

COLORADO JURY INSTRUCTIONS CRIMINAL 2014



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**MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE
OF THE COLORADO SUPREME COURT**

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Supreme Court of Colorado for the
State of Colorado

**COLORADO SUPREME COURT
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COLORADO SUPREME COURT

ORDER

WHEREAS, the Colorado Supreme Court Model Criminal Jury Instructions Committee has formulated instructions concerning criminal cases necessitated by numerous amendments to the statutes of the State of Colorado since the previous edition of these instructions was published; and

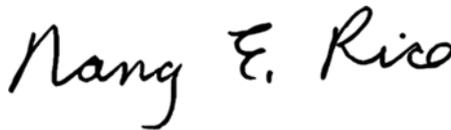
WHEREAS, the Chair of the Committee has regularly informed the Court of the Committee's work;

NOW, THEREFORE, IT IS ORDERED that these jury instructions and comments are approved by this Court for use in jury trials in criminal cases in the State of Colorado, subject to the following qualifications:

These instructions are intended as guidelines and should be used in cases in which they are applicable. The Court does not specifically approve any of these instructions not yet tested in an adversary proceeding. They are not intended to be a complete set of instructions for each case and additional or different instructions may be required depending on the issues of fact and law presented at the trial. Until these instructions are tested in adversary proceedings, they are approved in principle.

DONE and signed this 1st day of September, 2014.

COLORADO SUPREME COURT



By

Nancy E. Rice, Chief Justice

PREFACE

In 2011, then-Chief Justice Michael L. Bender established the Colorado Supreme Court's Model Criminal Jury Instructions Committee (the Committee) and charged it with publishing an updated edition of COLJI-Crim. The Committee thanks the former Chief Justice for providing the Committee with the staff and other resources necessary to accomplish this sizeable undertaking. The Committee is equally grateful to Chief Justice Nancy E. Rice, who has continued this support during her tenure.

The Committee has endeavored to draft model instructions that accurately state the law in neutral language. However, the precise format and wording for instructions and verdict forms have never been mandated as a matter of positive law in Colorado, and this publication is neither a restatement nor a comprehensive summary of the law.

The comments that follow the instructions include references to relevant legal authorities, cross-references to other instructions, and directions for addressing alternative scenarios. These comments include citations to relevant decisions of the United States Supreme Court and the Colorado Supreme Court that were announced prior to publication of this volume, as well as relevant decisions of the Colorado Court of Appeals that became final prior to publication (i.e., cases for which a mandate issued).

The Committee's drafting protocols are explained in greater detail in [Chapter A](#) (General Directions For Use of COLJI-Crim.), which includes a section with several [search tips](#).

The Committee intends to keep these jury instructions current by periodically publishing new editions or supplements. During the periods between these formal publications, the Committee Reporter will post online summaries of developments in the law related to criminal jury instructions based on legislative changes and decisions of the United States Supreme Court, the Colorado Supreme Court, and the Colorado Court of Appeals. This list, which will be captioned as the "Reporter's Online Update," will be available on the [Committee's web page](#).

Although the Committee expects that the Reporter's Online Update will be a valuable research tool, the Committee emphasizes that it will be an informal publication that is not subject to review by the Committee. Thus, users should not assume that the Committee will make modifications based on information that appears in the Reporter's Online Update.

In addition to these interim summaries of developments in the law related to criminal jury instructions, the Reporter's Online Update will include

notations documenting any errors that the Reporter learns of subsequent to publication. Accordingly, the Committee encourages users to alert the Reporter of errors at:

mcjic@judicial.state.co.us

However, here again, users should not assume that the Committee will make modifications based on recommended corrections that may appear in the Reporter's Online Update.

The Committee invites users to submit recommendations for substantive improvements to the Reporter at the above e-mail address. Although such submissions will not be posted online as part of the Reporter's Online Update, the Reporter will present all suggestions to the Committee for consideration.

Finally, the Committee wishes to express its appreciation for the suggestions of the Plain Language Jury Instructions Committee, a subcommittee of the Colorado Supreme Court's Jury System Standing Committee: Judge James B. Breese (Chair), former Chief Justice Michael L. Bender, Justice Brian D. Boatright, Judge Catherine A. Lemon, Judge Tamara S. Russell, Ruth Falkenberg, Jay S. Grant, Esq., Robert S. Grant, Esq., Thomas J. Hammond, Esq., Professor Timothy Hurley, Professor Anthony Lozano, Miles Madorin, Esq., Penny McPherson, Blake Renner, Esq., Marjorie Seawell, and Penny Wagner.

In addition, the Committee thanks: Weld County Court Judge Dana Nichols and Diane Balkin, Esq. (who collaborated to review a preliminary draft of Chapter 9-2 (Cruelty to Animals)); Christopher T. Ryan, Clerk of the Colorado Supreme Court, and staff (who provided the Committee with administrative and logistical support); Daniel Cordova, Supreme Court Law Librarian, and staff (who assisted the Committee with research); Bryan Lopez (who provided the cover photograph); and Andrea Cole, Joan Cordutsky, Joseph DeStafney, Kristin Marburg, Melissa McClure, Catherine McDaugale, Sandy Mills, David Steiner, and J.J. Wallace, Associate Staff Attorneys for the Colorado Court of Appeals, (who helped proofread the manuscript); Jenny Moore, Rules Research Attorney for the Colorado Supreme Court (who also helped proofread the manuscript); and Christine Kreger, of the Colorado State Library (who provided technical assistance).

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###

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CHAPTER A

GENERAL DIRECTIONS FOR USE OF COLJI-Crim. (2014)

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SCOPE OF COVERAGE

This publication includes several sections of model instructions that are generally applicable, as well as model instructions for selected offenses and defenses from Titles 18 and 42.

The instructions reflect all relevant statutory revisions that were made during the 2014 legislative session.

Although the Committee has not drafted model instructions for every offense and defense in the Colorado Criminal Code, the instructions in this volume encompass a sufficiently wide array of offenses and defenses that users should find them to be helpful templates when drafting instructions for other offenses and defenses.

CORRELATION WITH EARLIER EDITIONS

The numbering and lettering of the chapters in this edition of COLJI-Crim. is similar to the format that was used in COLJI-Crim. (2008). The instructions in Chapter B through Chapter I cover general matters, evidentiary issues, defenses, and definitions of terms. The elemental instructions for the Title 18 offenses are located in Chapter 3-1 through Chapter 18, with numbering before the colon that is derived from the number of the relevant Article and Part (this method of numbering is also utilized in Chapter 1.3 (crime of violence sentence enhancement interrogatories)). The numbers that appear after the colons are not derived from statute; they denote the order of the instruction within the chapter. For example, Chapter 3-4 (Unlawful Sexual Behavior) includes the instructions for all offenses in Title 18, Article 3, Part 4, and Instruction 3-4:39.INT (sexual assault on a child - interrogatory (at-risk victim)) is numbered in a manner that identifies it as the thirty-ninth instruction in Chapter 3-4.

The numbering for Chapter 42 (vehicle and traffic offenses) is an exception (as it was in COLJI-Crim. (2008)). It is numbered based on the Title that contains statutes defining vehicle and traffic offenses. Further, because the chapter includes only selected offenses from Title 42, the numbering of the individual instructions, after the colons, is based solely on their sequence within the chapter (and not according to the Article or Part number of the underlying statutes).

Due to the extensive revisions in this edition, it was not feasible to maintain the 2008 numbering and lettering for individual instructions. Although a handful of instructions in this edition happen to have the same numbers or letters as the corresponding instructions that appeared in COLJI-Crim. (2008), most do not. Accordingly, when conducting historical research to compare an instruction from this volume with an earlier version, take care to use the statute number or other source of authority as a search term (a method of research that should be familiar to most users, since COLJI-Crim. (2008) was a complete departure from the organizational framework of COLJI-Crim. (1983)).

ORGANIZATION WITHIN CHAPTERS

Interrogatories and special instructions are sequentially numbered like the other instructions, but they are also identified with suffixes (e.g., "3-1:08.INT" and "3-1:15.SP").

The Committee has positioned the interrogatories and special instructions in each chapter immediately after the elemental instruction(s) to which they apply. Therefore, the comments to the elemental instructions do not include citations directing users to the relevant special instructions and interrogatories (except where a comment for an elemental instruction includes a discussion of a particular interrogatory or special instruction).

CULPABLE MENTAL STATES

Where a culpable mental state for an offense is specified by statute, the Committee has segregated it as a separate element to make clear that it modifies *all* elements that follow. See § 18-1-503(4), C.R.S. 2014("When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears."); *People v. Rodriguez*, 914 P.2d 230, 272 (Colo. 1996)("`knowingly,' when offset from other elements, modifies all succeeding conduct elements"); *People v. Bossert*, 722 P.2d 998 (Colo. 1986)(no error if "knowingly" element set out in instruction as first element and all others described under number two); *People v. Stephens*, 837 P.2d 231 (Colo. App. 1992)(no error if "knowingly" element listed as number 3 and each later element assigned separate number). Further, out of

an abundance of caution, the Committee adopted the following drafting protocol to guide its application of section 18-1-503(4): "a clear intent to limit the application of a mens rea should not be inferred merely because an offense is defined in such a way that the mens rea does not appear at the beginning of a statutory provision."

Where the statutory definition of an offense does not include a culpable mental state, the issue of whether to impute a mental state is frequently the subject of litigation. See, e.g., *People v. Manzo*, 144 P.3d 551, 552 (Colo. 2006)(leaving the scene of an accident with serious bodily injury constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state); *Gorman v. People*, 19 P.3d 662, 665 (Colo. 2000)("We have held that legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental state is required. See *People v. Moore*, 674 P.2d 354, 358 (Colo. 1984). Rather, the requisite mental state may be implied from the statute."); *People v. Bridges*, 620 P.2d 1, 3 (Colo. 1980)("We conclude that the mental state 'knowingly' is implied by the statute and is required for the offense of engaging in a riot."). Therefore, unlike in previous editions of COLJI-Crim., the Committee has refrained from adding the culpable mental state of "knowingly" to any elemental instruction that does not include a mens rea as part of the statutory definition of the offense (unless the imputation has been recognized by case law, in which case the relevant authority is discussed in a comment). Nevertheless, where the Committee has concluded that it is debatable whether a mental state should be imputed to an offense, it has noted that possibility by including the following citation in a comment:

see also § 18-1-503(2), C.R.S. 2014("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

TERM DEFINITIONS

Definitional instructions for terms that have statutory definitions are located in [Chapter F](#).

Citations to definitional instructions located in Chapter F are included in the comments for the instructions in other chapters. However, citations for instructions defining subsidiary terms (i.e., statutorily-defined terms that are used in the statutory definitions of other terms) are included only in comments for instructions which use the subsidiary terms. For example, Instruction 3-2:01 defines the offense of assault in the first degree with a deadly weapon, in violation of section 18-3-202(1)(a), C.R.S. 2014. Accordingly, the comment to Instruction 3-2:01 includes a citation referring users to Instruction F:88(defining "deadly weapon"), and, because Instruction F:88 uses the term "firearm" as part of the definition of a "deadly weapon," the comment for Instruction F:88 includes a citation referring users to Instruction F:154(defining "firearm").

When utilizing the definitional instructions, note that some terms have more than one statutory definition. For example, there are four definitions of the term "masturbation." See § 18-6-403(2)(f), C.R.S. 2014(defining "masturbation" for purposes of sexual exploitation of children); § 18-7-201(2)(c), C.R.S. 2014(defining "masturbation" for purposes of prostitution); § 18-7-302(5), C.R.S. 2014(defining "masturbation" for purposes of indecent exposure); § 18-7-401(5), C.R.S. 2014(defining "masturbation" for purposes of child prostitution). Accordingly, the citations to definitional instructions direct users to the correct instruction. See Instruction F:216(defining "masturbation" (sexual exploitation of children)); Instruction F:217(defining "masturbation" (prostitution)); Instruction F:218(defining "masturbation" (indecent exposure)); Instruction F:219(defining "masturbation" (child prostitution)).

Where the Committee has concluded that a term that is not defined by statute may be unfamiliar to jurors, it has included a comment noting the absence of a statutory definition. Many of these comments are followed by citations to other relevant sources of authority, primarily dictionaries, that trial judges may wish to consider when deciding whether to exercise their discretion to draft supplemental definitional instructions. However, the Committee emphasizes that it has not adopted these dictionary definitions as model instructions, and courts should be cautious when drafting definitional instructions based on extra-statutory sources. See, e.g., *People v. Mascarenas*, 972 P.2d 717, 724 (Colo. App. 1998)("choosing one of the varying and not entirely consistent dictionary definitions of 'dominion'

could have amounted to an expression of opinion by the court on a matter that was properly determinable by the jury”).

DEFENSES

Model instructions defining defenses are located in [Chapter H](#), which is divided into two sections: [\(I\)](#) defenses that are generally applicable; and [\(II\)](#) defenses to inchoate offenses and specific crimes. In addition, there are several “Chapter Comments” at the beginning of the chapter that discuss organizational matters, relevant legal principles, and the reasoning underlying certain drafting decisions of the Committee.

As in previous editions of COLJI-Crim., this publication does not include a model “theory of defense” instruction. For guidance in drafting such an instruction, the Committee recommends that users refer to *Colorado Practice Series*, Vol. 15, Robert J. Dieter, *Colorado Criminal Practice and Procedure*, § 18.119 (2004)(“Instructions–Theory of Defense”).

BRACKETED MATERIAL

The Committee has used brackets sparingly to identify alternative language within instructions, interrogatories, and verdict forms. For example, where a single statutory subsection defines more than one way to commit an offense, the Committee has not enclosed the alternatives within brackets unless the Committee perceived a clear disjunctive separation point that warranted distinct numbering of the alternative element(s). See, e.g., Instruction 3-2:25.INT(assault in the third degree – interrogatory (at-risk adult or juvenile)); Instruction 9-1:36(harassment (communication)). But the fact that the Committee has enclosed two or more alternatives within brackets does not necessarily mean that there may not be situations where the court should instruct the jury regarding more than one of the bracketed alternatives.

Similarly, where the Committee has not bracketed alternative ways of committing an offense, it may be appropriate to delete one or more unbracketed alternative for which there is no evidentiary support. For example, in a case where the defendant is charged with possession of burglary tools in violation of section 18-4-205(1), C.R.S. 2014, it would be appropriate to excise the word “explosive” from the third

element of Instruction 4-2:08 if it is undisputed that the only tool in the defendant's possession was a screwdriver.

In summary, the Committee's bracketing decisions are, like all other aspects of these model instructions, purely advisory.

SENTENCING PROVISIONS

The use of interrogatories in this edition is in accord with Colorado Supreme Court precedent explaining how to distinguish an element from a sentencing factor.

For example, the supreme court has held that a statutory circumstance which reduces a defendant's sentence for an offense reflects a binding legislative choice to create a mitigating factor, and not to add an element to the offense. See *Rowe v. People*, 856 P.2d 486, 492-93 (Colo. 1993)(endorsing COLJI-Crim. 10:20 (1983), a separate heat of passion interrogatory for first and second degree assault that informed the jury that it was to consider the interrogatory only if it first found the defendant guilty of the assault).

Similarly, the supreme court has made clear that "a sentence enhancement provision is not an element of the offense charged. A defendant still may be convicted of the underlying offense without any proof of the sentence enhancer, and this would not be possible if we were dealing with an essential element of the offense." *Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993). Consequently, a sentence enhancer that turns on a factual determination distinct from the elements of offense should be determined by means of an interrogatory, as indicated throughout this publication.

However, some sentence enhancement provisions that are based on determinations concerning prior convictions need not be submitted to the jury. See *Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010)(explaining the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)).

The model special verdict form, Instruction E:28, is designed to ensure that the jury's response to each "verdict question" corresponds to a guilty verdict for a charged offense. Cf. *Sanchez v. People*, 325 P.3d 553, 554-59, 2014 CO 29, ¶¶ 2, 17 (Colo. 2014)(jury's findings with respect to a sentence enhancer were not a constitutionally proper basis for inferring that it

had found the defendant guilty of a substantive offense). Thus, where a defendant is charged with multiple counts of the same offense, the model special verdict form will prevent the jury from answering a verdict question for a sentence enhancement factor without clearly identifying the specific guilty verdict to which it applies (conversely, this same protection exists with regard to a verdict question that asks about a mitigation factor, such as heat of passion). Nevertheless, in a case involving evidence of an uncharged act that is similar to a charged offense, the Committee recommends modifying the verdict question to include language that explicitly links the jury's response to the verdict question to its guilty verdict for a charged offense. For example, in a case where the defendant is charged with first degree arson and evidence of a second, uncharged act of arson is admitted pursuant to CRE 404(b), the court could modify Instruction 4-1:02.INT by inserting the following italicized language: "*Did the defendant commit the offense of first degree arson, for which you have found him [her] guilty in Instruction ____, by the use of an explosive?*".

Finally, although some of the comments include references to the sentencing classification levels for particular offenses, the Committee has included such information solely for the purpose of providing guidance with respect to instructional issues. See, e.g., Instruction 3-1:16.INT, Comment 1. The Committee strongly discourages users from relying on this publication at sentencing.

CROSS-REFERENCING

The Committee recognizes that cross-references to other numbered instructions can serve as useful guideposts for jurors (e.g., a first degree burglary instruction that identifies the crime that the defendant allegedly intended to commit with the following language: "robbery, as defined in Instruction 23"). However, because an incorrect cross-reference may inject error into otherwise accurate instructions, the Committee has not included entries for such cross-references except where the Committee has determined that such cross-referencing is necessary to help the jury understand the interrelationship of instructions. See, e.g., Instruction H:27.SP(explaining that this special instruction is provided for purposes of one or more particular affirmative defense instructions, which are to be identified by specifying the relevant instruction number(s)).

SEARCH TIPS

This publication is navigable using the main hyperlinked [Table of Contents](#), the individual hyperlinked tables of contents (located at the beginning of each chapter), and the [Summary of Contents](#).

To use a hyperlink, maneuver the mouse pointer over a hyperlinked entry. In Microsoft Word®, a small pop-up box will prompt you to press the Ctrl key while clicking on the link. Doing so will take you directly to the corresponding bookmarked location. Pressing the Ctrl key with a mouse click works the same way in Adobe Reader®, though that program does not include a prompting pop-up box.

To search within the document in Microsoft Word®, use the "Find" function (press and hold Ctrl while pressing the key for the letter "F," or click on the icon in the tool bar that looks like a small pair of binoculars). To search within the document in Adobe Reader®, use the "Find" box in the navigation bar (or use the Ctrl + F keystroke combination). In both programs, craft your search terms as narrowly as possible (e.g., by using statutory citations, case names, or key words).

Use the "Find" function to return to the [Summary of Contents](#) from anywhere in the document by entering three hash tags (#) as your search term. Alternatively, in Microsoft Word®, use the Ctrl + Home keystroke combination to return to the beginning of the document, place the mouse over the photograph (which is hyperlinked to the [Summary of Contents](#)), and use the Ctrl + mouse click keystroke combination (in Adobe Acrobat®, the photograph is not hyperlinked, but the line of text with the credit and description, which appears immediately below the photograph, is).

Use the "Find" function to return to the main [Table of Contents](#) from anywhere in the document by entering three asterisks (*) as your search term.

To go directly to a particular page in Microsoft Word®, press F5 and enter the page number (once this function is open, it can also be used to move forward or backward through the sections). In Adobe Acrobat®, enter the page number in the box that is part of the tool bar.

MISCELLANEOUS

1. The captions and comments are designed to assist users. They should be omitted from the set of instructions that the court provides to the jury.
2. When possible, draft instructions using the proper names of all parties and witnesses. Avoid using indefinite pronouns, formal titles, or words which can be construed as connoting prejudgment of the evidence (e.g., the term "victim," which presupposes the commission of a crime).
3. Although the term "bailiff" is used in several of the model instructions, it may be appropriate (depending on the court's staffing) to substitute the term "court clerk" or "law clerk."

DIRECTIONS FOR PRINTING

1. These instructions were drafted using Microsoft Word 2010®. The PDF version of this volume was created using Adobe Acrobat 8 Professional®. The Committee has used simple formatting. The margins are set to "Normal" for Microsoft Word 2010® (i.e., one-inch margins on all four sides). The numbering of elements and conditions has been entered manually (rather than with automatic renumbering). Likewise, the indentations for these components have been entered manually with tabs (rather than with margin settings).
2. A double-sided printed copy of this publication will fit in two three-inch wide three-ring binders. The chapters are separated with section breaks so that the first page of each chapter will appear on an odd-numbered page, on the right-hand side, when using double-sided printing. As a result, there are blank unnumbered pages between some chapters. The sections can be separated in a set of three-ring notebooks with forty-eight tabbed dividers, and a cover image has been provided which can be inserted in the clear plastic slip covers of the binders. To create title labels for the spines, print two extra copies of the cover image and cut off the portion with the title that appears above the photograph.

CITATION

The publication should be cited as:

COLJI-Crim. (2014).

Individual instructions should be cited as:

COLJI-Crim. ___:___ (2014).

Individual comments should be cited as:

COLJI-Crim. ___:___, Comment ___ (2014).

The Committee has utilized the following abbreviated form of citation when citing to materials located within this publication:

See Instruction ___:___.

However, this shortened form of citation should not be used in briefs, orders, opinions, or other documents where it is important to identify the title and edition of the publication.