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SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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In the Matter of the Publication and Distribution  
of the  
Hawai'i Pattern Jury Instructions - Criminal

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ORDER APPROVING PUBLICATION AND DISTRIBUTION  
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL  
(By: Recktenwald, C.J., for the court<sup>1</sup>)

Upon consideration of the request of the Standing  
Committee on Pattern Criminal Jury Instructions to publish and  
distribute revisions of criminal jury instruction 7.01B of the  
Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED, that the request is granted and  
the attached criminal jury instruction 7.01B is approved for  
publication and distribution.

IT IS FURTHER ORDERED that this approval for  
publication and distribution is not and shall not be considered  
by this court or any other court to be an approval or judgment as

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<sup>1</sup> Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and  
McKenna, JJ.

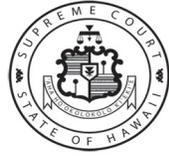
to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, August 26, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



## **7.01B Self-Defense When Only Force Is At Issue.**

Self-defense is a defense to the charge(s) of (specify charge and its included offenses). The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justified. If the prosecution does not meet its burden, then you must find the defendant not guilty.

The use of force upon or toward another person is justified if the defendant reasonably believes that force is immediately necessary to protect himself/herself on the present occasion against the use of unlawful force by the other person. The reasonableness of the defendant's belief that the use of protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be. The defendant may estimate the necessity for the use of force under the circumstances as he/she reasonably believes them to be when the force is used, without [retreating] [surrendering possession] [doing any other act that he/she has no legal duty to do] [abstaining from any lawful action].

[The use of force is not justifiable to resist an arrest which the defendant knows is being made by a law enforcement officer, even if the arrest is unlawful, but is justifiable if the officer threatens to use or uses unlawful force.]

[The use of force is not justifiable to resist force used by the occupier or possessor of property or by another person on his/her behalf, where the defendant knows that the person using the force is doing so under a claim of right to protect the property, but is justifiable if the defendant [is a public officer acting in the performance of his duties or a person lawfully assisting the officer therein] [is a person making or assisting in a lawful arrest] [reasonably believes that force is necessary to protect himself/herself against death or serious bodily injury.]

[The use of confinement as force is justifiable only if the defendant takes all reasonable measures to terminate the confinement as soon as he/she knows that he/she safely can, unless the person confined has been arrested on a charge of crime.]

“Force” means any bodily impact, restraint, or confinement, or the threat thereof.

“Unlawful force” means force which is used without the consent of the person against whom it is directed and the use of which would constitute an unjustifiable use of force. A person cannot consent to the infliction of death, serious bodily injury, or substantial bodily injury.

“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

“Substantial bodily injury” means bodily injury which causes: [A major avulsion, laceration, or penetration of the skin]; [a burn of at least second degree severity]; [a bone fracture]; [a serious concussion]; [or a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs].

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

[Self-defense is not available for the offense(s) of (specify any offense in which the requisite state of mind is either recklessness or negligence) if the prosecution proves that:

(1) the defendant was reckless in believing that he/she was justified in using force against the other person; or

(2) the defendant was reckless in acquiring or failing to acquire any knowledge or belief which was material to the justifiability of his/her use of force against the other person.]

### **Commentary**

H.R.S. § 703-304 provides for “use of force in self-protection.” H.R.S. § 703-300 defines “believes,” “force,” “unlawful force” and “deadly force.”

This instruction is applicable to all self-defense cases, including an offense involving a reckless state of mind, *State v. Van Dyke*, 101 Hawai‘i 377, 69 P.3d 88 (2003), although the bracketed language may or may not apply depending upon the facts. H.R.S. § 703-304 provides for additional circumstances where the use of force or deadly force is not justifiable, and describes a duty to retreat depending upon the degree of force used. The standard instruction does not cover these additional considerations, and the standard instruction should be modified as appropriate. See *State v. Napoleon*, 2 Haw.App. 369, 633 P.2d 547 (1981) (the use of deadly force in striking the victim and breaking his arm with a baseball bat was not justified where the defendant knew he could avoid the necessity of using such force with complete safety by retreating.)

A defendant is entitled to an instruction on self-defense if there is any evidence before the jury bearing on that issue, no matter how weak, unsatisfactory or inconclusive it might appear to the court. *State v. Unea*, 60 Haw. 504, 591 P.2d 615 (1979); *State v. Riveira*, 59 Haw. 148, 577 P.2d 793 (1978); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971). The instruction should be given even if it is inconsistent with an alternate theory of defense, such as accident, *Santiago*, 53 Haw. 254, 492 P.2d 657, or that the defendant never struck the complainant, *State v. Pavao*, 81 Hawai‘i 142, 913 P.2d 553 (App. 1996).

H.R.S. §§ 701-115 and 702-205 make clear that self defense is an ordinary defense, and once the issue is raised, the prosecution has the burden to negative

self-defense beyond a reasonable doubt. *State v. Lubong*, 77 Hawai'i 429, 886 P.2d 766 (App. 1994). The court must instruct the jury that the burden of disproving self-defense is on the prosecution. *Raines v. State*, 79 Hawai'i 219, 900 P.2d 1286 (1995); see also *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982) (the defendant in any criminal case is entitled to have the jury properly instructed with respect to the burden of proof). Plain error may be noticed where a court fails to instruct the jury that the government has the burden of disproving self-defense beyond a reasonable doubt. *Raines*, 79 Hawai'i 219, 900 P. 2d 1286 (overruling *State v. McNulty*, 60 Haw. 259, 588 P.2d 438 (1978), which had held that the defendant must request such a burden instruction at trial or the court's failure to give it is not reversible error). In *State v. Carson*, 1 Haw.App. 214, 617 P.2d 573 (1980), the Intermediate Court of Appeals found plain error affecting substantial rights when the trial court, at the defendant's request, affirmatively instructed that the defendant had the burden of proving self-defense by a preponderance of the evidence.

The use of force upon another person is not justifiable when the actor does not reasonably believe that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person. *State v. Sanchez*, 2 Haw.App. 577, 636 P.2d 1365 (1981). If self-defense is raised in a homicide prosecution, evidence of the decedent's violent or aggressive character is admissible either to demonstrate the reasonableness of the defendant's apprehension of immediate danger or to show that the decedent was the aggressor. *State v. Lui*, 61 Haw. 328, 603 P.2d 151 (1979); *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987).

There is no offense of attempted reckless manslaughter. *State v. Holbron*, 80 Hawai'i 27, 904 P.2d 912 (1995) (overruling *State v. Tagaro*, 7 Haw.App. 291, 296, 757 P.2d 1175 (1987), where the Intermediate Court of Appeals held it was plain error for the court to not instruct the jury upon the included offense of attempted reckless manslaughter).

The standard of judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a reasonable person in the defendant's position under the circumstances as the defendant believed them to be. *Estrada*, 69 Haw. 204, 738 P.2d 812. The jury must consider the circumstances as the defendant subjectively believed them to be at the time the defendant defended himself or herself, and an instruction focusing the jury on "defendant's position under the circumstances shown in the evidence" was misleading and erroneous. *State v. Pemberton*, 71 Haw. 466, 477-78, 796 P.2d 80, 85 (1990). See also *State v. Straub*, 9 Haw.App. 435, 843 P.2d 1389 (1993) (the situation must be viewed from the defendant's point of view when defendant was forced to choose a course of action).

The facts of consequence to the determination of self-defense all concern the actor's state of mind: (1) whether the actor reasonably believed that deadly force was necessary, and (2) whether the actor reasonably believed that he or she was

threatened with one of the specified harms. *State v. Kupihea*, 80 Hawai'i 307, 909 P.2d 1122 (1996). Compare *Lubong*, 77 Hawai'i 429, 886 P.2d 766 (to assess a defendant's self-protection defense requires a subjective determination of whether the defendant had the requisite belief that deadly force was necessary to avert death, serious bodily injury, kidnaping, rape, or forcible sodomy, and if the State fails to disprove that subjective belief, it then requires an objective determination of whether a reasonable person in the same situation as the defendant would have believed that deadly force was necessary for self-protection).

The use of force to resist the unlawful use of force by a police officer during an arrest may, in certain circumstances, require additional instruction, particularly on the issue of what constitutes "unlawful force" within the context of an arrest. See, e.g., H.R.S. §§ 703-307 (use of force in law enforcement) and 803-7 (use of force in effectuating an arrest); see also *Territory v. Machado*, 30 Haw. 487 (1928).

**Reprinted herein is H.R.S. Commentary on § 703-310.**

[The Proposed Draft of the Penal Code employed a subjective standard for justification. As mentioned previously and in the Supplemental Commentary hereafter, the Legislature introduced an objective or "reasonable man" standard. The following commentary is based on the Proposed Draft. The Supplemental Commentary indicates that § 703-310 may be contrary to the Legislature's actual intent.]

Subsection (1) states that, where the actor is reckless or negligent in forming a belief about the existence of facts which would establish a justification for his conduct, he does not have a defense of justification for any crime as to which recklessness or negligence suffices to establish culpability. This rule seems to be required in light of the Code's subjective standards of justification, which have led to the omission of the requirement that the actor's belief be reasonable.

Subsection (2) denies the defense of justification in cases which the actor negligently or recklessly injures or creates a risk of injury to innocent persons. In such cases the actor may be prosecuted for a crime involving negligence or recklessness as the case may be.

**Reprinted herein is H.R.S. Supplemental Commentary on § 703-310.**

As mentioned in the Supplemental Commentary on §§ 703-300 and 302, the Legislature introduced the "reasonable man standard" or objective standard in making a determination of whether a defense of justification is available. This being the case, it would appear that, where the defendant has been negligent in believing the use of force to be necessary, he loses the defense of justification for all related crimes, including those which require intent, knowledge, and recklessness, as well as negligence, to establish culpability. Thus, § 703-310, which was consistent with the principles of

Chapter 703 as originally set forth in the Proposed Draft, now appears contrary to the Legislature's intent in this area.