

CHAPTER 137

CRIMINAL LAW AND PROCEDURE

HOUSE BILL 98-1264

BY REPRESENTATIVES Adkins, Kaufman, Epps, and Nichol;
also SENATORS Wells, Arnold, Mutzebaugh, Powers, and Wattenberg.

AN ACT

CONCERNING DISCOVERY PROCEDURES IN CLASS 1 FELONY CASES.

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

SECTION 1. 16-11-103, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

16-11-103. Imposition of sentence in class 1 felonies - appellate review.
(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 FIVE DAYS AFTER THE VERDICT IS RETURNED FINDING THE DEFENDANT GUILTY OF A CLASS 1 FELONY:

(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

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

STATEMENTS, FOR EACH WITNESS WHOM THE PROSECUTING ATTORNEY MAY CALL AT THE SENTENCING HEARING;

(IV) ANY REPORTS, RECORDED STATEMENTS, AND NOTES OF ANY EXPERT WHOM THE PROSECUTING ATTORNEY MAY CALL AS A WITNESS DURING THE SENTENCING HEARING, INCLUDING RESULTS OF PHYSICAL OR MENTAL EXAMINATIONS AND SCIENTIFIC TESTS, EXPERIMENTS, OR COMPARISONS;

(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.

(c) THE DEFENDANT SHALL PROVIDE THE PROSECUTING ATTORNEY WITH THE FOLLOWING INFORMATION AND MATERIALS NO LATER THAN TWENTY DAYS AFTER THE VERDICT IS RETURNED FINDING THE DEFENDANT GUILTY OF A CLASS 1 FELONY:

(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;

(III) ANY REPORTS, RECORDED STATEMENTS, AND NOTES OF ANY EXPERT WHOM THE DEFENDANT MAY CALL AS A WITNESS DURING THE SENTENCING HEARING, INCLUDING RESULTS OF PHYSICAL OR MENTAL EXAMINATIONS AND SCIENTIFIC TESTS, EXPERIMENTS, OR COMPARISONS; AND

(IV) A LIST OF BOOKS, PAPERS, DOCUMENTS, PHOTOGRAPHS, OR TANGIBLE OBJECTS THAT THE DEFENDANT MAY INTRODUCE AT THE SENTENCING HEARING.

(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 (3.5) 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.

(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 (3.5) 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 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 (3.5). 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.

(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 (3.5).

(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 (3.5) 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.

SECTION 2. 16-8-103.6, Colorado Revised Statutes, is amended to read:

16-8-103.6. Waiver of privilege. (1) (a) A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103, asserting the affirmative defense of impaired mental condition pursuant to section 16-8-103.5, ~~or~~ raising the question of incompetency to proceed pursuant to section 16-8-110, OR DISCLOSING WITNESSES WHO MAY PROVIDE EVIDENCE CONCERNING THE DEFENDANT'S MENTAL CONDITION DURING A SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 OR 16-11-802 waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, ~~or~~ hearing on the issue of such mental condition, OR SENTENCING HEARING CONDUCTED PURSUANT TO SECTION 16-11-103 OR 16-11-802. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.

(b) This subsection (1) shall apply only to offenses committed before July 1, 1995.

(2) (a) A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103, ~~or~~ raising the question of incompetency to proceed pursuant to section 16-8-110, OR DISCLOSING WITNESSES WHO MAY PROVIDE EVIDENCE CONCERNING THE DEFENDANT'S MENTAL CONDITION DURING A SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, ~~or~~ hearing on the issue of such mental condition, OR SENTENCING HEARING CONDUCTED PURSUANT TO SECTION 16-11-103. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.

(b) This subsection (2) shall apply to offenses committed on or after July 1, 1995.

SECTION 3. 16-8-106 (2), (3), (5) (d), and (6), Colorado Revised Statutes, are amended to read:

16-8-106. Examinations and report. (2) (a) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial on the issues of insanity, competency, or impaired mental condition AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 OR 16-11-802. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial on the issues of insanity or competency AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(3) (a) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 OR 16-11-802. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity, eligibility for release, impaired mental condition, or competency to proceed AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103

OR 16-11-802, the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity, eligibility for release, or competency to proceed AND IN ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103, the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(5) With respect to offenses committed before July 1, 1995, the report of examination shall include, but is not limited to:

(d) (I) An opinion as to whether the defendant suffers from a mental disease or defect; and if so,

(II) Separate opinions as to whether the defendant was insane or had an impaired mental condition at the time of the commission of the act, is incompetent to proceed, or is ineligible for release, as those terms are defined in this article, AND, IN ANY CLASS 1 FELONY CASE, AN OPINION AS TO HOW THE MENTAL DISEASE OR DEFECT AFFECTS ANY MITIGATING FACTOR. The nature of the opinions required depends upon the type of examination ordered by the court.

(6) With respect to offenses committed on or after July 1, 1995, the report of examination shall include, but is not limited to, the items described in paragraphs (a) to (c) of subsection (5) of this section, and:

(a) An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that prevented the person from forming the culpable mental state that is an essential element of any crime charged; and, if so,

(b) Separate opinions as to whether the defendant was insane, is incompetent to proceed, or is ineligible for release, as those terms are defined in this article, AND, IN ANY CLASS 1 FELONY CASE, AN OPINION AS TO HOW THE MENTAL DISEASE OR DEFECT OR THE CONDITION OF MIND CAUSED BY MENTAL DISEASE OR DEFECT AFFECTS ANY MITIGATING FACTOR. The nature of the opinions required depends upon the type of examination ordered by the court.

SECTION 4. 16-8-107 (1) and (1.5), Colorado Revised Statutes, are amended to read:

16-8-107. Evidence. (1) (a) Except as provided in this subsection (1), no evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible against the defendant on the issues raised by a plea of not guilty, if the defendant is put to trial on those issues, except to rebut evidence of his OR HER mental condition introduced by the defendant to show incapacity to form a culpable mental state; and, in such case, that evidence may be considered by the trier of fact only as bearing upon the question of capacity to form a culpable mental state, and the jury, at the request of either party, shall be so instructed.

(b) EVIDENCE ACQUIRED DIRECTLY OR INDIRECTLY FOR THE FIRST TIME FROM A COMMUNICATION DERIVED FROM THE DEFENDANT'S MENTAL PROCESSES DURING THE COURSE OF A COURT-ORDERED EXAMINATION UNDER SECTION 16-8-108 OR ACQUIRED PURSUANT TO SECTION 16-8-103.6 IS ADMISSIBLE AT ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 OR 16-11-802 ONLY TO PROVE THE EXISTENCE OR ABSENCE OF ANY MITIGATING FACTOR.

(c) If the defendant testifies in his OR HER own behalf upon the trial of the issues raised by the plea of not guilty OR AT A SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 OR 16-11-802, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

(1.5) (a) Except as otherwise provided in this subsection (1.5), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed.

(b) EVIDENCE ACQUIRED DIRECTLY OR INDIRECTLY FOR THE FIRST TIME FROM A COMMUNICATION DERIVED FROM THE DEFENDANT'S MENTAL PROCESSES DURING THE COURSE OF A COURT-ORDERED EXAMINATION UNDER SECTION 16-8-106 OR ACQUIRED PURSUANT TO SECTION 16-8-103.6 IS ADMISSIBLE AT ANY SENTENCING HEARING HELD PURSUANT TO SECTION 16-11-103 ONLY TO PROVE THE EXISTENCE OR ABSENCE OF ANY MITIGATING FACTOR.

(c) If the defendant testifies in his or her own behalf, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony. This subsection (1.5) shall apply to offenses committed on or after July 1, 1995.

SECTION 5. 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: April 21, 1998