

## Document: C.R.S. 18-1-702

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**Colorado Revised Statutes Annotated    Title 18. Criminal Code (Arts. 1 — 26)    Article 1. Provisions Applicable to Offenses Generally (Pts. 1 — 11)    Part 7. Justification and Exemptions from Criminal Responsibility (§§ 18-1-701 — 18-1-714)**

#### 18-1-702. Choice of evils.

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**(1)** Unless inconsistent with other provisions of sections 18-1-703 to 18-1-707, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

**(2)** The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

#### History

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**Source:** L. 71:R&RE, p. 407, § 1. **C.R.S. 1963:**§ 40-1-802.

## ▼ Annotations

### Research References & Practice Aids

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#### Hierarchy Notes:

C.R.S. Title 18

C.R.S. Title 18, Art. 1

### State Notes

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### ANNOTATION

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#### Law reviews.

For comment, "Civil Disobedience as the Lesser Evil", see 59 U. Colo. L. Rev. 961 (1988). For article, "Choice of Evils in Colorado", see 18 Colo. Law. 1117 (1989). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

#### **The "choice of evils" defense has its roots in the common-law doctrine of necessity,**

and has long been recognized in criminal law under the latter description. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975).

This section is really no more than a codification of the common law on "justification defenses". *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

The statutory codification of the choice of evils defense has its roots in the common-law doctrine of necessity. *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

#### **Choice of evils defense may be found even though defendant has requisite intent of "knowingly" with respect to offense charged.**

*People v. Trujillo*, 682 P.2d 499 (Colo. App. 1984).

#### **For this defense to be available, it must first be shown that defendant's conduct was necessitated by**

a specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979); *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

#### **Normal conditions of confinement will not support a defense of choice of evils**

pursuant to this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

### **Defense is available in prison escape situation**

where the prisoner is motivated by a definite, specific, and imminent threat of death or substantial bodily injury. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may be available to justify a prison escape if the facts of the case, as a matter of law, satisfy the conditions stated in this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

### **But only if escapee immediately reports duress,**

or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Where the charge is escape, the defendant must also show that the escape was committed without violence and that he voluntarily submitted to authorities as soon as a position of safety was reached. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

### **As condition for admitting evidence relating to defense, proper foundation must be laid.**

As a condition to the admission of evidence relating to the choice of evils defense, a proper foundation must be laid, as indicated by this section. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may only be invoked when an offer of proof is made that establishes the requisite statutory foundation. *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

### **Court may refuse to give choice of evils instruction when defendant fails to comply with procedural requirements of statute**

and was given reasonable opportunity to comply. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

### **Choice of evils is potentially available as a defense to any criminal charge**

unless it is inconsistent with other enumerated affirmative defenses or other explicit provisions of the law. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

### **Once defense credibly raised, burden of proof shifts to prosecution.**

Choice of evils is an affirmative defense covered by § 18-1-407, which provides that once "some credible evidence" is presented to raise a defense, the burden is on the prosecution to disprove the defense beyond a reasonable doubt as to that issue as well as all other elements of the offense. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981).

### **Evidence entitling defendant to choice of evils instruction.**

Where defense testimony indicated that three men wearing masks and carrying knives attempted to kill the defendant a few nights prior to the escape, that defendant was informed that there was a "contract on his life", and that defendant's cellmates received notes the night of the escape threatening them and the defendant, these facts, if believed by the jury, would show that the defendant was faced with specific and imminent threats mandating a choice of evils instruction. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

### **"Morality" and "advisability" of statute are not to be tried to jury.**

Subsection (2) of this section does nothing but emphasize that "morality" or "advisability" of a statute are not things to be tried to a jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

### **Preliminary determination of admissibility to be decided by court**

rather than by the jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

**And preliminary ruling by court required.**

It was well within the province of the general assembly to require that a preliminary ruling by the court would serve as a prerequisite in invoking the defense of choice of evils. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

**Defense of choice of evils is very similar to duress**

and the foundation requirements set forth in the choice of evils statute was intended as a safeguard against abuse of the defense. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Before a choice of evils defense may be presented to the jury, the trial court must make an initial determination of whether the allegations of facts by the defendant, if proven, would constitute legal justification for the prohibited conduct. *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

**The threat to defendant's person must be so definite, specific, and imminent as to rise beyond mere speculation.**

*People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

**The felon with a gun statute, § 18-12-108, must be read in pari materia with this section.**

*People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

**Trial court finding that no emergency existed to justify a choice of evils defense did not conflict with a finding of an emergency sufficient to permit a reduced sentence.**

*People v. Weiser*, 789 P.2d 454 (Colo. App. 1989).

**Test for sufficiency of offer of proof.**

A sufficient offer of proof must establish that: (1) All other potentially viable and reasonable alternative actions were pursued or shown to be futile; (2) the action taken had a direct causal connection with the harm sought to be prevented and would bring about the abatement of the harm; and (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Offer of proof is insufficient if the defendants fail to show that their criminal actions, rather than legal actions taken by themselves and others, brought about the abatement of the harm or if the offer merely alleges that other persons have attempted to pursue reasonable alternatives or that the criminal action taken was a more effective alternative. *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

**Evidence of a generalized fear of future injury is not sufficient to warrant the invocation of a choice of evils defense.**

The evidence must affirmatively demonstrate the existence of a specific threat or likelihood of an imminent injury necessitating the actor's conduct. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990); *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

**A choice of evils defense cannot be based upon economic necessity.**

*People v. Fontes*, 89 P.3d 484 (Colo. App. 2003).

**If a reasonable legal alternative was available to defendants as a means to avoid the threatened injury,**

they properly may be foreclosed from asserting a choice of evils defense. People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

**A defendant who seeks to assert a choice of evils defense**

must offer evidence that his conduct did not exceed that reasonably necessary to avoid the impending injury. People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

Colorado Revised Statutes Annotated

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