CRIMINAL JUSTICE

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Identity Theft

Law Enforcement Authority and Procedures

HB 09-1262 *(Enacted)*
Issue Summons Instead of Arrest Warrant

SB 09-284 *(Enacted)*
Police Authority to Block Communications

During the 2009 legislative session, the General Assembly considered and passed a wide variety of bills related to criminal justice. These bills covered issues ranging from limiting the loss of driving privileges as a result of certain criminal actions to the use of text messaging technology in the commission of certain sex offenses. One notable bill from the 2009 session requires all individuals arrested for a felony offense to submit to DNA testing.

DNA Evidence

Collection of DNA samples. A bill that was discussed at great length in 2009, **Senate Bill 09-241,** requires every individual who is arrested or charged for a felony offense after September 30, 2010, to provide a DNA sample to the arresting or investigating law enforcement agency. The DNA sample may be collected as part of the booking process or at the suspect's first court appearance, depending on the circumstances of the case. If the Colorado Bureau of Investigation (CBI) already has a DNA sample for the suspect, the local law enforcement agency is not required to obtain an additional sample. Each DNA sample collected must to be submitted to the CBI for testing. The CBI is responsible for providing all materials necessary for local law enforcement agencies to collect the sample. The CBI also must store and preserve all of the DNA samples collected.

The bill allows an individual to submit a written request that includes specific information to the CBI for the expungement of his or her DNA sample if:

- each felony charge has been dismissed, resulted in acquittal, or resulted in a conviction for an offense that is not a felony; or
- a felony charge was not filed within 90 days after the individual's arrest.

Upon receiving such a request, the CBI is required to verify the status of felony charges with the district attorney and then destroy the DNA sample within 90 days. Additionally, the CBI will expunge the results of the testing from the Federal Combined DNA Index System (CODIS) and any state index system, unless the bureau receives written notification from the district attorney that the person does not qualify for expungement. The CBI is required to notify the requesting individual either that the DNA sample has been destroyed and the results expunged or explain why the sample will not be destroyed and the results expunged. A DNA match may not be admitted as evidence if it is based on a sample that was required to be destroyed and expunged and it is obtained after the required date of destruction or expungement.

The state has a working group to address issues of DNA evidence retention that includes legislators and stakeholders in the area of public safety. The bill requires the working group to discuss and make recommendations about the appropriateness and implementation of the bill. The working group is required to submit a report to the General Assembly prior to January 12, 2010, that includes the group's recommendations.

Finally, in order to cover the cost of the DNA testing, the bill imposes a surcharge of $2.50 on most criminal actions, traffic infractions, and tickets issued by the Division of Wildlife and the Division of Parks and Outdoor Recreation in the Department of Natural Resources. The surcharge may be waived for indigent defendants.

Preservation of DNA evidence. Current law requires the preservation of all evidence that may contain DNA, which is collected in cases resulting in a conviction for a class 1 felony or a sex offense that is eligible for lifetime supervision. **House Bill 09-1121** repeals and re-enacts this section of law with some changes.

The bill reduces the number of cases where DNA evidence must be preserved. Specifically, non-sex offense misdemeanors are no longer subject to DNA preservation requirements. Other

evidence, unless it involves an unsolved felony, a class 1 felony, or a sex offense subject to indeterminate sentencing, may be disposed of with a court order.

The bill streamlines the existing process for court approval of the disposal of DNA evidence in cases where neither the district attorney nor the defendant objects to such disposal. The bill also specifies that the defendant may petition the court for disposal of DNA evidence, and establishes a process for doing so. In cases where the evidence being held is property of the victim, the bill specifies a process for having the evidence returned to the victim.

The bill also provides a new level of detail regarding notice requirements for the district attorney or the court prior to the disposal of DNA evidence. Finally, the bill requires and provides a process for data collection by the courts with regard to DNA evidence cases.

Sex Offenders

House Bill 09-1132 adds text messaging and instant messaging to the list of means to commit the existing crimes of internet luring of a child, internet sexual exploitation of a child, and harassment. Internet luring of a child is a class 4 or class 5 felony, depending on the circumstances. Internet sexual exploitation of a child is a class 4 felony. Harassment is a class 1 or class 3 misdemeanor, depending on the circumstances. The bill also adds text messaging and instant messaging to the means of committing computer dissemination of indecent material to a child, a prohibited act for which a civil penalty may be assessed.

House Bill 09-1163 makes a number of changes to laws concerning crimes against children. These include:

- clarifying that the crime of internet sexual exploitation of a child applies to an individual the actor knows or believes to be under the age of 15 and at least 4 years younger than the actor;
- clarifying that previous convictions for child abuse in Colorado or any other state apply to the aggravated sentencing provisions for that offense;
- making other clarifications with regard to extraordinary aggravating conduct related to child abuse; and
- modifying the crime of sexual exploitation of a child by possession of sexually exploitative material to include the possession of one video recording of child pornography. Currently, it is a class 4 felony to possess more than 20 different items of sexually exploitative material and, under the bill, one video recording essentially equals the current 20 items.

House Bill 09-1144, which was postponed indefinitely, would have required a court to impose a mandatory minimum sentence of incarceration of at least 20 years, but no more than 30 years, for an offender who commits a sexual assault on a child when the child is:

- 14 years old or younger; and
- 7 years younger than the offender at the time of the offense.

Current law allows for indeterminate sentencing of many serious sex offenders for a maximum period of the offender's natural life. This bill would not have changed the maximum sentence; it would have instead imposed a minimum sentence. In the event that an offender sentenced pursuant to this bill was released on parole, the State Board of Parole would have been required to keep the offender on parole for the remainder of the offender's life.

Firearms

Current state and federal law requires a firearm vendor to obtain a background check on a prospective buyer before selling the buyer a gun. **House Bill 09-1180**, which was vetoed by the Governor, would have allowed the buyer to present a valid permit to carry a concealed weapon (CCW) and a government-issued identification card in order to satisfy the background check requirement.

The bill also sought to amend the application process for obtaining a permit to carry a concealed weapon to include information about an applicant's citizenship status. Under federal law, a criminal background check is required for all firearm transfers. The federal Bureau of Alcohol, Tobacco, and Firearms (ATF) accepts concealed carry permits from certain states as a substitute for the background check. Colorado is not currently one of the state-issued permits that meets ATF requirements. This bill attempted to satisfy ATF concerns about Colorado concealed carry permits and convince the ATF to add Colorado permits to the list of those that are adequate substitutes for a criminal background check.

Finally, the bill would have required sheriffs to use a standard template when issuing CCWs. The CBI would have been responsible for creating a template that is resistant to tampering and forgery and distributing it to sheriffs across the state. The bill required sheriffs who revoke a CCW to confiscate the actual permit. Permits issued before the effective date of the bill could not be renewed, but would instead be replaced with a new permit that conformed to the standard template.

Current law requires a local school district board of education to expel a student who carries, brings, uses, or possesses a dangerous weapon on school grounds. **Senate Bill 09-237** changes the definition of a dangerous weapon to omit a firearm facsimile that could reasonably be mistaken for an actual firearm. It then adds carrying, using, actively displaying, or threatening with the use of a firearm facsimile that could reasonably be mistaken for an actual firearm to the list of grounds for suspension or expulsion.

The bill requires each school district to develop a policy that authorizes a student to carry, bring, use, or possess a firearm facsimile on school property for either a school-related or a nonschool-related activity. Such policies must consider student violations on a case-by-case basis to determine whether suspension, expulsion, or any other disciplinary action, if any, is necessary.

Juvenile Justice

Current law allows certain juvenile offenders to petition the court to have their juvenile criminal records permanently removed or expunged, provided they meet certain criteria (i.e., a mandatory waiting period, no new offenses or pending charges, and whether the expungement is in

the best interests of the community). Some offenders are not eligible to file such a petition. These include individuals who have been:

- designated by the court as aggravated or violent juvenile offenders;
- convicted of an offense involving unlawful sexual behavior;
- convicted of an offense that is considered a crime of violence under Colorado law; and
- charged as an adult for a crime committed as a juvenile, a process known as "direct file."

House Bill 09-1044 allows a juvenile who was charged as an adult, but who is ultimately sentenced as a juvenile, to later petition the court to have his or her record expunged. All of the other conditions for expungement will still apply.

The Youthful Offender System (YOS) in the Department of Corrections (DOC) is a sentencing option for certain juveniles who are charged as adults. It exists between the traditional adult prison system and the Division of Youth Corrections, Department of Human Services. The YOS is an intensively structured program that provides services and treatment to juvenile offenders during incarceration, as well as the transition back to the community. The length of stay for an offender in the YOS is anywhere between two and seven years, depending on the severity of the crime committed. The number of beds is capped at 256 by law and by the physical limitations of the facility. Certain conditions must be met before an individual may be sentenced to the YOS, including an age requirement and a restriction on certain types of crimes.

House Bill 09-1122 expands the eligibility for sentencing to the YOS to include young adult offenders who are 18 or 19 at the time the offense is committed, but less than 21 years old at the time of sentencing. The bill excludes from eligibility for the YOS:

- most sex offenders;
- individuals convicted of class 1 felonies;
- most class 2 felons (felony murder is the exception if it is pled down to a class 2 felony and meets certain sentencing guidelines); and
- offenders who have previously been sentenced to the YOS.

The bill requires the warden of the YOS facility, upon the request of the prosecution or the defense, to determine whether a young adult offender may be sentenced to the YOS for the presentence report. The warden must consider the nature and circumstances of the crime, the criminal history of the offender, the available bed space in the system, and any other appropriate considerations.

Juvenile offenders who are charged as adults for criminal offenses (this is known as direct filing of charges) are currently detained in county jail facilities pending trial unless the district attorney and defense counsel agree otherwise. **House Bill 09-1321** requires the district attorney and the defense counsel to make a reasonable attempt to consider the appropriate place of confinement within 30 days after charges are direct filed. The bill lists specific factors that must be considered by the district attorney and defense counsel when considering the place of confinement. These include:

- the age of the juvenile;
- the nature, seriousness, and circumstances of the alleged offense;

- the juvenile's history of prior delinquent or criminal acts;
- whether detention in a juvenile facility will adequately serve the need for community protection pending the outcome of the criminal proceedings;
- whether detention in a juvenile facility will negatively impact the functioning of the juvenile facility by compromising the goals of detention to maintain a safe, positive, and secure environment for all juveniles within the facility;
- the relative ability of the available adult and juvenile detention facilities to meet the needs of the juvenile and protect the public;
- whether the juvenile presents an imminent risk of harm to himself or herself or others within a juvenile facility;
- the physical maturity of the juvenile;
- the current mental state or maturity of the juvenile as evidenced by relevant mental health or psychological assessments or screenings that are made available to both the district attorney and defense counsel; and
- any other relevant factors.

After consideration of the listed factors, the district attorney may agree to move a juvenile from detention in a county jail to a juvenile facility. Current law already allows the district attorney to make such a motion to the court.

Driving Offenses

House Bill 09-1081 extends the statute of limitations for vehicular homicide and leaving the scene of an accident that resulted in the death of a person from three years to five years. Vehicular homicide may be a class 3 or class 4 felony, depending on the presence of alcohol or drugs.

Current law permits the revocation of driving privileges as a penalty for committing certain criminal offenses. **House Bill 09-1266** removes driving privilege revocation as a penalty for the following crimes:

- criminal mischief;
- defacing property;
- offenses related to the forgery of a traffic ticket issued to a minor;
- unlawful use of a controlled substance;
- unlawful distribution, manufacturing, dispensing, sale, or possession of a controlled substance;
- offenses related to marijuana; and
- offenses related to possession of alcohol by minors except when the minor fails to complete a court-ordered treatment program or upon conviction for a second or subsequent offense.

Three other bills related to driving offenses were lost:

House Bill 09-1283 sought to increase the penalty for careless driving, if the driver's actions result in the death of another person, to a class 1 misdemeanor. Under current law, the penalty for careless driving resulting in death is a class 1 misdemeanor traffic offense. In addition to the

penalties for a class 1 misdemeanor, individuals convicted of this crime would have been sentenced to 8 hours of community service per month for a year and 32 hours of driver training.

Currently, photo technology can be used to enforce traffic laws in school zones, residential neighborhoods, construction zones, and along streets that border a municipal park. **Senate Bill 09-143** would have changed the use of photo traffic enforcement to:

- allow photo traffic enforcement to be used on any road with a speed limit of up to 50 miles per hour, instead of being limited to roads in residential neighborhoods with speeds of up to 35 miles per hour;
- clarify that traffic regulation and traffic safety are the only authorized use of ticket revenue;
- permit the maximum penalty fine to be raised beyond the current limit of $40 (under specified conditions) to cover the expenses of the photo traffic enforcement system; and
- prohibit photo traffic enforcement systems from being used to detect a violation of using a cell phone while driving.

Senate Bill 09-296 would have made violations of seat belt and child car seat laws primary offenses for which tickets could be issued if violations were clearly observed. The bill included language to reinforce that profiling is prohibited.

Controlled Substances

House Bill 09-1157 makes any material compound or mixture containing the stimulant N-benzylpiperazine (BZP) a schedule I controlled substance. Possession of less than an ounce of a schedule I controlled substance is publishable as a class 6 felony, while possession of over an ounce is punishable as a class 4 felony.

Senate Bill 09-060 defines the term illegal drug laboratory to include areas where controlled substances are manufactured, processed, cooked, disposed of, used, or stored. It also includes nearby areas. In addition, the State Board of Health is required to establish procedures for the testing and evaluation of contamination caused by an illegal drug laboratory. Any contract to sell contaminated property cannot limit the right of the buyer to test the property or to cancel the contract based upon the results of the tests.

The Colorado Methamphetamine Task Force was created by the General Assembly in 2006 to develop a statewide strategy to respond to methamphetamine use in the state. The task force receives funding from private foundations and is comprised of 27 members from government and the private sector, including members of the General Assembly or their designees. The recent work of the task force includes creating a blueprint for addressing the methamphetamine problem in the state, conducting demonstration initiatives, and developing strategies to protect communities from the effects of methamphetamine. **Senate Bill 09-231** extends the repeal of the task force from January 1, 2010, to January 1, 2014.

Increased Penalties

House Bill 09-1120 expands the circumstances for committing third degree assault to include a person who, with the intent to:

- infect;
- injure;
- harm;
- harass;
- annoy;
- threaten; or
- alarm

a peace officer, a firefighter, or an emergency medical technician causes that person to come into contact with certain biological or hazardous materials. Third degree assault is a class 1 misdemeanor and is an extraordinary risk crime that is subject to a modified sentencing range.

An individual who commits third degree assault in the manner described is required to submit to a medical test for communicable diseases. The results of the test must be disclosed to the victim of the assault if the victim so requests. If the offender voluntarily submits to a test for communicable diseases, that voluntary submission may be used as a mitigating factor for the purposes of sentencing. The bill is silent on the subject of who pays for such medical tests, although the court is permitted to order the offender to pay for the test and any treatment prescribed for the victim.

House Bill 09-1123 modifies existing laws regarding human trafficking to:

- define an adult as a person who is 18 years or older;
- define a child as a person who is under the age of 18; and
- increase the penalty for trafficking in children from a class 3 felony to a class 2 felony.

Additionally, the bill adds the following elements to the crime of coercion of involuntary servitude:

- threats of serious harm or physical restraint against that person or another person;
- a scheme, plan, or pattern intended to cause a person to believe that the person or another person will suffer serious harm or physical restraint if labor or services are not performed; and
- abuse or threatened abuse of the law or legal process.

Under current law, it is a class 1 misdemeanor to sell illegally packaged recorded materials. **Senate Bill 09-036** expands the definition of the crime of selling illegally packaged recordings. The bill specifies that any person who knowingly and for commercial advantage or private financial gain *transports* recorded articles that do no clearly display the name of the manufacturer on the cover commits dealing in unlawfully packaged recorded articles. Current law applies only to those that advertise, sell, or possess such articles.

In addition, the bill specifies that if the offense involves more than 100 articles, or the offense is a second or subsequent offense, the minimum fine is $1,000. The bill also requires law

enforcement officials to confiscate all illegally labeled, transferred, or recorded articles, as well as any equipment used to produce or manufacture those recordings. These items will be delivered to the local district attorney who may request a court order to destroy the recordings and a court order to distribute the equipment to a charitable or educational organization.

Finally, the bill requires a convicted offender to make restitution to the owner or lawful producer of the recorded article. Such restitution is to be based on the aggregate, wholesale value of the number of articles involved in the offense if they had been lawfully manufactured.

Senate Bill 09-093 modifies the existing statutes concerning identity theft in the following ways:

- makes criminal possession of one or more identification documents issued to the same person a class 1 misdemeanor;
- makes criminal possession of two or more people's identification a class 6 felony;
- imposes a minimum sentence on anyone convicted of attempt, conspiracy, or solicitation to commit identity theft; and
- starts the statute of limitations for identity theft at the time the crime was discovered.

Law Enforcement Authority and Procedures

House Bill 09-1262 allows a judge to issue a summons in lieu of an arrest warrant for a suspect in certain crimes without the consent of the prosecutor. The judge may not issue a summons if a law enforcement officer presents a written statement that the suspect presents a significant flight risk or if the safety of a victim or the public may be at risk.

Current law allows a law enforcement official to order that phone lines be cut if he or she has reason to believe that there is a hostage situation. **Senate Bill 09-284** amends the law to also allow law enforcement officials to cut Internet access and to block cellular phone reception if the official has reason to believe that there is a hostage situation. This authority also applies if a person has barricaded himself or herself into a structure without a hostage.