

CHAPTER 210

CRIMINAL LAW AND PROCEDURE

HOUSE BILL 02-1225

BY REPRESENTATIVE(S) Lawrence, Boyd, Coleman, Garcia, Groff, Hefley, Jahn, Kester, Mace, Romanoff, Tapia, Veiga, and Williams S.;
also SENATOR(S) Fitz-Gerald.

AN ACT

CONCERNING PROCEDURAL CHANGES FOR THE STRENGTHENING OF CRIMINAL LAWS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 18-3-408.5, Colorado Revised Statutes, is amended to read:

18-3-408.5. Jury instruction on consent - when required. In any criminal prosecution under ~~sections~~ SECTION 18-3-402 (1) (a) ~~to~~ OR 18-3-404 (1) (a), (1) (c), (1) (d), OR (1.7) OR UNDER SECTION 18-3-402 (1) (b), (1) (c), OR (1) (e) OR 18-3-403 (1) (a) OR (1) (b), FOR OFFENSES COMMITTED BEFORE JULY 1, 2000, or for attempt or conspiracy to commit any crime ~~under sections 18-3-402 to 18-3-404~~ LISTED IN 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.

SECTION 2. 18-3-203 (2) (b.5) and (2) (c), Colorado Revised Statutes, are amended to read:

18-3-203. Assault in the second degree. (2) (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, ~~in the first degree~~ 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

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

assault on a child.

(c) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to SEXUAL ASSAULT OR sexual assault in the first degree AS IT EXISTED PRIOR TO JULY 1, 2000, the court shall sentence the defendant in accordance with the provisions of section 16-11-309, C.R.S. 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 18-1-105 (9) (e) OR (9) (e.5).

SECTION 3. 18-1-105 (9) (e.5), Colorado Revised Statutes, is amended to read:

18-1-105. Felonies classified - presumptive penalties. (9) (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 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.

SECTION 4. 20-1-107, Colorado Revised Statutes, is amended to read:

20-1-107. Disqualification - court to appoint prosecutor - legislative declaration. (1) THE GENERAL ASSEMBLY FINDS THAT THE OFFICE OF THE DISTRICT ATTORNEY WAS CREATED BY THE STATE CONSTITUTION AND THAT THE STATE CONSTITUTION GIVES TO THE GENERAL ASSEMBLY THE EXCLUSIVE AUTHORITY TO PRESCRIBE THE DUTIES OF THE OFFICE OF THE DISTRICT ATTORNEY. THE GENERAL ASSEMBLY FINDS AND DECLARES THAT THIS SECTION IS NECESSARY TO PROTECT THE INDEPENDENCE OF PERSONS DULY ELECTED TO THE OFFICE OF DISTRICT ATTORNEY.

(2) A DISTRICT ATTORNEY MAY ONLY BE DISQUALIFIED IN A PARTICULAR CASE AT THE REQUEST OF THE DISTRICT ATTORNEY OR UPON A SHOWING THAT THE DISTRICT ATTORNEY HAS A PERSONAL OR FINANCIAL INTEREST OR FINDS SPECIAL CIRCUMSTANCES THAT WOULD RENDER IT UNLIKELY THAT THE DEFENDANT WOULD RECEIVE A FAIR TRIAL. A MOTION TO DISQUALIFY A DISTRICT ATTORNEY SHALL BE SERVED UPON THE DISTRICT ATTORNEY AT LEAST TWO WEEKS BEFORE THE MOTION IS HEARD. SUCH MOTION SHALL CONTAIN AT LEAST A STATEMENT OF THE FACTS SETTING FORTH THE GROUNDS FOR THE CLAIMED DISQUALIFICATION AND THE LEGAL AUTHORITIES RELIED UPON BY THE MOVANT AND SHALL BE SUPPORTED BY AFFIDAVITS OF WITNESSES WHO ARE COMPETENT TO TESTIFY TO THE FACTS SET FORTH IN THE AFFIDAVIT. THE DISTRICT ATTORNEY MAY FILE A RESPONSE IN OPPOSITION TO THE MOTION AND MAY APPEAR AT ANY HEARING HELD ON THE MOTION. THE JUDGE SHALL REVIEW THE PLEADINGS AND DETERMINE WHETHER AN EVIDENTIARY HEARING IS NECESSARY. THE MOTION SHALL NOT BE GRANTED UNLESS REQUESTED BY THE DISTRICT ATTORNEY OR UNLESS THE COURT FINDS THAT THE DISTRICT ATTORNEY HAS A PERSONAL OR FINANCIAL INTEREST OR SPECIAL CIRCUMSTANCES EXIST THAT WOULD RENDER IT UNLIKELY THAT THE DEFENDANT WOULD RECEIVE A FAIR TRIAL. THE ORDER DISQUALIFYING THE DISTRICT ATTORNEY SHALL BE STAYED PENDING ANY APPEAL AUTHORIZED BY THIS SECTION. IF THE MOTION IS BROUGHT AT OR BEFORE THE

PRELIMINARY HEARING, IT MAY NOT BE RENEWED AT THE TRIAL COURT ON THE BASIS OF FACTS THAT WERE RAISED OR COULD HAVE BEEN RAISED AT THE TIME OF THE ORIGINAL MOTION.

(3) AN INTERLOCUTORY APPEAL FROM AN ORDER OF DISQUALIFICATION OF A DISTRICT ATTORNEY ENTERED IN THE DISTRICT COURT SHALL BE FILED IN THE SUPREME COURT PURSUANT TO SECTION 16-12-102 (2), C.R.S. AN APPEAL FROM AN ORDER OF DISQUALIFICATION FILED IN THE COUNTY COURT SHALL BE FILED IN THE DISTRICT COURT. IN COMPUTING THE TIME PERIOD WITHIN WHICH A TRIAL MUST BE COMMENCED, THE PERIOD DURING WHICH AN APPEAL PURSUANT TO THIS SECTION IS PENDING SHALL BE EXCLUDED.

(4) If the district attorney is ~~interested or has been employed as counsel~~ DISQUALIFIED in any case which it is his OR HER duty to prosecute or defend, the court having criminal jurisdiction may appoint a special prosecutor to prosecute or defend the cause. The judge shall appoint the special prosecutor from among the full-time district attorneys, assistant district attorneys, or deputy district attorneys who serve in judicial districts other than where the appointment is made; except that, upon the written approval of the chief justice of the supreme court, the judge may appoint any disinterested private attorney who is licensed to practice law in the state of Colorado to serve as the special prosecutor. Any special prosecutor appointed pursuant to this section shall be compensated as provided in section 20-1-308.

SECTION 5. 16-12-102 (2), Colorado Revised Statutes, is amended to read:

16-12-102. Appeals by the prosecution. (2) The prosecution may file an interlocutory appeal in the supreme court from a ruling of the trial court granting a motion made in advance of trial by the defendant for the return of property and to suppress evidence or granting a motion to suppress an extrajudicial confession or admission if the prosecution certifies to the judge who granted such motion and to the supreme court that the appeal is not taken for the purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant. The prosecution may also file an interlocutory appeal in the supreme court from a ruling of the trial court granting a motion in limine pertaining to the matters described in this subsection (2), or from a ruling on a motion made pursuant to section 18-1-202 (11), C.R.S., challenging the place of trial OR FROM A RULING ON A MOTION TO DISQUALIFY A DISTRICT ATTORNEY PURSUANT TO SECTION 20-1-107, C.R.S.

SECTION 6. 16-5-204, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

16-5-204. Witnesses before a grand jury - procedure. (1.5) (a) UPON VERIFIED APPLICATION OF THE PROSECUTING ATTORNEY STATING THAT A WITNESS WAS LAWFULLY SERVED WITH A SUBPOENA TO APPEAR AND TESTIFY BEFORE THE GRAND JURY AND THAT THE WITNESS FAILED TO APPEAR IN ACCORDANCE WITH SUCH SUBPOENA, THE COURT SHALL ISSUE A WARRANT COMMANDING ANY PEACE OFFICER TO BRING THE WITNESS WITHOUT UNNECESSARY DELAY BEFORE THE COURT FOR A HEARING ON THE MATTERS SET FORTH IN THE APPLICATION AND TO DETERMINE WHETHER THE WITNESS SHOULD BE HELD IN CONTEMPT PURSUANT TO SUBSECTION (1) OF THIS SECTION.

(b) UPON ISSUANCE OF THE WARRANT, THE COURT MAY FIX AN APPROPRIATE BOND AND DIRECT, AS A CONDITION OF THE BOND, THAT THE WITNESS APPEAR ON A DATE AND AT A TIME CERTAIN FOR THE HEARING.

SECTION 7. 18-5-205, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

18-5-205. Fraud by check - definitions - penalties. (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.

SECTION 8. 18-5-512, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

18-5-512. Issuance of bad check. (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.

SECTION 9. 16-7-403 (2), Colorado Revised Statutes, is amended to read:

16-7-403. Deferred sentencing of defendant. (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 shall be similar in all respects to conditions permitted as part of probation. Any 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), C.R.S., shall stipulate to the conditions specified in section 16-11-204 (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. Such 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 such guilty plea. When, as a condition of the deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the said 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 five 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 days thereafter. The burden of proof at such

hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.

SECTION 10. 16-10-301 (4) (c), Colorado Revised Statutes, is amended as follows:

16-10-301. Evidence of similar transactions - legislative declaration. (4) If the prosecution intends to introduce evidence of other acts of the defendant pursuant to this section, the following procedures shall apply:

(c) ~~The evidence of other acts may not be admitted until the trial court finds that the prosecution has by evidence or offer of proof established a prima facie case for the charged offense.~~ THE TRIAL COURT MAY DETERMINE THE ADMISSIBILITY OF OTHER ACTS BY AN OFFER OF PROOF.

SECTION 11. Repeal. 16-5-402 (3), Colorado Revised Statutes, is repealed as follows:

16-5-402. Limitation for collateral attack upon trial judgment. (3) ~~If the judgment of conviction or adjudication to which any collateral attack is directed was sustained upon review by a court of appellate jurisdiction in the state where the judgment or adjudication was entered, no collateral attack on such judgment or adjudication shall be permitted whether commenced within or outside the time limitations set forth in subsection (1) of this section, unless said collateral attack is based upon an opinion of the court of last resort subsequently announced in the state where the judgment or adjudication was entered, which opinion is given retroactive effect in a manner invalidating the conviction or adjudication.~~

SECTION 12. 13-71-105, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

13-71-105. Qualifications for juror service. (3) A PROSPECTIVE GRAND JUROR SHALL BE DISQUALIFIED IF HE OR SHE HAS PREVIOUSLY BEEN CONVICTED OF A FELONY IN THIS STATE, ANY OTHER STATE, THE UNITED STATES, OR ANY TERRITORY UNDER THE JURISDICTION OF THE UNITED STATES.

SECTION 13. 20-1-111 (1) and (3), Colorado Revised Statutes, are amended to read:

20-1-111. District attorneys may cooperate or contract - contents.
(1) District attorneys may cooperate or contract with one another to provide any function or service lawfully authorized to each of the cooperating or contracting district attorneys, including the sharing of costs AND THE ADMINISTRATION AND DISTRIBUTION OF MONEYS RECEIVED FOR MANDATED COSTS.

(3) Any such contract may provide for the joint exercise of the function or service, including the establishment of a separate legal entity to do so. THE DISTRICT ATTORNEYS MAY ALLOCATE UP TO FIVE PERCENT OF THE MONEYS RECEIVED FOR MANDATED COSTS AUTHORIZED BY THE GENERAL ASSEMBLY FOR ADMINISTRATIVE EXPENSES.

SECTION 14. Effective date. This act shall take effect July 1, 2002.

SECTION 15. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 30, 2002