West's Colorado Revised Statutes Annotated Currentness
Title 18. Criminal Code (Refs & Annos)
Article 1. Provisions Applicable to Offenses Generally (Refs & Annos)
Part 4. Rights of Defendant (Refs & Annos)

§ 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.

§ 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.

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

Except as provided in section 16-5-501, C.R.S., 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.

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

(1) Every person accused of a class 1, 2, or 3 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 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 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.

§ 18-1-405. Speedy trial

(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 shall be brought to trial as provided in subsection (1) of this section, the following periods of time shall be 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 the provisions of subsection (7) of this section shall apply.

(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.

§ 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.

§ 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.

§ 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.

➡ **§ 18-1-409. Appellate review of sentence for a felony**

(1) When 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), 18-1.3-1302(6) , or 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 to be employed in the review shall be as provided by supreme court rule.

(2) No appellate court shall review any sentence which is imposed unless, within forty-five 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) Repealed by Laws 1979, H.B.1589, § 24.

(2.2) Repealed by Laws 1981, S.B.304, § 2.

(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.

➡ § 18-1-409.5. Repealed by Laws 1981, S.B.304, § 2

➡ § 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.

➡ § 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) “Actual innocence” means clear and convincing evidence such that no reasonable juror would have convicted the defendant.

(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.

(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.

➡ § 18-1-412. Procedure for application for DNA testing--appointment of counsel

(1) An incarcerated person may apply to the district court in the district where the conviction was secured for DNA testing concerning the conviction and sentence the person is currently serving.

(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. The court may deny a second or subsequent motion requesting relief pursuant to this section.

(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 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 his or her counsel, the court shall order a database search by a law enforcement agency 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.

§ 18-1-413. Content of application for DNA testing

(1) A court shall not order DNA testing unless the petitioner demonstrates by a preponderance of the evidence that:

(a) Favorable results of the DNA testing will demonstrate the petitioner's actual innocence;

(b) A law enforcement agency collected biological evidence pertaining to the offense and retains actual or constructive possession of the evidence that allows for reliable DNA testing;

(c)(I) Conclusive DNA results were not available prior to the petitioner's conviction; and

(II) The petitioner did not secure DNA testing prior to his or her 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.

§ 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.

(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.

§ 18-1-415. Testing--payment

All testing shall be performed at a law enforcement facility, and the petitioner shall pay for the testing. 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 their budget.

§ 18-1-416. Results of the DNA test

(1) Notwithstanding any law or rule of procedure that bars a motion for post-conviction review as untimely, 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 post-conviction review under section 18-1-410 and the Colorado rules of criminal procedure.

(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.

§ 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.

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