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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., Nakayama, Acoba, and McKenna, JJ., and  
Intermediate Court of Appeals Chief Judge Nakamura,  
in place of Pollack, J., unavailable)

Upon consideration of the request of the Standing  
Committee on Pattern Criminal Jury Instructions to publish and  
distribute the addition of Criminal Instructions 3.17 and Chapter  
19 of the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED that the request is granted and  
the attached criminal jury instructions 3.17 and Chapter 19 are  
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 to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, January 3, 2013.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Craig H. Nakamura



### **3.17 Eyewitness Testimony**

The burden of proof is on the prosecution with reference to every element of a crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person responsible for the crime charged.

You must decide whether an eyewitness gave accurate testimony regarding identification.

In evaluating identification testimony, you may consider the following factors:

The opportunity of the witness to observe the person involved in the alleged criminal act;

The stress, if any, to which the witness was subject at the time of the observation;

The witness's ability, following the observation, to provide a description of the person;

The extent to which the defendant fits or does not fit the description of the person previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness's capacity to make an identification;

Evidence relating to the witness's ability to identify other participants in the alleged criminal act;

Whether the witness was able to identify the person in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness's identification;

Whether the witness had prior contacts with the person;

The extent to which the witness is either certain or uncertain of the identification and whether the witness's assertions concerning certainty or uncertainty are well-founded;

Whether the witness's identification is in fact the product of his/her own recollection; and

Any other evidence relating to the witness's ability to make an identification.

### **Notes**

This instruction is based on the model instruction approved in *State v. Cabagbag*, 127 Hawai'i 302, 277 P.3d 1027 (2012). *Cabagbag* held that "(1) in criminal cases, the circuit courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in the case, and it is requested by the defendant, [and] (2) a circuit court may, in the exercise of its discretion, give the instruction if it believes the instruction is otherwise warranted in a particular case ..."

The court may wish to delete from the instruction those listed factors that do not apply in a given case.

## CHAPTER 19 – EXTENDED TERM SENTENCING

### 1. PRELIMINARY INSTRUCTIONS

#### **19.1.1. Instruction that May Be Given at Outset of Trial on Issue of Guilt or Innocence**

The prosecution may seek [an extended term of imprisonment]\* [life in prison]\*\* in this case if the defendant is convicted. If this occurs, there may be a separate sentencing hearing. At that hearing, additional evidence may be presented and the jury will be given additional instructions. At the conclusion of that hearing, the jury will be asked to determine facts relevant to the court's sentencing decision.

#### **Notes**

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

The decision whether to give this instruction is left to the court's discretion.

### **19.1.2. Instruction to be Given at Outset of Sentencing Hearing**

Members of the jury, the purpose of this hearing is to determine whether defendant may be subject to [an extended term of imprisonment]\* [life in prison]\*\* for the offense of (specify offense).

For the defendant to be subject to [an extended term of imprisonment]\* [life in prison]\*\* the prosecution must prove beyond a reasonable doubt that the defendant is [a persistent offender,] [a professional criminal,] [a dangerous person,] [a multiple offender,] [an offender against the elderly, handicapped or a minor eight years of age of younger,] [and/or] [a hate crime offender] and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public.

This hearing will proceed similarly to the trial in this case. Each lawyer will have an opportunity to give an opening statement. The prosecution will then present evidence to you. The defense may present evidence but is not required to do so. If the defense presents evidence, the prosecution will have the opportunity to present rebuttal evidence. Following the presentation of evidence, the court will read its jury instructions to you. The prosecution and defense will then have an opportunity to give closing arguments.

After closing arguments, you will begin your deliberations to answer certain questions which will be provided to you on special interrogatory forms. In answering these questions, you are to consider evidence that is presented to you during this hearing [, in addition to evidence that was presented to you during the trial in this case].

#### **Notes**

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

## 2. GENERAL INSTRUCTIONS

### **19.2.1. Consider Instructions as a Whole**

The court will instruct you now concerning the law which you must follow in arriving at your decision.

You are the exclusive judges of the facts of this case. However, you must follow these instructions even though you may have opinions to the contrary.

You must consider all of the instructions as a whole and consider each instruction in the light of all of the others. Do not single out any word, phrase, sentence or instruction and ignore the others. Do not give greater emphasis to any word, phrase, sentence or instruction simply because it is repeated in these instructions.

### **19.2.2. Reasonable Doubt**

For the purpose of this hearing, the law requires that the prosecution prove certain facts beyond a reasonable doubt.

What is a reasonable doubt?

It is a doubt in your mind about the facts at issue in this hearing which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense.

Each of you must decide, individually, whether there is or is not such a doubt in your mind after careful and impartial consideration of the evidence.

Be mindful, however, that a doubt which has no basis in the evidence presented, or the lack of evidence, or reasonable inferences therefrom, or a doubt which is based upon imagination, suspicion or mere speculation or guesswork is not a reasonable doubt.

What is proof beyond a reasonable doubt?

If, after consideration of the evidence and the law, you have a reasonable doubt regarding a fact at issue in this hearing, then the prosecution has not proved that fact beyond a reasonable doubt and it is your duty to answer "No" to the relevant question in the interrogatory form which will be provided to you.

If, after consideration of the evidence and the law, you do not have a reasonable doubt regarding a fact at issue in this hearing, then the prosecution has proved that fact beyond a reasonable doubt and it is your duty to answer "Yes" to the relevant question in the interrogatory form.

### **19.2.3. Consider Only the Evidence**

You must consider only the evidence which has been presented to you in this hearing and such inferences therefrom as may be justified by reason and common sense.

The prosecution's allegations are a mere formality, and they are not to be considered as evidence against the defendant. You must not be influenced at all because the prosecution has made these allegations.

This hearing is governed by rules. When an attorney believes that the rules require it, it is his or her duty to raise an objection. It is within the province of the trial judge to rule on such objections.

During the course of this hearing you have heard counsel make objections. You must not consider objections raised by counsel in your deliberations.

Statements or remarks made by counsel are not evidence. You should consider their arguments to you, but you are not bound by their recollections or interpretations of the evidence. You must also disregard any remark I may have made, unless the remark was an instruction to you.

If I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of any party, or if any expression or statement of mine has seemed to indicate an opinion relating to which witnesses are, or are not, worthy of belief or what facts are or are not established or what inferences should be drawn therefrom, I instruct you to disregard it.

You must not be influenced by pity for the defendant or by passion or prejudice against the defendant. Both the prosecution and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh all of the evidence and follow these instructions, and that you will reach a just decision.

#### **19.2.4. Disregard Stricken Evidence**

You must disregard entirely any matter which the court has ordered stricken.

### **19.2.5. Judicial Notice**

You may but are not required to accept, as conclusively proved, any fact or event which the court has judicially noticed.

### **19.2.6. Stipulations**

You must accept, as conclusively proved, any fact to which the parties have stipulated.

### **19.2.7. Direct and Circumstantial Evidence**

In addition to facts which [counsel have stipulated to be true] [the court has taken judicial notice of], there are two types of evidence -- direct evidence, such as the testimony of witnesses who assert actual knowledge of a fact, and circumstantial evidence, which permits a reasonable inference of the existence of another fact.

Facts may be proved by direct or circumstantial evidence, or by a combination of both direct evidence and circumstantial evidence.

### **19.2.8. Weight of the Evidence**

While you must consider all of the evidence in determining the facts in this case, this does not mean that you are bound to give every bit of evidence the same weight. You are the sole and exclusive judges of the effect and value of the evidence and of the credibility of the witnesses.

### **19.2.9. Credibility and Weight of Testimony**

It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence; the witness's candor or frankness, or lack thereof; the witness's interest, if any, in the result of this case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness has made contradictory statements, whether in this hearing or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. In weighing the effect of inconsistencies or discrepancies, whether they occur within one witness's testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail, and whether they result from innocent error or deliberate falsehood.

### **19.2.10. Rejecting Testimony**

If you find that a witness has deliberately testified falsely to any important fact or deliberately exaggerated or suppressed any important fact, then you may reject the testimony of that witness except for those parts which you nevertheless believe to be true.

### **19.2.11. Number of Witnesses**

You are not bound to decide a fact one way or another just because more witnesses testify on one side than the other. It is testimony that has a convincing force upon you that counts, and the testimony of even a single witness, if believed, can be sufficient to prove a fact.

### **19.2.12. Prosecution Not Required to Call All Witnesses**

The prosecution is not required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

### **19.2.13. Defendant Not Required to Call Any Witnesses**

The defendant has no duty or obligation to call any witnesses or produce any evidence.

#### **19.2.14. Defendant Not Required to Testify**

The defendant has no duty or obligation to testify, and you must not draw any inference unfavorable to the defendant because he/she did not testify in this hearing, or consider this in any way in your deliberations.

### **19.2.15. Defendant as a Witness**

The defendant in this case has testified. When a defendant testifies, his/her credibility is to be tested in the same manner as any other witness.

### **19.2.16. Evidence Admitted for a Limited Purpose**

During the hearing I told you that certain evidence was admitted for a particular and limited purpose. When you consider that evidence, you must limit your consideration to that purpose.

### **19.2.17. Availability of Exhibits During Deliberations**

During the hearing items were received into evidence as exhibits. These exhibits will be sent into the jury room with you when you begin to deliberate.

### **19.2.18. Expert Witnesses**

During the hearing you heard the testimony of one or more witnesses who were described as experts. Training and experience may make a person an expert in a particular field. The law allows that person to state an opinion about matters in that field. Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. It is up to you to decide whether to accept this testimony and how much weight to give it. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

### 3. EXTENDED TERM CATEGORIES AND SPECIAL INTERROGATORIES

#### 19.3.1A. Persistent Offender: H.R.S. § 706-662(1)

The prosecution has alleged that the Defendant, (defendant's name), is a persistent offender and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a persistent offender in that he/she has previously been convicted of two or more felonies committed at different times when the Defendant was eighteen years of age or older?
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

#### Notes

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.1B. Persistent Offender: H.R.S. § 706-662(1) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a persistent offender in that he/she has previously been convicted of two or more felonies committed at different times when the Defendant was eighteen years of age or older?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant’s sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Notes**

\*When the ordinary term is life with possibility of parole, question 2 should read: “Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?”

### 19.3.2A. Professional Criminal: H.R.S. § 706-662(2)

The prosecution has alleged that the Defendant, (defendant's name), is a professional criminal and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a professional criminal in that [the circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood] [the defendant has substantial income or resources not explained to be derived from a source other than criminal activity]?
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

#### Notes

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.2B. Professional Criminal: H.R.S. § 706-662(2) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a professional criminal in that [the circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood] [the defendant has substantial income or resources not explained to be derived from a source other than criminal activity]?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Note**

\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

### 19.3.3A. Dangerous Person: H.R.S. § 706-662(3)

The prosecution has alleged that the Defendant, (defendant's name), is a dangerous person and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a dangerous person in that: (a) he/she has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct; and (b) this history makes the defendant a serious danger to others?
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

#### Notes

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.3B. Dangerous Person: H.R.S. § 706-662(3) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a dangerous person in that: (a) he/she has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct; and (b) this history makes the defendant a serious danger to others?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant’s sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Note**

\*When the ordinary term is life with possibility of parole, question 2 should read: “Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?”

### 19.3.4A. Multiple Offender: H.R.S. § 706-662(4)

The prosecution has alleged that the Defendant, (defendant's name), is a multiple offender and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a multiple offender in that [[he/she is [being sentenced for two or more felonies] [already under sentence of imprisonment for any felony]] [the maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, [would equal or exceed in length the maximum of the extended term imposed] [would equal or exceed forty years]\*\*\*]?
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

#### Notes

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*Use this alternative when the extended term imposed is for a class A felony.

\*\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.4B. Multiple Offender: H.R.S. § 706-662(4) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a multiple offender in that [[he/she is [being sentenced for two or more felonies] [already under sentence of imprisonment for any felony]] [the maximum terms of imprisonment authorized for each of the defendant’s crimes, if made to run consecutively, [would equal or exceed in length the maximum of the extended term imposed] [would equal or exceed forty years]]?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant’s sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Notes**

\*When the ordinary term is life with possibility of parole, question 2 should read: “Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?”

**19.3.5A. Offender Against the Elderly, Handicapped or a Minor:  
H.R.S. § 706-662(5)**

The prosecution has alleged that the Defendant, (defendant's name), is an offender against [the elderly] [the handicapped] [a minor eight years of age or younger] and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is an offender against [the elderly] [the handicapped] [a minor eight years of age or younger] in that: (a) he/she committed or attempted to commit [murder] [manslaughter] [sexual assault in the [first] [second] [third] degree] [robbery] [assault in the [first] [second] degree] [burglary] [kidnapping]; and (b) in the course of committing or attempting to commit the crime, he/she inflicted serious or substantial bodily injury upon a person who was [sixty years of age or older] [[blind] [a paraplegic] [a quadriplegic]] [eight years of age or younger]; and (c) the person's status was known or reasonably should have been known to the Defendant?
  
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

**Notes**

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.5B. Offender Against the Elderly, Handicapped or a Minor:  
H.R.S. § 706-662(5) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is an offender against [the elderly] [the handicapped] [a minor eight years of age or younger] in that: (a) he/she committed or attempted to commit [murder] [manslaughter] [sexual assault in the [first] [second] [third] degree] [robbery] [assault in the [first] [second] degree] [burglary] [kidnapping]; and (b) in the course of committing or attempting to commit the crime, he/she inflicted serious or substantial bodily injury upon a person who was [sixty years of age or older] [[blind] [a paraplegic] [a quadriplegic]] [eight years of age or younger]; and (c) the person's status was known or reasonably should have been known to the Defendant?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Notes**

\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

### 19.3.6A. Hate Crime Offender: H.R.S. § 706-662(6)

The prosecution has alleged that the Defendant, (defendant's name), is a hate crime offender and that [an extended term of imprisonment]\* [life in prison]\*\* is necessary for the protection of the public. The prosecution has the burden of proving these allegations beyond a reasonable doubt. It is your duty to decide whether the prosecution has done so by answering the following two questions on a special interrogatory that will be provided to you:

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a hate crime offender in that he/she (a) has been convicted of (specify a crime under chapter 707, 708, or 711); (b) intentionally selected [a victim] [the property that was the object of the crime] because of hostility toward the actual or perceived [race] [religion] [disability] [ethnicity] [national origin] [gender identity or expression]\*\*\* [sexual orientation] of any person?
2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*\*\*\*

You must answer each of these questions separately. Your answers must be unanimous.

#### Notes

\*Use this alternative when the ordinary term is 5, 10, or 20 years.

\*\*Use this alternative when the ordinary term is life with possibility of parole.

\*\*\*\*If this alternative is selected, include the following definition:

["Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.]

\*\*\*\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

**19.3.6B. Hate Crime Offender: H.R.S. § 706-662(6) – Special Interrogatory**

You must answer the following two questions separately. Your answers must be unanimous.

1. Has the prosecution proved beyond a reasonable doubt that the Defendant is a hate crime offender in that he/she (a) has been convicted of (specify a crime under chapter 707, 708, or 711); and (b) intentionally selected [a victim] [the property that was the object of the crime] because of hostility toward the actual or perceived [race] [religion] [disability] [ethnicity] [national origin] [gender identity or expression] [sexual orientation] of any person?

Yes \_\_\_\_\_

No \_\_\_\_\_

2. Has the prosecution proved beyond a reasonable doubt that it is necessary for the protection of the public to extend the Defendant's sentence from a (specify maximum number of years in ordinary term) year sentence to a (specify maximum number of years in extended term) year sentence?\*

Yes \_\_\_\_\_

No \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

**Notes**

\*When the ordinary term is life with possibility of parole, question 2 should read: "Has the prosecution proved beyond a reasonable doubt that life in prison is necessary for the protection of the public?"

## 4. JURY DELIBERATIONS

### **19.4.1. Unanimous Decision**

The decisions of the jury regarding the facts at issue in this hearing must represent the considered judgment of each juror, and in order to return the decisions, it is necessary that each juror agree thereto. In other words, your decisions must be unanimous.

Each of you must decide the case for yourself, but it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest belief as to the weight or effect of evidence for the mere purpose of returning a decision on the facts at issue in this hearing.

#### **19.4.2. Unanimity Instruction – Generic**

The law allows the introduction of evidence for the purpose of showing that there is more than one [act] [omission] [item] upon which proof of a fact may be based. In order for the prosecution to prove a fact, all twelve jurors must unanimously agree that [the same act] [the same omission] [possession of the same item] has been proved beyond a reasonable doubt.

### **19.4.3. Conduct of Deliberations**

[Upon retiring to the jury room, elect one of your members as foreperson to] [Your foreperson will] preside over your deliberations and be your spokesperson in court.

You may take such time as you feel is necessary for your deliberations. You may inform the court if you have any questions about or do not understand the court's instructions.

When you reach a decision, the foreperson is to sign and date the decision form(s) that will be given to you.

Until you are through with your consideration of this case or you are otherwise excused by the court, it is necessary from this time that you remain together as a body. A bailiff will be sworn to attend you and take care of any personal problems you may have and see to your comfort.

If you need to communicate with the court, send a note through the bailiff. Please do not attempt to communicate with the court except in writing.

During the course of the hearing, you have received all of the evidence you may consider to decide the case. You must not attempt to gather any information on your own which you think might be helpful. Do not engage in any outside reading on any matter having anything to do with this case. Do not refer to dictionaries or other outside sources. Do not visit any places mentioned in the case. Do not in any other way try to learn about the case outside the courtroom.

During your recesses from deliberations, when you are released to go home in the evening, you must not discuss this case with anyone or permit anyone to discuss this case with you. You must not read or listen to news accounts about this case, if there are any.

You must not discuss this case with any person other than your fellow jurors. You must not reveal to the court or to any other person how the jury stands, numerically or otherwise, until you have reached a unanimous decision and it has been received by the court.

After your decisions have been reached and your foreperson has signed and dated the decision form(s), you will notify the bailiff, and court will be reconvened to receive the decisions.