CFR 1311.

(b) A practitioner, other than a pharmacy, may dispense a schedule III, IV, or V substance directly to the ultimate user without a written prescription.

(c) A prescription order for a schedule III, IV, or V substance must not be filled or refilled more than six months after the date of the order or be refilled more than five times.

(5) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner's profession.

(6) No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

Source: **L. 92:** Entire article R&RE, p. 353, § 1, effective July 1. **L. 96:** (4) amended, p. 1427, § 17, effective July 1. **L. 98:** (2) amended, p. 430, § 2, effective July 1. **L. 2012:** (3) and (4) amended, (SB 12-037), ch. 40, p. 139, § 1, effective March 22.

Editor's note: This section is similar to former § 12-22-122 as it existed prior to 1992.

18-18-309. Diversion prevention and control.

(1) As used in this section, "diversion" means the transfer of any controlled substance from a licit to an illicit channel of distribution or use.

(2) The BHA shall regularly prepare and make available to other state regulatory, licensing, and law enforcement agencies a report on the patterns and trends of actual distribution, diversion, and abuse of controlled substances.

(3) The BHA shall enter into written agreements with local, state, and federal agencies for the purpose of improving identification of sources of diversion and to improve enforcement of and compliance with this article 18 and other laws and rules pertaining to unlawful conduct involving controlled substances. An agreement must specify the roles and responsibilities of each agency that has information or authority to identify, prevent, and control drug diversion and drug abuse. The BHA shall convene periodic meetings to coordinate a state diversion prevention and control program. The BHA shall arrange for cooperation and exchange of information among agencies and with neighboring states and the federal government.

(4) Repealed.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1. **L. 2017:** (4) repealed, (SB 17-234), ch. 154, p. 520, § 2, effective August 9. **L. 2022:** (2) and (3) amended, (HB 22-1278), ch. 222, p. 1502, § 38, effective July 1.

PART 4

OFFENSES AND PENALTIES

18-18-401. Legislative declaration.

(1) The general assembly finds, determines, and declares that:

(a) The regulation of controlled substances in this state is important and necessary for the preservation of public safety and public health;

(b) Meeting the public safety and public health needs of our communities demands a collaborative effort involving primary health-care, behavioral health, criminal justice, and social service systems;

(c) Successful, community-based substance abuse treatment and education programs and substance use disorder treatment programs, in conjunction with treatment for behavioral or mental health disorders as necessary, provide effective tools in the effort to reduce drug usage and enhance public safety by reducing the likelihood that drug users will have further contact with the criminal justice system. Therapeutic intervention and ongoing individualized treatment plans prepared through the use of meaningful and proven assessment tools and evaluations offer an effective alternative to incarceration in appropriate circumstances and should be utilized accordingly.

(d) Savings recognized from reductions in incarceration rates should be dedicated toward funding community-based treatment options and other mechanisms that are accessible to all of the state's counties for the implementation and continuation of such programs;

(e) The Colorado commission on criminal and juvenile justice submitted a report to the general assembly on December 15, 2012, after significant study of effective approaches to reduced drug abuse and use of criminal justice sanctions that recommends multiple changes to the criminal law relating to controlled substances.

Source: **L. 92:** Entire article R&RE, p. 354, § 1, effective July 1. **L. 2010:** Entire section amended, (HB 10-1352), ch. 259, p. 1162, § 1, effective August 11. **L. 2013:** (1) amended, (SB 13-250), ch. 333, p. 1908, § 7, effective October 1. **L. 2017:** IP(1) and (1)(c) amended, (SB 17-242), ch. 263, p. 1308, § 144, effective May 25. **L. 2024:** (1)(e) amended, (HB 24-1450), ch. 490, p. 3409, § 24, effective August 7.

Editor's note: This section is similar to former § 12-22-302 as it existed prior to 1992.

Cross references: (1) For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

(2) For the Colorado commission on criminal and juvenile justice as it existed prior to its repeal in 2023, see article 11.3 of title 16, C.R.S., in the 2022 Colorado Revised Statutes.

18-18-402. Definitions - terms used.

As used in this part 4, unless this part 4 otherwise provides or unless the context otherwise requires, terms used in this part 4 shall have the same meanings as those set forth in part 1 of this article 18.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1. **L. 2018:** Entire section amended, (HB 18-1375), ch. 274, p. 1703, § 29, effective May 29.

Editor's note: This section is similar to former § 18-18-102 as it existed prior to 1992.

18-18-403. Additional definition.

As used in this part 4, unless the context otherwise requires:

(1) "Sale" includes a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee, with or without remuneration.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1.

Editor's note: This section is similar to former § 18-18-103 as it existed prior to 1992.

18-18-403.5. Unlawful possession of a controlled substance - notice to revisor of statutes - repeal.

(1) Except as authorized by part 1 or 3 of article 280 of title 12, part 2 of article 80 of title 27, section 18-1-711, section 18-18-428 (1)(b), part 2 or 3 of this article 18, section 18-18-434, article 170 of title 12, or article 50 of title 44, it is unlawful for a person knowingly to possess a controlled substance.

(2) On or after March 1, 2020, a person who violates subsection (1) of this section by possessing:

(a) Any material, compound, mixture, or preparation that contains any quantity of flunitrazepam; ketamine; gamma hydroxybutyrate, including its salts, isomers, and salts of

isomers; cathinones; or more than four grams of a controlled substance listed in schedule I or II of part 2 of this article 18 commits a level 4 drug felony.

(b) (Deleted by amendment, L. 2013.)

(c) Any material, compound, mixture, or preparation that contains not more than four grams of a controlled substance listed in schedule I or II of part 2 of this article 18 or any quantity of a controlled substance listed in schedule III, IV, or V of part 2 of this article 18 except flunitrazepam, gamma hydroxybutyrate, or ketamine commits a level 1 drug misdemeanor; except that a fourth or subsequent offense for a violation of this subsection (2)(c) is a level 4 drug felony.

(2.5) (a) Notwithstanding subsection (2)(c) of this section, on or after July 1, 2022, a person who violates subsection (1) of this section by knowingly possessing:

(I) Any material, compound, mixture, or preparation that weighs more than one gram and not more than four grams and contains any quantity of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), commits a level 4 drug felony;

(II) Any material, compound, mixture, or preparation that weighs not more than one gram and contains any quantity of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), commits a level 1 drug misdemeanor; except that a fourth or subsequent offense for a violation of this subsection (2.5)(a)(II) is a level 4 drug felony.

(b) Notwithstanding the provisions of section 18-18-403.5 (2.5)(a)(I) of this section, when a defendant shows supporting evidence to establish that he or she made a reasonable mistake of fact and did not know that the controlled substance he or she possessed contained fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), the matter shall be submitted to the finder of fact in the form of an interrogatory included in the verdict form. Should the finder of fact determine the defendant made such a reasonable mistake of fact, the defendant commits a level 1 drug misdemeanor.

(2.7) (a) A person who violates subsection (1) of this section by possessing any material, compound, mixture, or preparation that contains a quantity of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), that is more than sixty percent of the total composition of the material, compound, mixture, or preparation, commits a level 2 drug felony.

(b) (I) This subsection (2.7) takes effect at 12:01 a.m. thirty days after the date identified in the notice provided to the revisor of statutes by the director of the Colorado bureau of investigation that the Colorado bureau of investigation has the resources to determine the quantity of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), compared to the total composition of the material, compound, mixture,

or preparation, or on the date of the notice to the revisor of statutes if the notice does not specify a different date.

(II) The director of the Colorado bureau of investigation shall notify the revisor of statutes in writing when the condition specified in subsection (2.7)(b)(I) of this section has occurred by e-mailing the notice to revisorofstatutes.ga@coleg.gov.

(III) Concurrent with the notice required in subsection (2.7)(b)(II) of this section, the director of the Colorado bureau of investigation shall notify the speaker of the house of representatives, the president of the senate, the chief justice of the supreme court, the governor, the attorney general, the state public defender, and each district attorney in the state, that the Colorado bureau of investigation has the resources to determine the quantity of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), compared to the total composition of the material, compound, mixture, or preparation.

(IV) This subsection (2.7)(b) is repealed, effective one year after notice to the revisor of statutes pursuant to subsection (2.7)(b)(II) of this section.

(3) If the circumstances described in section 18-18-428 (1)(b) occur, the peace officer shall not arrest the person pursuant to this section for any minuscule, residual controlled substance that may be present in the used hypodermic needle or syringe, and the district attorney shall not charge or prosecute the person pursuant to this section for any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe. The circumstances described in section 18-18-428 (1)(b) may be used as a factor in a probable cause or reasonable suspicion determination of any criminal offense if the original stop or search was lawful.

(4) Notwithstanding the provisions of subsection (2) of this section, on or after March 1, 2020, a district attorney shall not charge or prosecute a person pursuant to this section for any minuscule, residual, or unusable amount of a controlled substance that may be present in a used hypodermic needle or syringe, or other drug paraphernalia, as defined in section 18-18-426. The circumstances described in this subsection (4) may be used as a factor in a probable cause or reasonable suspicion determination of any criminal offense if the original stop or search was lawful.

(5) Notwithstanding any provision of this section, a person may be charged with any other offense in this article 18, including unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, or possession with intent to do the same, pursuant to section 18-18-405, when there is evidence for the person to be so charged. Such evidence may include, but is not limited to, the amount of the controlled substance that the person possesses.

(6) Notwithstanding subsection (2) of this section to the contrary, a peace officer shall not arrest and a district attorney shall not charge or prosecute an employee, agent, or volunteer of an eligible entity described in section 25-1.5-115.1 (1) who, in the performance of the person's

duties, is in possession of a controlled substance, including fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), for the purpose of safe disposal of the controlled substance, including fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), in accordance with applicable law. As used in this subsection (6), "safe disposal" means the procedure and process for depositing the controlled substance, including fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), in a secure container for law enforcement to subsequently access and dispose of.

(7) Notwithstanding subsections (2) and (2.5) of this section, when a colorimetric field drug test was used, a peace officer shall not arrest a person when the sole basis for the arrest is a level 1 drug misdemeanor for possession of a controlled substance pursuant to subsection (2)(c) or (2.5)(a)(II) of this section, or when the sole basis for the arrest is a municipal drug possession charge, and shall instead issue a summons and complaint pursuant to section 16-2-104.

(8) Before accepting a plea from a person charged with possession of a controlled substance pursuant to subsection (1), (2), or (2.5) of this section, or for a drug possession offense in municipal court, when a colorimetric field drug test was used, a trial judge shall issue an advisement that includes the following language: "The court cannot accept a plea without first advising the defendant that presumptive colorimetric field drug tests are subject to false positive results. Presumptive colorimetric field drug tests have known error rates and are inadmissible in court. The defendant has the right to enter a not guilty plea and to request drug testing by an accredited forensic laboratory."

Source: L. 2010: Entire section added, (HB 10-1352), ch. 259, p. 1165, § 4, effective August 11. **L. 2012:** (1) amended, (SB 12-020), ch. 225, p. 988, § 4, effective May 29; (1) amended, (HB 12-1311), ch. 281, p. 1622, § 54, effective July 1. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1908, § 8, effective October 1. **L. 2014:** (2)(a) amended, (SB 14-163), ch. 391, p. 1976, § 18, effective July 1. **L. 2015:** (1) amended and (3) added, (SB 15-116), ch. 76, p. 201, § 2, effective July 1. **L. 2019:** (1) amended, (HB 19-1172), ch. 136, p. 1679, § 105, effective October 1; IP(2), (2)(a), and (2)(c) amended and (4) and (5) added, (HB 19-1263), ch. 291, p. 2676, § 1, effective March 1, 2020. **L. 2022:** (2.5), (2.7), and (6) added, (HB 22-1326), ch. 225, p. 1626, § 2, effective July 1. **Initiated 2022:** (1) amended, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** (1) amended, (SB 23-290), ch. 249, p. 1411, § 24, effective July 1. **L. 2025:** (6) amended, (SB 25-164), ch. 168, p. 684, § 9, effective August 6. **L. 2026:** (7) and (8) added, (HB 26-1020), ch. 12, p. 54, § 2, effective March 26.

Editor's note: (1) Amendments to subsection (1) by House Bill 12-1311 and Senate Bill 12-020 were harmonized.

(2) This section was amended by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

(3) As of publication date, the revisor of statutes has not received the notice referred to in subsection (2.7).

(4) Section 6 of chapter 12 (HB 26-1020), Session Laws of Colorado 2026, provides that the act changing this section applies to offenses committed on or after March 26, 2026.

Cross references: For the legislative declaration in SB 12-020, see section 1 of chapter 225, Session Laws of Colorado 2012. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

Law reviews. For article, "Automatic Record Sealing in Colorado", see 54 Colo. Law. 26 (Dec. 2025).

Double jeopardy and merger require defendant's possession conviction be vacated because the evidence at trial did not support a finding, beyond a reasonable doubt, that defendant possessed a quantum of drugs in addition to the one defendant gave the undercover officer. *People v. Davis*, 2015 CO 36M, 352 P.3d 950.

Subsections (1) and (2)(a) are broader than the federal Controlled Substances Act (CSA) because they criminalize possessing morpholine while the CSA does not. Thus a drug conviction under

those subsections cannot qualify as a predicate for removal from the United States under 8 U.S.C. § 1227(a)(2)(B)(i). *Johnson v. Barr*, 967 F.3d 1103 (10th Cir. 2020) (decided under law in effect prior to the 2019 amendment).

The provision of § 18-18-413 allowing for possession of a controlled substance by "a person acting at the direction of the legal owner" is not an affirmative defense with regard to this section. *People v. Gonzales*, 2017 COA 62, 415 P.3d 846.

Prosecution presented sufficient evidence that the drugs in the car were under the dominion and control of the defendant since the evidence showed that

the defendant was the only person in the car. *People v. Yeadon*, 2018 COA 104, 468 P.3d 50, *aff'd* on other grounds, 2020 CO 38, 462 P.3d 1087.

The drug offense of possession is not a per se grave or serious offense for proportionality review purposes. Not all drug offenses are per se grave or serious. *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191; *Melton v. People*, 2019 CO 89,

451 P.3d 415; *People v. Session*, 2020 COA 158, 480 P.3d 747.

The new rules announced in *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, are procedural, not substantive. Therefore, the holdings in *Wells-Yates* do not apply retroactively to cases on collateral review. *McDonald v. People*, 2024 CO 75, 560 P.3d 412.

18-18-404. Unlawful use of a controlled substance.

(1) (a) Except as is otherwise provided for offenses concerning marijuana and marijuana concentrate in sections 18-18-406 and 18-18-406.5, or for natural medicine or natural medicine product in section 18-18-434, article 170 of title 12, or article 50 of title 44, any person who uses any controlled substance, except when it is dispensed by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense the controlled substance for bona fide medical needs, commits a level 2 drug misdemeanor.

(b) Repealed.

(1.1) Repealed.

(2) and (3) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1163, § 2, effective August 11, 2010.)

(4) Repealed.

Source: **L. 92:** Entire article R&RE, p. 354, § 1, effective July 1. **L. 98:** (4) added, p. 1435, § 4, effective July 1. **L. 99:** IP(1) amended, p. 799, § 17, effective July 1. **L. 2000:** (4) amended, p. 1359, § 41, effective July 1, 2001. **L. 2002:** (4) amended, p. 1583, § 12, effective July 1. **L. 2003:** (1) amended and (1.1) added, p. 2681, § 2, effective July 1; (3) amended, p. 2429, § 2, effective July 1. **L. 2007:** (1)(b) and (1.1) repealed, p. 1689, § 10, effective July 1. **L. 2009:** (4) repealed, (HB 09-1266), ch. 347, p. 1815, § 4, effective August 5. **L. 2010:** (1)(a), (2), and (3) amended, (HB 10-1352), ch. 259, p. 1163, § 2, effective August 11. **L. 2012:** (1)(a) amended, (SB 12-020), ch. 225, p. 988, § 5, effective May 29. **L. 2013:** (1)(a) amended, (SB 13-250), ch. 333, p. 1909, § 9, effective October 1. **Initiated 2022:** (1)(a) amended, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** (1)(a) amended, (SB 23-290), ch. 249, p. 1412, § 25, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-104 as it existed prior to 1992.

(2) This section was amended by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

Cross references: For the legislative intent contained in the 2003 act amending subsection (1) and enacting subsection (1.1), see section 1 of chapter 424, Session Laws of Colorado 2003. For the legislative declaration in the 2012 act amending subsection (1)(a), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989).

Equal protection is not violated when a defendant is charged for the same conduct under both this section and § 18-18-405(1)(a) because unlawful use and unlawful possession are distinct offenses that each require proof of at least one fact that the other does not. *People v. District Ct. of 11th Jud. Dist.*, 964 P.2d 498 (Colo. 1998).

This section and § 18-18-405 do not contain identical elements for purposes of an equal protection analysis. The general assembly's choice to classify possession as a graver offense than use is reasonably related to the general purposes of the criminal legislation. *Campbell v. People*, 73 P.3d 11 (Colo. 2003).

As written, this section is clear and unambiguous in exempting § 18-18-406.5 from its provisions, including the treatment option. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

By intentionally omitting marihuana from the treatment option available under this section, the general assembly explicitly chose to offer the treatment option only to those addicted to other substances. Such a classification has a rational basis based upon real in fact differences between the substances and is not completely arbitrary or irrational. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

Under § 18-18-404 (3), defendant's guilty plea is tantamount to a conviction in that it establishes guilt. *People v. Roberts*, 865 P.2d 938 (Colo. App. 1993).

Trial court exceeded its jurisdiction by applying sentencing alternative under subsection (3) applicable to unlawful "use" of controlled substance offenses to resentencing of probationer convicted of "possession" of a controlled substance under § 18-18-405. *People v. Hutchings*, 881 P.2d 466 (Colo. App. 1994).

Court order to surrender a driver's license and pay certain victim's fees and a drug surcharge fee was not erroneous where the defendant pled guilty to the

charge and where the statute authorizes the court to impose "reasonable conditions." *People v. Roberts*, 865 P.2d 938 (Colo. App. 1993).

While an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it. *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-18-405. Unlawful distribution, manufacturing, dispensing, or sale.

(1) (a) Except as authorized by part 1 of article 280 of title 12, part 2 of article 80 of title 27, part 2 or 3 of this article 18, section 18-18-434, article 170 of title 12, or article 50 of title 44, it is unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.

(b) As used in this subsection (1), "dispense" does not include labeling, as defined in section 12-280-103 (23).

(2) Except as otherwise provided for an offense concerning marijuana and marijuana concentrate in section 18-18-406 and for special offenders as provided in section 18-18-407, any person who violates any of the provisions of subsection (1) of this section:

(a) Commits a level 1 drug felony and is subject to the mandatory sentencing provisions in section 18-1.3-401.5 (7) if:

(I) The violation involves any material, compound, mixture, or preparation that weighs:

(A) More than two hundred twenty-five grams and contains a schedule I or schedule II controlled substance; or

(B) More than one hundred twelve grams and contains methamphetamine, heroin, ketamine, or cathinones; or

(C) More than fifty milligrams and contains flunitrazepam; or

(D) More than fifty grams and contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g); or

(II) An adult sells, dispenses, distributes, or otherwise transfers any quantity of a schedule I or schedule II controlled substance or any material, compound, mixture, or preparation that contains any amount of a schedule I or schedule II controlled substance, other than marijuana or marijuana concentrate, to a minor and the adult is at least two years older than the minor;

(III) (A) Except as provided in section 18-1-711 (3)(i), the defendant committed a violation of subsection (2)(a)(I)(D), (2)(b)(I)(D), or (2)(c)(V) of this section, and the actions in violation of subsection (2)(a)(I)(D), (2)(b)(I)(D), or (2)(c)(V) of this section are the proximate cause of the death of another person who used or consumed the material, compound, mixture, or preparation that contained fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g).

(B) Notwithstanding subsection (2)(a)(III)(A) of this section, a defendant who committed a violation of subsection (2)(c)(V) of this section, and the actions in violation of subsection (2)(c)(V) of this section are the proximate cause of the death of another person who used or consumed the material, compound, mixture, or preparation that contained fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g), is not subject to the mandatory sentencing requirement as described in section 18-1.3-401.5 (7).

(b) Commits a level 2 drug felony if:

(I) The violation involves any material, compound, mixture, or preparation that weighs:

(A) More than fourteen grams, but not more than two hundred twenty-five grams, and contains a schedule I or schedule II controlled substance;

(B) More than seven grams, but not more than one hundred twelve grams, and contains methamphetamine, heroin, ketamine, or cathinones;

(C) More than ten milligrams, but not more than fifty milligrams, and contains flunitrazepam; or

(D) More than four grams, but not more than fifty grams, and contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g);

(II) An adult sells, dispenses, distributes, or otherwise transfers any quantity of a schedule III or schedule IV controlled substance or any material, compound, mixture, or preparation that contains any quantity of a schedule III or schedule IV controlled substance to a minor and the adult is at least two years older than the minor;

(c) Except as provided in subsection (8) of this section, commits a level 3 drug felony if the violation involves any material, compound, mixture, or preparation that weighs:

(I) Not more than fourteen grams and contains a schedule I or schedule II controlled substance;

(II) Not more than seven grams and contains methamphetamine, heroin, ketamine, or cathinones;

(III) Not more than ten milligrams and contains flunitrazepam;

(IV) More than four grams and contains a schedule III or schedule IV controlled substance;
or

(V) Not more than four grams and contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g).

(d) Except as provided in subsection (8) of this section or section 18-1-711 (3)(j), commits a level 4 drug felony if:

(I) The violation involves any material, compound, mixture, or preparation that weighs not more than four grams and contains a schedule III or schedule IV controlled substance; or

(II) Notwithstanding the provisions of paragraph (c) of this subsection (2), the violation involves distribution or transfer of the controlled substance for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer; except that this subparagraph (II) applies only if the distribution or transfer involves not more than four grams of a schedule I or II controlled substance or not more than two grams of methamphetamine, heroin, ketamine, or cathinones;

(e) Commits a level 1 drug misdemeanor if the violation involves:

(I) A schedule V controlled substance; or

(II) A transfer with no remuneration of not more than four grams of a schedule III or schedule IV controlled substance.

(2.1) Repealed.

(2.3) (a) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1163, § 3, effective August 11, 2010.)

(b) Repealed.

(2.5) to (4) Repealed.

(5) When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones, or conspires with one or more persons to commit the offense, pursuant to subsection

(1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense.

(6) and (7) Repealed.

(8) Except for a prosecution for manufacturing, a person commits a level 1 drug misdemeanor for a violation of subsection (2)(c)(I), (2)(c)(II), (2)(c)(V), or (2)(d) of this section if:

(a) The distribution, dispensing, transfer, or sale involves a material, compound, mixture, or preparation that weighs not more than four grams and contains any amount of a controlled substance identified in subsection (2)(c)(I), (2)(c)(II), (2)(c)(V), or (2)(d) of this section;

(b) The defendant reports in good faith an emergency drug overdose event to a law enforcement officer, to the 911 system, or to a medical provider, or the defendant aids or seeks aid for the person who suffered the emergency drug overdose;

(c) The defendant remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the defendant remains at the facilities of the medical provider until a law enforcement officer arrives;

(d) The defendant identifies himself or herself and cooperates with the law enforcement officer, emergency medical responder, or medical provider; and

(e) The offense arises from the same course of events from which the emergency overdose event arose.

Source: **L. 92:** Entire article R&RE, p. 356, § 1, effective July 1. **L. 93:** (4) amended, p. 972, § 2, effective July 1. **L. 94:** (2)(a)(I) and (4)(a) amended, p. 1723, § 24, effective July 1. **L. 97:** (2)(a)(I) and (3)(a) amended and (4) repealed, pp. 1542, 1543, §§ 9,10, effective July 1. **L. 98:** (5) amended and (6) added, pp. 1443, 1435, §§ 30, 5, effective July 1. **L. 99:** (2.5) added and (5) amended, pp. 795, 796, §§ 6, 8, effective July 1. **L. 2000:** (6) amended, p. 1360, § 42, effective July 1, 2001. **L. 2002:** (1)(a) amended, p. 1270, § 1, effective July 1; (2)(a)(II), (2)(b)(II), (2)(c)(II), (2)(d)(II), (2.5)(a), and (6) amended, pp. 1579, 1583, §§ 4, 13, effective July 1; (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b) amended, p. 1518, § 212, effective October 1. **L. 2003:** IP(3)(a) amended, p. 1424, § 2, effective April 29; (2), (2.5), and IP(3)(a) amended and (2.1), (2.3), and (2.6) added, p. 2682, § 3, effective July 1. **L. 2004:** (3)(a) amended and (3.5) added, p. 636, § 12, effective August 4. **L. 2007:** (2)(b), (2.1), (2.3)(b), (2.5)(c), and (2.6) repealed, p. 1689, § 10, effective July 1. **L. 2009:** (6) repealed, (HB 09-1266), ch. 347, p. 1815, § 5, effective August 5. **L. 2010:** (1)(a), IP(2)(a), (2)(a)(I)(A), (2.3)(a), (2.5)(a), (2.5)(b), IP(3)(a), and (5)

amended and (7) added, (HB 10-1352), ch. 259, pp. 1163, 1166, §§ 3, 5, effective August 11. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1622, § 55, effective July 1. **L. 2013:** (2) and (5) amended and (2.5), (3), (3.5), and (7) repealed, (SB 13-250), ch. 333, p. 1909, § 10, effective October 1. **L. 2014:** (2)(a)(I)(B), (2)(b)(I)(B), (2)(c)(II), (2)(d)(II), and (5) amended, (SB 14-163), ch. 391, p. 1976, § 19, effective July 1. **L. 2019:** (1) amended, (HB 19-1172), ch. 136, p. 1679, § 106, effective October 1. **L. 2022:** (2)(a)(I)(D), (2)(a)(III), (2)(b)(I)(D), and (2)(c)(V) added and (2)(b)(I)(B), (2)(b)(I)(C), (2)(c)(III), and (2)(c)(IV) amended, (HB 22-1326), ch. 225, p. 1628, § 3, effective July 1. **Initiated 2022:** (1)(a) amended, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** IP(2)(c) and IP (2)(d) amended and (8) added, (HB 23-1167), ch. 144, p. 616, § 2, effective May 1; (1)(a) amended, (SB 23-290), ch. 249, p. 1412, § 26, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-105 as it existed prior to 1992.

(2) Amendments to the introductory portion to subsection (3)(a) by House Bill 03-1236 and Senate Bill 03-318 were harmonized.

(3) This section was amended by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

Cross references: For the legislative declaration contained in the 2002 act amending subsections (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative intent contained in the 2003 act amending subsections (2) and (2.5) and the introductory portion to subsection (3)(a) and enacting subsections (2.1), (2.3), and (2.6), see section 1 of chapter 424, Session Laws of Colorado 2003. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

-1935-

Annotator's note. Since § 18-18-405 is similar to § 18-18-105 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Provision of this section classifying conspiracy to distribute a schedule II controlled substance as a class three felony does not violate equal protection even though distribution of a schedule II controlled substance is itself a class three felony and § 18-2-206 generally classifies any conspiracy to commit a class three felony as a class four felony. The general assembly could reasonably determine that conspiracies to distribute drugs have greater social impact and consequences than other conspiracies and should carry harsher penalties. *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

Defendant's felony conviction under this statute did not violate equal protection when compared with § 12-22-314, which punishes cocaine possession as a misdemeanor, in that practitioners are engaged in an occupation which regularly requires administration, dispensation, and possession of controlled substance. *People v. Unruh*, 713 P.2d 370 (Colo. 1986).

Equal protection is not violated when a defendant is charged for the same conduct under both this section and § 18-18-404(1)(a) because unlawful use and unlawful possession are distinct offenses that each require proof of at least one fact that the other does not. *People v. District Ct.*

of 11th Jud. Dist., 964 P.2d 498 (Colo. 1998).

Prohibiting possession of controlled substances under this section does not violate equal protection when compared with § 18-18-104, which punishes use of the same controlled substances less harshly, because punishing possession more harshly than use is justified to control distribution of controlled substances. *People v. Cagle*, 751 P.2d 614 (Colo. 1988); *People v. Warren*, 55 P.3d 809 (Colo. App. 2002); *People v. Campbell*, 58 P.3d 1080 (Colo. App. 2002), *aff'd on other grounds*, 73 P.3d 11 (Colo. 2003).

This section and § 18-18-404 do not contain identical elements for purposes of an equal protection analysis. The general assembly's choice to classify possession as a graver offense than use is reasonably related to the general purposes of the criminal legislation. *Campbell v. People*, 73 P.3d 11 (Colo. 2003).

Conduct proscribed under this statute different than conduct proscribed by more general criminal attempt and conspiracy statutes; therefore, this statute's harsher penalty does not violate equal protection. *People v. Roy*, 723 P.2d 1345 (Colo. 1986).

Defendant's due process rights not violated when the amount of cocaine was included in the information and jury instructions. The instructions correctly charged the jury to determine the substantive offense: Possession with intent to sell the controlled substance. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001) (decided under law in effect prior to 1997 amendment).

The general assembly has chosen to make drug possession a crime requiring only a general intent: if one knowingly possesses the substance, he has violated the statute. *People v. Barry*, 888 P.2d 327 (Colo. App. 1994).

"Knowing" element. This section requires only that a person know that he or she possesses a controlled substance, and not that he or she know the precise controlled substance possessed. *People v. Perea*, 126 P.3d 241 (Colo. App. 2005).

"Knowingly" requirement does not apply to the amount of controlled substance. "Knowingly" appears only in subsection (1)(a) and applies only to the elements of the crime. The amount of controlled substance in subsection (2) operates as a sentence enhancer and does not contain a mens rea. *People v. Scheffer*, 224 P.3d 279 (Colo. App. 2009).

To sustain a conviction for possession of a controlled substance, the prosecution must show that defendant had knowledge that he or she was in possession of a narcotic drug and that he or she knowingly intended to possess the drug. This element may be established circumstantially: If the defendant has exclusive possession of the premises in which drugs are found, the jury may infer knowledge from the fact of possession. Similarly, knowledge can be inferred from the fact that defendant was the driver and sole occupant of a vehicle, irrespective of whether he or she was also the vehicle's owner. *People v. Baca*, 109 P.3d 1005 (Colo. App. 2004).

A conviction for unlawful possession of a controlled substance may be predicated on circumstantial evidence. The controlled substance need not be found on the person of the defendant as long as it is found in a place under his or her dominion and control. Whenever a person is not in exclusive possession of the premises where the drugs are found, such an inference may not be drawn unless there are statements or circumstances tending to buttress the inference of possession. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

In this case, there are four pieces of circumstantial evidence that buttress the inference: (1) The defendant fled from officers; (2) the baggies were found in the place where defendant's flight was interrupted; (3) the baggies were warmer than the night air; and (4) the baggies had not been in the location of the yard prior to apprehension of the defendant. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

"Knowingly" element of this section is applied in *People v. Romero*, 689 P.2d 692 (Colo. App. 1984).

Subsection (1)(a) is an indivisible statute, setting forth one offense that can be committed by a variety of means. *United States v. McKibbin*, 878 F.3d 967 (10th Cir. 2017).

In light of all the indications suggesting a legislative intent to create a single, unitary offense, as well as the absence of evidence to the contrary, the acts enumerated in subsection (1)(a) all represent stages in the commission of one

crime. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

The statutory language of the Uniform Controlled Substance Act of 1992 does not convey an intention by the Colorado general assembly to limit its application solely to designer drugs. Thus, the argument that pseudoephedrine is not a designer drug and therefore outside the jurisdiction of this act is invalid. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Legislature did not intend to limit representations regarding the amount to those made during the transaction. The statute is intended to target offenders whose level of involvement is that of an "ounce dealer", and all representations made by a defendant regarding the amount are indicative of an offender's level of involvement in a transaction. *People v. Abiodun*, 87 P.3d 164 (Colo. App. 2003), *aff'd on other grounds*, 111 P.3d 462 (Colo. 2005).

Quantity not an element. Subsection (3)(a) does not create an additional element of quantity for the underlying substantive offense; rather, it defines circumstances that, if proven beyond a reasonable doubt, may require a sentence greater than the presumptive minimum contained in § 18-1.3-401 (1)(a). *Whitaker v. People*, 48 P.3d 555 (Colo. 2002); *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd in part, rev'd in part on other grounds*, 169 P.3d 662 (Colo. 2007).

Nevertheless, quantity still must be proved beyond a reasonable doubt. *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo.

App. 2005), *aff'd in part, rev'd in part on other grounds*, 169 P.3d 662 (Colo. 2007).

The provision in subsection (2.3)(a) applies to possession of one gram or less of a compound, mixture, or preparation that contains any quantity of a controlled substance not to the weight of the controlled substance itself. *People v. Reeves*, 252 P.3d 1137 (Colo. App. 2010).

Where the quantity of a drug is so minute that it amounts to only a trace, there is no basis, from that fact alone, for any logical or reasonable inference that the defendant had knowledgeable possession. *People v. Theel*, 505 P.2d 964 (Colo. 1973).

When the amount of contraband is less than a usable quantity, other evidence may be necessary to establish knowing possession. *People v. Theel*, 505 P.2d 964 (Colo. 1973); *People v. Ceja*, 904 P.2d 1308 (Colo. 1995); *Richardson v. People*, 25 P.3d 54 (Colo. 2001).

The absence of a usable quantity does not constitute evidence that the defendant did not know that he possessed the drug. Rather, evidence of a usable quantity alone is sufficient evidence of knowledge to permit the case to go to a jury. Where there is not evidence of a usable quantity, the people must present other evidence regarding the defendant's knowledge to justify the jury's consideration of the element. *Richardson v. People*, 25 P.3d 54 (Colo. 2001).

Evidence sufficient to uphold conviction. The jury could infer that defendant was at the scene to sell drugs

based on the evidence that an informant had arranged a drug deal for \$300, defendant was one of two people at the location of the drug deal, and there was \$300 worth of drugs under defendant's car seat. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

Whether defendant had been previously convicted of possession of a controlled substance was not required to be proven beyond a reasonable doubt since previous conviction related to sentence enhancement statutory provision, properly deemed so by the trial court. *People v. Whitley*, 998 P.2d 31 (Colo. App. 1999).

Preponderance of the evidence is the correct standard for imposing an enhanced sentence under former subsection (2.3)(a). *People v. Wilson*, 2013 COA 75, 318 P.3d 538 (decided under law in effect prior to 2010 amendment).

When sentence enhancement provision increases punishment based on a defendant's criminal history but requires no statutory burden of proof or hearing procedure applicable to determination of the prior criminal conduct, due process is satisfied as long as the defendant receives reasonable notice of the potential for an increased sentence and the prosecution meets its burden of proving the prior criminal conduct by a preponderance of the evidence. *People v. Whitley*, 998 P.2d 31 (Colo. App. 1999).

A positive field test result is not a prerequisite for a warrantless arrest of a defendant for a drug-related offense if sufficient other factors are present to support

probable cause for such an arrest. *People v. Rayford*, 725 P.2d 1142 (Colo. 1986).

Presence at defendant's laboratory of phenylacetoacetonitrile, which can be combined with other substances to produce a schedule II controlled substance, was insufficient to support conviction of attempted manufacture and possession of schedule II controlled substance against defendant. *People v. Noland*, 739 P.2d 906 (Colo. App. 1987).

Taking delivery of a controlled substance by purchase is inevitably incident to the criminal conduct of one who delivers it; therefore, the person who purchases the controlled substance is exempt from liability as a complicitor for the crime of distribution committed by the person delivering the controlled substance. *People v. Hart*, 787 P.2d 186 (Colo. App. 1989).

Adoption of the rule that "transitory" handling of a drug may not constitute "possession" would provide no defense to defendant since jurisdictions with such rule have held that the rule is inapplicable in a case in which the defendant had flushed an alleged narcotic down the toilet when police raided the residence. *People v. Barry*, 888 P.2d 327 (Colo. App. 1994).

The prescription exception referenced in subsection (1)(a) of this section and appearing in § 18-18-302 (3)(c) is an affirmative defense, notwithstanding the fact that the general assembly did not label it as such. Thus, the trial court erred by refusing to instruct the jury that it was the prosecution's burden to disprove, beyond a reasonable doubt, evidence that defendant

attempted to gain possession of the controlled substance pursuant to a lawful order of a practitioner. *People v. Whaley*, 159 P.3d 757 (Colo. App. 2006).

While subsection (1)(a) uses both the words "sale" and "distribute" to define methods by which the statute may be violated, those words no longer have distinct legal meaning or effect as they had prior to the enactment of the Colorado Controlled Substances Act. Both are words used to describe an exchange involving the unauthorized delivery of a controlled substance. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

Where the information charged the defendant with "sale and distribution" of a controlled substance, and although the verdict found that he "sold or distributed" such a substance, thereby charging and sustaining only one offense, the trial court properly instructed the jury as to the elements of the crime of sale or distribution of cocaine and as to the pertinent definition of distribution, its refusal to instruct on the "procuring agent" defense was not error. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

With the exception of simple possession, the general assembly intended the drug-related crimes proscribed in subsection (1), including possession with intent to distribute, to be punished as class 3 felonies. *People v. Pierrie*, 30 P.3d 816 (Colo. App. 2001).

Crime of simple possession is lesser included offense of the crime of possession with the intent to distribute. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

While an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it. *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

A type of possession is a lesser-included offense of the crime of manufacture. It is evident that one who manufactures a controlled substance also possesses the substance in the course of manufacturing it; possession requires immediate and knowing control over the substance. *Patton v. People*, 35 P.3d 124 (Colo. 2001).

Possession is incidental and necessary to distribution, and convictions for possession must merge with the convictions for distribution. *People v. Abiodun*, 87 P.3d 164 (Colo. App. 2003), *aff'd* on other grounds, 111 P.3d 462 (Colo. 2005).

Manufacturing a controlled substance is a lesser included offense of child abuse based on manufacturing a controlled substance. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to § 18-6-401 (1)(c)).

No conflict between this section and § 18-1.3-401. In this section, the general assembly defined the elements of the crime of possession with intent to distribute and incorporated the presumptive range found in § 18-1.3-401 (1)(a). This section does not preclude the finding that an offense is an extraordinary risk crime and does not preclude the application of § 18-1.3-401 (10) to increase the presumptive range found

in subsection (1)(a). *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd in part, rev'd in part on other grounds*, 169 P.3d 662 (Colo. 2007).

Conspiracy to distribute a controlled substance is not an extraordinary risk crime. A plain reading of the statute does not include inchoate crimes. *People v. Valenzuela*, 216 P.3d 588 (Colo. 2009).

Because subsection (1)(a) of this section criminalizes a broader range of conduct than is encompassed by the federal sentencing guideline's definition of a "controlled substance offense" in U.S.S.G. § 4B1.2(b), any conviction under subsection (1)(a) will categorically not qualify as a "controlled substance offense" under § 4B1.2(b). *United States v. McKibbin*, 878 F.3d 967 (10th Cir. 2017).

Parolee's crime of conviction for "selling or distributing" a controlled substance in violation of subsection (1)(a) of this section comprises fraudulent offers to sell a controlled substance and does not categorically match the federal Immigration and Naturalization Act's definition of an aggravated felony. *United States v. Almanza-Vigil*, 912 F.3d 1310 (10th Cir. 2019) (decided under law in effect in 2006).

The general assembly's express use of "proximate cause" in subsection (2)(a)(III)(A) requires a defendant's distribution of fentanyl to be the proximate cause of the purchaser's death in order to enhance the defendant's penalty. If the general assembly intended to trigger the enhanced penalty any time that a fentanyl

distribution resulted in death, it could have said so. *People v. Beverly*, 2025 CO 18, 568 P.3d 398.

Evidence of a fentanyl purchaser's suicidal intent may be relevant to establish an intervening cause when the purchaser died by fentanyl overdose. The supreme court was not persuaded by the people's argument that a reasonable person distributing fentanyl should, as a matter of law, always foresee the possibility that a purchaser will die upon ingestion. A distributor should foresee that distributing fentanyl may result in death by accidental overdose but should not necessarily be expected to foresee in every case that a purchaser will make the abnormal decision to intentionally die by ingesting extraordinary amounts of fentanyl. *People v. Beverly*, 2025 CO 18, 568 P.3d 398.

Subsection (3)(a)(I) is a sentence enhancer that requires a court to impose a mandatory minimum sentence of at least four years and limits its discretion to impose a lesser sentence under § 18-1.3-401 (6). *People v. Rice*, 2015 COA 168, 378 P.3d 791 (decided under law in effect prior to the 2012 amendment).

Subsection (3)(a) requires that, when a defendant is convicted pursuant to subsection (3)(a) and another drug offense with a different sentencing regimen, the court shall apply the regimen producing the greater sentence. In this case, defendant was convicted as a special offender under this section and convicted of possession with intent to distribute under § 18-18-407. Under the

regimen in § 18-18-407, the sentencing range was eight to 48 years, under the regimen for this section, the court was required to impose a sentence of at least 16 years and one day, so the court correctly sentenced the defendant pursuant to the regimen of this section. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

For the sentence enhancer in subsection (3), a finding of the defendant's knowledge of the precise amount possessed is not required whether the person is a principal or a complicitor. Once a determination of guilt has been made, then if the amount is 28 grams or more, the court is required to sentence the defendant to a minimum presumptive sentence. *People v. Ramirez*, 997 P.2d 1200 (Colo. App. 1999), *aff'd*, 43 P.3d 611 (Colo. 2001).

Under subsection (3), defendant is not entitled to credit against sentence for time served in a supervised, nonresidential community corrections program rather than in incarceration in the department of corrections. *People v. Winters*, 789 P.2d 1120 (Colo. App. 1990).

Trial court exceeded its jurisdiction in applying sentencing alternative available under § 18-18-404 (3) to probationer who was convicted under this section. *People v. Hutchings*, 881 P.2d 466 (Colo. App. 1994).

A reviewing court's decision whether to address a challenge to multiple punishments by first comparing the acts for which punishment was separately imposed, or by first assessing whether the acts constitute separate offenses, is largely

a matter of preference, based on the circumstances of each case and the extent to which one or the other analysis is likely to completely resolve the question. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

As long as each legally distinct offense has been charged with sufficient specificity to distinguish it from other offenses and evidence at trial is sufficient to support convictions of each charge, general verdicts of guilt will be adequate to support multiple convictions. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

Convictions for possession of a controlled substance and possession of manufacturing chemicals or supplies were based on factually distinct conduct and do not violate double jeopardy. *People v. Crespi*, 155 P.3d 570 (Colo. App. 2006).

Double jeopardy and merger require defendant's possession conviction be vacated because the evidence at trial did not support a finding, beyond a reasonable doubt, that defendant possessed a quantum of drugs in addition to the one defendant gave the undercover officer. *People v. Davis*, 2015 CO 36M, 352 P.3d 950.

Double jeopardy requires that conspiracy to distribute conviction be vacated where defendant was convicted of distribution for the same quantum of drugs. *People v. Jacobs*, 2018 COA 159, 433 P.3d 163.

This section as it existed prior to its amendment in 1987 mandated sentencing defendants convicted of cocaine offenses involving more than 28 grams to the

department of corrections and did not permit sentencing of such defendants to community corrections. *People v. Winters*, 765 P.2d 1010 (Colo. 1988).

To obtain a conviction for possession of cocaine, subsection (1)(a) does not require the prosecution to prove that the defendant knowingly possessed a usable quantity of cocaine. Rather, the prosecution must prove that the defendant knowingly possessed some quantity of a controlled substance. *People v. Ceja*, 904 P.2d 1308 (Colo. 1995) (decided under former § 18-18-105 (1)(a) as it existed prior to the 1992 repeal and reenactment of the Uniform Controlled Substances Act of 1992, article 18 of title 18); *People v. Richardson*, 8 P.3d 562 (Colo. App. 2000), *aff'd*, 25 P.3d 54 (Colo. 2001).

Subsection (3)(a) was not intended to create a separate offense for possessing more than 25 grams of a schedule I or schedule II controlled substance, but instead was merely intended to be a mandatory sentencing provision. Therefore, defendant's conviction and sentence for possession of 28 grams or more of cocaine must be vacated. *People v. Salcedo*, 985 P.2d 7 (Colo. App. 1998), *rev'd on other grounds*, 999 P.2d 833 (Colo. 2000); *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

The language in the introductory paragraph of subsection (3)(a) stating "[e]xcept as otherwise provided in § 18-18-407 relating to special offenders" gives the court discretion in special offender cases to impose a minimum sentence less than the minimum sentence otherwise

required by subsection (3)(a). *People v. Coleman*, 55 P.3d 817 (Colo. App. 2002).

The definition of "cocaine" in § 18-18-102 (4), by its plain language, includes a mixture that includes any amount of cocaine. Therefore, the amount of cocaine involved in a transaction is determined by the total amount of the mixture containing the cocaine, not just the amount of cocaine in the mixture. *People v. Esquivel-Alaniz*, 985 P.2d 22 (Colo. App. 1999).

Possession of 28 grams or more of cocaine is not a separate offense, but rather triggers a mandatory sentencing provision. *People v. Ramirez*, 1 P.3d 233 (Colo. App. 1999) (decided under law in effect prior to 1997 amendment).

Possession of more than 25 grams of cocaine is an element that increases the length of sentence, not a separate offense. However, where defendant's sentence reflected the appropriate application of this section to the sentence imposed for his conviction of other charges under this section, his sentence did not need to be changed. Only the mittimus need be changed to reflect two convictions rather than three. *People v. Esquivel-Alaniz*, 985 P.2d 22 (Colo. App. 1999).

The offense classification for conspiring to sell or distribute a controlled substance is controlled by this section, despite § 18-2-206 (7)(a) that classifies conspiracy to commit a level 1 drug felony as a level 2 drug felony with an exception as otherwise provided by law. The sections do not conflict. *People v. Bice*, 2023 COA 98, 542 P.3d 709.

The general assembly intended to punish as a class 3 felony possession with intent to distribute a schedule II controlled substance when the amount possessed does not trigger the enhanced sentencing provisions of subsection (3). People v. Perry, 68 P.3d 472 (Colo. App. 2002).

Defendant's conviction and sentence for possession with intent to sell greater than 28 grams of a controlled substance must be vacated when defendant's conviction had already been enhanced by § 18-18-407; and may not be applied as a sentence enhancer to either defendant's possession conviction or his conspiracy conviction because the charge of which defendant had notice in the charging document only allowed for the 28 grams or more of a controlled substance to be applied to the possession with intent to sell conviction. People v. Pineda-Eriza, 49 P.3d 329 (Colo. App. 2001).

Sufficient evidence to support crime of possession with intent to distribute. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Evidence of a buyer-seller relationship, without more, does not constitute a conspiracy to distribute a controlled substance. People v. Lucero, 2016 COA 105, 381 P.3d 436.

When applying the buyer-seller rule to a conspiracy to distribute a controlled substance conviction, the evidence, by itself, that the defendant proposed a one-time sale of an ounce of methamphetamine between strangers was insufficient to support the conviction. People v. Rodriguez, 2024 COA 46, 553 P.3d 914.

Repeat offender penalty enhancer does not have to be considered by the jury. The fact of a prior conviction does not have to be proved a jury. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Court required to apply both § 18-1.3-801 and this section. A second violation of this section for unlawful distribution and sale of a schedule II controlled substance increases the offense to a class 2 felony. If defendant has been convicted of three previous felonies, § 18-1.3-801 (2) requires court to sentence defendant to four times the maximum of the presumptive range for a class 2 felony. People v. Cordova, 199 P.3d 1 (Colo. App. 2007).

The drug offense of possession with intent is not a per se grave or serious offense for proportionality review purposes. Not all drug offenses are per se grave or serious. Wells-Yates v. People, 2019 CO 90M, 454 P.3d 191.

The new rules announced in Wells-Yates v. People, 2019 CO 90M, 454 P.3d 191, are procedural, not substantive. Therefore, the holdings in Wells-Yates do not apply retroactively to cases on collateral review. McDonald v. People, 2024 CO 75, 560 P.3d 412.

Applied in People v. Donald, 637 P.2d 392 (Colo. 1981); People v. Nunez, 658 P.2d 879 (Colo. 1983); People v. Clements, 661 P.2d 267 (Colo. 1983); Holmes v. District Court, 668 P.2d 11 (Colo. 1983); People v. Sprow, 718 P.2d 524 (Colo. 1986); People v. Holmberg, 992 P.2d 705 (Colo. App. 1999).

18-18-406. Offenses relating to marijuana and marijuana concentrate - definitions.

(1) (a) The sale, transfer, or dispensing of more than two and one-half pounds of marijuana or more than one pound of marijuana concentrate to a minor if the person is an adult and two years older than the minor is a level 1 drug felony subject to the mandatory sentencing provision in section 18-1.3-401.5 (7).

(b) The sale, transfer, or dispensing of more than six ounces, but not more than two and one-half pounds of marijuana or more than three ounces, but not more than one pound of marijuana concentrate to a minor if the person is an adult and two years older than the minor is a level 2 drug felony.

(c) The sale, transfer, or dispensing of more than one ounce, but not more than six ounces of marijuana or more than one-half ounce, but not more than three ounces, of marijuana concentrate to a minor if the person is an adult and two years older than the minor is a level 3 drug felony.

(d) The sale, transfer, or dispensing of not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate to a minor if the person is an adult and two years older than the minor is a level 4 drug felony.

(2) (a) (I) It is unlawful for a person to knowingly process or manufacture any marijuana or marijuana concentrate or knowingly allow to be processed or manufactured on land owned, occupied, or controlled by him or her any marijuana or marijuana concentrate except as authorized pursuant to part 1 of article 280 of title 12 or part 2 of article 80 of title 27.

(II) A person who violates the provisions of subparagraph (I) of this paragraph (a) commits a level 3 drug felony.

(b) (I) Except as otherwise provided in subsection (7) of this section and except as authorized by part 1 of article 280 of title 12, part 2 of article 80 of title 27, or part 2 or 3 of this article 18, it is unlawful for a person to knowingly dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate; or attempt, induce, attempt to induce, or conspire with one or more other persons, to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.

(II) As used in subsection (2)(b)(I) of this section, "dispense" does not include labeling, as defined in section 12-280-103 (23).

(III) A person who violates any of the provisions of subparagraph (I) of this paragraph (b) commits:

(A) A level 1 drug felony and is subject to the mandatory sentencing provision in section 18-1.3-401.5 (7) if the amount of marijuana is more than fifty pounds or the amount of marijuana concentrate is more than twenty-five pounds;

(B) A level 2 drug felony if the amount of marijuana is more than five pounds but not more than fifty pounds or the amount of marijuana concentrate is more than two and one-half pounds but not more than twenty-five pounds;

(C) A level 3 drug felony if the amount is more than twelve ounces but not more than five pounds of marijuana or more than six ounces but not more than two and one-half pounds of marijuana concentrate;

(D) A level 4 drug felony if the amount is more than four ounces, but not more than twelve ounces of marijuana or more than two ounces but not more than six ounces of marijuana concentrate; or

(E) A level 1 drug misdemeanor if the amount is not more than four ounces of marijuana or not more than two ounces of marijuana concentrate.

(3) (a) (I) It is unlawful for a person to knowingly cultivate, grow, or produce a marijuana plant or knowingly allow a marijuana plant to be cultivated, grown, or produced on land that the person owns, occupies, or controls.

(II) (A) Regardless of whether the plants are for medical or recreational use, it is unlawful for a person to knowingly cultivate, grow, or produce more than twelve marijuana plants on or in a residential property; or to knowingly allow more than twelve marijuana plants to be cultivated, grown, or produced on or in a residential property.

(B) Except as provided in section 25-1.5-106 (8.5)(a.5)(I) or section 25-1.5-106 (8.6)(a)(I.5) for a medical marijuana patient or a primary caregiver with a twenty-four-marijuana-plant-count exception to subsection (3)(a)(II)(A) of this section, it is not a violation of subsection (3)(a)(II)(A) of this section if a county, municipality, or city and county law expressly permits the cultivation, growth, or production of more than twelve marijuana plants on or in a residential property and the person is cultivating, growing, or producing the plants in an enclosed and locked space and within the limit set by the county, municipality, or city and county where the plants are located.

(III) A person who violates the provisions of subsection (3)(a)(I) of this section commits:

(A) A level 3 drug felony if the offense involves more than thirty plants;

(B) A level 4 drug felony if the offense involves more than six but not more than thirty plants; or

(C) A level 1 drug misdemeanor if the offense involves not more than six plants.

(IV) A person who violates the provisions of subsection (3)(a)(II)(A) of this section commits:

(A) A level 1 drug petty offense for a first offense if the offense involves more than twelve plants, and, upon conviction, shall be punished by a fine of up to one thousand dollars;

(B) A level 1 drug misdemeanor for a second or subsequent offense if the offense involves more than twelve but not more than twenty-four plants; or

(C) A level 3 drug felony for a second or subsequent offense if the offense involves more than twenty-four plants.

(V) Prosecution under subsection (3)(a)(II)(A) of this section does not prohibit prosecution under any other section of law.

(b) It is not a violation of this subsection (3) if:

(I) The person is lawfully cultivating medical marijuana pursuant to the authority granted in section 14 of article XVIII of the state constitution in an enclosed and locked space;

(II) The person is lawfully cultivating marijuana in an enclosed and locked space pursuant to the authority granted in section 16 of article XVIII of the state constitution; except that, if the cultivation area is located in a residence and:

(A) A person under twenty-one years of age lives at the residence, the cultivation area itself must be enclosed and locked; and

(B) If no person under twenty-one years of age lives at the residence, the external locks of the residence constitutes an enclosed and locked space. If a person under twenty-one years of age enters the residence, the person must ensure that access to the cultivation site is reasonably restricted for the duration of that person's presence in the residence.

(c) For purposes of this subsection (3):

(I) "Flowering" means the reproductive state of the cannabis plant in which there are physical signs of flower budding out of the nodes in the stem.

(II) "Plant" means any cannabis plant in a cultivating medium which plant is more than four inches wide or four inches high or a flowering cannabis plant regardless of the plant's size.

(III) "Residential property" means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation. "Residential property" also includes the real property surrounding a structure, owned in common with the structure, that includes one or more single units providing complete independent living facilities.

(3.5) A person is not in compliance with the authority to assist another individual granted in section 14 (2)(b) or section 16 (3)(e) of article XVIII of the state constitution and is subject to the offenses and penalties of subsection (3) of this section if the person possesses any marijuana plant he or she is growing on behalf of another individual, unless he or she is the primary caregiver for the individual and is in compliance with the requirements of section 25-1.5-106.

(4) On or after March 1, 2020:

(a) Repealed.

(b) A person who possesses more than six ounces of marijuana or more than three ounces of marijuana concentrate commits a level 1 drug misdemeanor.

(c) A person who possesses more than two ounces of marijuana but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate commits a level 2 drug misdemeanor.

(5) (a) Repealed.

(b) (I) Except as described in section 18-1-711, a person who openly and publicly displays, consumes, or uses two ounces or less of marijuana commits a drug petty offense and, upon conviction thereof, shall be punished by a fine of up to one hundred dollars and up to twenty-four hours of community service.

(II) Open and public display, consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate is deemed possession thereof, and violations shall be punished as provided for in subsection (4) of this section.

(III) Except as otherwise provided for in subsection (5)(b)(I) of this section, consumption or use of marijuana or marijuana concentrate is deemed possession thereof, and violations must be punished as provided for in subsection (4) of this section.

(IV) Public display, consumption, or use of marijuana or marijuana concentrate pursuant to the provisions of section 44-10-609, when such display, consumption, or use is within the licensed premises of a marijuana hospitality business licensed pursuant to section 44-10-609, is not a violation of this subsection (5).

(V) Public display, consumption, or use of retail marijuana or retail marijuana concentrate pursuant to the provisions of section 44-10-610, when such display, consumption, or use is within the licensed premises of a retail marijuana hospitality and sales business licensed pursuant to section 44-10-610 and when an individual's display, consumption, or use does not exceed the sales limit established by the state licensing authority by rule pursuant to section 44-10-203 (2)(ff)(II), is not a violation of this subsection (5).

(c) Transferring or dispensing not more than two ounces of marijuana from one person to another for no consideration is a drug petty offense and is not deemed dispensing or sale thereof.

(5.5) (a) It is unlawful for a person to transfer marijuana or marijuana concentrate at no cost to a person if the transfer is in any way related to remuneration for any other service or product.

(b) A violation of this subsection (5.5) is a level 1 drug misdemeanor.

(6) The provisions of this section do not apply to any person who possesses, uses, prescribes, dispenses, or administers any drug classified under group C guidelines of the national cancer institute, as amended, approved by the federal food and drug administration.

(7) The provisions of this section do not apply to any person who possesses, uses, prescribes, dispenses, or administers dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product, pursuant to part 1 of article 280 of title 12 or part 2 of article 80 of title 27.

Source: **L. 92:** Entire article R&RE, p. 358, § 1, effective July 1. **L. 95:** (10) amended, p. 206, § 21, effective April 13. **L. 98:** (12) added, p. 1436, § 6, effective July 1. **L. 2000:** (12) amended, p. 1360, § 43, effective July 1, 2001. **L. 2002:** (4)(a)(II), (4)(b)(II), (7)(c), (8)(a)(II)(B), (8)(b)(III)(B), and (12) amended, pp. 1580, 1583, §§ 5, 14, effective July 1; (3)(a)(I), (7)(a), (7)(b), and (7)(c) amended, p. 1519, § 213, effective October 1. **L. 2003:** (7)(c) and (9) amended, p. 1428, § 12, effective April 29. **L. 2009:** (12) repealed, (HB 09-1266), ch. 347, p. 1815, § 6, effective August 5. **L. 2010:** (1), (3), (4), (5), (6), (7), and (8) amended and (7.5) added, (HB 10-1352), ch. 259, p. 1166, § 6, effective August 11. **L. 2011:** (3)(a)(II) and (3)(b) amended, (HB 11-1303), ch. 264, p. 1157, § 35, effective August 10. **L. 2012:** (1) and (3)(a)(I) amended, (SB 12-020), ch. 225, p. 988, § 6, effective May 29; (2) amended, (SB 12-175), ch. 208, p. 874, § 133, effective July 1; (6)(a)(I), (6)(b)(I), (6)(b)(II), and (11) amended, (HB 12-1311), ch. 281, p. 1622, § 56, effective July 1. **L. 2013:** Entire section R&RE, (SB 13-250), ch. 333, p. 1913, § 11, effective October 1. **L. 2014:** (3) amended, (HB 14-1122), ch. 39, p. 201, § 5, effective March 17. **L. 2016:** (3)(b)(I) amended, (SB 16-080), ch. 247, p. 1017, § 1, effective June 8; (5.5) added, (HB 16-1261), ch. 338, p. 1378, § 11, effective June 10. **L. 2017:** (3.5) added, (HB 17-1221), ch. 401, p. 2091, § 2, effective July 1; (3)(a) amended and (3)(c) added, (HB 17-1220), ch. 402, p. 2095, § 2, effective January 1, 2018. **L. 2019:** (5)(b)(IV) and (5)(b)(V) added, (HB 19-1230), ch. 340, p. 3116, § 9, effective August 2; (2)(a)(I), (2)(b)(I), (2)(b)(II), and (7) amended, (HB 19-1172), ch. 136, p. 1679, § 107, effective October 1; (5)(b)(IV) and (5)(b)(V) amended, (HB 19-1230), ch. 340, p. 3127, § 23, effective January 1, 2020; (4) and (5)(a)(II) amended, (HB 19-1263), ch. 291, p. 2677, § 2, effective March 1, 2020. **L. 2021:** (5)(a) repealed and (5)(b)(III) amended, (HB 21-1090), ch. 157, p. 901, § 3, effective May 20.

Editor's note: (1) This section is similar to former § 18-18-106 as it existed prior to 1992.

(2) Amendments to subsection (7)(c) by House Bill 02-1237 and House Bill 02-1046 were harmonized.

(3) Subsection (4)(a)(II) provided for the repeal of subsection (4)(a), effective March 1, 2020. (See L. 2019, p. 2677.)

Cross references: For the legislative declaration contained in the 2002 act amending subsections (3)(a)(I), (7)(a), (7)(b), and (7)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2012 act amending subsections (1) and (3)(a)(I), see section 1 of chapter 225, Session Laws of Colorado 2012. For the legislative declaration in HB 17-1221, see section 1 of chapter 401, Session Laws of Colorado 2017. For the legislative declaration in HB 17-1220, see section 1 of chapter 402, Session Laws of Colorado 2017.

ANNOTATION

Law reviews. For article, "When May a Probation Condition Allowing Use of Medical Marijuana Violate the Code of Judicial Conduct? Judicial Respect for the Law and Promoting Public Confidence in the Judiciary", see 89 Denv. U.L. Rev. 1017 (2012). For article, "Amendment 64: Five Years Later", see 46 Colo. Law. 34 (Oct. 2017). For article, "In 'Case' You Missed It—2020-21: Real Estate Case Law Highlights", see 51 Colo. Law. 44 (Jan. 2022).

Annotator's note. Since § 18-18-406 is similar to § 18-18-406 as it existed prior to its 2013 repeal and reenactment, relevant cases construing that provision and former provisions similar to that section have been included in the annotations to this section.

Double jeopardy. The elements of the offense of possession of eight or more

ounces of marihuana and the offense of cultivation of marihuana are not identical; therefore, conviction of both offenses does not violate constitutional protections against double jeopardy. *People v. Benson*, 124 P.3d 851 (Colo. App. 2005).

Possession of hashish constitutionally treated differently. Because hashish is readily distinguishable from and potentially more intoxicating than marijuana, the general assembly may constitutionally treat possession of those substances differently, subsection (1) and (4)(b)(I), even though hashish falls into the statutory definition of marijuana in § 12-22-303 (17). *People v. Velasquez*, 666 P.2d 567 (Colo. 1983).

As is possession of hash oil. Since the active ingredient in hash oil is THC and occurs in greater concentrations in hash oil than in hashish, statute providing for more

severe punishment for possession of hashish and hash oil is based upon reasonable classification and does not deny equal protection. *People v. Siwierka*, 683 P.2d 356 (Colo. 1984).

Penalty scheme does not violate equal protection even though lesser penalties for criminal conspiracy are established under § 18-2-206. *People v. Finnessey*, 747 P.2d 673 (Colo. 1987).

The phrase "intent to distribute" is not unconstitutionally vague. The phrase is a term that a person of ordinary intelligence can understand. The quantity required to permit the fact finder to infer that the possessor intended to distribute a controlled substance is evidentiary in nature and necessarily depends upon all the facts and circumstances of the case. *People v. Clendenin*, 232 P.3d 210 (Colo. App. 2009) (decided prior to 2010 amendment).

The general assembly cannot modify the affirmative defense found in article XVIII, § 14 (2)(a), to a charge pursuant to subsection (3)(a) of this section. The trial court properly excluded the provisions of subsections (3)(b)(I) and (3.5) of this section in the affirmative defense jury instruction. Inclusion of those provisions would dilute the affirmative defense, and the general assembly has no authority to dilute constitutional rights. A statute that purports to add substantive elements to a defense defined in the constitution cannot trump the constitution. *People v. Cox*, 2021 COA 68, 493 P.3d 914.

The defense in § 14 (4)(b) of article XVIII of the state constitution for

possessing more than six plants cannot be raised based on a claim of medical necessity obtained after a defendant is charged with possession of marijuana plants. *People v. Fioco*, 2014 COA 22, 342 P.3d 530 (decided under former law).

The distinction between marihuana and marihuana concentrate as set forth in §§ 12-22-303 (17) and 12-22-303 (18) complies with both the equal protection and due process requirements of the Colorado and United States constitutions. *People v. Rickstrew*, 712 P.2d 1008 (Colo. 1986).

Section 16 of article XVIII of the state constitution deprived the state of its power to continue to prosecute cases for possession of less than one ounce of marijuana that had not gone to trial and cases when there was a nonfinal conviction and a pending right to appeal on the effective date of that section, December 10, 2012. *People v. Boyd*, 2017 CO 2, 387 P.3d 755; *Russell v. People*, 2017 CO 3, 387 P.3d 750; *People v. Wolf*, 2017 CO 4, 387 P.3d 753.

The mitigating statute, § 18-1-410 (1)(f)(I), permits the provisions of art. XVIII, § 16, of the state constitution (known as amendment 64) to apply retroactively to any appeal pending on or after December 10, 2012. Therefore, defendant's convictions for possession of less than one ounce of marijuana and possession of marijuana concentrate must be vacated. *People v. Russell*, 2014 COA 21M, 396 P.3d 71, *aff'd*, 2017 CO 3, 387 P.3d 750.

"Hash-oil extraction" is manufacturing, not processing, and is not

protected as a personal use authorized under amendment 64. When amendment 64 was approved, "processing" marijuana had a settled meaning and did not include hash-oil extraction. Individual could be charged with processing or manufacturing marijuana or marijuana concentrate in violation of this section for extracting hash oil using butane. *People v. Lente*, 2017 CO 74, 406 P.3d 829.

"Land" as used in subsection (3)(a)(I), in the context of a marijuana grow operation, excludes an enclosed, locked space on residential property. *People v. Garcia-Gonzalez*, 2020 COA 166, 478 P.3d 1288.

When the facts warrant, prosecution can proceed under both subsections (3)(a)(I) and (3)(a)(II); prosecution under subsection (3)(a)(II) does not preclude prosecution under other applicable statutes. *People v. Garcia-Gonzalez*, 2020 COA 166, 478 P.3d 1288.

Subsection (5) does not state an element of felony distribution and the language used demonstrates a deliberate choice by the general assembly to differentiate the crime of possession from the crime of dispensing or sale under subsection (8)(b)(I) and the circumstances giving rise to the crime of possession. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990) (decided prior to 2010 amendment).

The absence of the phrase "[a]ny provision of this article to the contrary notwithstanding" in subsection (7)(b) does not indicate that any statutory provisions of article 18 of title 18 that are

"to the contrary" of that subsection are not overridden by it, nor does the absence of this phrase require a court to instruct a jury in accordance with subsection (5). *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

The 1982 addition of subsection (8)(b)(I) makes clear that subsections (8)(b)(I) and (5) are independent of one another, define distinctly different crimes, and effectuate different legislative goals. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990).

Multiple drug convictions sustainable if factually distinct. Both of the defendant's marihuana convictions are sustainable because the facts suggest one package of marihuana was intended for personal use and the other package was intended for distribution. *People v. Valencia*, 169 P.3d 212 (Colo. App. 2007).

There was no basis for a jury to have acquitted defendant on felony distribution charge under subsection (8)(b)(I) and at the same time find him guilty of possession under subsection (5) because the transactions involved consideration and the fact that defendant's motive was a desire to develop a friendship and sexual relationship with the detective rather than profit did not change the character of the transaction. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990).

Possession of eight ounces of marijuana or more is a lesser included offense of possession with the intent to distribute marijuana. Each element of the possession offense is included in the offense of possession with intent to distribute except

the quantity; however, the quantity is a sentence enhancer, not an essential element of the offense. *People v. Garcia*, 251 P.3d 1152 (Colo. App. 2010).

Possession of marijuana is not a lesser included offense of transferring marijuana under subsection (7)(b) or contributing to the delinquency of a minor under § 18-6-701. *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

Possession not lesser included offense to crime of introducing contraband. Because proof of possession is not an essential element to the crime of introducing contraband (§ 18-8-203), the crime of possession of cannabis cannot be a lesser included offense thereof. *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982).

Probable cause to believe defendant committed the crime of possession of contraband under § 18-8-204.1 where defendant tested positive for marijuana and was in the custody of the department of corrections on the date of the offense and evidence of use assumes possession. *People v. Smith*, 984 P.2d 50 (Colo. 1999).

A person may not be subject to a custodial arrest for violating this section. The plain meaning of this section is that a peace officer may issue a summons and complaint and may subject a person only to a non-custodial arrest, under which circumstances a peace officer may conduct only a pat-down search for weapons and search for instrumentalities or evidence of the specific crime for which the officer had probable cause to make an arrest. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

Applying this statute, which criminalizes the possession and growing of marijuana, to a person who conducts such activities for religious reasons does not violate that person's rights under the free exercise clauses of the federal and state constitutions. *People v. Torline*, 2020 COA 160, 487 P.3d 1284.

"Arrest and detention", as used in subsection (2), are synonymous terms; both refer to "noncustodial" arrests. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

Even though a person may not be subject to a custodial arrest for possessing one ounce or less of marihuana in violation of this section, the non-custodial arrest of such a person may permit not only a search for weapons, but also an extensive search for the instrumentalities of the crime. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

Lawful possession of marihuana under subsection (10) is an affirmative defense to charges of unlawful possession with intent to distribute marihuana and unlawful possession of eight or more ounces of marihuana. The provision provides a legal justification to what would otherwise be criminally culpable behavior. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

Question of the validity of § 42-2-124 was ripe for determination where court stayed its surrender of defendant's license pending appeal after convicting defendant of drug use under this section. *People v. Smith*, 944 P.2d 639 (Colo. App. 1997).

Subsection (10) does not preclude a finding of probable cause to conduct a

search based upon the smell of burning marihuana. People v. Mendez, 948 P.2d 105 (Colo. App. 1997), aff'd on other grounds, 986 P.2d 275 (Colo. 1999).

Prosecution's theory that defendants were fraudulently using their medical marijuana licenses to illegally distribute marijuana was supported by sufficient evidence. The prosecution presented evidence that the amount of marijuana was more consistent with distribution than with personal use; the defendant's marijuana

grow demonstrated the plants were grown for distribution, not personal medical use; and the presence of guns and cash at the residence strongly suggested that the defendants were engaged in illegal distribution. People v. Douglas, 2015 COA 155, 412 P.3d 785.

Applied in People v. Root, 650 P.2d 562 (Colo. 1982); Corr v. District Court, 661 P.2d 668 (Colo. 1983); People v. Hazelhurst, 662 P.2d 1081 (Colo. 1983).

18-18-406.1. Unlawful use or possession of synthetic cannabinoids or salvia divinorum.

(1) Except as provided in section 25-5-427 or article 10 of title 44, it is unlawful for any person to use or possess any amount of any synthetic cannabinoid or salvia divinorum.

(2) A person who violates any provision of subsection (1) of this section commits a level 2 drug misdemeanor.

Source: L. 2011: Entire section added, (SB 11-134), ch. 261, p. 1139, § 2, effective July 1. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1917, § 12, effective October 1. **L. 2023:** (1) amended, (SB 23-271), ch. 444, p. 2617, § 10, effective June 7.

18-18-406.2. Unlawful distribution, manufacturing, dispensing, sale, or cultivation of synthetic cannabinoids or salvia divinorum.

(1) Except as provided in section 25-5-427 or article 10 of title 44, it is unlawful for any person knowingly to:

(a) Manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, any amount of any synthetic cannabinoid or salvia divinorum;

(b) Induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, any amount of any synthetic cannabinoid or salvia divinorum; or

(c) Cultivate salvia divinorum with intent to dispense, sell, or distribute any amount of the salvia divinorum.

(2) A person who violates any provision of subsection (1) of this section commits a level 3 drug felony.

(3) Notwithstanding the provisions of subsection (2) of this section, a person who violates any provision of subsection (1) of this section by dispensing, selling, or distributing any amount of any synthetic cannabinoid or salvia divinorum commits a level 2 drug felony if the person:

(a) Dispenses, sells, or distributes the synthetic cannabinoid or salvia divinorum to a minor who is less than eighteen years of age; and

(b) Is at least eighteen years of age and at least two years older than said minor.

(4) As used in this section, "dispense" does not include labeling, as defined in section 12-280-103 (23).

Source: L. 2011: Entire section added, (SB 11-134), ch. 261, p. 1139, § 2, effective July 1. **L. 2012:** (4) amended, (HB 12-1311), ch. 281, p. 1623, § 57, effective July 1. **L. 2013:** (2) and (3) amended, (SB 13-250), ch. 333, p. 1917, § 13, effective October 1. **L. 2019:** (4) amended, (HB 19-1172), ch. 136, p. 1680, § 108, effective October 1. **L. 2023:** IP(1) amended, (SB 23-271), ch. 444, p. 2618, § 11, effective June 7.

18-18-406.3. Medical use of marijuana by persons diagnosed with debilitating medical conditions - unlawful acts - penalty - medical marijuana program cash fund.

(1) The general assembly hereby finds and declares that:

(a) Section 14 of article XVIII of the state constitution was approved by the registered electors of this state at the 2000 general election;

(b) Section 14 of article XVIII of the state constitution creates limited exceptions to the criminal laws of this state for patients, primary care givers, and physicians concerning the medical use of marijuana by a patient to alleviate an appropriately diagnosed debilitating medical condition;

(c) Section 14 of article XVIII of the state constitution requires a state health agency designated by the governor to establish and maintain a confidential registry of patients authorized to engage in the medical use of marijuana;

(d) The governor, in accordance with paragraph (h) of subsection (1) of section 14 of article XVIII of the state constitution, has designated the department of public health and environment, referred to in this section as the department, to be the state health agency responsible for the administration of the medical marijuana program;

(e) Section 14 of article XVIII of the state constitution requires the department to process the applications of patients who wish to qualify for and be placed on the confidential registry for the medical use of marijuana, and to issue registry identification cards to patients who qualify for placement on the registry;

(f) Section 14 of article XVIII of the state constitution sets forth the lawful limits on the medical use of marijuana;

(g) Section 14 of article XVIII of the state constitution requires the general assembly to determine and enact criminal penalties for specific acts described in the constitutional provision;

(h) In interpreting the provisions of section 14 of article XVIII of the state constitution, the general assembly has applied the definitions contained in subsection (1) of the constitutional provision and has attempted to give the remaining words of the constitutional provision their plain meaning;

(i) This section reflects the considered judgment of the general assembly regarding the meaning and implementation of the provisions of section 14 of article XVIII of the state constitution.

(2) (a) Any person who fraudulently represents a medical condition to a physician, the department, or a state or local law enforcement official for the purpose of falsely obtaining a marijuana registry identification card from the department, or for the purpose of avoiding arrest and prosecution for a marijuana-related offense, commits a class 2 misdemeanor.

(b) If an officer or employee of the department receives information that causes such officer or employee reasonably to believe that fraudulent representation, as described in paragraph (a) of this subsection (2), has occurred, such officer or employee shall report the information to either the district attorney of the county in which the applicant for the marijuana registry identification card resides, or to the attorney general.

(3) The fraudulent use or theft of any person's marijuana registry identification card, including, but not limited to, any card that is required to be returned to the department pursuant to section 14 of article XVIII of the state constitution, is a class 2 misdemeanor.

(4) The fraudulent production or counterfeiting of, or tampering with, one or more marijuana registry identification cards is a class 2 misdemeanor.

(5) Any person, including, but not limited to, any officer, employee, or agent of the department, or any officer, employee, or agent of any state or local law enforcement agency, who releases or makes public any confidential record or any confidential information contained in any such record that is provided to or by the marijuana registry or primary caregiver registry of the department without the written authorization of the marijuana registry patient commits a class 2 misdemeanor.

(6) The use, possession, manufacturing, dispensing, selling, or distribution of a synthetic cannabinoid, as defined in section 18-18-102 (34.5), shall not be considered an exception to the criminal laws of this state for the purposes of this section or of section 14 of article XVIII of the state constitution.

(7) An owner, officer, or employee of a business licensed pursuant to article 10 of title 44, or an employee of the state medical marijuana licensing authority, a local medical marijuana licensing authority, or the department of public health and environment, who releases or makes public a patient's medical record or any confidential information contained in any such record that is provided to or by the business licensed pursuant to article 10 of title 44 without the written authorization of the patient commits a class 2 misdemeanor; except that the owner, officer, or employee shall release the records or information upon request by the state or local medical marijuana licensing authority. The records or information produced for review by the state or local licensing authority shall not become public records by virtue of the disclosure and may be used only for a purpose authorized by article 10 of title 44 or for another state or local law enforcement purpose. The records or information shall constitute medical data as defined by section 24-72-204 (3)(a)(I). The state or local medical marijuana licensing authority may disclose any records or information so obtained only to those persons directly involved with any investigation or proceeding authorized by article 10 of title 44 or for any state or local law enforcement purpose.

Source: **L. 2001:** Entire section added, p. 471, § 1, effective April 27. **L. 2011:** (6) added, (SB 11-134), ch. 261, p. 1140, § 3, effective July 1; (7) added, (HB 11-1043), ch. 266, p. 1215, § 28, effective July 1. **L. 2015:** (5) amended, (SB 15-014), ch. 199, p. 688, § 6, effective May 18. **L. 2018:** (7) amended, (HB 18-1023), ch. 55, p. 587, § 13, effective October 1. **L. 2019:** (7) amended, (SB 19-224), ch. 315, p. 2937, § 17, effective January 1, 2020. **L. 2021:** (2)(a), (3), (4), (5), and (7) amended, (SB 21-271), ch. 462, p. 3218, § 379, effective March 1, 2022.

Editor's note: Subsection (7) was numbered as subsection (6) in House Bill 11-1043 but was renumbered on revision for ease of location.

Cross references: For the legislative declaration in SB 15-014, see section 1 of chapter 199, Session Laws of Colorado 2015.

ANNOTATION

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The legislative declaration of this section reflects the narrow purpose of benefitting medical marijuana patients with debilitating medical conditions by creating exceptions to some of the laws regulating unlawful drugs. It cannot reasonably be presumed that in enacting this section the general assembly exercised the full police power of the state or provided criminal sanctions for all possible medical marijuana related offenses. People v. Montante, 2015 COA 40, 351 P.3d 530.

This section does not specifically address physician conduct, and the acts criminalized by this section are not acts specifically made unlawful by the Colorado Medical Marijuana Code. People v. Montante, 2015 COA 40, 351 P.3d 530.

This section does not expressly criminalize all improper conduct by physicians in connection with medical marijuana. People v. Montante, 2015 COA 40, 351 P.3d 530.

Primary care-giver must do more than merely supply a patient with marijuana for medical use in order to meet the constitutional requirement of having a significant responsibility for managing the well-being of a patient who has a debilitating medical condition. People v. Clendenin, 232 P.3d 210 (Colo. App. 2009).

Primary care-giver affirmative defense does not apply where the provision of

marijuana is itself the substance of the relationship. People v. Clendenin, 232 P.3d 210 (Colo. App. 2009).

There is no clear legislative intent to limit offenses related to medical marijuana to the medical marijuana registry fraud statute, and this section does not preclude prosecution of a physician under the attempt to influence a public servant statute. People v. Montante, 2015 COA 40, 351 P.3d 530.

Written waiver requirement of subsection (5) of this section is inapplicable where defendant raised affirmative defense of medical use. Physician's rebuttal testimony concerning his conversations with defendant was a lawful disclosure under § 13-90-107 (1)(d) rather than an unlawful disclosure of defendant's confidential medical marijuana patient registry information. People v. Sexton, 2012 COA 26, 296 P.3d 157.

A submitted physician certification includes representations made by the physician to the department of public health and environment for the purpose of obtaining a marijuana registry identification card for a patient. The plain language of subsection (2)(a) criminalizes such conduct by physicians if done fraudulently and for the purpose of someone else falsely obtaining an identification card. People v. Montante, 2015 COA 40, 351 P.3d 530.

18-18-406.4. Unlawful advertising of marijuana - exception.

(1) A person who is not licensed to sell medical marijuana or retail marijuana pursuant to article 10 of title 44, or pursuant to the laws regarding medical or retail marijuana under the laws of another state, who knowingly advertises in a newspaper, magazine, handbill, or other publication or on the internet the unlawful sale of marijuana, marijuana concentrate, or a marijuana product by a person not licensed to sell marijuana, marijuana concentrate, or a marijuana product commits a level 2 drug misdemeanor.

(2) The provisions of subsection (1) of this section do not apply to a primary caregiver, as defined in section 14 (1)(f) of article XVIII of the state constitution, who advertises that the primary caregiver is available to be a primary caregiver to a patient, as defined in section 14 (1)(d) of article XVIII of the state constitution.

Source: L. 2017: Entire section added, (SB 17-015), ch. 104, p. 383, § 1, effective September 1. **L. 2019:** (1) amended, (SB 19-224), ch. 315, p. 2938, § 18, effective January 1, 2020.

18-18-406.5. Unlawful use of marijuana in a detention facility.

(1) A person confined in a detention facility in this state who possesses or uses marijuana commits a level 1 drug misdemeanor.

(2) Repealed.

(3) For purposes of this section, "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.

Source: L. 99: Entire section added, p. 798, § 16, effective July 1. **L. 2010:** (1) and (2) amended, (HB 10-1352), ch. 259, p. 1174, § 19, effective August 11. **L. 2013:** (1) amended, (SB 13-250), ch. 333, p. 1917, § 14, effective October 1. **L. 2014:** (1) amended and (2) repealed, (SB 14-163), ch. 391, p. 1979, § 24, effective June 6.

ANNOTATION

This section does not violate the equal treatment option available under § 18-18-404. This section presents a classification protection clause of the Colorado or U.S. Constitution by failing to provide the

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that is neither arbitrary nor irrational. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

By intentionally omitting marihuana from the treatment option available under § 18-18-404, the legislature explicitly chose to offer the treatment option only to those addicted to other substances. Such a classification has a rational basis based upon real in fact differences between the substances. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

This section is directly related to the legislature's purpose of punishing those who use marihuana in a detention facility. Section 18-18-404 is clear and unambiguous in exempting this section from its provisions, including the treatment option.

The legislature explicitly intended that marihuana users not be given the treatment option provided for in § 18-18-404. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

Defendant's argument rests on the misleading presumption that, because use of a schedule I or II controlled substance is a more serious crime than the use of marihuana in a detention facility, any opportunity given those charged with the more serious crime must also be given to those charged with the less serious crime. Such symmetry of punishment, however, is not required by the constitution where valid classifications, based on varieties of evils, exist. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

18-18-406.6. Extraction of marijuana concentrate - definitions.

(1) It shall be unlawful for any person who is not licensed pursuant to article 10 of title 44 to knowingly manufacture marijuana concentrate using an inherently hazardous substance.

(2) It shall be unlawful for any person who is not licensed pursuant to article 10 of title 44 who owns, manages, operates, or otherwise controls the use of any premises to knowingly allow marijuana concentrate to be manufactured on the premises using an inherently hazardous substance.

(3) A person who violates this section commits a level 2 drug felony.

(4) As used in this section, unless the context otherwise requires, "inherently hazardous substance" means any liquid chemical, compressed gas, or commercial product that has a flash point at or lower than thirty-eight degrees celsius or one hundred degrees fahrenheit, including butane, propane, and diethyl ether and excluding all forms of alcohol and ethanol.

Source: L. 2015: Entire section added, (HB 15-1305), ch. 242, p. 896, § 2, effective July 1. **L. 2018:** (1) and (2) amended, (HB 18-1023), ch. 55, p. 587, § 14, effective October 1. **L. 2019:** (1) and (2) amended, (SB 19-224), ch. 315, p. 2938, § 19, effective January 1, 2020.

Cross references: For the legislative declaration in HB 15-1305, see section 1 of chapter 242, Session Laws of Colorado 2015.

18-18-406.7. Unlawful possession of cathinones. (Repealed)

Source: L. 2012: Entire section added, (HB 12-1310), ch. 268, p. 1405, § 31, effective June 7.
L. 2013: Entire section repealed, (SB 13-250), ch. 333, p. 1917, § 15, effective October 1.

18-18-406.8. Unlawful distribution, manufacturing, dispensing, or sale of cathinones. (Repealed)

Source: L. 2012: Entire section added, (HB 12-1310), ch. 268, p. 1406, § 31, effective June 7.
L. 2013: Entire section repealed, (SB 13-250), ch. 333, p. 1917, § 15, effective October 1.

18-18-406.9. Unlawful distribution or purchase of dextromethorphan - penalty - preemption - definitions.

(1) It is unlawful for a seller, retailer, or vendor to knowingly or willfully dispense, sell, or distribute a finished drug product containing any quantity of dextromethorphan to a person less than eighteen years of age.

(2) (a) A seller, retailer, or vendor making a retail sale of a finished drug product containing any quantity of dextromethorphan must require and obtain proof of age from the purchaser before completing the sale unless the seller, retailer, or vendor reasonably presumes from the purchaser's outward appearance that the purchaser is at least twenty-five years of age.

(b) This section does not require a retail entity to:

(I) Place products in a specific place within a store;

(II) Impose other restrictions on consumers' direct access to finished drug products; or

(III) Maintain transaction records.

(3) A seller, retailer, or vendor who violates subsection (1) or (2)(a) of this section commits an unclassified petty offense and, upon conviction thereof, shall be punished as follows:

(a) For a first offense, the court shall issue a written warning to the seller, retailer, or vendor; and

(b) For a second or subsequent offense, the seller, retailer, or vendor shall pay a fine of not more than two hundred dollars.

(4) This section does not apply to a medication containing dextromethorphan, which medication is sold pursuant to a valid prescription.

(5) If a seller, retailer, or vendor is an employer and trains its employees concerning this section's restrictions on the distribution of medications containing dextromethorphan, such fact is an affirmative defense to any prosecution for an offense described in this section.

(6) As used in this section, unless the context otherwise requires:

(a) "Finished drug product" means a drug legally marketed under the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. sec. 301 et seq., that is in finished dosage form.

(b) "Proof of age" means any document issued by a governmental agency that contains a description or photograph of the person and gives the person's date of birth, including a passport, military or state identification card, or driver's license.

(7) The general assembly finds that the regulation of access to products containing dextromethorphan is a matter of statewide concern, and, therefore, this section preempts any ordinance or code of any city, county, city and county, town, or other political subdivision of this state regulating the distribution or purchase of dextromethorphan.

Source: L. 2018: Entire section added, (HB 18-1307), ch. 211, p. 1346, § 1, effective August 8.

18-18-407. Special offender - definitions.

(1) A person who commits a felony offense pursuant to this part 4 under any one or more of the following aggravating circumstances commits a level 1 drug felony and is a special offender:

(a) The defendant committed the violation as part of a pattern of manufacturing, sale, dispensing, or distributing controlled substances, which violation is a felony under applicable laws of Colorado, which constituted a substantial source of that person's income, and in which that person manifested special skill or expertise;

(b) The defendant committed the violation in the course of, or in furtherance of, a conspiracy with one or more persons to engage in a pattern of manufacturing, sale, dispensing, or distributing a controlled substance, which offense is a felony under applicable laws of Colorado,

and the defendant did, or agreed that he or she would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or manufacture, sale, dispensing, or distributing, or give or receive a bribe, or use force in connection with such manufacture, sale, dispensing, or distribution;

(c) The defendant committed the violation and in the course of that violation, introduced or imported into the state of Colorado more than fourteen grams of any schedule I or II controlled substance listed in part 2 of this article 18; more than seven grams of methamphetamine, heroin, ketamine, or cathinones; ten milligrams of flunitrazepam; or any material, compound, mixture, or preparation that weighs more than four grams and contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof as described in section 18-18-204 (2)(g);

(d) (I) The defendant used, displayed, or possessed on his or her person or within his or her immediate reach, a deadly weapon as defined in section 18-1-901 (3)(e) at the time of the commission of a violation; or

(II) The defendant or a confederate of the defendant possessed a firearm, as defined in section 18-1-901 (3)(h), to which the defendant or confederate had access in a manner that posed a risk to others or in a vehicle the defendant was occupying at the time of the commission of the violation;

(e) The defendant solicited, induced, encouraged, intimidated, employed, hired, or procured a child, as defined in section 19-1-103, to act as the defendant's agent to assist in the unlawful distribution, manufacturing, dispensing, sale, or possession for the purposes of sale of any controlled substance at the time of the commission of the violation. It is not a defense pursuant to this subsection (1)(e) that the defendant did not know the age of the child.

(f) (I) The defendant engaged in a continuing criminal enterprise by violating any felony provision; and

(II) The violation is a part of a continuing series of two or more violations of this part 4 on separate occasions:

(A) Which are undertaken by that person in concert with five or more other persons with respect to whom that person occupies a position of organizer, supervisor, or any other position of management; and

(B) From which that person obtained substantial income or resources.

(g) (I) The defendant is convicted of selling, distributing, possessing with intent to distribute, manufacturing, or attempting to manufacture any controlled substance either within or upon the grounds of any public or private elementary school, middle school, junior high school, or high school, vocational school, or public housing development; within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley,

parkway, sidewalk, public park, playground, or other area or premises that is accessible to the public; within any private dwelling that is accessible to the public for the purpose of the sale, distribution, use, exchange, manufacture, or attempted manufacture of controlled substances in violation of this article; or in any school vehicle, as defined in section 42-1-102 (88.5), C.R.S., while such school vehicle is engaged in the transportation of persons who are students.

(II) The department of education may cooperate with local boards of education and the officials of public housing developments and make recommendations regarding the uniform implementation and furnishing of notice of the provisions of this paragraph (g). Such recommendations may include, but need not be limited to, the uniform use of signs and other methods of notification that may be used to implement this paragraph (g).

(III) For the purposes of this section, the term "public housing development" means any low-income housing project of any state, county, municipal, or other governmental entity or public body owned and operated by a public housing authority that has an on-site manager. "Public housing development" does not include single-family dispersed housing or small or large clusters of dispersed housing having no on-site manager.

(h) The defendant committed a violation of section 18-18-405 (2)(a)(I)(D), (2)(b)(I)(D), or (2)(c)(V), and the defendant possessed pill or tablet manufacturing equipment with the intent to use the equipment in the manufacture of a controlled substance.

(2) (a) In support of the findings under paragraph (a) of subsection (1) of this section, it may be shown that the defendant has had in his or her own name or under his or her control income or property not explained as derived from a source other than such manufacture, sale, dispensing, or distribution of controlled substances.

(b) For the purposes of paragraph (a) of subsection (1) of this section only, a "substantial source of that person's income" means a source of income which, for any period of one year or more, exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, or which, for the same period, exceeds fifty percent of the defendant's declared adjusted gross income under Colorado or any other state law or under federal law, whichever adjusted gross income is less.

(c) For the purposes of paragraph (a) of subsection (1) of this section, "special skill or expertise" in such manufacture, sale, dispensing, or distribution includes any unusual knowledge, judgment, or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, directing, managing, supervising, executing, or concealing of such manufacture, sale, dispensing, or distributing, the enlistment of accomplices in such manufacture, sale, dispensing, or distribution, the escape from detection or apprehension for such manufacture, sale, dispensing, or distribution, or the disposition of the fruits or proceeds of such manufacture, sale, dispensing, or distribution.

(d) For the purposes of paragraphs (a) and (b) of subsection (1) of this section, such manufacture, sale, dispensing, or distribution forms a pattern if it embraces criminal acts which have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(3) Reserved.

(4) and (5) (Deleted by amendment, L. 2013.)

Source: **L. 92:** Entire article R&RE, p. 361, § 1, effective July 1. **L. 93:** (2) amended, p. 972, § 3, effective July 1. **L. 94:** (2)(a) amended, p. 1723, § 25, effective July 1; (2)(a) amended, p. 2553, § 45, effective January 1, 1995. **L. 97:** IP(1), (2)(a), and (2)(c) amended, pp. 1542, 1544, §§ 8, 12, effective July 1. **L. 2000:** (1)(d) and (2)(a) amended, pp. 709, 708, §§ 42, 40, effective July 1. **L. 2002:** (2)(a) amended, p. 1581, § 6, effective July 1; (2)(a) amended, p. 1520, § 214, effective October 1. **L. 2003:** IP(1), (2)(a), and (5) amended, p. 1423, § 1, effective April 29. **L. 2010:** (2)(a) amended, (HB 10-1232), ch. 163, p. 568, § 2, effective April 28; (1)(d), (1)(e), and (1)(f) amended, (HB 10-1352), ch. 259, p. 1170, § 7, effective August 11. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1917, § 16, effective October 1. **L. 2014:** IP(1), (1)(c), and (1)(d)(II) amended, (SB 14-163), ch. 391, p. 1978, § 20, effective July 1. **L. 2021:** IP(1) and (1)(e) amended, (SB 21-059), ch. 136, p. 725, § 58, effective October 1. **L. 2022:** (1)(c) amended and (1)(h) added, (HB 22-1326), ch. 225, p. 1629, § 4, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-107 as it existed prior to 1992.

(2) Amendments to subsection (2)(a) in House Bill 94-1126 and Senate Bill 94-1 were harmonized. Amendments to subsection (2)(a) by House Bill 02-1237 and House Bill 02-1046 were harmonized.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

ANNOTATION

-1965-

Law reviews. For article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989).

Annotator's note. Since § 18-18-407 is similar to § 18-18-107 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Subsection (1)(d) is not unconstitutionally vague or overbroad. There is no constitutionally protected right of expression in introducing, distributing, or importing a controlled substance into Colorado. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

The words "introduced," "distributed," and "imported" have meanings commonly understood by persons of reasonable intelligence and, therefore, the trial court did not need to provide definitional instructions for these terms. *People v. Whitaker*, 32 P.3d 511 (Colo. App. 2000), *aff'd* on other grounds, 48 P.3d 555 (Colo. 2002).

Subsection (1)(d) does not deny defendants' equal protection rights. The special offender statute does not proscribe precisely the same unlawful act as the substantive statute, and any defendant who is convicted of a controlled substance offense, and as part of that criminal act also unlawfully introduced, distributed, or imported the controlled substance into Colorado is subject to the special offender statute. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Subsection (1)(f) is not unconstitutionally vague or overbroad. Subjecting a narcotics offender to special offender sentencing because of the offender's possession of a deadly weapon is reasonably related to the government's legitimate interest in preventing crime, and constitutes a valid exercise of the state's police power and does not violate the right to bear arms in self-defense as protected in the Colorado constitution. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Evidence showing that defendant had a loaded 9 millimeter handgun in a bedroom in close proximity to the drugs and to where the defendant was arrested established sufficient nexus between the deadly weapon and the offense. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Term "deadly weapon" is not vague; it was not necessary for the prosecution to show that the defendant intended to use the handgun found in his bedroom as a deadly weapon. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Ordinary and commonplace definitions of the terms "used," "displayed," "possessed," or "available for use" provide fair notice of the conduct prohibited by subsection (1)(f) of this section. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Pre-2010 version of subsection (1)(f) does not violate the right to bear arms. The United States and Colorado constitutions do not protect the unlawful purpose of possessing a firearm in furtherance of a drug offense. *People v. Cisneros*, 2014 COA 49, 356 P.3d 877

(decided under law in effect prior to the 2010 amendment).

Proximity of revolver to methamphetamine sufficient to establish its "availability for use" under the statute even if its trigger mechanism was secured by a padlock. *People v. Martinez*, 165 P.3d 907 (Colo. App. 2007).

Defendant violated pre-2010 version of subsection (1)(f) even if he fired his gun in self defense. Because defendant elected to deal drugs from his home and to keep a gun available for use in connection with that drug dealing in close proximity to his drug supply, he violated the special offender statute. *People v. Cisneros*, 2014 COA 49, 356 P.3d 877 (decided under law in effect prior to the 2010 amendment).

Defendant charged with a level 1 drug felony pursuant to this section is entitled to a preliminary hearing pursuant to § 16-5-301 because special offender allegation affects the level of offense defendant is accused of and charged with. The right to the preliminary hearing does not depend on whether the special offender allegation is deemed an element or a sentence enhancer, and the fact that the legislature elected to set forth the special offender aggravating circumstances in a separate statute is of no consequence. *People v. Vanness*, 2020 CO 18, 458 P.3d 901 (overruling *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007)).

Provisions of this section do not define substantive offenses, but rather merely represent sentence enhancement provisions which limit the sentencing discretion of the

district court. Therefore the defendant is not entitled to a preliminary hearing. *Felts v. County Court*, 725 P.2d 61 (Colo. App. 1986); *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

Since subsection (1) is a sentence-enhancing provision and does not create a separate criminal offense, it was not necessary for the trial court to instruct the jury as to a culpable mental state and it was sufficient for the jury to be given a special interrogatory. *People v. Whitaker*, 32 P.3d 511 (Colo. App. 2000), *aff'd*, 48 P.3d 555 (Colo. 2002); *People v. Hopper*, 284 P.3d 87 (Colo. App. 2011).

Defendant should not receive a separate sentence on the special offender count because section does not create a substantive offense. *People v. Rios*, 43 P.3d 726 (Colo. App. 2001).

Evidence that defendant brought a controlled substance from a foreign or external source into the state is sufficient evidence to convict defendant under subsection (1)(d). Because the statute uses the disjunctive "or", defendant need not have intended both the importation and distribution of the substance in the state. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

Prosecution was not required to prove that defendant "knew" the quantity of drugs he possessed or that defendant "knew" that he imported a controlled substance into Colorado to increase a defendant's sentence pursuant to this section. *Whitaker v. People*, 48 P.3d 555 (Colo. 2002).

When defendant convicted and sentenced on a separate charge as a special offender as a substantive offense in addition to the conviction and sentence upon the enhanced offenses, the conviction and sentence on the special offender charge must be vacated. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001).

The enhancement provision of §18-18-405 (3), as it previously existed, does not apply if an accused was found to be a special offender; defendant's sentence on a count cannot be enhanced twice. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001).

Defendant's drug conviction, as both a special drug offender under prior version of subsection (1) and as an habitual criminal, should have resulted in a prison sentence determined by the additional aggravating circumstances of this section. By using a formula that increases the sentence length without reclassifying the offense for which it is imposed, the legislature requires the application of two different sentence enhancing provisions when the special offender is also an habitual criminal, independently mandating sentence enhancement for different aggravating circumstances. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Neither this section nor the habitual criminal statute purports to limit the effect of additional aggravation or to place an upper limit on the ultimate sentence for a defendant to whom its provisions apply. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

The plain language of the 1997 amendment to the introductory paragraph of subsection (1) shows that the general assembly gave sentencing courts discretion to impose a lower minimum sentence under this section than would in some circumstances be the minimum sentence under § 18-18-405 (3)(a). *People v. Coleman*, 55 P.3d 817 (Colo. App. 2002).

The correct interpretation of subsection (2)(a) is that it requires a showing that the defendant intended to distribute the controlled substance to a person who was within, or on the grounds of, the school or public housing development. *People v. Trusty*, 53 P.3d 668 (Colo. App. 2001).

Assertion of an affirmative defense to a charge brought pursuant to this section is inappropriate. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

Bifurcated trial on special offender count not required. This section is not analogous to the habitual criminal statute but is instead analogous to the crime of violence sentence enhancement statute. Therefore a separate charge, a special interrogatory to the jury, and an instruction to the jury that the beyond a reasonable doubt burden of proof applies to the special offender count are required, but a bifurcated trial is not required in order to adequately accord the defendant procedural and constitutional safeguards. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Nor is defendant entitled to a bifurcated trial under this section. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988).

This section does not require proof of a mental state. People v. Vazquez, 768 P.2d 721 (Colo. App. 1988); People v. Pineda-Eriza, 49 P.3d 329 (Colo. App. 2001); People v. Hopper, 284 P.3d 87 (Colo. App. 2011).

Knowledge of the amount of illegal drugs involved is not required even if the defendant is convicted as a complicitor. Complicitor is held to the same level of culpability as a principal. Defendant convicted as a complicitor is subject to the enhanced penalties under the provisions of this section. People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999), aff'd, 43 P.3d 611 (Colo. 2001).

Section as applied to defendant convicted as a complicitor does not violate federal or state constitutional due process rights. People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999), aff'd, 43 P.3d 611 (Colo. 2001).

Imposition of a 20-year sentence was not an abuse of discretion where underlying offense was possession of four pounds of cocaine with intent to distribute and defendant had violated terms of probation imposed in previous drug-related murder case. People v. Garcia, 752 P.2d 570 (Colo. 1988).

Trial court's conclusion that the minimum mandatory enhanced sentence defendant could receive for possession with intent to sell a controlled substance was 24 years and one day was not abuse of discretion, statute was not ambiguous, and rule of lenity does not apply. People v.

Pineda-Eriza, 49 P.3d 329 (Colo. App. 2001).

This statute constitutes a sentence enhancement provision which limits the trial court's sentencing discretion. People v. Delgado, 832 P.2d 971 (Colo. App. 1991).

Section does not permit a mandatory parole sentence in excess of that authorized for the underlying class of felony. The statute is a sentence enhancer that is not a reclassification of the underlying substantive offense. People v. Butler, 224 P.3d 380 (Colo. App. 2009); People v. Garcia, 251 P.3d 1152 (Colo. App. 2010).

Section 18-1-105 (10) allows the trial court only to suspend the imposition or execution of a sentence, not the length of the sentence, and in light of the mandatory language of this section, the trial court was required to sentence the defendant within the range set forth in the statute. People v. Delgado, 832 P.2d 971 (Colo. App. 1991).

This section mandates only the length of sentence which a special drug offender must receive, without altering the sentencing options otherwise within the court's discretion. The general assembly intended merely to increase the length of the sentence prescribed for each particular offense, rather than shifting discretion from the courts to the executive director of the department of corrections, regardless of the character and circumstances of the underlying offense. Shipley v. People, 45 P.3d 1277 (Colo. 2002).

No special verdict required. This statute is a presumptive penalty statute which requires no special verdict of special offender status by the jury and therefore affirmative defenses are not applicable and no determination of aggravating or mitigating factors are required. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

A bifurcated trial is not required under the special offender statute. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

Defendant not entitled to the ameliorative effects of amendatory legislation if the legislature has not indicated its intent to require retroactive application; thus trial court had no discretion to reduce defendant's sentence under an

amended statute when legislation specified that the amendment applied only to offenses committed on or after a date that occurred after defendant committed his offense. *People v. Pineda-Eriza*, 49 P.3d 329 (Colo. App. 2001).

The evidence supported a conclusion that the knives were readily accessible for use by defendant with defendant's intended drug trafficking activity. *People v. Tweedy*, 126 P.3d 303 (Colo. App. 2005).

Jury instruction concerning special offender conviction was not misleading. The instructions contained the elements that the jury was required to find, although not in an elemental format. *People v. Cisneros*, 2014 COA 49, 356 P.3d 877 (decided under law in effect prior to the 2010 amendment).

18-18-408. Money laundering - illegal investments - penalty. (Repealed)

Source: L. 92: Entire article R&RE, p. 364, § 1, effective July 1. **L. 2010:** Entire section repealed, (HB 10-1081), ch. 256, p. 1141, § 4, effective August 11.

18-18-409. Reduction or suspension of sentence for providing substantial assistance.

Notwithstanding any other provision of this article, the district attorney may request the sentencing court to reduce or suspend the sentence of any individual who is convicted of a violation of section 18-18-405 or 18-18-407 (1)(e) and who provides substantial assistance in the identification, arrest, or conviction of any person for a violation of this article. Upon good cause shown, the request may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the assistance rendered was substantial.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1.

18-18-410. Declaration of class 1 public nuisance.

Except as authorized by section 18-18-434, article 170 of title 12, or article 50 of title 44, any store, shop, warehouse, dwelling house, building, vehicle, boat, or aircraft or any place whatsoever that is frequented by controlled substance addicts for the unlawful use of controlled substances or which is used for the unlawful storage, manufacture, sale, or distribution of controlled substances is declared to be a class 1 public nuisance and subject to the provisions of section 16-13-303. Any real or personal property that is seized or confiscated as a result of an action to abate a public nuisance shall be disposed of pursuant to part 7 of article 13 of title 16.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1. **Initiated 2022:** Entire section amended, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** Entire section amended, (SB 23-290), ch. 249, p. 1412, § 27, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-108 as it existed prior to 1992.

(2) This section was amended by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

ANNOTATION

Storage for purposes of § 16-13-303 denotes that an item is left at a location for some period of time. It is not synonymous with possession. Generally the term indicates duration and not a transient

situation. *People v. One 1967 Ford Mustang*, 781 P.2d 186 (Colo. App. 1989) (decided under § 18-18-108 as it existed prior to the 1992 repeal and reenactment of this article).

18-18-411. Keeping, maintaining, controlling, renting, or making available property for unlawful distribution or manufacture of controlled substances.

(1) It is unlawful for any person knowingly or intentionally to keep, maintain, control, rent, lease, or make available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place, which that person knows is resorted to for the purpose of keeping for distribution, transporting for distribution, or distributing controlled substances in violation of this article.

(2) Except as authorized by this article, it is unlawful for any person to:

(a) Knowingly or intentionally open or maintain any place which that person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance; or

(b) Manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly or intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure which that person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance.

(3) A person does not violate subsection (2) of this section:

(a) By reason of any act committed by another person while that other person is unlawfully on or in the structure or place, if the person lacked knowledge of the unlawful presence of that other person; or

(b) If the person has notified a law enforcement agency with jurisdiction to make an arrest for the illegal conduct.

(3.5) It is not a violation of this section if a person is acting in compliance with section 18-18-434, article 170 of title 12, or article 50 of title 44.

(4) A person who violates this section commits a level 1 drug misdemeanor.

(5) Repealed.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1. **L. 2013:** (4) amended, (SB 13-250), ch. 333, p. 1922, § 17, effective October 1. **Initiated 2022:** (5) added, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** (3.5) added and (5) repealed, (SB 23-290), ch. 249, p. 1412, § 28, effective July 1.

Editor's note: Subsection (5) was added by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

18-18-412. Abusing toxic vapors - prohibited.

(1) No person shall knowingly smell or inhale the fumes of toxic vapors for the purpose of causing a condition of euphoria, excitement, exhilaration, stupefaction, or dulled senses of the nervous system. No person shall knowingly possess, buy, or use any such substance for the purposes described in this subsection (1), nor shall any person knowingly aid any other person to use any such substance for the purposes described in this subsection (1). This subsection (1) shall not apply to the inhalation of anesthesia or other substances for medical or dental purposes.

(2) A person who knowingly violates the provisions of subsection (1) of this section commits the offense of abusing toxic vapors. Abusing toxic vapors is a level 2 drug misdemeanor.

(3) For the purposes of this section, the term "toxic vapors" means the following substances or products containing such substances:

- (a) Alcohols, including methyl, isopropyl, propyl, or butyl;
- (b) Aliphatic acetates, including ethyl, methyl, propyl, or methyl cellosolve acetate;
- (c) Acetone;
- (d) Benzene;
- (e) Carbon tetrachloride;
- (f) Cyclohexane;
- (g) Freons, including freon 11 and freon 12;
- (h) Hexane;
- (i) Methyl ethyl ketone;
- (j) Methyl isobutyl ketone;
- (k) Naphtha;
- (l) Perchlorethylene;
- (m) Toluene;
- (n) Trichloroethane; or
- (o) Xylene.

(4) In a prosecution for a violation of this section, evidence that a container lists one or more of the substances described in subsection (3) of this section as one of its ingredients shall be prima facie evidence that the substance in such container contains toxic vapors and emits the fumes thereof.

(5) A juvenile charged with an offense pursuant to this section is subject to the jurisdiction of the juvenile court pursuant to section 19-2.5-103.

Source: **L. 92:** Entire article R&RE, p. 366, § 1, effective July 1. **L. 96:** (5) amended, p. 1693, § 29, effective January 1, 1997. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1922, § 18, effective October 1. **L. 2019:** (2) amended, (HB 19-1263), ch. 291, p. 2678, § 3, effective March 1, 2020. **L. 2021:** (5) amended, (SB 21-059), ch. 136, p. 725, § 59, effective October 1.

Editor's note: This section is similar to former § 18-18-111 as it existed prior to 1992.

18-18-412.5. Unlawful possession of materials to make methamphetamine and amphetamine - penalty.

(1) The general assembly finds and declares that persons are manufacturing methamphetamine and amphetamine using nonprescription drugs that are readily and legally available. The general assembly further finds that it is necessary to make illegal the possession of such nonprescription drugs with the intent to use them as immediate precursors in manufacturing any controlled substance.

(2) Notwithstanding any other provision of law to the contrary, no person shall possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use such product as an immediate precursor in the manufacture of any controlled substance.

(3) A person who violates the provisions of this section commits a level 2 drug felony.

Source: **L. 2002:** Entire section added, p. 1265, § 1, effective August 7. **L. 2013:** (3) amended, (SB 13-250), ch. 333, p. 1922, § 19, effective October 1.

18-18-412.7. Sale or distribution of materials to manufacture controlled substances.

(1) A person who sells or distributes chemicals, supplies, or equipment, and who knows or reasonably should know or believes that a person intends to use the chemicals, supplies, or equipment to illegally manufacture a controlled substance violates this section.

(1.5) It is not a violation of this section if a person is acting in compliance with section 18-18-434, article 170 of title 12, or article 50 of title 44.

(2) A violation of this section is a level 2 drug felony.

(3) Repealed.

Source: **L. 2003:** Entire section added, p. 2387, § 2, effective July 1, 2004. **L. 2004:** (2) amended, p. 637, § 13, effective August 4. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1922, § 20, effective October 1. **Initiated 2022:** (3) added, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** (1.5) added and (3) repealed, (SB 23-290), ch. 249, p. 1413, § 29, effective July 1.

Editor's note: Subsection (3) was added by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

Cross references: For the legislative declaration contained in the 2003 act enacting this section, see section 1 of chapter 360, Session Laws of Colorado 2003.

18-18-412.8. Retail sale of methamphetamine precursor drugs - unlawful acts - penalty.

(1) (Deleted by amendment, L. 2006, p. 1705, § 3, effective July 1, 2006.)

(2) (a) A person may not knowingly deliver in or from a store to the same individual during any twenty-four-hour period more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs.

(b) A person may not purchase more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs during any twenty-four-hour period.

(c) It is unlawful for a methamphetamine precursor drug that is offered for retail sale in or from a store to be offered for sale or stored or displayed prior to sale in an area of the store to which the public is allowed access.

(2.5) (a) A person may not deliver in a retail sale in or from a store a methamphetamine precursor drug to a minor under eighteen years of age.

(b) It shall be an affirmative defense to a prosecution under this subsection (2.5) that the person performing the retail sale was presented with and reasonably relied upon a document that identified the person receiving the methamphetamine precursor drug as being eighteen years of age or older.

(3) (a) A person who knowingly violates a provision of this section commits a level 2 drug misdemeanor and, upon conviction, shall be punished as provided in section 18-1.3-501.

(b) A person who is an owner, operator, manager, or supervisor at a store in which, or from which, a retail sale of a methamphetamine precursor drug in violation of this section is made shall not be liable under this section if he or she:

(I) Did not have knowledge of the sale; and

(II) Did not participate in the sale; and

(III) Did not knowingly direct the person making the sale to commit a violation of this section.

(4) For purposes of this section:

(a) (I) Except as otherwise provided in subparagraph (II) of this paragraph (a), "methamphetamine precursor drug" means ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, isomers, or salts of isomers.

(II) "Methamphetamine precursor drug" does not include a substance contained in any package or container that is labeled by the manufacturer as intended for pediatric use.

(b) "Person" means an individual who owns, operates, is employed by, or is an agent of a store.

(c) "Store" means any establishment primarily engaged in the sale of goods at retail.

(5) Nothing in this section shall be construed to restrict the discretion of a district attorney to bring charges under this section against a person who also is charged with violating section 18-18-412.7.

Source: **L. 2005:** Entire section added, p. 606, § 2, effective July 1. **L. 2006:** (1) and (2) amended and (2.5) added, p. 1705, § 3, effective July 1. **L. 2013:** (3)(a) amended, (SB 13-250), ch. 333, p. 1922, § 21, effective October 1.

Cross references: For the legislative declaration contained in the 2005 act enacting this section, see section 1 of chapter 172, Session Laws of Colorado 2005. For the legislative declaration contained in the 2006 act amending subsections (1) and (2) and enacting subsection (2.5), see section 1 of chapter 341, Session Laws of Colorado 2006.

18-18-413. Authorized possession of controlled substances.

A person to whom or for whose use any controlled substance has been prescribed or dispensed by a practitioner may lawfully possess it, but only in the container in which it was delivered to him unless he is able to show that he is the legal owner or a person acting at the direction of the legal owner of the controlled substance. Any person convicted of violating this section commits a drug petty offense, and the court shall impose a fine of not more than one hundred dollars.

Source: **L. 92:** Entire article R&RE, p. 367, § 1, effective July 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1923, § 22, effective October 1.

Editor's note: This section is similar to former § 18-18-109 as it existed prior to 1992.

ANNOTATION

The provision of this section allowing for possession of a controlled substance by "a person acting at the direction of the legal owner" applies only to the crime of

possession as described in this section and not to any other crimes. *People v. Gonzales*, 2017 COA 62, 415 P.3d 846.

18-18-414. Unlawful acts - licenses - penalties.

(1) Except as otherwise provided in this article 18 or in article 280 of title 12, the following acts are unlawful:

- (a) The dispensing or possession of a schedule I controlled substance except by a researcher who is registered under federal law to conduct research with that schedule I controlled substance;
- (b) Except as provided in subsection (2) of this section, the dispensing of any schedule II controlled substance unless such substance is dispensed:
 - (I) From a pharmacy pursuant to a written order or an order electronically transmitted in accordance with 21 CFR 1311; or
 - (II) By any practitioner in the course of his or her professional practice;
- (c) The dispensing of any schedule III, IV, or V controlled substance unless such controlled substance is dispensed from a pharmacy pursuant to a written, oral, mechanically produced, computer generated, electronically transmitted, or facsimile transmitted order or is dispensed by any practitioner in the course of his or her professional practice;
- (d) The dispensing of any marijuana or marijuana concentrate;
- (e) To refill any schedule III, IV, or V controlled substance more than six months after the date on which such prescription was issued or more than five times;
- (f) The failure of a pharmacy to file and retain the prescription as required in section 12-280-134;
- (g) The failure of a hospital to record and maintain a record of such dispensing as provided in section 12-280-134 or 27-80-210;
- (h) The refusal to make available for inspection and to accord full opportunity to check any record or file as required by this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27;
- (i) The failure to keep records as required by this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27;
- (j) The failure to obtain a license or registration as required by this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27;
- (k) Except when controlled substances are dispensed by a practitioner for direct administration in the course of his practice or are dispensed for administration to hospital inpatients, the failure to affix to the immediate container a label stating:
 - (I) The name and address of the person from whom such controlled substance was dispensed;
 - (II) The date on which such controlled substance was dispensed;

(III) The number of such prescription as filed in the prescription files of the pharmacy which dispensed such prescription;

(IV) The name of the prescribing practitioner;

(V) The directions for use of the controlled substance as contained in the prescription; and

(VI) The name of the patient and, if for an animal, the name of the owner;

(l) The failure of a practitioner, in dispensing a controlled substance other than by direct administration in the course of his practice, to affix to the immediate container a label bearing directions for use of the controlled substance, his name and registry number, the name of the patient, the date, and, if for an animal, the name of the owner;

(m) The administration of a controlled substance other than to the patient for whom prescribed;

(n) The possession, by any practitioner, of a controlled substance which was not obtained from a pharmacy and which was received from a person who is not licensed as a manufacturer, distributor, or practitioner. It is also unlawful for a pharmacy to have possession of a controlled substance which is received from any person who is not licensed as a manufacturer or distributor; except that a pharmacy may buy controlled substances from another pharmacy.

(o) Knowingly transferring drug precursors to any person who uses them for an unlawful activity;

(p) (Deleted by amendment, L. 96, p. 149, § 5, effective April 8, 1996.)

(q) Knowingly acquiring or obtaining, or attempting to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(r) Knowingly furnishing false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27, or any record required to be kept by this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27;

(s) (Deleted by amendment, L. 96, p. 149, § 5, effective April 8, 1996.)

(t) The refusal of entry into any premises for any inspection authorized by this article 18, part 1 of article 280 of title 12, or part 2 of article 80 of title 27.

(2) (a) A pharmacist in an emergency situation, in lieu of a written or electronically transmitted prescription order, in good faith, may dispense up to a seventy-two-hour supply of any controlled substance listed in schedule II of part 2 of this article without a written or

electronically transmitted prescription order. An "emergency situation", as used in this paragraph (a), means a situation in which the prescribing practitioner determines:

(I) That immediate dispensing of the controlled substance is necessary for proper treatment of the intended ultimate user;

(II) That no alternative prescription drug is available, including drugs that are not controlled substances under schedule II of part 2 of this article;

(III) That it is not reasonably possible for the prescribing practitioner to provide a written prescription order to be presented to the person dispensing the controlled substance, or to electronically transmit a prescription order to the dispenser, prior to such dispensing.

(b) (I) Upon receiving an emergency oral prescription order from the practitioner, the pharmacist shall immediately reduce the prescription order to writing or an electronic format and shall write or otherwise ensure that the following language and information is recorded in the prescription record: "Authorization for emergency dispensing" and the date and time of dispensing of the oral prescription.

(II) The prescribing practitioner shall reduce the prescription order to writing or an electronic format and shall deliver the prescription order to the pharmacist in person, by facsimile transmission as provided in paragraph (c) of this subsection (2), by mail, or by electronic transmission within seventy-two hours after prescribing the schedule II controlled substance. If delivered by mail, the envelope must be postmarked within seventy-two hours after prescribing. Upon receipt of the prescription order, the pharmacist shall maintain the prescription order with the oral prescription order that has been reduced to writing or an electronic format.

(III) The pharmacist shall notify the board if the prescribing practitioner fails to deliver the written or electronic prescription order to the pharmacist.

(c) (I) A prescription for a controlled substance listed in schedule II of part 2 of this article may be transmitted via facsimile equipment, so long as the original written, signed prescription is presented to the pharmacist for review prior to the actual dispensing of the controlled substance, except as provided in subparagraph (II) of this paragraph (c).

(II) A prescription written for a schedule II controlled substance for a hospice patient or for a resident of a long-term care facility or for the direct home administration to a patient by parenteral, intravenous, intramuscular, subcutaneous, or intraspinal infusion (infusion drug therapy) may be transmitted by the practitioner or the practitioner's agent to the dispensing pharmacy or pharmacist by facsimile transmission. The practitioner or the practitioner's agent shall note on the prescription that the patient is a hospice patient or a resident in a long-term care facility or a patient receiving infusion drug therapy. The facsimile serves as the original written prescription for purposes of this section and shall be maintained as specified by the board.

(III) For the purposes of this paragraph (c):

(A) "Hospice patient" means an individual who is receiving hospice care from an entity licensed and regulated by the department of public health and environment pursuant to sections 25-1.5-103 (1)(a)(I) and 25-3-101, C.R.S.

(B) "Long-term care facility" means a facility that is licensed and regulated as a skilled nursing facility or nursing care facility by the department of public health and environment pursuant to sections 25-1.5-103 (1)(a)(I) and 25-3-101, C.R.S.

(3) A person who violates paragraph (a), (b), (c), or (d) of subsection (1) of this section commits a level 4 drug felony.

(4) A person who violates paragraph (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n) of subsection (1) of this section or subsection (2) of this section or any other provision of this part 4 for which a penalty is not specified is guilty of a level 2 drug misdemeanor.

(5) A person who violates paragraph (o), (q), (r), or (t) of subsection (1) of this section commits a level 3 drug felony.

Source: **L. 92:** Entire article R&RE, p. 368, § 1, effective July 1. **L. 95:** (1)(d) amended, p. 206, § 22, effective April 13. **L. 96:** (1)(o), (1)(p), (1)(s), and (5) amended, p. 149, § 5, effective April 8; (1)(c) and (2) amended, p. 1427, § 18, effective July 1. **L. 97:** (2) amended, p. 17, § 1, effective March 20. **L. 98:** (2) amended, p. 428, § 1, effective July 1. **L. 2003:** (2)(c)(III) amended, p. 704, § 25, effective July 1. **L. 2010:** (1)(d) amended, (HB 10-1352), ch. 259, p. 1174, § 20, effective August 11. **L. 2012:** (1)(b), IP(2)(a), (2)(a)(III), and (2)(b) amended, (SB 12-037), ch. 40, p. 140, § 2, effective March 22; IP(1), (1)(f), (1)(g), (1)(h), (1)(i), (1)(j), (1)(r), and (1)(t) amended, (HB-1311), ch. 281, p. 1623, § 58, effective July 1. **L. 2013:** (3), (4), and (5) amended, (SB 13-250), ch. 333, p. 1923, § 23, effective October 1. **L. 2019:** IP(1), (1)(f) to (1)(j), (1)(r), and (1)(t) amended, (HB 19-1172), ch. 136, p. 1680, § 109, effective October 1.

Editor's note: This section is similar to former § 12-22-314 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since § 18-18-414 is similar to § 12-22-314 as it existed prior to its repeal in 1992 and is similar to §§ 12-22-302, 12-22-313, 12-22-322, 12-22-404, and 12-22-412 as they existed prior to the repeal

and reenactment of part 3 and part 4 of article 22 of title 12 in 1981, relevant cases construing those provisions have been included in the annotations to this section. For other cases construing the former

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provisions, see the annotations following those sections in the 1978 replacement volume 5 and the 1980 cumulative supplement thereto.

No equal protection violation stems from the fact that this statute punishes cocaine possession as a misdemeanor and § 18-18-105 punishes cocaine possession as a felony, since practitioners are engaged in an occupation which regularly requires administration, dispensation, and possession of controlled substances. *People v. Unruh*, 713 P.2d 370 (Colo. 1986).

For constitutionality of legislative distinction between narcotics and other drugs, see *People v. Caponey*, 647 P.2d 668 (Colo. 1982).

Possession deemed general intent crime. Possession of a narcotic drug in violation of former § 12-22-302 is a general intent crime. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

The offenses proscribed by §§ 12-22-302 and 12-22-314, now encompassed by this section, were general intent offenses having a culpability requirement of knowing conduct which did not entitle a defendant to an instruction on specific intent. And, the court must instruct the jury that each of the elements constituting the offense must be done "knowingly". *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

Defense of voluntary intoxication not applicable. The policies adopted by the general assembly in refusing to permit a defense of voluntary intoxication in general intent crimes defined in the criminal code

apply with equal force to general intent crimes under the Colorado Controlled Substances Act. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

Chemical tests are not necessary in all cases to prove that a particular substance is a narcotic drug. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981); *People ex rel. J.G.*, 97 P.3d 300 (Colo. App. 2004).

Proof through circumstantial evidence. The prosecution may prove that a substance is cocaine through circumstantial evidence. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981).

The prosecution does not need to admit a substance into evidence to prove that is a controlled substance. So long as a sufficient chain of custody is established, the prosecution can meet its burden through circumstantial evidence. *People ex rel. J.G.*, 97 P.3d 300 (Colo. App. 2004).

Procuring agent defense requires that the defendant act as an exclusive agent for the buyer; as such, the defendant becomes a principal, or a conspirator in the purchase rather than in the sale of the narcotics and, therefore, he cannot be convicted of sale or conspiracy to sell. *People v. Smith*, 623 P.2d 404 (Colo. 1981); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

Defense is available in prosecution under this section for sale of a narcotic. *People v. Hall*, 44 Colo. App. 535, 622 P.2d 571 (1980).

Procuring agent defense negates existence of essential element of offense of sale of narcotic, the sale itself. *People v.*

Hall, 44 Colo. App. 535, 622 P.2d 571 (1980).

Under the "procuring agent" defense, a defendant becomes a principal or conspirator in the purchase rather than the sale of the narcotics and, therefore, cannot be convicted of sale or conspiracy to sell narcotic drugs. Bailey v. People, 630 P.2d 1062 (Colo. 1981).

Trial court must credit defendant for time served against maximum as well as minimum sentence term. When the trial

court credits the defendant for time already served in setting the minimum term of his sentence, it is error for the trial court not to also credit the defendant for that time against the maximum term of the sentence. People v. Stewart, 626 P.2d 685 (Colo. 1981).

Applied in People v. Macias, 631 P.2d 584 (Colo. 1981); People v. Gomez, 632 P.2d 586 (Colo. 1981); People v. Ball, 639 P.2d 1078 (Colo. 1982); People v. Hoffman, 655 P.2d 393 (Colo. 1982); People v. Sprowl, 718 P.2d 524 (Colo. 1986).

18-18-415. Fraud and deceit.

(1) (a) No person shall obtain a controlled substance or procure the administration of a controlled substance by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of an order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.

(b) Information communicated to a practitioner in an effort to procure a controlled substance other than for legitimate treatment purposes or unlawfully to procure the administration of any such controlled substance shall not be deemed a privileged communication.

(c) No person shall willfully make a false statement in any order, report, or record required by this article.

(d) No person, for the purpose of obtaining a controlled substance, shall falsely assume the title of, or represent himself to be, a manufacturer, distributor, practitioner, or other person authorized by law to obtain a controlled substance.

(e) No person shall make or utter any false or forged order.

(f) No person shall affix any false or forged label to a package or receptacle containing a controlled substance.

(2) Any person who violates any provision of this section commits:

(a) A level 4 drug felony and shall be punished as provided in section 18-1.3-401.5.

(b) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1170, § 8, effective August 11, 2010.)

Source: **L. 92:** Entire article R&RE, p. 371, § 1, effective July 1. **L. 2002:** (2)(a) and (2)(b) amended, p. 1520, § 215, effective October 1. **L. 2010:** (2) amended, (HB 10-1352), ch. 259, p. 1170, § 8, effective August 11. **L. 2013:** (2)(a) amended, (SB 13-250), ch. 333, p. 1923, § 24, effective October 1.

Editor's note: This section is similar to former § 12-22-315 as it existed prior to 1992.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2)(a) and (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 18-18-415 is similar to § 12-22-315 as it existed prior to its repeal in 1992 and is similar to § 12-22-319 as it existed prior to the repeal and reenactment of part 3 of article 22 of title 12 in 1981, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1)(b) is not unconstitutionally vague on its face. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

Subsection (1)(b) of this section operates as an exception to the physician-privilege in § 13-90-107 (1)(d). When subsection (1)(b) applies, there is no privilege as to a communication made by a patient to a physician, and no waiver is required to introduce the communication at trial. *People v. Harte*, 231 P.3d 1180 (Colo. App. 2005).

The determination whether subsection (1)(b) applies to a communication between a patient and practitioner rests with the trial court, not with the recipient of the communication, a prospective witness, or another health care provider. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

An attorney's guilty plea to making and altering a false and forged prescription for Phentermine, a controlled substance, and of criminal attempt to obtain a controlled substance by forgery and alteration constituted "serious crimes" as defined by C.R.C.P. 241.16 (e). *People v. Moore*, 849 P.2d 40 (Colo. 1993).

Criminal provisions not overlapping. Section 12-22-126 and former § 12-22-319 (now this section) do not proscribe the same conduct and, hence, do not violate the constitutional guarantees of equal protection and due process. *People v. Wellington*, 633

P.2d 1390 (Colo. 1981); People v. Caponey, 647 P.2d 668 (Colo. 1982).

The exception in subsection (1)(b) applies to a physician's original prescription order when defendant altered the order for fraudulent purposes, even though a prescription order is

considered a medical record for other purposes. People v. Moon, 2015 COA 23, 411 P.3d 130.

Applied in People v. Madonna, 651 P.2d 378 (Colo. 1982); People v. Frayer, 661 P.2d 1198 (Colo. App. 1982).

18-18-416. Controlled substances - inducing consumption by fraudulent means.

(1) It is unlawful for any person, surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge, to cause any other person to unknowingly consume or receive the direct administration of any controlled substance, as defined in section 18-18-102 (5); except that nothing in this section shall diminish the scope of health care authorized by law.

(2) A person who violates the provisions of this section commits a level 3 drug felony.

Source: L. 92: Entire article R&RE, p. 371, § 1, effective July 1. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1923, § 25, effective October 1.

18-18-417. Notice of conviction.

Upon the conviction of any person for a violation of any provision of this part 4, a copy of the judgment, sentence, and opinion, if any, of the court shall be sent by the clerk of the court to the state board of pharmacy or the department of public health and environment or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business.

Source: L. 92: Entire article R&RE, p. 372, § 1, effective July 1. **L. 94:** Entire section amended, p. 2736, § 362, effective July 1.

Editor's note: This section is similar to former § 12-22-316 as it existed prior to 1992.

18-18-418. Exemptions.

- (1) The provisions of section 18-18-414 do not apply to:
 - (a) Agents of persons licensed under part 2 of article 80 of title 27, C.R.S., or under part 3 of this article, acting within the provisions of their licenses; or
 - (b) Officers or employees of appropriate agencies of federal, state, or local governments acting pursuant to their official duties; or
 - (c) A student who is in possession of an immediate precursor who is enrolled in a chemistry class for credit at an institution of higher education, or a work study student, a teaching assistant, a graduate assistant, or a laboratory assistant, if such student's or assistant's use of the immediate precursor is for a bona fide educational purpose or research purpose and if the chemistry department of the institution of higher education otherwise possesses all the necessary licenses required by the BHA.
- (2) All combination drugs that are exempted by regulation of the attorney general of the United States department of justice, pursuant to section 1006 (b) of Public Law 91-513 (84 Stat. 1236), known as the "Comprehensive Drug Abuse Prevention and Control Act of 1970", on or after July 1, 1981, are exempted from the provisions of part 1 of article 280 of title 12, part 2 of article 80 of title 27, and part 3 of this article 18.
- (3) The provisions of this part 4 do not apply to peyote if said controlled substance is used in religious ceremonies of any bona fide religious organization.
- (4) The provisions of sections 12-280-134 and 27-80-210 shall not apply to a practitioner authorized to prescribe with respect to any controlled substance that is listed in schedule III, IV, or V of part 2 of this article 18 and that is manufactured, received, or dispensed by the practitioner in the course of his or her professional practice unless he or she dispenses, other than by direct administration, any such controlled substance to patients and they are charged therefor either separately or together with charges for other professional services or unless the practitioner regularly engages in dispensing any such controlled substance to his or her patients.
- (5) The exemptions set forth in this section shall be available as a defense to any person accused of violating the provisions of section 18-18-414.
- (6) It shall not be necessary for the state to negate any exemption or exception in this part 4, part 1 of article 280 of title 12, part 2 of article 80 of title 27, or part 3 of this article 18 in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this part 4. The burden of proof of any such exemption or exception is upon the person claiming it.

Source: L. 92: Entire article R&RE, p. 372, § 1, effective July 1. **L. 2012:** (1)(a), (2), (4), and (6) amended, (HB 12-1311), ch. 281, p. 1624, § 59, effective July 1. **L. 2019:** (2), (4), and (6) amended, (HB 19-1172), ch. 136, p. 1681, § 110, effective October 1. **L. 2022:** IP(1) and (1)(c) amended, (HB 22-1278), ch. 222, p. 1503, § 39, effective July 1.

Editor's note: This section is similar to former § 12-22-317 as it existed prior to 1992.

18-18-419. Imitation and counterfeit controlled substances act.

Sections 18-18-419 to 18-18-424 shall be known and may be cited as the "Imitation and Counterfeit Controlled Substances Act".

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

18-18-420. Imitation controlled substances - definitions.

As used in sections 18-18-419 to 18-18-424, unless the context otherwise requires:

- (1) "Controlled substance" shall have the same meaning as set forth in section 18-18-102 (5).
- (2) "Distribute" means the actual, constructive, or attempted transfer, delivery, or dispensing to another of an imitation controlled substance, with or without remuneration.
- (3) "Imitation controlled substance" means a substance that is not the controlled substance that it is purported to be but which, by appearance, including color, shape, size, and markings, by representations made, and by consideration of all relevant factors as set forth in section 18-18-421, would lead a reasonable person to believe that the substance is the controlled substance that it is purported to be.
- (4) "Manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance.

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

ANNOTATION

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Legislative intent of "purported". The general assembly intended the term "purported", as applied in this section, to refer to the circumstances surrounding defendant's conduct. Based on the substance's appearance by a representation made and by consideration of all relevant

factors as set out in § 18-18-421, a reasonable person would believe the substance to be a controlled substance. There is no requirement, therefore, that a defendant knowingly purport the substance to be a controlled substance. *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005).

18-18-421. Imitation controlled substances - determination - considerations.

(1) In determining whether a substance is an imitation controlled substance, the trier of fact may consider, in addition to all other relevant factors, the following:

(a) Statements by an owner or by anyone in control of the substance concerning the nature of the substance or its use or effect;

(b) Statements made to the recipient that the substance may be resold for inordinate profit which is more than the normal markup charged by legal retailers of similar pharmaceutical products;

(c) Whether the substance is packaged in a manner normally used for illicit controlled substances;

(d) Evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(e) The proximity of the imitation controlled substance to any controlled substances when conduct purported to be illegal under this article is observed.

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

ANNOTATION

Legislative intent of "purported" in § 18-18-420. The general assembly intended the term "purported", as applied in § 18-18-420, to refer to the circumstances surrounding defendant's conduct. Based on the substance's appearance by a representation made and by consideration of

all relevant factors as set out in this section, a reasonable person would believe the substance to be a controlled substance. There is no requirement, therefore, that a defendant knowingly purport the substance to be a controlled substance. *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005).

18-18-422. Imitation controlled substances - violations - penalties.

(1) (a) Except as provided in section 18-18-424, it is unlawful for a person to manufacture, distribute, or possess with intent to distribute an imitation controlled substance.

(b) A person who violates the provisions of paragraph (a) of this subsection (1) commits:

(I) A level 4 drug felony.

(II) (Deleted by amendment, L. 2013.)

(2) (a) If an adult distributes an imitation controlled substance to a minor and the adult is at least two years older than the minor, the adult commits a level 3 drug felony.

(b) (Deleted by amendment, L. 2013.)

(3) (a) It is unlawful for a person to place in a newspaper, magazine, handbill, or other publication or to post or distribute in a public place an advertisement or solicitation that the person knows will promote the distribution of imitation controlled substances.

(b) A person who violates the provisions of paragraph (a) of this subsection (3) commits a level 1 drug misdemeanor.

(4) It is not a defense to a violation of this section that the defendant believed that the imitation controlled substance was a genuine controlled substance.

Source: L. 92: Entire article R&RE, p. 374, § 1, effective July 1. L. 2013: (1), (2), and (3) amended, (SB 13-250), ch. 333, p. 1923, § 26, effective October 1.

ANNOTATION

A conviction under subsection (1)(a) is a "controlled substance offense" under § 4B1.2 of the United States sentencing guidelines. United States v. Thomas, 939 P.3d 1121 (10th Cir. 2019).

A conviction under subsection (1)(a) for a level 4 drug felony that was not punishable by more than one year in

prison does not satisfy the prior-conviction requirements of 18 U.S.C. § 922(g)(1). There was no fact in the record of conviction that could have permitted the state court to impose a sentence above the presumptive maximum of one year's imprisonment. United States v. Davis, 137 F.4th 1140 (10th Cir. 2025).

18-18-423. Counterfeit substances prohibited - penalty.

(1) It is unlawful for any person knowingly or intentionally to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who in fact manufactured, distributed, or dispensed the substance.

(2) It is unlawful for any person knowingly or intentionally to make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof.

(3) A person who violates this section commits a level 3 drug felony.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1. L. 2013: (3) amended, (SB 13-250), ch. 333, p. 1924, § 27, effective October 1.

18-18-424. Imitation controlled substances - exceptions.

The provisions of sections 18-18-419 to 18-18-424 shall not apply to practitioners licensed, registered, or otherwise authorized under the laws of this state to possess, administer, dispense, or distribute a controlled substance, if the distribution, possession, dispensing, or administering of the imitation controlled substance is done in the lawful course of his professional practice.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1.

Cross references: For the "Colorado Licensing of Controlled Substances Act", see part 2 of article 80 of title 27.

18-18-425. Drug paraphernalia - legislative declaration.

(1) The general assembly hereby finds and declares that the possession, sale, manufacture, delivery, or advertisement of drug paraphernalia results in the legitimization and encouragement of the illegal use of controlled substances by making the drug culture more visible and enticing and that the ready availability of drug paraphernalia tends to promote, suggest, or increase the

public acceptability of the illegal use of controlled substances. Therefore, the purposes of the provisions controlling drug paraphernalia are:

- (a) To protect and promote the public peace, health, safety, and welfare by prohibiting the possession, sale, manufacture, and delivery, or advertisement, of drug paraphernalia; and
- (b) To deter the use of controlled substances by controlling the drug paraphernalia associated with their use.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-501 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, "Constitutional Law and Civil Rights", see 59 Den. L.J. 239 (1982).

Annotator's note. Since § 18-18-425 is similar to § 12-22-501 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

This part is not unconstitutionally vague on its face with regard to the issue of subjective intent. *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-426. Drug paraphernalia - definitions.

As used in sections 18-18-425 to 18-18-430, unless the context otherwise requires:

(1) "Drug paraphernalia" means all equipment, products, and materials of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of this state. "Drug paraphernalia" includes, but is not limited to:

- (a) Repealed.
- (b) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(c) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marijuana;

(d) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(e) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(f) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances; or

(g) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(I) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(II) Water pipes;

(III) Carburetion tubes and devices;

(IV) Smoking and carburetion masks;

(V) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

(VI) Miniature cocaine spoons and cocaine vials;

(VII) Chamber pipes;

(VIII) Carburetor pipes;

(IX) Electric pipes;

(X) Air-driven pipes;

(XI) Chillums;

(XII) Bongs; or

(XIII) Ice pipes or chillers.

(2) "Drug paraphernalia" does not include:

(a) Any marijuana accessories as defined in section 16 (2)(g) of article XVIII of the state constitution; or

(b) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances.

Source: **L. 92:** Entire article R&RE, p. 376, § 1, effective July 1. **L. 2010:** (1)(c), IP(1)(g), and (1)(g)(V) amended, (HB 10-1352), ch. 259, p. 1174, § 21, effective August 11. **L. 2013:** (2) added, (SB 13-283), ch. 332, p. 1891, § 6, effective May 28. **L. 2014:** (2) amended, (SB 14-129), ch. 387, p. 1938, § 7, effective June 6. **L. 2019:** IP(1) and (2) amended and (1)(a) repealed, (SB 19-227), ch. 273, p. 2580, § 8, effective May 23.

Editor's note: This section is similar to former § 12-22-502 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, "Constitutional Law and Civil Rights", see 59 Den. L.J. 239 (1982).

Annotator's note. Since § 18-18-426 is similar to § 12-22-502 as it existed prior to its repeal in 1992, relevant cases construing those provisions have been included in the annotations to this section.

Terms "designed" and "primarily" in definition of "drug paraphernalia" are not unconstitutionally vague. High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984).

Term "intended" is unconstitutionally vague and is severed from the definition. High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984).

Definition of "drug paraphernalia" does not violate due process. By severing

the word "adapted" from the definition, the act can be upheld. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981) (decided prior to the 1981 amendment to subsection (2) which deleted the word "adapted").

Term "designed" not overbroad. As this section restricts the term "designed," by requiring that an item must be primarily designed for use with illegal drugs in order to constitute paraphernalia, that term, as used in this part, not overbroad. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981).

Intent requirement of subsection (2) refers to intent of possessor or seller. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981).

Applied in Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

18-18-427. Drug paraphernalia - determination - considerations.

(1) In determining whether an object is drug paraphernalia, a court, in its discretion, may consider, in addition to all other relevant factors, the following:

- (a) Statements by an owner or by anyone in control of the object concerning its use;
 - (b) The proximity of the object to controlled substances;
 - (c) The existence of any residue of controlled substances on the object;
 - (d) Direct or circumstantial evidence of the knowledge of an owner, or of anyone in control of the object, or evidence that such person reasonably should know, that it will be delivered to persons who he knows or reasonably should know, could use the object to facilitate a violation of sections 18-18-425 to 18-18-430;
 - (e) Instructions, oral or written, provided with the object concerning its use;
 - (f) Descriptive materials accompanying the object which explain or depict its use;
 - (g) National or local advertising concerning its use;
 - (h) The manner in which the object is displayed for sale;
 - (i) Whether the owner, or anyone in control of the object, is a supplier of like or related items to the community for legal purposes, such as an authorized distributor or dealer of tobacco products;
 - (j) The existence and scope of legal uses for the object in the community;
 - (k) Expert testimony concerning its use.
- (2) In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera.

Source: L. 92: Entire article R&RE, p. 377, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-503 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, "Constitutional Law and Civil Rights", see 59 Den. L.J. 239 (1982).

its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Annotator's note. Since § 18-18-427 is similar to § 12-22-503 as it existed prior to

Constitutionality of Drug Paraphernalia Act upheld against

-1994-

challenge based on assertion that use of the terms "reasonably should know" and "could" were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects constitutionally protected conduct, and since no constitutionally protected conduct was raised in challenge to Drug Paraphernalia Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Standards not set for courts alone. The 11 specific standards of this section, to be

considered when determining whether an item falls within the definition of drug paraphernalia, are not for the court's use alone. They were not intended to be withheld from the enforcement officers or anyone else administering or complying with the statute. *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

Section contains sufficient language to avoid arbitrary enforcement even though there are no guidelines specifically directed to enforcement authorities. *High Gear and Toke Shop v. Beacom*, 689 P.2d 624 (Colo. 1984).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-428. Possession of drug paraphernalia - penalty - exceptions.

(1) (a) Except as described in section 18-1-711 and paragraph (b) of this subsection (1), a person commits possession of drug paraphernalia if he or she possesses drug paraphernalia and knows or reasonably should know that the drug paraphernalia could be used under circumstances in violation of the laws of this state.

(b) (I) Prior to searching a person, a person's premises, or a person's vehicle, a peace officer may ask the person whether the person is in possession of a hypodermic needle or syringe that may cut or puncture the officer or whether such a hypodermic needle or syringe is on the premises or in the vehicle to be searched. If a hypodermic needle or syringe is on the person, on the person's premises, or in the person's vehicle and the person, either in response to the officer's question or voluntarily, alerts the officer of that fact prior to the search, assessment, or treatment, the peace officer shall not arrest or cite the person pursuant to this section for the hypodermic needle or syringe or section 18-18-403.5 for any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe, and the district attorney shall not charge or prosecute the person pursuant to this section for the hypodermic needle or syringe or section 18-18-403.5 for any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe. The circumstances described in this paragraph (b) may be used as a factor in a probable cause or reasonable suspicion determination of any criminal offense if the original stop or search was lawful.

(II) Prior to assessing or treating a person, an emergency medical service provider, as defined in section 18-3-201 (1.3), or other first responder may ask the person whether the person is in possession of a hypodermic needle or syringe that may cut or puncture the technician or first responder. If a hypodermic needle or syringe is on the person, and the person, either in response to the question or voluntarily, alerts the emergency medical service provider or first responder of that fact, a peace officer shall not arrest or cite the person pursuant to this section for the hypodermic needle or syringe or section 18-18-403.5 for any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe, and the district attorney shall not charge or prosecute the person pursuant to this section for the hypodermic needle or syringe or section 18-18-403.5 for any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe.

(III) This section does not apply to the possession of drug paraphernalia that a person received from an approved syringe exchange program created pursuant to section 25-1-520 or a program carried out by a harm reduction organization, as defined in section 12-30-110 (7), while participating in the program.

(2) Any person who commits possession of drug paraphernalia commits a drug petty offense and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars.

Source: **L. 92:** Entire article R&RE, p. 378, § 1, effective July 1. **L. 2012:** (1) amended, (SB 12-020), ch. 225, p. 989, § 7, effective May 29. **L. 2013:** (2) amended, (SB 13-250), ch. 333, p. 1924, § 28, effective October 1. **L. 2015:** (1) amended, (SB 15-116), ch. 76, p. 200, § 1, effective July 1. **L. 2018:** (1)(b)(II) amended, (HB 18-1375), ch. 274, p. 1703, § 30, effective May 29. **L. 2024:** (1)(b)(III) added, (HB 24-1037), ch. 458, p. 3164, § 5, effective June 6.

Editor's note: This section is similar to former § 12-22-504 as it existed prior to 1992.

Cross references: For the legislative declaration in the 2012 act amending subsection (1), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-18-428 is similar to § 12-22-504 as it existed prior to its repeal in 1992, relevant cases construing

that provision have been included in the annotations to this section.

Constitutionality of Drug Paraphernalia Act upheld against

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challenge based on assertion that use of the terms "reasonably should know" and "could" were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects constitutionally protected conduct, and since no constitutionally protected conduct was raised in challenge to Drug Paraphernalia

Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Knowingly. This section will be construed to require that the defendant acted "knowingly", that is, with knowledge that the object is practically certain to be put to an illegal use in connection with a controlled substance. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-429. Manufacture, sale, or delivery of drug paraphernalia - penalty.

Any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver equipment, products, or materials knowing, or under circumstances where one reasonably should know, that such equipment, products, or materials could be used as drug paraphernalia commits a level 2 drug misdemeanor.

Source: **L. 92:** Entire article R&RE, p. 378, § 1, effective July 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1924, § 29, effective October 1.

Editor's note: This section is similar to former § 12-22-505 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since § 18-18-429 is similar to § 12-22-505 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality of Drug Paraphernalia Act upheld against challenge based on assertion that use of the

terms "reasonably should know" and "could" were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects constitutionally

protected conduct, and since no constitutionally protected conduct was raised in challenge to Drug Paraphernalia Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Knowingly. This section will be construed to require that the defendant acted

"knowingly", that is, with knowledge that the object is practically certain to be put to an illegal use in connection with a controlled substance. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-430. Advertisement of drug paraphernalia - penalty.

Any person who places an advertisement in a newspaper, magazine, handbill, or other publication and who intends thereby to promote the sale in this state of equipment, products, or materials designed and intended for use as drug paraphernalia commits a level 2 drug misdemeanor.

Source: **L. 92:** Entire article R&RE, p. 378, § 1, effective July 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1924, § 30, effective October 1.

Editor's note: This section is similar to former § 12-22-506 as it existed prior to 1992.

ANNOTATION

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982) (decided under former § 12-22-506 prior to its repeal in 1992).

18-18-430.5. Drug paraphernalia - exemption.

- (1) A person is exempt from sections 18-18-425 to 18-18-430 if the person is:
 - (a) Participating as an employee, volunteer, or participant in an approved syringe exchange program created pursuant to section 25-1-520; or
 - (b) A pharmacist or pharmacy technician who sells nonprescription syringes or needles pursuant to section 12-280-123 (4).

(c) Using equipment, products, or materials in compliance with section 18-18-434, article 170 of title 12, or article 50 of title 44. The manufacture, possession, and distribution of such equipment, products, or materials is authorized within the meaning of 21 U.S.C. 863 sec. (f).

Source: **L. 2010:** Entire section added, (SB 10-189), ch. 272, p. 1252, § 1, effective August 11. **L. 2013:** Entire section amended, (SB 13-208), ch. 179, p. 662, § 1, effective May 10. **L. 2020:** Entire section amended, (HB 20-1065), ch. 287, p. 1420, § 6, effective September 14. **Initiated 2022:** (1)(c) added, Proposition 122, L. 2022, effective upon proclamation of the Governor, December 27, 2022. **L. 2023:** (1)(c) amended, (SB 23-290), ch. 249, p. 1413, § 30, effective July 1.

Editor's note: Subsection (1)(c) was added by Proposition 122, with the proclamation of the governor on December 27, 2022. The vote count for the measure at the general election held November 8, 2022, was as follows:

FOR: 1,296,992

AGAINST: 1,121,124

18-18-431. Defenses.

The common law defense known as the "procuring agent defense" is not a defense to any crime in this title.

Source: **L. 92:** Entire article R&RE, p. 378, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-324 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since this section is similar to § 18-18-110 as it existed prior to the repeal and reenactment of this article in 1992, a relevant case construing that

provision has been included in the annotations to this section.

Where the information charged the defendant with "sale and distribution" of a controlled substance, and although the

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verdict found that he "sold or distributed" such a substance, thereby charging and sustaining only one offense, the trial court properly instructed the jury as to the elements of the crime of sale or distribution of cocaine and as to the pertinent definition of distribution, its refusal to instruct on the "procuring agent" defense was not error. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

sell narcotic drugs under the old statute rather than for distribution of drugs after the enactment of the Colorado Controlled Substances Act in 1981 and are distinguishable under the rationale expressed in *People v. Dinkel* (189 Colo. 404, 541 P.2d 898 (1975)), which has now been formally codified in this section. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

Cases relied on by the defendant all involved charges for sale or conspiracy to

18-18-432. Drug offender public service and rehabilitation program - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Convicted" and "conviction" mean a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(b) "Drug offender" means any person convicted of any offense under this article.

(c) "Useful public service" means any work which is beneficial to the public and which involves a minimum of direct supervision or other public cost. "Useful public service" does not include any work which would endanger the health or safety of a drug offender.

(2) (a) Upon conviction for an offense committed on or after March 1, 2020, a court shall sentence each drug offender, other than an offender sentenced to the department of corrections or an offender sentenced directly to a community corrections facility, to pay for and complete, at a minimum, forty-eight hours of useful public service for any felony, twenty-four hours of useful public service for any misdemeanor, and sixteen hours of useful public service for any petty offense. Such useful public service is in addition to, and not in lieu of, any other sentence received by the drug offender. The court may suspend any portion of the minimum number of useful public service hours ordered when completion of the useful public service requirement interferes with appropriate and necessary treatment or with any other requirements of probation ordered by the court. If any drug offender is sentenced to probation, whether supervised by the court or by a probation officer, the order to pay for and complete the useful public service hours is made a condition of probation.

(b) Repealed.

(c) (I) If not already established pursuant to law, there may be established in each judicial district in the state a useful public service program under the direction of the chief judge of the judicial district. The purpose of the useful public service program is to identify and seek the cooperation of governmental entities and political subdivisions thereof and corporations organized not-for-profit or charitable trusts, as specified in subsection (2)(c)(II) of this section, for the purpose of providing useful public service jobs; to interview and assign persons who have been ordered by the court to perform useful public service to suitable useful public service jobs; and to monitor compliance or noncompliance of such persons in performing useful public service assignments as specified in subsection (2)(a) of this section. Nothing in this subsection (2) limits the authority of an entity that is the recipient of community or useful public service to accept or reject such service, in its sole discretion.

(II) In addition to governmental entities and political subdivisions thereof, the following organizations are eligible to provide community or useful public service jobs established under this section or any other provision of law so long as they meet any other requirement related to the provision of those jobs, as established by the entity that is the recipient of community or useful public service:

(A) A charitable trust or other organization that is exempt from taxation under section 501 (c)(3) of the federal "Internal Revenue Code of 1986", as amended;

(B) A civic league or organization that is exempt from taxation under section 501 (c)(4) of the federal "Internal Revenue Code of 1986", as amended, and that also would qualify as a veterans' service organization as defined in section 501 (c)(19) of the federal "Internal Revenue Code of 1986", as amended; and

(C) A veterans' service organization that is exempt from taxation under section 501 (c)(19) of the federal "Internal Revenue Code of 1986", as amended.

(d) Any general public liability insurance policy obtained pursuant to this subsection (2) shall be in a sum of not less than the current limit on government liability under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(e) For the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., "public employee" does not include any person who is sentenced pursuant to this subsection (2) to participate in any type of useful public service.

(f) No governmental entity shall be liable under the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., or under the "Colorado Employment Security Act", articles 70 to 82 of title 8, C.R.S., for any benefits on account of any person who is sentenced pursuant to this section to participate in any type of useful public service, but nothing in this subsection (2) shall prohibit a governmental entity from electing to accept the provisions of the

"Workers' Compensation Act of Colorado" by purchasing and keeping in force a policy of workers' compensation insurance covering such person.

(3) Upon a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence pursuant to section 18-1.3-102 or a verdict of guilty by the court or a jury, to any felony offense pursuant to this article 18, the court shall order the drug offender to immediately report to the sheriff's department in the county where the drug offender was charged, at which time the drug offender's fingerprints and photographs must be taken and returned to the court, which fingerprints and photographs become a part of the court's official documents and records pertaining to the charges against the drug offender and the drug offender's identification in association with such charges. On any trial for a violation of any criminal law of this state, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the drug offender named in said convictions and judgments is prima facie evidence of such convictions and may be used in evidence against the drug offender. Identification photographs and fingerprints that are part of the record of such former convictions and judgments of any court of record or which are part of the record at the place of the drug offender's incarceration after sentencing for any of such former convictions and judgments are prima facie evidence of the identity of the drug offender and may be used in evidence against such drug offender. Any drug offender who fails to immediately comply with the court's order to report to the sheriff's department, to furnish fingerprints, or to have photographs taken may be held in contempt of court.

Source: **L. 93:** Entire section added, p. 1777, § 40, effective June 6. **L. 2002:** (1)(a), (2)(b), and (3) amended, p. 1520, § 216, effective October 1. **L. 2004:** (2)(c) amended, p. 506, § 2, effective August 4. **L. 2013:** (2)(b) and (3) amended, (HB 13-1156), ch. 336, p. 1958, § 6, effective August 7. **L. 2017:** (2)(c) amended, (HB 17-1056), ch. 56, p. 178, § 2, effective March 20. **L. 2019:** (2)(a) and (3) amended and (2)(b) repealed, (HB 19-1263), ch. 291, p. 2678, § 4, effective March 1, 2020.

Editor's note: Subsection (2)(b)(II) provided for the repeal of subsection (2)(b), effective March 1, 2020. (See L. 2019, p. 2678.)

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1)(a), (2)(b), and (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-18-433. Constitutional provisions.

The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in conformance with section 16 of article XVIII of the state constitution and do not apply to a person acting in conformance with section 14 of article XVIII of the state constitution.

Source: L. 2013: Entire section added, (SB 13-250), ch. 333, p. 1925, § 31, effective October 1.

18-18-434. Offenses relating to natural medicine and natural medicine product - definitions.

(1) A person who is under twenty-one years of age who knowingly possesses or consumes natural medicine or natural medicine product commits a drug petty offense and, upon conviction thereof, is subject to a fine of not more than one hundred dollars or not more than four hours of substance use education or counseling; except that a second or subsequent conviction for a violation of this subsection (1) is subject to a fine of not more than one hundred dollars, not more than four hours of substance use education or counseling, and not more than twenty-four hours of useful public service.

(2) A person who openly and publicly displays or consumes natural medicine or natural medicine product commits a drug petty offense and, upon conviction thereof, is subject to a fine of not more than one hundred dollars and not more than twenty-four hours of useful public service.

(3) (a) A person who knowingly cultivates natural medicine that cumulatively exceeds an area of more than twelve feet wide by twelve feet long in one or more cultivation areas on the private property, or knowingly allows such cultivation on private property that the person owns, occupies, or controls, commits a drug petty offense, and upon conviction thereof, is subject to a fine of not more than one thousand dollars.

(b) (I) Except as provided in subsection (3)(b)(II) of this section, a person who knowingly cultivates natural medicine on the private property outside of an enclosed and locked space, or knowingly allows such cultivation on the private property outside of an enclosed and locked space, that the person owns, occupies, or controls, commits a drug petty offense, and upon conviction thereof, is subject to a fine of not more than one thousand dollars.

(II) It is not a violation of this subsection (3)(b) if the person who is cultivating natural medicine is twenty-one years of age or older, if the cultivation area is located in a dwelling on the private property, and:

(A) If a person under twenty-one years of age lives at the dwelling, the cultivation area itself is enclosed and locked; or

(B) If no person under twenty-one years of age lives at the dwelling, the external locks on the dwelling constitute an enclosed and locked space, but if a person under twenty-one years of age enters the dwelling, the person cultivating the natural medicine shall ensure that access to the cultivation area is reasonably restricted for the duration of the person under twenty-one years of age's presence in the private property.

(c) It is not a violation of subsection (3)(a) of this section if a county, municipality, or city and county law expressly permits the cultivation of natural medicine that cumulatively exceeds an area of more than twelve feet wide by twelve feet long in one or more cultivation areas on the private property and the person cultivates the natural medicine in an enclosed and locked space within the limit set by the county, municipality, or city and county where the natural medicine is located.

(4) (a) It is unlawful for a person who is not licensed pursuant to article 50 of title 44 to knowingly manufacture natural medicine product using an inherently hazardous substance.

(b) It is unlawful for a person who is not licensed pursuant to article 50 of title 44 who owns, manages, operates, or otherwise controls the use of a property to knowingly allow natural medicine product to be manufactured on the premises using an inherently hazardous substance.

(c) A person who violates this subsection (4) commits a level 2 drug felony.

(5) (a) Unless expressly limited by this section, article 170 of title 12, or article 50 of title 44, a person who, for the purpose of personal use and without remuneration, possesses, consumes, shares, cultivates, or manufactures natural medicine or natural medicine product, does not violate state law, or county, municipality, or city and county ordinance, rule, or resolution.

(b) Unless expressly limited by this section, a person who performs testing on natural medicine or natural medicine product, and possesses natural medicine or natural medicine product in conjunction therewith, for another person who is twenty-one years of age or older who submits for testing natural medicine or natural medicine product intended for personal use, does not violate state law, or county, municipality, or city and county ordinance, rule, or resolution, article 170 of title 12, or article 50 of title 44, if:

(I) The person performing the testing provides written notice to the person submitting for testing natural medicine or natural medicine product intended for personal use that the person is not licensed by the state to conduct testing; and

(II) The person who submits for testing natural medicine or natural medicine product provides a signed statement that the natural medicine or natural medicine product is intended for personal use only.

(c) Nothing in this section permits a person to:

(I) Dispense, sell, distribute, or possess with intent to dispense, sell, or distribute natural medicine or natural medicine product to a person under twenty-one years of age;

(II) Dispense, sell, distribute, or possess with intent to dispense, sell, or distribute, natural medicine or natural medicine product for remuneration, except as provided by article 170 of title 12 and article 50 of title 44;

(III) Manufacture, cultivate, possess, consume, use, dispense, or distribute natural medicine or natural medicine product, or possess with intent to manufacture, cultivate, possess, consume, use, dispense, or distribute natural medicine or natural medicine product for a purpose other than personal use or as provided by article 170 of title 12 and article 50 of title 44;

(IV) Dispense, distribute, or possess with intent to dispense or distribute natural medicine or natural medicine product as a part of a business promotion or commercial activity, except as provided by article 170 of title 12 and article 50 of title 44;

(V) Dispense, sell, or distribute, or possess with intent to dispense, sell, or distribute, ibogaine or natural medicine product that contains ibogaine to another person, except as provided by article 170 of title 12 and article 50 of title 44;

(VI) Advertise bona fide harm reduction services or bona fide support services offered for remuneration except as provided for in subsection (12)(d) of this section;

(VII) Advertise natural medicine or natural medicine product; or

(VIII) Use harm reduction services or support services to conduct sales of natural medicine. Prohibited sales activities related to harm reduction services or support services include but are not limited to:

(A) Operating a retail store, vendor table, vendor booth, or other commercial business that dispenses for remuneration any amount of natural medicine or natural medicine product not intended for consumption under supervision by the natural person or entity that dispenses the natural medicine or natural medicine product;

(B) Sales of services or items that include the transfer of natural medicine, which does not preclude remuneration for bona fide harm reduction services or bona fide support services;

(C) Paying recurring fees to acquire natural medicine or natural medicine products; and

(D) Online sales that include natural medicine or natural medicine products.

(d) A peace officer shall not arrest a person, and a district attorney shall not charge or prosecute a person, for a criminal offense involving natural medicine or natural medicine product pursuant to this part 4, except as expressly provided in this section.

(e) Notwithstanding any provision of this section to the contrary, a peace officer may arrest a person, or a district attorney may charge or prosecute a person, for a criminal offense that is not expressly lawful pursuant to this section or article 170 of title 12 and article 50 of title 44.

(5.5) Bona fide harm reduction services or bona fide support services without the exchange or sharing of natural medicine or natural medicine products are not subject to this section.

(6) Notwithstanding any law to the contrary, an action that is lawful pursuant to this section, article 170 of title 12, or article 50 of title 44, individually or in combination with another action that is lawful pursuant to this section, must not be the sole reason to:

- (a) Subject a person to a civil fine, penalty, or sanction;
- (b) Deny a person a right or privilege; or
- (c) Seize or forfeit assets.

(7) (a) Except as provided in subsection (7)(b) of this section, an action that is lawful pursuant to this section, individually or in combination with another action that is lawful pursuant to this section, must not solely be used as a factor in a probable cause determination of any criminal offense.

(b) An action that is lawful pursuant to this section may be used as a factor in a probable cause determination of any criminal offense if the original stop or search was lawful and other factors are present to support a probable cause determination of any criminal offense.

(8) The fact that a person is entitled to consume natural medicine or natural medicine product under the laws of this state does not constitute a defense against any charge for violation of an offense related to the operation of a vehicle, aircraft, boat, machinery, or other device.

(9) A county, municipality, or city and county shall not adopt, enact, or enforce any ordinance, rule, or resolution imposing any greater criminal or civil penalty than provided by this section or that is otherwise in conflict with this section.

(10) Nothing in this section prohibits a person or any entity who occupies, owns, or controls a property from prohibiting or otherwise regulating the cultivation or manufacture of natural medicine or natural medicine product on or in that property.

(11) Notwithstanding any other law to the contrary, the offenses provided for in this section do not apply to a person possessing, displaying, cultivating, purchasing, or selling a living plant for ornamental purposes only that was commonly and lawfully sold prior to July 1, 2023. For purposes of this section, a "living plant" does not include mushrooms or other fungal matter.

(12) As used in this section, unless the context otherwise requires:

(a) "Inherently hazardous substance" means any liquid chemical, compressed gas, or commercial product that has a flash point at or lower than thirty-eight degrees celsius or one hundred degrees fahrenheit, including butane, propane, and diethyl ether, and excluding all forms of alcohol and ethanol.

(b) (I) "Natural medicine" means the following substances:

(A) Dimethyltryptamine;

(B) Mescaline;

(C) Ibogaine;

(D) Psilocybin; or

(E) Psilocin.

(II) "Natural medicine" does not mean a synthetic or synthetic analog of the substances listed in this subsection (12)(b), including a derivative of a naturally occurring compound of natural medicine that is produced using chemical synthesis, chemical modification, or chemical conversion.

(III) Notwithstanding subsection (12)(b)(I) of this section, "mescaline" does not include peyote, meaning all parts of the plant classified botanically as *lophophora williamsii* lemaire, whether growing or not; its seeds; any extract from any part of the plant, and every compound, salt, derivative, mixture, or preparation of the plant; or its seeds or extracts.

(c) "Natural medicine product" means a product infused with natural medicine that is intended for consumption.

(d) ***[Editor's note: (see the editor's note following this section)]*** "Personal use" means the consumption or use of natural medicine or natural medicine product; or the amount of natural medicine or natural medicine product a person may lawfully possess, cultivate, or manufacture that is necessary to share with another person who is twenty-one years of age or older within the context of counseling, spiritual guidance, beneficial community-based use and healing, supported use, or related services. "Personal use" does not mean the sale of natural medicine or natural medicine product for remuneration; the possession, cultivation, or manufacture of natural medicine or natural medicine product with intent to sell the natural medicine or natural medicine product for remuneration; or the possession, cultivation, manufacture, or distribution of natural medicine or natural medicine product for business or commercial purposes, except as provided by article 170 of title 12 and article 50 of title 44. Nothing in this section precludes remuneration for bona fide harm reduction services or bona fide support services used concurrently with the consumption of shared natural medicine or natural medicine product, if there is no advertisement of natural medicine, natural medicine product, or services offered, and if the individual providing

the services informs an individual engaging in the services that the individual is not a licensed facilitator pursuant to article 170 of title 12.

(e) "Private property" means a dwelling, its curtilage, and a structure within the curtilage that is being used by a natural person or natural persons for habitation and that is not open to the public.

(f) "Remuneration" means anything of value, including money, real property, tangible and intangible personal property, contract right, chose in action, service, any right of use or employment or promise or agreement connected therewith, business promotion, or commercial activity.

Source: **L. 2023:** Entire section added, (SB 23-290), ch. 249, p. 1413, § 31, effective July 1. **L. 2024:** (12)(b)(I)(E) amended, (SB 24-198), ch. 452, p. 3140, § 4, effective June 6. **L. 2026:** (5)(c)(IV) and (12)(d) amended and (5)(c)(VI), (5)(c)(VII), (5)(c)(VIII), and (5.5) added, (HB 26-1325), ch. 372, p. 2259, § 8, effective August 12 (see editor's note).

Editor's note: (1) Several provisions of this section are similar to several former provisions of §§ 12-170-109 and 12-170-111 as they existed prior to 2023.

(2) As of publication date, a referendum petition has been filed against the portion of HB 26-1325 amending subsection (12)(d). Subsection (12)(d) will be updated accordingly in the 2027 Colorado Revised Statutes if the petition is submitted to a vote of the registered electors of the state of Colorado at the next biennial regular general election in 2026, for its approval or rejection.

Cross references: For the legislative declaration in HB 26-1325, see section 1 of chapter 372, Session Laws of Colorado 2026.

ANNOTATION

Law reviews. For article, "Colorado's Bold Move to Legalize Psychedelics", see 53 Colo. Law. 32 (July-Aug. 2024).

PART 5

ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

18-18-501. Administrative inspections and warrants.

(1) As used in this section, "controlled premises" means:

(a) Places where persons registered or exempted from registration requirements under this article are required to keep records; and

(b) Places including factories, warehouses, establishments, and conveyances in which persons registered or exempted from registration requirements under this article are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance.

(2) The procedure for issuance and execution of administrative inspection warrants is as follows:

(a) A judge of a state court of record within the judge's jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections of controlled premises as authorized by this article or rules adopted under this article, and seizures of property appropriate to the inspections. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a reasonable belief that this article or the rules adopted therein have been violated, sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant.

(b) A warrant may issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the judge shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant must:

(I) State the grounds for its issuance and the name of each individual whose affidavit has been taken in support thereof;

(II) Be directed to an individual authorized under Colorado law to execute it;

(III) Command the individual to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(IV) Identify the item or types of property to be seized, if any; and

(V) Direct that it be served during normal business hours and designate the court to which it must be returned.

(c) A warrant issued pursuant to this section must be executed and returned within fourteen days after its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy must be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant must be made promptly, accompanied by a written inventory of any property taken. The inventory must be made in the presence of the individual executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible individual other than the individual executing the warrant. A copy of the inventory must be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(d) The judge or court who has issued a warrant shall attach to the warrant a copy of the return and all papers returnable in connection therewith and file them with the clerk of the appropriate state court for the judicial district in which the inspection was made.

(3) The board or BHA may conduct administrative inspections of controlled premises of those persons they are authorized to register under this article 18 in accordance with the following provisions:

(a) If authorized by an administrative inspection warrant issued pursuant to subsection (2) of this section, an officer or employee designated by the board or BHA, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection.

(b) If authorized by an administrative inspection warrant, an officer or employee designated by the board or BHA may:

(I) Inspect and copy records required by this article to be kept;

(II) Inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in paragraph (d) of this subsection (3), all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this article; and

(III) Inventory any stock of any controlled substance therein and obtain samples thereof.

(c) This section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with section 24-4-105, C.R.S., nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(I) If the owner, operator, or agent in charge of the controlled premises consents;

(II) In situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(III) In any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(IV) In all other situations in which a warrant is not constitutionally required.

(d) An inspection authorized by this section may not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1. **L. 2012:** (2)(c) amended, (SB 12-175), ch. 208, p. 874, § 134, effective July 1. **L. 2022:** IP(3), (3)(a), and IP(3)(b) amended, (HB 22-1278), ch. 222, p. 1503, § 40, effective July 1.

18-18-502. Injunctions.

(1) The district courts of this state have jurisdiction to restrain or enjoin violations of this article.

(2) The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section. Nothing in this section shall preclude any person from applying for injunctive relief from administrative inspections and warrants conducted under this article or for the immediate return of property seized under this article.

Source: L. 92: Entire article R&RE, p. 381, § 1, effective July 1.

18-18-503. Cooperative arrangements and confidentiality.

(1) The board and the BHA shall cooperate with federal and other state agencies in discharging the board's and the BHA's responsibilities concerning controlled substances and in controlling the abuse of controlled substances. To this end, the BHA may:

(a) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(b) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(c) Cooperate with the drug enforcement administration by establishing a centralized unit to accept, catalog, file, and collect statistics, including records of persons with substance use disorders and other controlled substance law offenders within this state, and make the information available for federal, state, and local law enforcement purposes, but may not furnish the name or identity of a patient or research subject whose identity could not be obtained pursuant to subsection (3) of this section; and

(d) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(2) Results, information, and evidence received from the drug enforcement administration relating to the regulatory functions of this article 18, including results of inspections conducted by the drug enforcement administration, may be relied and acted upon by the board or BHA in the exercise of the regulatory functions under this article 18.

(3) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the board or BHA, nor may the practitioner be compelled in any state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

Source: **L. 92:** Entire article R&RE, p. 381, § 1, effective July 1. **L. 2017:** (1)(c) amended, (SB 17-242), ch. 263, p. 1308, § 145, effective May 25. **L. 2022:** IP(1), (2), and (3) amended, (HB 22-1278), ch. 222, p. 1503, § 41, effective July 1.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

18-18-504. Pleadings - presumptions - liabilities.

(1) It is not necessary for the state to negate any exemption or exception in this article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this article.

(2) No person is presumed to be the holder of an appropriate registration or order form issued under this article.

(3) No civil or criminal liability is imposed by this article upon any authorized state, county, or municipal officer, engaged in the lawful administration or enforcement of this article.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1.

18-18-505. Judicial review.

All final determinations, findings, and conclusions of the board or BHA under this article 18 are subject to judicial review pursuant to section 24-4-106.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1. **L. 2022:** Entire section amended, (HB 22-1278), ch. 222, p. 1504, § 42, effective July 1.

Editor's note: This section is similar to former § 12-22-125.5 as it existed prior to 1992.

18-18-506. Education and research.

(1) The BHA shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs, the BHA may:

(a) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(b) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(c) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(d) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(e) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to alleviate them; and

(f) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(2) The BHA shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this article 18, the BHA may:

(a) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(b) Make studies and undertake programs of research to:

(I) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this article;

(II) Determine patterns of misuse and abuse of controlled substances and the social effects thereof; and

(III) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(c) Enter into contracts with public institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(3) The BHA may enter into contracts for educational and research activities.

(4) The BHA may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(5) The BHA may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1. **L. 2022:** IP(1), IP(2), (3), (4), and (5) amended, (HB 22-1278), ch. 222, p. 1504, § 43, effective July 1.

PART 6

MISCELLANEOUS

18-18-601. Pending proceedings - applicability.

(1) This article does not affect or abate a prosecution for a violation of law occurring before July 1, 1992. If the offense being prosecuted is similar to one set out in part 4 of this article, the penalties under said part 4 apply if they are less than those under prior law.

(2) This article does not affect a civil seizure, forfeiture, or injunctive proceeding commenced before July 1, 1992.

(3) All administrative proceedings pending under previous laws that are superseded by this article must be continued and brought to a final determination in accord with the laws and rules in effect before July 1, 1992. Any substance controlled under prior law but which is not listed in section 18-18-203, 18-18-204, 18-18-205, 18-18-206, or 18-18-207 is automatically controlled without further proceedings and must be included in the appropriate schedule.

(4) Repealed.

Source: L. 92: Entire article R&RE, p. 384, § 1, effective July 1. **L. 2022:** (4) repealed, (HB 22-1278), ch. 222, p. 1504, § 44, effective July 1.

18-18-602. Continuation of rules - application to existing relationships.

Any orders and rules adopted under any law affected by this article and in effect on July 1, 1992, and not in conflict with this article continue in effect until modified, superseded, or repealed. Rights and duties that matured, penalties that were incurred, and proceedings that were begun prior to July 1, 1992, are not affected by the enactment of the "Uniform Controlled Substances Act of 2013" or the corresponding repeal of provisions in article 22 of title 12, as they existed prior to July 1, 1992, and part 6 of article 5 of this title.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1311), ch. 281, p. 1624, § 60, effective July 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1940, § 60, effective October 1. **L. 2019:** Entire section amended, (SB 19-241), ch. 390, p. 3466, § 16, effective August 2.

18-18-603. Statutes of limitations.

A civil action under this article must be commenced within seven years after the claim for relief became known or should have become known, excluding any time during which a party is out of the state or in confinement or during which criminal proceedings relating to a party are in progress.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1.

18-18-604. Uniformity of interpretation.

To the extent that this article is uniform, the judiciary may look to decisions regarding the "Uniform Controlled Substances Act of 2013" among states enacting it, subject to rights and obligations provided under other Colorado statutes and the state constitution.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1. **L. 2013:** Entire section amended, (SB 13-250), ch. 333, p. 1940, § 61, effective October 1.

18-18-605. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1.

18-18-606. Drug case data collection.

(1) The division of criminal justice in the department of public safety shall collect the data specified in subsection (2) of this section for the period between October 1, 2013, and September 30, 2016, and issue a report by December 31, 2016, on the impact of Senate Bill 13-250, enacted in 2013.

(2) The data must include, but is not limited to:

- (a) The total number of drug cases diverted from prosecution prior to filing through referral to law enforcement or district attorney diversion programs;
- (b) The total number of drug cases filed statewide by jurisdiction;
- (c) All demographic information and relevant background information on the defendants for which a drug case has been filed or diverted including prior criminal history; and
- (d) For all cases filed, the nature of the charges by statutory citation and the outcome or disposition information on all the cases filed, which shall include but not be limited to:
 - (I) Dismissal without prosecution;
 - (II) Dismissal as a result of a plea bargain;
 - (III) Deferred judgment to the original charge or a lesser charge;
 - (IV) Any plea bargain that reduces the original charge or charges filed;
 - (V) Any sentence bargain including, but not limited to, a stipulation to a certain sentence or a limit on the amount of jail or department of corrections imposed;
 - (VI) Any plea bargain that involves multiple cases;
 - (VII) Any sentence bargain that involves concurrent or consecutive time in the custody of the department of corrections;
 - (VIII) Any probation or deferred judgment revocation filed and the result of any revocation;
 - (IX) Any successful completion of probation or a deferred judgment; and
 - (X) Any successful completion of supervision resulting in conversion of the felony to a misdemeanor pursuant to the provisions of section 18-1.3-103.5 (2).

Source: L. 2013: Entire section added, (SB 13-250), ch. 333, p. 1938, § 58, effective October 1.

18-18-607. Safe stations - disposal of controlled substances - medical evaluation - definition.

(1) (a) Upon arrival to a safe station, a person may turn in any controlled substances and request assistance in gaining access to treatment for a substance use disorder. Safe station personnel shall utilize current procedures and protocols for the disposal of the controlled substances.

(b) A person who turns in one or more controlled substances pursuant to subsection (1)(a) of this section is not subject to arrest or prosecution for possession of such controlled substances.

(2) Reasonable efforts should be taken by safe station personnel to determine if the person is in need of immediate medical attention and facilitate transportation to an appropriate medical facility, if necessary. If the person does not require immediate medical attention, the safe station personnel shall provide the person with information about the behavioral health crisis response system, created in section 27-60-103, to help identify available treatment options and, if practicable, provide transportation for the person to the most appropriate facility for treatment of a substance use disorder. Information about the crisis hotline must be developed by the BHA and be provided to safe stations for distribution.

(3) This section does not apply if safe station personnel are not available to assist a person who arrives at a safe station for disposal of a controlled substance.

(4) As used in this section, unless the context otherwise requires, a "safe station" means any municipal police station or county sheriff's office.

Source: L. 2020: Entire section added, (HB 20-1017), ch. 288, p. 1424, § 5, effective September 14. L. 2021: (4) amended, (SB 21-137), ch. 362, p. 2382, § 29, effective June 28. L. 2022: (2) amended, (HB 22-1278), ch. 222, p. 1504, § 45, effective July 1.

Cross references: For the short title ("Behavioral Health Recovery Act of 2021") and the legislative declaration in SB 21-137, see sections 1 and 2 of chapter 362, Session Laws of Colorado 2021.

18-18.5 ARTICLE 18.5

Substance Abuse Prevention, Intervention, and Treatment Response of the Criminal Justice System

18-18.5-101. Legislative declaration.	18-18.5-104. Task force funding.
18-18.5-102. Definitions.	18-18.5-105. Cash fund - created.
18-18.5-103. State substance abuse trend and response task force - creation - membership - duties.	18-18.5-106. Repeal of article.

18-18.5-101. Legislative declaration.

(1) The general assembly finds that:

(a) Each year Colorado spends significant amounts of money related to untreated substance abuse. The magnitude of public funds spent on the direct and indirect consequences of substance use and abuse is staggering, and dozens of Colorado public agencies play a part in controlling substance use or dealing with its consequences.

(b) Deaths in Colorado related to the abuse of prescription opioids, such as oxycodone, hydrocodone, and fentanyl, nearly doubled from one hundred eighty in 2000 to three hundred forty-three in 2010;

(c) Children whose parents abuse alcohol or drugs are three times more likely to be verbally, physically, or sexually abused and four times more likely than other children to be neglected. Additionally, research indicates that children in families affected by substance use are at an increased risk for substance use and mental health issues in adolescence. The health, safety, and future success of drug-endangered children are pressing issues in Colorado.

(d) Substance use by youth is detrimental to brain maturation, impacting brain structure, functioning, and neurocognition;

(e) Substance use during pregnancy places children at direct risk for complications, including premature delivery, altered neonatal behavior patterns such as abnormal reflexes and extreme irritability, congenital deformities, low birth weight, attention deficit disorder, and prenatal and postnatal neglect, many of which cause lifelong defects; and

(f) Each year Colorado spends significant moneys related to untreated substance abuse.

(2) The general assembly further finds that substance abuse, including that related to illicit drugs, prescription drugs, underage marijuana use, and methamphetamine labs and abuse, harms citizens of Colorado. Responses to substance abuse should be supported in the criminal justice system, the public health system, mental health services, social services, child welfare and youth services, community task forces, and with treatment for parents who abuse drugs and prevention and treatment for children affected by substance abuse and nonfederally regulated pharmaceutical drug production and distribution, and other systems affected by substance abuse.

(3) The general assembly, therefore, determines and declares that it is necessary to change the state methamphetamine task force into a substance abuse trend and response task force to:

(a) Examine drug trends and the most effective models and practices for:

(I) The prevention of and intervention into substance abuse;

(II) The prevention of unintended harmful exposures due to nonfederal-drug-administration-regulated pharmaceutical drug production and distribution;

(III) The prevention of potential negative public health impacts due to improper dispensing, management, and disposal of drugs; and

(IV) The treatment of children and adults affected by substance use disorders;

(b) Formulate a response to current and emerging substance use disorder problems from the criminal justice, prevention, and treatment sectors, including the use of drop-off treatment services, mobile and walk-in crisis centers, and withdrawal management programs, rather than continued criminal justice involvement for offenders of low-level drug offenses; and

(c) Make recommendations to the general assembly for the development of statewide strategies and legislative proposals related to these issues. The recommendations made to the general assembly shall be made in coordination with the task force and the department of human services, the agency responsible for the administration of behavioral health programs and services.

Source: **L. 2006:** Entire article added, p. 1699, § 2, effective July 1. **L. 2013:** Entire section R&RE, (SB 13-244), ch. 295, p. 1575, § 1, effective August 7. **L. 2017:** (3)(a)(IV) amended, (SB 17-242), ch. 263, p. 1308, § 146, effective May 25. **L. 2019:** (3)(b) amended, (SB 19-008), ch. 275, p. 2594, § 3, effective August 2.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

18-18.5-102. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Task force" means the state substance abuse trend and response task force established pursuant to section 18-18.5-103.

Source: **L. 2006:** Entire article added, p. 1700, § 2, effective July 1. **L. 2013:** (1) amended, (SB 13-244), ch. 295, p. 1577, § 2, effective August 7.

18-18.5-103. State substance abuse trend and response task force - creation - membership - duties.

- (1) There is hereby created the state substance abuse trend and response task force.
- (2) The task force consists of the following members:
 - (a) (I) The attorney general or his or her designee, who shall serve as the chair;
 - (II) An expert in the field of substance abuse prevention, who shall be appointed by the president of the senate and serve as a vice-chair;
 - (III) An expert in the field of substance abuse treatment, who shall be appointed by the speaker of the house of representatives and serve as a vice-chair;
 - (IV) A representative of the criminal justice system, who shall be appointed by the governor and serve as a vice-chair;
 - (V) The president of the senate or his or her designee;
 - (VI) The minority leader of the senate or his or her designee;
 - (VII) The speaker of the house of representatives or his or her designee;
 - (VIII) The minority leader of the house of representatives or his or her designee;
- (a.5) Repealed.
- (b) Twenty-one members appointed by the task force chair and vice-chairs as follows:
 - (I) A representative of a local child and family service provider;
 - (II) A representative of a major health facility that focuses on the treatment of children;
 - (III) A representative of a human services agency with experience in child welfare issues;
 - (IV) A representative of the criminal defense bar;
 - (V) A representative of a behavioral health treatment provider that is an expert in substance abuse treatment procedures;
 - (VI) A representative of the department of education, who is familiar with the department's drug prevention initiatives;
 - (VII) A representative of the Colorado district attorneys council;
 - (VIII) A representative of a Colorado sheriffs' organization;
 - (IX) A representative of a Colorado police chiefs' organization;
 - (X) A county commissioner from a rural county;

(XI) A representative of an organization that provides information, advocacy, and support services to municipalities located in rural counties;

(XII) A licensed pharmacist;

(XIII) A representative of the department of public safety;

(XIV) A representative of the office of the child's representative;

(XV) A representative of the division of adult parole of the department of corrections;

(XVI) A representative of the Colorado drug investigators association;

(XVII) A youth representative;

(XVIII) A representative of a substance abuse recovery organization;

(XIX) Repealed.

(XX) A representative of a community prevention coalition;

(XXI) A representative of the Colorado department of public health and environment;

(XXII) A representative of the behavioral health administration in the department of human services.

(c) Two members appointed by the chief justice of the Colorado supreme court who represent the judicial department, one of whom is a district court judge experienced in handling cases involving substance abuse and one of whom represents the division of probation within the judicial department;

(d) A member appointed by the governor who represents the governor's policy staff.

(3) (a) A vacancy occurring in a position shall be filled as soon as possible by the appropriate appointing authority designated in subsection (2) of this section.

(b) The terms of members appointed or reappointed by the speaker and the president expire on the convening date of the first regular session of each general assembly, and all subsequent appointments and reappointments by the speaker and the president shall be made as soon as practicable after the convening date. The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members appointed or reappointed by the speaker and the president serve at the pleasure of the appointing authority and continue in office until the member's successor is appointed.

(4) The task force, in collaboration with state agencies charged with prevention, intervention, or treatment of substance abuse, shall:

(a) Assist local communities in implementing the most effective models and practices for substance abuse prevention, intervention, and treatment and in developing the responses by the criminal justice system;

(b) Review model programs that have shown the best results in Colorado and across the United States and provide information on the programs to local communities and local drug task forces;

(c) Assist and augment local drug task forces without supplanting them;

(d) Investigate collaborative models on protecting children and other victims of substance abuse and nonfederal- drug-administration-regulated pharmaceutical drug production and distribution;

(e) Measure and evaluate the progress of the state and local jurisdictions in preventing substance abuse and nonfederal-drug-administration-regulated pharmaceutical drug production and distribution and in prosecuting persons engaging in these acts;

(f) Evaluate and promote approaches to increase public awareness of current and emerging substance abuse problems and strategies for addressing those problems;

(g) Assist local communities with implementation of the most effective practices to respond to current and emerging substance abuse problems and nonfederal-drug- administration-regulated pharmaceutical drug production and distribution;

(h) Consider any other issues concerning substance abuse problems and nonfederal-drug-administration- regulated pharmaceutical drug production and distribution that arise during the course of the task force study;

(i) Develop a definition of a "drug-endangered child" to be used in the context of the definition of "child abuse or neglect" as set forth in section 19-1-103 (1).

(5) All state and local agencies shall cooperate with the task force and provide such data and other information as the task force may require in carrying out its duties under this section. Any state or local agency or organization that is represented on the task force may provide staff assistance to the task force, subject to the discretion of the chair. Any staff assistance provided to the task force pursuant to this subsection (5) shall be without compensation.

(6) In addition, the task force shall:

(a) Meet at least four times each year or more often as directed by the chair of the task force;

(b) Communicate with and obtain input from groups throughout the state affected by the issues identified in subsection (4) of this section;

(c) Create subcommittees as needed to carry out the duties of the task force. The subcommittees may consist, in part, of persons who are not members of the task force. Such persons may vote on issues before the subcommittee but shall not be entitled to a vote at meetings of the task force.

(c.5) and (d) Repealed.

(7) (a) Except as otherwise provided in section 2-2-326, C.R.S., members of the task force shall serve without compensation.

(b) (Deleted by amendment, L. 2014.)

Source: **L. 2006:** Entire article added, p. 1700, § 2, effective July 1. **L. 2007:** (2)(a.5) added, p. 179, § 9, effective March 22. **L. 2009:** (6)(a) and IP(6)(d) amended, (SB 09-231), ch. 151, p. 631, § 1, effective April 20. **L. 2013:** (1), (2)(a)(II), (2)(a)(III), (2)(b), (2)(c), (4), (6)(a), and IP(6)(d) amended, (SB 13-244), ch. 295, p. 1577, § 3, effective August 7; (4)(i) added, (SB 13-278), ch. 300, p. 1592, § 2, effective August 7. **L. 2014:** (7) amended, (SB 14-153), ch. 390, p. 1962, § 10, effective June 6. **L. 2018:** (6)(a) and IP(6)(d) amended, (SB 18-071), ch. 167, p. 1141, § 1, effective April 26. **L. 2020:** (6)(c.5) added, (SB 20-028), ch. 186, p. 853, § 3, effective June 30. **L. 2022:** IP(2) and (3) amended and (2)(a.5) repealed, (SB 22-013), ch. 2, p. 25, § 30, effective February 25; IP(2) and (2)(b)(XXII) amended, (HB 22-1278), ch. 222, p. 1505, § 46, effective July 1. **L. 2026:** IP(2)(b) and (4)(i) amended and (2)(b)(XIX), (6)(c.5), and (6)(d) repealed, (HB 26-1426), ch. 334, p. 2023, § 93, effective August 12.

Cross references: For the legislative declaration in the 2013 act adding subsection (4)(i), see section 1 of chapter 300, Session Laws of Colorado 2013.

18-18.5-104. Task force funding.

(1) The division of criminal justice in the department of public safety, on behalf of the task force, is authorized to receive and expend contributions, grants, services, and in-kind donations from any public or private entity for any direct or indirect costs associated with the duties and functions of the task force set forth in this article.

(2) The task force shall, no later than August 1, 2006, identify all funding sources described in subsection (1) of this section that the task force intends to utilize for its operation through August 1, 2008.

(3) Subject to available moneys, the task force may approve grants to recipients. In selecting grant recipients, the task force, to the extent possible, shall ensure that grants are awarded to law enforcement agencies or other applicants in a variety of geographic areas of the state.

Source: L. 2006: Entire article added, p. 1704, § 2, effective July 1.

18-18.5-105. Cash fund - created.

(1) (a) All private and public funds received by the task force or the division of criminal justice in the department of public safety, on behalf of the task force, through grants, contributions, and donations pursuant to this article 18.5 shall be transmitted to the state treasurer, who shall credit the same to the substance abuse prevention, intervention, and treatment cash fund, which fund is hereby created and referred to in this section as the "fund". The money in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs associated with the implementation of this article 18.5. All money in the fund not expended for the purpose of this article 18.5 may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of money in the fund shall be credited to the fund. Any unexpended and unencumbered money remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund. All unexpended and unencumbered money remaining in the fund as of September 1, 2028, shall be transferred to the general fund.

(b) It is the intent of the general assembly that the task force and the division of criminal justice of the department of public safety, on behalf of the task force, shall not be required to solicit gifts, grants, or donations from any source and that the task force shall operate in accordance with the provisions of this article, independently of the balance in the fund.

(2) Compensation as provided in section 18-18.5-103 (7)(b) for legislative members of the task force shall be approved by the chair of the legislative council and paid by vouchers and warrants drawn as provided by law from moneys appropriated for such purpose and allocated to the legislative council from the fund.

Source: L. 2006: Entire article added, p. 1704, § 2, effective July 1. **L. 2009:** (1)(a) amended, (SB 09-231), ch. 151, p. 631, § 2, effective April 20. **L. 2013:** (1)(a) amended, (SB 13-244), ch. 295, p. 1579, § 4, effective August 7. **L. 2018:** (1)(a) amended, (SB 18-071), ch. 167, p. 1141, § 2, effective April 26.

18-18.5-106. Repeal of article.

This article 18.5 is repealed, effective September 1, 2028.

Source: **L. 2006:** Entire article added, p. 1705, § 2, effective July 1. **L. 2009:** Entire section amended, (SB 09-231), ch. 151, p. 632, § 3, effective April 20. **L. 2013:** Entire section amended, (SB 13-244), ch. 295, p. 1580, § 5, effective August 7. **L. 2018:** Entire section amended, (SB 18-071), ch. 167, p. 1142, § 3, effective April 26.

ARTICLE 19

Drug Offender Surcharge

18-19-101.	Legislative declaration.	18-19-103.5.	Rural alcohol and substance abuse surcharge - repeal.
18-19-102.	Definitions.		
18-19-103.	Source of revenues - allocation of money - correctional treatment cash fund.	18-19-104.	Judicial district drug offender treatment boards - creation.

18-19-101. Legislative declaration.

The general assembly hereby finds, determines, and declares that the use of controlled substances exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the fiscal burden on the taxpayers of this state. It is the intent of the general assembly in enacting this article to shift the costs of controlled substance use to those persons who unlawfully traffic, possess, or use controlled substances.

Source: **L. 91:** Entire article added, p. 445, § 12, effective May 29.

18-19-102. Definitions.

As used in this article 19, unless the context otherwise requires:

(1) "Alcohol- or drug-related offender" means a person convicted of any of the following offenses or of attempt to commit any of the following offenses:

(a) Violation of a protection order as described in section 18-6-803.5 if the violation involved a mandatory criminal protection order effective pursuant to section 18-1-1001, the order prohibited the possession or consumption of alcohol or controlled substances, and the violation related to such provisions;

(b) Vehicular homicide as described in section 18-3-106 (1)(b);

(c) Vehicular assault as described in section 18-3-205 (1)(b);

(d) Bringing alcohol beverages into the major league stadium as described in section 18-9-123 (1)(a)(I); or

(e) Illegal possession or consumption of ethyl alcohol or marijuana by an underage person or illegal possession of marijuana paraphernalia by an underage person, as described in section 18-13-122.

(1.5) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(2) "Drug offender" means any person convicted of any offense under article 18 of this title or an attempt to commit such offense as provided by article 2 of this title.

Source: **L. 91:** Entire article added, p. 445, § 12, effective May 29. **L. 95:** (2) amended, p. 1255, § 20, effective July 1. **L. 2002:** (1) amended, p. 1521, § 217, effective October 1. **L. 2009:** (1) amended and (1.5) added, (HB 09-1119), ch. 397, p. 2147, § 5, effective January 1, 2010. **L. 2014:** (1)(e) amended, (SB 14-129), ch. 387, p. 1938, § 8, effective June 6. **L. 2025:** IP and (1)(a) amended, (HB 25-1148), ch. 154, p. 626, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-19-103. Source of revenues - allocation of money - correctional treatment cash fund.

(1) For offenses committed on and after July 1, 1996, each drug offender who is convicted, or receives a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in the county in which the conviction occurs or in which the deferred sentence is entered. Such surcharge shall be in the following amounts:

(a) For each class 2 felony or level 1 drug felony of which a person is convicted, four thousand five hundred dollars;

(b) For each class 3 felony or level 2 drug felony of which a person is convicted, three thousand dollars;

(c) For each class 4 felony or level 3 drug felony of which a person is convicted, two thousand dollars;

(d) For each class 5 felony or level 4 drug felony of which a person is convicted, one thousand five hundred dollars;

(e) For each class 6 felony of which a person is convicted, one thousand two hundred fifty dollars;

(f) For each class 1 misdemeanor or level 1 drug misdemeanor of which a person is convicted, one thousand dollars;

(g) For each class 2 misdemeanor of which a person is convicted, six hundred dollars;

(h) For each class 3 misdemeanor or level 2 drug misdemeanor of which a person is convicted, three hundred dollars.

(2) Repealed.

(3) The clerk of the court shall disburse the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be deposited by the clerk in the judicial stabilization cash fund created in section 13-32-101 (6) for purposes of administering the disbursement of the surcharge pursuant to this subsection (3).

(b) Four percent shall be disbursed to the investigating agency to cover the costs of fingerprinting and photographing offenders pursuant to section 16-21-104 (1), C.R.S.

(c) One percent shall be disbursed to the sheriff of the county in which the conviction or deferred sentence is entered, to cover the costs of fingerprinting and photographing offenders pursuant to section 18-18-432 (3).

(d) Ninety percent shall be disbursed to the state treasurer who shall credit the same to the correctional treatment cash fund created pursuant to subsection (4) of this section.

(3.5) (a) Repealed.

(b) The general assembly shall appropriate to the correctional treatment cash fund created pursuant to subsection (4) of this section at least seven million six hundred fifty-six thousand two hundred dollars in fiscal year 2012-13 from the general fund, at least nine million five hundred thousand dollars in fiscal year 2013-14 from the general fund, and each year thereafter generated from estimated savings from House Bill 10-1352, enacted in 2010.

(c) The general assembly shall appropriate to the correctional treatment cash fund created pursuant to subsection (4) of this section at least three million five hundred thousand dollars in fiscal year 2014-15 from the general fund generated from estimated savings from Senate Bill 13-250, enacted in 2013.

(4) (a) There is created in the state treasury the correctional treatment cash fund, referred to in this subsection (4)(a) as the "fund", which consists of money appropriated pursuant to section 39-28.8-501, money received by the state treasurer pursuant to subsections (3)(d) and (3.5) of this section, and, in addition, each year, the general assembly shall appropriate at least two million two hundred thousand dollars generated from estimated savings from the enactment of Senate Bill 03-318, enacted in 2003, to the fund. The money in the fund shall be used for the purposes described in subsection (5)(c) of this section. Any money not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(a.5) Repealed.

(b) Notwithstanding any provision of paragraph (a) of this subsection (4) to the contrary, on April 20, 2009, the state treasurer shall deduct one hundred fifty-one thousand three hundred forty-one dollars from the drug offender surcharge fund and transfer such sum to the general fund.

(c) Notwithstanding any provision of paragraph (a) of this subsection (4) to the contrary, on July 1, 2009, the state treasurer shall deduct one million three hundred sixty thousand dollars from the drug offender surcharge fund and transfer such sum to the general fund.

(d) (I) For state fiscal years commencing on or before July 1, 2024, the state treasurer shall credit all interest and income derived from the deposit and investment of money in the correctional treatment cash fund to the correctional treatment cash fund.

(II) Notwithstanding subsection (4)(a) of this section, for state fiscal years commencing on or after July 1, 2025, in accordance with section 24-36-114 (1), the state treasurer shall credit all interest and income derived from the deposit and investment of money in the correctional treatment cash fund to the general fund.

(III) Repealed.

(5) (a) The correctional treatment board, hereby created and referred to in this subsection (5) as the "board", shall prepare an annual treatment funding plan that includes a fair and reasonable allocation of resources for programs throughout the state. The judicial department shall include the annual treatment funding plan in its annual presentation to the joint budget committee.

(b) The board consists of:

(I) The executive director of the department of corrections or his or her designee;

(II) The director of the division of probation services in the judicial department or his or her designee;

(III) The executive director of the department of public safety or his or her designee;

(IV) The commissioner of the behavioral health administration in the department of human services or the commissioner's designee. If the commissioner appoints a designee, the commissioner is encouraged to select someone with expertise in substance use disorder counseling and substance abuse issues.

(V) The state public defender or his or her designee;

(VI) The president of the statewide association representing district attorneys or his or her designee; and

(VII) The president of the statewide association representing county sheriffs or his or her designee.

(c) The board may direct that money in the correctional treatment cash fund may be used for the following purposes:

(I) Alcohol and drug screening, assessment, and evaluation;

(II) Alcohol and drug testing;

(III) Substance abuse education and training;

(IV) An annual statewide conference regarding substance abuse treatment;

(V) Treatment for assessed substance abuse and co-occurring disorders;

(VI) Recovery support services, including offender reentry;

(VII) Administrative support to the correctional treatment board including, but not limited to, facilitating and coordinating data collection, conducting data analysis, developing contracts, preparing reports, scheduling and staffing board and subcommittee meetings, and engaging in budget planning and analysis; and

(VIII) Repealed.

(IX) Drug overdose prevention, including medication-assisted treatment for opiate dependence, opioid antagonists, and non-laboratory synthetic opiate detection tests.

(d) Moneys from the correctional treatment cash fund may be used to serve the following populations:

(I) Adults and juveniles on diversion for a state offense and adults and juveniles under supervision in a pretrial diversion program for a state offense;

(II) Adults and juveniles serving a probation sentence for a state offense, including Denver county;

(III) Adults and juveniles on parole;

(IV) Offenders sentenced or transitioned to a community corrections program;

(V) Offenders serving a sentence in a county jail, on a work-release program supervised by the county jail, or receiving after-care treatment following release from jail if the offender participated in a jail treatment program; and

(VI) Offenders on bond or on summons, with a pending criminal case in a pre-trial treatment program.

(e) Before adopting the annual treatment fund plan, the board shall review the information specified in paragraph (f) of this subsection (5) and shall consider proposals from the drug offender treatment boards created in section 18-19-104 for funding local assessed treatment needs.

(f) The board shall determine the scope, method, and frequency of the data collection and the parties responsible for data collection, analysis, and reporting. The data shall be organized by judicial district and shall include, at a minimum, the following from each treatment program:

(I) Name and location of the program, including the county and judicial district;

(II) The referring criminal agency;

(III) Demographic information including gender and ethnicity;

(IV) Level of treatment delivered;

(V) Actual length of time in treatment for each client;

(VI) Discharge status and, if the status is negative, the reason for the negative discharge; and

(VII) Any special licenses held by the treatment program.

(5.5) Repealed.

(6) (a) The court may not waive any portion of the surcharge required by this section unless the court first finds that the drug offender is financially unable to pay any portion of said surcharge.

(b) The finding required by paragraph (a) of this subsection (6) shall only be made after a hearing at which the drug offender shall have the burden of presenting clear and convincing evidence that he is financially unable to pay any portion of the surcharge.

(c) The court shall waive only that portion of the surcharge which the court has found the drug offender is financially unable to pay.

Source: **L. 91:** Entire article added, p. 445, § 12, effective May 29. **L. 93:** (3)(c) amended, p. 1779, § 41, effective June 6. **L. 94:** (2) and (3) amended, p. 1632, § 36, effective May 31; (4) amended, p. 2605, § 5, effective July 1. **L. 96:** (1) amended, p. 134, § 1, effective March 25. **L. 2002:** IP(1) and (2) amended, p. 1522, § 218, effective October 1. **L. 2003:** (5.5) added, p. 2686, § 4, effective July 1. **L. 2009:** (4) and (5.5) amended, (SB 09-208), ch. 149, p. 621, § 13, effective April 20; (4)(c) added, (SB 09-279), ch. 367, p. 1926, § 5, effective June 1. **L. 2010:** (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (2), (4)(a), and (5.5)(b) amended and (3.5) added, (HB 10-1352), ch. 259, pp. 1175, 1171, §§ 25, 9, effective August 11. **L. 2011:** (5.5)(c) added, (SB 11-164), ch. 33, p. 92, § 2, effective March 18. **L. 2012:** (3)(d), (3.5)(b), (4)(a), (5), and (5.5) amended, (3.5)(a) repealed, and (4)(a.5) added, (HB 12-1310), ch. 268, p. 1407, § 35, effective June 7. **L. 2013:** (5)(d)(I) amended, (HB 13-1156), ch. 336, p. 1962, § 16, effective August 7; (1) and (2) amended and (3.5)(c) added, (SB 13-250), ch. 333, p. 1935, § 55, effective October 1. **L. 2014:** (5)(d)(I), (5)(d)(IV), and (5)(d)(V) amended and (5)(d)(VI) added, (SB 14-163), ch. 391, p. 1978, § 21, effective June 6. **L. 2015:** (4)(a) amended, (HB 15-1367), ch. 271, p. 1073, § 10, effective June 4. **L. 2017:** (5)(b)(IV) amended, (SB 17-242), ch. 263, p. 1308, § 147, effective May 25. **L. 2018:** IP(5)(c) and (5)(c)(VI) amended, (HB 18-1176), ch. 321, p. 1927, § 4, effective May 30. **L. 2021:** (2) repealed, (HB 21-1090), ch. 157, p. 901, § 4, effective May 20. **L. 2022:** (3)(a) amended, (HB 22-1336), ch. 132, p. 899, § 2, effective April 25; (5)(b)(IV) amended, (HB 22-1278), ch. 222, p. 1505, § 47, effective July 1; (5)(c)(VI) and (5)(c)(VII) amended and (5)(c)(VIII) added, (HB 22-1326), ch. 225, p. 1667, § 44, effective July 1; (5)(c)(VI) and (5)(c)(VII) amended and (5)(c)(IX) added, (HB 22-1326), ch. 225, p. 1644, § 19, effective January 1, 2023. **L. 2024:** (5)(c)(IX) amended, (HB 24-1037), ch. 458, p. 3170, § 18, effective June 6. **L. 2025:** (4)(a) amended and (4)(d) added, (SB 25-317), ch. 385, p. 2142, § 8, effective June 3.

Editor's note: (1) Subsection (4)(a.5) provided for the repeal of subsection (4)(a.5), effective July 1, 2012. (L. 2012, p. 1407.)

(2) Subsection (5.5) provided for the repeal of subsection (5.5), effective July 2, 2012. (L. 2012, p. 1407.)

(3) Subsection (5)(c)(VIII)(B) provided for the repeal of subsection (5)(c)(VIII), effective July 1, 2025. (See L. 2022, p. 1667.)

(4) Subsection (4)(d)(III)(B) provided for the repeal of subsection (4)(d)(III), effective July 1, 2026. (See L. 2025, p. 2142.)

Cross references: For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1) and subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative intent contained in the 2003 act enacting subsection (5.5), see section 1 of chapter 424, Session Laws of Colorado 2003. For the legislative declaration in HB 15-1367, see section 1 of chapter 271, Session Laws of Colorado 2015. For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017. For the legislative declaration in HB 18-1176, see section 1 of chapter 321, Session Laws of Colorado 2018. For the legislative declaration in HB 22-1326 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2025, see sections 1 and 55 of chapter 225, Session Laws of Colorado 2022. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website. For the legislative declaration in SB 25-317, see section 1 of chapter 385, Session Laws of Colorado 2025.

ANNOTATION

Drug offender surcharge is properly characterized as a punishment rather than as a nonpunitive, compensatory payment. As such, the surcharge is appropriately scrutinized against constitutional provisions prohibiting ex post facto legislation. *People v. Stead*, 845 P.2d 1156 (Colo. 1993).

Imposition of drug offender surcharge violated prohibition against ex post facto laws where defendant committed offenses before effective date of statute. *People v. Stead*, 845 P.2d 1157 (Colo. 1993); *People v. Henry*, 845 P.2d 1160 (Colo. 1993); *People v. Ellington*, 854 P.2d 223 (Colo. 1993); *People v. Brown*, 854 P.2d 228 (Colo. 1993); *People v. Stead*, 854 P.2d 229 (Colo. 1993).

Court erred in imposing surcharge for offenses that took place in December, 1990. Statute was intended to apply to acts committed on or after July 1, 1991, and imposition of surcharge for 1990 act violates

constitutional prohibition against ex post facto law. *People v. Racheli*, 878 P.2d 46 (Colo. App. 1994).

The double jeopardy clause requires the trial court to impose the drug offender surcharge at the time it imposes defendant's sentence in open court. The surcharge is considered punishment and may be waived in full or in part based upon a defendant's financial ability to pay. *People v. McQuarrie*, 66 P.3d 181 (Colo. App. 2002), overruled in *Yeadon v. People*, 2020 CO 38, 462 P.3d 1087, and *Waddell v. People*, 2020 CO 39, 462 P.3d 1100.

A drug offender surcharge is statutorily mandated and a trial court's failure to impose it in open court renders a defendant's sentence illegal and subject to correction at any time pursuant to Crim. P. 35(a) without violating the double jeopardy clause. *Yeadon v. People*, 2020 CO 38, 462

P.3d 1087; Waddell v. People, 2020 CO 39, 462 P.3d 1100 (both overruling People v. McQuarrie, 66 P.3d 181 (Colo. App. 2002)); People v. Cattaneo, 2020 COA 40, 471 P.3d 1186.

The conversion of a defendant's felony conviction to a misdemeanor conviction pursuant to § 18-1.3-103.5 does not affect the amount of the drug offender surcharge required to be imposed pursuant to this section. People v. DeBorde, 2016 COA 185, 411 P.3d 220.

A court has the authority to waive any portion of the otherwise mandatory drug

offender surcharge that it finds the offender is financially unable to pay. People v. Archuleta-Ferales, 2014 COA 178, 343 P.3d 1069.

A court may consider family contributions and future ability to pay when determining a defendant's financial ability to pay the surcharge. People v. Archuleta-Ferales, 2014 COA 178, 343 P.3d 1069.

Incarceration does not necessarily render a defendant unable to pay the drug offender surcharge. People v. Griffiths, 251 P.3d 462 (Colo. App. 2010).

18-19-103.5. Rural alcohol and substance abuse surcharge - repeal.

(1) In addition to the surcharges established in section 18-19-103, each drug offender and each alcohol- or drug-related offender who is convicted, or receives a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in the county in which the conviction occurs or in which the deferred sentence is entered. The surcharge shall be in an amount determined by the judge but shall be not less than one dollar nor more than ten dollars.

(2) The clerk of the court shall disburse the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be deposited by the clerk in the judicial stabilization cash fund created in section 13-32-101 (6) for purposes of administering the disbursement of the surcharge pursuant to this subsection (2);

(b) Ninety-five percent shall be disbursed to the state treasurer who shall credit the same to the rural alcohol and substance abuse cash fund created in section 27-80-117 (3), C.R.S.

(3) The minimum penalty surcharge shall be mandatory, and the court shall have no discretion to suspend or waive the surcharge; except that the court may suspend or waive the surcharge for a defendant determined by the court to be indigent.

(4) This section is repealed, effective September 1, 2030, unless the general assembly extends the repeal of the rural alcohol and substance abuse prevention and treatment program created in section 27-80-117.

Source: L. 2009: Entire section added, (HB 09-1119), ch. 397, p. 2148, § 6, effective January 1, 2010. **L. 2010:** (2)(b) and (4) amended, (SB 10-175), ch. 188, p. 788, § 35, effective April 29. **L. 2017:** (4) amended, (SB 17-294), ch. 264, p. 1393, § 40, effective May 25. **L. 2022:** (2)(a) amended, (HB 22-1336), ch. 132, p. 899, § 3, effective April 25. **L. 2025:** (4) amended, (SB 25-195), ch. 243, p. 1230, § 3, effective August 6.

18-19-104. Judicial district drug offender treatment boards - creation.

(1) Each judicial district shall create a drug offender treatment board, whose membership is knowledgeable about adult criminal and juvenile justice matters, consisting of:

- (a) The district attorney serving the judicial district or his or her designee;
- (b) The chief public defender serving the judicial district or his or her designee;
- (c) The chair of the local community corrections board or his or her designee;
- (d) A parole officer working in the judicial district chosen by the director of the department of corrections or his or her designee;
- (e) A sheriff that serves the judicial district chosen by the chief judge of the judicial district;
- (f) A representative of a drug court or similar problem-solving court if such a court exists in the judicial district chosen by the chief judge of the judicial district;
- (g) A person with expertise in juvenile matters chosen by the chief judge of the judicial district; and
- (h) A probation officer working in the judicial district chosen by the chief judge of the judicial district.

(1.5) Effective November 1, 2024, the judicial district drug offender treatment board for the twenty-third judicial district is created. Initial members of the board are appointed pursuant to the provisions of subsection (1) of this section; except that the twenty-third judicial district administrative judge shall appoint the members appointed pursuant to subsections (1)(e) to (1)(h) of this section. Effective January 7, 2025, all members of the judicial district drug offender treatment board for the twenty-third judicial district must be appointed pursuant to subsection (1) of this section.

(2) The board shall give priority to drug court funding if the jurisdiction operates a drug court and the drug court operates with best evidence-based or promising practices. Each drug offender treatment board shall annually make recommendations to the correctional treatment board for funding local assessed treatment needs.

(3) Each judicial district's drug offender treatment board may adopt rules and guidelines as necessary to perform the functions of the board.

(4) and (5) Repealed.

Source: **L. 2003:** Entire section added, p. 2688, § 6, effective July 1. **L. 2008:** (2) amended, p. 1890, § 58, effective August 5. **L. 2009:** (5) repealed, (SB 09-292), ch. 369, p. 1949, § 33, effective August 5. **L. 2012:** (1) and (2) amended and (4) repealed, (HB 12-1310), ch. 268, p. 1410, § 36, effective June 7. **L. 2024:** (1.5) added, (HB 24-1212), ch. 8, p. 20, § 1, effective February 27.

Cross references: For the legislative intent contained in the 2003 act enacting this section, see section 1 of chapter 424, Session Laws of Colorado 2003.

ARTICLE 20

Offenses Related to Limited Gaming

18-20-101.	Legislative declaration.	18-20-109.	Use of counterfeit or
18-20-102.	Definitions - terms used.		unapproved chips or
18-20-103.	Violations of taxation		tokens or unlawful coins
	provisions - penalties.		or devices - possession of
18-20-104.	False statement on		certain unlawful devices,
	application - violations of		equipment, products, or
	rules or provisions of	18-20-110.	materials.
	article 30 of title 44 as		
	felony.	18-20-111.	Cheating game and devices.
18-20-105.	Slot machines - shipping		Unlawful manufacture, sale,
	notices.		distribution, marking,
18-20-106.	Cheating.		altering, or modification
18-20-107.	Fraudulent acts.		of equipment and devices
18-20-108.	Use of device for calculating		related to limited gaming
	probabilities.		- unlawful instruction.
		18-20-112.	Unlawful entry by excluded
			and ejected persons.
		18-20-113.	Personal pecuniary gain or
			conflict of interest.

18-20-114. False or misleading
information - unlawful.

18-20-115. Exceptions.

18-20-101. Legislative declaration.

The general assembly hereby finds, determines, and declares that the strict control of limited gaming in this state is necessary for the immediate and future preservation of the public peace, health, and safety.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4.

18-20-102. Definitions - terms used.

(1) As used in this article 20, unless this article 20 otherwise provides or unless the context otherwise requires, terms used in this article 20 shall have the same meanings as those set forth in article 30 of title 44.

(2) The term "repeating gambling offender" means any person who is convicted of an offense under section 18-10-103 (2), sections 18-10-105 to 18-10-107, or sections 18-20-103 to 18-20-114, or sections 44-30-809 to 44-30-811 or 44-30-818 to 44-30-831 or 44-30-837, within five years after a previous misdemeanor conviction under said sections or under a former statute prohibiting gambling activities or at any time after a previous felony conviction under any of said sections. A conviction in any jurisdiction of the United States of an offense which, if committed in this state, would be professional gambling shall constitute a previous conviction for purposes of a prosecution in this state as a repeating gambling offender.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4. **L. 2018:** Entire section amended, (SB 18-034), ch. 14, p. 240, § 15, effective October 1.

18-20-103. Violations of taxation provisions - penalties.

(1) Any person who:

(a) Makes any false or fraudulent return in attempting to defeat or evade the tax imposed by article 30 of title 44 commits a class 5 felony;

(b) Fails to pay tax due under article 30 of title 44 within thirty days after the date the tax becomes due commits a class 2 misdemeanor;

(c) Fails to file a return required by article 30 of title 44 within thirty days after the date the return is due commits a class 2 misdemeanor;

(d) Repealed.

(e) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under or in connection with any matter arising under any title administered by the commission or a return, affidavit, claim, or other document which is fraudulent or is false as to any material fact, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document commits a class 5 felony.

(2) For purposes of this section, "person" includes corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to article 30 of title 44.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4. L. 2018: (1)(a) to (1)(d), and (2) amended, (SB 18-034), ch. 14, p. 241, § 16, effective October 1. L. 2021: (1)(b) and (1)(c) amended, (SB 21-271), ch. 462, p. 3218, § 380, effective March 1, 2022. L. 2023: (1)(d) repealed, (HB 23-1293), ch. 298, p. 1795, § 55, effective October 1.

18-20-104. False statement on application - violations of rules or provisions of article 30 of title 44 as felony.

Any person who knowingly makes a false statement in any application for a license or in any statement attached to the application, or who provides any false or misleading information to the commission or the division, or who fails to keep books and records to substantiate the receipts, expenses, or uses resulting from limited gaming conducted under article 30 of title 44, as prescribed in rules promulgated by the commission, or who falsifies any books or records which relate to any transaction connected with the holding, operating, and conducting of any limited card games or slot machines, or who knowingly violates any of the provisions of article 30 of title 44, or any rule adopted by the commission or any terms of any license granted under said article 30, commits a class 5 felony.

Source: L. 91: Entire article added, p. 1584, § 11, effective June 4. L. 2018: Entire section amended, (SB 18-034), ch. 14, p. 241, § 17, effective October 1.

ANNOTATION

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This section is neither unconstitutionally overbroad nor unconstitutionally vague. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

This section does not require that a "false or misleading" statement be material. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

Where the defendant's capacity as chief executive officer for applicant was such that he could speak for the applicant, it is not necessary that the defendant have an individual key employee application pending or that the applicant be a licensee at the time the false statement is made or the misleading information is provided. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

18-20-105. Slot machines - shipping notices.

(1) Any slot machine manufacturer or distributor shipping or importing a slot machine into the state of Colorado shall provide to the Colorado limited gaming control commission created in section 44-30-301, at the time of shipment a copy of the shipping invoice which shall include, at a minimum, the destination, the serial number of each machine, and a description of each machine. Any person within the state of Colorado receiving a slot machine shall, upon receipt of the machine, provide to the Colorado limited gaming control commission upon a form available from the commission information showing at a minimum the location of each machine, its serial number, and description. The report shall be provided regardless of whether the machine is received from a manufacturer or any other person. Any machine licensed pursuant to section 44-30-803 shall be licensed for a specific location, and movement of the machine from that location shall be reported to said commission within the time period set out in rules promulgated pursuant to section 44-30-803 (1)(d). Any person violating any provision of section 44-30-803 commits a class 5 felony. Any slot machine that is not in compliance with article 30 of title 44 is declared contraband and may be summarily seized and destroyed after notice and hearing.

(2) Slot machines which because of age and condition bear no manufacturer serial number shall be assigned a serial number by a remanufacturer of slot machines. Such new serial number shall be duly recorded as required by federal regulations.

(3) The director of the division of gaming appointed pursuant to section 44-30-201 may approve a change to the registration of a slot machine under circumstances constituting an emergency. If said director approves an emergency change, the registration of the slot machine shall not be suspended pending the filing of a supplemental application.

Source: L. 91: Entire article added, p. 1584, § 11, effective June 4. **L. 97:** (1) amended, p. 1013, § 18, effective August 6. **L. 2018:** (1) and (3) amended, (SB 18-034), ch. 14, p. 241, § 18, effective October 1.

18-20-106. Cheating.

(1) It is unlawful for any person, whether he is an owner or employee of, or a player in, an establishment, to cheat at any limited gaming activity.

(2) For purposes of article 30 of title 44, "cheating" means to alter the selection of criteria which determine:

(a) The result of a game; or

(b) The amount or frequency of payment in a game.

(3) Any person issued a license pursuant to article 30 of title 44, violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 2 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: **L. 91:** Entire article added, p. 1585, § 11, effective June 4. **L. 2018:** IP(2) and (3) amended, (SB 18-034), ch. 14, p. 242, § 19, effective October 1. **L. 2021:** (3) amended, (SB 21-271), ch. 462, p. 3219, § 381, effective March 1, 2022.

18-20-107. Fraudulent acts.

(1) It is unlawful for any person:

(a) To alter or misrepresent the outcome of a game or other event on which wagers have been made after the outcome is made sure but before it is revealed to the players;

(b) To place, increase, or decrease a bet or to determine the course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing, or decreasing a bet or determining the course of play contingent upon that event or outcome;

(c) To claim, collect, or take, or attempt to claim, collect, or take, money or anything of value in or from a limited gaming activity with intent to defraud and without having made a wager contingent thereon, or to claim, collect, or take an amount greater than the amount won;

(d) Knowingly to entice or induce another to go to any place where limited gaming is being conducted or operated in violation of the provisions of article 30 of title 44, with the intent that the other person play or participate in that limited gaming activity;

(e) To place or increase a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including past-posting and pressing bets;

(f) To reduce the amount wagered or to cancel a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including pinching bets;

(g) To manipulate, with the intent to cheat, any component of a gaming device in a manner contrary to the designed and normal operational purpose for the component, including, but not limited to, varying the pull of the handle of a slot machine, with knowledge that the manipulation affects the outcome of the game or with knowledge of any event that affects the outcome of the game;

(h) To, by any trick or sleight of hand performance, or by fraud or fraudulent scheme, cards, or device, for himself or another, win or attempt to win money or property or a representative of either or reduce a losing wager or attempt to reduce a losing wager in connection with limited gaming;

(i) To conduct any limited gaming operation without a valid license;

(j) To conduct any limited gaming operation on an unlicensed premises;

(k) To permit any limited gaming game or slot machine to be conducted, operated, dealt, or carried on in any limited gaming premises by a person other than a person licensed for the premises pursuant to article 30 of title 44;

(l) To place any limited gaming games or slot machines into play or display such games or slot machines without the authorization of the Colorado limited gaming control commission;

(m) To employ or continue to employ any person in a limited gaming operation who is not duly licensed or registered in a position whose duties require a license or registration pursuant to article 30 of title 44; or

(n) To, without first obtaining the requisite license or registration pursuant to article 30 of title 44, be employed, work, or otherwise act in a position whose duties would require licensing or registration pursuant to said article 30.

(2) Any person issued a license pursuant to article 30 of title 44 violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 2 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1585, § 11, effective June 4. **L. 2018:** (1)(d), (1)(k), (1)(m), (1)(n), and (2) amended, (SB 18-034), ch. 14, p. 242, § 20, effective October 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3219, § 382, effective March 1, 2022.

18-20-108. Use of device for calculating probabilities.

(1) It is unlawful for any person at a licensed gaming establishment to use, or possess with the intent to use, any device to assist:

- (a) In projecting the outcome of the game;
- (b) In keeping track of the cards played;
- (c) In analyzing the probability of the occurrence of an event relating to the game; or
- (d) In analyzing the strategy for playing or betting to be used in the game, except as permitted by the Colorado limited gaming control commission.

(2) Any person issued a license pursuant to article 30 of title 44 violating any provision of this section commits a class 6 felony and any other person violating any provision of this section commits a class 2 misdemeanor.

Source: L. 91: Entire article added, p. 1587, § 11, effective June 4. **L. 2018:** (2) amended, (SB 18-034), ch. 14, p. 243, § 21, effective October 1. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3219, § 383, effective March 1, 2022. **L. 2023:** (2) amended, (HB 23-1293), ch. 298, p. 1795, § 56, effective October 1.

18-20-109. Use of counterfeit or unapproved chips or tokens or unlawful coins or devices - possession of certain unlawful devices, equipment, products, or materials.

(1) It is unlawful for any licensee, employee, or other person to use counterfeit chips in any limited gaming activity.

(2) It is unlawful for any person, in playing or using any limited gaming activity designed to be played with, to receive, or to be operated by chips or tokens approved by the Colorado limited gaming control commission or by lawful coin of the United States of America:

- (a) Knowingly to use anything other than chips or tokens approved by the Colorado limited gaming control commission or lawful coin, legal tender of the United States of America, or to use coin not of the same denomination as the coin intended to be used in that limited gaming activity; or
- (b) To use any device or means to violate the provisions of article 30 of title 44.

(3) It is unlawful for any person to possess any device, equipment, or material which he knows has been manufactured, distributed, sold, tampered with, or serviced in violation of the provisions of article 30 of title 44.

(4) It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his or her employment within an establishment, to have on his or her person or in his or her possession any device intended to be used to violate the provisions of article 30 of title 44.

(5) It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his or her employment within an establishment, to have on his or her person or in his or her possession while on the premises of any licensed gaming establishment any key or device known to have been designed for the purpose of and suitable for opening, entering, or affecting the operation of any limited gaming activity, drop box, or electronic or mechanical device connected thereto, or for removing money or other contents therefrom.

(6) Possession of more than one of the devices, equipment, products, or materials described in this section shall give rise to a rebuttable presumption that the possessor intended to use them for cheating.

(7) It is unlawful for any person to use or possess while on the premises any cheating or thieving device, including but not limited to, tools, drills, wires, coins, or tokens attached to strings or wires or electronic or magnetic devices, to facilitate the alignment of any winning combination or to facilitate removing from any slot machine any money or contents thereof, unless the person is a duly authorized gaming employee acting in the furtherance of his or her employment.

(8) A person violating any provision of this section commits a class 6 felony.

Source: L. 91: Entire article added, p. 1587, § 11, effective June 4. L. 2001: (8) amended, p. 605, § 3, effective July 1. L. 2018: (2)(b), (3), and (4) amended, (SB 18-034), ch. 14, p. 243, § 22, effective October 1. L. 2023: (8) amended, (HB 23-1293), ch. 298, p. 1795, § 57, effective October 1.

ANNOTATION

In adopting the Limited Gaming Act of 1991, including the specific offenses included in this section, the general assembly intended that offenses defined in this section be prosecuted under this

section or under the criminal provisions included in § 12-47.1-825 rather than under the general offenses specified in other portions of this title. Therefore, the district attorney had no discretion to charge

the defendant with the broader offenses of burglary and possession of burglary tools for actions that violated the specific provisions

of this section. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

18-20-110. Cheating game and devices.

(1) It is unlawful for any person playing any licensed game in licensed gaming premises to:

(a) Knowingly conduct, carry on, operate, or deal or allow to be conducted, carried on, operated, or dealt any cheating or thieving game or device; or

(b) Knowingly deal, conduct, carry on, operate, or expose for play any game or games played with cards or any mechanical device, or any combination of games or devices, which have in any manner been marked or tampered with or placed in a condition or operated in a manner the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.

(2) Any person violating any provision of this section commits a class 6 felony; except that, if the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1589, § 11, effective June 4. **L. 2001:** (2) amended, p. 606, § 4, effective July 1.

18-20-111. Unlawful manufacture, sale, distribution, marking, altering, or modification of equipment and devices related to limited gaming - unlawful instruction.

(1) It is unlawful to manufacture, sell, or distribute any cards, chips, dice, game, or device that is intended to be used to violate any provision of article 30 of title 44.

(2) It is unlawful to mark, alter, or otherwise modify related equipment or a limited gaming device in a manner that:

(a) Affects the result of a wager by determining win or loss; or

(b) Alters the normal criteria of random selection, which affects the operation of a game or which determines the outcome of a game.

(3) It is unlawful for any person to instruct another in cheating or in the use of any device for that purpose, with the knowledge or intent that the information or use so conveyed may be employed to violate any provision of article 30 of title 44.

(4) Any person issued a license pursuant to article 30 of title 44 violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 2 misdemeanor.

Source: **L. 91:** Entire article added, p. 1589, § 11, effective June 4. **L. 2013:** IP(2) amended, (SB 13-173), ch. 397, p. 2323, § 19, effective July 1. **L. 2018:** (1), (3), and (4) amended, (SB 18-034), ch. 14, p. 243, § 23, effective October 1. **L. 2021:** (4) amended, (SB 21-271), ch. 462, p. 3219, § 384, effective March 1, 2022. **L. 2023:** (4) amended, (HB 23-1293), ch. 298, p. 1795, § 58, effective October 1.

18-20-112. Unlawful entry by excluded and ejected persons.

(1) (a) It is unlawful for any person whose name is on the list promulgated by the Colorado limited gaming control commission pursuant to section 44-30-1703 (3) or (4) to enter the licensed premises of a limited gaming licensee.

(b) A person who violates subsection (1)(a) of this section commits a class 6 felony.

(2) (a) It is unlawful for any person whose name is on the list promulgated by the Colorado limited gaming control commission pursuant to section 44-30-1703 (3) or (4) to have any personal pecuniary interest, direct or indirect, in any limited gaming licensee, licensed premises, establishment, or business involved in or with limited gaming or in the shares in any corporation, association, or firm licensed pursuant to article 30 of title 44.

(b) A person who violates subsection (2)(a) of this section commits a class 5 felony.

(3) (Deleted by amendment, L. 2023.)

Source: **L. 91:** Entire article added, p. 1590, § 11, effective June 4. **L. 2018:** (1) and (2) amended, (SB 18-034), ch. 14, p. 244, § 24, effective October 1. **L. 2022:** (1) and (2) amended, (HB 22-1402), ch. 402, p. 2869, § 11, effective August 10. **L. 2023:** Entire section amended, (HB 23-1293), ch. 298, p. 1795, § 59, effective October 1.

18-20-113. Personal pecuniary gain or conflict of interest.

(1) It is unlawful for any person to issue, suspend, revoke, or renew any license pursuant to article 30 of title 44 for any personal pecuniary gain or any thing of value, as defined in section 18-1-901 (3)(r), or for any person to violate any of the provisions of part 4 of article 30 of title 44.

(2) Any person violating any of the provisions of this section commits a class 3 felony.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4. **L. 2018:** (1) amended, (SB 18-034), ch. 14, p. 244, § 25, effective October 1.

18-20-114. False or misleading information - unlawful.

(1) It is unlawful for any person to provide any false or misleading information under the provisions of article 30 of title 44.

(2) Any person violating any of the provisions of this section commits a class 5 felony.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4. **L. 2018:** (1) amended, (SB 18-034), ch. 14, p. 244, § 26, effective October 1.

18-20-115. Exceptions.

Nothing contained in this article shall be construed to modify, amend, or otherwise affect the validity of any provisions contained in article 10 of this title.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4.

ARTICLE 21

Sex Offender Surcharge

18-21-101.	Legislative declaration.	sexual exploitation of
18-21-102.	Definitions.	children surcharge fund -
18-21-103.	Source of revenues -	creation - definition.
	allocation of money - sex	
	offender surcharge fund -	

18-21-101. Legislative declaration.

The general assembly hereby finds, determines, and declares that the commission of sex offenses exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the fiscal burden upon the taxpayers of this state. It is the intent of the general assembly in enacting this article to require, as much as possible, that persons convicted of a sex offense pay for the cost of the evaluation, identification, and treatment and continuing monitoring to protect victims and potential victims as described in article 11.7 of title 16, C.R.S.

Source: L. 92: Entire article added, p. 462, § 10, effective June 2.

18-21-102. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102 or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(2) "Sex offense" has the same meaning as defined in section 16-11.7-102 (3), C.R.S.

Source: L. 92: Entire article added, p. 462, § 10, effective June 2. **L. 2002:** (1) amended, p. 1522, § 219, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-21-103. Source of revenues - allocation of money - sex offender surcharge fund - sexual exploitation of children surcharge fund - creation - definition.

(1) On and after July 1, 1992, each person who is convicted of a sex offense, or receives for such offense a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in which the conviction occurs or in which the deferred sentence is entered. Such surcharge shall be in the following amounts:

(a) For each class 2 felony of which a person is convicted, three thousand dollars;

(b) For each class 3 felony of which a person is convicted, two thousand dollars;

- (c) For each class 4 felony of which a person is convicted, one thousand dollars;
- (d) For each class 5 felony of which a person is convicted, seven hundred fifty dollars;
- (e) For each class 6 felony of which a person is convicted, five hundred dollars;
- (f) For each class 1 misdemeanor of which a person is convicted, four hundred dollars;
- (g) For each class 2 misdemeanor of which a person is convicted, three hundred dollars;
- (h) For each class 3 misdemeanor of which a person is convicted, one hundred fifty dollars.

(1.4) (a) A court shall not require a juvenile or the juvenile's parent, guardian, or legal custodian to pay the surcharge described in subsection (1) of this section. A court or the state shall not enforce or collect a court-ordered surcharge charged to the juvenile or the juvenile's parent, guardian, or legal custodian on or after July 6, 2021, that is outstanding against a juvenile or the juvenile's parent, guardian, or legal custodian.

(b) As used in this subsection (1.4), "juvenile" means a person who is under eighteen years old when the crime is committed.

(1.5) Repealed.

(2) The clerk of the court shall allocate the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be retained by the clerk for administrative costs incurred pursuant to this subsection (2). Such amount retained shall be transmitted to the state treasurer, who shall credit the same to the general fund, and such amount shall be subject to appropriation by the general assembly for the costs of such administration.

(b) Ninety-five percent shall be transferred to the state treasurer who shall credit the same to the sex offender surcharge fund created pursuant to subsection (3) of this section.

(3) There is hereby created in the state treasury a sex offender surcharge fund which shall consist of moneys received by the state treasurer pursuant to paragraph (b) of subsection (2) of this section. The state treasurer may invest any moneys in the fund not expended for the purpose of this section as provided by law. The state treasurer shall credit all interest and income derived from the investment and deposit of moneys in the fund to the fund. Any moneys not appropriated by the general assembly shall remain in the sex offender surcharge fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year. All moneys in the fund shall be subject to annual appropriation by the general assembly to the judicial department, the department of corrections, the division of criminal justice of the department of public safety, and the department of human services, after consideration of the plan developed pursuant to section 16-11.7-103 (4)(c), C.R.S., to cover the direct and indirect costs associated with the evaluation, identification, and treatment and the continued monitoring of sex offenders.

(3.3) (a) On and after January 1, 2022, each person who is convicted of or receives a deferred sentence pursuant to section 18-1.3-102 for sexual exploitation of a child, as described in section 18-6-403, is required to pay a sexual exploitation of children surcharge in addition to the sex offender surcharge required pursuant to subsection (1) of this section to the clerk of the court where the conviction occurs or the deferred sentence is entered. The amount of the additional surcharge is, based on the highest penalty level among the crimes of conviction or deferred sentence in the case:

- (I) For a class 3 felony of which a person is convicted, two thousand dollars;
- (II) For a class 4 felony of which a person is convicted, one thousand dollars;
- (III) For a class 5 felony of which a person is convicted, five hundred dollars; and
- (IV) For a class 6 felony of which a person is convicted, two hundred and fifty dollars.

(b) A juvenile who is convicted or receives a deferred sentence pursuant to section 18-1.3-102 for sexual exploitation of a child, as described in section 18-6-403, is not required to pay an additional surcharge pursuant to subsection (3.3)(a) of this section.

(3.5) The clerk of the court shall allocate the surcharge required by subsection (3.3) of this section as follows:

(a) The clerk of the court shall retain five percent for administrative costs incurred pursuant to this subsection (3.5). The clerk of the court shall transmit the amount retained pursuant to this subsection (3.5)(a) to the state treasurer, who shall credit the amount to the general fund. The amount is subject to appropriation by the general assembly for the costs of such administration.

(b) The clerk of the court shall transmit ninety-five percent to the state treasurer, who shall credit the amount to the sexual exploitation of children surcharge fund created in subsection (3.7) of this section.

(3.7) (a) There is hereby created in the state treasury the sexual exploitation of children surcharge fund, referred to in this subsection (3.7) as the "fund", that consists of money received by the state treasurer pursuant to subsection (3.5) of this section. The money in the fund is continuously appropriated to the Colorado bureau of investigation in the department of public safety to enhance the effective investigation and prosecution of computer-facilitated sexual exploitation of children pursuant to section 24-33.5-430.

(b) The state treasurer may invest any money in the fund not expended for the purpose of this section as provided by law. The state treasurer shall credit all interest and income derived from the investment of money in the fund to the fund. Any money not appropriated by the general assembly and all unexpended and unencumbered money at the end of the fiscal year remains in the fund and must not be transferred or revert to the general fund at the end of any fiscal year.

(4) The court may waive all or any portion of a surcharge required by this section if the court finds that a person is indigent or financially unable to pay all or any portion of such surcharge. The court shall waive only that portion of a surcharge if the court has found that the person is financially unable to pay.

Source: **L. 92:** Entire article added, p. 462, § 10, effective June 2. **L. 94:** (3) amended, p. 2657, § 141, effective July 1. **L. 2000:** (1.5) added, p. 923, § 13, effective July 1. **L. 2002:** IP(1) amended, p. 1522, § 220, effective October 1. **L. 2012:** (3) amended, (HB 12-1310), ch. 268, p. 1398, § 17, effective June 7. **L. 2021:** (1.5) repealed, (HB 21-1315), ch. 461, p. 3109, § 8, effective July 6; (3.3), (3.5), and (3.7) added and (4) amended, (HB 21-1069), ch. 446, p. 2943, § 5, effective September 7. **L. 2026:** (1.4) added, (HB 26-1232), ch. 98, p. 389, § 5, effective May 4.

Cross references: (1) For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

(2) For the legislative declaration in HB 21-1069 stating the purpose of, and the provision directing legislative staff agencies to conduct, a post-enactment review pursuant to § 2-2-1201 scheduled in 2024, see sections 1 and 7 of chapter 446, Session Laws of Colorado 2021. To obtain a copy of the review, once completed, go to "Legislative Resources and Requirements" on the Colorado General Assembly's website.

(3) For the legislative declaration in HB 26-1232, see section 1 of chapter 98, Session Laws of Colorado 2026.

ANNOTATION

Surcharge improperly applied where offense occurred approximately 18 months before section enacted. People v. Salas, 902 P.2d 398 (Colo. App. 1994).

Imposition of two surcharges for conviction does not violate the prohibition against double jeopardy. The surcharge created by subsection (1)(c) and the surcharge created by § 24-4.2-104 (1)(a)(II)(A) may both be applied to the

conviction for second degree sexual assault. People v. Thien Van Vo, 932 P.2d 849 (Colo. App. 1996).

Assessment of surcharges pursuant to this section violates the prohibition against ex post facto laws since the offenses at issue occurred before the effective date of this section. People v. Bowring, 902 P.2d 911 (Colo. App. 1995).

Imposition of the mandatory \$1,000 fine for persons convicted of a class 4 felony sex offense was not unconstitutionally excessive where the trial court discussed the defendant's ability to pay the surcharge at the sentencing hearing and defendant did not object to the amount of the fine or request a reduction of the amount. *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

The surcharge amounts specified in this section are not disproportionate to the levels of offenses as a matter of law. *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

Trial court improperly imposed surcharge where defendant plead guilty to an offense that is not included in the definition of "sex offense" in § 16-11.7-102. Although defendant was a "sex offender", as defined in § 16-11.7-102, because her plea was based on acts that were included in the definition of "sex offense" and thus created a history of sex offenses, the surcharge created in this section applies only to persons convicted of a "sex offense". *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

ARTICLE 22

Juvenile Offender Surcharge

18-22-101. Legislative declaration.

18-22-102. Definitions.

18-22-103. Source of revenues -
allocation of money -
surcharge fund - transfer.

18-22-101. Legislative declaration.

The general assembly hereby finds, determines, and declares that the commission of violent crimes by juveniles exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the financial burden upon the taxpayers of this state. It is the intent of the general assembly in enacting this article to require, as much as possible, that juveniles convicted as adults of violent crimes pay for the cost of the rehabilitation, education, and treatment of juveniles sentenced to the youthful offender system or committed to the department of human services.

Source: L. 93, 1st Ex. Sess.: Entire article added, p. 26, § 1, effective September 13. **L. 94:** Entire section amended, p. 2657, § 142, effective July 1.

18-22-102. Definitions.

As used in this article, unless the context otherwise requires:

- (1) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102 or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.
- (2) "Juvenile" means a person under the age of eighteen years.
- (3) "Violent crime" means a felony enumerated as a crime of violence pursuant to section 18-1.3-406 or a felony involving a weapon or firearm.

Source: L. 93, 1st Ex. Sess.: Entire article added, p. 26, § 1, effective September 13. **L. 2002:** (1) and (3) amended, p. 1522, § 221, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1) and (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-22-103. Source of revenues - allocation of money - surcharge fund - transfer.

- (1) Each juvenile who is convicted as an adult of a violent crime shall be required to pay a surcharge to the clerk of the court in which the conviction occurs in an amount equal to any fine imposed by such court.
- (2) The clerk of the court shall allocate the surcharge required by subsection (1) of this section as follows:
 - (a) (I) Five percent shall be retained by the clerk for administrative costs incurred pursuant to this section. Such amount retained shall be transmitted to the state treasurer, who shall credit the same to the general fund, and such amount shall be subject to appropriation by the general assembly for the costs of such administration.
 - (II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), on and after July 1, 2008, the portion of the surcharge that is retained under this paragraph (a) shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.
 - (b) Ninety-five percent shall be transferred to the state treasurer who shall credit the same to the youthful offender system surcharge fund created pursuant to subsection (3) of this section.

(3) There is created in the state treasury a youthful offender system surcharge fund that consists of money received by the state treasurer pursuant to subsection (2)(b) of this section. In accordance with section 24-36-114, all interest derived from the deposit and investment of this fund is credited to the general fund. Any money not appropriated by the general assembly remains in the youthful offender system surcharge fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year. All money in the fund is subject to annual appropriation by the general assembly to the department of corrections to cover the direct and indirect costs associated with the rehabilitation, education, and treatment of juveniles and young adults sentenced to the youthful offender system.

(4) A surcharge assessed by the court pursuant to this section may be collected in the same manner as a judgment in a civil action and the court shall order the district attorney to institute proceedings to collect such surcharge if the court finds that a juvenile convicted as an adult of a violent crime is financially unable to pay all or any portion of such surcharge at the time of sentencing.

(5) Repealed.

Source: **L. 93, 1st Ex. Sess.:** Entire article added, p. 27, § 1, effective September 13. **L. 94:** (3) amended, p. 2657, § 143, effective July 1. **L. 96:** (3) amended, p. 1693, § 30, effective January 1, 1997. **L. 2007:** (2)(a) amended, p. 1538, § 30, effective May 31. **L. 2008:** (2)(a)(II) amended, p. 2146, § 22, effective June 4. **L. 2025:** (5) added, (HB 25-1215), ch. 312, p. 1630, § 4, effective May 30. **L. 2026:** (3) amended, (HB 26-1064), ch. 15, p. 76, § 8, effective August 12.

Editor's note: Subsection (5)(b) provided for the repeal of subsection (5), effective July 1, 2026. (See L. 2025, p. 1630.)

Cross references: For the legislative declaration contained in the 2008 act amending subsection (2)(a)(II), see section 1 of chapter 417, Session Laws of Colorado 2008. For the legislative declaration in HB 25-1215, see section 1 of chapter 312, Session Laws of Colorado 2025.

ARTICLE 23

Gang Recruitment Act

18-23-101. Definitions.

18-23-102. Recruitment of juveniles for a criminal street gang.

18-23-101. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal:

(a) Which has as one of its primary objectives or activities the commission of one or more predicate criminal acts; and

(b) Whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(2) "Pattern of criminal gang activity" means the commission, attempt, conspiracy, or solicitation of two or more predicate criminal acts which are committed on separate occasions or by two or more persons.

(3) "Predicate criminal acts" means the commission of or attempt, conspiracy, or solicitation to commit any of the following:

(a) Any conduct defined as racketeering activity in section 18-17-103 (5);

(b) Any violation of section 18-8-706 or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would violate section 18-8-706.

Source: L. 2001: Entire article added, p. 986, § 1, effective March 1, 2002.

18-23-102. Recruitment of juveniles for a criminal street gang.

(1) A person commits recruitment of a juvenile for a criminal street gang if he or she is eighteen years of age or older and:

(a) Knowingly solicits, invites, recruits, encourages, coerces, or otherwise causes a person younger than eighteen years of age to actively participate in or become a member of a criminal street gang; or

(b) By use of force, threat, or intimidation directed at any person, or by the infliction of bodily injury upon any person, knowingly prevents a person younger than eighteen years of age from leaving a criminal street gang.

(2) Recruitment of a juvenile for a criminal street gang in violation of subsection (1)(b) of this section is a class 1 misdemeanor, and recruitment of a juvenile for a criminal street gang in violation of subsection (1)(a) of this section is a class 2 misdemeanor.

(3) Nothing in this section shall affect the ability to charge criminal offenses under article 17 of this title.

Source: L. 2001: Entire article added, p. 987, § 1, effective March 1, 2002. **L. 2021:** (2) amended, (SB 21-271), ch. 462, p. 3219, § 385, effective March 1, 2022.

ARTICLE 24

Crimes Against Children Surcharge

18-24-101.	Definitions.	investigation surcharge fund - creation.
18-24-102.	Surcharge.	
18-24-103.	Collection and distribution of funds - child abuse	

18-24-101. Definitions.

As used in this article 24, unless the context otherwise requires:

(1) "Convicted" and "conviction" mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

(2) "Crime against a child" means any offense listed in section 18-3-411, or criminal attempt, conspiracy, or solicitation to commit any of those offenses, and any of the following offenses, or criminal attempt, conspiracy, or solicitation to commit any of the following offenses:

- (a) Incest, in violation of section 18-6-301;
- (b) Child abuse, in violation of section 18-6-401;
- (c) Contributing to the delinquency of a minor, in violation of section 18-6-701;
- (d) Internet luring of a child, in violation of section 18-3-306;
- (e) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, when the victim is a child;

(f) Invasion of privacy for sexual gratification, in violation of section 18-3-405.6, when the victim is a child;

(g) Human trafficking of a minor for involuntary servitude, in violation of section 18-3-503;
or

(h) Human trafficking of a minor for sexual servitude, in violation of section 18-3-504.

Source: **L. 2006:** Entire article added, p. 2040, § 1, effective July 1. **L. 2007:** (2)(b) and (2)(c) amended and (2)(d) added, p. 1688, § 7, effective July 1. **L. 2011:** (2) amended, (SB 11-232), ch. 199, p. 830, § 2, effective July 1. **L. 2014:** (2)(g) amended, (HB 14-1273), ch. 282, p. 1156, § 20, effective July 1. **L. 2018:** IP, (2)(f), and (2)(g) amended and (2)(h) added, (SB 18-055), ch. 147, p. 936, § 3, effective August 8.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 199, Session Laws of Colorado 2011.

18-24-102. Surcharge.

(1) Each person who is convicted of a crime against a child shall be required to pay a surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(2) Surcharges pursuant to subsection (1) of this section are in the following amounts:

(a) For each class 2 felony of which a person is convicted, except as described in subsection (3) of this section, one thousand five hundred dollars;

(b) For each class 3 felony of which a person is convicted, one thousand dollars;

(c) For each class 4 felony of which a person is convicted, five hundred dollars;

(d) For each class 5 felony of which a person is convicted, three hundred seventy-five dollars;

(e) For each class 6 felony of which a person is convicted, two hundred fifty dollars;

(f) For each class 1 misdemeanor of which a person is convicted, two hundred dollars;

(g) For each class 2 misdemeanor of which a person is convicted, one hundred fifty dollars;
and

(h) For each class 3 misdemeanor of which a person is convicted, seventy-five dollars.

(3) For the purposes of subsection (2)(a) of this section, if the class 2 felony of which the person is convicted is for human trafficking of a minor for involuntary servitude, as described in section 18-3-503, or for human trafficking of a minor for sexual servitude, as described in section 18-3-504, then the person is required to pay a surcharge in the amount of three thousand dollars.

Source: **L. 2006:** Entire article added, p. 2041, § 1, effective July 1. **L. 2018:** IP(2) and (2)(a) amended and (3) added, (SB 18-055), ch. 147, p. 935, § 1, effective August 8.

18-24-103. Collection and distribution of funds - child abuse investigation surcharge fund - creation.

(1) The clerk of the court shall allocate the surcharge required by section 18-24-102 as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (1). Such amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the child abuse investigation surcharge fund created pursuant to subsection (2) of this section.

(2) (a) There is hereby created in the state treasury the child abuse investigation surcharge fund that shall consist of moneys received by the state treasurer pursuant to this section. The moneys in the fund shall be subject to annual appropriation by the general assembly to the division of criminal justice in the department of public safety for distribution to the state chapter of a nonprofit or not-for-profit organization that coordinates programs that offer a multidisciplinary team response for child sexual abuse intervention in child-friendly, child-appropriate facilities, referred to in this section as the "state chapter".

(a.1) The division of criminal justice in the department of public safety shall establish guidelines for the distribution of the moneys from the fund, including but not limited to:

- (I) Procedures for programs to use in applying to the state chapter for moneys from the fund;
- (II) Procedures for the state chapter to use in reporting to the division pursuant to paragraph (a.7) of this subsection (2); and
- (III) Accountability and performance standards for programs that receive moneys from the fund.

(a.3) The state chapter may use a portion of the moneys that it receives pursuant to paragraph (a) of this subsection (2) for training and technical assistance to facilitate the coordination of

programs that offer a multidisciplinary team response for child sexual abuse intervention in child-friendly, child-appropriate facilities. The state chapter shall distribute the remainder of the moneys directly to the programs.

(a.5) Each program that receives money from the fund must:

(I) Include in the services provided forensic interviews, therapeutic intervention, medical evaluations, victim advocacy, case tracking, and case review;

(II) Have a signed interagency agreement and protocol with the law enforcement agencies, the district attorney's office, and the county department of human or social services in the jurisdiction where the program is operating;

(III) Meet the national performance standards of a national accrediting body that requires programs to satisfy the criteria described in subparagraphs (I) and (II) of this paragraph (a.5); and

(IV) Satisfy the accountability and performance standards established by the division pursuant to subparagraph (III) of paragraph (a.1) of this subsection (2).

(a.7) The state chapter shall report to the division of criminal justice in the department of public safety on a regular basis to be specified by the division of criminal justice. The report shall include, but need not be limited to:

(I) A list of all programs that received moneys from the fund in the preceding fiscal year;

(II) A description of how each program that received moneys from the fund in the preceding fiscal year used those moneys;

(III) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the criteria specified in paragraph (a.5) of this subsection (2); and

(IV) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the accountability and performance standards established by the division pursuant to subparagraph (III) of paragraph (a.1) of this subsection (2).

(b) The division of criminal justice shall not expend any moneys until the fund has enough money to pay the expenses necessary to administer the fund.

(c) All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(3) The court may waive all or any portion of the surcharge required by section 18-24-102 if the court finds that a person convicted of a crime against a child is indigent or financially unable

to pay all or any portion of the surcharge. The court may waive only that portion of the surcharge that the court finds that the person convicted of a crime against a child is financially unable to pay. In cases where an offender is required to pay a surcharge as described in section 18-24-102 (3), the court is encouraged to delay any finding of indigence until six months after the offender's conviction, at which time the court may require the offender or the offender's counsel to submit documents that substantiate the offender's indigence. The documents may include documents establishing income.

Source: **L. 2006:** Entire article added, p. 2041, § 1, effective July 1. **L. 2007:** (2) amended, p. 506, § 1, effective April 16. **L. 2008:** (1)(a) amended, p. 2147, § 23, effective June 4. **L. 2018:** (3) amended, (SB 18-055), ch. 147, p. 935, § 2, effective August 8; IP(2)(a.5) and (2)(a.5)(II) amended, (SB 18-092), ch. 38, p. 406, § 26, effective August 8.

Cross references: For the legislative declaration contained in the 2008 act amending subsection (1)(a), see section 1 of chapter 417, Session Laws of Colorado 2008. For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

ARTICLE 25

Restorative Justice Surcharge

18-25-101. Restorative justice surcharge
- definitions.

18-25-101. Restorative justice surcharge - definitions.

(1) (a) Each person who is convicted of a crime is required to pay a ten-dollar surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(b) (I) The surcharge described in this section does not apply to a person under the jurisdiction of the juvenile court or the person's parent, guardian, or legal custodian. The surcharge described in this section shall not be assessed against a juvenile or charged to the juvenile's parent, guardian, or legal custodian. A court or the state shall not enforce or collect any surcharge assessed by the court on or after July 6, 2021, that is outstanding against a juvenile or the juvenile's parent, guardian, or legal custodian.

(II) As used in this subsection (1)(b), "juvenile" means a person who is under eighteen years old when the crime is committed.

(2) The clerk of the court shall allocate the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (1). Such amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the restorative justice surcharge fund created pursuant to subsection (3) of this section.

(3) (a) There is created in the state treasury the restorative justice surcharge fund that consists of money received by the state treasurer pursuant to this section and section 13-3-116 (4.5) and any other money that the general assembly may appropriate or transfer to the fund. The money in the fund is subject to annual appropriation by the general assembly to the judicial department for distribution to judicial districts that offer restorative justice programs and to the restorative justice coordinating council for administrative expenses.

(b) The judicial department shall establish guidelines for the distribution of the moneys from the fund to assist in defraying the costs of restorative justice programs, including but not limited to procedures for programs to use in applying to the judicial department for moneys from the fund.

(c) The judicial department shall not expend any moneys until the fund has enough money to pay the expenses necessary to administer the fund.

(d) All interest derived from the deposit and investment of moneys in the fund must be credited to the fund. Any moneys not appropriated by the general assembly must remain in the fund and may not be transferred or revert to the general fund of the state at the end of any fiscal year.

(4) The court may waive all or any portion of the surcharge required by subsection (1) of this section if the court finds that a person is indigent or financially unable to pay all or any portion of the surcharge. The court may waive only that portion of the surcharge that the court finds that the person is financially unable to pay.

(5) As used in this section, "convicted" and "conviction" mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

Source: L. 2013: Entire article added, (HB 13-1254), ch. 341, p. 1989, § 10, effective August 7. **L. 2015:** (3)(a) amended, (HB 15-1094), ch. 44, p. 109, § 1, effective August 5. **L. 2017:** (3)(a) amended, (SB 17-220), ch. 173, p. 631, § 2, effective April 28. **L. 2021:** (1), (3)(a), and (4) amended, (HB 21-1315), ch. 461, pp. 3111, 3120, §§ 12, 32, effective July 6. **L. 2026:** (1)(b) amended, (HB 26-1232), ch. 98, p. 389, § 6, effective May 4.

Cross references: For the legislative declaration in HB 21-1315, see section 1 of chapter 461, Session Laws of Colorado 2021. For the legislative declaration in HB 26-1232, see section 1 of chapter 98, Session Laws of Colorado 2026.

ARTICLE 26

Statewide Discovery Sharing System Surcharge

18-26-101.	Statewide discovery sharing system surcharge.	discovery sharing system surcharge fund - creation.
18-26-102.	Collection and distribution of funds - statewide	

18-26-101. Statewide discovery sharing system surcharge.

(1) Each person who is represented by private counsel or appears pro se and is convicted of a felony, misdemeanor, drug felony, or drug misdemeanor shall be required to pay a surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(2) Surcharges pursuant to subsection (1) of this section are in the following amounts:

(a) For each felony or drug felony of which a person is convicted, ten dollars; and

(b) For each misdemeanor or drug misdemeanor of which a person is convicted, five dollars.

(3) The court may waive all or any portion of the surcharge required by this section if the court finds that a person convicted of a crime is indigent or financially unable to pay all or any portion of the surcharge. The court may waive only that portion of the surcharge that the court finds that the person convicted of a crime is financially unable to pay.

(4) Repealed.

Source: L. 2014: Entire article added, (SB 14-190), ch. 275, p. 1108, § 4, effective May 29. **L. 2016:** (4) repealed, (SB 16-091), ch. 52, p. 122, § 3, effective August 10.

18-26-102. Collection and distribution of funds - statewide discovery sharing system surcharge fund - creation.

(1) The clerk of the court shall allocate the surcharge required by section 18-26-101 as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (1). The amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the statewide discovery sharing system surcharge fund created pursuant to subsection (2) of this section.

(2) (a) There is created in the state treasury the statewide discovery sharing surcharge fund that consists of moneys received by the state treasurer pursuant to this section. The moneys in the fund are subject to annual appropriation by the general assembly to the judicial department for distribution to the Colorado district attorneys' council for development, continuing enhancement, and maintenance of the statewide discovery sharing system under section 16-9-702, C.R.S. These moneys are in addition to general fund moneys appropriated to the judicial department for distribution to the Colorado district attorneys' council for development, continuing enhancement, and maintenance of the statewide discovery sharing system under section 16-9-702, C.R.S.

(b) The state treasurer shall credit all interest derived from the deposit and investment of moneys in the fund to the fund. Any moneys not appropriated by the general assembly must remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

Source: L. 2014: Entire article added, (SB 14-190), ch. 275, p. 1108, § 4, effective May 29.