

# CRIMINAL JUSTICE

## Criminal Law

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<b>Juvenile Justice</b>		
<b>HB 08-1016</b> (Enacted) <i>Juvenile Justice Mental Health Process</i>	<b>HB 08-1117</b> (Enacted) <i>Juvenile Justice Restorative Programs</i>	<b>HB 08-1142</b> (Postponed Indefinitely) <i>Juvenile Competency</i>
<b>HB 08-1156</b> (Enacted) <i>Changes Juvenile Parole</i>	<b>SB 08-066</b> (Enacted) <i>Felony Murder Penalty for Juveniles</i>	
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During the 2008 legislative session, the General Assembly considered and passed a wide variety of bills related to criminal justice. These bills covered issues ranging from juvenile sentencing to increasing penalties for drunk driving. One notable goal from the 2008 session was to improve the retention methods for DNA evidence in criminal cases.

## Criminal Law

***Substance abuse assessment treatment.*** **Senate Bill 08-234** requires each individual convicted of a misdemeanor or petty offense, if the sentence is a deferred judgement or includes supervision by the probation department, to submit to an assessment for the use of alcohol and other controlled substances. This is an expansion of current law which requires only those convicted of a felony to submit to an assessment. The court also may require counseling or treatment for alcohol or drug abuse.

***Protection order crime.*** **Senate Bill 08-236** expands the existing crime of violation of a protection order to include a violation that occurs after the restrained individual acquires knowledge from a law enforcement official of the protection order's contents. This bill expands current law under which it is only a crime to violate a protection order if the individual has been personally served the order or is informed of the order by the court.

## Sex Offenders

A number of bills were considered by the General Assembly relating to sex offenders. The bills mainly focused on the sexual exploitation of children and protecting children from sexual predators. Seven bills were adopted and five were postponed indefinitely.

***Sexually exploitative material.*** **Senate Bill 08-238** prohibits the reproduction of sexually exploitative material as part of the proceedings in a criminal case. The bill specifies that the court will deny a request by the defendant to copy or reproduce any sexually exploitative material as long as the prosecuting attorney makes the material reasonably available to the defendant.

**Senate Bill 08-125**, which was postponed indefinitely, would have made changes to certain offenses concerning sexually explicit materials and performances that are harmful to children. The bill defined material to include pictures, drawings, video or digital recordings, or other written or

electronic representations of nudity or sexual activity. The bill established standards for what constitutes harmful materials or performances and it provided affirmative defenses to prosecution. Under current law, disseminating material that is harmful to minors is a class 2 misdemeanor.

The bill also would have created a new class 4 felony of luring a child with material that is harmful to a minor. A person would have committed this crime if he or she had the intent to commit sexual assault or unlawful sexual contact with a child under 15 years of age and he or she lured the child to enter a vehicle, building, room, or secluded place with the enticement of sexually explicit materials. A second offense of luring a child with material that is harmful to a minor would have been a class 3 felony.

***Public indecency.*** Current law requires exposure of the genital area in order for an act to be considered public indecency. **Senate Bill 08-235** includes an act of masturbation or simulated masturbation, regardless of whether the genital area is exposed or covered, in the existing crime of public indecency. Public indecency is a petty offense.

***Sexual assault victim protections.*** The federal 2005 Stop Violence Against Women Act (VAWA) provides federal funds from the U.S. Department of Justice to states for distribution for competitive grants to organizations that address violence against women. In the summer of 2007, the Department of Justice changed its regulations with regard to the VAWA program. Specifically, it threatened to cut off funding unless states were able to certify certain things by January 1, 2009. **House Bill 08-1217** will allow Colorado to make such a certification by making the changes described below.

The bill prohibits a law enforcement agency, prosecuting officer, or other governmental official from asking a sexual assault victim to take a polygraph test as a condition of proceeding with a criminal investigation or prosecution. The bill also prohibits a law enforcement agency, prosecuting officer, or other governmental official from making the performance of a forensic medical examination, including the collection of evidence, contingent upon a victim's willingness to participate in the criminal justice process. The bill requires the Division of Criminal Justice in the Department of Public Safety, and not the victim, to pay for such a medical examination.

In the event that a medical exam is conducted at the request of the victim and not law enforcement, medical personnel are required by the bill to contact the law enforcement agency in whose jurisdiction the crime occurred regarding storage of the evidence. The evidence must be stored for at least 2 years by the law enforcement agency.

***Sex offender child custody cases.*** **Senate Bill 08-106** requires the court to modify an order granting parenting time when a parent has been convicted in another state or jurisdiction (including convictions in military and federal courts) of an offense that, if committed in Colorado, would constitute murder, a sex offense against a child, or child abuse. The convicted parent is required to submit to and pay for a sex offender assessment in Colorado and the court is required to use that assessment in making a determination regarding parenting time.

***Sexually violent predators.*** Except in cases where the court was not required to enter such an order when imposing the original sentence, **House Bill 08-1247** requires the Department of Corrections to notify the court if it receives a court order that *does not* include a determination by the court regarding a defendant's status as a sexually violent predator (SVP). The bill applies to

defendants who are convicted of offenses under Colorado's SVP statute. The bill authorizes the department to return the defendant to the custody of the county sheriff for delivery to the court to make the required SVP determination.

**House Bill 08-1219** would have required SVPs sentenced to probation or released on parole to be monitored using a global positioning system (GPS) device. The bill was postponed indefinitely in the House Appropriations Committee.

**Youthful offender system treatment.** **House Bill 08-1132** allows the Youthful Offender System (YOS) in the Department of Corrections to provide adult sex offender treatment services to inmates who are at least 18 years old. Current law requires the YOS to provide juvenile sex offender treatment to these offenders. The bill also adds mental health treatment to the list of services the YOS may provide to inmates without parental consent.

**Sex offender registration.** **Senate Bill 08-237** clarifies that an individual who is a temporary or permanent resident of Colorado must register as a sex offender in Colorado if he or she is convicted of an offense in another jurisdiction that would require the individual to register as a sex offender in that jurisdiction.

**House Bill 08-1188** would have required all sex offenders to provide e-mail addresses, instant messaging identities, and chat room identities to local law enforcement agencies when registering as required under the Colorado Sex Offender Registration Act. Current law only requires offenders convicted of *sex offenses against children* to provide this information. The bill would have made failure to provide such information a qualification for the offense of failure to register as a sex offender, which is a class 5 or class 6 felony, depending on the circumstances. The bill was postponed indefinitely by the House Judiciary Committee.

**Statute of limitations.** **House Bill 08-1011**, which was postponed indefinitely by the House Judiciary Committee, would have removed the statute of limitations for victims of sexual assault on a child to file civil actions against either the perpetrator of the sexual assault or a third party. The bill also specifically allowed victims to:

- file a civil action against an individual who is deceased or incapacitated;
- recover damages for other than those for medical treatment and counseling when filing a civil action more than 15 years after turning 18 years old; and
- file a civil claim by July 1, 2010 (a two-year window from the effective date of the bill), even if they were originally barred from filing such an action by the applicable statute of limitations.

**Death penalty child rape under 12.** **Senate Bill 08-195** would have made it a class 1 felony, under certain circumstances, to commit sexual assault on a child who is under the age of 12 when the perpetrator was previously convicted of an aggravated sexual offense against a child. A class 1 felony is punishable by life in prison without parole, or the death penalty. The bill was postponed indefinitely by the Senate Appropriations Committee.

## New Crimes

The General Assembly considered several bills that create new crimes:

- traffic right of way violations;
- retaliation against a judge;
- online ticket sales;
- theft of sound recordings; and
- public indecency.

***Traffic right of way violations.*** **House Bill 08-1104** would have created a new traffic infraction class and misdemeanor traffic offense. An “aggravated right-of-way” offense would have applied when death or bodily injury was caused by a violation of traffic rights-of-way. The first violation of this new offense would have been a class C traffic infraction. A second or subsequent conviction would have been a class 1 misdemeanor traffic offense. This bill was lost in the House.

***Retaliation against a judge.*** Under **House Bill 08-1115**, a person commits a class 4 felony if he or she threatens, harasses, or harms a judge or a family member or close associate of a judge as retaliation or retribution against the judge for a decision in a legal matter. The penalty for a class 4 felony is a minimum sentence of 2 years and a maximum sentence of 6 years.

***Online ticket sales.*** **Senate Bill 08-077** establishes both criminal and civil penalties for using a computer to circumvent set limits or queues to obtain more tickets than allowed by a vendor through an online sale. If done by a business entity, this violation is a deceptive trade practice and if done by an individual the violation is a computer crime. In addition to civil penalties, the Attorney General and district attorneys may seek a court order requiring forfeiture of any tickets obtained through illegal means. The bill does not prohibit individuals from reselling tickets that they own, but cannot use on the secondary market. This exception was included in the bill for individuals who have season tickets for sporting events, but may not be able to use all of the tickets. The bill creates a scale of penalties depending upon the number and value of the tickets obtained.

***Theft of sound recordings.*** **Senate Bill 08-104** would have created additional penalties for selling illegally packaged recordings. Under current law, it is a class 1 misdemeanor to sell illegally packaged recorded materials. The bill would have left it as a class 1 misdemeanor if the offense involved 100 or fewer articles and it was the person's first conviction; otherwise the penalty would have been increased to a class 6 felony if the offense involved more than 100 articles or the person had been previously convicted of this crime. The bill also would have required law enforcement to confiscate all illegally packaged recordings as well as any equipment used to produce or manufacture those recordings. This bill was lost in the House.

***Possession of graffiti tools.*** **House Bill 08-1023** would have created a new class 2 misdemeanor crime of possession of graffiti tools. Graffiti tools are any instruments or other articles adapted, designed, or commonly used to deface public or private property. This bill was postponed indefinitely by the House Judiciary Committee.

**Public indecency.** Current law requires exposure of the genital area in order for an act to be considered public indecency. **Senate Bill 08-235** includes an act of masturbation or simulated masturbation, regardless of whether the genital area is exposed or covered, in the existing crime of public indecency. Public indecency is a petty offense.

## **Witness Protection**

**Witness protection training report.** **House Bill 08-1147** requires any witness protection curriculum developed by the Witness Protection Board, within the Department of Public Safety, to be provided to the Peace Officers Standards and Training (POST) Board, within the Department of Law. Subsequently, the POST board must provide the training curriculum to any law enforcement agency that requests it and the POST board may include the witness protection training curriculum as a part of the broader POST curriculum.

## **DNA Testing**

Four bills were considered regarding DNA testing with the primary focus on retention and preservation of evidence in criminal cases.

**New trial for destroying DNA evidence.** **Senate Bill 08-205** allows for a defendant to have a hearing if physical evidence, which is subject to a court order for preservation of the evidence or release and testing of the evidence, is destroyed, lost, or otherwise disposed of by a law enforcement agency prior to the evidence being used for the purpose for which it was ordered to be preserved. At the hearing, the court must determine if a remedy for the loss of evidence is warranted. The court also has the discretion to determine what type of remedy may be appropriate in each case.

**Disposition of DNA evidence in criminal cases.** **House Bill 08-1397** expands the evidence collected and preserved for certain crimes. For cases resulting in the conviction of a class 1 felony or a sex offense, all reasonable and relevant evidence that may contain DNA must be preserved for the life of the defendant. Additionally, any DNA evidence must be preserved by the accredited lab that develops the profile. If charges are not filed in a class 1 felony or applicable sex offense, evidence that may contain DNA that is collected must be preserved for the length of the statute of limitations for the crime under investigation. The bill also sets up notification provisions for disposing of such evidence for different types of crimes. If any of the relevant DNA-containing evidence is destroyed, the court is charged with setting an applicable remedy.

**Retention of DNA evidence.** **House Bill 08-1351** would have required the preservation of DNA evidence for certain periods of time, depending upon the type of crime committed. DNA-sample evidence (an item subjected to DNA analysis) would have been required to be preserved by the accredited laboratory in Colorado that developed the sample. DNA-bulk evidence (all evidence collected at a crime scene that may contain DNA that has not been subjected to DNA analysis) would have been required to be preserved and retained by the law enforcement agency that collected the bulk-evidence. This bill was postponed indefinitely by the House Judiciary Committee.

**DNA testing in paternity suits.** **Senate Bill 08-183** allows an individual named as the father of a child to petition the court to modify or terminate the determination of parentage, based on a

DNA test, within two years of the establishment of parentage. Further, if a child support order exists, the individual named as the father may file a motion to modify or terminate the order within two years of the order's establishment. This bill also leaves it to the discretion of the court to determine if a modification of the parentage determination or a child support order is in the best interests of the child.

## **Peace Officer Certification**

***Higher education police officers.*** **House Bill 08-1106** clarifies distinctions between job classifications for police officers and security guards at public institutions of higher education, and gives the chiefs of higher education police departments similar authorities to those of chiefs in other jurisdictions. The bill permits chiefs to obtain board membership on the Colorado Peace Officer Standards and Training (POST) Board.

***Federal agents as peace officers.*** **House Bill 08-1348** grants officers of the Federal Protective Service in the United States Department of Homeland Security Immigration and Customs Enforcement limited peace officer authority in Colorado. These federal officers will be given the authority to respond to non-federal felonies and misdemeanors, render assistance to state peace officers, and make arrests as part of a state law enforcement task force investigation. The state will not be required to indemnify agents for the performance of these activities.

***Arson investigators as peace officers.*** **House Bill 08-1360** clarifies that a fire arson investigator who is *authorized* by a local government is a peace officer while engaged in the performance of his or her duties. Current law only empowers as peace officers investigators who are *employed* by local governments.

## **Increased Penalties**

***Increased penalties for drunk driving.*** **House Bill 08-1194** increases the fee for reinstatement of a driver's license from \$60 to \$95 and requires that the additional \$35 be credited to the First Time Drunk Driving Offenders Account. The bill increases the periods of mandatory revocations for individuals convicted of drunk driving and for those offenders convicted on more than one occasion. It also expands the ability for some drivers to use the ignition interlock device which prevents a person who has been drinking from starting or operating the vehicle.

***Aggravated driving under the influence.*** **House Bill 08-1313**, which was postponed indefinitely by the House Appropriations Committee, would have established a new class 5 felony of aggravated driving under the influence (DUI) if a person committed a DUI offense and was previously convicted of vehicular homicide or vehicular assault. A person also would have been guilty of aggravated DUI if the offender had:

- 2 prior alcohol-related offenses; or
- at least 1 prior alcohol-related offense and the person's blood alcohol level was 0.20 or more, or the person refused to take, complete, or cooperate with the completion of a blood, breath, urine, or saliva test.

The bill also provided for the revocation of the driver's license of a driver convicted of this offense under certain conditions.

***Penalty for leaving a scene involving death.*** **Senate Bill 08-239** increases the penalty for leaving the scene of an accident involving a death from a class 4 felony to a class 3 felony. The penalty for a class 4 felony is a minimum sentence of 2 years and a maximum sentence of 6 years; the penalty for a class 3 felony is a minimum of 4 years and a maximum of 12 years.

## **Juvenile Justice**

***Juvenile justice restorative programs.*** **House Bill 08-1117** directs that, when possible, the Juvenile Diversion Program within the Department of Public Safety should institute restorative justice practices as a part of juvenile diversion programs. Restorative justice practices are defined as practices designed to repair the harm done to the victim and the community. These practices include apologies, community service, restitution, and counseling. The bill also makes restorative justice a sentencing alternative for the court. Restorative justice practices may not be used in instances when the juvenile has been adjudicated for sex or domestic violence offenses.

***Juvenile justice mental health process.*** **House Bill 08-1016** requires specified individuals involved with a juvenile delinquency proceeding to advise the court if there is reason to believe that the juvenile could benefit from mental health services. The bill requires the court to then order a mental health screening of the juvenile, unless sufficient information regarding the juvenile's mental state already exists in the record. The court also may order a mental health assessment if the screening indicates that the juvenile could benefit from mental health services. The cost of the assessment may be assigned to any party having legal custody or legal guardianship of the juvenile. Evidence obtained as a result of a mental health screening or assessment is not admissible for a not guilty plea. Additionally, each judicial district may appoint a committee to develop an implementation plan.

***Changes juvenile parole.*** **House Bill 08-1156** establishes the Division of Youth Corrections (DYC) as the sole authority for managing juvenile parole services and eliminates the Division of Juvenile Parole. Current statute allows for the Division of Juvenile Parole in the Department of Human Services to play a role in juvenile parole services; although, current practice is that DYC manages all juvenile parole services. In addition, the bill requires DYC to use an objective risk assessment to identify appropriate treatment for juveniles; this also reflects current practice. The bill clarifies DYC's jurisdiction over juveniles when they turn 21. If a juvenile is released prior to turning 18, the bill specifies that the juvenile is to be returned to the family or the person who had custody prior to the juvenile's commitment to DYC. The bill also expands victim notification requirements.

***Felony murder penalty for juveniles.*** **Senate Bill 08-066** would enable a judge to sentence a juvenile convicted of felony murder, to the Youthful Offender System (YOS) if the juvenile is charged with a class 1 felony and pleads guilty to a class 2 felony, and the underlying crime is eligible for YOS placement. Under current law, a juvenile can be convicted of felony murder when the juvenile commits an underlying felony, such as a robbery, and a victim dies as a result. The bill takes into account juveniles who are convicted of an underlying crime, such as robbery, but did not commit or assist in committing a murder in the same criminal episode.

***Juvenile competency.*** **House Bill 08-1142** would have revised the standard for when a juvenile is determined to be incompetent to include "immature development." Immature development was defined as not having the cognitive or psychosocial capacities of an average adult. The legislation would have required this standard to be used for competency determinations for individuals under the age of 18. At a minimum, the competency evaluation would have addressed the juvenile's ability to rationally assess the allegations against him or her, to make rational decisions concerning the possible penalties against him or her, to understand and participate in legal proceedings, and to display appropriate courtroom behavior.

### **Direct Filing on Juveniles**

***Limitations on direct file juvenile case.*** **House Bill 08-1208** creates a reverse transfer process, in the case of a direct filing of a juvenile as an adult, whereby the juvenile may request, within 30 days of being charged, that the case be remanded to the juvenile court. As a part of the hearing, the juvenile must demonstrate that the reverse transfer process serves the best interests of the juvenile and the community. In addition, while awaiting trial, the juvenile must be held in a juvenile facility unless the juvenile is a danger to him or herself, or others, in which case the juvenile must be held at an adult facility, but separate from the adult offender population.