

**Electronically Filed  
Supreme Court  
SCMF-11-0000315  
18-DEC-2014  
09:15 AM**

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 the (1) addition of Criminal Instructions 3.19A, 10.03B, 10.03C, 10.03E, 10.03F, and 11.06A, and (2) revision of Criminal Instructions 10.03A, 10.03D, 10.03G, 10.03H, 10.03I, 10.04A, and 10.04B of the Hawai‘i Pattern Jury Instructions - Criminal,

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

IT IS HEREBY ORDERED that the request is granted and the attached criminal jury instructions 3.19A, 10.03A, 10.03B, 10.03C, 10.03D, 10.03E, 10.03F, 10.03G, 10.03H, 10.03I, 10.04A, 10.04B, and 11.06A 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, December 18, 2014.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



### 3.19A. Show-Up Identification

In this case, in addition to other eyewitness identification testimony, you have received evidence that the defendant was identified by a witness at a so-called “show-up” conducted by the police. While show-ups are permissible, they are inherently suggestive police procedures. In determining the reliability and accuracy of an identification made at a police show-up, you must consider the totality of the circumstances involved in the show-up, which may include the following:

[Whether the identification was the result of a suggestive procedure, including actions taken or words spoken by police or anyone else to the witness before, during, or after the identification process;]

[Whether the police either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure;]

[Whether the defendant was required to wear distinctive clothing that the perpetrator allegedly wore, or was handcuffed or otherwise appeared to be in police custody;]

[Whether the witness was exposed to opinions, descriptions, or identifications made by other witnesses, or to photographs, news media, or to any other information that may have influenced the independence of the identification;]

[Whether other participants in the show-up were similar in appearance to the defendant;]

[Whether the witness's identification was made spontaneously and remained consistent thereafter;]

[and any other circumstance relating to the witness's ability to make an identification.]

#### Notes

See *State v. Cabinatan*, 132 Hawai'i 63, 319 P.3d 1071 (2014).

### **10.03A. Unauthorized Entry in a Dwelling: H.R.S. § 708-812.6**

(Applicable to offenses occurring from June 22, 2006 through July 4, 2011)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry in a Dwelling.

A person commits the offense of Unauthorized Entry in a Dwelling if he/she intentionally or knowingly enters unlawfully into a dwelling, and he/she recklessly disregards a risk that another person was lawfully present in the dwelling, and another person was lawfully present in the dwelling.

There are four material elements of the offense of Unauthorized Entry in a Dwelling, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant entered unlawfully into a dwelling; and
2. That the Defendant did so intentionally or knowingly; and
3. That the Defendant recklessly disregarded the risk that another person was lawfully present in the dwelling; and
4. That another person, at that time, was lawfully present in the dwelling.

#### **Notes**

H.R.S. § 708-812.6.

For definition of states of mind, see instruction:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “dwelling”

10.00 – “enter or remain unlawfully”

**10.03B. Unauthorized Entry in a Dwelling in the First Degree:  
H.R.S. § 708-812.55**

(Applicable to offenses occurring on or after July 5, 2011)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry in a Dwelling in the First Degree.

A person commits the offense of Unauthorized Entry in a Dwelling in the First Degree if he/she intentionally or knowingly enters unlawfully into a dwelling and another person was, at the time of the entry, lawfully present in the dwelling, and the other person [was sixty-two years of age or older] [was an incapacitated person] [had a developmental disability].

There are three material elements of the offense of Unauthorized Entry in a Dwelling in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally or knowingly entered unlawfully into a dwelling; and
2. That another person was, at the time of the entry, lawfully present in the dwelling; and
3. That the other person [was sixty-two years of age or older] [was an incapacitated person] [had a developmental disability].

**Notes**

H.R.S. § 708-812.55.

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “dwelling”

10.00 – “enter or remain unlawfully”

For definition of “developmental disability” see HRS § 333E-2.

For definition of “incapacitated person” see HRS § 560: 5-102.

The commentary on § 708-812.55 reads as follows:

Act 187, Session Laws 2011, established the offense of unauthorized entry in a dwelling in the first degree, a class B felony, for the unauthorized entry in a dwelling if another person, at the time of entry, was lawfully present in the dwelling and the person was sixty-two years of age or older, was an incapacitated person, or had a developmental disability. The legislature found that home invasions are traumatic experiences for the victims and may be especially frightening for vulnerable elderly and disabled individuals present during the intrusion. The legislature intended that the presence of a person lawfully in the dwelling shall be a strict liability element and that it shall not be necessary to prove that a defendant knew or had any reason to know that the person lawfully in the dwelling was sixty-two years of age or older, incapacitated, or disabled. Conference Committee Report No. 32.

Consistent with the commentary and the majority opinion in *State v. Buch*, 83 Hawai'i 308, 926 P.2d 599 (1996), the states of mind specified in the definition of the offense are not made applicable to elements two and three. See also H.R.S. § 702-207.

**10.03C. Unauthorized Entry in a Dwelling in the Second Degree:  
H.R.S. § 708-812.6**

(Applicable to offenses occurring on or after July 5, 2011)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Entry in a Dwelling in the Second Degree.

A person commits the offense of Unauthorized Entry in a Dwelling in the Second Degree if he/she intentionally or knowingly enters unlawfully into a dwelling and another person was, at the time of the entry, lawfully present in the dwelling.

There are two material elements of the offense of Unauthorized Entry in a Dwelling in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally or knowingly entered unlawfully into a dwelling; and
2. That another person was, at the time of the entry, lawfully present in the dwelling.

**Notes**

H.R.S. § 708-812.6.

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “dwelling”

10.00 – “enter or remain unlawfully”

The commentary on § 708-812.6 reads in part as follows:

Act 187, Session Laws 2011, redesignated the offense of  
unauthorized entry in a dwelling as a second degree

offense. The legislature also repealed the element of reckless disregard of the risk that another person was lawfully present in the dwelling, with the intent that the presence of a person lawfully present in the dwelling shall be a strict liability element, and for purposes of prosecuting the offense, it shall not be necessary to prove that a defendant knew or had any reason to know that someone else was lawfully in the dwelling. Conference Committee Report No. 32.

Consistent with the commentary and the majority opinion in *State v. Buch*, 83 Hawai'i 308, 926 P.2d 599 (1996), the states of mind specified in the definition of the offense are not made applicable to element two. See *also* H.R.S. § 702-207.

**10.03D. Affirmative Defense to Unauthorized Entry in a Dwelling:  
H.R.S. § 708-812.6(3)**

(Applicable to offenses occurring from June 22, 2006 through July 4, 2011)

The Defendant has raised an affirmative defense to the offense of Unauthorized Entry in a Dwelling. Before you may consider the affirmative defense, you must first determine whether the prosecution has proved all of the elements of Unauthorized Entry in a Dwelling beyond a reasonable doubt. If you unanimously find that the prosecution has not proved all of the elements of that offense beyond a reasonable doubt, then you must find the Defendant not guilty of the offense without considering the affirmative defense. If you unanimously find that the prosecution has proved all of the elements of the offense beyond a reasonable doubt, then you must consider the affirmative defense.

There are three elements for to the affirmative defense, each of which the Defendant must prove.

These three elements are:

1. That there was a social gathering of invited guests at the dwelling the Defendant entered; and
2. That the Defendant intended to join the social gathering; and
3. That the Defendant did not intend to commit any unlawful act other than the unlawful entry.

The Defendant must prove an affirmative defense by a preponderance of the evidence. This means that the Defendant must prove that it is more likely than not, or more probable than not, that each element of the affirmative defense occurred. In determining whether the defendant has proved an affirmative defense by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

Your determination as to whether the Defendant has proved the affirmative defense must be unanimous and is to be indicated by answering "Yes" or "No" on a special interrogatory that will be provided to you.

If you are unable to reach a unanimous agreement as to whether the affirmative defense has been proved or not been proved, then a verdict may not be returned on the charge of Unauthorized Entry in a Dwelling.

## Notes

H.R.S. § 708-812.6(3)

For special interrogatory, see instruction 10.03G.

**10.03E. Affirmative Defense to Unauthorized Entry in a Dwelling in the First Degree: H.R.S. § 708-812.55(4)**

(Applicable to offenses occurring on or after July 5, 2011)

The Defendant has raised an affirmative defense to the offense of Unauthorized Entry in a Dwelling in the First Degree. Before you may consider the affirmative defense, you must first determine whether the prosecution has proved all of the elements of Unauthorized Entry in a Dwelling in the First Degree beyond a reasonable doubt. If you unanimously find that the prosecution has not proved all of the elements of that offense beyond a reasonable doubt, then you must find the Defendant not guilty of the offense without considering the affirmative defense. If you unanimously find that the prosecution has proved all of the elements of the offense beyond a reasonable doubt, then you must consider the affirmative defense.

There are three elements to the affirmative defense, each of which the Defendant must prove.

These three elements are:

1. That there was a social gathering of invited guests at the dwelling the Defendant entered; and
2. That the Defendant intended to join the social gathering as an invited guest; and
3. That the Defendant did not intend to commit any unlawful act other than the unlawful entry.

The Defendant must prove an affirmative defense by a preponderance of the evidence. This means that the Defendant must prove that it is more likely than not, or more probable than not, that each element of the affirmative defense occurred. In determining whether the Defendant has proved an affirmative defense by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

Your determination as to whether the Defendant has proved the affirmative defense must be unanimous and is to be indicated by answering "Yes" or "No" on a special interrogatory that will be provided to you.

If you are unable to reach a unanimous agreement as to whether the affirmative defense has been proved or not been proved, then a verdict may not be returned on the charge of Unauthorized Entry in a Dwelling in the First Degree.

## Notes

H.R.S. § 708-812.55(4)

For special interrogatory, see instruction 10.03G.

**10.03F. Affirmative Defense to Unauthorized Entry in a Dwelling in the Second Degree: H.R.S. § 708-812.6(3)**

(Applicable to offenses occurring on or after July 5, 2011)

The Defendant has raised an affirmative defense to the offense of Unauthorized Entry in a Dwelling in the Second Degree. Before you may consider the affirmative defense, you must first determine whether the prosecution has proved all of the elements of Unauthorized Entry in a Dwelling in the Second Degree beyond a reasonable doubt. If you unanimously find that the prosecution has not proved all of the elements of that offense beyond a reasonable doubt, then you must find the Defendant not guilty of the offense without considering the affirmative defense. If you unanimously find that the prosecution has proved all of the elements of the offense beyond a reasonable doubt, then you must consider the affirmative defense.

There are three elements to the affirmative defense, each of which the Defendant must prove.

These three elements are:

1. That there was a social gathering of invited guests at the dwelling the Defendant entered; and
2. That the Defendant intended to join the social gathering; and
3. That the Defendant did not intend to commit any unlawful act other than the unlawful entry.

The Defendant must prove an affirmative defense by a preponderance of the evidence. This means that the Defendant must prove that it is more likely than not, or more probable than not, that each element of the affirmative defense occurred. In determining whether the Defendant has proved an affirmative defense by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

Your determination as to whether the Defendant has proved the affirmative defense must be unanimous and is to be indicated by answering "Yes" or "No" on a special interrogatory that will be provided to you.

If you are unable to reach a unanimous agreement as to whether the affirmative defense has been proved or not been proved, then a verdict may not be returned on the charge of Unauthorized Entry in a Dwelling in the Second Degree.

## Notes

H.R.S. § 708-812.6(3)

For special interrogatory, see instruction 10.03G.

**10.03G. Affirmative Defense to Unauthorized Entry in a Dwelling – Special Interrogatory: H.R.S. [§] §§ 708-812.55(4) and 708-812.6(3)**

1. Did the Defendant prove the affirmative defense by a preponderance of the evidence? (Your answer to this question must be unanimous.)

Yes \_\_\_\_\_

No \_\_\_\_\_

**Notes**

H.R.S. [§] §§ 708-812.55(4) and 708-812.6(3)

This interrogatory may be used with instructions 10.03D, E, and F.

The jury's answer to an interrogatory of this type, whether affirmative or negative, must be unanimous. See *State v. Peralto*, 95 Hawai'i 1, 18 P.3d 203 (2001); see also *State v. Yamada*, 99 Hawai'i 542, 57 P.3d 467 (2002).

**10.03H. Criminal Trespass in the First Degree: H.R.S. § 708-813(1)(a)**

[In Count (count number) of the Indictment/Complaint/Petition, the] [The] Defendant (defendant's name) is charged with the offense of Criminal Trespass in the First Degree.

A person commits the offense of Criminal Trespass in the First Degree if he/she knowingly enters or remains unlawfully [in a dwelling] [in or upon the premises of a hotel or apartment building].

There are two material elements of the offense of Criminal Trespass in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These two elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant entered or remained unlawfully [in a dwelling] [in or upon the premises of a hotel or apartment building]; and

2. That the Defendant did so knowingly.

**Notes**

H.R.S. § 708-813(1)(a).

For definition of states of mind, see instruction:

6.03 – “knowingly”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “apartment building”

10.00 – “dwelling”

10.00 – “enter or remain unlawfully”

10.00 – “hotel”

10.00 – “premises”

**10.03I. Criminal Trespass in the Second Degree: H.R.S. § 708-814(1)(a)**

[In Count (count number) of the Indictment/Complaint/Petition, the] [The] Defendant (defendant's name) is charged with the offense of Criminal Trespass in the Second Degree.

A person commits the offense of Criminal Trespass in the Second Degree if he/she knowingly enters or remains unlawfully in or upon premises that are [enclosed in a manner designed to exclude intruders] [fenced].

There are three material elements to the offense of Criminal Trespass in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant entered or remained unlawfully in or upon premises; and

2. That the premises were [enclosed in a manner designed to exclude intruders] [fenced]; and

3. That the Defendant did so knowingly.

**Notes**

H.R.S. § 708-814 (1)(a).

For definition of states of mind, see instruction:

6.03 – “knowingly”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “enter or remain unlawfully”

10.00 – “premises”

**10.04A. Burglary of a Dwelling During a Civil Defense Emergency or Disaster Relief Period: H.R.S. § 708-817**

(Applicable to offenses occurring on or after May 22, 2006)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Burglary of a Dwelling During a Civil Defense Emergency or Disaster Relief Period.

A person commits the offense of Burglary of a Dwelling During a Civil Defense Emergency or Disaster Relief Period if during a [civil defense emergency] [disaster relief period], the defendant intentionally [enters a dwelling unlawfully][remains unlawfully in a dwelling], with intent to commit therein a crime against a person or against property rights, and he/she recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

There are six material elements of the offense of Burglary of a Dwelling During a Civil Defense Emergency or Disaster Relief Period, each of which the prosecution must prove beyond a reasonable doubt.

These six elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally [entered unlawfully in a building] [remained unlawfully in a building]; and
2. That the Defendant had the intent to commit therein a crime against a person or against property rights; and
3. That the Defendant recklessly disregarded the risk that the building was the dwelling of another; and
4. That the building was a dwelling of another; and
5. That the defendant's foregoing behavior occurred during [the time of a civil defense emergency proclaimed by the governor pursuant to the Civil Defense and Emergency Act within the area covered by the civil defense emergency][the period of disaster relief under Chapter 127, H.R.S.]; and
6. That the defendant recklessly disregarded the risk that his/her behavior occurred during [the time of a civil defense emergency proclaimed by the governor pursuant to the Civil Defense and Emergency Act within the area covered by the civil defense emergency] [the period of disaster relief under Chapter 127, H.R.S.].

## Notes

H.R.S. § 708-817.

For definition of states of mind, see instruction:

6.02 – “intentionally”

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “building”

10.00 – “dwelling”

10.00 – “enter or remain unlawfully”

10.00 – “premises”

For statutory parameters of a “crime,” see H.R.S. § 701-107.

**10.04B. Burglary of a Building During a Civil Defense Emergency or Disaster Relief Period: H.R.S. § 708-818**

(Applicable to offenses occurring on or after May 22, 2006)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Burglary of a Building During a Civil Defense Emergency or Disaster Relief Period.

A person commits the offense of Burglary of a Building During a Civil Defense Emergency or Disaster Relief Period if during a [civil defense emergency][disaster relief period], the defendant intentionally [enters unlawfully into a building] [remains unlawfully in a building], with intent to commit therein a crime against a person or against property rights.

There are four material elements of the offense of Burglary of a Building During a Civil Defense Emergency or Disaster Relief Period, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally [entered unlawfully into a building][remained unlawfully in a building]; and
2. That the Defendant had the intent to commit therein a crime against a person or against property rights; and
3. That the Defendant's foregoing behavior occurred during [the time of a civil defense emergency proclaimed by the governor pursuant to the Civil Defense and Emergency Act within the area covered by the civil defense emergency] [the period of disaster relief under Chapter 127, H.R.S.]; and
4. That the Defendant recklessly disregarded the risk that his/her behavior occurred during [the time of a civil defense emergency proclaimed by the governor pursuant to the Civil Defense and Emergency Act within the area covered by the civil defense emergency] [the period of disaster relief under Chapter 127, H.R.S.].

**Notes**

H.R.S. § 708-818.

For definition of states of mind, see instruction:

6.02 – “intentionally”

*HAWJIC 10.04B (12/18/14)*

For definition of terms defined by H.R.S. Chapter 708, see instructions:

10.00 – “building”

10.00 – “enter or remain unlawfully”

10.00 – “premises”

For statutory parameters of a “crime,” see H.R.S. § 701-107.

**11.06A. Abuse of Family or Household Members in the Presence of a Household Member Less than 14 Years of Age: H.R.S. § 709-906(1) and (9)**

(Applicable to offenses occurring on or after June 20, 2014)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members in the Presence of a Household Member Less than 14 Years of Age.

A person commits the offense of Abuse of Family or Household Members in the Presence of a Household Member Less than 14 Years of Age if he/she intentionally, knowingly, or recklessly physically abuses a family or household member in the presence of any family or household member who is less than fourteen years of age.

There are four material elements of the offense of Abuse of Family or Household Members in the Presence of a Household Member Less than 14 Years of Age, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and
2. That the Defendant did so in the presence of (name of witness), who was less than 14 years of age; and
3. That, at that time, (name of complainant) and (name of witness) were family or household members of the Defendant; and
4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

“Family or household member” means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

**NOTES**

H.R.S. §§ 709-906(1) and (9), 702-206(1), (2), and (3).

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.