

CHAPTER 279

CRIMINAL LAW AND PROCEDURE

SENATE BILL 20-221

BY SENATOR(S) Moreno and Tate, Bridges, Coram, Crowder, Danielson, Donovan, Fenberg, Fields, Foote, Ginal, Gonzales, Hansen, Lee, Pettersen, Priola, Rodriguez, Smallwood, Story, Todd, Winter, Woodward, Zenzinger, Garcia;
also REPRESENTATIVE(S) Titone and Soper, Arndt, Benavidez, Bird, Buckner, Buentello, Caraveo, Cutter, Duran, Esgar, Exum, Garnett, Gonzales-Gutierrez, Gray, Herod, Hooton, Jackson, Jaquez Lewis, Kipp, Kraft-Tharp, Lontine, McCluskie, McKean, McLachlan, Melton, Michaelson Jenet, Mullica, Roberts, Singer, Sirota, Snyder, Sullivan, Tipper, Valdez A., Valdez D., Weissman, Woodrow, Young, Becker.

AN ACT**CONCERNING BANNING THE USE OF A PANIC DEFENSE UNLESS A PARTY CAN SHOW ITS RELEVANCE TO THE COURT.**

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

SECTION 1. Legislative declaration. The general assembly hereby finds and declares that it is the right of every crime victim to be protected from bias-motivated crimes, including crimes against lesbian, gay, bisexual, transgender, and queer persons. The general assembly further finds and declares that it is the right of every victim and witness to be treated with respect and protected from unfair attack on their character and privacy. So-called "gay panic" and "trans panic" defenses seek to partially or completely excuse a defendant from full accountability for the commission of a violent crime on the grounds that the sexual orientation or gender identity or expression of the victim is sufficient in itself to arouse the heat of passion in the defendant, or contribute to a valid provocation or justification for the violent reaction of the defendant, or cause the defendant to be temporarily insane. In other contexts, a victim's or witness's gender identity or expression or sexual orientation is used to attack their credibility and character and invade their privacy, creating disincentives to testify and impediments to the search for truth and justice. These tactics appeal to irrational fears and hatred of these persons, undermining the legitimacy of criminal prosecutions and resulting in unjustifiable acquittals or sentencing reductions due to bias, fear, shock, or disgust rather than competent evidence. Continued use of these anachronistic defenses and appeals to reinforce bias and institutionalize prejudice at the expense of norms of self-control, tolerance, and compassion, which the law should encourage, and it is an impediment to a just

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

criminal justice system. Any suggestion of legally sanctioned discrimination against a person's sexual orientation or gender identity or expression must end. As the American Bar Association has urged legislative action to curtail the availability and effectiveness of "gay panic" and "trans panic" defenses, the general assembly brings forth this legislation.

SECTION 2. In Colorado Revised Statutes, 16-8-101.5, **amend** (2) as follows:

16-8-101.5. Insanity defined - offenses committed on and after July 1, 1995 - definitions. (2) As used in subsection (1) of this section:

(a) "Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct. EVIDENCE OF KNOWLEDGE OR AWARENESS OF THE VICTIM'S ACTUAL OR PERCEIVED GENDER, GENDER IDENTITY, GENDER EXPRESSION, OR SEXUAL ORIENTATION SHALL NOT CONSTITUTE INABILITY TO DISTINGUISH RIGHT FROM WRONG.

(b) "GENDER IDENTITY" AND "GENDER EXPRESSION" HAVE THE SAME MEANING AS IN SECTION 18-1-901 (3)(h.5).

~~(b)~~ (c) "Mental disease or defect" includes only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance but does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(d) "SEXUAL ORIENTATION" HAS THE SAME MEANING AS IN SECTION 18-9-121 (5)(b).

SECTION 3. In Colorado Revised Statutes, 18-1-704, **amend** (3)(b) and (3)(c); and **add** (3)(d) and (5) as follows:

18-1-704. Use of physical force in defense of a person - definitions. (3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:

(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; ~~or~~

(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.

(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).

SECTION 4. In Colorado Revised Statutes, **add** 18-1-714 as follows:

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).

SECTION 5. In Colorado Revised Statutes, 18-1-901, **add** (3)(h.5) as follows:

18-1-901. Definitions. (3) (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.

SECTION 6. In Colorado Revised Statutes, 18-3-103, **add** (3)(c) and (5) as follows:

18-3-103. Murder in the second degree - definitions. (3) (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.

(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).

SECTION 7. In Colorado Revised Statutes, 18-3-201, **add** (1.6), (1.7), and (3) as follows:

18-3-201. Definitions. As used in sections 18-3-201 to 18-3-204, unless the

context otherwise requires:

(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.

(3) "SEXUAL ORIENTATION" HAS THE SAME MEANING AS IN SECTION 18-9-121 (5)(b).

SECTION 8. In Colorado Revised Statutes, 18-3-202, **add** (2)(e) as follows:

18-3-202. Assault in the first degree. (2) (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.

SECTION 9. In Colorado Revised Statutes, 18-3-203, **add** (2)(d) as follows:

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

SECTION 10. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.

Approved: July 13, 2020