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[1]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

[2]A few instructions have been published which were not originally published in 1991 and for which no Supreme Court approval date could be verified.

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TABLE OF INSTRUCTIONS[4]

1. PRELIMINARY INSTRUCTIONS

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1. PRELIMINARY INSTRUCTIONS

INTRODUCTORY COMMENT

Preliminary instructions, while not a substitute for final instructions given after closing argument, can be helpful in orienting the jury toward that which is to come. "A court may," said the Court in *State v. Mata*, 71 Haw. 319, 330, 789 P.2d 1122 (1990), "to facilitate the jury's understanding of a case, make an appropriate and accurate general statement to the jury of what the case is all about."

The trial court should not, however, give "detailed instructions on the law in advance of trial." *State v. Mata*, 71 Haw. at 330. "[G]iving detailed instructions on the law with respect to the anticipated legal substantive issues to be raised at trial does not fit within the procedural framework contemplated by HRPP Rule 30." *State v. Mata*, 71 Haw. at 330. "Counsel had no opportunity to request the pre-trial instructions before they were given," observed the *State v. Mata* Court, "and there was no settlement procedure as is required by HRPP Rule 30(b)." *State v. Mata*, 71 Haw. at 330.

Judge Barrett Prettyman has observed:

> What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all of these recollections into a pattern of evaluation and judgment given him for the first time after the events?

Prettyman, *Jury Instructions -- First or Last?*, 46 A.B.A.J. 1066, 1066 (1960), *quoted in* Manual of Model Criminal Jury Instructions for the Ninth Circuit at 1 (1989).

1.01 PRELIMINARY INSTRUCTIONS TO THE JURY

I shall at this time mention some fundamental principles of law applicable to all criminal cases in order to assist you in following the evidence in this case.

The indictment/complaint in this case is not to be considered as any evidence against the defendant. It is a mere formal charge necessary to place the defendant upon trial. The defendant, under the law, is presumed to be innocent of the charge in the indictment/complaint. This presumption remains with the defendant throughout the trial unless the evidence in this case has satisfied you beyond a reasonable doubt of the defendant's guilt. The burden of proving the defendant guilty beyond a reasonable doubt is on the prosecution. The law does not require the defendant to prove his/her innocence.

The judge is the judge of the law, and at the conclusion of the case, after you have heard all the evidence and the arguments of counsel, I will instruct you in full as to the law applicable to the case. It will be your duty to accept the law as defined in these instructions and to follow it.

You will be the judges of the facts in this case, and that includes the credibility of the witnesses. By "credibility" I mean not only whether or not a witness is telling the truth but also the weight to be given to his or her testimony. It is my duty to instruct you about the applicable law and also to decide what evidence you may hear. After you have heard all the evidence in this case and the arguments of counsel, and have received the written instructions of the court as to the law that applies to this case, it will be your duty to determine whether the defendant is guilty or not guilty.

During the course of the trial you may hear objections made by the lawyers. It is their duty to make objection when they think it should be done. It is a help to the court and its purpose as part of our legal system is to have the case heard upon the issues and not upon irrelevant matters. You should not hold objections against either the state or the defendant or feel that either side is trying to keep something relevant from you.

From time to time during the trial I may be called on to make rulings of law on objections or motions made by the attorneys. You should not conclude from any such ruling that I have any opinions on the merits of the case or favor one side or the other. If I sustain an objection to a question asked of a witness, which means I will not permit the question to be answered, you should not speculate on what the answer might have been, or draw any conclusion from the question itself.

At times you will be excused from the courtroom to enable the attorneys to discuss legal issues with me out of your hearing. Under the law, various matters must be heard out of your presence. Also, when the trial is recessed or adjourned for further hearing, and the trial does not begin promptly at the designated time, the delay may be caused by the court's administrative duties or a need to address other matters. When a trial is necessarily interrupted or delayed for any of these reasons, you should not feel that your time is being wasted.

From time to time during the trial, the lawyers may approach me here at the bench and hold a whispered discussion. This is called a "bench conference." We will be discussing legal matters. Please do not feel offended by our whispering and do not speculate about the subject matter of our discussion.

You have now been sworn to try this case. You will decide all disputed issues of fact. But until the case is submitted to you with the court's instructions, you should not discuss the case, even among yourselves. Do not discuss the case with anyone. Do not allow anyone to discuss it with you. Do not talk to the defendant, the lawyers, or the witnesses. Do not investigate the case in any way. Do not read any newspaper article or listen to any radio or television broadcast that discusses this case. Your decision must be based solely on the evidence you receive in this room and the court's instructions.

Commentary

This preliminary instruction is taken from the *Hawai`i Criminal Benchbook* (1986). The language is not intended to be mandatory, and the trial court should feel free to modify it to suit the circumstances of a particular case or the court's preferences. *But see State v. Mata*, 71 Haw. 319, 330, 789 P.2d 1122 (1990) ("giving detailed instructions on the law with respect to the anticipated legal substantive issues to be raised at trial does not fit within the procedural framework contemplated by HRPP Rule 30").

1.02 USE OF INTERPRETER

No matter what language people speak, they have the right to have their testimony heard and understood. You are about to hear a trial in which an interpreter will translate for one or more of the participants. The interpreter is required to remain neutral. The interpreter is required to translate between English and (specify other language), accurately and impartially to the best of the interpreter's skill and judgment.

You must evaluate interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's interpreted testimony based on your conclusions, if any, regarding the extent to which that person speaks English.

Commentary

Oregon Uniform Criminal Jury Instruction No. 1001A. This instruction should be given to the jury at the commencement of trial when an interpreter is being used for one or more of the participants at trial.

1.02A JUROR NOTETAKING

(To be given prior to evidence being presented)

You are allowed to take notes during the presentation of evidence in this case. You will be provided with paper and a pen or pencil. You are not required to take notes.

If you choose to take notes, you must follow some important rules:

1. As you are notetaking, do not become distracted from the ongoing proceedings.

2. Do not let your notetaking take priority over your duty to pay attention to the witnesses. Do not permit your notetaking to interfere with your duty to listen to the testimony of the witnesses or with your duty to observe the witnesses while they are testifying. Your observation of the witnesses will be important in determining their credibility.

3. Do not take notes outside of this courtroom. When leaving the courtroom during a recess or at the end of the day, leave your notes face down on your seat. They will be collected by the court at the end of the day and returned to you for the next court session.

4. Do not jot down any notes outside the courtroom. In other words, you are not permitted to notetake during recesses or when you return home for the evening.

If you have any questions regarding notetaking, please notify the bailiff.

1.02B JUROR NOTETAKING

(To be given prior to deliberations)

You have been allowed to take notes during the presentation of this case. When you leave the courtroom to commence deliberations of this case, you must follow some important rules with regard to notes:

1. Notes are for your own personal reference to assist you in refreshing your memory of the evidence. Keep your notes to yourself and do not show or read them to any other juror.

2. You must not give your notes precedence over your independent recollection of the evidence. If there is an inconsistency between your memory of the evidence and your notes, treat your memory of the evidence as controlling and accurate.

3. You must not give certain evidence emphasis simply because it appears in your notes. Do not assume that because something appears in your notes that it necessarily took place in court.

4. Some of you have not taken notes. If you have not taken notes, you should rely on your own independent recollection of the proceedings. Jurors who do not take notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror took notes. Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

5. Anytime you leave the jury room during deliberations, leave your notes face down on the table.

6. If you go home overnight without reaching a verdict, the court will collect the notes and return them to you at the start of the next day.

7. After you have reached a verdict, your notes will be collected by the court and destroyed.

TABLE OF INSTRUCTIONS[5]

2. INSTRUCTIONS IN THE COURSE OF TRIAL

[5]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

[6]A few instructions have been published which were not originally published in 1991 and for which no Supreme Court approval date could be verified.

2. INSTRUCTIONS IN THE COURSE OF TRIAL

INTRODUCTORY COMMENT

Many cautionary instructions used in mid-trial are repeated in substance in the final charge. These Pattern Jury Instructions do not contain separate mid-trial instructions for material covered in the charge. An immediate cautionary instruction can sometimes avoid the need for a mistrial. *See State v. Miyazaki*, 64 Haw. 611, 621-22, 645 P.2d 1340 (1982) (immediate cautionary instruction to disregard reference to "earlier trial" adequate to cure any prejudice the statement may have had); *see also* A. Bowman, *Hawai`i Rules of Evidence Manual* at 22 (Michie 1990) ("[l]imiting instruction should be delivered at the point of receipt of the evidence and, if necessary or desirable, they can be repeated in the court's general charge").

The trial judge may give cautionary instructions at the time the jury is instructed on the law of the case rather than immediately following receipt of testimony, where the rights of the accused are adequately protected. *State v. Perez*, 64 Haw. 232, 638 P.2d 335 (1981).

2.01 CAUTIONARY INSTRUCTION -- RECESS

I want to remind you of a few things that are especially important. Until I ask you to begin deliberations, you must not discuss this case with your fellow jurors. Furthermore, until the verdict is received or you are otherwise excused from jury service, you are not to discuss the case with anyone. If anyone approaches you and tries to discuss the trial with you, please let me know about it immediately. Also, you must not read or listen to any news reports of the trial. Remember that you must not speak with any person who is involved in the trial--even about something that has nothing to do with the trial. Finally, if you observe anyone, including a fellow juror, violate these instructions you must immediately report it to the court by written note through the bailiff.

If you need to speak with me about anything, simply give a note to the bailiff to give to me.

I may not repeat these things to you before every break that we take, but keep them in mind throughout the trial.

2.02 DISCHARGE OF DEFENSE COUNSEL DURING TRIAL

Even though (defendant) was at first represented by a lawyer, he/she has decided to continue this trial representing himself/herself and not use the services of a lawyer. He/She has a perfect right to do that. His/Her decision has no bearing on whether he/she is guilty or not guilty, and it should have no effect on your consideration of the case.

Commentary

An accused "has the constitutional right to appear *pro se* and defend himself." *State v. Dickson*, 4 Haw.App. 614, 619, 673 P.2d 1036 (1983) *(citing Faretta v. California*, 422 U.S. 806 (1975)). The record must affirmatively reflect that the accused "was offered counsel but that he voluntarily, knowingly, and intelligently rejected the offer and waived that right." *Dickson*, 4 Haw.App. at 619, 673 P.2d at 1041 ("specific waiver inquiry" factors set out). Although the waiver of a minor's right to counsel should be reviewed with great care, the right may nevertheless be waived if, based upon the totality of circumstances, the waiver is knowing and voluntary. *In the Interest of Doe*, 77 Hawai'i 46, 50, 881 P.2d 533, 537(1994) (citing *Medeiros v. State*, 63 Haw. 162, 163, 623 P.2d 86, 86 (1981)).

A defendant for whom counsel has been appointed has no per se right to change counsel, particularly when trial is underway. *See State v. Ahlo*, 2 Haw.App. 462, 634 P.2d 421 (1981); *State v. Torres*, 54 Haw. 502, 510 P.2d 494 (1973); *see also State v. Soto*, 60 Haw. 493, 495, 591 P.2d 119, 121 (1979) (preparation time for counsel should be sufficient to "assure the defendant of effective assistance of counsel").

Rule 10.1 of the Hawai 'i Rules of the Circuit Courts provides that "withdrawal of counsel in cases pending before the circuit courts shall be effective only upon the approval of the court and shall be subject to the guidelines of Rule 1.16 of the Hawai'i Rules of Professional Conduct and other applicable law."

2.03 OTHER CRIMES, WRONGS OR ACTS

You [are about to hear] [have heard] evidence that the Defendant at another time, may have [engaged] [committed] other [crimes] [wrongs] [acts]. You must not use this evidence to determine that the Defendant is a person of bad character and therefore must have committed the offense[s] charged in this case. Such evidence may be considered by you only on the issue of Defendant's [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [modus operandi] [absence of mistake or accident] and for no other purpose.

Commentary

This instruction is to be given at the time evidence of other crimes, wrongs or acts is admitted unless the defense objects on the record to the giving of the instruction. When given, Instruction No. 4.01 should be given at the end of the case, as appropriate.

TABLE OF INSTRUCTIONS[7]

3. INSTRUCTIONS AT END OF CASE

[7]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

3. INSTRUCTIONS AT END OF CASE

INTRODUCTORY COMMENT

HRPP 30(e) provides that the court shall instruct the jury after closing arguments are completed. The defendant has a constitutional and statutory right to be present when the Court instructs the jury. HRPP 43; *State v. Pokini*, 55 Haw. 640, 642, 526 P.2d 94 (1974) (defendant "has a procedural and constitutional right to be present whenever the court communicates with the jury").

HRPP 30 provides specific procedures whereby counsel and the court settle final instructions. *See State v. Mata*, 71 Haw. 319, 330, 789 P.2d 1122 (1990). HRPP 30(d) mandates that once instructions have been settled, the court "shall in no case orally qualify, modify or explain to the jury any instruction." Objections to the instructions must be made before the jury retires to deliberate. HRPP 30(e); HRS § 641-16;*see also State v. Iaukea*, 56 Haw. 343, 537 P.2d 724 (1975).

Jury instructions, as a whole, must correctly instruct the jury on the law. *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987); *see also State v. Nakamura* , 65 Haw. 74, 648 P.2d 183 (1982); *State v. Feliciano*, 62 Haw. 637, 618 P.2d 306 (1980). Instructions need not merely "parrot the language of the statute." *State v. Nakamura*, 65 Haw. at 79; *see also State v. Nuetzel*, 61 Haw. 531, 551, 606 P.2d 920 (1980) ("[c]larity is the true virtue of effective communication"); *State v. Apao*, 59 Haw. 625, 645, 586 P.2d 250 (1978) ("the trial court is not required to instruct the

jury in the exact words of the applicable statute"). Instructions should be "easily understandable," and present the jury with an instruction that aids the jury in applying the law to the facts of the case. *State v. Nakamura*, 65 Haw. at 79; *see also State v. Nuetzel*, 61 Haw. at 550 (instructions should be "flexible with wide discretion vested in the trial judge to clarify the terms of the definition").

It is not error for the court to refuse ambiguous and misleading instructions. *State v. Chang*, 46 Haw. 22, 374 P.2d 5 (1962). If the jury is fully and adequately instructed on a given proposition of law, a request for another instruction restating the same proposition in different terms may properly be refused. *State v. Nakamura, supra; see also State v. Bush*, 58 Haw. 340, 569 P.2d 349 (1977); *State v. Faafiti* , 54 Haw. 637, 513 P.2d 697 (1973); *State v. Johnson*, 3 Haw. App. 472, 653 P.2d 428 (1982); *State v. Le Vasseur*, 1 Haw.App. 19, 613 P.2d 1328 (1980), *cert. denied*, 449 U.S. 1018 (1981).

The court may refuse an instruction that is not supported by the evidence. *State v. Apao*, 59 Haw. 625, 586 P.2d 250 (1978); *see also State v. Horn*, 58 Haw. 252, 566 P.2d 1378 (1977); *State v. Lincoln*, 3 Haw. App. 107, 643 P.2d 807 (1982); *State v. Le Vasseur*, 1 Haw. App. 19, 29, 613 P.2d 1328 (1980).

The court may not, however, refuse an instruction simply because there is only slight evidence on the point, or because the evidence against the point appears overwhelming. *State v. Lira*, 70 Haw. 23, 759 P.2d 869 (1988); *State v. Warner*, 58 Haw. 492, 496-98,

573 P.2d 959 (1977). As long as there is some evidence on the point, the credibility and weight of that evidence is for the jury. *Id.; State v. Irebaria* , 55 Haw. 353, 519 P.2d 1246 (1974); *see* cases cited in the Introductory Comment to Section 7. Specific Defenses, infra.

"Erroneous instructions are presumptively harmful and are a grounds for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." *State v. Pinero*, 70 Haw. at 527, *quoting, Turner v. Willis* , 59 Haw. 319, 326, 582 P.2d 710 (1978); *see also State v. Pemberton*, 71 Haw. 466, 796 P.2d 80 (1990).

The court may correct erroneous instructions by withdrawal, explanation, or correction. *State v. O'Keefe*, 45 Haw. 368, 371, 367 P.2d 91 (1961). The court must clearly inform the jury, however, that the withdrawal of an erroneous instruction is absolute, to preclude any inference that the jury might be influenced by the erroneous instruction previously given. *Id.* "A clearly prejudicial instruction, however, cannot be cured by other proper instructions which do not call attention to the error." *State v. Estrada*, 69 Haw. 204, 223, 738 P.2d 812 (1987); *see also State v. Villeza* , 72 Haw. 327, 817 P.2d 1054 (1991); *State v. Napeahi*, 57 Haw. 365, 377, 556 P.2d 569 (1976). When the court has withdrawn, explained, or corrected an instruction, the reviewing court will presume that the jury accepted the correction. *State v. O'Keefe, supra*.

3.01 CONSIDER INSTRUCTIONS AS A WHOLE

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

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.

Commentary

HRE 1102 provide, the "court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment on the evidence."

Further, HRE 1102 provides the court shall also "inform the jury that they are the exclusive judges of all questions of fact and credibility of witnesses."

3.02 PRESUMPTION OF INNOCENCE; REASONABLE DOUBT

You must presume the defendant is innocent of the charge against him/her. This presumption remains with the defendant throughout the trial of the case, unless and until the prosecution proves the defendant guilty beyond a reasonable doubt.

The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. It places upon the prosecution the duty of proving every material element of the offense charged against the defendant beyond a reasonable doubt.

You must not find the defendant guilty upon mere suspicion or upon evidence which only shows that the defendant is probably guilty. What the law requires before the defendant can be found guilty is not suspicion, not probabilities, but proof of the defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt?

It is a doubt in your mind about the defendant's guilt 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 of the defendant's guilt, then the prosecution has not proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant not guilty.

If, after consideration of the evidence and the law, you do not have a reasonable doubt of the defendant's guilt, then the prosecution has proved the defendant's guilt beyond a reasonable doubt and it is your duty to find the defendant guilty.

Commentary

The Hawai`i Supreme Court has approved various formulations of the reasonable doubt instruction. *See, e.g. State v. Bush*, 58 Haw. 340, 342 n.4, 569 P.2d 349, 350 n.4 (1977); *State v. Olivera*, 57 Haw. 339, 341, 555 P.2d 1199, 1201 (1976); *State v. Stuart*, 51 Haw. 656, 660-61, 466 P.2d 444, (1970); *Territory v. Honda*, 31 Haw. 913, 914-15 (1931); *see also State v. Norton*, 72 Haw. 296, 815 P.2d 1025 (1991) (discussion of reasonable doubt in context of a bench trial).

"The difficulties faced in formulating a satisfactory definition of 'reasonable doubt' have led to the growth of a respectable body of opinion which holds that it is better to leave the term undefined in charging the jury." *Olivera*, 57 Haw. at 341-42, 555 P.2d at 1201; *see also United States v. Moss*, 756 F.2d 329, 333 (4th Cir. 1985) ("[t]he practice of defining reasonable doubt in the charge to the jury has been widely condemned"); *Holland v. United States*, 348 U.S. 121, 140 (1954) ("[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury"). The *Olivera* court, however, held that it was "not persuaded that it should be held to be error" for Hawai`i courts to attempt to define reasonable doubt. 57 Haw. at 342, 555 P.2d at 1201. The court concluded that "[w]hatever doubts may be entertained as to the necessity or advisability of attempting to explain the term to the jury, the question on appeal is whether 'the instructions correctly conveyed the concept of reasonable doubt to the jury.'" *Id.*, (*quoting Holland*, 348 U.S. at 140).

A jury instruction that shifts the burden of proof to the defendant on a material element of the offense charged violates due

process. *State v. Pimental*, 61 Haw. 308, 603 P.2d 141 (1979); *see also State v. Fabio*, 1 Haw.App. 544, 622 P.2d 619 (1981). Under prior statues, the Hawai`i Supreme Court ruled that to instruct a jury to presume the existence of malice aforethought from proof of a killing violates a defendant's right to have every element of the offense proved beyond a reasonable doubt. *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971); *see also State v. Cuevas*, 53 Haw. 110, 113, 488 P.2d 322, 324 (1971) ("[u]nder our legal system, the burden is always upon the prosecution to establish every element of crime by proof beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element").

A refusal to give an instruction on presumption of innocence (in addition to an instruction on reasonable doubt) can violate a defendant's due process right to a fair trial; the failure to give such an instruction must be evaluated in light of the totality of the circumstances. *State v. Iosefa*, 77 Hawai‘i 177, 880 P.2d 1224 (App. 1994) (based on the totality of the circumstances, defendant’s federal constitutional rights to due process and a fair trial were seriously jeopardized by the trial court’s failure to read the requested instruction on presumption of innocence and burden of proof.) *Compare Kentucky v. Whorton*, 441 U.S. 786 (1979), and *Taylor v. Kentucky*, 436 U.S. 478 (1978).

3.03 CONSIDER ONLY THE EVIDENCE

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

The indictment/complaint is a mere formal accusation, and it is not evidence of the defendant's guilt. You must not be influenced at all because the defendant has been charged with an offense(s).

Trial procedures are 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 trial 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 either [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 verdict.

3.04 DISREGARD STRICKEN EVIDENCE

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

Commentary

An immediate cautionary instruction can sometimes avoid the need for a mistrial. *See State v. Miyazaki*, 64 Haw. 611, 621-22, 645 P.2d 1340 (1982); *see also* A. Bowman, *Hawai`i Rules of Evidence Manual* at 22 (Michie 1990) ("[l]imiting instruction should be delivered at the point of receipt of the evidence and, if necessary or desirable, they can be repeated in the court's general charge").

The trial court may give a cautionary instruction during the general jury charge rather than immediately following receipt of affected testimony, where the rights of the accused are adequately protected thereby. *State v. Perez*, 64 Haw. 232, 638 P.2d 335 (1981).

3.05 JUDICIAL NOTICE

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

Commentary

See HRE 201. A judicially noticed fact must be one not subject to reasonable dispute that is either generally known within the territorial jurisdiction of the trial court or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In a criminal case the jury may, but is not required to, accept as conclusive any fact judicially noticed. HRE 201(g). The court must take notice of its own court records in another criminal case. *State v. Akana* , 68 Haw. 164, 706 P.2d 1300 (1985) (trial court mandated under HRE 201(d) to take judicial notice of its own records of another case where a party so requested, the file was in the court's immediate possession, and the same court had recently taken action in that case).

The Hawai`i courts have taken judicial notice that under ordinary circumstances an automobile traveling at 35 miles per hour can be stopped well within a distance of 135 feet, *State v. Arena*, 46 Haw. 315, 379 P.2 594 (1963); the exact time of sunrise on a particular day, *Territory v. Makaena*, 39 Haw. 270 (1952); the occurrence of a territory wide sugar strike, *Territory v. Kaholokua*, 37 Haw. 625 (1947); the Hawaiian language, *Bishop v. Mahiko*, 35 Haw. 608 (1940); the date of the King's birthday celebration, *Kapiolani v. Mahelona*, 9 Haw. 676 (1895); the announcement of a political candidate for office, *Application of Pioneer Mills Co.*, 53 Haw. 496, 497 P.2d 549 (1972); and the fact that banana trees hold water, *Territory v. Araujo*, 21 Haw. 56 (1912); *see generally* 1980 Commentary to HRE 201.

3.06 STIPULATIONS

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

Commentary

See, e.g., *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976) ("when parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established").

3.07 DIRECT AND CIRCUMSTANTIAL EVIDENCE

[In addition to facts which counsel have stipulated to be true] [Facts which 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.

Commentary

Where evidence in a case is circumstantial, "instructions on circumstantial evidence [are] necessary," although a reasonable doubt instruction may suffice. *State v. Bush*, 58 Haw. 340, 341, 569 P.2d 349 (1977).

Guilt may be proved beyond a reasonable doubt on the basis of reasonable inferences drawn from circumstantial evidence. *State v. Simpson*, 64 Haw. 363, 373 n. 7, 641 P.2d 320 (1982); *see also State v. Bright*, 64 Haw. 226, 228, 638 P.2d 330 (1981); *State v. Murphy*, 59 Haw. 1, 19, 575 P.2d 448 (1978); *State v. O'Daniel*, 62 Haw. 518, 528, 616 P.2d 1383 (1980). "No greater degree of certainty is required where a conviction is based solely on circumstantial evidence rather than on direct evidence." *State v. Simpson*, 64 Haw. at 373 n. 7, *citing State v. Smith*, 63 Haw. 51, 54, 621 P.2d 343 (1980). "Both direct evidence and circumstantial evidence are acceptable as means of proof. Neither is entitled to any greater weight than the other." *State v. Bush*, 58 Haw. at 341 n. 3 (jury instruction approved by court).

3.08 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.

Commentary

See HRE 1102 (court must "inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses").

3.09 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 trial 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.

Commentary

See HRE 1102 (jury must be instructed they are the "exclusive judges of . . . the credibility of witnesses"). This proposition is also established by a venerable line of caselaw. *See State v. Gabrillo*, 10 Haw.App. 448, 877 P.2d 891 (1994) (evidence that another person confessed to the offense or evidence that defendant was not present at the crime scene raises issues going to reasonable doubt and, like other issues going to reasonable doubt, is generally a matter for the finder of fact to determine); *State v. Estrada*, 69 Haw. 204, 218, 738 P.2d 812, 823 (1987) (jury is "sole judge of witness credibility and weight of the evidence"), *appeal after remand*, 71 Haw. 260, 787 P.2d 692 (1990); *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); *State v. Tamura*, 63 Haw. 636, 633 P.2d 1115 (1981); *State v. Masaniai*, 63 Haw. 354, 628 F.2d 1018 (1981) (lineup identification); *State v. Summers*, 62 Haw. 325, 614 P.2d 925 (1980); *State v. Bogdanoff*, 59 Haw. 603, 609-10, 585 P.2d 602, 606-07 (1978) (trial court should exercise restraint when presented with testimony it is tempted to find incredible or improbable as a matter of law; credibility is for the jury and even though a "witness may be inaccurate, contradictory and even untruthful in some respects[,]" the witness may "yet be entirely credible in the essentials of his testimony"); *State v. Johnston*, 51 Haw. 195, 456 P.2d 805 (1969); *State v. Kekaualua*, 50 Haw. 130, 433 P.2d 131 (1967); *State v. Kahunahana*, 48 Haw. 384, 402 P.2d 679 (1965); *State v. Dizon*, 47 Haw. 444, 390 P.2d 759 (1964); *State v. Hashimoto*, 47 Haw. 185, 389 P.2d 146 (1963); *State v. Hassard*, 45 Haw. 221, 365 P.2d 202 (1961) (competency of infant complaining witness was for court and weight and credibility of the testimony were for the jury); *Territory v. Kimbrel*, 31 Haw. 81 (1929); *Territory v. Buick*, 27 Haw. 28 (1923); *Territory v. Pong Chong*, 20 Haw. 229 (1910); *Territory v. Nakamura*, 20 Haw. 222 (1910); *Territory v. Sing Kee*, 14 Haw. 586 (1903) (motive and interest of witness always to be considered by jury in determining weight to give testimony, but general credibility instruction sufficient for informant's testimony); *see also Young Ah Chor v. Dulles*, 270 F.2d 338 (9th Cir. 1959) (list of factors a trier of fact may consider in determining witness credibility).

Sexual Assault Cases: The trial court is not required to give special cautionary instructions regarding the uncorroborated testimony of a complainant in sexual assault cases. An instruction on general witness credibility is sufficient. *State v. Jones*, 62 Haw. 572, 617 P.2d 1214 (1980); *State v. Dizon*, 47 Haw. 444, 390 P.2d 759.

Accomplice Testimony: An accomplice instruction which advises the jury that such testimony should be viewed with caution or suspicion is not required in every case where the accomplice substantially aids the prosecution's proof. *State v. Okumura*, 78 Hawai'i 383, 894 P.2d 80 (1995) (overruling *State v. Chang*, 46 Haw. 22, 374 P.2d 5 (1962)). A court in its discretion may give such an

instruction, considering whether the jury's attention was adequately drawn to the possible motives that the accomplice witness may have had to testify falsely. *Okumura*, 78 Hawai‘i at 409, 894 P.2d at 105. See HAWJIC 6.01A.

Identification: The giving of special instructions on identification testimony is within the discretion of the trial court; a defendant has no due process right to the giving of an identification instruction. *State v. Pahio*, 58 Haw. 323, 568 P.2d 1200 (1977); *see also State v. Padilla*, 57 Haw. 150, 162, 552 P.2d 357, 365 (1976) (refusal to give requested instructions relating to eyewitness testimony was not an abuse of discretion where the cross examination of the prosecution witnesses, the arguments to the jury, and the instructions that the court gave to the jury had adequately directed the jury's attention to the identification evidence); *but see State v. Lira*, 70 Haw. 23, 29, 759 P.2d 869, 873 (1988) (defendant entitled to an instruction on every defense or theory of defense having any support in the evidence).

3.10 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.

Commentary

This is a version of the traditional "falsus in uno, falsus in omnibus" instruction. *See, generally*, 81 Am. Jur. 2d *Witnesses* § 669 (1976).

3.11 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.

Commentary

Courts have criticized the giving of this instruction when the defendant presents no witnesses, without finding reversible error. *See, e.g.*, *United States v. Moss*, 756 F.2d 329, 335 (4th Cir. 1985) ("[d]istrict courts should refrain from giving such a number of witnesses instruction when the defendant has no witnesses").

3.12 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.

3.13 DEFENDANT NOT REQUIRED TO CALL ANY WITNESSES

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

Commentary

Where the trial court instructed the jury that reasonable doubt may arise not only from the evidence but also from a lack of evidence, "the possibility that the jury might, under this instruction, have considered [defendant's] failure to produce evidence as erasing any reasonable doubt which might otherwise have been seen by the jury appears . . . insubstantial at most." *State v. Olivera*, 57 Haw. 339, 343, 555 P.2d 1199 (1976).

3.14 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 case, or consider this in any way in your deliberations.

Commentary

An admonitory instruction that no inference shall be drawn prejudicial to the accused by reason of his failure to testify is required, if such instruction is requested by the defense. *Carter v. Kentucky*, 450 U.S. 288, 300, 67 L.Ed.2d 241, 101 S.Ct. 1112 (1981) ("the Fifth Amendment requires that a criminal trial judge must give a 'no adverse inference' jury instruction when requested by a defendant to do so"). Where the defense objects to the giving of an admonitory instruction, the trial court may well be advised not to give such instruction, but the giving of such instruction over defense objection is not error. *State v. Baxter*, 51 Haw. 157, 454 P.2d 366 (1969). Some defendants object to this instruction because it "highlights to the jury [their] failure to testify." *State v. Baxter*, 51 Haw. at 158. The Court upheld the giving of such an instruction over the defendant's objection, however, because it is "far from clear that such an instruction is prejudicial to a defendant." *State v. Baxter*, 51 Haw. at 159; *see also Lakeside v. Oregon*, 435 U.S. 333, 339 (1972) ("[i]t would be very strange indeed to conclude that this instruction violates the very constitutional provision it is intended to protect").

3.15 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.

Commentary

In *Territory v. Awana*, 28 Haw. 546, 567 (1925), the Court approved language in a similar instruction that "when a defendant does testify in his own behalf, then you have no right to disregard his testimony merely because he is accused of crime[.]" When he does so testify, instructed the *Awana* Court, "he at once becomes the same as any other witness and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness[.]"

The *Awana* Court also approved an instruction, however, that, "in determining the degree of credibility that shall be accorded to [a defendant's] testimony the jury ha[s] a right to take into consideration the fact that he is interested in the result of the prosecution[.]" *Id.*; *see also Territory v. Oneha*, 29 Haw. 150, 158-59 (1926) (noting that "while such an instruction has been upheld in many jurisdictions, it is not looked upon with favor"). The committee declined to place this additional language in the instruction because 1) it unnecessarily singles out the defendant for comment about his or her interest in the prosecution, and 2) a generic statement about witness interest in the prosecution is addressed in standard instruction No. 3.09 ("you may consider . . . the witness's interest, if any, in the result of this case"). *See also People v. Hankin*, 498 P.2d 1116, 1119 (Colo. 1972) ("while it is unnecessary and poor practice to give the jury a separate instruction on the credibility of the defendant as a witness, the giving of such an instruction does not constitute reversible error").

3.16 STATE OF MIND - PROOF BY CIRCUMSTANTIAL EVIDENCE

The state of mind with which a person commits an act such as ["intentionally"] ["knowingly"] ["recklessly"] may be proved by circumstantial evidence. While witnesses may see and hear, and thus be able to give direct evidence of what a person does or fails to do, there can be no eye-witness account of the state of mind with which the acts are done or omitted. But what a person does or fails to do may or may not indicate the state of mind with which he/she does or refrains from doing an act.

Commentary

"While a defendant's state of mind can rarely be proved by direct evidence, 'the mind of an alleged offender may be read from his or her acts or conduct and the inferences fairly drawn from all of the circumstances.'" *State v. Pudiquet*, 82 Hawai'i 419, 425, 922 P.2d 1032, 1038 (App. 1996); *State v. Leung*, 79 Hawai'i 538, 544, 904 P.2d 552, 558 (App. 1995). "[S]ince intent can rarely be proved by direct evidence, proof by circumstantial evidence and reasonable inferences arising from circumstances surrounding the act is sufficient to establish the requisite intent." *State v. Sadino*, 64 Haw. 427, 430, 642 P.2d 534, 537 (1982); *see also State v. Rushing*, 62 Haw. 102, 612 P.2d 103 (1980); *State v. Hernandez*, 61 Haw 475, 605 P.2d 75 (1980); *State v. Yabusaki*, 58 Haw. 404, 570 P.2d 844 (1977).

TABLE OF INSTRUCTIONS[8]

4. CONSIDERATION OF PARTICULAR EVIDENCE

[8]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

4. CONSIDERATION OF PARTICULAR EVIDENCE

4.01 EVIDENCE ADMITTED FOR A LIMITED PURPOSE

Several times during the trial I told you that certain evidence was allowed into this trial for a particular and limited purpose. When you consider that evidence, you must limit your consideration to that purpose.

Commentary

In some situations where evidence is admissible for one purpose and inadmissible for another, the evidence may, upon request, be admitted for the admissible purpose subject to an instruction to the jury not to consider it for the inadmissible purpose. HRE 105, However,

> [HRE 105] is not designed to provide automatic, uncritical admission in every such instance. . . . 'In situations . . . where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight . . . the judge's power to exclude the evidence altogether would be recognized.'" McCormick [*on* Evidence] § 59 [(2d ed. 1972)].

State v. Timas, 82 Hawai'i 499, 513, 923 P.2d 916, 930 (App. 1996) (quoting Commentary to HRE 105). In *Timas*, the Intermediate Court of Appeals held that the lower court did not abuse its discretion when it implicitly decided that the danger of the jury's misuse of a defendant's hearsay testimony "for the incompetent purpose was more, and its value for the legitimate purpose was less," and declined to admit the testimony. 82 Hawai'i at 513, 913 P.2d at 930.

When evidence is admitted for a limited purpose, the court, upon request, "shall restrict the evidence to its proper scope and instruct the jury accordingly." See HRE 105. "In those cases where trial courts have allowed evidence of other crimes, bad acts, etc., to be admitted, the better practice has been found to be to instruct the jury as to the limited purpose for which the evidence was received." *State v. Chong*, 3 Haw. App. 246, 253, 648 P.2d 1112, 1117 (1982).

Generally, the trial judge may give a cautionary instruction during final jury instructions rather than immediately following receipt of the testimony, when the rights of the accused are otherwise adequately protected. *State v. Perez*, 64 Haw. 232,

638 P.2d 335 (1981). The Intermediate Court of Appeals has "strongly suggest[ed]" that the trial court, "when dealing with evidence of other crimes, wrongs or bad acts, give a cautionary instruction regarding the restrictive use of such evidence prior to the offer of the evidence *and* during the charge to the jury." *State v. Chong*, 3 Haw.App. at 254, 648 P.2d at 118 (emphasis added).

In *Kaeo v. Davis*, 68 Haw. 447, 719 P.2d 387 (1986), the Hawai`i Supreme Court reversed in a civil case because the trial court excluded relevant, albeit prejudicial, evidence. "Nor can we say its admission would have caused confusion of the issues," concluded the court, "for the jury could have been properly instructed that the reports were admitted for the limited purpose of showing notice." 68 Haw. at 457, (*citing* HRE 105).

In *State v. Moore*, 82 Hawai'i 202, 921 P.2d 122 (1996), the trial court admitted the complainant's statements to a police officer that "I told [my husband] I was leaving him" and "[h]e's distraught." At defense counsel's request, the statements were admitted with a limiting instruction that the statements were "limited solely for the purposes of explaining and describing the complainant's then existing mental, emotional or physical condition." 82 Hawai'i at 211 n.8, 921 P.2d at 131 n.8. On appeal, the supreme court held that these statements, even if arguably related to the defendant's state of mind at the time of the shooting, could not support consideration by the jury of an instruction on extreme mental or emotional disturbance manslaughter, as the evidence had been admitted for a limited purpose. 82 Hawai'i at 211, 921 P.2d at 131.

4.02 EVIDENCE APPLICABLE TO ONLY ONE DEFENDANT

Each defendant is entitled to have his/her case decided solely on the evidence that applies to him/her. Some of the evidence in this case was limited to one of the defendants and cannot be considered in the cases of the other. You must limit your consideration of that evidence to the defendant as to whom the evidence was admitted.

Commentary

This instruction is only for use in cases where evidence has been admitted that is applicable to only one defendant. *See* HRE 105 (when evidence admitted for a limited purpose the court upon request "shall restrict the evidence to its proper scope and instruct the jury accordingly"). An example of this might be a co-defendant confession of the limited type still admissible under *Bruton v. United States*, 391 U.S. 123 (1968). *See, e.g.*, *State v. Torres*, 70 Haw. 219, 223, 768 P.2d 230 (1989), *citing Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("admission of a nontestifying codefendant's confession with a proper limiting instruction" does not violate the confrontation clause if the statement is redacted to eliminate not only the co-defendant's name but any reference to the co-defendant's existence).

4.03 AVAILABILITY OF EXHIBITS DURING DELIBERATIONS

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

4.04 MUG SHOTS

The evidence has referred to a photograph of the defendant in the possession of the police. The government has access to photographs of people from different sources and for different purposes. The fact that the police had the defendant's photograph does not mean that he/she committed any offense.

Commentary

The committee recommends that this instruction is to be given only upon defendant's request.

See State v. Huihui , 62 Haw. 142, 612 P.2d 115 (1980) (introduction of words "police mug photographs" in prosecutor's questions to witness was error and trial court should have sustained objection and followed it with a prophylactic instruction); *see also State v. Kutzen*, 1 Haw.App. 406, 620 P.2d 258 (1980) (setting out three criteria to determine whether the admission of police photographs at trial is proper).

4.05 EXPERT WITNESSES

During the trial 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.

Commentary

HRE 602 provides a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he [or she] has personal knowledge of the matter" unless the trial court finds the witness is an "expert witness" under HRE 702, 703, 704, 705, and 706.

HRE 702 permits opinion testimony by experts if "scientific, technical, or other specialized knowledge will assist the trier of fact" and the trial court first qualifies the witness "as an expert by knowledge, skill, experience, training, or education". *See State v. Rinehart*, 8 Haw.App. 638, 819 P.2d 1122 (1991); *State v. Pinero*, 70 Haw 509, 778 P.2d 704 (1989); *but see* the limitations on the general rule imposed by *Pinero*, and *State v. Batangan*, 71 Haw 552, 799 P.2d 48 (1990).

Generally, in order to assist the trier of fact to understand the evidence or determine a fact in issue, an expert must base his or her testimony upon a sound factual foundation; any inferences or opinions must be the product of an explicable and reliable system of analysis; and such opinions must add to the common understanding of the jury. *State v. Fukusaku*, 85 Hawai‘i 462, 472-73, 946 P.2d 32, 42-43 (1997); *State v. Maelega*, 80 Hawai‘i 172, 181, 907 P.2d, 758, 767 (1995); *State v. Montalbo*, 73 Haw. 130, 138, 828 P.2d 1274 (1992); see also HRE 702.

In short, expert testimony must be (1) relevant and (2) reliable. *Fukusaku*, 85 Hawai‘i at 473, 946 P.2d at 43; *State v.*

Samonte, 83 Hawai‘i 507, 533, 928 P.2d 1, 27 (1996); *Maelega*, 80 Hawai‘i at 181, 907 P.2d at 767. In addition, the trial court must determine whether admitting such evidence will be more probative than prejudicial. *Fukusaku*, 85 Hawai‘i at 473, 846 P.2d at 43; *Maelega*, 80 Hawai‘i at 181, 907 P.2d at 767.

With respect to scientific evidence, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court held that the trial court must ensure that any scientific testimony or evidence presented is reliable. Further, the need for a judicial determination of reliability is not limited to novel scientific procedures. See 590 U.S. at 592.

In *Kumho Tire Company, Ltd. v. Carmichael* , 119 S.Ct 1167 (1999), the United States Supreme Court held that the federal evidence rule on expert testimony "makes no relevant distinction between 'scientific knowledge' and 'technical' or 'other specialized' knowledge." A trial court's duty to ensure that only relevant and reliable expert testimony is admitted into evidence is not limited to "scientific" expert testimony but expends to testimony based on technical or specialized knowledge. *Id. But see Fukusaku*, 85 Hawai‘i 462, 946 P.2d 32 (expert testimony based on "technical knowledge" does not call for the same searching inquiry into reliability that is required in the case of testimony based on scientific knowledge).

Daubert cited four factors to use in evaluating the reliability of the proffered expert testimony: whether the knowledge being presented has been tested, whether it has been subject to peer review and publication, the rate of error relevant to the methodology, and the degree of acceptance in the relevant community. Trial courts may consider these same factors when expert testimony depends on personal knowledge or experience. *Kumho Tire*, 119 S.Ct 1167. The Supreme Court added, however, that "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." *Id.* 119 S.Ct. 15 1175.

A determination by the trial court that a witness qualifies as an expert is binding upon the jury only as it relates to the admissibility of the testimony. *See Territory v. Adelmeyer*, 45 Haw. 144, 163, 363 P.2d 979, 989 (1961) ('[e]xperts' opinions vary and the competence, credibility and weight of their testimony is exclusively the province of the jury").

4.06 SEPARATE CONSIDERATION OF MULTIPLE COUNTS/DEFENDANTS

ALTERNATIVE A: MULTIPLE COUNTS, ONE DEFENDANT

The defendant is charged with more than one offense under separate counts in the indictment/complaint. Each count and the evidence that applies to that count is to be considered separately. The fact that you may find the defendant not guilty or guilty of one of the counts charged does not mean that you must reach the same verdict with respect to [any] [the] other count charged.

ALTERNATIVE B: MULTIPLE DEFENDANTS, ONE COUNT

Each defendant has been accused of committing the offense of (charge). You must give separate consideration to the evidence applicable to each defendant. Each defendant is entitled to your separate consideration. You must return a separate verdict for each defendant.

ALTERNATIVE C: MULTIPLE DEFENDANTS, MULTIPLE COUNTS

[Some counts in this case have been charged against some defendants and not against others.] You must give separate consideration to the evidence that applies to each individual defendant. You must consider separately each count charged against each individual defendant.

Commentary

If all defendants are charged in all counts, omit the bracketed language in Alternative C.

4.07 OUT-OF-COURT STATEMENT BY DEFENDANT

As the sole and exclusive judges of the facts and of the credibility of the witnesses, it is your exclusive right to determine whether and to what extent the Defendant's out-of-court statement to police is worthy of belief. In evaluating the reliability and trustworthiness of the out-of-court statement, you should consider all of the circumstances surrounding the making of the statement [, including the use of deception or coercion to obtain the out-of-court statement].

*[There has been conflicting testimony as to whether the Defendant made a statement outside of court. It is for you to decide whether or not the Defendant made the statement. In making this decision, you should consider all of the evidence about the statement, including the circumstances under which the Defendant may have made it.]

Commentary

State v. Robinson, 82 Hawai`i 304, 922 P.2d 358 (1996); *State v. Bowe*, 77 Haw. 51, 881 P.2d 538 (1994); *State v. Kelekolio*, 74 Haw. 479, 849 P.2d 58 (1993).

This instruction is appropriate when the Defendant is disputing the reliability or trustworthiness of an out-of-court statement.

*The bracketed paragraph alone may be submitted to the jury in the situation where the Defendant denies having made the out-of-court statement.

TABLE OF INSTRUCTIONS[9]

5. OFFENSES

[9]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

5. OFFENSES

5.01 GENERIC ELEMENTS INSTRUCTION

In Count (count number) of the Indictment/Complaint, the Defendant (defendant's name) is charged with the offense of (charge).

A person commits the offense of (charge) if he/she (track statutory language).

There are (number) material elements of the offense of (charge), each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are:

1.

2.

3.

4.

5.

Commentary

"The ingredients of an offense, denominated elements in Section 702-205 of the Penal Code, are the conduct, the circumstances attendant to conduct, and the results of conduct, which are specified in the definition of the offense and which negative a defense on the merits." *State v. Pineda*, 70 Haw. 245, 251-52, 768 P.2d 239 (1989).

"It is a grave error to submit a criminal case to a jury without accurately defining the offense charged and its elements." *State v. Pinero*, 70 Haw. 509, 527, 778 P.2d 704 (1989). The court must instruct the jury as to what specific facts it must find in order for it to find the defendant guilty of a particular count. *State v. Correa*, 5 Haw. App. 644, 646-47, 706 P.2d 1321 (1985). When "timeliness of the prosecution and venue are issues of fact,

the jury must be so instructed." *State v. Correa*, 5 Haw.App. at 650.

The Committee was unable to agree on whether negating a defense, when properly raised, should be set forth as an element in the elements instruction, or whether it is sufficient that a clear statement of the prosecution's burden to negate the defense beyond a reasonable doubt be contained in the instruction on the defense. *See* HRS §§ 701-114, 701-115, 702-205; *see also* Ninth Circuit Model Jury Instructions, No. 6.04, 6.05 (1989). For example, if there is evidence of self-defense, add an additional element to the prosecution's burden of proof; *e.g.*, "4. The defendant was not justified in using deadly force."

An affirmative defense is not an element of an offense that must be negated by the prosecution. *State v. Anderson*, 58 Haw. 479, 572 P.2d 159 (1977) (entrapment). With ordinary defenses, however, the prosecution must prove beyond a reasonable doubt facts which negate the defense, and the court should specifically instruct the jury that the prosecution's burden of persuasion includes negating the defense. HRS §§ 701-114, 702-205; *see State v. McNulty*, 60 Haw. 259, 588 P.2d 438 (1978) (self-defense), *cert. denied* 441 U.S. 961 (1979); *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982) (self-defense); *State v. Carson*, 1 Haw.App. 214, 617 P.2d 573 (1980); *see also State v. Cordeira*, 68 Haw. 207, 707 P.2d 373 (1985) (alibi is in the nature of rebuttal evidence).

5.02 RESERVED

5.03 INCLUDED OFFENSE -- GENERIC

If and only if you find the defendant not guilty of (charged offense), or you are unable to reach a unanimous verdict as to this offense, then you must consider whether the defendant is guilty or not guilty of the included offense of (included offense).

A person commits the offense of (included offense) if he/she (track statutory language).

There are (number) material elements of this offense, each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are:

1.

2.

3.

4.

5.

Commentary

See HRS § 701-109(4) and (5). According to *State v. Sneed*, 68 Haw. 463, 464, 718 P.2d 280, 281 (1986), "[t]he doctrine evolved historically as an aid to the prosecution when there was a failure of proof of all of the elements necessary for conviction of the accusation." "From the defendant's point of view," however, "it provides the jury with an alternative to a guilty verdict on the greater offense." *Id.*, 68 Haw. at 465, 718 P.2d at 281. "[T]he prosecution as well as defendant may request an instruction on a lesser included offense if there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the lesser included offense." *State v. Kinnane*, 79 Hawai`i 46, 897 P.2d 973 (1995); *Sneed*, 68 Haw. at 465, 718 P.2d at 282; *see also State v. Williams*, 6 Haw.App. 17, 708 P.2d 834 (1985) (it is reversible error not to give a lesser included offense instruction to which a defendant is entitled upon timely request therefor).

According to HRS § 701-109(5), "[t]he court is not obligated to charge the jury with respect to an included offense

unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *State v. Smith*, 91 Hawai'i 450, 984 P.2d 1276 (1999). In *State v. Ferreira*, 8 Haw.App. 1, 791 P.2d 407, 409 (1990), the Intermediate Court of Appeals interpreted this language to require "the giving of included offense instructions over both the prosecution's and the defendant's objections." *See also State v. Nakachi*, 7 Haw.App. 28, 742 P.2d 388 (1987) (court upheld lesser included offense instruction given over the objection of the defendant).

The trial judge must bring all included offense instructions that are supported by the evidence to the attention of the parties. The trial judge must then give each such instruction to the jury unless (1) the prosecution does not request that included instructions be given and (2) the defendant specifically objects to the included offense instructions for tactical reasons. If the prosecution does not make a request and the defendant makes a tactical objection, the trial judge must then exercise his or her discretion as to whether the included offense instructions should be given. *State v. Kupau*, 76 Hawai`i 387, 879 P.2d 492 (1994).

The trial judge's discretion should be guided by the nature of the evidence presented during the trial, as well as the extent to which the defendant appears to understand the risks involved. For that purpose the trial judge must enter into a colloquy, on the record, directly with the defendant to insure that the defendant understands the effect and potential consequences of waiving the right to have the jury instructed regarding included offenses. *State v. Kinnane*, 79 Hawai`i 46, 897 P.2d 973. *State v. Ito*, 85 Hawai`i 44, 936 P.2d 1292 (App. 1997).

A court must follow the same procedures where a defendant withdraws an included offense instruction for which there is a rational basis in the evidence, as those required where a defendant objects to an included offense instruction. *State v. Ito*, 85 Hawai`i 44, 936 P.2d 1292 (App. 1997).

In *State v. Pinero*, 70 Haw. 509, 524, 778 P.2d 704, 714 (1989), the court ruled that "[i]f a lesser-included offense instruction is given, it is customary to tell the jury to consider first the greater offense, and to move on to consideration of the lesser offense only if they have some reasonable doubt as to guilt of the greater offense." *See also State v. Horn*, 8 Haw.App. 167, 796 P.2d 503 (1990) and *State v. Reyes*, 5 Haw.App. 651, 706 P.2d 1326 (1985). The jury need not unanimously reject the greater charge in order to consider the lesser included offense, and an instruction requiring this procedure is reversible error. *State v. Ferreira*, 8 Haw.App. 1, 791 P.2d 407(1990).

If there is no rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him

of the included offense, the trial court should not tender a lesser included offense instruction. *State v. Moore*, 82 Hawai`i 202, 921 P.2d 122 (1996); *see also Sneed*, 68 Haw. 463, 718 P.2d 280; *Williams*, 6 Haw.App. 17, 708 P.2d 834; *State v. Smith*, 91 Hawai'i 450, 984 P.2d 1276 (1999). The test is *not* the "any support in the evidence no matter how weak, inconclusive or unsatisfactory" standard established for defense instructions in *State v. O'Daniel*, 62 Haw. 518, 616 P.2d 1383 (1980), but rather the "rational basis" test provided in HRS § 701-109(5). *Sneed*, 68 Haw. at 464, 718 P.2d at 281; *see also Nakachi*, 7 Haw.App. at 31, 742 P.2d at 391 ("the issue we face is the same as we would be facing if Nakachi were appealing the denial of [a] post trial motion for judgment of acquittal on the included offense").

Absent a waiver of the statute of limitations, a trial court is not required to read a jury instruction for a time-barred lesser included offense because there is no rational basis to furnish a jury instruction on the lesser included offense. *See, e.g.*, *State v. Timoteo*, 87 Hawai`i 108, 952 P.2d 865 (1997) (when defendant requested the jury instruction on simple trespass, he effectively waived the statute of limitations and agreed that the jury could convict him of simple trespass, rather than burglary 1°); *State v. Torres*, 85 Hawai`i 417, 945 P.2d 849 (App. 1997) (there was no rational basis to instruct jury on the time-barred lesser included offense because no lesser was requested or brought to the attention of the parties and therefore no waiver of the statute of limitations was elicited or made).

It is not error to refuse to instruct a jury on a lesser included offense if the offense is not a lesser included offense of the offense charged as defined by HRS § 701-109(4). *State v. Pukahi*, 70 Haw. 456, 776 P.2d 392 (1989); *see also Kinnane*, 79 Hawai`i 46, 897 P.2d 973; *State v. Sugimoto*, 62 Haw. 259, 614 P.2d 386 (1980); *State v. Doi*, 6 Haw.App. 115, 711 P.2d 736 (1985).

When a defendant is convicted of an offense and a "lesser" included offense, the court simply dismisses the "lesser" included offense. *Tomomitsu v. State*, No. 21545, slip op., n.5 (App. Jan. 12, 2000).

The following cases are appellate court decisions indicating whether a particular offense is an included offense of another offense. Refer to the greater offense to determine whether an appellate court has ruled upon the question of whether a particular offense is included in a greater offense.

CHAPTER 707

MURDER

Murder 2º: Murder in the second degree is not a lesser of murder in the first degree, as murder in the first degree requires proof Defendant "intended to murder both victims as part of the *same* plan," while murder in the second degree is based on Defendant acting with "separate, unrelated states of mind to cause the death of each victim." *State v. Briones*, 74 Haw. 442, 848 P.2d 966 (1993).

Manslaughter: manslaughter as defined by HRS § 707-702(1)(a) "unquestionably" is a lesser included offense of murder since one cannot commit murder without also having committed manslaughter. *State v. Pinero*, 70 Haw. 509, 778 P.2d 704 (1989); *Whiting v. State*, 88 Haw. 356 966 P.2d 1082 (1998).

Attempted Robbery: Because attempted murder and attempted robbery have different statutory elements and mens rea requirements, one is not a lesser included offense of the other. *State v. Mendonca* , 68 Haw. 280, 711 P.2d 731 (1985); *see also State v. Ah Choy*, 70 Haw. 618, 780 P.2d 1097 (1989).

Reckless Endangering 2º: Reckless endangering in the second degree is a lesser included offense of attempted murder. *State v. Feliciano* , 62 Haw. 637, 618 P.2d 306 (1980); *State v. Samonte*, 83 Haw. 507, 928 P.2d 1 (1996).

MANSLAUGHTER

Negligent Homicide: Supreme court rejects "over-literal" reading of HRS § 701-109 4(a) and (c) and holds that negligent homicide is a lesser included offense of manslaughter. *State v. Smythe*, 72 Haw. 217, 811 P.2d 1100 (1991).

Assault 2º: Assault in the second degree is merely one of the lesser included offenses of attempted manslaughter. *State v. Horn*, 8 Haw.App. 167, 796 P.2d 503 (1990).

ASSAULT 1º

Attempted Assault 1º: Attempted assault in the first degree is an included offense of assault in the first degree, and thus, a "deficiency" in the indictment does not preclude retrial on attempted assault in the first degree. *State v. Malufau*, 80 Hawai`i 126, 906 P.2d 612 (1995).

Assault 2º and 3º: Assault in the second degree and third degree are lesser included offenses of assault in the first

degree. *State v. Malufau*, 80 Hawai`i 126, 906 P.2d 612 (1995).

ASSAULT 2º

Assault 3º: Assault in the second degree under HRS § 707-712(1)(a) necessarily includes the lesser offense of assault in the third degree under HRS § 707-712. *State v. Ito*, 85 Hawai`i 44, 936 P.2d 1292 (App. 1997); *State v. Kupau*, 76 Hawai`i 387, 879 P.2d 492 (1994).

Assault 3º: Assault in the third degree is not a lesser included offense of assault in the second degree, § 707-711(c) because of the requirement that the offense be committed against a correctional worker. *State v. Tupuola*, 68 Haw. 276, 711 P.2d 1289 (1985).

ASSAULT 3º

Harassment: Harassment is not a lesser included offense of assault in the third degree. *State v. Kupau*, 63 Haw. 1, 620 P.2d 250 (1980).

ASSAULT AGAINST A POLICE OFFICER

Assault 3º: Assault in the third degree is a lesser included offense of assault against a police officer. *State v. Elliott*, 77 Hawai`i 309, 884 P.2d 372 (1994).

TERRORISTIC THREATENING 1º

Terroristic Threatening 2º: "Unquestionably," terroristic threatening in the second degree can be an offense included within terroristic threatening in the first degree. *State v. Nakachi*, 7 Haw.App. 28, 742 P.2d 388 (1987).

Harassment: Harassment is not a lesser included offense of terroristic threatening in the first degree. *State v. Burdett*, 70 Haw. 85, 762 P.2d 164 (1988).

SEXUAL ASSAULT 2º

Sexual Assault 4º: Sexual assault in the fourth degree and attempted sexual assault in the fourth degree are included offenses of attempted sexual assault in the second degree. *State v. Kinnane*, 79 Hawai`i 46, 897 P.2d 973 (1995).

Indecent Exposure: Indecent exposure is an included offense of attempted second degree sodomy. *State v. Smith*, 68 Haw. 304, 712 P.2d 496 (1986).

SEXUAL ASSAULT 3º

Sexual Assault 4º: Sexual assault in the fourth degree under HRS § 707-733(1)(a) is a lesser included offense of sexual assault in the third degree under HRS § 707-732(1)(e), as the only difference in the required proof is the latter offense requires "strong compulsion" while the former requires only "compulsion." *State v. Caprio*, 85 Hawai`i 92, 937 P.2d 933 (App. 1997).

Sexual Assault 4º: Sexual assault in the fourth degree as defined by HRS § 707-733(1)(a) is not a lesser included offense of sexual assault in the third degree, HRS § 707-732(1)(b), because sexual assault in the fourth degree requires proof of an additional fact - compulsion - and it does not involve a less serious injury or less culpable state of mind. *State v. Buch*, 83 Hawai`i, 308, 926 P.2d 599 (1996).

ATTEMPTED EXTORTION 2º

Terroristic Threatening 2º: Terroristic threatening in the second degree is not a lesser included offense of attempted extortion in the second degree. *State v. Pukahi*, 70 Haw. 456, 776 P.2d 392 (1989).

CHAPTER 708

BURGLARY

Theft: Theft is not a lesser included offense of burglary in the first degree. *State v. Alvey*, 2 Haw.App. 579, 637 P.2d 780 (1981).

Trespass: Criminal trespass in the first degree is a lesser included offense of burglary in the first degree. *State v. Williams*, 6 Haw.App. 17, 708 P.2d 834 (1985).

ROBBERY 1º

Robbery 2º: The difference between robbery in the first degree and robbery in the second degree is the absence of a dangerous instrument in the latter. *State v. Halemanu*, 3 Haw.App. 300, 650 P.2d 587 (1982). *State v. Arlt*, 9 Haw.App. 263, 833 P.2d 902 (1992) (robbery in the second degree is a lesser of robbery in the first degree, HRS § 708-840(1)(b)(i)).

Assault 3º: Assault in the third degree is not an included offense of robbery in the first degree because robbery requires a finding that force was used, whereas assault in

the third degree requires a finding of infliction of bodily injury. *State v. Doi*, 6 Haw.App. 115, 711 P.2d 736 (1985). *State v. Arlt*, 9 Haw.App. 263, 833 P.2d 902 (1992) (assault in the third degree is not a lesser included offense of robbery in the first degree).

Theft and Attempted Theft: Theft and attempted theft, regardless of degree, are included offenses of robbery. *State v. Vinge*, 81 Hawai`i 309, 916 P.2d 1210 (1996). See also *Tomomitsu v. State*, No. 21545, slip op., n.5 (App. Jan. 12, 2000). Robbery is simply an aggravated form of theft. Where, on the facts, a defendant may not be convicted of theft, a fortiori he may not be convicted of robbery. *State v. Brighter*, 62 Haw. 25, 608 P.2d 855 (1980).

Receiving Stolen Property: Receiving stolen property is not a lesser included offense of robbery in the first degree. *State v. Sugimoto*, 62 Haw. 259, 614 P.2d 386 (1980).

Burglary 1º: Burglary in the first degree is not an included offense of robbery in the first degree, as it is possible to commit robbery without committing burglary. *State v. Vinge*, 81 Hawai`i 309, 916 P.2d 1210 (1996).

FRAUDULENT USE OF CREDIT CARD

Theft 2º: Theft in the second degree is not a lesser included offense of fraudulent use of a credit card. *State v. Freeman*, 70 Haw. 434, 774 P.2d 888 (1989).

CHAPTER 710

INTIMIDATING A WITNESS

Terroristic Threatening 1º: Terroristic Threatening is not a lesser included offense of Intimidating a Witness under HRS § 701-109(a) & (c) because of the different mens rea requirements of the two offenses, their different treatment in the legislative scheme, and the end results of the crimes are distinct. *State v. Alston* , 75 Haw. 517, 865 P.2d 157 (1994).

CHAPTER 711

DISORDERLY CONDUCT

Harassment: Harassment is not a lesser included offense of disorderly conduct. *State v. Woicek*, 63 Haw. 548, 632 P.2d 654 (1981).

CHAPTER 712

PROMOTING DANGEROUS DRUG 1º

Promoting Dangerous Drug 2º: Promoting dangerous drug in the second degree, HRS § 712-1242(1)(b)(i), is a lesser included offense of promoting dangerous drug in the first degree, HRS § 712-1241(1)(a)(i). *State v. Wallace*, 80 Hawai`i 382, 910 P.2d 695 (1996).

Promoting Dangerous Drug 3º: Promoting dangerous drug in the third degree, HRS § 712-1243(1), is a lesser included offense of promoting dangerous drug in the first degree, HRS § 712-1241(1)(a)(i). *State v. Wallace*, 80 Hawai`i 382, 910 P.2d 695 (1996).

PROMOTING DETRIMENTAL DRUG 1º

Promoting Detrimental Drug 2º: Although HRS § 712-1248(1)(d) (distributing marijuana in any amount) is a lesser included offense of HRS § 712-1247(1)(f) (distributing 1 oz. or more of a substance containing marijuana), it was not a lesser included of the offense actually charged, HRS § 712-1247 (1)(h) (selling or bartering marijuana). *State v. Rullman*, 78 Hawai`i 488, 896 P.2d 944 (App. 1995).

PROMOTING PRISON CONTRABAND 1º

Promoting Prison Contraband 2º: The offense in HRS § 710-1023 (promoting prison contraband in the second degree) is a lesser included offense of that in HRS §710-1022 (promoting prison contraband in the first degree) when the charge is based on in-prison possession of marijuana. *State v. Hatori*, 92 Hawai'i 217, 990 P.2d 115 (App.1999).

CHAPTER 134

FIREARMS

Prohibited Ownership or Possession of Firearm or Ammunition: There are no lesser included offenses of HRS § 134-7(b) and therefore the cases may not be remanded for retrial. *State v. Sanchez*, 82 Hawai`i 517, 923 P.2d 934 (1996).

TRAFFIC

DUTY UPON STRIKING ATTENDED VEHICLE OR PROPERTY

Unattended Property: The offense of violating HRS § 291C-15, which involves the duties with respect to collisions with unattended property, is an included offense of HRS § 291C-13 and -14, which involves the duties with respect to collisions with attended property. *State v. Gartrell*, 9 Haw.App. 156, 828 P.2d 298 (1992).

DRIVING WHILE LICENSE IS SUSPENDED

Driving Without a License: Since driving without a license is not a lesser included offense of driving while license suspended, the amended complaint charged an additional or different charge from the original complaint and was thus improper. *State v. Matautia*, 81 Hawai`i 76, 912 P.2d 573 (App. 1996).

5.04 MURDER IN THE SECOND DEGREE -- BY OMISSION -- GENERIC -- H.R.S. §§ 707-701.5 and 702-203(2)

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

A person commits the offense of Murder in the Second Degree if he/she causes the death of another person by intentionally or knowingly failing to (specify the duty), a duty imposed by law upon a (specify the relationship that creates the duty), intending or knowing that the failure to perform that duty would cause the death of the other person.

There are four material elements of the offense of Murder in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That the Defendant was (specify factual finding(s) necessary to raise a legal duty); and

2. That, on or about (date) in the [City and] County of (name of county), the Defendant intentionally or knowingly failed to (specify the duty), a duty imposed by law upon a (specify the relationship that creates the duty); and

3. That the Defendant failed to perform that duty intending or knowing that his/her failure would cause the death of the other person; and

4. That the Defendant's failure to perform that duty caused the death of the other person.

Commentary

H.R.S. §§ 707-701.5, 702-203(2), 702-206(1) and (2). *State v. Robinson*, 82 Hawai`i 304, 922 P.2d 358 (1996), *State v. Cabral*, 77 Hawai`i 216, 883 P.2d 638 (App. 1994); *State v. Cabral*, 8 Haw. App. 506, 810 P.2d 672 (1991), *aff'd.* 72 Haw. 603, 822 P.2d 957 (Haw. 1991); *State v. Tucker*, 10 Haw. App. 43, 861 P.2d 24 (1993), *cert. gr., remanded on other issues*, 10 Haw. App. 73, 861 P.2d 37 (1993).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The Committee discussed whether element two of the instruction could be satisfied by merely showing a voluntary omission. *But see* H.R.S. § 702-200(1).

[5.04A Renumbered 6/29/00. See 9.07B]

TABLE OF INSTRUCTIONS[10]

6. RESPONSIBILITY

[10]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

6. RESPONSIBILITY

6.01 ACCOMPLICE

A defendant charged with committing an offense may be guilty because he/she is an accomplice of another person in the commission of the offense. The prosecution must prove accomplice liability beyond a reasonable doubt.

A person is an accomplice of another in the commission of an offense if:

1. With the intent to promote or facilitate the commission of the offense, he/she

a. solicits the other person to commit it; or

b. aids or agrees or attempts to aid the other person in the planning or commission of the offense; [or]

[c. having a legal duty to prevent the commission of the offense, fails to make a reasonable effort to do so;] [or]

[2. His/her conduct is expressly declared by law to establish his/her complicity.]

Mere presence at the scene of an offense or knowledge that an offense is being committed, without more, does not make a person an accomplice to the offense. However, if a person plans or participates in the commission of an offense with the intent to promote or facilitate the offense, he/she is an accomplice to the commission of the offense.

Commentary

HRS §§ 702-221 through 702-226 describe "liability for conduct of another" or accomplice liability. If an indictment charges a defendant as a principal, it is not error to instruct the jury that under the facts of a particular case, the defendant may be guilty

as an accomplice. *State v. Apao*, 59 Haw. 625, 644, 586 P.2d 250, 262 (1978); *see also State v. Fukusaku*, 85 Hawai`i 462, 946 P.2d 32 (1997) (one who is charged as a principal can be convicted as an accomplice without accomplice allegations being made in the indictment); *State v. Sequin*, 9 Haw.App. 551, 851 P.2d 926 (1993) (a person can violate HRS § 134-6, place to keep firearms, either as a principal or as an accomplice). The Commentary to HRS § 702-221 states that "[d]istinctions between principals and accessories have been dispensed with and a defendant may be convicted directly of an offense committed by another for whose conduct he is accountable." *Apao*, 59 Haw. at 644, 586 P.2d at 262; *State v. Churchill*, 4 Haw.App. 276, 283, 664 P.2d 757, 762 (1983).

In *State v. Soares*, 72 Haw. 278, 815 P.2d 428 (1991), the court set aside an accomplice conviction because the accomplice instruction did not contain a mens rea element thereby relieving the prosecution of its burden of proving that defendants acted with the requisite intent. To be guilty as an accomplice, a person must act with the intent of promoting or facilitating the commission of the crime. *Id.* For example, "with regard to accomplice liability for second degree murder, it is not necessary for the State to prove that the defendant 'intentionally or knowingly' caused the death of another. Rather, under HRS § 702-222, the accomplice liability statute, the State is required to prove beyond a reasonable doubt that with regard to his or her state of mind, the defendant had the intent to 'promote or facilitate' the commission of second degree murder." *State v. Brantley*, 84 Hawai`i 112, 121, 929 P.2d 1362, 1371 (App. 1996).

An accomplice instruction which advises the jury that such testimony should be viewed with caution or suspicion is not required in *every* case where the accomplice substantially aids the prosecution's proof. *State v. Okumura*, 78 Hawai`i 383, 894 P.2d 80 (1995) (overruling *State v. Chang*, 46 Haw. 22, 374 P.2d 5 (1962)). A court in its discretion may give such an instruction, considering whether the jury's attention was adequately drawn to the possible motives that the accomplice witness may have had to testify falsely. *Okumura*, 78 Hawai`i 383, 894 P.2d 80. *See* HAWJIC 6.01A.

The theory of accomplice liability applies when use or possession of firearm is an element of the offense or is a separate offense, even though the defendant did not engage in the requisite conduct. *Garringer v. State*, 80 Hawai`i 327, 332, 909 P.2d 1133 (1996). However, HRS § 706-660.1(1) precludes the imposition of enhanced sentencing with respect to a defendant's conviction of robbery where the defendant did not personally possess, threaten to use, or use a firearm while engaged in the commission of that felony. *Garringer*, 80 Hawai`i at 333-34, 909 P.2d at 1148-49. The circuit court should instruct the jury, by special verdict interrogatories, to make any and all findings relevant to the imposition of an enhanced sentence under HRS § 706-660.1. *Garringer*, 80 Hawai`i at 335, 909 P.2d at 1150. *See* HAWJIC 6.01C.

6.01A CAUTION AS TO ACCOMPLICE

The testimony of an alleged accomplice should be examined and weighed by you with greater care and caution than the testimony of ordinary witnesses. You should decide whether the witness's testimony has been affected by the witness's interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness stands to receive because of his/her testimony, or by the witness's fear of retaliation from the government.

Commentary

This instruction is not mandatory whenever an accomplice instruction is given. Rather, "in some cases in which the testimony of an accomplice substantially aids the prosecution's proof, a trial court may act properly within its discretion if it refuses or otherwise fails to give an accomplice witness instruction." *State v. Okumura*, 78 Hawai`i 383, 408, 894 P.2d 80, 105 (1995).

The purpose of an accomplice instruction is to assure that the jury realizes that an admitted accomplice's testimony may be affected by the hope of a favor or conversely by the fear of reprisal from the government and considers this factor in weighing such person's testimony. *United States v. Beasley*, 519 F.2d 233, 243 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 956 (1976).

"In deciding whether to give an accomplice witness instruction . . . the trial court must consider the need for such an instruction in light of the evidence presented regarding the witness's possible motives to fabricate, particularly the cross-examination of the accomplice witness, as well as the opening statements and arguments made by counsel, and weigh that against the disparaging effect that the giving of an accomplice witness instruction could have." *Okumura*, 78 Hawai`i at 408, 894 P.2d at 105. "Other relevant considerations should also be considered by the trial court." *Id.* For example, the Hawai`i Supreme Court in *Okumura* quoted a California case, as follows:

> When one of several defendants takes the stand to confess his own guilt and incriminates his codefendants, the accomplice instruction should be given. If, however, each of several defendants testifies in his own defense

> and none is called as a witness for or against the others, the instructions are not appropriate. Even where one defendant denies participation and incriminates another, the instruction should not be given.

78 Hawai`i at 408 n.21, 894 P.2d at 105 n.21 (*quoting People v. Fowler*, 196 Cal.App.3d 79, 86, 241 Cal.Rptr. 571, 575 (1987) (*quoting People v. Sawyer*, 256 Cal.App.2d 66, 73, 63 Cal.Rptr. 749, 753 (1967))).

"Instructions that simply tell the jury to be suspicious of an accomplice's testimony do not ensure that jurors will properly consider the factors that could be influencing the testimony." *Okumura*, 78 Hawai`i at 408 n.20, 894 P.2d at 105 n.20. "Indeed, if an instruction that does not delineate those factors is given, jurors might discredit a truthful accomplice witness simply because of the instruction, even though the jurors may not have thought that the witness's testimony was affected by the hope of a favor or by the fear of reprisal from the government." *Id.* "Therefore, if accomplice witness instructions are to be given in any particular case, . . . the trial court, with the assistance of counsel, . . . [should] craft accomplice witness instructions that do more than simply tell the jury to be suspicious of the accomplice's testimony. *Id.*

[6.01C Renumbered 10/27/03. See 8.07A.]

6.02 STATE OF MIND -- INTENTIONALLY

A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

Commentary

See HRS § 702-206(1). Where the evidence of crime was such that it could only have been done intentionally, the use of the surplus words "or knowingly" in a jury instruction was not error. *State v. Reiger*, 64 Haw. 510, 644 P.2d 959 (1982) (attempted murder).

"The basic distinction between a person who acts purposely (intentionally) and one who acts knowingly is that the former actor *desires* to engage in given conduct (which happens to amount to a crime) or *desires* by his conduct to cause a prohibited harmful result, while the latter actor is merely *aware* that he is engaging in given conduct (which happens to amount to a crime) or is *aware* that it is practically certain that his conduct will cause a prohibited harmful result." *State v. Pinero*, 70 Haw. 509, 522 n.7, 778 P.2d 704 (1989) (emphasis in original).

6.03 STATE OF MIND -- KNOWINGLY

A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

Commentary

See HRS § 702-206(2).

"The basic distinction between a person who acts purposely (intentionally) and one who acts knowingly is that the former actor *desires* to engage in given conduct (which happens to amount to a crime) or *desires* by his conduct to cause a prohibited harmful result, while the latter actor is merely *aware* that he is engaging in given conduct (which happens to amount to a crime) or is *aware* that it is practically certain that his conduct will cause a prohibited harmful result." *State v. Pinero*, 70 Haw. 509, 522 n.7, 778 P.2d 704 (1989) (emphasis in original).

6.04 STATE OF MIND -- RECKLESSLY

A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

A risk is substantial and unjustifiable if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law abiding person would observe in the same situation.

Commentary

See HRS 702-206(3).

"The difference between the terms recklessly and negligently, as usually defined, is one of kind, rather than degree." *State v. Pinero*, 70 Haw. 509, 522 n.7, 778 P.2d 704 (1989). "Each actor creates a *risk* of harm." *Id.* (emphasis in original). "The reckless actor is *aware* of the risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." *Id.* (emphasis in original).

6.05 STATE OF MIND -- NEGLIGENTLY

A person acts negligently with respect to his conduct when he should be aware of a substantial and unjustifiable risk taken that the person's conduct is of the specified nature.

A person acts negligently with respect to attendant circumstances when he should be aware of a substantial and unjustifiable risk that such circumstances exist.

A person acts negligently with respect to a result of his conduct when he should be aware of a substantial and unjustifiable risk that his conduct will cause such a result.

A risk is substantial and unjustifiable if the person's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a law-abiding person would observe in the same situation.

Commentary

See 702-206(4).

"The difference between the terms recklessly and negligently, as usually defined, is one of kind, rather than degree." *State v. Pinero*, 70 Haw. 509, 522 n.7, 778 P.2d 704 (1989). "Each actor creates a *risk* of harm." *Id.* (emphasis in original). "The reckless actor is *aware* of the risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." *Id.* (emphasis in original).

6.06 POSSESSION

A person is in possession of an object if the person knowingly procured or received the thing possessed or was aware of his/her control of it for a sufficient period to have terminated his/her possession.

The law recognizes two kinds of possession: actual possession and constructive possession.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing for a sufficient period to terminate his/her possession of it, either directly or through another person or persons, is then in constructive possession of it. The fact that a person is near an object or is present or associated with a person who controls an object, without more, is not sufficient to support a finding of possession.

[The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.]

The element of possession has been proved if you find beyond a reasonable doubt that the defendant had actual or constructive possession[, either solely or jointly with others].

Commentary

Possession is a voluntary act only if the defendant knowingly procured or received the thing possessed or if the defendant was aware of the defendant's control of it for a sufficient period to have been able to terminate the defendant's possession. HRS § 702-

202. *State v. Jenkins* , No. 22071, slip op. (Apr. 6, 2000) (overruling *State v. Mundell*). *See State v. Auwae*, 89 Hawai`i 59, 968 P.2d 1070 (App. 1998); *State v. Lloyd*, 61 Haw. 505, 514 n. 7, 606 P.2d 913, 919 (1980).

Thus, under HRS § 702-202, an individual may be found to have possessed a thing *only* if he/she did so *knowingly* or intentionally. However, the knowing requisite applies only for the possession of the physical object *itself*. *State v. Jenkins*, *supra*. The particular qualities or properties of the object that make it a crime to possess the object are governed by the state of mind specified in the offense. When the offense *lacks* a scienter requirement, possession as to the particular qualities of an object that make possession of it a crime may be satisfied by a finding of recklessness. HRS § 702-204.

Therefore, possession must be analyzed as a *two-prong analysis*: (1) possession of an object itself is satisfied where the person acts knowingly; and (2) the attendant circumstances -- the particular qualities of the object that make it illegal to posses it -- are satisfied by the specific state of mind stated in the offense or by a reckless state of mind when the offense lacks a scienter requirement. *State v. Jenkins*, *supra* (overruling *State v. Mundell*, 8 Haw.App. 610, 822 P.2d 23 (1991) and *State v. Auwae*, 89 Hawai`i 59 (App. 1998) to the extent incompatible with the *Jenkins* analysis.)

The term "*control*" is subsumed in the definition of "possession" and the same two-pronged analysis would apply. *State v. Jenkins*, *supra*. While " *carrying*" and "possessing" are not synonymous (e.g. the place to keep offense, HRS § 134-6, employs "carry" in terms of carrying on the person and carrying in a vehicle), "carrying" implies personal agency and some degree of possession. Thus, the knowing requirement of HRS § 702-202 is triggered, and the two-pronged analysis applies.

In *State v. Mundell*, 8 Haw.App. 610, 822 P.2d 23 (1991), the defendant argued that drug offenses require him to have actual possession of contraband on his person and that constructive possession is not sufficient to support the charge. "[T]he legislature intended to impose penal sanctions," ruled the *Mundell* court, "for constructive as well as actual possession of contraband items." 8 Haw.App. at 618-619, 822 P.2d 27-28. To support a finding of constructive possession the evidence must show "a sufficient nexus between the accused and the drug to permit an inference that the accused has both the power and the intent to exercise dominion and control over the drug." 8 Haw.App. at 622. "Mere proximity to the [object], mere presence, or mere association with the person who does control the [object] is insufficient to support a finding of possession." *Id*; *see also State v. Opupele*, 88 Hawai`i 433, 967 P.2d 265 (1998).

HRS § 712-1251 (possession in a motor vehicle) states, "the presence of a dangerous drug, harmful drug, or detrimental drug in a motor vehicle, other than a public omnibus, is prima facie evidence of knowing possession thereof by each and every person in the vehicle at the time the drug is found." *State v. Brighter*, 61 Haw. 99, 595 P.2d 1072 (1979) (absent a clarifying statement that HRS § 712-1251 creates a prima facia inference as to dealership quantities, and not a certainty, an instruction based on HRS § 712-1251 improperly shifted the burden of proof of possession from the prosecution to the defendant); *State v. Pimental*, 61 Haw. 308, 603 P.2d 141 (1979); *State v. Fabio*, 1 Haw.App. 544, 622 P.2d 619 (1981).

In *State v. Reed*, 77 Hawai`i 72, 88, 881 P.2d 1218, 1234 (1994), the Hawai`i Supreme Court held that despite the fact the prohibited drug was delivered in three separate bindles on the day of the incident, nothing in the statute requires that the defendant "possess at any one time" 1/8 ounce or more of the substance or that the substance be delivered all at once in a single container. The defendant had agreed to give, and actually delivered a substance weighing more than 1/8 ounce in the aggregate, and actual delivery is not required for distribution. *Id.*

Possession of a microscopic amount of a drug in combination with other factors indicating an inability to use or sell the narcotic may constitute a *de minimis* infraction, although "traffic in narcotics can hardly be said to be a *de minimis* offense." *State v. Reed*, 77 Hawai`i 72, 85, 881 P.2d 1218, 1231 (1994); *see also State v. Schofill*, 63 Haw. 77, 84, 621 P.2d 364, 370 (1980); *State v. Vance*, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979). However, dismissal of a prosecution pursuant to HRS § 702-236 is within the discretion of the court, and is not a defense. *State v. Reed*, 77 Hawai`i 72, 85, 881 P.2d 1218, 1231 (1994).

The Hawai`i appellate courts have not previously addressed the defense of possession for the sole purpose of disposing of contraband or reporting it to police. *State v. Opupele*, 88 Hawai`i 433, 967 P.2d 265 (1998). While the *Opupele* decision noted that "courts in other jurisdictions have recognized this as a defense to a criminal prosecution," the supreme court found that under the facts present in the *Opupele* case it was unnecessary to decide whether this defense should be recognized. *Id.* at 439.

TABLE OF INSTRUCTIONS[11]

7. SPECIFIC DEFENSES

[11]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

7. SPECIFIC DEFENSES

INTRODUCTORY COMMENT

A defendant "is entitled to an instruction on every defense or theory of defense having *any* support in the evidence . . . no matter how weak, inconclusive or unsatisfactory the evidence may be." *State v. Robinson*, 82 Hawai`i 304, 922 P.2d 358 (1996); *State v. O'Daniel*, 62 Haw. 518, 527, 616 P.2d 1383, 1390 (1980) (emphasis in original); *see also State v. Pinero*, 70 Haw. 509, 778 P.2d 704 (1989); *State v. Lira*, 70 Haw. 23, 759 P.2d 869 (1988); *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987); *State v. Russo*, 69 Haw. 72, 734 P.2d 156 (1987); *State v. Cordeira*, 68 Haw. 207, 707 P.2d 373 (1985); *State v. Unea*, 60 Haw. 504, 591 P.2d 615 (1979); *State v. Riveira*, 59 Haw. 148, 577 P.2d 793 (1978); *State v. Warner*, 58 Haw. 492, 573 P.2d 959 (1977); *State v. Dumlao*, 6 Haw.App. 173, 715 P.2d 822 (1977); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971); *State v. Irvin*, 53 Haw. 119, 488 P.2d 327 (1971); *State v. Chang*, 46 Haw. 22, 347 P.2d 5 (1962); *Territory v. Alcantara*, 24 Haw. 197 (1918).

The court should review the evidence "in a light most favorable to [the defendant] in determining whether or not the instruction should be given." *Lira*, 70 Haw. at 30, 759 P.2d at 873; *O'Daniel*, 62 Haw. at 527, 616 P.2d at 1390-91.

But "where evidentiary support for the asserted defense, or any of its essential components, is clearly lacking, it would not be error for the trial court either to refuse to charge on the issue or to instruct the jury not to consider it." *Lira*, 70 Haw. 23, 759 P.2d 869; *Russo*, 69 Haw. at 76, 734 P.2d at 158; *State v. Manloloyo*, 61 Haw. 193, 600 P.2d 1139 (1979); *State v. Horn*, 58 Haw. 252, 566 P.2d 1378 (1977).

The Hawai`i Penal Code "places an initial burden on the defendant to come forward with some credible evidence of facts constituting the defense, unless, of course, those facts are supplied by the prosecution's witnesses." Commentary to HRS § 701-115 (1985); *see also State v. Gabrillo*, 10 Haw.App. 448, 877 P.2d 891 (1994). If affirmative defenses are not involved and the defendant introduces evidence of a defense or the evidence is provided by the government's witnesses, the defendant becomes "entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt." HRS § 701-115(2)(a) (1985); *Gabrillo*, 10 Haw.App. 448, 877 P.2d 891.

A defendant is entitled to have the jury instructed with inconsistent theories of defense if there is evidence supporting the theories. *See Lira*, 70 Haw. at 29, 759 P.2d at 873 ("[a] seeming inconsistency of defenses thus did not preclude an

instruction on consent"); *State v. Pavao*, 81 Hawai`i 142, 913 P.2d 553 (App. 1996) (defendant entitled to defense of others instruction even if he was also asserting that he never struck complainant); *see also Santiago*, 53 Haw. 254, 492 P.2d 657; *Irvin*, 53 Haw. 119, 488 P.2d 327.

If the evidence supports a defense, the trial court's denial of an improperly worded defense instruction, or an instruction that is inaccurate in some particular, does not relieve the trial court from the burden of instructing the jury on every defense or theory of defense having support in the evidence. *Riveira*, 59 Haw. 148, 577 P.2d 793.

Where a jury has been given instructions on a defense other than an affirmative defense, but has *not* been instructed that the prosecution bears the burden of proof beyond a reasonable doubt to *negative* that defense, substantial rights of the defendant may be affected and plain error may be noticed. *Raines v. State* , 79 Hawai`i 219, 900 P.2d 1286 (1995) (overruling *State v. McNulty*, 60 Haw. 259, 588 P.2d 438 (1978)).

7.01 SELF-DEFENSE

Justifiable use of force--commonly known as self-defense--is a defense to the charge of (specify charge and its included offenses except those involving a reckless state of mind). The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. 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 when a person reasonably believes that such 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 such 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 use of deadly force upon or toward another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy]. The reasonableness of the defendant's belief that the use of such 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 use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter, or if the defendant knows that he/she can avoid the necessity of using such force with complete safety by retreating.]

"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 [or deadly force].

["Deadly force" means force which the actor uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury.]

[Intentionally firing a firearm in the direction of another person or in the direction which the person is believed to be constitutes deadly force.]

[A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he/she will use deadly force if necessary, does not constitute deadly force.]

["Bodily injury" means physical pain, illness, or any impairment of physical condition.]

["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.]

[If and only if you find that the defendant was reckless in having a belief that he/she was justified in using self-protective force against another person, or that 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, then the use of such self-protective force is unavailable as a defense to the offense of (any offense the requisite mental state of which is either reckless or negligent conduct).]

[The use of force is not justifiable to resist an arrest that the defendant knows is being made by a police officer, even if the arrest is unlawful. On the other hand, if the police officer threatens to use or uses unlawful force, the law regarding use of protective force would apply.]

Commentary

HRS § 703-304 provides for "use of force in self-protection." HRS § 703-300 defines "believes," "force," "unlawful force" and "deadly force."

This instruction is applicable to all self-defense cases, although the bracketed language may or may not apply depending upon the facts. HRS § 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).

HRS §§ 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.*, HRS §§ 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 HRS 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 HRS 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.

7.02 DEFENSE OF OTHERS

Justifiable use of force in defense of another person is a defense to the charge of (specify charge and its included offenses except those involving a reckless state of mind). The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. 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 to protect a third person when:

(1) Under the circumstances as the defendant reasonably believed them to be, (the third person) would have been justified in using such force to protect himself/herself; and

(2) The defendant reasonably believed that his/her intervention was immediately necessary to protect (the third person).

The reasonableness of the defendant's belief that the use of such 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 third person) would have been justified in using force upon or toward (complaining witness) if he/she reasonably believed that such force was immediately necessary to protect himself/herself on the present occasion against the use of unlawful force by (complaining witness).]

[([The third person) would have been justified in using deadly force upon or toward (the complaining witness) if he/she reasonably believed that deadly force was immediately necessary to protect himself/herself on the present occasion against [death] [serious bodily injury] [kidnapping] [rape] [forcible sodomy].]

[The use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter, or if the defendant knows that he/she can avoid the necessity of using such force with complete safety by retreating.]

"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 [or deadly force].

["Deadly force" means force which the actor uses with the intent of causing, or which he/she knows to create a substantial risk of causing, death or serious bodily injury.]

[Intentionally firing a firearm in the direction of another person or in the direction which the person is believed to be constitutes deadly force.]

[A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he/she will use deadly force if necessary, does not constitute deadly force.]

["Bodily injury" means physical pain, illness, or any impairment of physical condition.]

["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.]

[If and only if you find that the defendant was reckless in having a belief that he/she was justified in using self-protective force against another person, or that 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, then the use of such self-protective force is unavailable as a defense to the offense of <u>(any offense the requisite mental state of which is either reckless or negligent conduct)</u>.]

[The use of force is not justifiable to resist an arrest that the defendant knows is being made by a police officer, even if the arrest is unlawful. On the other hand, if the police officer threatens to use or uses unlawful force, the law regarding use of protective force would apply.]

Commentary

HRS § 703-305 provides for "use of force for the protection of other persons." "This section extends the defense of justification to include the use of physical force to protect another person on the same terms as the defense is available for the use of force in self-protection." Commentary to HRS § 703-305 (1972). HRS § 703-300 defines "believes," "force," "unlawful force" and "deadly force." HRS § 703-305 follows Model Penal Code § 3.05 in allowing defense of others regardless of the relationship between the actor and the person protected. Commentary to HRS § 703-305 (1972).

Thus, under HRS § 703-305, the use of force upon another is justifiable to protect a third person if (1) under the circumstances known to the actor, the actor reasonably believes the third person would be justified in using self-protective force, and (2) the actor believes the actor's intervention is necessary to protect the third person. *State v. Pavao*, 81 Hawai`i 142, 913 P.2d 553 (App. 1996).

HRS §§ 701-115 and 702-205 make clear that defense of others is an ordinary defense, and once the issue is raised, the prosecution has the burden of negativing the defense beyond a reasonable doubt. The self defense cases requiring an instruction on the prosecutor's burden of disproving self-defense also apply to defense of others. *Raines v. State*, 79 Hawai`i 219, 900 P.2d 1286 (1995) (where jury has been given instructions on defense other than affirmative defense, but has not been instructed that prosecution bears burden of proof beyond reasonable doubt with respect to negativing that defense, substantial rights of defendant may be affected and plain error may be noticed (*overruling State v. McNulty*, 60 Haw. 259, 588 P.2d 438 (1978))); *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982); *State v. Carson*, 1 Haw.App. 214, 617 P.2d 573 (1980). The Commentary to HAWJIC 7.01 also discusses related justification principles.

Similarly, the cases entitling a defendant 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," also apply to defense of others. See State v. Unea, 60 Haw. 504, 505, 591 P.2d 615, 616 (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. *Pavao*, 81 Hawai`i 142, 913 P.2d 553.

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.*, HRS §§ 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 HRS 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.

For Commentary and Supplemental Commentary on HRS § 703-310, see HAWJIC 7.01.

7.03 DEFENSE TO THEFT

It is a defense to a charge of theft 1) that the defendant believed that he/she was entitled to the property or service involved under a claim of right, or 2) that the defendant believed that he/she was authorized by the owner or by law to obtain or exert control as he/she did. It does not matter if the defendant's belief was mistaken, as long as the defendant held the belief genuinely and in good faith at the time of the alleged offense. However, the interest which the defendant asserts under a claim of right 1) must be to the specific property or the specific service involved, and 2) must be a complete interest, not an interest shared with the alleged victim.

The prosecution has the burden of proving beyond a reasonable doubt that 1) the defendant was aware that the property or service belonged to another, 2) the defendant did not genuinely and in good faith believe he/she was entitled to the property or service under a claim of right, and 3) the defendant did not genuinely and in good faith believe that he/she was authorized by the owner or by law to obtain or exert control as he/she did.

Commentary

This instruction combines HRS §§ 702-218 and 708-834(1)(b).

HRS § 702-218 ("Ignorance or Mistake as a Defense") provides that "it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact" if "the ignorance or mistake negatives the state of mind" or "the law defining the offense" provides that "the state of mind established by such ignorance or mistake constitutes a defense."

HRS § 708-834(1)(b) provides that "[i]t is a defense to a prosecution for theft that the defendant . . . [b]elieved that he

was entitled to the property or services under a claim of right or that he was authorized, by the owner or by law, to obtain and exert control as he did."

While unauthorized control of propelled vehicle (UCPV) is a form of theft, the legislature has chosen to treat UCPV differently from other varieties of theft and did not intend that HRS § 708-834 defenses to theft would apply to UCPV. *State v. Palmeira*, 10 Haw.App. 200, 862 P.2d 1073 (1993).

The HRS § 708-834 claim of right defense to theft does not apply in a prosecution for robbery. *State v. McMillen*, 83 Hawai`i 264, 925 P.2d 1088 (1996) (the legislature has expressed a policy discouraging assertion of self-help to recover property through the use of force).

7.04 INTOXICATION

Evidence of self-induced intoxication of the defendant may not be used to negative the state of mind sufficient to establish an element of the offense. However, evidence of self-induced intoxication of the defendant may be used to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense.

"Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances, including alcohol, into the body.

"Self-induced intoxication" means intoxication caused by substances, including alcohol, which the defendant knowingly introduces into his/her body, the tendency of which to cause intoxication he/she knows or ought to know.

Commentary

The intoxication defense statute, HRS § 702-230, was amended in 1986. HRS § 702-230, as amended, "prohibits a defendant who willingly becomes intoxicated and then commits a crime from using that self-induced intoxication as a defense. The use of such intoxication remains permissible for the limited purposes of proving or negating conduct or proving state of mind sufficient to establish an element of an offense." Supplemental Commentary to HRS § 702-230 (1986); *see also State v. Freitas*, 62 Haw. 17, 608 P.2d 408 (1980) (self-induced intoxication is not to be considered a substantial factor in determining legal responsibility, since mental disability excusing criminal responsibility must be the product of circumstances beyond the defendant's control).

In *State v. Souza*, 72 Haw. 246, 813 P.2d 1384 (1991), the defendant challenged the constitutionality of HRS § 702-230 (1986) and an instruction based on the statute. The statute -- and the instruction given -- were declared constitutional. *See also State v. Birdsall*, 88 Hawai`i 1, 960 P.2d 729 (1998) (reaffirming *Souza* decision that HRS § 702-230 is constitutional).

In *State v. Tyrrell*, 60 Haw. 17, 26 n.4, 586 P.2d 1028, 1034 n.4 (1978), the court ruled that "the better practice" under the then current statute was to refrain from using the term "defense" in instructing the jury with respect to intoxication.

In *State v. Garringer*, 80 Hawai`i 327, 909 P.2d 1142 (1996), the supreme court remanded the Rule 40 petition for a hearing on whether Defendant's counsel provided ineffective assistance by failing to obtain a psychiatric evaluation as to a possible trial defense of pathological intoxication based on mental illness induced or exacerbated by chronic use of "ice" or crystal methamphetamine.

7.05 CONSENT

In any prosecution, the complaining witness' consent to the conduct alleged or to the result thereof, is a defense if the consent negatives an element of the offense or precludes the infliction of the harm [or evil] sought to be prevented by the law defining the offense.

[Consent is not a defense if:

(1) It is given by a person who is legally incompetent to authorize the conduct alleged; or

(2) It is given by a person who by reason of youth, mental disease, disorder, or defect, or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged; or

(3) It is given by a person whose [improvident] consent is sought to be prevented by the law defining the offense; or

(4) It is induced by force, duress, or deception.]

The burden is upon the prosecution to prove beyond a reasonable doubt that the complaining witness did not consent to the conduct alleged or the result thereof. If the prosecution fails to meet its burden, then you must find the defendant not guilty.

Commentary

At common law, consent was generally not a defense to a criminal prosecution. *State v. Lira*, 70 Haw. 23, 27, 759 P.2d 869, 872 (1988). HRS § 702-233, however, based on Model Penal Code § 2.11, provides that consent is a defense in a criminal prosecution "if the consent negatives an element of the offense or precludes

the infliction of the harm or evil sought to be prevented by the law defining the offense." *See also State v. Suka*, 70 Haw. 472, 478, 777 P.2d 240, 243 (1989) ("if the consent negatives an element of the offense"). *See* HRS §§ 702-234 ("consent to bodily injury") and 702-235 ("ineffective consent").

A defendant may raise the defense of consent and the court should so instruct the jury even though it is inconsistent with other defenses, such as denial that the conduct occurred. *Lira*, 70 Haw. 23, 759 P.2d 869 (1988). A defendant is entitled to a jury instruction on the defense of consent where there is any evidence of consent in a trial on sexual assault, however, the consent instruction need not be included in the same instruction as the elements of sexual assault and can be given separately. *State v. Horswill*, 75 Haw. 152, 857 P.2d 579 (1993).

When a defendant requests an instruction on consent in a sex offense prosecution, and there is evidence of consent, the trial court must instruct the jury on the defense of consent notwithstanding the giving of instructions requiring the jury to find forcible compulsion. *Suka*, 70 Haw. 472, 777 P.2d 240. "Consent is a valid defense to the first degree sexual offenses since consent to the sexual conduct clearly negatives forcible compulsion." *Id.* at 478, 777 P.2d at 243. "Only the giving of a consent instruction will ensure that the defense of consent is not compromised." *Id.* However, consent is not a defense to statutory sexual assault (sexual penetration or contact with a person less than fourteen years old) since the complainant's consent or lack thereof is not an element of this form of the offense. *State v. Cardus*, 86 Hawai`i 426, 949 P.2d 1047 (App. 1997).

Consent must be informed consent. "[C]onsent does not constitute a defense if . . . [i]t is induced by force, duress or deception." HRS § 702-235(4). A teller's mistake in paying out too much money on cashing a check did not afford the defendant a consent defense. *Territory v. Lee*, 29 Haw. 30 (1926); *see also State v. Oshiro*, 5 Haw.App. 404, 696 P.2d 846 (1985) (the rape victim did not consent to the nitrous oxide administered by the defendant dentist). Consent also does not constitute a defense if it "is given by a person whose improvident consent is sought to be prevented by the law defining the offense." HRS § 702-235(3); *Cardus*, 86 Hawai`i 426, 949 P.2d 1047 (in those provisions of HRS §§ 707-730 and 707-733 where compulsion or strong compulsion is not an element of the offense, as in HRS § 707-731(1)(c), the lack of consent is not relevant to the harm sought to be prohibited by the statute, and thus an inmate's consent to sexual penetration is deemed "improvident" and "prevented" by law).

Consistent with the rationale that a youth or mentally defective person is incapable of giving consent, HRS § 702-235(2) provides that consent does not constitute a defense if "it is given by a person who by reason of youth, mental disease, or defect is

manifestly unable or known by the defendant to be unable to make unreasonable judgment as to the nature or harmfulness of the conduct alleged. *In re Doe*, 81 Hawai`i 447, 918 P.2d 254 (App. 1996) (defendant could not be found guilty of HRS § 707-731(1)(b) unless it is proved beyond a reasonable doubt that (1) complainant was mentally defective, mentally incapacitated, or physically helpless, and (2) defendant was aware that complainant was such a person).

7.06 AFFIRMATIVE DEFENSE--GENERIC

The defendant has raised the affirmative defense of (specify the affirmative defense). Before you may consider (specify the affirmative defense), you must first determine whether the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must find the defendant not guilty of that offense(s) without considering the affirmative defense. If you unanimously find that the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must consider the affirmative defense of (specify the affirmative defense).

(Specify the affirmative defense) is an affirmative defense to the charge(s) of (specify in the disjunctive charge(s) and any instructed included offense(s)). (Provide a general statement of the affirmative defense).

(Specify the affirmative defense) has (specify number) elements. These (specify number) elements are: (particularize the affirmative defense into its elements).

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 (specify the affirmative defense) occurred. In determining whether the defendant has proven 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.

If you unanimously find that the defendant has proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify in the disjunctive charge(s) and any instructed included offense(s)). If you unanimously find that the defendant has not proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant guilty of (specify charge(s) or any instructed offense(s)).*

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 (specify in the disjunctive charge(s) and any instructed included offense(s)).

*Modification of this sentence is required if any defense in addition to the affirmative defense is submitted to the jury.

Commentary

While HRS § 702-205 provides that the prosecution must negative ordinary defenses "beyond a reasonable doubt," HRS § 701-115(2)(b) provides that "[i]f the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability." *See State v. Anderson*, 58 Haw. 479, 484, 572 P.2d 159, 162 (1977) ("[t]he legislature clearly intended to provide for affirmative defenses by enacting Section 701-115, and we do not

construe Section 702-205 in a manner that would nullify the provisions of Section 701-115").

HRS § 701-115(3) provides that "[a] defense is an affirmative defense if (a) [i]t is specifically so designated by the Code or another statute; or (b) [i]f the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence."

Affirmative defenses "specifically so designated" include duress (HRS § 702-231), insanity (HRS § 704-402), entrapment (HRS § 702-237), military orders (HRS § 702-232), choice of evils -- escape (HRS § 703-302) and mistake of law (HRS § 702-220). The alibi defense, *i.e.*, evidence that the defendant was not present at the time of the crime, is not an affirmative defense. *State v. Gabrillo*, 10 Haw.App. 448, 877 P.2d 891 (1994).

The constitutionality of affirmative defenses was upheld in *State v. Kelsey*, 58 Haw. 234, 566 P.2d 1370 (1977) ("there is no constitutional due process violation"); *see also Anderson*, 58 Haw. at 482, 572 P.2d at 161 ("does not in any way lessen the requisite number of the elements to be proven by the state or the degree of the quantum of proof").

The form of the generic affirmative defense instruction is derived from *State v. Miyashiro*, 90 Hawai'i 489, 979 P.2d 85 (1999).

7.07 INSANITY

The defendant has raised the affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility. Before you may consider this affirmative defense, you must first determine whether the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must find the defendant not guilty of that/those offense(s) without considering the affirmative defense. If you unanimously find that the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must consider the affirmative defense.

It is an affirmative defense to (specify in the disjunctive charge(s) and any instructed included offense(s)) that, at the time of the offense, the defendant was not criminally responsible for his/her conduct.

The defendant is not criminally responsible for his/her conduct if, at the time of the charged offense(s) and as a result of a physical or mental disease, disorder or defect, the defendant lacked substantial capacity either to appreciate the wrongfulness of his/her conduct or to conform his/her conduct to the requirements of the law.

A person "lacks substantial capacity" either to appreciate the wrongfulness of his/her conduct or to conform his/her conduct to the requirements of the law if his/her capacity to do so has been extremely limited by physical or mental disease, disorder or defect. The phrase "lack of substantial capacity" does not mean a total lack of capacity. It means capacity which has been impaired to such a degree that only an extremely limited amount remains. [The term "physical or mental disease, disorder or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.]

The affirmative defense of physical or mental disease, disorder or defect excluding criminal responsibility has two elements.

These two elements are:

1. That at the time of the charged offense, the defendant was suffering from a physical or mental disease, disorder, or defect; and

2. That as a result of such physical or mental disease, disorder, or defect, he/she lacked substantial capacity either to appreciate the wrongfulness of his/her conduct or to conform his/her conduct to the requirements of the law.

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 existed. In determining whether the defendant has proven the 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.

If you unanimously find that the defendant has proven both elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify in the disjunctive charge(s) and any instructed included offense(s)). If you unanimously find that the defendant has not proven both elements of the affirmative defense by a preponderance of the evidence, then you must find the defendant guilty of (specify in the disjunctive charge(s) and any instructed included offense(s)).*

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 (specify in the disjunctive charge(s) and any instructed included offense(s)).

[If the defendant is acquitted on the ground of physical or mental disease, disorder or defect excluding responsibility, the court shall make an order as follows:

(a) The court shall order him/her committed to the custody of the Director of Health to be placed in an appropriate institution for custody, care, and treatment if the court finds that he/she presents a risk of danger to himself/herself or others and that he/she is not a proper subject for conditional release; or

(b) The court shall order him/her to be released on such conditions as the court deems necessary if the court finds that he/she is affected by physical or mental disease, disorder or

defect and that he/she presents a danger to himself/herself or others, but that he/she can be controlled adequately and given proper care, supervision, and treatment if he/she is released on condition; or

(c) The court shall order him/her discharged from custody if the court finds that he/she is no longer affected by physical or mental disease, disorder, or defect, or if so affected, that he/she no longer presents a danger to himself/herself or others and is not in need of care, supervision, or treatment.

This information on the alternatives available to the court is given only for the purpose of informing you of the consequences to the defendant that may result from an acquittal on the ground of physical or mental disease, disorder or defect excluding responsibilities. These consequences must not in any way influence your decision.]

*Modification of this sentence is required if any defense in addition to insanity is submitted to the jury.

Commentary

HRS § 704-400 provides, "[a] person is not responsible . . . for conduct if at the time of the conduct as a result of physical or mental disease, disorder or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." HRS § 704-402(1) (1982) makes insanity "an affirmative defense."

Until 1982, insanity was an ordinary defense in Hawai`i, and pursuant to HRS § 702-205, the prosecution had to disprove insanity beyond a reasonable doubt. *See State v. Rodrigues*, 67 Haw. 70, 72, 679 P.2d 615, 617 (1984) ("then the State has the burden of proving a defendant's sanity beyond a reasonable doubt"); *State v. Nuetzel*, 61 Haw. 531, 606 P.2d 920 (1980) ("appellant's raising the defense of insanity under HRS § 704-400(1) required the prosecution to prove the additional element of appellant's sanity"); *State v.*

Valentine, 1 Haw.App. 1, 2, 612 P.2d 117, 118 (1980) ("the State had the burden of proving appellant's sanity beyond a reasonable doubt"); *State v. Moeller*, 50 Haw. 110, 121, 433 P.2d 136, 143 (1967) ("the State is required to establish the sanity of the defendant beyond a reasonable doubt").

In 1982, insanity became an affirmative defense. *See State v. Nizam*, 7 Haw.App. 402, 407 n.4, 771 P.2d 899, 904 n.4 (1989) ("Section 704-402 (1985) delineates the affirmative defense of physical or mental disease, disorder or defect excluding responsibility"). A defendant must now prove mental incapacity by a preponderance of the evidence. *See* HRS § 701-115(2)(b).

In defining legal insanity to the jury, trial courts are not restricted to merely repeating the terms of the insanity statute. *Nuetzel*, 61 Haw. 531, 606 P.2d 920. Instruction on legal insanity should be flexible, with wide discretion vested in the trial court to clarify the statutory definition. *Id.* In *Nuetzel*, the court upheld an insanity instruction defining "lack of substantial capacity" as "capacity which has been impaired to such a degree that only an extremely limited amount remains." *Id.* at 550-51, 606 P.2d at 930. But an instruction defining "insanity" as "such a diseased and deranged condition of the mental faculties of a person as to render him incapable of knowing the nature and quality of the act he is committing *and* incapable of knowing the difference between right and wrong" was prejudicial error. *Moeller*, 50 Haw. at 113, 433 P.2d at 139 (emphasis in original).

HRS § 704-402(2) provides that when an insanity defense is submitted to a jury, "the court shall, if requested by the defendant, instruct the jury as to the consequences to the defendant of an acquittal" on grounds of insanity. "The purpose of allowing such an instruction is purely informational" because "there is the possibility that they will fear that such an acquittal will necessarily lead to the defendant's release." *State v. Amorin*, 58 Haw. 623, 627-28, 574 P.2d 895, 898 (1978). The jury, however, "should not be influenced by the extraneous consideration of the consequence of a finding of insanity wholly unconnected and apart from the evidence." *Id.* at 628, 574 P.2d at 898-99. Prior to the 1972 enactment of the Hawai`i Penal Code, the trial court was not required to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity, whether the defendant requested it or not. *Moeller*, 50 Haw. 110, 433 P.2d 136.

7.08 ENTRAPMENT -- METHODS OF PERSUASION

The defendant has raised the affirmative defense of entrapment. Before you may consider entrapment, you must first determine whether the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must find the defendant not guilty of that/those offense(s) without considering entrapment. If you unanimously find that the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must consider entrapment.

Entrapment is an affirmative defense to the charge(s) of (specify charge(s) and any instructed included offense(s)). A person is entrapped if he/she engaged in the prohibited conduct or caused the prohibited result because he/she was induced or encouraged to do so by a law enforcement officer [or by a person acting in cooperation with a law enforcement officer] who, for the purpose of obtaining evidence of the commission of an offense, employed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

Entrapment has two elements.

These two elements are:

1. That the defendant engaged in the prohibited conduct or caused the prohibited result because he/she was induced or encouraged to do so by a law enforcement officer [or by a person acting in cooperation with a law enforcement officer]; and

2. That the law enforcement officer [or a person acting in cooperation with a law enforcement officer] did, for the purpose of obtaining evidence of the commission of an offense, employ methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

The defendant must prove entrapment 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 occurred. In determining whether the defendant has proven entrapment by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

If you unanimously find that the defendant has proven both elements of entrapment by a preponderance of the evidence, then you must find the defendant not guilty of <u>(specify in the disjunctive charge(s) and any instructed included offense(s))</u>. If you unanimously find that the defendant has not proven both elements of entrapment by a preponderance of the evidence, then you must find the defendant guilty of <u>(specify in the disjunctive charge(s) and any instructed included offense(s))</u>.*

If you are unable to reach a unanimous agreement as to whether entrapment has been proved or not been proved, then a verdict may not be returned on (specify in the disjunctive charge(s) and any instructed included offense(s)).

[Whether or not the defendant may have known a person or persons involved in the drug culture does not establish that he/she was not or could not be entrapped.]

[An offer to buy narcotics, in and of itself, is not a method which creates a substantial risk that the offense would be committed by persons other than those ready to commit it.]

*Modification of this sentence is required if any defense in addition to entrapment is submitted to the jury.

Commentary

See HRS § 702-237. Subsection 702-237(a) addresses entrapment by "false representations designed to induce the belief that such conduct or result was not prohibited," and subsection 702-237(b) addresses entrapment by "methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it. The first subsection is covered by HAWJIC 7.09 and the second is covered by HAWJIC 7.08.

Prior Hawai`i law made entrapment an ordinary defense, but in 1972 Hawai`i adopted Model Penal Code § 2.13, which shifted the burden to the defendant and made entrapment an affirmative defense. *See State v. Anderson*, 58 Haw. 479, 572 P.2d 159 (1977); Commentary to HRS § 702-237. This change requiring the defendant to prove entrapment by a preponderance of the evidence did not violate due process. *Anderson*, 58 Haw. 479, 572 P.2d 159; *State v. Kelsey*, 58 Haw. 234, 566 P.2d 1370 (1977). When an accused can show, by a preponderance of the evidence, that he was induced or encouraged into committing the conduct proscribed, he is entitled to an acquittal on the charge. *State v. Nakamura*, 65 Haw. 74, 648 P.2d 183 (1982).

While entrapment may be raised by a pre-trial motion to dismiss, unless the evidence is undisputed and so clear it presents a legal question as a matter of law, entrapment is a jury question. *State v. Agrabante*, 73 Haw. 179, 830 P.2d 492 (1992) (reverse buy operation did not constitute entrapment as a matter of law but jury

may be instructed on the defense if evidence of government inducement); *State v. Powell*, 68 Haw. 635, 726 P.2d 266 (1986) (drunk decoy operation was entrapment as a matter of law); *State v. Provard*, 63 Haw. 536, 631 P.2d 181 (1981) (conflict in evidence whether police conduct constituted entrapment and therefore issue was for jury to resolve); *Kelsey*, 58 Haw. 234, 566 P.2d 1370 (evidence disputed as to conduct pertaining to entrapment question and thus issue was for jury to resolve).

According to HRS § 702-237(2), "[t]he defense afforded by this section is unavailable when causing or threatening injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment."

Hawai`i follows the "objective" view of entrapment, and the trier of fact must focus on the conduct of law enforcement rather than the defendant's predisposition to commit the offense charged. *State v. Reed*, 77 Hawai`i 72, 881 P.2d 1218 (1994); *Agrabante*, 73 Haw. 179, 830 P.2d 492; *Powell*, 68 Haw. 635, 726 P.2d 266; *Nakamura*, 65 Haw. 74, 648 P.2d 183; *Provard*, 63 Haw. 536, 631 P.2d 181; *Anderson*, 58 Haw. 479, 572 P.2d 159.

When the evidence does not support a finding that police conduct would have the probable effect on a reasonable person of inducing her to engage in prohibited activity, a claim of entrapment is not established. *State v. Tookes*, 67 Haw. 608, 699 P.2d 983 (1985). On the other hand, when an officer told the defendant that, "[e]ven probation officers smoke marijuana," a substantial question existed as to whether the conduct of the officer entrapped the defendant. *State v. Erickson*, 60 Haw. 8, 10, 586 P.2d 1022, 1023 (1978).

The doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not a law enforcement officer or a person acting in cooperation with a law enforcement officer. *Agrabante*, 73 Haw. 179, 830 P.2d 492 (rejecting theory of derivative or vicarious entrapment).

7.09 ENTRAPMENT -- FALSE REPRESENTATIONS

The defendant has raised the affirmative defense of entrapment. Before you may consider entrapment, you must first determine whether the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must find the defendant not guilty of that/those offense(s) without considering entrapment. If you unanimously find that the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must consider entrapment.

Entrapment is an affirmative defense to the charge(s) of (specify in the disjunctive charge(s) and any instructed included offense(s)). A person is entrapped if he/she engaged in the prohibited conduct or caused the prohibited result because he/she was induced or encouraged to do so by a law enforcement officer [or by a person acting in cooperation with a law enforcement officer] who, for the purpose of obtaining evidence of the commission of an offense, knowingly made false representations designed to induce the belief that such conduct or result was not prohibited.

Entrapment has two elements.

These two elements are:

1. That the defendant engaged in the prohibited conduct or caused the prohibited result because he/she was induced or encouraged to do so by a law enforcement officer [or by a person acting in cooperation with a law enforcement officer]; and

2. That the law enforcement officer [or a person acting in cooperation with a law enforcement officer] did, for the purpose of obtaining evidence of the commission of an offense, knowingly make false representations designed to induce the belief that such conduct or result was not prohibited.

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 entrapment occurred. In determining whether the defendant has proven entrapment by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

If you unanimously find that the defendant has proven both elements of entrapment by a preponderance of the evidence, then you must find the defendant not guilty of <u>(specify in the disjunctive charge(s) and any instructed included offense(s))</u>. If you unanimously find that the defendant has not proven both elements of entrapment by a preponderance of the evidence, then you must find the defendant guilty of <u>(specify in the disjunctive charge(s) and any instructed included offense(s))</u>.*

If you are unable to reach a unanimous agreement as to whether entrapment has been proved or not been proved, then a verdict may

not be returned on (specify in the disjunctive charge(s) and any instructed included offense(s)).

[Whether or not the defendant may have known a person or persons involved in the drug culture does not establish that he/she was not or could not be entrapped.]

[An offer to buy narcotics, in and of itself, is not a method which creates a substantial risk that the offense would be committed by persons other than those ready to commit it.]

*Modification of this sentence is required if any defense in addition to entrapment is submitted to the jury.

Commentary

See HRS § 702-237. Subsection 702-237(a) addresses entrapment by "false representations designed to induce the belief that such conduct or result was not prohibited," and subsection 702-237(b) addresses entrapment by "methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it. The first subsection is covered by HAWJIC 7.09 and the second is covered by HAWJIC 7.08.

Prior Hawai`i law made entrapment an ordinary defense, but in 1972 Hawai`i adopted Model Penal Code § 2.13, which shifted the burden to the defendant and made entrapment an affirmative defense. *See State v. Anderson*, 58 Haw. 479, 572 P.2d 159 (1977); Commentary to HRS § 702-237. This change requiring the defendant to prove entrapment by a preponderance of the evidence did not violate due process. *Anderson*, 58 Haw. 479, 572 P.2d 159; *State v. Kelsey*, 58 Haw. 234, 566 P.2d 1370 (1977). When an accused can show, by a preponderance of the evidence, that he was induced or encouraged into committing the conduct proscribed, he is entitled to an acquittal on the charge. *State v. Nakamura*, 65 Haw. 74, 648 P.2d 183 (1982).

While entrapment may be raised by a pre-trial motion to dismiss, unless the evidence is undisputed and so clear it presents a legal question as a matter of law, entrapment is a jury question. *State v. Agrabante*, 73 Haw. 179, 830 P.2d 492 (1992) (reverse buy operation did not constitute entrapment as a matter of law but jury may be instructed on the defense if evidence of government inducement); *State v. Powell*, 68 Haw. 635, 726 P.2d 266 (1986) (drunk decoy operation was entrapment as a matter of law); *State v. Provard*, 63 Haw. 536, 631 P.2d 181 (1981) (conflict in evidence

whether police conduct constituted entrapment and therefore issue was for jury to resolve); *Kelsey*, 58 Haw. 234, 566 P.2d 1370 (evidence disputed as to conduct pertaining to entrapment question and thus issue was for jury to resolve).

According to HRS § 702-237(2), "[t]he defense afforded by this section is unavailable when causing or threatening injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment."

Hawai`i follows the "objective" view of entrapment, and the trier of fact must focus on the conduct of law enforcement rather than the defendant's predisposition to commit the offense charged. *State v. Reed*, 77 Hawai`i 72, 881 P.2d 1218 (1994); *Agrabante*, 73 Haw. 179, 830 P.2d 492; *Powell*, 68 Haw. 635, 726 P.2d 266; *Nakamura*, 65 Haw. 74, 648 P.2d 183; *Provard*, 63 Haw. 536, 631 P.2d 181; *Anderson*, 58 Haw. 479, 572 P.2d 159.

When the evidence does not support a finding that police conduct would have the probable effect on a reasonable person of inducing her to engage in prohibited activity, a claim of entrapment is not established. *State v. Tookes*, 67 Haw. 608, 699 P.2d 983 (1985).

The doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not a law enforcement officer or a person acting in cooperation with a law enforcement officer. *Agrabante*, 73 Haw. 179, 830 P.2d 492 (rejecting theory of derivative or vicarious entrapment).

7.10 DURESS

The defendant has raised the affirmative defense of duress. Before you may consider duress, you must first determine whether the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must find the defendant not guilty of that/those offense(s) without considering duress. If you unanimously find that the prosecution has proven all of the elements of (specify in the disjunctive charge(s) and any instructed included offense(s)) beyond a reasonable doubt, then you must consider duress.

Duress is an affirmative defense to the charge(s) of (specify in the disjunctive charge(s) and any instructed included offense(s)).

Duress has (specify number) elements.

These (specify number) elements are:

1. The defendant engaged in the conduct or caused the result alleged in the Indictment/Complaint because the defendant was coerced to do so by the threat to use or use of unlawful force against the defendant's person [or another person];

2. The unlawful force used or threatened to be used was the type that a person of reasonable firmness in the defendant's situation would have been unable to resist;

3. The defendant did not recklessly place himself/herself in the situation in which it was probable that the defendant would be subjected to duress;

[_. When negligence suffices to establish the required state of mind for the offense charged, the defendant did not negligently place himself/herself into a situation in which it was probable that the defendant would be subjected to duress;]

[_. When the defendant acted on the command of a spouse, the defendant still must prove by a preponderance of the evidence the previous elements.]

"Force" means any bodily impact, restraint, or confinement, or threat to do the same.

"Unlawful force" means force that 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 [or deadly force].

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 duress occurred. In determining whether the defendant has proven duress by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

If you unanimously find that the defendant has proven the elements of the duress defense by a preponderance of the evidence, then you must find the defendant not guilty of (specify in the

disjunctive charge(s) and any instructed included offense(s)). If you unanimously find that the defendant has not proven the elements of duress by a preponderance of the evidence, then you must find the defendant guilty of (specify charge(s) or any instructed offense(s)).*

If you are unable to reach a unanimous agreement as to whether duress has been proved or not been proved, then a verdict may not be returned on (specify in the disjunctive charge(s) and any instructed included offense(s)).

*Modification of this sentence is required if any defense in addition to duress is submitted to the jury.

Commentary

HRS § 702-231 provides for an affirmative defense of "duress" where "defendant engaged in the conduct or caused the result alleged because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."

In 1979, HRS § 702-231 was amended to make duress an affirmative defense, requiring a defendant to prove "the facts constituting such defense, unless such facts are supplied by the testimony of the prosecuting witness or circumstance in such testimony, and of proving such facts by a preponderance of the evidence pursuant to Section 701-115." *See* HRS § 702-231(5); *State v. Corpuz*, 3 Haw.App. 206, 646 P.2d 976 (1982).

Since duress is an affirmative defense, the defendant has the burden of going forward with the evidence to prove facts constituting the defense and of proving such facts by a preponderance of the evidence. *State v. Fukusaku*, 85 Hawai`i 462, 946 P.2d 32 (1997) (trial court properly refused to give duress instruction where there was no evidence that any member of organized crime used unlawful force or threatened to use force against defendant).

7.11 CHOICE OF EVILS -- ESCAPE

The defendant has raised the affirmative defense of "choice of evils." Before you may consider "choice of evils," you must first determine whether the prosecution has proven all of the elements of escape beyond a reasonable doubt. If you unanimously find that the prosecution has not proven all of the elements of escape beyond a reasonable doubt, then you must find the defendant not guilty of escape without considering "choice of evils." If you unanimously find that the prosecution has proven all of the elements of escape beyond a reasonable doubt, then you must consider "choice of evils." "Choice of evils" is an affirmative defense to the charge of escape.

"Choice of evils" has five elements.

These five elements are:

1. The defendant received a threat, express or implied, of death, substantial bodily injury, or forcible sexual attack and the threatened harm was imminent;
2. A complaint to the proper prison authorities was either impossible under the circumstances or there exists a history of futile complaints;
3. Under the circumstances, there was no time or opportunity to resort to the courts;
4. No force or violence was used against prison personnel or other innocent persons; and

5. The defendant promptly reported to the proper authorities when the defendant had attained a position of safety from the immediate threat.

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 "choice of evils" occurred. In determining whether the defendant has proven "choice of evils" by a preponderance of the evidence, you must consider all of the evidence that has been presented to you regardless of who presented it.

If you unanimously find that the defendant has proven the five elements of the "choice of evils" defense by a preponderance of the evidence, then you must find the defendant not guilty of escape. If you unanimously find that the defendant has not proven the five elements of "choice of evils" by a preponderance of the evidence, then you must find the defendant guilty of escape.*

If you are unable to reach a unanimous agreement as to whether "choice of evils" has been proved or not been proved, then a verdict may not be returned on escape.

*Modification of this sentence is required if any defense in addition to "choice of evils" is submitted to the jury.

7.12 CHOICE OF EVILS -- NECESSITY

It is a defense to the offense charged that the defendant's conduct was legally justified. The law recognizes the "choice of evils" defense, also referred to as the "necessity" defense.

The "choice of evils" defense justifies the defendant's conduct if the defendant reasonably believes such conduct is necessary to avoid an imminent harm or evil to [himself/herself] [another person]. The conduct is justifiable if the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.

If the prosecution has not proved beyond a reasonable doubt that the defendant's conduct was not legally justified by the "choice of evils" defense, then you must find the defendant not guilty of (offense). If the prosecution has done so, then you must find that the "choice of evils" defense does not apply.

[If you find that the defendant was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his/her conduct, the justification afforded by this defense is unavailable as a defense to the offense of (any offense for which the requisite state of mind is either recklessly or negligently).]

Notes

H.R.S. §703-302

For other restrictions on the “choice of evils” defense, *see* H.R.S. §703-302(b) and (c):

(b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

For definition of states of mind, *see* instruction:

6.02--"intentionally”
6.03--"knowingly”
6.04--"recklessly”
6.05--"negligently”

For definition of terms defined by H.R.S. Chapter 703, *see* section:

703-300--"Believes” means reasonably believes.

7.13 IGNORANCE OR MISTAKE OF FACT

In any prosecution for an offense, it is a defense that the Defendant engaged in the prohibited conduct under ignorance or mistake of fact if the ignorance or mistake negates the state of mind required to establish an element of the offense.

[Thus, for example, a person is provided a defense to a charge based on an intentional or knowing state of mind, if the person is mistaken (either reasonably, negligently, or recklessly) as to a fact that negates the person's state of mind required to establish an element of the offense; however, a reckless mistake would not afford a defense to a charge based on a reckless state of mind.]

[Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the Defendant would be guilty of another offense had the situation been as the Defendant supposed. In such a case, the Defendant may be convicted of the offense of which the Defendant would be guilty had the situation been as the Defendant supposed.]

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the offense. If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

Commentary

See HRS §§ 702-218 and 702-219; Commentary to HRS § 702-218; *State v. Cavness*, 80 Hawai`i 460, 911 P.2d 95 (App. 1996); *State v. Adams*, 10 Haw.App. 593, 880 P.2d 226 (1994).

The bracketed paragraphs of the instruction may be given as determined appropriate by the court. The second paragraph of the instruction would need to be modified when a defendant is charged with a reckless state of mind. The third paragraph of the instruction would apply, for example, where a defendant charged with burglary had grounds to believe the structure was a store, although it was actually a dwelling. Similarly, the third paragraph would be applicable where a defendant charged with theft had a basis to believe the value of the item was such that it would constitute a different grade of the offense charged. *See also* HAWJIC 10.00A(2).

If there is any rational basis in the evidence to support the defense of mistake of fact, the court must give an instruction on that defense. *State v. Cabrera*, No. 21617 (Haw. Mar. 17, 1999). The ignorance or mistake of fact instruction is applicable where there is ignorance or a mistake as to a fact relevant to the state of mind required to establish an element of the offense. On the other hand, where there is ignorance or a mistake as to a fact relevant only to a defense, other principles may apply. *See*, *e.g.*, bracketed language in HAWJIC 7.01 referring to a reckless belief in using self-protective force.

In *Adams*, the defendant testified he believed the complainant "was receptive to engaging in sexual activity with [him] and that during the acts of penetration [she] never protested or resisted." 10 Haw.App. at 598, 880 P.2d at 231. The *Adams* court held that the defendant was entitled to an instruction on mistake of fact "on his mistaken belief . . . that he had [complainant's] consent" and that "reasonable jurors" could so "construe" the facts. *Id.* at 607, 880 P.2d at 235.

In *Cavness*, the Intermediate Court of Appeals held that the defendant was entitled to introduce evidence of the basis of his belief that he had a right to be present on the premises to establish that defendant did not act intentionally, knowingly or recklessly without license, invitation or privilege in a trespass prosecution. Not allowing the defendant to establish the basis of his belief, and failing to decide if defendant acted recklessly, required a remand for new trial. *Cavness*, 80 Hawai`i 460, 911 P.2d 95.

In *Cabrera*, the defendant admitted at trial that he was aware that he was stealing the property of J.C. Penney, but maintained he had no knowledge, one way or the other, as to what the property's value was. That being the case, the *Cabrera* court held that under these circumstances, there was no element of the offense of second degree theft about which defendant could have

been factually mistaken and, therefore, the defendant was not entitled to a jury instruction regarding mistake of fact. *Cabrera*, No. 21617 (Haw. Mar. 17, 1999).

7.14 ALIBI

The Defendant has introduced evidence to show that he/she was not present at the time and place of the commission of the offense charged in [Count (count number) of] the Indictment/Complaint. The State has the burden of establishing beyond a reasonable doubt the Defendant's presence at that time and place.

If, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the Defendant was present at the time the crime was committed, you must find the Defendant not guilty.

Commentary

This instruction is patterned after Ninth Circuit Manual of Model Jury Instructions Criminal 6.01 (1995).

The alibi defense, *i.e.*, evidence that the defendant was not present at the time of the crime, is *not* an affirmative defense. *State v. Gabrillo*, 10 Haw.App. 448, 877 P.2d 891 (1994). This instruction is not appropriate in a case where the crime charged can be committed without proof that the defendant was present, such as in prosecutions where the government seeks a conviction on an accomplice or conspiracy theory.

Alibi notice is not required where the defendant was not challenging the identity of the "perpetrator" but instead was attempting to show the complainant was making false accusations by his impeaching of complainant's credibility regarding the time of day that the incident allegedly occurred. *State v. Baron*, 80 Hawai`i 107, 905 P.2d 613 (1995).

TABLE OF INSTRUCTIONS[12]

8. JURY DELIBERATIONS

[12]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

8. JURY DELIBERATIONS

INTRODUCTORY COMMENT

The submission of written instructions to the jury during deliberations is a matter within the discretion of the trial court. *State v. Lester*, 64 Haw. 659, 649 P.2d 346 (1982); *see also State v. Peters*, 44 Haw. 1, 352 P.2d 329 (1959). Written copies of the given instructions may be provided to the jury without separation or markings to indicate who requested them, so long as (1) the copies have been previously examined by counsel and (2) counsel have expressly agreed that the copies are accurate transcriptions of the instructions that the trial court actually read to the jury. *State v. Minn*, 79 Hawai`i 461, 467 n.10, 903 P.2d 1282, 1289 (1995); *Peters*, 44 Haw. at 6, 352 P.2d at 332. *See also Lester*, 64 Haw. at 670, 649 P.2d at 354; *State v. Pokini*, 55 Haw. 640, 655, 526 P.2d 94, 107 (1974).

In *Minn*, the supreme court stated that it was common knowledge that the practice of providing written copies of the instructions is "routinely, albeit inconsistently, followed in the trial courts of this state, and we can think of no good reason why the practice should not be observed in *all* cases." 79 Hawai`i at 467 n.10, 903 P.2d at 1288 n.10.

Supplemental instructions in response to a jury communication must not confuse or leave an erroneous impression in the minds of the jurors on the applicable legal standard. *State v. Feliciano*, 62 Haw. 637, 618 P.2d 306 (1980).

It is not error for a trial judge to reread a portion of the original instructions during jury deliberations when such reading does not confuse or leave an erroneous impression in the jurors' minds. *State v. Laurie*, 56 Haw. 664, 548 P.2d 271 (1976). The "piecemeal" transmission of selected instructions has been condemned, however. *State v. Estrada*, 69 Haw. 204, 738 P.2d 812 (1987); *Pokini*, 55 Haw. 640, 526 P.2d 94.

Objections to the instructions or to any oral modifications of the instructions must be made *before* the jury retires to consider its verdict. HRPP 30(e); *State v. Iaukea*, 56 Haw. 343, 537 P.2d 724 (1975); *State v. Chong*, 3 Haw. App. 246, 253, 648 P.2d 1112, 1118 (1982); *State v. Inoue*, 3 Haw.App. 217, 646 P.2d 983 (1982) (previous objection to instruction as a whole was sufficient to preserve question of deletion of a sentence during reading of instruction).

Read Back of Testimony: The decision whether to allow a read back of testimony to a jury during deliberations is a matter within the sound discretion of the trial court. *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286; *Medeiros v. Udell*, 34 Haw. 632, 638

(1938). "[A] 'read back' of a witness's testimony constitutes an abuse of discretion where such a read back results in prejudice to a party or an improper influence on the jury." *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286; *see Estrada*, 69 Haw. at 229, 738 P.2d at 828. However, the supreme court has held that "an arbitrary denial of a jury's request for a 'read back' of a witness's testimony during deliberations constitutes an abuse of discretion." *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286; *see Estrada*, 69 Haw. at 228-29, 738 P.2d at 828.

Similarly, "the decision to allow or refuse a jury's request to review a transcript of a witness's testimony is within the discretion of the trial court." *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286. In *Minn*, the trial court denied the jury's request for a transcript of a witness's testimony because a transcript of the requested testimony may not have been helpful to the jury in determining the contested issue of value. 79 Hawai`i at 466, 903 P.2d at 1287. The supreme court found no abuse of discretion as the trial court could reasonably have concluded that the testimony would not have been helpful to the jury and therefore there was no arbitrary denial of the jury's request. *Id.*

Deadlocked Jury: Hawai`i has specifically rejected use of the *Allen* instruction. *State v. Fajardo*, 67 Haw. 593, 699 P.2d 20 (1985), rejecting *Allen v. United States*, 164 U.S. 492 (1896). Thus, an instruction urging each juror in a deadlocked jury who finds himself or herself in the minority to reconsider his or her views in light of the opinion of the majority is not tolerated and not approved in Hawai`i. *Fajardo*, 67 Haw. 593, 699 P.2d 20. It is error for the trial court to instruct the jury on the consequences of a hung jury. *Id.*; *see also State v. Villeza*, 72 Haw. 327, 817 P.2d 1054 (1991).

Declaration of Mistrial: "Where a mistrial is declared without the consent of the defendant and without manifest necessity, reprosecution will be barred by double jeopardy." *Minn*, 79 Hawai`i at 464, 903 P.2d at 1285; *State v. Lam*, 75 Haw. 195, 201, 857 P.2d 585, 589 (1993). "[A] mistrial ordered *sua sponte* because of a true inability of the jury to agree upon a verdict represents the 'classic example' of manifest necessity." *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286; *State v. Moriwake*, 65 Haw. 47, 51, 647 P.2d 705, 710 (1982). "Even though a 'hung jury' constitutes a 'classic example' of manifest necessity, a trial court must first consider less severe options available and balance the accused's rights against the public interest." *Minn*, 79 Hawai`i at 465, 903 P.2d at 1286 (the trial court was held to have sufficiently considered alternatives less severe than a mistrial and thus the declaration of the mistrial over defense objection was supported by manifest necessity); *Lam*, 75 Haw. at 206, 857 P.2d at 591 (mistrial declaration in mid-trial was not supported by manifest necessity because less severe options were

available that would have protected both the defendant's rights and the public interest).

8.01 PENALTY OR PUNISHMENT NOT TO BE DISCUSSED

You must not discuss or consider the subject of penalty or punishment in your deliberations of this case.

Commentary

See State v. Moellen, 50 Haw. 110, 433 P.2d 136 (1967) (jury does not determine punishment).

This instruction may need modification when the issue of guilt or punishment may be relevant to an issue, such as when testimony is provided pursuant to a plea agreement and the testifying witness has received a reduced penalty or punishment as inducement for his/her testimony, or when punishment may be relevant to the defense of entrapment.

8.02 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 an element of an offense may be based. In order for the prosecution to prove an element, 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.

Commentary

HRPP 31(a) provides the "verdict shall be unanimous, unless otherwise stipulated to by the parties."

A trial court is obligated to exercise its broad discretion to obtain a verdict from a jury where the jury reports that it is unable to reach a verdict. *State v. Minn*, 79 Hawai'i 461, 467, 903 P.2d 1282, 1288 (1995), *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982). In *Minn*, the trial court refused to instruct the jury regarding its duty to deliberate towards arriving at a unanimous verdict, ruling that sending in one instruction was "sort of arm twisting" and copies of instructions had not been requested by the jury. 79 Hawai'i at 467-68, 647 P.2d at 1288-89. On appeal, the supreme court concluded that the trial court reasonably concluded that reinstructing the jury during deliberation might have placed undue pressure on the jury and therefore the court did not abuse its discretion in refusing to reinstruct the jury. *Id.* at 468, 903 P.2d at 1289.

8.02A UNANIMOUS VERDICT

A verdict must represent the considered judgment of each juror, and in order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict 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 verdict.

8.03 CONDUCT OF DELIBERATIONS

Upon retiring to the jury room, elect one of your members as foreperson to 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 verdict, the foreperson is to sign and date the verdict, appropriate forms for which 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 trial, 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 verdict and it has been received by the court.

Commentary

See State v. Williamson, 72 Haw. 97, 807 P.2d 593 (1990) (improper for jury to refer to dictionary definition not part of the record).

8.04 FORM OF VERDICTS

You may bring in either one of the following verdicts:

1. Not guilty; or

2. Guilty as charged.

Your verdict must be unanimous.

After a verdict has been reached and your foreperson has signed and dated the verdict form, you will notify the bailiff, and court will be reconvened to receive the verdict.

Commentary

A verdict must be responsive to the evidence. In other words, the possible verdicts submitted to the jury are determined and limited by the evidence submitted during trial. *State v. Shon*, 47 Haw. 158, 385 P.2d 830 (1963).

When the defendant is charged with lesser and greater offenses that would merge into one offense if committed concurrently, the court should instruct the jury that if it so finds, it must return a verdict only on the greater offense. *State v. Ah Choy*, 70 Haw. 618, 780 P.2d 1097 (1989); *see also State v. Briones*, 71 Haw. 86, 784 P.2d 860 (1989); *State v. Reyes*, 5 Haw. App. 561, 706 P.2d 1326 (1985).

When an ambiguous or improper verdict is returned by the jury, the trial court may recommit the verdict to the jury with proper instructions, in order to obtain a complete and correct verdict before discharging the jury. *State v. Manipon*, 70 Haw. 175, 177, 765 P.2d 1091 (1989).

8.05 PARTIAL VERDICTS

You may at any time during your deliberations return a verdict[s] with respect to the [a] defendant [one or more counts] to which you can agree even though you may not be able to reach agreement as to all [defendants] [counts].

Commentary

This instruction is usually used if the jurors ask about, attempt to return or otherwise indicate that they may have reached a partial verdict. It may also be appropriate if the jury has deliberated for an extensive period of time.

HRPP Rule 31(b) provides, "[i]f there are 2 or more defendants, or 2 or more counts, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants, or with respect to a count or counts, as to whom it has agreed; if the jury cannot with respect to all, the defendant or defendants, or count or counts, as to whom it does not agree may be tried again."

8.06 RETURN TO DELIBERATIONS AFTER POLLING

It has just become apparent that the decision in this case may not be unanimous, that one or more of you may not have agreed with that decision. Please return to the jury room, and continue your deliberations with a view to reaching a verdict, if you can do so without violating your individual judgment.

Commentary

HRPP 31(c) provides, "[i]f upon the poll there is not unanimous concurrence, or there is not concurrence by the number of jurors stipulated as being necessary for returning a verdict, the jury may be directed to retire for further deliberations or may be discharged." *See also State v. Keaulana*, 71 Haw. 81, 784 P.2d 328 (1989).

Further, once a juror indicates a contrary vote, the trial court has discretion whether to continue polling the rest of the jurors, or to stop immediately and order the jury to resume deliberations. *Id.* The advantage of stopping immediately and returning the jury to deliberations, however, is that the numerical division of the jury is not disclosed. *See, e.g.*, *Brasfield v. United States*, 272 U.S. 448 (1926).

8.07A SPECIAL INTERROGATORY ON INTRINSIC AGGRAVATING CIRCUMSTANCE WHEN AN ACCOMPLICE INSTRUCTION IS GIVEN

Did the prosecution prove beyond a reasonable doubt that the Defendant actually [constructively] possessed, used, or threatened to use (specify type of firearm) during the commission of the (identify underlying crime)?

Your answer to this question must be unanimous.

Yes _____

No _____

Commentary

In *Garringer v. State*, 80 Hawai`i 327, 909 P.2d 1142 (1996), the Hawai`i Supreme Court held that HRS § 706-660.1 precludes imposition of enhanced sentencing where the defendant did not personally possess, threaten to use, or use a firearm while engaged in the commission of a felony. Thus, when an accomplice liability instruction is given upon the underlying offense, "the circuit court should instruct the jury, by special verdict interrogatories, to make any and all findings relevant to the imposition of enhanced sentences where the requisite aggravating circumstances are intrinsic to the commission of the crime charged." *Garringer*, 80 Hawai`i at 335, 909 P.2d at 1150.

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).

8.07B OFFENDER AGAINST ELDERLY, HANDICAPPED OR A MINOR UNDER THE AGE OF EIGHT: H.R.S. § 706-662 (5)

If you find that the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of (name of felony offense), then you must also answer the following two questions on a special interrogatory which will be provided to you:

1. Has the prosecution proven beyond a reasonable doubt that the Defendant, in the course of committing [or attempting to commit] the offense of (name of felony offense), inflicted serious bodily injury upon a person who was [sixty years or older] [blind] [a paraplegic] [a quadriplegic] [eight years or younger]?

2. Has the prosecution proven beyond a reasonable doubt that the Defendant knew or reasonably should have known that said person was [sixty years or older] [blind] [a paraplegic] [a quadriplegic] [eight years or younger]?

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

Notes

Section 706-662(5) of the Hawaii Revised Statutes

State v. Tafoya, 91 Hawai`i 261, 982 P.2d 890 (1999)

8.07C SPECIAL INTERROGATORY: OFFENDER AGAINST ELDERLY, HANDICAPPED OR A MINOR UNDER THE AGE OF EIGHT: H.R.S. § 706-662 (5)

1. Has the prosecution proven beyond a reasonable doubt that the Defendant, in the course of committing [or attempting to commit] the offense of (name of felony offense), inflicted serious bodily injury upon a person who was [sixty years or older] [blind] [a paraplegic] [a quadriplegic] [eight years or younger]?

_____ Yes _____ No

2. Has the prosecution proven beyond a reasonable doubt that the Defendant knew or reasonably should have known that said person was [sixty years or older] [blind] [a paraplegic] [a quadriplegic] [eight years or younger]?

_____ Yes _____ No

You must answer each of the questions separately. Your answer to each question must be unanimous.

Notes

Section 706-662 (5) of the Hawaii Revised Statutes

State v. Tafoya, 91 Hawai`i 261, 982 P.2d 890 (1999)

TABLE OF INSTRUCTIONS[13]

9. CHAPTER 707 -- OFFENSES AGAINST THE PERSON

[13]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

9.00 DEFINITIONS OF TERMS USED IN CHAPTER 9, STANDARD JURY INSTRUCTIONS

"bodily injury" means physical pain, illness, or any impairment of physical condition.

"compulsion" means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.

"dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

"deviate sexual intercourse" means any act of sexual gratification between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

"married" includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.

"mentally defective" means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of his/her conduct.

"mentally incapacitated" means a person rendered temporarily incapable of appraising or controlling his/her conduct owing to the influence of a substance administered to him/her without his/her consent.

"physically helpless" means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

"relative" means parent, ancestor, brother, sister, uncle, or legal guardian.

"restrain" means to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) by means of force, threat, or deception; or

(b) if the person is under the age of eighteen or incompetent, without the consent of the relative,

person, or institution having lawful custody of him.

"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.

"Sexual contact" means any touching, other than acts of "sexual penetration", of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

"Sexual penetration" means:

(1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required; or

(2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

"strong compulsion" means the use of or attempt to use one or more of the following to overcome a person:

(a) a threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;

(b) a dangerous instrument; or

(c) physical force.

"substantial bodily injury" means:

(a) a major avulsion, laceration, or penetration of the skin; or

(b) a burn of at least second degree severity; or

(c) a bone fracture; or

(d) a serious concussion; or

(e) a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

9.01 MURDER IN THE FIRST DEGREE -- MORE THAN ONE PERSON: H.R.S. § 707-701(a)

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

A person commits the offense of Murder in the First Degree if he/she intentionally or knowingly causes the death of more than one person in [the same incident] [separate incidents].

There are three material elements of the offense of Murder 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 caused the death of more than one person; and

2. That the Defendant intentionally or knowingly caused the death of more than one person; and

3. That the Defendant intended to cause the death of more than one person as part of the same plan in [the same incident] [separate incidents].

Notes

H.R.S. §§ 707-701(a), 702-206(1) and (2). *Briones v. State*, 74 Haw. 442, 848 P.2d 966 (1993).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

If the Defendant is also charged with Murder in the Second Degree with respect to the same circumstances, the jury must be instructed that a guilty verdict of Murder in the First Degree precludes a guilty verdict of Murder in the Second Degree, and vice versa. *Briones v. State*, *supra*.

9.02 MURDER IN THE FIRST DEGREE -- PEACE OFFICER, JUDGE OR PROSECUTOR: H.R.S. § 707-701(b)

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

A person commits the offense of Murder in the First Degree if he/she intentionally or knowingly causes the death of a [peace officer] [judge] [prosecutor] arising out of the performance of official duties.

There are four material elements of the offense of Murder in the First Degree, 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 caused the death of a [peace officer] [judge] [prosecutor]; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant knew, at that time, that the decedent was a [peace officer] [judge] [prosecutor]; and

4. That the Defendant intentionally or knowingly caused the death because of the [peace officer's] [judge's] [prosecutor's] performance of official duties.

Notes

H.R.S. §§ 707-701(b), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

9.03 MURDER IN THE FIRST DEGREE -- WITNESS IN A CRIMINAL PROSECUTION: H.R.S. § 707-701(c)

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

A person commits the offense of Murder in the First Degree if he/she intentionally or knowingly causes the death of a witness in a criminal prosecution.

There are three material elements of the offense of Murder 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 caused the death of a witness in a criminal prosecution;* and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant knew, at that time, that the decedent was a witness in a criminal prosecution.

Notes

H.R.S. §§ 707-701(c), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

*The statute, and therefore the instruction, do not state or require that the Defendant cause the death *because* the decedent is a witness in a criminal prosecution. However, this

nexus appears to underlie the elevation of the conduct to Murder in the First Degree. If the court deems it appropriate the following language may be inserted into the first element of the instruction: "person because the person was a" before the word "witness". *Cf. State v. Pinero*, 75 Haw. 282, 859 P.2d 1369 (1993) (murder of a police officer requires proof that the accused engaged in the death causing conduct *because* of the officer's performance of official duties).

9.04 MURDER IN THE FIRST DEGREE -- HIRES A KILLER: H.R.S. § 707-701(d)

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

A person commits the offense of Murder in the First Degree if he/she intentionally or knowingly causes the death of another person by a hired killer.

There are three material elements of the offense of Murder 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 hired a person to cause the death of another person; and

2. That the Defendant did so intentionally or knowingly; and

3. That, as a result of the hiring, the person the Defendant hired caused the death of the other person.

Notes

H.R.S. §§ 707-701(d), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

9.05 MURDER IN THE FIRST DEGREE -- HIRED KILLER: H.R.S. § 707-701(d)

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

A person commits the offense of Murder in the First Degree if he/she is hired to cause the death of another person and, as a result of the hiring, he/she intentionally or knowingly causes the death of that person.

There are three material elements of the offense of Murder 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 was hired to cause the death of another person; and

2. That, as a result of the hiring, the Defendant caused the death of that person; and

3. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 707-701(d), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

9.06 MURDER IN THE FIRST DEGREE -- WHILE DEFENDANT IMPRISONED: H.R.S. § 707-701(e)

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

A person commits the offense of Murder in the First Degree if he/she intentionally or knowingly causes the death of another person while the Defendant is imprisoned.

There are three material elements of the offense of Murder 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 caused the death of another person; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so while the Defendant was imprisoned.

Notes

H.R.S. §§ 707-701(e), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

There was discussion by the Committee as to whether a state of mind requirement is applicable to Defendant's imprisonment status in element 3 of the offense.

9.07 MURDER IN THE SECOND DEGREE: H.R.S. § 707-701.5

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

A person commits the offense of Murder in the Second Degree if he/she intentionally or knowingly causes the death of another person.

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

These two elements are:

1. That on or about the (date) in the [City and] County of (name of county), the Defendant intentionally or knowingly engaged in conduct; and

2. That by engaging in that conduct, the Defendant intentionally or knowingly caused the death of another person.

Notes

H.R.S. §§ 707-701.5, 702-206(1) and (2).

For definition of states of mind, see instructions:
6.02 – "intentionally"
6.03 – "knowingly"

9.07B MURDER IN THE SECOND DEGREE -- MURDER ALLEGED BY COMMISSION AND OMISSION IN ONE COUNT - GENERIC: PARENT/MINOR CHILD (WITH INCLUDED OFFENSE AND DEFENSE) -- HRS §§ 707-701.5 and 702-203(2)

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

This offense is being charged and can be proved by the prosecution in either of two ways. With respect to the first alternative, a person commits the offense of Murder in the Second Degree if he/she intentionally or knowingly causes the death of another person.

In the first alternative, there are two material elements of the offense of Murder 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 caused the death of another person; and

2. That the Defendant did so intentionally or knowingly.

With respect to the second alternative, a person commits the offense of Murder in the Second Degree if he/she causes the death of another person by intentionally or knowingly failing to obtain to the best of his/her ability reasonably necessary and available medical services for the other person, a duty imposed by law upon a parent, intending or knowing that the failure to obtain medical services would result in the death of the other person.

In the second alternative, there are four material elements of the offense of Murder in the Second Degree, 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 was the parent of a minor child; and

2. That the Defendant intentionally or knowingly failed to obtain to the best of his/her ability reasonably necessary and available medical services for the minor child, a duty imposed by law upon a parent; and

3. That the Defendant failed to perform that duty intending or knowing that the Defendant's failure would cause the death of the minor child; and

4. That the Defendant's failure to perform that duty caused the death of the minor child.

If and only if you unanimously find that all the elements of either or both alternatives of Murder in the Second Degree have been proven by the prosecution beyond a reasonable doubt, then you must consider whether, at the time the Defendant caused the death, he/she was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the Defendant's situation under the circumstances of which the Defendant was aware or as the Defendant believed them to be.

Under either alternative, the prosecution must prove beyond a reasonable doubt that the Defendant was not, at the time that he/she caused the death of (decedent), under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If you unanimously find that the prosecution has done so, then you must return a verdict of guilty of Murder in the Second Degree. If unanimously find that the prosecution has not done so, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance.

If you are unable to reach a unanimous agreement as to whether the prosecution has proved, or failed to prove, that the Defendant was not under the influence of extreme mental or emotional disturbance, then your decision is not unanimous and a verdict may not be returned on this offense.

If and only if you find the Defendant not guilty of both alternatives of Murder in the Second Degree, or you are unable to reach a unanimous verdict as to this offense, then you must consider whether the Defendant is guilty or not guilty of the offense of Manslaughter based upon reckless conduct.

The offense of Manslaughter based upon reckless conduct can be proved by the prosecution in either of two ways. With respect to the first alternative, a person commits the offense of Manslaughter if he/she recklessly caused the death of another person.

In the first alternative, there are two material elements of Manslaughter based upon reckless conduct, 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 caused the death of another person; and

2. That the Defendant did so recklessly.

With respect to the second alternative, a person commits the offense of Manslaughter if he/she causes the death of another person by recklessly failing to obtain to the best of his/her ability reasonably necessary and available medical services for injuries to the other person, a duty imposed by law upon a parent, consciously disregarding a substantial and unjustifiable risk that failure to obtain medical services would result in the death of the other person.

In the second alternative, there are four material elements of the offense of Manslaughter based upon reckless conduct, 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 was the parent of a minor child; and

2. That the Defendant recklessly failed to obtain to the best of his/her ability reasonably necessary and available

medical services for the minor child, a duty imposed by law upon a parent; and

3. That the Defendant failed to perform that duty consciously disregarding a substantial and unjustifiable risk that the Defendant's failure would cause the death of the minor child; and

4. That the Defendant's failure to perform that duty caused the death of the minor child.

If you unanimously find that all the elements of either or both alternatives of Manslaughter have been proved by the prosecution beyond a reasonable doubt, then you must return a verdict of guilty of Manslaughter based upon reckless conduct.

[In any prosecution for an offense it is a defense that the Defendant engaged in the prohibited conduct under ignorance or mistake of fact if the ignorance or mistake negatives the state of mind required to establish an element of the offense.

With respect to the charge of Murder in the Second Degree it is a defense that the Defendant believed it was not reasonably necessary to obtain medical care for the minor child. It does not matter if the Defendant's belief was mistaken, so long as the Defendant held the belief reasonably, recklessly or negligently at the time of the alleged offense. Thus, the prosecution has the burden of proving beyond a reasonable doubt that the Defendant was aware or believed or hoped that medical care for the minor child was reasonably necessary at the time of the alleged offense of Murder in the Second Degree. If the

prosecution fails to meet its burden, then you must find the Defendant not guilty of Murder in the Second Degree.

With respect to the offense of Manslaughter based upon reckless conduct, it is not a defense that the Defendant was recklessly mistaken. However, a negligent mistake would afford a defense to this offense. A person acts negligently when he/she is not aware of the risk that medical care for his/her child is reasonably necessary, but the person should have been aware of that risk. Thus, the prosecution has the burden of proving beyond a reasonable doubt that the Defendant either knew or consciously disregarded a substantial and unjustifiable risk that medical care for the minor child was reasonably necessary at the time of the alleged offense of Manslaughter based upon reckless conduct.]

Commentary

HRS §§ 707-701.5, 707-702, 702-203(2), 577-7(a), 702-206(1), (2) and (3), 702-218. *State v. Robinson*, 82 Hawai`i 304, 922 P.2d 358 (1996), *State v. Cabral*, 77 Hawai`i 216, 883 P.2d 638 (App. 1994); *State v. Cabral*, 8 Haw. App. 506, 515, 810 P.2d 672, 677 (1991); *State v. Tucker*, 10 Haw. App. 43, 861 P.2d 24 (1993), *cert. gr., remanded on other issues*, 10 Haw. App. 73, 861 P.2d 37 (1993); *State v. Batson*, 73 Haw. 236, 251 n. 8, 831 P.2d 924, 932-33 n. 8 (1992).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

This instruction is included for the convenience of the court and parties. It is not intended to indicate in any way that the pattern included offense or defense should be submitted to the jury in a particular case.

9.08 EXTREME MENTAL OR EMOTIONAL DISTURBANCE MANSLAUGHTER: H.R.S. § 707-702(2)

If and only if you unanimously find that all the elements of (specify murder charge) have been proven by the prosecution beyond a reasonable doubt [and you unanimously find that the defendant was not justified in using deadly force], then you must consider whether, at the time defendant caused the death, he/she was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that the defendant was not, at the time that he/she caused the death of (decedent), under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If you unanimously find that the prosecution has done so, then you must return a verdict of guilty of (specify murder charge). If you unanimously find that the prosection has not done so, then you must return a verdict of guilty of Manslaughter based upon extreme mental or emotional disturbance.

If you are unable to reach a unanimous agreement as to whether the prosecution has proved, or failed to prove, that the defendant was not under the influence of extreme mental or

emotional disturbance, then your decision is not unanimous and a verdict may not be returned on this offense.

9.08A EXTREME MENTAL OR EMOTIONAL DISTURBANCE MANSLAUGHTER: H.R.S. § 707-702(2)

If and only if you unanimously find that all the elements of (specify murder or attempted murder charge) have been proven by the prosecution beyond a reasonable doubt [and you unanimously find that the defendant was not justified in using deadly force/force], then you must consider the affirmative defense of Extreme Mental or Emotional Disturbance.

Extreme Mental or Emotional Disturbance has two elements. These two elements are:

1. That the Defendant was, at the time he/she caused the death/attempted to cause the death of the other person, under the influence of extreme mental or emotional disturbance; and

2. There was a reasonable explanation for the extreme mental or emotional disturbance. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the Defendant believed them to be.

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 Extreme Mental or Emotional Disturbance occurred. In determining whether the Defendant has proven 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.

If you unanimously find that the Defendant has proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the Defendant guilty of Manslaughter/Attempted Manslaughter based upon Extreme Mental or Emotional Disturbance. If you unanimously find that the Defendant has not proven the elements of the affirmative defense by a preponderance of the evidence, then you must find the Defendant guilty of (specify murder or attempted murder charge).

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 (specify murder or attempted murder charge).

Notes

Effective May 19, 2003, Extreme Mental or Emotional Disturbance became an affirmative defense.

9.09 MANSLAUGHTER -- RECKLESS: H.R.S. § 707-702(1)(a)

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

A person commits the offense of Manslaughter if he/she recklessly causes the death of another person.

There are two material elements of the offense of Manslaughter, 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 caused the death of another person; and

2. That the Defendant did so recklessly.

Notes

H.R.S. §§ 707-702(1)(a), 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

9.09A MANSLAUGHTER -- BY CAUSING SUICIDE: H.R.S. § 707-702(1)(b)

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

A person commits the offense of Manslaughter if he/she intentionally causes another person to commit suicide.

There are two material elements of the offense of Manslaughter, 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 caused another person to commit suicide; and

2. That the Defendant did so intentionally.

Notes

H.R.S. §§ 707-702(1)(b), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

9.10 NEGLIGENT HOMICIDE IN THE FIRST DEGREE: H.R.S. § 707-702.5

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

A person commits the offense of Negligent Homicide in the First Degree if he/she causes the death of another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol.

There are three material elements of the offense of Negligent Homicide 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 caused the death of another person; and

2. That the Defendant did so by negligently operating a vehicle; and

3. That the Defendant did so while under the influence of drugs or alcohol.

Notes

H.R.S. §§ 707-702.5, 702-206(4).

For definition of states of mind, *see* instruction:
6.05 - "negligently"

For definition of term *not* defined by H.R.S. Chapter 707, *see*:

Chapter 291C-1 - "vehicle". *See also* H.R.S. § 708-836(2) - "propelled vehicle".

For instructions on offense of "driving under the influence of intoxicating liquor", *see* instructions 16.02 through 16.05. The offense of "driving under the influence of drugs" is set forth in H.R.S. § 291-7.

The term "drugs" or "alcohol" may be stricken to conform with the charge.

9.11 NEGLIGENT HOMICIDE IN THE SECOND DEGREE: H.R.S. § 707-703

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

A person commits the offense of Negligent Homicide in the Second Degree if he/she causes the death of another person by the operation of a vehicle in a negligent manner.

There are two material elements of the offense of Negligent Homicide 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 caused the death of another person; and

2. That the Defendant did so by negligently operating a vehicle.

Notes

H.R.S. §§ 707-703, 702-206(4).

For definition of states of mind, *see* instruction:
6.05 - "negligently"

For definition of term *not* defined by H.R.S. Chapter 707, *see*:
H.R.S. § 708-836(2) - "propelled vehicle"
Chapter 291C-1 - "vehicle"

The term "negligently operating", contained in element two of the instruction, slightly deviates from the language of the statute which states "operation of a vehicle in a negligent manner." This change enables the statutory definition of "negligently" to be submitted to the factfinder. However, the

exact wording of the statute may cover additional situations than that encompassed by the language of the instruction.

9.12 NEGLIGENT HOMICIDE IN THE THIRD DEGREE: H.R.S. § 707-704

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Negligent Homicide in the Third Degree.

A person commits the offense of Negligent Homicide in the Third Degree if he/she causes the death of another person by the operation of a vehicle in a manner which is simple negligence.

There are two material elements of the offense of Negligent Homicide in the Third 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 caused the death of another person; and

2. That the Defendant did so by operation of a vehicle in a manner which was simple negligence.

"Simple negligence" is defined as follows:

A person acts with simple negligence with respect to the person's conduct when the person should be aware of a risk that the person engages in that conduct.

A person acts with simple negligence with respect to attendant circumstances when the person should be aware of a risk that those circumstances exist.

A person acts with simple negligence with respect to a result of the person's conduct when the person should be aware of a risk that the person's conduct will cause that result.

A risk is within the meaning of "simple negligence" if the person's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to the person, involves a deviation from the standard of care that a law-abiding person would observe in the same situation.

Notes

H.R.S. § 707-704.

For definition of term *not* defined by H.R.S. Chapter 707, *see*:

Chapter 291C-1 - "vehicle". *See also* H.R.S. § 708-836(2) -"propelled vehicle".

9.13 NEGLIGENT INJURY IN THE FIRST DEGREE: H.R.S. § 707-705

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

A person commits the offense of Negligent Injury in the First Degree if he/she causes serious bodily injury to another person by the operation of a vehicle in a negligent manner.

There are two material elements of the offense of Negligent Injury 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 caused serious bodily injury to another person; and

2. That the Defendant did so by negligently operating a vehicle.

Notes

H.R.S. §§ 707-705, 707-206(4).

For definition of states of mind, *see* instruction:
6.05 - "negligently"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "serious bodily injury"

For definition of term *not* defined by H.R.S. Chapter 707, *see*:
Chapter 291C-1 - "vehicle". *See also* H.R.S. § 708-836(2) -"propelled vehicle".

The term "negligently operating", contained in element two of the instruction, slightly deviates from the language of the statute which states "operation of a vehicle in a negligent manner." This change enables the statutory definition of "negligently" to be submitted to the factfinder. However, the exact wording of the statute may cover additional situations than that encompassed by the language of the instruction.

9.14 NEGLIGENT INJURY IN THE SECOND DEGREE: H.R.S. § 707-706

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

A person commits the offense of Negligent Injury in the Second Degree if he/she causes substantial bodily injury to another person by the operation of a vehicle in a negligent manner.

There are two material elements of the offense of Negligent Injury 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 caused substantial bodily injury to another person; and

2. That the Defendant did so by negligently operating a vehicle.

Notes

H.R.S. §§ 707-706, 707-206(4).

For definition of states of mind, *see* instruction:
6.05 - "negligently"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "substantial bodily injury"

For definition of term *not* defined by H.R.S. Chapter 707, *see*:

Chapter 291C-1 - "vehicle". *See also* H.R.S. § 708-836(2) -"propelled vehicle".

The term "negligently operating", contained in element two of the instruction, slightly deviates from the language of the statute which states "operation of a vehicle in a negligent manner." This change enables the statutory definition of "negligently" to be submitted to the factfinder. However, the exact wording of the statute may cover additional situations than that encompassed by the language of the instruction.

9.15 ASSAULT IN THE FIRST DEGREE: H.R.S. § 707-710

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

A person commits the offense of Assault in the First Degree if he/she intentionally or knowingly causes serious bodily injury to another person.

There are two material elements of the offense of Assault 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 caused serious bodily injury to another person; and

2. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 707-710, 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "serious bodily injury"

9.16 ASSAULT IN THE SECOND DEGREE -- INTENTIONAL OR KNOWING: H.R.S. § 707-711(1)(a)

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

A person commits the offense of Assault in the Second Degree if he/she intentionally or knowingly causes substantial bodily injury to another person.

There are two material elements of the offense of Assault 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 caused substantial bodily injury to another person; and

2. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 707-711(1)(a), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "substantial bodily injury"

9.17 ASSAULT IN THE SECOND DEGREE -- RECKLESS: H.R.S. § 707-711(1)(b)

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

A person commits the offense of Assault in the Second Degree if he/she recklessly causes serious bodily injury to another person.

There are two material elements of the offense of Assault 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 caused serious bodily injury to another person; and

2. That the Defendant did so recklessly.

Notes

H.R.S. §§ 707-711(1)(b), 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "serious bodily injury"

9.18 ASSAULT IN THE SECOND DEGREE -- CORRECTIONAL WORKER: H.R.S. § 707-711(1)(c)

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

A person commits the offense of Assault in the Second Degree if he/she intentionally or knowingly causes bodily injury to a correctional worker [who is engaged in the performance of duty] [who is within a correctional facility].

There are four material elements of the offense of Assault in the Second Degree, 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 caused bodily injury to a correctional worker; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so to a correctional worker who was [engaged in the performance of duty] [within a correctional facility]; and

4. That the Defendant knew, at that time, that the person was a correctional worker [engaged in the performance of duty] [within a correctional facility].

Notes

H.R.S. §§ 707-711(1)(c), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

For definition of term *not* defined by H.R.S. Chapter 707, *see* instruction:
12.16 - "correctional worker" (H.R.S. § 710-1031(2))

9.19 ASSAULT IN THE SECOND DEGREE -- DANGEROUS INSTRUMENT: H.R.S. § 707-711(1)(d)

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

A person commits the offense of Assault in the Second Degree if he/she intentionally or knowingly causes bodily injury to another person with a dangerous instrument.

There are three material elements of the offense of Assault 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 caused bodily injury to another person;

2. That the Defendant did so with a dangerous instrument; and

3. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 707-711(1)(d), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "dangerous instrument"

9.20 ASSAULT IN THE SECOND DEGREE -- EDUCATIONAL WORKER: H.R.S. § 707-711(1)(e)

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

A person commits the offense of Assault in the Second Degree if he/she intentionally or knowingly causes bodily injury to an educational worker [who is engaged in the performance of duty] [who is within an educational facility].

There are four material elements of the offense of Assault in the Second Degree, 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 caused bodily injury to an educational worker; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so to an educational worker who was [engaged in the performance of duty] [within an educational facility]; and

4. That the Defendant knew, at that time, that the person was an educational worker [engaged in the performance of duty] [within an educational facility].

"Educational worker" means any administrator, specialist, counselor, teacher, or employee of the department of education,

or a person who is a volunteer in a school program, activity, or function that is established, sanctioned, or approved by the department of education or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function.

Notes

H.R.S. §§ 707-711(1)(e), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

9.21 ASSAULT IN THE THIRD DEGREE -- INTENTIONAL, KNOWING OR RECKLESS: H.R.S. § 707-712(1)(a)

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

A person commits the offense of Assault in the Third Degree if he/she intentionally, knowingly or recklessly causes bodily injury to another person.

There are two material elements of the offense of Assault in the Third 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 caused bodily injury to another person; and

2. That the Defendant did so intentionally, knowingly or recklessly.

Notes

H.R.S. §§ 707-712(1)(a), 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 terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

9.21A ASSAULT IN THE THIRD DEGREE--MUTUAL AFFRAY*: H.R.S. § 707-712(1)(a)

If you find that the prosecution has proven the offense of Assault in the Third Degree beyond a reasonable doubt, then you must also determine whether the prosecution has proven beyond a reasonable doubt that the fight or scuffle was not entered into by mutual consent. This determination must be unanimous and is to be indicated by answering "Yes" or "No" on a special interrogatory which will be provided to you.

Notes

H.R.S. § 707-712(1)(a).

[*] When an Assault in the Third Degree instruction is submitted to the jury, the court must also submit a mutual affray instruction and special interrogatory where there is any evidence that the fight or scuffle was entered into by mutual consent. *See* instructions 9.21B and 9.21C.

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).

[Note: Instruction 9.21B, Assault in the Third Degree by Mutual Affray: HRS §707-712(1)(a) is not included in this set.]

9.21C ASSAULT IN THE THIRD DEGREE BY MUTUAL AFFRAY SPECIAL INTERROGATORY: H.R.S. § 707-712(1)(a)

Did the prosecution prove beyond a reasonable doubt that the fight or scuffle was not entered into by mutual consent? (Your answer to this question must be unanimous.)

Yes _____

No _____

Notes

H.R.S. § 707-712(1)(a).

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).

9.22 ASSAULT IN THE THIRD DEGREE -- DANGEROUS INSTRUMENT: H.R.S. § 707-712(1)(b)

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

A person commits the offense of Assault in the Third Degree if he/she negligently causes bodily injury to another person with a dangerous instrument.

There are two material elements of the offense of Assault in the Third 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 caused bodily injury to another person with a dangerous instrument; and

2. That the Defendant did so negligently.

Notes

H.R.S. §§ 707-712(1)(b), 702-206(4).

For definition of states of mind, *see* instruction:
6.05 - "negligently"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "dangerous instrument"

For circumstances when a mutual affray instruction is appropriate, *see* note to 9.21A. In such event, instruction 9.21A, verdict form 9.21B, and special interrogatory 9.21C should be submitted to the jury.

9.23 ASSAULT AGAINST A POLICE OFFICER -- INTENTIONAL, KNOWING OR RECKLESS: H.R.S. § 707-712.5(1)(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault Against a Police Officer.

A person commits the offense of Assault Against a Police Officer if he/she intentionally, knowingly or recklessly causes bodily injury to a police officer who is engaged in the performance of official duties.

There are four material elements of the offense of Assault Against a Police Officer, 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 caused bodily injury to a police officer; and

2. That the Defendant did so intentionally, knowingly or recklessly; and

3. That the Defendant did so to a police officer who was, at that time, engaged in the performance of his/her official duties as a police officer; and

4. That, at that time, the Defendant knew or recklessly disregarded a substantial and unjustifiable risk that the person was a police officer engaged in the performance of his/her official duties as a police officer.

Notes

H.R.S. §§ 707-712.5(1)(a), 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 terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

9.23A ASSAULT AGAINST A LAW ENFORCEMENT OFFICER IN THE FIRST DEGREE -- INTENTIONAL OR KNOWING: H.R.S. § 707-712.5(1)(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault Against a Law Enforcement Officer in the First Degree.

A person commits the offense of Assault Against a Law Enforcement Officer in the First Degree if he/she intentionally or knowingly causes bodily injury to a law enforcement officer who is engaged in the performance of duty.

There are four material elements of the offense of Assault Against a Law Enforcement Officer in the First Degree, 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 engaged in conduct; and
2. That the Defendant's conduct caused bodily injury to another person; and
3. That, at that time, the person was a law enforcement officer engaged in the performance of his/her official duties as a law enforcement officer; and
4. That the Defendant acted intentionally or knowingly as to each of the foregoing elements.

Notes

H.R.S. §§ 707-712.5(1)(a), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 – "intentionally"
6.03 – "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 – "bodily injury"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instruction:
12.00 – "law enforcement officer"

9.23B ASSAULT AGAINST A LAW ENFORCEMENT OFFICER IN THE SECOND DEGREE: H.R.S. § 707-712.6

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault Against a Law Enforcement Officer in the Second Degree.

A person commits the offense of Assault Against a Law Enforcement Officer in the Second Degree if he/she recklessly causes bodily injury to a law enforcement officer who is engaged in the performance of duty.

There are four material elements of the offense of Assault Against a Law Enforcement Officer in the Second Degree, 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 engaged in conduct; and
2. That the Defendant's conduct caused bodily injury to another person; and
3. That, at that time, the person was a law enforcement officer engaged in the performance of his/her official duties as a law enforcement officer; and
4. That the Defendant acted recklessly as to each of the foregoing elements.

Notes

H.R.S. §§ 707-712.6, 702-206(3).

For definition of states of mind, *see* instruction:
6.04 – "recklessly"

9.24 ASSAULT AGAINST A POLICE OFFICER -- DANGEROUS INSTRUMENT: H.R.S. § 707-712.5(1)(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault Against a Police Officer.

A person commits the offense of Assault Against a Police Officer if he/she negligently causes, with a dangerous instrument, bodily injury to a police officer who is engaged in the performance of official duties.

There are three material elements of the offense of Assault Against a Police Officer, 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 caused bodily injury to a police officer with a dangerous instrument; and

2. That the Defendant did so negligently; and

3. That, at that time, the Defendant knew or was negligent in not being aware of a substantial and unjustifiable risk, that the person was a police officer who was engaged in the performance of his/her official duties as a police officer.

Notes

H.R.S. §§ 707-712.5(1)(b), 702-206(2), (3) and (4).

For definition of states of mind, *see* instructions:
- 6.03 - "knowingly"
- 6.04 - "recklessly"
- 6.05 - "negligently"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:

9.00 - "bodily injury"
9.00 - "dangerous instrument"

9.24A ASSAULT AGAINST A LAW ENFORCEMENT OFFICER IN THE FIRST DEGREE -- DANGEROUS INSTRUMENT: H.R.S. § 707-712.5(1)(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Assault Against a Law Enforcement Officer in the First Degree.

A person commits the offense of Assault Against a Law Enforcement Officer in the First Degree if he/she recklessly or negligently causes, with a dangerous instrument, bodily injury to a law enforcement officer who is engaged in the performance of duty.

There are five material elements of the offense of Assault Against a Law Enforcement Officer in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date), in the [City and] County of (name of county), the Defendant engaged in conduct; and
2. That the Defendant's conduct caused bodily injury to another person; and
3. That the bodily injury was caused with a dangerous instrument; and
4. That, at that time, the person was a law enforcement officer engaged in the performance of his/her official duties as a law enforcement officer; and
5. That the Defendant acted recklessly or negligently as to each of the foregoing elements.

Notes

H.R.S. §§ 707-712.5(1)(b), 702-206(3) and (4).

For definition of states of mind, *see* instructions:
6.04 – "recklessly"
6.05 – "negligently"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 – "bodily injury"

9.00 – “dangerous instrument”

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instruction:

12.00 – “law enforcement officer”

9.25 RECKLESS ENDANGERING IN THE FIRST DEGREE -- WIDELY DANGEROUS MEANS: H.R.S. § 707-713

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

A person commits the offense of Reckless Endangering in the First Degree if he/she employs widely dangerous means in a manner which recklessly places another person in danger of death or serious bodily injury.

There are three material elements of the offense of Reckless Endangering 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 employed widely dangerous means; and

2. That the Defendant did so intentionally, knowingly or recklessly; and

3. That the Defendant did so in a manner which recklessly placed another person in danger of death or serious bodily injury.

Notes

H.R.S. §§ 707-713, 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 terms defined by H.R.S. Chapter 707, *see* instruction:

9.00 - "serious bodily injury"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instruction:

10.00 - "widely dangerous means"

9.26 RECKLESS ENDANGERING IN THE FIRST DEGREE -- FIREARM: H.R.S. § 707-713

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

A person commits the offense of Reckless Endangering in the First Degree if he/she intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

There are three material elements of the offense of Reckless Endangering 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 fired a firearm; and

2. That the Defendant did so intentionally; and

3. That the Defendant did so in a manner which recklessly placed another person in danger of death or serious bodily injury.

Notes

H.R.S. §§ 707-713, 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "serious bodily injury"
For definition of terms *not* defined by H.R.S. Chapter 707, *see* instruction:
15.00 - "firearm"

9.27 RECKLESS ENDANGERING IN THE SECOND DEGREE: H.R.S. § 707-714

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

A person commits the offense of Reckless Endangering in the Second Degree if he/she engages in conduct which recklessly places another person in danger of death or serious bodily injury.

There are two material elements of the offense of Reckless Endangering 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 engaged in conduct which recklessly placed another person in danger of death or serious bodily injury; and

2. That the Defendant did so intentionally, knowingly or recklessly.

Notes

H.R.S. §§ 707-714, 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 terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "serious bodily injury"

9.28 TERRORISTIC THREATENING IN THE FIRST DEGREE -- MORE THAN ONE OCCASION: H.R.S. § 707-716(1)(a)

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

A person commits the offense of Terroristic Threatening in the First Degree if, [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] another person, he/she threatens, by word or conduct, to [cause bodily injury to that person] [cause serious damage to property of another] [commit a felony] on more than one occasion for the same or a similar purpose.

There are three material elements of the offense of Terroristic Threatening 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),, on more than one occasion, the Defendant threatened, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony*]; and

2. That the Defendant made the threats for the same or a similar purpose; and

3. That the Defendant did so [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] another person.

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

Notes

H.R.S. §§ 707-716(1)(a), 707-715(1), 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

See State v. Valdivia, No. 23556 (Haw. June 7, 2001) for discussion of "gravity of purpose" and "imminent prospect of execution".

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

9.29 TERRORISTIC THREATENING IN THE FIRST DEGREE -- COMMON SCHEME: H.R.S. § 707-716(1)(b)

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

A person commits the offense of Terroristic Threatening in the First Degree if, [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] different persons, he/she threatens, by word or conduct, to [cause bodily injury to other persons] [cause serious damage to property of other persons] [commit a felony against other persons] in a common scheme against different persons.

There are three material elements of the offense of Terroristic Threatening 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 made threats, by word or conduct, to [cause bodily injury to] [cause serious damage to property of] [commit a felony against*] different persons; and

2. That the Defendant made the threats in a common scheme against different persons; and

3. That the Defendant did so [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] those different persons.

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

Notes

H.R.S. §§ 707-716(1)(b), 707-715(1), 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

See State v. Valdivia, No. 23556 (Haw. June 7, 2001) for discussion of "gravity of purpose" and "imminent prospect of execution".

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

9.30 TERRORISTIC THREATENING IN THE FIRST DEGREE -- PUBLIC SERVANT: H.R.S. § 707-716(1)(c)

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

A person commits the offense of Terroristic Threatening in the First Degree if, [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] a public servant, he/she threatens, by word or conduct, to [cause bodily injury to a public servant] [cause serious damage to the property of a public servant] [commit a felony against a public servant] who was, at that time, in the performance of official duties.

There are four material elements of the offense of Terroristic Threatening in the First Degree, 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 threatened, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony*]; and

2. That the Defendant did so [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] that person; and

3. That the person threatened was, at the time, a public servant;** and

4. That, at that time, the Defendant knew or recklessly disregarded a substantial and unjustifiable risk, that the person was a public servant.***

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

Notes

H.R.S. §§ 707-716(1)(c), 707-715(1), 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 terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instruction:
12.00 - "public servant"

See State v. Valdivia, No. 23556 (Haw. June 7, 2001) for discussion of "gravity of purpose" and "imminent prospect of execution".

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

**Element 3 of the instruction tracks the statutory language of H.R.S. § 707-716(1)(c). However, it may be appropriate, in light of statutes with similar attendant circumstances, to conclude element 3 with the following language "who was engaged in the performance of his/her official duties."

***Similarly, it may be appropriate to conclude element 4 of the instruction with the following language "engaged in the performance of his/her official duties."

9.31 TERRORISTIC THREATENING IN THE FIRST DEGREE -- DANGEROUS INSTRUMENT: H.R.S. § 707-716(1)(d)

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

A person commits the offense of Terroristic Threatening in the First Degree if, [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] another person, he/she threatens, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony] with the use of a dangerous instrument.

There are three material elements of the offense of Terroristic Threatening 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 threatened, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony*]; and

2. That the Defendant did so with the use of a dangerous instrument; and

3. That the Defendant did so [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] that person.

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

Notes

H.R.S. §§ 707-716(1)(d), 707-715(1), 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "dangerous instrument"

See State v. Valdivia, No. 23556 (Haw. June 7, 2001) for discussion of "gravity of purpose" and "imminent prospect of execution".

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

9.32 TERRORISTIC THREATENING IN THE SECOND DEGREE: H.R.S. § 707-717

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

A person commits the offense of Terroristic Threatening in the Second Degree if, [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] another person, he/she threatens, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony].

There are two material elements of the offense of Terroristic Threatening 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 threatened, by word or conduct, to [cause bodily injury to another person] [cause serious damage to property of another] [commit a felony*]; and

2. That the Defendant did so [with the intent to terrorize] [in reckless disregard of the risk of terrorizing] that person.

The threat on its face and in the circumstances in which it is made must be so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and an imminent prospect of execution.

Notes

H.R.S. §§ 707-717, 707-715(1), 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "bodily injury"

See State v. Valdivia, No. 23556 (Haw. June 7, 2001) for discussion of "gravity of purpose" and "imminent prospect of execution".

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

9.33 KIDNAPPING -- FACILITATE FELONY OR FLIGHT: H.R.S. § 707-720(1)(c)

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

A person commits the offense of Kidnapping if he/she intentionally or knowingly restrains another person with intent to facilitate the commission of a felony or flight thereafter.

There are three material elements of the offense of Kidnapping, 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 restrained another person; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so with the intent to facilitate the commission of a felony or flight thereafter.*

Notes

H.R.S. §§ 707-720(1)(c), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "restrain"

*The court should identify whether applicable or included offenses are felonies, and instruct as to the elements of these felonies (and any applicable defenses that vitiate intent), if the felony offenses are not otherwise charged.

9.34 KIDNAPPING -- INJURY OR SEXUAL OFFENSE: H.R.S. § 707-720(1)(d)

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

A person commits the offense of Kidnapping if he/she intentionally or knowingly restrains another person with intent to [inflict bodily injury upon that person] [subject that person to a sexual offense].

There are three material elements of the offense of Kidnapping, 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 restrained another person; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so with the intent to [inflict bodily injury upon that person] [subject that person to (name of sexual offense or included sexual offense)*].

Notes

H.R.S. §§ 707-720(1)(d), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "restrain"

*The court should instruct as to the elements of the sexual offense or included sexual offenses (and any applicable defense that vitiate intent), unless such sexual offenses are otherwise charged.

9.35 KIDNAPPING -- INTENT TO TERRORIZE: H.R.S. § 707-720(1)(e)

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

A person commits the offense of Kidnapping if he/she intentionally or knowingly restrains a person with intent to terrorize [that person] [another person].

There are three material elements of the offense of Kidnapping, 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 restrained a person; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so with the intent to terrorize [that person] [another person].

Notes

H.R.S. §§ 707-720(1)(e), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "restrain"

9.36 KIDNAPPING -- RANSOM, HOSTAGE, INTERFERENCE WITH GOVERNMENTAL FUNCTION: H.R.S. § 707-720(1)(a),(b) and (f)

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

A person commits the offense of Kidnapping if he/she intentionally or knowingly restrains another person with intent to [hold that person for ransom or reward] [use that person as a shield or hostage] [interfere with the performance of any governmental or political function].

There are three material elements of the offense of Kidnapping, 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 restrained another person; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so with the intent to [hold that person for ransom or reward] [use that person as a shield or hostage] [interfere with the performance of any governmental or political function].

Notes

H.R.S. §§ 707-720(1)(a),(b) and (f), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:

9.00 - "restrain"

9.37 KIDNAPPING--VOLUNTARY RELEASE: H.R.S. § 707-720(3)

If you find that the prosecution has proven beyond a reasonable doubt that the Defendant committed the offense of Kidnapping, then you must also answer the following three questions on a special interrogatory which will be provided to you:

1. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) voluntarily?

2. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) alive and not suffering from serious or substantial bodily injury?

3. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) in a safe place?

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

Notes

H.R.S. § 707-720(3).

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00--"serious bodily injury"
9.00--"substantial bodily injury"

This instruction must be submitted to the jury when there is any evidence in the record to support the instruction. *State v. Molitoni*, 6 Haw.App. 77, 711 P.2d 1303 (1985).

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).

A "yes" response to any of the three questions results in a Class A felony.

9.38 KIDNAPPING--SPECIAL INTERROGATORY: H.R.S. § 707-720(3)

1. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) voluntarily?

Yes _____

No _____

2. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) alive and not suffering from serious or substantial bodily injury?

Yes _____

No _____

3. Has the prosecution proven beyond a reasonable doubt that prior to trial the Defendant did not release (name of person) in a safe place?

Yes _____

No _____

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

Notes

H.R.S. § 707-720(3).

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).

9.39 UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE: H.R.S. § 707-721(1)(a)

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

A person commits the offense of Unlawful Imprisonment in the First Degree if he/she knowingly restrains another person under circumstances which expose the person to the risk of serious bodily injury.

There are three material elements of the offense of Unlawful Imprisonment 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 restrained another person; and

2. That the Defendant did so under circumstances which exposed the person to the risk of serious bodily injury; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-721(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "restrain"
9.00 - "serious bodily injury"

9.40 UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE: H.R.S. § 707-722

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

A person commits the offense of Unlawful Imprisonment in the Second Degree if he/she knowingly restrains another person.

There are two material elements of the offense of Unlawful Imprisonment 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 restrained another person; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-722, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "restrain"

Affirmative defenses to this misdemeanor offense are set forth in H.R.S. § 707-722(2) and (3).

9.41 CUSTODIAL INTERFERENCE IN THE FIRST DEGREE -- REMOVES MINOR FROM THE STATE: H.R.S. § 707-726(1)(a) (Applicable to offenses occurring on or after June 12, 1996)

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

A person commits the offense of Custodial Interference in the First Degree if he/she intentionally or knowingly [violates a domestic abuse protective court order] [takes, entices, conceals, or detains the minor from any other person who has a right to custody pursuant to a court order, judgment, or decree] and removes the minor from the State of Hawai`i.

There are four elements of the offense of Custodial Interference in the First Degree, 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 removed the minor from the State of Hawai`i; and

2. That the Defendant [violated a domestic abuse protective court order] [took, enticed, concealed or detained the minor from any other person who had a right to custody pursuant to a court order, judgment, or decree]; and

3. That the Defendant did so intentionally or knowingly; and

4. That the Defendant knew, at that time, the person was a minor.

Notes

H.R.S. §§ 707-726(1)(a), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For statutory affirmative defense to this offense, *see* instruction 9.41B.

9.41A CUSTODIAL INTERFERENCE IN THE FIRST DEGREE -- REMOVES MINOR FROM THE STATE: H.R.S. § 707-726(1)(c) (Applicable to offenses occurring on or after June 12, 1996)

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

A person commits the offense of Custodial Interference in the First Degree if he/she, in the absence of a court order determining custody or visitation rights, intentionally or knowingly [takes] [detains] [conceals] [entices away] a minor with the intent to deprive another person or a public agency of their right to custody, and removes the minor from the State of Hawai`i.

There are five elements of the offense of Custodial Interference in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant removed the minor from the State of Hawai`i; and

2. That the Defendant, in the absence of a court order determining custody or visitation rights, [took] [detained] [concealed] [enticed away] a minor; and

3. That the Defendant did so intentionally or knowingly; and

4. That the Defendant did so with the intent to deprive another person or a public agency of their right to custody; and

5. That the Defendant knew, at that time, the person was a minor.

Notes

H.R.S. §§ 707-726(1)(c), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For statutory affirmative defense to this offense, *see* instruction 9.41B.

9.41B AFFIRMATIVE DEFENSE: CUSTODIAL INTERFERENCE IN THE FIRST DEGREE: H.R.S. § 707-726(2) (Applicable to offenses occurring on or after June 12, 1996)

It is an affirmative defense to a charge of Custodial Interference that the Defendant had good cause for the [violation of the domestic abuse protective court order] [taking, detaining, concealing, or enticing away of the minor] [removing the minor from the State]; provided that the Defendant filed a report with the clerk of the family court detailing the whereabouts of the minor and the Defendant, and the circumstances of the event as soon as the filing of the report was practicable; and also filed a request for a custody order as soon as the filing of the request was practicable.

"Good cause" means a good faith and reasonable belief that the taking, detaining, concealing, enticing away, or removing of the minor is necessary to protect the minor from immediate bodily injury.

Notes

H.R.S. §§ 707-726(2).

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:

9.00 - "bodily injury"

For definition of "affirmative defense," *see* instruction 7.06.

9.41C CUSTODIAL INTERFERENCE IN THE FIRST DEGREE -- RELATIVE OF MINOR: H.R.S. § 707-726(1)(a) (Applicable to offenses that occurred on or before June 11, 1996)

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

A person commits the offense of Custodial Interference in the First Degree if a relative of a minor intentionally or knowingly [violates a domestic abuse protective court order] [takes, entices, conceals, or detains the minor from any other person who has a right to custody pursuant to a court order, judgment, or decree] and removes the minor from the State of Hawai`i.

There are five elements of the offense of Custodial Interference in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant was a relative of the minor person; and

2. That the Defendant knew, at that time, he/she was a relative of the person and that the person was a minor; and

3. That the Defendant [violated a domestic abuse protective court order] [took, enticed, concealed or detained the minor from any other person who had a right to custody pursuant to a court order, judgment, or decree]; and

4. That the Defendant removed the minor from the State of Hawai`i; and

5. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 707-726(1)(a), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instruction:
9.00 - "relative"

9.42 CUSTODIAL INTERFERENCE IN THE FIRST DEGREE -- MINOR LESS THAN AGE 11: H.R.S. § 707-726(1)(b) (Applicable to offenses occurring on or after June 12, 1996)

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

A person commits the offense of Custodial Interference in the First Degree if he/she intentionally or knowingly [takes] [entices] [conceals] [detains] a minor less than eleven years old from that minor's lawful custodian, knowing that the person had no right to do so.

There are three elements of the offense of Custodial Interference 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 [took] [enticed] [concealed] [detained] the minor from that minor's lawful custodian; and

2. That the Defendant knew that he/she had no right to do so; and

3. That the Defendant knew, at that time, the minor was less than eleven years old.

Notes

H.R.S. §§ 707-726(1)(b), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"

6.03 – "knowingly"

For statutory affirmative defense to this offense, *see* instruction 9.41B.

9.42A CUSTODIAL INTERFERENCE IN THE FIRST DEGREE -- RELATIVE OF A CHILD LESS THAN AGE 11: H.R.S. § 707-726(1)(b) (Applicable to offenses that occurred on or before June 11, 1996)

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

A person commits the offense of Custodial Interference in the First Degree if a relative intentionally or knowingly [takes] [entices] [conceals] [detains] a child less than eleven years old from that child's lawful custodian, knowing that the relative had no right to do so.

There are four elements of the offense of Custodial Interference in the First Degree, 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 was a relative of the child; and

2. That the Defendant knew, at that time, he/she was a relative of the child and that the child was less than eleven years old; and

3. That the Defendant intentionally or knowingly [took] [enticed] [concealed] [detained] the child from that child's lawful custodian; and

4. That the Defendant knew that he/she had no right to do so.

Notes

H.R.S. §§ 707-726(1)(b), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"

6.03 - "knowingly"

9.43 SEXUAL ASSAULT IN THE FIRST DEGREE -- STRONG COMPULSION: H.R.S. § 707-730(1)(a)

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

A person commits the offense of Sexual Assault in the First Degree if he/she knowingly subjects another person to an act of sexual penetration by strong compulsion.

There are three material elements of the offense of Sexual Assault 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so by strong compulsion; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-730(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "dangerous instrument"
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"
9.00 - "strong compulsion"

9.44 SEXUAL ASSAULT IN THE FIRST DEGREE -- LESS THAN AGE 14: H.R.S. § 707-730(1)(b)

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

A person commits the offense of Sexual Assault in the First Degree if he/she knowingly engages in sexual penetration with a minor who is less than fourteen years old.

There are three material elements of the offense of Sexual Assault 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 engaged in sexual penetration with (minor's name); and

2. That the Defendant did so knowingly; and

3. That (minor's name) was less than fourteen years old at that time.

Notes

H.R.S. §§ 707-730(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"

State v. Buch, 83 Hawai`i 308, 926 P.2d 599 (1996)(a defendant is strictly liable with respect to the attendant circumstance of the complainant's age in a sexual assault).

9.44A SEXUAL ASSAULT IN THE FIRST DEGREE -- AGES 14 AND 15 H.R.S. § 707-730(1)(c)

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

A person commits the offense of Sexual Assault in the First Degree if he/she knowingly engages in sexual penetration with a minor who is at least fourteen years old but less than sixteen years old and the person is not less than five years older than the minor and the person is not legally married to the minor;

There are five material elements of the offense of Sexual Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant engaged in sexual penetration with (minor's name); and

2. That the Defendant did so knowingly; and

3. That (minor's name) was at least fourteen years old but less than sixteen years old at that time; and

4. That the Defendant was not less than five years older than (minor's name); and

5. That the Defendant was not legally married to (minor's name) at that time.

Notes

H.R.S. §§ 707-730(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:

9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"
9.00 - "married"

State v. Buch, 83 Hawai`i 308, 926 P.2d 599 (1996) (a defendant is strictly liable with respect to the attendant circumstance of the complainant's age in a sexual assault).

9.45 SEXUAL ASSAULT IN THE SECOND DEGREE -- COMPULSION: H.R.S. § 707-731(1)(a)

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

A person commits the offense of Sexual Assault in the Second Degree if he/she knowingly subjects another person to an act of sexual penetration by compulsion.

There are three material elements of the offense of Sexual Assault 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so by compulsion; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-731(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "compulsion"
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"

9.46 SEXUAL ASSAULT IN THE SECOND DEGREE -- SPECIAL STATUS PERSONS: H.R.S. § 707-731(1)(b)

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

A person commits the offense of Sexual Assault in the Second Degree if he/she knowingly subjects to sexual penetration another person who is [mentally defective] [mentally incapacitated] [physically helpless].

There are four material elements of the offense of Sexual Assault in the Second Degree, 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so knowingly; and

3. That the person was, at that time, [mentally defective] [mentally incapacitated] [physically helpless]; and

4. That the Defendant knew, at that time, that the person was [mentally defective] [mentally incapacitated] [physically helpless].

Notes

H.R.S. §§ 707-731(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:

6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:

9.00 - "deviate sexual intercourse"
9.00 - "mentally defective"
9.00 - "mentally incapacitated"
9.00 - "physically helpless"
9.00 - "sexual penetration"

9.47 SEXUAL ASSAULT IN THE SECOND DEGREE -- CORRECTIONAL EMPLOYEE/LAW ENFORCEMENT OFFICER: H.R.S. § 707-731(1)(c)

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

A person commits the offense of Sexual Assault in the Second Degree if he/she, while employed [in a state correctional facility] [by a private company providing services at a correctional facility] [by a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute] [by a private correctional facility operating in the State of Hawaii] [as a law enforcement officer], knowingly subjects to sexual penetration [an imprisoned person] [a person confined to a detention facility] [a person committed to the director of public safety] [a person residing in a private correctional facility operating in the State of Hawaii] [a person in custody].

There are four material elements of the offense of Sexual Assault in the Second Degree, 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so while the person was

[imprisoned] [confined to a detention facility] [committed to the director of public safety] [residing in a private correctional facility operating in the State of Hawaii] [in custody]; and

3. That the Defendant did so while the Defendant was employed [in a state correctional facility] [by a private company providing services at a correctional facility] [by a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute] [by a private correctional facility operating in the State of Hawaii] [as a law enforcement officer]; and

4. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-731(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03--"knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00--"deviate sexual intercourse"
9.00--"sexual penetration"

For definition of "law enforcement officer", *see* instruction:
12.00--"law enforcement officer"

9.48 SEXUAL ASSAULT IN THE THIRD DEGREE -- COMPULSION: H.R.S. § 707-732(1)(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she recklessly subjects another person to an act of sexual penetration by compulsion.

There are three material elements of the offense of Sexual Assault in the Third 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so by compulsion; and

3. That the Defendant did so recklessly.

Notes

H.R.S. §§ 707-732(1)(a), 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "compulsion"
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"

9.49 SEXUAL ASSAULT IN THE THIRD DEGREE -- LESS THAN AGE 14: H.R.S. § 707-732(1)(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she knowingly [subjects to sexual contact another person who is less than fourteen years old] [causes another person who is less than fourteen years old to have sexual contact with him/her].

There are three material elements of the offense of Sexual Assault in the Third 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 [subjected another person to sexual contact] [caused another person to have sexual contact with him/her]; and

2. That the Defendant did so knowingly; and

3. That the person was less than fourteen years old at that time.

Notes

H.R.S. §§ 707-732(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:

9.00 - "married"
9.00 - "sexual contact"

State v. Buch, No. 18972 (Haw. Oct. 9, 1996) (a defendant is strictly liable with respect to the attendant circumstance of the complainant's age in a sexual assault).

9.49A SEXUAL ASSAULT IN THE THIRD DEGREE -- AGES 14 AND 15 H.R.S. § 707-732(1)(c)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she knowingly [engages in sexual contact with a minor who is at least fourteen years old but less than sixteen years old][causes a minor who is at least fourteen years old but less than sixteen years old to have sexual contact with him/her] and he/she is not less than five years older than the minor and he/she is not legally married to the minor;

There are five material elements of the offense of Sexual Assault in the Third Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant [engaged in sexual contact with (minor's name)][caused (minor's name) to have sexual contact with him/her]; and

2. That the Defendant did so knowingly; and

3. That (minor's name) was at least fourteen years old but less than sixteen years old at that time; and

4. That the Defendant was not less than five years older than (minor's name); and

5. That the Defendant was not legally married to (minor's name) at that time.

Notes

H.R.S. §§ 707-730(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"
9.00 - "married"

State v. Buch, 83 Hawai`i 308, 926 P.2d 599 (1996) (a defendant is strictly liable with respect to the attendant circumstance of the complainant's age in a sexual assault).

9.50 SEXUAL ASSAULT IN THE THIRD DEGREE -- SPECIAL STATUS PERSON: H.R.S. § 707-732(1)(d)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she knowingly [subjects another person to sexual contact] [causes another person to have sexual contact with him/her] and that person is [mentally defective] [mentally incapacitated] [physically helpless].

There are four material elements of the offense of Sexual Assault in the Third Degree, 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 [subjected another person to sexual contact] [caused another person to have sexual contact with him/her]; and

2. That the Defendant did so knowingly; and

3. That the person was, at that time, [mentally defective] [mentally incapacitated] [physically helpless]; and

4. That the Defendant knew, at that time, that the person was [mentally defective] [mentally incapacitated] [physically helpless].

Notes

H.R.S. §§ 707-732(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "married"
9.00 - "mentally defective"
9.00 - "mentally incapacitated"
9.00 - "physically helpless"
9.00 - "sexual contact"

9.51 SEXUAL ASSAULT IN THE THIRD DEGREE -- CORRECTIONAL FACILITY/LAW ENFORCEMENT OFFICER: H.R.S. § 707-732(1)(e)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she, while employed [in a state correctional facility] [by a private company providing services at a correctional facility] [by a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute] [by a private correctional facility operating in the State of Hawaii] [as a law enforcement officer], knowingly [subjects to sexual contact] [causes to have sexual contact with him/her] [an imprisoned person] [a person confined to a detention facility] [a person committed to the director of public safety] [a person residing in a private correctional facility operating in the State of Hawaii] [a person in custody].

There are four material elements of the offense of Sexual Assault in the Third Degree, 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 [subjected another person to sexual contact] [caused another person to have sexual contact with him/her]; and

2. That the Defendant did so while the person was [imprisoned] [confined to a detention facility] [committed to the director of public safety] [residing in a private correctional facility operating in the State of Hawaii] [in custody]; and

3. That the Defendant did so while the Defendant was employed [in a state correctional facility] [by a private company providing services at a correctional facility] [by a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute] [by a private correctional facility operating in the State of Hawaii] [as a law enforcement officer]; and

4. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-732(1)(e), 702-206(2).

For definition of states of mind, *see* instruction:
6.03--"knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00--"married"
9.00--"sexual contact"

For definition of "law enforcement officer", *see* instruction:
12.00--"law enforcement officer"

9.52 SEXUAL ASSAULT IN THE THIRD DEGREE -- STRONG COMPULSION: H.R.S. § 707-732(1)(f)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Sexual Assault in the Third Degree.

A person commits the offense of Sexual Assault in the Third Degree if he/she knowingly, by strong compulsion, [has sexual contact with another person] [causes another person to have sexual contact with him/her].

There are three material elements of the offense of Sexual Assault in the Third 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 [subjected another person to sexual contact] [caused another person to have sexual contact with him/her]; and

2. That the Defendant did so by strong compulsion; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 707-732(1)(f), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:

9.00 - "dangerous instrument"
9.00 - "married"
9.00 - "sexual contact"
9.00 - "strong compulsion"

9.53 INCEST:
HRS § 707-741

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

A person commits the offense of Incest if he/she commits an act of sexual penetration with another person who is within the degrees of [consanguinity] [affinity] within which marriage is prohibited.

There are four material elements of the offense of Incest, 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 subjected another person to an act of sexual penetration; and

2. That the Defendant did so intentionally, knowingly or recklessly; and

3. That the person was [,at that time,] within the degrees of [consanguinity] [affinity] within which marriage is prohibited; and

4. That the Defendant knew, at that time, that the person was the Defendant's (specify the relationship).

Marriage is prohibited between parties who are related to each other -- whether legitimately or illegitimately -- as ancestor and descendant, brother and sister, half brother and sister, uncle and niece, and aunt and nephew.

Notes

HRS §§ 707-741, 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 terms defined by HRS Chapter 707, *see* instructions:
9.00 - "deviate sexual intercourse"
9.00 - "sexual penetration"

For degrees of consanguinity or affinity within which marriage is prohibited, *see* HRS § 572-1(1).

9.54 PROMOTING CHILD ABUSE IN THE FIRST DEGREE -- PORNOGRAPHIC MATERIAL: H.R.S. § 707-750

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

A person commits the offense of Promoting Child Abuse in the First Degree if he/she, knowing or having reason to know its character and content, [produces] [directs] [participates in the preparation of] pornographic material which [employs] [uses] [contains] a minor [engaging] [assisting others to engage] in sexual conduct.

There are four material elements of the offense of Promoting Child Abuse in the First Degree, 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 [produced] [directed] [participated in the preparation of] material which [employed] [used] [contained] a minor [engaging] [assisting others to engage] in sexual conduct; and

2. That the Defendant did so knowingly; and

3. That the material involved was pornographic; and

4. That the Defendant knew or had reason to know the character and content of the material.

"Material" means any printed matter, visual representation, or sound recording, and includes but is not limited to books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings.

"Minor" means any person less than sixteen years old.

"Pornographic" means all of the following are present:

(a) The average person, applying contemporary community standards would find that, taken as a whole, the material appeals to the prurient interest; and

(b) The material depicts or describes sexual conduct in a patently offensive way; and

(c) Taken as a whole, the material lacks serious literary, artistic, political, or scientific merit.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, or sadomasochistic abuse.

Notes

H.R.S. §§ 707-750, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For prima facie inference, *see* instruction 9.54A.

9.54A INFERENCE: PROMOTING CHILD ABUSE IN THE FIRST DEGREE -- PORNOGRAPHIC MATERIAL: HRS § 707-750(3)

If you find beyond a reasonable doubt that the Defendant [produced] [directed] [participated in the preparation of] pornographic material which [employed] [used] [contained] a minor [engaging] [assisting others to engage] in sexual conduct, you may, but are not required to, infer that the Defendant engaged in such conduct with knowledge of the character and content of the material [produced] [directed] [participated in]. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant engaged in such conduct with knowledge of the character and content of the material [produced] [directed] [participated in].

* * *

If you find beyond a reasonable doubt that the person who was [employed] [used] [contained] in the pornographic material was, at that time, a minor, you may, but are not required to, infer that the Defendant knew the person was a minor. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant knew the person was a minor.

Notes

HRS §§ 707-750(3), 702-206(2); HRS Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 P.2d 149 (App. 1998); *State v. Tabigne* , 88 Hawai‘i 296, 966 P.2d 608 (1998).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

9.55 PROMOTING CHILD ABUSE IN THE FIRST DEGREE -- PORNOGRAPHIC PERFORMANCE: HRS § 707-750

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

A person commits the offense of Promoting Child Abuse in the First Degree if he/she, knowing or having reason to know its character and content, engages in a pornographic performance which [employs] [uses] [contains] a minor [engaging] [assisting others to engage] in sexual conduct.

There are four material elements of the offense of Promoting Child Abuse in the First Degree, 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 engaged in a performance which [employed] [used] [contained] a minor [engaging] [assisting others to engage] in sexual conduct; and

2. That the Defendant did so knowingly; and

3. That the performance involved was pornographic; and

4. That the Defendant knew or had reason to know the character and content of the performance.

"Minor" means any person less than sixteen years old.

"Performance" means any play, motion picture film, dance, or other exhibition performed before any audience.

"Pornographic" means all of the following are present:

(a) The average person, applying contemporary community standards would find that, taken as a whole, the material appeals to the prurient interest; and

(b) The material depicts or describes sexual conduct in a patently offensive way; and

(c) Taken as a whole, the material lacks serious literary, artistic, political, or scientific merit.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, or sadomasochistic abuse.

Notes

H.R.S. §§ 707-750, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For prima facie inference, *see* instruction 9.55A.

9.55A INFERENCE: PROMOTING CHILD ABUSE IN THE FIRST DEGREE -- PORNOGRAPHIC PERFORMANCE: H.R.S. § 707-750(3)

If you find beyond a reasonable doubt that the Defendant engaged in a performance which [employed] [used] [contained] a minor [engaging] [assisting others to engage] in sexual conduct, you may, but are not required to, infer that the Defendant engaged in such conduct with knowledge of the character and content of the performance [produced] [directed] [participated in]. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant engaged in such conduct with knowledge of the character and content of the performance [produced] [directed] [participated in].

* * *

If you find beyond a reasonable doubt that the person who was [employed] [used] [contained] in the pornographic performance was, at that time, a minor, you may, but are not required to, infer that the Defendant knew the person was a minor. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant knew the person was a minor.

Notes

HRS §§ 707-750(3), 702-206(2); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 P.2d 149 (App. 1998); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

9.56 PROMOTING CHILD ABUSE IN THE SECOND DEGREE: H.R.S. § 707-751

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

A person commits the offense of Promoting Child Abuse in the Second Degree if he/she, knowing or having reason to know its character and content, disseminates any pornographic material which [employs] [uses] [contains] a minor [engaging] [assisting others to engage] in sexual conduct.

There are four material elements of the offense of Promoting Child Abuse in the Second Degree, 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 disseminated material which [employed] [used] [contained] a minor [engaging] [assisting others to engage] in sexual conduct; and

2. That the Defendant did so knowingly; and

3. That the material involved was pornographic; and

4. That the Defendant knew or had reason to know of the character and content of the material.

"Disseminate" means to publish, sell, distribute, transmit, exhibit, or present material or to offer or agree to do the same.

"Material" means any printed matter, visual representation, or sound recording, and includes but is not limited to books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings.

"Minor" means any person less than sixteen years old.

"Pornographic" means all of the following are present:

(a) The average person, applying contemporary community standards would find that, taken as a whole, the material appeals to the prurient interest; and

(b) The material depicts or describes sexual conduct in a patently offensive way; and

(c) Taken as a whole, the material lacks serious literary, artistic, political, or scientific merit.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, or sadomasochistic abuse.

Notes

H.R.S. §§ 707-751, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For prima facie inference, *see* instruction 9.54A.

9.57 EXTORTION IN THE FIRST DEGREE: H.R.S. § 707-765

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

A person commits the offense of Extortion in the First Degree if he/she obtains or exerts control over, the [property] [services] of another person, the value of which exceeds $200 in total during any twelve-month period, with the intent to deprive the other person of the [property] [services] by threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property] [subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense].

There are four material elements of the offense of Extortion in the First Degree, 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 obtained or exerted control over the [property] [services] of another person; and

2. That the Defendant did so with the intent to deprive the other person of the [property] [services]; and

3. That the Defendant did so by intentionally threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property]

[subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense]; and

4. That the value of the [property] [services] exceeded $200 in total value during any twelve-month period.

Notes

H.R.S. §§ 707-765, 707-764(1)(a) through (d), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "restrain"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instructions:
10.00 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00A(1) - "value"

When Defendant's state of mind as to element one is an issue in the case, *see* commentary to instruction 10.11.

When Defendant's state of mind as to value of the property is an issue in the case, *see* instruction 10.00A(2).

See H.R.S. § 707-764 for charges brought under subsections (e) through (k) of that statute. *See also* H.R.S. § 707-765(1)(b) for extortion offense relating to credit.

For defense to extortion, *see* instruction 9.57A (paragraph *A).

For affirmative defense to extortion, *see* instruction 9.57A (paragraph *B).

9.57A **DEFENSES TO EXTORTION: H.R.S. § 707-769**

*A. It is a defense to a prosecution for extortion that the Defendant:

[(a) Was unaware that the property or service was that of another; or

(b) Believed that he/she was entitled to the property or services under a claim of right or that he/she was authorized, by the owner or by law, to obtain or exert control as he/she did.]

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant (specify defense in negative). If the prosecution does not meet its burden, then you must find the Defendant not guilty.

[In a prosecution for extortion, it is not a defense that the Defendant has an interest in the property if the owner has an interest in the property to which the Defendant is not entitled.]

*B. If the owner of the property is the Defendant's spouse it is a defense to a prosecution for extortion that:

(a) The property which is obtained or over which unauthorized control is exerted constitutes household belongings; and

(b) The Defendant and his/her spouse were living together at the time of the conduct.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant (specify defense in negative). If the prosecution does not meet its burden, then you must find the Defendant not guilty.

"Household belongings" means furniture, personal effects, vehicles, or money or its equivalent in amounts customarily used for household purposes, and other property usually found in and about the common dwelling and accessible to its occupants.

**C. It is an affirmative defense to a prosecution for extortion that the Defendant believed the [threatened accusation to be true] [penal charge to be true] [exposure to be true] [proposed action of a public servant was justified] and that his/her sole intention was to compel or induce the victim to [give property or services to the Defendant due him/her as restitution or indemnification for harm done, or as compensation for property obtained or lawful services performed] [take reasonable action to prevent or to remedy the wrong which was the subject of the threatened accusation, charge, exposure, or action of a public servant in circumstances to which the threat relates].

[In a prosecution for extortion, it is not a defense that the Defendant has an interest in the property if the owner has an interest in the property to which the Defendant is not entitled.]

Notes

H.R.S. § 707-769.

*This defense is applicable to extortion as defined by H.R.S. §707-764(1). *See also* instructions 9.58 and 9.60.

**This affirmative defense is applicable to extortion as defined by H.R.S. § 707-764(1) and (2). *See also* instructions 9.58 thru 9.60.

For definition of "affirmative defense", *see* instruction 7.06.

9.58 EXTORTION IN THE SECOND DEGREE -- VALUE EXCEEDING $50 DURING ANY TWELVE-MONTH PERIOD: H.R.S. § 707-766(1)(a)

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

A person commits the offense of Extortion in the Second Degree if he/she obtains or exerts control over, the [property] [services] of another person, the value of which exceeds $50 in total during any twelve-month period, with the intent to deprive the other person of the [property] [services] by threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property] [subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense].

There are four material elements of the offense of Extortion in the Second Degree, 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 obtained or exerted control over the [property] [services] of another person; and

2. That the Defendant did so with the intent to deprive the other person of the [property] [services]; and

3. That the Defendant did so by intentionally threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property] [subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense]; and

4. That the value of the [property] [services] exceeded $50 in total value during any twelve-month period.

Notes

H.R.S. §§ 707-766(1)(a), 707-764(1)(a) through (d), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "restrain"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instructions:
10.00 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00A(1) - "value"

When Defendant's state of mind as to element one is an issue in the case, *see* commentary to instruction 10.11.

When Defendant's state of mind as to value of the property is an issue in the case, *see* instruction 10.00A(2).

For defense to extortion, *see* instruction 9.57A (paragraph *A).

For affirmative defense to extortion, *see* instruction 9.57A (paragraph *B).

See H.R.S. § 707-764 for charges brought under subsections (e) through (k) of that statute.

9.59 EXTORTION IN THE SECOND DEGREE -- COMPEL OR INDUCE CONDUCT: H.R.S. § 707-766(1)(b)

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

A person commits the offense of Extortion in the Second Degree if he/she intentionally [compels] [induces] another person [to engage in conduct from which he/she has a legal right to abstain] [to abstain from conduct in which he/she has a legal right to engage] by threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property] [subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense].

There are three material elements of the offense of Extortion 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 [compelled] [induced] another person [to engage in conduct from which he/she has a legal right to abstain] [to abstain from conduct in which he/she has a legal right to engage]; and

2. That the Defendant did so by threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property]

[subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense]; and

3. That the Defendant did so intentionally.

Notes

H.R.S. §§ 707-766(1)(b), 707-764(1)(a) through (d), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "restrain"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instructions:
10.00 - "property"
10.00 - "property of another"

For affirmative defense to extortion, *see* instruction 9.57A (paragraph *B).

See H.R.S. § 707-764 for charges brought under subsections (e) through (k) of that statute.

9.60 EXTORTION IN THE THIRD DEGREE: H.R.S. § 707-767

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

A person commits the offense of Extortion in the Third Degree if he/she obtains or exerts control over, the [property] [services] of another person with the intent to deprive the other person of the [property] [services] by threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property] [subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense].

There are three material elements of the offense of Extortion in the Third 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 obtained or exerted control over the [property] [services] of another person; and

2. That the Defendant did so with the intent to deprive the other person of the [property] [services]; and

3. That the Defendant did so by intentionally threatening by word or conduct to [cause bodily injury in the future to the person threatened or to any other person] [cause damage to property]

[subject the person threatened or any other person to physical confinement or restraint] [commit a penal offense].

Notes

H.R.S. §§ 707-767, 707-764(1)(a) through (d), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 707, *see* instructions:
9.00 - "bodily injury"
9.00 - "restrain"

For definition of terms *not* defined by H.R.S. Chapter 707, *see* instructions:
10.00 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"

When Defendant's state of mind as to element one is an issue in the case, *see* commentary to instruction 10.11.

See H.R.S. § 707-764 for charges brought under subsections (e) through (k) of that statute.

For defense to extortion, *see* instruction 9.57A (paragraph *A).

For affirmative defense to extortion, *see* instruction 9.57A (paragraph *B).

TABLE OF INSTRUCTIONS[14]

10. CHAPTER 708[15] -- OFFENSES AGAINST PROPERTY RIGHTS

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[14]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

[15]Cross-referencing note: See Chapter 18 of the Standard Jury Instructions for Part IX of HRS Chapter 708, Computer Crime.

10.14 Theft 1° -- Services H.R.S. § 708-830.5(1)(a) (4/19/96, 6/29/00).
10.14A Inference: Theft 1° -- Services H.R.S. § 708-830(4) (4/19/96, 6/29/00).
10.15 Theft 1° -- Firearm H.R.S. § 708-830.5(1)(b) (4/19/96).
10.16 Theft 1° -- Dynamite or Other Explosives H.R.S. § 708-830.5(1)(c) (4/19/96).
10.17 Theft 2° -- Theft From Person H.R.S. § 708-831(1)(a) (4/19/96).
10.18 Theft 2° -- Unauthorized Control H.R.S. § 708-831(1)(b) (4/19/96, 6/29/00).
10.19 Theft 2° -- Deception H.R.S. § 708-831(1)(b) (4/19/96, 6/29/00).
10.20 Theft 2° -- Receiving Stolen Property H.R.S. § 708-831(1)(b) (4/19/96, 6/29/00).
10.21 Theft 2° -- Shoplifting H.R.S. § 708-831(1)(b) (4/19/96, 6/29/00, 12/19/03).
10.21A Inference: Theft 2° -- Shoplifting H.R.S. § 708-830(8) (4/19/96, 6/29/00, 4/9/02).
10.22 Theft 2° -- Services H.R.S. § 708-831(1)(b) (4/19/96, 6/29/00).
10.23 Theft 3° -- Services H.R.S. § 708-832(1)(a) (4/19/96, 6/29/00).
10.24 Unauthorized Control of Propelled Vehicle -- Operating H.R.S. § 708-836 (12/27/96, 6/29/00, 4/9/02).
10.24A Affirmative Defense: Unauthorized Control of Propelled Vehicle -- Operating H.R.S. § 708-836(3) (12/27/96).
10.25 Unauthorized Control of Propelled Vehicle -- Changing Identity H.R.S. § 708-836 (12/27/96, 6/29/00).
10.26 Robbery 1° -- Attempt to Kill or Inflict Serious Bodily Injury H.R.S. § 708-840(1)(a) (4/19/96, 6/29/00).
10.27 Robbery 1° -- Armed With Dangerous Instrument and Use of Force H.R.S. § 708-840(1)(b)(i) (4/19/96).
10.28 Robbery 1° -- Armed With Dangerous Instrument and Threatened Use of Force H.R.S. § 708-840(1)(b)(ii) (4/19/96).
10.29 Robbery 2° -- Use of Force H.R.S. § 708-841(1)(a) (4/19/96).
10.30 Robbery 2° -- Threatened Use of Force H.R.S. § 708-841(1)(b) (4/19/96).
10.31 Robbery 2° -- Recklessly Inflicts Serious Bodily Injury H.R.S. § 708-841(1)(c) (4/19/96).
10.32 Forgery 1° H.R.S. § 708-851(1)(a) (4/19/96).
10.33 Forgery 1° H.R.S. § 708-851(1)(b) (4/19/96).
10.34 Forgery 2° H.R.S. § 708-852 (4/19/96).
10.35 Forgery 3° H.R.S. § 708-853 (4/19/96).
10.36 Fraudulent Use of a Credit Card -- Uses, Attempts or Conspires to Use H.R.S. § 708-8100(1)(a) (4/19/96).
10.36A Inference: Fraudulent Use of a Credit Card -- Uses, Attempts or Conspires to Use H.R.S. § 708-8100(4) (4/19/96, 6/29/00).

10.37 Fraudulent Use of a Credit Card -- Obtains, Attempts to Obtain or Conspires to Obtain H.R.S. § 708-8100(1)(b) (4/19/96).
10.38 Fraudulent Use of a Credit Card -- Uses, Attempts to Use or Conspires to Use a Credit Card Number H.R.S. § 708-8100(1)(c) (4/19/96).
10.39 Theft of a Credit Card -- Takes a Credit Card Without Consent H.R.S. § 708-8102(1) (4/19/96).
10.40 Theft of a Credit Card -- Receiving When Knowing It Had Been Taken Without Consent H.R.S. § 708-8102(1) (4/19/96).
10.40A Inference: Theft of a Credit Card -- Takes a Credit Card Without Consent H.R.S. § 708-8102(1) (4/19/96, 6/29/00).
10.41 Theft of a Credit Card -- Receiving When Knowing It To Be Lost, Mislaid or Misdelivered H.R.S. § 708-8102(2) (4/19/96).
10.42 Theft of a Credit Card -- Sells or Buys H.R.S. § 708-8102(3) (4/19/96).
10.43 Cable Television Service Fraud 1° H.R.S. § 708-8200(1)(b) (4/19/96).
10.44 Cable Television Service Fraud 2° H.R.S. § 708-8201(1)(a) (4/19/96).
10.45 Unauthorized Entry Into Motor Vehicle H.R.S. § 708- (12/27/96, 12/19/03).
10.46 Telemarketing Fraud H.R.S. § 708-835.6 (10/27/03).
10.47 Identity Theft 1° H.R.S. § 708-839.6 (10/27/03).
10.48 Identity Theft 2° H.R.S. § 708-839.7 (10/27/03).
10.49 Identity Theft 3° H.R.S. § 708-839.8 (10/27/03).

10.00 DEFINITIONS OF TERMS USED IN CHAPTER 10, STANDARD JURY INSTRUCTIONS

"building" includes any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

"cable television service" means one-way transmission of programming provided by, or generally considered comparable to programming provided by, a television broadcast station or other information made available by a cable operator to all subscribers generally.

"cable television service device" means any mechanical or electronic instrument, apparatus, equipment or device which can be used to obtain cable television services without payment of applicable charges therefor. A "cable television service device" does not include any instrument, apparatus, equipment, device, facility or any component thereof furnished by a cable operator in the ordinary course of its business.

"cardholder" means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

"control over the property" means the exercise of dominion over the property and includes, but is not limited to, taking, carrying away, or possessing the property, or selling, conveying, or transferring title to or an interest in the property.

"credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value, on credit.

"deception" occurs when a person knowingly:

(a) creates or confirms another's impression which is false and which the defendant does not believe to be true; or

(b) fails to correct a false impression which he previously has created or confirmed; or

(c) prevents another from acquiring information pertinent to the disposition of the property involved; or
(d) sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(e) promises performance which he/she does not intend to perform or knows will not be performed, but a person's intention not to perform a promise shall not be inferred from the fact alone that he/she did not subsequently perform the promise.

The term "deception" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or services in communications addressed to the public or to a class or group.

"deprive" means:
(a) to withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstance that a significant portion of its economic value, or of the use and benefit thereof, is lost to him; or

(b) to dispose of the property so as to make it unlikely that the owner will recover it; or

(c) to retain the property with intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return; or

(d) to sell, give, pledge, or otherwise transfer any interest in the property; or

(e) to subject the property to the claim of a person other than the owner.

"distributes" means to sell, transfer, give or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"dwelling" means a building which is used or usually used by a person for lodging.

"enter" means to have any intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument in contact with the body introduced for the purpose of committing a crime against a person or against property rights.

"enter or remain unlawfully"
A person "enters or remains unlawfully" in or upon premises when he/she is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his/her intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he/she defies a lawful order not to enter or remain, personally communicated to him/her by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

"expired credit card" means a credit card which is no longer valid because the term shown on the credit card has elapsed.

"government" means the United States, or any state, county, municipality, or other political unit within territory belonging to the United States, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government, or any corporation or agency formed pursuant to interstate compact or international treaty. As used in this definition "state" includes any state, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

"intent to defraud" means:
(a) an intent to use deception to injure another's interest which has value; or

(b) knowledge by the defendant that he is facilitating an injury to another's interest which has value.

"issuer" means the business organization or financial institution which issues a credit card or its agent.

"obtain" means:
(a) when used in relation to property, to bring about a transfer of possession or other interest, whether to the obtainer or to another.

"owner" means a person, other than the defendant, who has possession of or any other interest in, the property involved, even though that possession or interest is unlawful; however, a secured party is not an owner in relation to a defendant who is a debtor with respect to property in which the secured party has only a security interest.

"premises" includes any building and any real property.

"property" means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam, and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits, or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

"property of another" means property which any person, other than the defendant, has possession of or any other interest in, even though that possession or interest is unlawful. (See H.R.S. § 701-118(7) for definition of "person" if applicable.)

"receives" or "receiving" includes but is not limited to acquiring possession, control, or title, and taking a security interest in the property.

"revoked credit card" means a credit card which is no longer valid because permission to use the credit card has been suspended or terminated by the issuer.

"services" includes but is not limited to labor, professional services, transportation, telephone or other public services, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, and the supplying of equipment for use.

"stolen" means obtained by theft or robbery.

"unauthorized control over property" means control over property of another which is not authorized by the owner.

"widely dangerous means" includes explosion, fire, flood, avalanche, collapse of building, poison gas, radioactive material, or any other material, substance, force, or means capable of causing potential widespread injury or damage.

10.00A(1) VALUE -- DEFINITION:
H.R.S. § 708-801(1), (2) and (3)

A. Property or Services

Value means the market value of the property or services at the time and place of the offense, or the replacement cost if the market value of the property or services cannot be determined. When the property (or services*) has value but that value cannot be ascertained, the value shall be deemed to be an amount not exceeding $100.

**B. Written Instrument

The value of an instrument whether or not it has been issued or delivered constituting an evidence of debt, such as a check, traveler's check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied. The value of any other instrument that creates, releases, discharges or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument. [When the property (or services*) has value but that

value cannot be ascertained, the value shall be deemed to be an amount not exceeding $100.]

Notes

H.R.S. § 708-801(1),(2) and (3).

These value definitions are applicable whenever the value of property or services is determinative of the class or grade of an offense, or otherwise relevant to a prosecution.

For definition of terms defined by H.R.S. Chapter 708, *see* instructions:
10.00 - "property"
10.00 - "services"

*Inadvertently not included in statute.

**When the written instrument has a readily ascertained market value, a value instruction is not appropriate.

10.00A(2) VALUATION OF PROPERTY OR SERVICES -- DEFENSE AND PRIMA FACIE EVIDENCE: HRS § 708-801(4) and (5)

*A. If you find beyond a reasonable doubt that the value of the [property] [services] exceeded (specify relevant threshold amount), you may, but are not required to, infer that the Defendant [believed] [knew] the [property] [services] to be of that value. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant [believed] [knew] the [property] [services] to be of that value.

It is a defense to (name of charged offense) that the Defendant believed the valuation of the [property] [services] to be (specify relevant threshold amount) or less.

**B. If you find beyond a reasonable doubt that the value of the [property] [services] exceeded (specify relevant threshold amount), you may, but are not required to, infer that the Defendant acted in reckless disregard of the value. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant acted in reckless disregard of the value.

It is a defense that the Defendant did not act intentionally or knowingly, or recklessly disregard a risk that the property was of the specified value.

Notes

HRS §§ 708-801(4) and (5), 702-206(1), (2) and (3).

State v. Mitchell, 88 Hawai‘i 216, 965 P.2d 149 (App. 1998); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998); *State v. Cabrera*, No. 21617 (Haw. March 17, 1999).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 708, see instructions:
10.00 - "property"
10.00 - "services"
10.00A(1) - "value"

*Paragraph A is applicable when acting intentionally or knowingly with respect to the value of property or services is required to establish an element of an offense. If paragraph A is submitted to the jury, the court should then instruct upon the included offense, and also submit the valuation defense and inference instructions for the included offense, if applicable.

**Paragraph B is applicable when acting recklessly with respect to the value of property or services is required to establish an element of an offense. If paragraph B is submitted to the jury, no instruction on the included offense is necessary because this is a complete defense.

10.00A(3) VALUATION OF PROPERTY -- COMMON SCHEME: H.R.S. § 708-801(6)

A. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense.

B. Amounts involved in offenses of criminal property damage committed pursuant to one scheme or course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense.

Notes

H.R.S. § 708-801(6).

For definition of terms defined by H.R.S. Chapter 708, *see* instructions:
10.00 - "property"
10.00 - "services"

10.01 BURGLARY IN THE FIRST DEGREE -- DANGEROUS INSTRUMENT: HRS § 708-810(1)(a)

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

A person commits the offense of Burglary in the First Degree if he/she intentionally [enters a building unlawfully] [remains unlawfully in a building], with intent to commit therein a crime against a person or against property rights, and he/she is armed with a dangerous instrument in the course of committing the offense.

There are three material elements of the offense of Burglary 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 [entered a building unlawfully] [remained unlawfully in a building]; and

2. That, when the [Defendant unlawfully entered the building,] [Defendant's remaining in the building became unlawful,] the Defendant, at that time, had the intent to commit therein a crime against a person or against property rights; and

3. That the Defendant was intentionally armed with a dangerous instrument in the course of committing the offense.

An act occurs "in the course of committing the offense" if it occurs in effecting entry or while in the building, or in immediate flight therefrom.

Notes

HRS §§ 708-810(1)(a) and (2), 708-840(2), 702-206(1); *State v. Mahoe*, 89 Hawai`i 284, 972 P.2d 287 (1998).

The bracketed alternatives in element one of the instruction corresponds respectively to the bracketed alternatives in element two.

For definition of states of mind, see instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, see instructions:
10.00 - "building"
10.00 - "enter or remain unlawful"
10.00 - "premises"

For definition of terms *not* defined by HRS Chapter 708, *see* instruction 9.00 - "dangerous instrument." See also instruction 10.27 for definition of "dangerous instrument" as defined by HRS § 708-840.

For statutory parameters of a "crime," *see* HRS § 701-107.

10.02 BURGLARY IN THE FIRST DEGREE -- BODILY INJURY: HRS § 708-810(1)(b)

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

A person commits the offense of Burglary in the First Degree if he/she intentionally [enters a building unlawfully] [remains unlawfully in a building], with intent to commit therein a crime against a person or against property rights, and he/she intentionally inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense.

There are three material elements of the offense of Burglary 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 [entered a building unlawfully] [remained unlawfully in a building]; and

2. That, when the [Defendant unlawfully entered the building,] [Defendant's remaining in the building became unlawful,] the Defendant, at that time, had the intent to commit therein a crime against a person or against property rights; and

3. That the Defendant intentionally inflicted or attempted to inflict bodily injury on anyone in the course of committing the offense.

An act occurs "in the course of committing the offense" if it occurs in effecting entry or while in the building, or in immediate flight therefrom.

Notes

HRS §§ 708-810(1)(b) and (2), 702-206(1); *State v. Mahoe*, 89 Hawai`i 284, 972 P.2d 287 (1998).

The bracketed alternatives in element one of the instruction correspond respectively to the bracketed alternatives in element two.

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "building"
10.00 - "enter or remain unlawful"
10.00 - "premises"

For definition of terms *not* defined by HRS Chapter 708, *see* instruction:
9.00 - "bodily injury"

For statutory parameters of a "crime," *see* HRS § 701-107.

For instructions regarding Attempt, *see* HRS Chapter 14.

10.03 BURGLARY IN THE FIRST DEGREE -- DWELLING: HRS § 708-810(1)(c)

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

A person commits the offense of Burglary in the First Degree if he/she intentionally [enters a building unlawfully] [remains unlawfully in a building], 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 four material elements of the offense of Burglary in the First Degree, 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 a building unlawfully] [remained unlawfully in a building]; and

2. That, when the [Defendant unlawfully entered the building,] [Defendant's remaining in the building became unlawful,] the Defendant, at that time, 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.

Notes

HRS §§ 708-810(1)(c), 702-206(1); *State v. Mahoe*, 89 Hawai`i 284, 972 P.2d 287 (1998).

The bracketed alternatives in element one of the instruction corresponds respectively to the bracketed alternatives in element two.

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "building"
10.00 - "dwelling"
10.00 - "enter or remain unlawful"
10.00 - "premises"

For statutory parameters of a "crime," *see* HRS § 701-107.

10.04 BURGLARY IN THE SECOND DEGREE: HRS § 708-811

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

A person commits the offense of Burglary in the Second Degree if he/she intentionally [enters a building unlawfully] [remains unlawfully in a building], with intent to commit therein a crime against a person or against property rights.

There are two material elements of the offense of Burglary 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 [entered a building unlawfully] [remained unlawfully in a building]; and

2. That, when the [Defendant unlawfully entered the building,] [Defendant's remaining in the building became unlawful,] the Defendant, at that time, had the intent to commit therein a crime against a person or against property rights.

Notes

HRS §§ 708-811, 702-206(1); *State v. Mahoe*, 89 Hawai`i 284, 972 P.2d 287 (1998).

The bracketed alternatives in element one of the instruction correspond respectively to the bracketed alternatives in element two.

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:

10.00 - "building"
10.00 - "enter or remain unlawful"
10.00 - "premises"

For statutory parameters of a "crime," *see* HRS § 701-107.

10.05 CRIMINAL PROPERTY DAMAGE IN THE FIRST DEGREE -- DANGER OF DEATH OR BODILY INJURY: H.R.S. § 708-820(1)(a)

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

A person commits the offense of Criminal Property Damage in the First Degree if he/she intentionally or knowingly damages property and thereby recklessly places another person in danger of death or bodily injury.

There are three material elements of the offense of Criminal Property Damage 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 damaged the property; and

2. That the Defendant did so intentionally or knowingly; and

3. That such conduct recklessly placed another person in danger of death or bodily injury.

Notes

H.R.S. §§708-820(1)(a), 702-206(1) and (3).

For definition of states of mind, *see* instructions:
6.02--"intentionally"
6.03--"knowingly"
6.03–"recklessly"

For definition of terms defined by H.R.S. Chapter 708, *see* instruction:
10.00–"property"

For definition of terms *not* defined by H.R.S. Chapter 708, *see* instruction:

9.00-"bodily injury"

10.05A CRIMINAL PROPERTY DAMAGE IN THE FIRST DEGREE -- DAMAGE EXCEEDS $20,000: H.R.S. § 708-820(1)(b) (Applicable to offenses occurring on or after June 17, 1996)

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

A person commits the offense of Criminal Property Damage in the First Degree if he/she intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding $20,000.

There are four material elements of the offense of Criminal Property Damage in the First Degree, 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so intentionally or knowingly; and

4. That the Defendant was aware or believed the damage exceeded $20,000 and the damage in fact exceeded $20,000.

Notes

H.R.S. §§708-820(1)(B), 702-206(1).

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--"property"
10.00--"property of another"

For prima facie inference and defense regarding defendant's state of mind as to the value of the property, *see* instruction 10.00A(2) which embodies the statutory language of H.R.S. §708-801 (valuation of property). However, "H.R.S. §708-801, by its clear terms, applies only when 'the value of property or services is determinative of the class or grade of an offense'... H.R.S. §708-822 does not, on its face, require a determination of the value of property; H.R.S. §708-822 refers to the amount of damage done by the offender not the value of the property damaged." *State v. Pardee*, 86 Hawai`i 165, 168, 948 P.2d 586, 589 (App. 1997) (emphasis added). The Intermediate Court also found that even if H.R.S. §708-801 was applicable to criminal property damage offenses, the value of the damaged items had been sufficiently proved.

10.06 CRIMINAL PROPERTY DAMAGE IN THE SECOND DEGREE WIDELY DANGEROUS MEANS: H.R.S. § 708-821(1)(a)

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

A person commits the offense of Criminal Property Damage in the Second Degree if he/she intentionally or knowingly damages the property of another, without the other's consent, by the use of widely dangerous means.

There are four material elements of the offense of Criminal Property Damage in the Second Degree, 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so by the use of widely dangerous means; and

4. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§708-821(1)(a), 702-206(1).

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--"property"
10.00--"property of another"
10.00--"widely dangerous means"

10.07 CRIMINAL PROPERTY DAMAGE IN THE SECOND DEGREE: H.R.S. § 708-821(1)(b)

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

A person commits the offense of Criminal Property Damage in the Second Degree if he/she intentionally or knowingly damages the property of another, without the other's consent, in an amount exceeding [$1,500*] [$500].

There are four material elements of the offense of Criminal Property Damage in the Second Degree, 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so intentionally or knowingly; and

4. That the Defendant was aware or believed the damage exceeded [$1,500*] [$500] and the damage in fact exceeded [$1,500*] [$500].

Notes

H.R.S. §§708-821(1)(b), 702-206(1).

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--"owner"
10.00--"property of another"

For prima facie inference and defense regarding defendant's state of mind as to the value of the property, see instruction 10.00A(2) which embodies the statutory language of H.R.S. §708-801 (valuation of property). However, "H.R.S. §708-801, by its clear terms, applies only when 'the value of property or services is determinative of the class or grade of an offense'... H.R.S. §708-822 does not, on its face, require a determination of the value of property; H.R.S. §708-822 refers to the amount of damage done by the offender not the value of the property damaged." *State v. Pardee*, 86 Hawai`i 165, 168, 948 P.2d 586, 589 (App. 1997) (emphasis added). The Intermediate Court also found that even if H.R.S. §708-801 was applicable to criminal property damage offenses, the value of the damaged items had been sufficiently proved.

*The $1,500 amount is applicable to offenses that occur on or after June 17, 1996.

10.08 CRIMINAL PROPERTY DAMAGE IN THE THIRD DEGREE WIDELY DANGEROUS MEANS: H.R.S. § 708-822(1)(a)

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

A person commits the offense of Criminal Property Damage in the Third Degree if he/she recklessly damages the property of another, without the other's consent, by the use of widely dangerous means.

There are four material elements of the offense of Criminal Property Damage in the Third Degree, 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so by the use of widely dangerous means; and

4. That the Defendant did so recklessly.

Notes

H.R.S. §§ 708-822(1)(a), 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

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

10.00 - "property"
10.00 - "property of another"
10.00 - "widely dangerous means"

10.09 CRIMINAL PROPERTY DAMAGE IN THE THIRD DEGREE: HRS § 708-822(1)(b)

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

A person commits the offense of Criminal Property Damage in the Third Degree if he/she intentionally damages the property of another, without the other's consent, in an amount exceeding [$500*] [$100].

There are four material elements of the offense of Criminal Property Damage in the Third Degree, 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so intentionally; and

4. That the Defendant believed the damage exceeded [$500*] [$100].

Notes

HRS §§ 708-822(1)(b), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:

10.00 - "property"
10.00 - "property of another"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, see instruction 10.00A(2) which embodies the statutory language of HRS § 708-801 (valuation of property). However, "HRS § 708-801, by its clear terms, applies only when 'the value of property or services is determinative of the class or grade of an offense.' . . . HRS § 708-822 does not, on its face, require a determination of the value of property; HRS § 708-822 refers to the amount of damage done by the offender not the value of the property damaged." *State v. Pardee*, 86 Hawai`i 165, 168, 948 P.2d 586, 589 (App. 1997) (emphasis added). The Intermediate Court also found that even if HRS § 708-801 was applicable to criminal property damage offenses, the value of the damaged items had been sufficiently proved.

*The $500 amount is applicable to offenses that occur on or after June 17, 1996.

10.10 CRIMINAL PROPERTY DAMAGE IN THE FOURTH DEGREE: H.R.S. § 708-823

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

A person commits the offense of Criminal Property Damage in the Fourth Degree if he/she intentionally damages the property of another without the other's consent.

There are three material elements of the offense of Criminal Property Damage in the Fourth 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 damaged the property of another; and

2. That the Defendant did so without the other's consent; and

3. That the Defendant did so intentionally.

Notes

H.R.S. §§ 708-823, 702-206(1).

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 - "property"
10.00 - "property of another"

10.11 THEFT IN THE FIRST DEGREE -- UNAUTHORIZED CONTROL: HRS § 708-830.5(1)(a)

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

A person commits the offense of Theft in the First Degree if he/she obtains or exerts control over the property of another, the value of which exceeds $20,000, by deception with intent to deprive the person of that property.

There are three material elements of the offense of Theft 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 obtained or exerted unauthorized control over the property of another; and

2. That the Defendant did so with intent to deprive the person of that property; and

3. That the Defendant believed the value of the property exceeded $20,000.

Notes

HRS §§ 708-830.5(1)(a), 708-830(2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "control over the property"
10.00 - "deception"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"

10.00 - "property of another"
10.00 - "unauthorized control over property"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

10.11A **DEFENSE TO THEFT:**
H.R.S. § 708-834(1) thru (3)

A. It is a defense to a prosecution for theft that the Defendant:

(a) Was unaware that the property or service was that of another; or

(b) Believed that he/she was entitled to the property or services under a claim of right or that he/she was authorized, by the owner or by law, to obtain or exert control as he/she did.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant (specify defense in negative). If the prosecution does not meet its burden, then you must find the Defendant not guilty.

[In a prosecution for theft, it is not a defense that the Defendant has an interest in the property if the owner has an interest in the property to which the Defendant is not entitled.]

B. If the owner of the property is the Defendant's spouse, it is a defense to a prosecution for theft of property that:

(a) The property which is obtained or over which unauthorized control is exerted constitutes household belongings; and

(b) The Defendant and his/her spouse were living together at the time of the conduct.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant (specify defense in

negative). If the prosecution does not meet its burden, then you must find the Defendant not guilty.

"Household belongings" means furniture, personal effects, vehicles, money or its equivalent in amounts customarily used for household purposes, and other property usually found in and about the common dwelling and accessible to its occupants.

Notes

H.R.S. § 708-834(1) thru (3).

10.12 THEFT IN THE FIRST DEGREE -- DECEPTION: HRS § 708-830.5(1)(a)

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

A person commits the offense of Theft in the First Degree if he/she obtains or exerts control over the property of another, the value of which exceeds $20,000, by deception with intent to deprive the person of that property.

There are four material elements of the offense of Theft in the First Degree, 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 obtained or exerted control over the property of another; and

2. That the Defendant did so by deception; and

3. That the Defendant did so with intent to deprive the person of the property; and

4. That the Defendant believed the value of the property exceeded $20,000.

Notes

HRS §§ 708-830.5(1)(a), 708-830(2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:

10.00 - "control over the property"
10.00 - "deception"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

10.13 THEFT IN THE FIRST DEGREE -- RECEIVING STOLEN PROPERTY: HRS § 708-830.5(1)(a)

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

A person commits the offense of Theft in the First Degree if he/she intentionally receives, retains, or disposes of the property of another, the value of which exceeds $20,000, knowing that it has been stolen, with intent to deprive the owner of that property.

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

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant received, retained, or disposed of the property of another; and

2. That the Defendant did so intentionally; and

3. That the Defendant did so knowing that the property had been stolen; and

4. That the Defendant did so with intent to deprive the owner of the property; and

5. That the Defendant believed the value of the property exceeded $20,000.

Notes

HRS §§ 708-830.5(1)(a), 708-830(7), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "deprive"
10.00 - "property"
10.00 - "property of another"
10.00 - "receives" or "receiving"
10.00 - "stolen"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference when Defendant is a dealer in property of the kind received who knowingly paid far below its reasonable value, *see* instruction 10.13A.

10.13A INFERENCE: THEFT IN THE FIRST DEGREE -- RECEIVING STOLEN PROPERTY: HRS § 708-830(7)

If you find beyond a reasonable doubt that the Defendant, at the time he/she received the property, was a dealer in property of the kind received and that he/she acquired the property for a consideration which he/she knew was far below its reasonable value, you may, but are not required to, infer that the Defendant knew the property was stolen. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant knew the property was stolen.

Notes

HRS § 708-830(7); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai'i 216, 965 Hawai'i 149 (App. 1997); *State v. Tabigne*, 88 Hawai'i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that the Defendant is a dealer in property of the kind received and that the Defendant knowingly paid far below its reasonable value.

10.14 THEFT IN THE FIRST DEGREE -- SERVICES: HRS § 708-830.5(1)(a)

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

A person commits the offense of Theft in the First Degree if he/she intentionally obtains services, known by him/her to be available only for compensation, by [deception] [false token] [other means to avoid payment for the services] and the value of the services exceeds $20,000.

There are four material elements of the offense of Theft in the First Degree, 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 obtained services by [deception] [false token] [other means to avoid payment for the services]; and

2. That the Defendant did so intentionally; and

3. That the Defendant knew, at that time, the services were available only for compensation; and

4. That the Defendant believed the value of the services exceeded $20,000.

Notes

HRS §§ 708-830.5(1)(a), 708-830(4), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "deception"
10.00 - "obtain"
10.00 - "services"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference when there is evidence that the services Defendant received are ordinarily paid upon rendering and Defendant absconded without payment, *see* instruction 10.14A.

10.14A INFERENCE: THEFT IN THE FIRST DEGREE -- SERVICES: HRS § 708-830(4)

If you find beyond a reasonable doubt that the services the Defendant received are ordinarily paid immediately upon the rendering of them and that the Defendant absconded without payment or offer to pay, you may, but are not required to, infer that the services were obtained by deception. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the services were obtained by deception.

Notes

HRS § 708-830(4).

State v. Mitchell, 88 Hawai'i 216, 965 Hawai'i 149 (App. 1997); *State v. Tabigne*, 88 Hawai'i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that the services the Defendant received are ordinarily paid immediately upon rendering and Defendant absconded without payment.

It may be appropriate for the court to submit a definition of "absconded" to the jury.

10.15 THEFT IN THE FIRST DEGREE -- FIREARM: H.R.S. § 708-830.5(1)(b)

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

A person commits the offense of Theft in the First Degree if he/she obtains or exerts unauthorized control over a firearm of another with intent to deprive the person of the firearm.

There are two material elements of the offense of Theft 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 obtained or exerted unauthorized control over a firearm of another; and

2. That the Defendant did so with intent to deprive the person of the firearm.

Notes

H.R.S. §§ 708-830.5(1)(b), 702-206(1).

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 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For definition of terms *not* defined by H.R.S. Chapter 708, *see* instruction:

15.00 - "firearm"

For statutory defense, *see* instruction 10.11A.

10.16 THEFT IN THE FIRST DEGREE -- DYNAMITE OR OTHER EXPLOSIVES: H.R.S. § 708-830.5(1)(c)

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

A person commits the offense of Theft in the First Degree if he/she obtains or exerts unauthorized control over dynamite or other explosives of another with intent to deprive the person of the dynamite or other explosives.

There are two material elements of the offense of Theft 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 obtained or exerted unauthorized control over dynamite or other explosives of another; and

2. That the Defendant did so with intent to deprive the person of the dynamite or other explosives.

Notes

H.R.S. §§ 708-830.5(1)(c), 702-206(1).

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 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For statutory defense, *see* instruction 10.11A.

10.17 THEFT IN THE SECOND DEGREE -- THEFT FROM PERSON: H.R.S. § 708-831(1)(a)

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

A person commits the offense of Theft in the Second Degree if he/she obtains or exerts unauthorized control over property of another, from the person of another, with intent to deprive the person of the property.

There are three material elements of the offense of Theft 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 obtained or exerted unauthorized control over property of another; and

2. That the Defendant did so from the person of another; and

3. That the Defendant did so with intent to deprive the person of the property.

Notes

H.R.S. §§ 708-831(1)(a), 708-830(1), 702-206(1).

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 - "control over the property"

10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For statutory defense, *see* instruction 10.11A.

10.18 THEFT IN THE SECOND DEGREE -- UNAUTHORIZED CONTROL: HRS § 708-831(1)(b)

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

A person commits the offense of Theft in the Second Degree if he/she obtains or exerts unauthorized control over the property of another, the value of which exceeds $300, with intent to deprive the person of the property.

There are three material elements of the offense of Theft 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 obtained or exerted unauthorized control over the property of another; and

2. That the Defendant did so with intent to deprive the person of the property; and

3. That the Defendant believed the value of the property exceeded $300.

Notes

HRS §§ 708-831(1)(b), 708-830(1), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "control over the property"
10.00 - "deprive"

10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

10.19 THEFT IN THE SECOND DEGREE -- DECEPTION: HRS § 708-831(1)(b)

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

A person commits the offense of Theft in the Second Degree if he/she obtains or exerts control over the property of another, the value of which exceeds $300, by deception with intent to deprive the person of the property.

There are four material elements of the offense of Theft in the Second Degree, 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 obtained or exerted control over the property of another; and

2. That the Defendant did so by deception; and

3. That the Defendant did so with intent to deprive the person of the property; and

4. That the Defendant believed the value of the property exceeded $300.

Notes

HRS §§ 708-831(1)(b), 708-830(2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by HRS Chapter 708, *see* instructions:

10.00 - "control over the property"
10.00 - "deception"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

10.20 THEFT IN THE SECOND DEGREE -- RECEIVING STOLEN PROPERTY: HRS § 708-831(1)(b)

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

A person commits the offense of Theft in the Second Degree if he/she intentionally receives, retains, or disposes of the property of another, the value of which exceeds $300, knowing that it has been stolen, with intent to deprive the owner of the property.

There are five material elements of the offense of Theft in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant received, retained, or disposed of the property of another; and

2. That the Defendant did so intentionally; and

3. That the Defendant did so knowing that the property had been stolen; and

4. That the Defendant did so with intent to deprive the owner of the property; and

5. That the Defendant believed the value of the property exceeded $300.

Notes

HRS §§ 708-831(1)(b), 708-830(7), 702-206(1) and (2).

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 - "deprive"
10.00 - "property"
10.00 - "property of another"
10.00 - "receives" or "receiving"
10.00 - "stolen"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference when Defendant is a dealer in property of the kind received who knowingly paid far below its reasonable value, *see* instruction 10.13A.

10.21 THEFT IN THE SECOND DEGREE -- SHOPLIFTING: HRS § 708-831(1)(b)

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

A person commits the offense of Theft in the Second Degree if, with intent to defraud, he/she conceals or takes possession of the goods or merchandise of any store or retail establishment, the value of which property exceeds $300.

There are four material elements of the offense of Theft in the Second Degree, 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 concealed or took possession of the goods or merchandise of (name of store or retail establishment); and

2. That (name of store or retail establishment) was a store or retail establishment; and

3. That the value of goods or merchandise of (name of store or retail establishment) exceeded $300; and

4. That the Defendant either (a) intended to use deception to injure (name of store or retail establishment)'s interest, which had value, in which case the requisite state of mind as to each of the foregoing elements is "intentionally," or (b) knew that he was facilitating an injury to (name of store or retail

establishment)'s interest, which had value, in which case the requisite state of mind as to each of the foregoing elements is "knowingly."

Notes

H.R.S. §§ 708-831(1)(b), 708-830(8), 702-206(1) and (2).

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--"intent to defraud"
10.00--"property"
10.00A(1)--"value"

For prima facie inference and defense regarding Defendant's state of mind as to value of property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference where the goods or merchandise in question had an unaltered price or name tag or other marking, *see* instruction 10.21A.

For state of mind regarding value of property taken, *see State v. Cabrera*, 90 Hawai`i 359, 978 P.2d 797 (1999).

For state of mind regarding "any store or retail establishment", *see State v. Shinyama*, No. 23669 (Hawai`i May 29, 2003).

10.21A INFERENCE: THEFT IN THE SECOND DEGREE -- SHOPLIFTING: HRS § 708-830(8)

If you find beyond a reasonable doubt that at the time of the incident the goods or merchandise in question had an unaltered price or name tag or other marking [or there was a printed register receipt], you may, but are not required to, infer the value and ownership of such goods or merchandise from the price or name tag or other marking [or the printed register receipt]. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt the value and ownership of such goods or merchandise.

Notes

HRS § 708-830(8); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 Hawai‘i 149 (App. 1997); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that at the time of the incident the goods or merchandise in question had an altered price or name tag or other marking.

The printed register receipt language is applicable to offenses that occur after May 2, 2001. *See* 2001 Haw. Sess. L. Act 87.

10.22 THEFT IN THE SECOND DEGREE -- SERVICES: HRS § 708-831(1)(b)

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

A person commits the offense of Theft in the Second Degree if he/she intentionally obtains services, known by him/her to be available only for compensation, by [deception] [false token] [other means to avoid payment for the services] and the value of the services exceeds $300.

There are four material elements of the offense of Theft in the Second Degree, 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 obtained services by [deception] [false token] [other means to avoid payment for the services]; and

2. That the Defendant did so intentionally; and

3. That the Defendant knew, at that time, the services were available only for compensation; and

4. That the Defendant believed the value of the services exceeded $300.

Notes

HRS §§ 708-831(1)(b), 708-830(4), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "deception"
10.00 - "obtain"
10.00 - "services"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference when there is evidence that the services Defendant received are ordinarily paid upon rendering and Defendant absconded without payment, *see* instruction 10.14A.

10.23 THEFT IN THE THIRD DEGREE -- SERVICES: HRS § 708-832(1)(a)

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

A person commits the offense of Theft in the Third Degree if he/she intentionally obtains services known by him/her to be available only for compensation, by [deception] [false token] [other means to avoid payment for the services] and the value of the services exceeds $100.

There are four material elements of the offense of Theft in the Third Degree, 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), Defendant obtained services by [deception] [false token] [other means to avoid payment for the services]; and

2. That the Defendant did so intentionally; and

3. That the Defendant knew, at that time, the services were available only for compensation; and

4. That the Defendant believed the value of the services exceeded $100.

Notes

HRS §§ 708-832(1)(a), 708-830(4), 702-206(1) and (2).

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 - "deception"
10.00 - "obtain"
10.00 - "services"
10.00A(1) - "value"

For prima facie inference and defense regarding Defendant's state of mind as to the value of the property, *see* instruction 10.00A(2).

For statutory defense, *see* instruction 10.11A.

For prima facie inference when there is evidence that the services Defendant received are ordinarily paid upon rendering and Defendant absconded without payment, *see* instruction 10.14A.

10.24 UNAUTHORIZED CONTROL OF PROPELLED VEHICLE -- OPERATING: H.R.S. § 708-836

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Control of Propelled Vehicle.

A person commits the offense of Unauthorized Control of Propelled Vehicle if he/she intentionally or knowingly* exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent.

There are three material elements of the offense of Unauthorized Control of Propelled Vehicle, 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 exerted unauthorized control over another's propelled vehicle; and

2. That the Defendant did so by operating the vehicle without the owner's consent; and

3. That the Defendant did so intentionally or knowingly*.

"Owner" means the [registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership][legal owner].

"Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

Notes

HRS §§ 708-836, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "owner" (The definition in instruction 10.00 is only applicable to offenses that occur on or before June 16, 1996.)
10.00 - "unauthorized control over property"

"Legal owner" is to be used where there is no registered owner or unrecorded owner of the vehicle pending transfer of ownership. *See* 2001 Haw. Sess. L. Act 87.

For statutory affirmative defense to this offense, *see* instruction 10.24A.

*The term "knowingly" is to be included within the general statement and elements of the offense when the incident occurred on or after 04/12/99.

10.24A AFFIRMATIVE DEFENSE: UNAUTHORIZED CONTROL OF PROPELLED VEHICLE -- OPERATING: H.R.S. § 708-836(3)

It is an affirmative defense to a charge of Unauthorized Control of Propelled Vehicle that the Defendant:

(a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or

(b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.*

It is an affirmative defense to a charge of Unauthorized Control of Propelled Vehicle that the Defendant reasonably believed that the owner would have authorized the use had the owner known of it.**

Notes

H.R.S. § 708-836(3).

For definition of "affirmative defense", *see* instruction 7.06.

*Applicable to offenses occurring on or after June 17, 1996.

**Applicable to offenses that occurred on or before June 16, 1996.

10.25 UNAUTHORIZED CONTROL OF PROPELLED VEHICLE -- CHANGING IDENTITY: H.R.S. § 708-836

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unauthorized Control of Propelled Vehicle.

A person commits the offense of Unauthorized Control of Propelled Vehicle if he/she intentionally or knowingly* exerts unauthorized control over another's propelled vehicle by changing the identity of the vehicle without the owner's consent.

There are three material elements of the offense of Unauthorized Control of Propelled Vehicle, 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 exerted unauthorized control over another's propelled vehicle; and

2. That the Defendant did so by changing the identity of the vehicle without the owner's consent; and

3. That the Defendant did so intentionally or knowingly*.

"Owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership.

"Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

Notes

HRS §§ 708-836, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "owner" (The definition in instruction 10.00 is only applicable to offenses that occur on or before June 16, 1996.)
10.00 - "unauthorized control over property"

For statutory affirmative defense to this offense, *see* instruction 10.24A.

*The term "knowingly" is to be included within the general statement and elements of the offense when the incident occurred on or after 04/12/99.

10.26 ROBBERY IN THE FIRST DEGREE -- ATTEMPT TO KILL OR INFLICT SERIOUS BODILY INJURY: H.R.S. § 708-840(1)(a)

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

A person commits the offense of Robbery in the First Degree if, in the course of committing theft, he/she [attempts to kill another] [intentionally or knowingly* inflicts or attempts to inflict serious bodily injury upon another].

There are two material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That[, while doing so,] the Defendant [attempted to kill another] [intentionally or knowingly* inflicted or attempted to inflict serious bodily injury upon another].

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

A person attempts to kill another if, with the intent to kill, he/she intentionally engages in conduct which is a

substantial step in a course of conduct intended or known to be practically certain by the Defendant to cause death.

A person attempts to inflict serious bodily injury on another if, with the intent to inflict serious bodily injury, he/she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to create 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.

Notes

HRS §§ 708-840(1)(a), 708-830(1), 708-842, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by HRS Chapter 708, *see* instructions:
10.00 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For definition of terms *not* defined by HRS Chapter 708, *see* instruction:
9.00 - "serious bodily injury"

For elements of attempt, *see* instructions 14.01 through 14.03.

Only the most common form of theft defined by HRS § 708-830(1) has been included within the instruction; other forms of theft specified by HRS § 708-830 may also be relevant.

For statutory defense to theft, *see* instruction 10.11A.

*The term "knowingly" is to be included within the general statement and elements of the offense when the incident occurred on or after 04/29/98.

10.27 ROBBERY IN THE FIRST DEGREE -- ARMED WITH DANGEROUS INSTRUMENT AND USE OF FORCE: H.R.S. § 708-840(1)(b)(i)

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

A person commits the offense of Robbery in the First Degree if, in the course of committing theft, he/she is armed with a dangerous instrument, and he/she uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance.

There are three material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That [,while doing so,] the Defendant was armed with a dangerous instrument; and

3. That [,while doing so,] the Defendant used force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance.

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

"Dangerous instrument" means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

Notes

H.R.S. §§ 708-840(1)(b)(i) and (2), 708-842, 702-206(1).

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 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For statutory defense to theft, *see* instruction 10.11A.

10.28 ROBBERY IN THE FIRST DEGREE -- ARMED WITH DANGEROUS INSTRUMENT AND THREATENED USE OF FORCE: H.R.S. § 708-840(1)(b)(ii)

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

A person commits the offense of Robbery in the First Degree if, in the course of committing theft, he/she is armed with a dangerous instrument, and he/she threatens the imminent use of force against the person of anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property.

There are three material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That [,while doing so,] the Defendant was armed with a dangerous instrument; and

3. That [,while doing so,] the Defendant threatened the imminent use of force against anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property.

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

"Dangerous instrument" means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

Notes

H.R.S. §§ 708-840(1)(b)(ii), 708-830(1), 708-842, 702-206(1).

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 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"
10.00 - "unauthorized control over property"

For statutory defense to theft, *see* instruction 10.11A.

10.29 ROBBERY IN THE SECOND DEGREE -- USE OF FORCE: H.R.S. § 708-841(1)(a)

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

A person commits the offense of Robbery in the Second Degree if, in the course of committing theft, he/she uses force against the person of anyone present, with intent to overcome that person's physical resistance or physical power of resistance.

There are two material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That [,while doing so,] the Defendant used force against the person of anyone present, with intent to overcome that person's physical resistance or physical power of resistance.

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

Notes

H.R.S. §§ 708-841(1)(a), 708-842, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For statutory defense to theft, *see* instruction 10.11A.

10.30 ROBBERY IN THE SECOND DEGREE -- THREATENED USE OF FORCE: H.R.S. § 708-841(1)(b)

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

A person commits the offense of Robbery in the Second Degree if, in the course of committing theft, he/she threatens the imminent use of force against the person of anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property.

There are two material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That [,while doing so,] the Defendant threatened the imminent use of force against anyone who is present, with intent to compel acquiescence to the taking of or escaping with the property.

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

Notes

H.R.S. §§ 708-841(1)(b), 708-842, 702-206(1).

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 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"

For statutory defense to theft, *see* instruction 10.11A.

10.31 ROBBERY IN THE SECOND DEGREE -- RECKLESSLY INFLICTS SERIOUS BODILY INJURY: H.R.S. § 708-841(1)(c)

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

A person commits the offense of Robbery in the Second Degree if, in the course of committing theft, he/she recklessly inflicts serious bodily injury upon another.

There are two material elements of the offense of Robbery 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 was in the course of committing theft; and

2. That [,while doing so,] the Defendant recklessly inflicted serious bodily injury on another person.

A person commits theft if he/she obtains or exerts unauthorized control over the property of another with intent to deprive the person of the property.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

Notes

H.R.S. §§ 708-841(1)(c), 708-842, 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

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

10.00 - "control over the property"
10.00 - "deprive"
10.00 - "obtain"
10.00 - "property"
10.00 - "property of another"

For definition of terms *not* defined by H.R.S. Chapter 708, *see* instructions:

9.00 - "serious bodily injury"

For statutory defense to theft, *see* instruction 10.11A.

10.32 FORGERY IN THE FIRST DEGREE: H.R.S. § 708-851(1)(a)

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

A person commits the offense of Forgery in the First Degree if, with intent to defraud, he/she falsely [makes] [completes] [endorses] [alters] a written instrument, or utters a forged instrument, [which is or purports to be] [which is calculated to become or to represent if completed] part of an issue of [stamps] [securities] [other valuable instruments issued by a government or governmental agency].

There are two material elements of the offense of Forgery 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 falsely [made] [completed] [endorsed] [altered] a written instrument, or uttered a forged instrument, [which is or purported to be] [which is calculated to become or to represent if completed] part of an issue of [stamps] [securities] [other valuable instruments issued by a government or governmental agency]; and

2. That the Defendant did so with the intent to defraud.

"Complete written instrument" means a written instrument which purports to be genuine and fully drawn with respect to every essential feature thereof.

"Falsely alter", in relation to a written instrument, means to change, without the authority of the ostensible maker or drawer, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by that person.

"Falsely complete", in relation to a written instrument, means to transform, by adding, inserting, or changing matter, an incomplete written instrument into a complete one, without the authority of the ostensible maker or drawer, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

"Falsely endorse", in relation to a written instrument, means to endorse, without the authority of the ostensible maker or drawer, any part of a written instrument, whether complete or incomplete, so that the written instrument so endorsed falsely appears or purports to be authorized by the ostensible maker or drawer.

"Falsely make", in relation to a written instrument, means to make or draw a complete written instrument, or an incomplete

written instrument, which purports to be an authentic creation of its ostensible maker, but which is not either because the ostensible maker is fictitious or because, if real, the person did not authorize the making or drawing thereof.

"Forged instrument" means a written instrument which has been falsely made, completed, or altered.

"Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

"Utter", in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

"Written instrument" means:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or

(b) Any token, coin, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

Notes

H.R.S. §§ 708-851(1)(a), 702-206(1) and (2).

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 - "government"

10.00 - "intent to defraud"

10.33 FORGERY IN THE FIRST DEGREE: H.R.S. § 708-851(1)(b)

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

A person commits the offense of Forgery in the First Degree if, with intent to defraud, he/she falsely [makes] [completes] [endorses] [alters] a written instrument, or utters a forged instrument, [which is or purports to be] [which is calculated to become or to represent if completed] part of an issue of [stock] [bonds] [other instruments representing interests in or claims against a corporate or other organization or its property].

There are two material elements of the offense of Forgery 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 falsely [made] [completed] [endorsed] [altered] a written instrument, or uttered a forged instrument, [which is or purported to be] [which is calculated to become or to represent if completed] part of an issue of [stock] [bonds] [other instruments representing interests in or claims against a corporate or other organization or its property]; and

2. That the Defendant did so with the intent to defraud.

"Falsely alter", in relation to a written instrument, means to change, without the authority of the ostensible maker or drawer, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new

matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by that person.

"Falsely complete", in relation to a written instrument, means to transform, by adding, inserting, or changing matter, an incomplete written instrument into a complete one, without the authority of the ostensible maker or drawer, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

"Falsely endorse", in relation to a written instrument, means to endorse, without the authority of the ostensible maker or drawer, any part of a written instrument, whether complete or incomplete, so that the written instrument so endorsed falsely appears or purports to be authorized by the ostensible maker or drawer.

"Falsely make", in relation to a written instrument, means to make or draw a complete written instrument, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker, but which is not either because the ostensible maker is fictitious or because, if real, the person did not authorize the making or drawing thereof.

"Forged instrument" means a written instrument which has been falsely made, completed, or altered.

"Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

"Utter", in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

"Written instrument" means:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or

(b) Any token, coin, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

Notes

H.R.S. §§ 708-851(1)(b), 708-850, 702-206(1) and (2).

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 - "intent to defraud"

10.34 FORGERY IN THE SECOND DEGREE: H.R.S. § 708-852

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

A person commits the offense of Forgery in the Second Degree if, with intent to defraud, he/she falsely [makes] [completes] [endorses] [alters] a written instrument, or utters a forged instrument, which is or purports to be, or which is calculated to become or to represent if completed, a [deed] [will] [codicil] [contract] [assignment] [commercial instrument] [other instrument] which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

There are two material elements of the offense of Forgery 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 falsely [made] [completed] [endorsed] [altered] a written instrument, or uttered a forged instrument, which is or purported to be, or which is calculated to become or to represent if completed, a [deed] [will] [codicil] [contract] [assignment] [commercial instrument] [other instrument] which does or may evidence, create, transfer,

terminate, or otherwise affect a legal right, interest, obligation, or status; and

2. That the Defendant did so with the intent to defraud.

"Complete written instrument" means a written instrument which purports to be genuine and fully drawn with respect to every essential feature thereof.

"Falsely alter", in relation to a written instrument, means to change, without the authority of the ostensible maker or drawer, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by that person.

"Falsely complete", in relation to a written instrument, means to transform, by adding, inserting, or changing matter, an incomplete written instrument into a complete one, without the authority of the ostensible maker or drawer, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

"Falsely endorse", in relation to a written instrument, means to endorse, without the authority of the ostensible maker or drawer, any part of a written instrument, whether complete or incomplete, so that the written instrument so endorsed falsely

appears or purports to be authorized by the ostensible maker or drawer.

"Falsely make", in relation to a written instrument, means to make or draw a complete written instrument, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker, but which is not either because the ostensible maker is fictitious or because, if real, the person did not authorize the making or drawing thereof.

"Forged instrument" means a written instrument which has been falsely made, completed, or altered.

"Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

"Utter", in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

"Written instrument" means:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or

(b) Any token, coin, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

Notes

H.R.S. §§ 708-852, 708-850, 702-206(1) and (2).

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 - "intent to defraud"

10.35 FORGERY IN THE THIRD DEGREE: H.R.S. § 708-853

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

A person commits the offense of Forgery in the Third Degree if, with intent to defraud, he/she falsely [makes] [completes] [endorses] [alters] a written instrument, or utters a forged instrument.

There are two material elements of the offense of Forgery in the Third 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 falsely [made] [completed] [endorsed] [altered] a written instrument, or uttered a forged instrument; and

2. That the Defendant did so with the intent to defraud.

"Complete written instrument" means a written instrument which purports to be genuine and fully drawn with respect to every essential feature thereof.

"Falsely alter", in relation to a written instrument, means to change, without the authority of the ostensible maker or drawer, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in

all respects an authentic creation of its ostensible maker or authorized by that person.

"Falsely complete", in relation to a written instrument, means to transform, by adding, inserting, or changing matter, an incomplete written instrument into a complete one, without the authority of the ostensible maker or drawer, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

"Falsely endorse", in relation to a written instrument, means to endorse, without the authority of the ostensible maker or drawer, any part of a written instrument, whether complete or incomplete, so that the written instrument so endorsed falsely appears or purports to be authorized by the ostensible maker or drawer.

"Falsely make", in relation to a written instrument, means to make or draw a complete written instrument, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker, but which is not either because the ostensible maker is fictitious or because, if real, the person did not authorize the making or drawing thereof.

"Forged instrument" means a written instrument which has been falsely made, completed, or altered.

"Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

"Utter", in relation to a forged instrument, means to offer, whether accepted or not, a forged instrument with representation by acts or words, oral or in writing, that the instrument is genuine.

"Written instrument" means:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or

(b) Any token, coin, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

Notes

H.R.S. §§ 708-853, 708-850, 702-206(1) and (2).

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 - "intent to defraud"

10.36 FRAUDULENT USE OF A CREDIT CARD -- USES, ATTEMPTS OR CONSPIRES TO USE: H.R.S. § 708-8100(1)(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Fraudulent Use of a Credit Card.

A person commits the offense of Fraudulent Use of a Credit Card, if with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person], the person [uses] [attempts to use] [conspires to use], for the purpose of obtaining [money] [goods] [services] [anything else of value] that together exceeds $300 in any six-month period a credit card [obtained or retained in violation of the law prohibiting theft of a credit card] [which the person knows is forged, expired, or revoked].

There are four material elements of the offense of Fraudulent Use of a Credit Card, 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 [used] [attempted to use] [conspired to use] a credit card [obtained or retained in violation of the law prohibiting theft of a credit card] [which the person knows is forged, expired, or revoked]; and

2. That the Defendant did so for the purpose of obtaining [money] [goods] [services] [anything else of value]; and

3. That together the [money] [goods] [services] [anything else of value] exceeded $300 in any six-month period; and

4. That the Defendant did so with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person].

Notes

H.R.S. § 708-8100(1)(a), 702-206(1) and (2).

The court must instruct the jury on the elements of Theft of a Credit Card. *See* H.R.S. § 708-8102 and instructions 10.39 - 10.42.

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 - "credit card"
10.00 - "expired credit card"
10.00 - "intent to defraud"
10.00 - "issuer"
10.00 - "revoked credit card"

For elements of conspiracy, *see* instruction 14.05.

For prima facie inference when the notice of revocation was mailed to Defendant at the address set forth on the credit card or at the last known address by registered or certified mail, return receipt requested, and, if the address was more than 500 miles from the place of mailing by air mail, *see* instruction 10.36A.

10.36A INFERENCE: FRAUDULENT USE OF A CREDIT CARD -- USES, ATTEMPTS OR CONSPIRES TO USE: HRS § 708-8100(4)

If you find beyond a reasonable doubt that notice of revocation was mailed to Defendant at the address set forth on the credit card or at the last known address by registered or certified mail, return receipt requested, and, if the address was more than 500 miles from the place of mailing by air mail, you may, but are not required to, infer that the Defendant had knowledge of the revocation of the credit card [four] [ten*] days after mailing. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant had knowledge of the revocation of the credit card [four] [ten*] days after mailing.

Notes

HRS § 708-8100(4); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 Hawai‘i 149 (App. 1997); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that the notice of revocation was mailed to Defendant at the address set forth on the credit card or at the last known address by registered or certified mail, return receipt requested, and, if the address was more than 500 miles from the place of mailing by air mail.

*If the address is located outside the United States, the Virgin Islands, the Canal Zone and Canada.

10.37 FRAUDULENT USE OF A CREDIT CARD -- OBTAINS, ATTEMPTS TO OBTAIN OR CONSPIRES TO OBTAIN: H.R.S. § 708-8100(1)(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Fraudulent Use of a Credit Card.

A person commits the offense of Fraudulent Use of a Credit Card, if with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person], the person [obtains] [attempts to obtain] [conspires to obtain], [money] [goods] [services] [anything else of value] that together exceeds $300 in any six-month period [by representing without the consent of the cardholder that the person is the holder of a specified card] [by representing that the person is the holder of a card and such card has not in fact been issued].

There are four material elements of the offense of Fraudulent Use of a Credit Card, 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 [obtained] [attempted to obtain] [conspired to obtain], [money] [goods] [services] [anything else of value]; and

2. That the [money] [goods] [services] [anything else of value] together exceeded $300 in any six-month period; and

3. That the Defendant did so [by representing without the consent of the cardholder that the person is the holder of a specified card] [by representing that the person is the holder of a card and such card has not in fact been issued]; and

4. That the Defendant did so with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person].

Notes

H.R.S. § 708-8100(1)(b), 702-206(1) and (2).

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 - "cardholder"
10.00 - "credit card"
10.00 - "intent to defraud"
10.00 - "issuer"

For elements of conspiracy, *see* instruction 14.05.

10.38 FRAUDULENT USE OF A CREDIT CARD -- USES, ATTEMPTS TO USE OR CONSPIRES TO USE A CREDIT CARD NUMBER: H.R.S. § 708-8100(1)(c)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Fraudulent Use of a Credit Card.

A person commits the offense of Fraudulent Use of a Credit Card, if with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person], the person [uses] [attempts to use] [conspires to use] a credit card number without the consent of the cardholder for the purpose of obtaining [money] [goods] [services] [anything else of value] that together exceeds $300 in any six-month period.

There are five material elements of the offense of Fraudulent Use of a Credit Card, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant [used] [attempted to use] [conspired to use] a credit card number of a cardholder; and

2. That the Defendant did so for the purpose of obtaining [money] [goods] [services] [anything else of value]; and

3. That the value of the [money] [goods] [services] [anything else of value] together exceeded $300 in any six-month period; and

4. That the Defendant did so without the cardholder's consent; and

5. That the Defendant did so with intent to defraud [the issuer] [another person or organization providing money, goods, services, or anything else of value] [any other person].

Notes

H.R.S. § 708-8100(1)(c), 702-206(1) and (2).

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 - "cardholder"
10.00 - "credit card"
10.00 - "intent to defraud"
10.00 - "issuer"

For definition of "consent", *see* instruction 7.05.

For elements of conspiracy, *see* instruction 14.05.

10.39 THEFT OF A CREDIT CARD -- TAKES A CREDIT CARD WITHOUT CONSENT: H.R.S. § 708-8102(1)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Theft of a Credit Card.

A person commits the offense of Theft of a Credit Card, if he/she takes a credit card from the [person] [possession] [custody] [control] of another without the cardholder's consent.

There are three material elements of the offense of Theft of a Credit Card, 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 took a credit card from the [person] [possession] [custody] [control] of another; and

2. That the Defendant did so without the cardholder's consent; and

3. That the Defendant did so intentionally, knowingly or recklessly.

Notes

H.R.S. § 708-8102(1), 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 terms defined in Chapter 708, *see* instruction:
10.00 - "cardholder"
10.00 - "credit card"

For definition of "consent", *see* instruction 7.05.
For definition of "possession", *see* instruction 6.06.

For prima facie inference when Defendant had in his/her possession or control credit cards issued in the names of two or more persons that had been taken or obtained without the cardholder's consent, *see* instruction 10.40A.

10.40 THEFT OF A CREDIT CARD -- RECEIVING WHEN KNOWING IT HAD BEEN TAKEN WITHOUT CONSENT: H.R.S. § 708-8102(1)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Theft of a Credit Card.

A person commits the offense of Theft of a Credit Card, if he/she receives a credit card with knowledge that it has been taken from the cardholder without consent, with intent to [use it] [sell it] [transfer it to a person other than the issuer or the cardholder].

There are three material elements of the offense of Theft of a Credit Card, 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 received a credit card; and

2. That the Defendant did so with knowledge that the credit card had been taken from the [person] [possession] [custody] [control] of another without the cardholder's consent; and

3. That the Defendant received the credit card with intent to [use it] [sell it] [transfer it to a person other than the issuer or the cardholder].

Notes

H.R.S. § 708-8102(1), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined in Chapter 708, *see* instruction:

10.00 - "cardholder"
10.00 - "credit card"
10.00 - "issuer"
10.00 - "receives" or "receiving"

For definition of "consent", *see* instruction 7.05.

For definition of "possession", *see* instruction 6.06.

For prima facie inference when Defendant had in his/her possession or control credit cards issued in the names of two or more persons that had been taken or obtained without the cardholder's consent, *see* instruction 10.40A.

10.40A INFERENCE: THEFT OF A CREDIT CARD -- TAKES A CREDIT CARD WITHOUT CONSENT: H.R.S. § 708-8102(1)

If you find beyond a reasonable doubt that the Defendant intentionally, knowingly or recklessly had in his/her possession or under his/her control credit cards issued in the names of two or more other persons that had been taken or obtained without the cardholder's consent, you may, but are not required to, infer that Defendant knew that the credit cards had been taken or obtained without the cardholder's consent. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant knew that the credit cards had been taken or obtained without the cardholder's consent.

Notes

HRS § 708-8102(1); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai'i 216, 965 Hawai'i 149 (App. 1997); *State v. Tabigne*, 88 Hawai'i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that the Defendant had in his/her possession or control credit cards issued in the names of two or more persons that had been taken or obtained without the cardholder's consent.

10.41 THEFT OF A CREDIT CARD -- RECEIVING WHEN KNOWING IT TO BE LOST, MISLAID OR MISDELIVERED: H.R.S. § 708-8102(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Theft of a Credit Card.

A person commits the offense of Theft of a Credit Card, if he/she receives a credit card that the person knows to have been [lost] [mislaid] [delivered under a mistake as to the identity or address of the cardholder] and who retains possession with intent to [use it] [sell it] [transfer it to a person other than the issuer or the cardholder].

There are three material elements of the offense of Theft of a Credit Card, 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 received a credit card; and

2. That the Defendant did so with the knowledge that the credit card had been [lost] [mislaid] [delivered under a mistake as to the identity or address of the cardholder]; and

3. That the Defendant retained possession of the credit card with intent to [use it] [sell it] [transfer it to a person other than the issuer or the cardholder].

Notes

H.R.S. § 708-8102(2), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined in Chapter 708, *see* instruction:
10.00 - "cardholder"
10.00 - "credit card"
10.00 - "issuer"
10.00 - "receives" or "receiving"

For definition of "possession", *see* instruction 6.06.

10.42 THEFT OF A CREDIT CARD -- SELLS OR BUYS: H.R.S. § 708-8102(3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Theft of a Credit Card.

A person commits the offense of Theft of a Credit Card, if he/she [sells a credit card and is not the issuer] [buys a credit card from a person other than the issuer].

There are two material elements of the offense of Theft of a Credit Card, 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 [sold a credit card and was not the issuer] [bought a credit card from a person other than the issuer]; and

2. That the Defendant did so intentionally, knowingly or recklessly.

Notes

H.R.S. § 708-8102(3), 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 terms defined in Chapter 708, *see* instruction:
10.00 - "credit card"
10.00 - "issuer"

10.43 CABLE TELEVISION SERVICE FRAUD IN THE FIRST DEGREE: H.R.S. § 708-8200(1)(b)

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

A person commits the offense of Cable Television Service Fraud in the First Degree if he/she knowingly distributes a cable television service device and knows that the device is intended to be used to obtain cable television service without payment of applicable charges.

There are three material elements of the offense of Cable Television Service Fraud 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 distributed a cable television service device; and

2. That the Defendant did so knowingly; and

3. That the Defendant knew that the device was intended to be used to obtain cable television service without payment of applicable charges.

Notes

H.R.S. §§ 708-8200(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined in Chapter 708, *see* instruction:
10.00 - "cable television service"

10.44 CABLE TELEVISION SERVICE FRAUD IN THE SECOND DEGREE: H.R.S. § 708-8201(1)(a)

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

A person commits the offense of Cable Television Service Fraud in the Second Degree if he/she knowingly possesses a cable television service device with the intent to obtain cable television service without payment of applicable charges.

There are three material elements of the offense of Cable Television Service Fraud 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 possessed a cable television service device; and

2. That the Defendant did so knowingly; and

3. That the Defendant did so with the intent to obtain cable television service without payment of applicable charges.

Notes

H.R.S. §§ 708-8201(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined in Chapter 708, *see* instruction:
10.00 - "cable television service"
10.00 - "cable television service device"

For definition of "possession", *see* instruction 6.06.

10.45 UNAUTHORIZED ENTRY INTO MOTOR VEHICLE: H.R.S. § 708-836.5

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

A person commits the offense of Unauthorized Entry Into Motor Vehicle if he/she intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

There are three material elements of the offense of Unauthorized Entry Into Motor Vehicle, 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 a motor vehicle; and

2. That the Defendant did so intentionally or knowingly; and

3. That the Defendant did so with the intent to commit a crime against a person or against property rights.

Notes

H.R.S. §§ 708-836.5, 702-206(1) and (2).

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--"enter or remain unlawfully"
10.00--"enter"

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

10.46 TELEMARKETING FRAUD: H.R.S. § 708-835.6

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name) is charged with the offense of Telemarketing Fraud.

A person commits the offense of Telemarketing Fraud if, he/she engages in a plan, program, or campaign, including a prize promotion or investment opportunity that was conducted to include the [purchase of goods or services] [solicitation of funds or contributions] by the use of one or more telephones and involving more than one telephone call, and with the intent to [defraud] [misrepresent], he/she [obtains] [attempts to obtain] the transfer of [possession] [control] [ownership] of the property of another through communications conducted at least in part by telephone and involving [direct] [implied] claims that the person contacted [will or is about to receive anything of value] [may be able to recover any losses suffered by the person contacted in connection with a prize promotion].

There are three material elements of the offense of Telemarketing Fraud, 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 engaged in a plan, program, or campaign, including a prize promotion or investment opportunity that was conducted to include the [purchase of goods

or services] [solicitation of funds or contributions] by the use of one or more telephones and involving more than one telephone call; and

2. Defendant, with intent to [defraud] [misrepresent], intentionally [obtained] [attempted to obtain] the transfer of [possession] [control] [ownership] of the property of another; and

3. Defendant intentionally did so through communications conducted at least in part by telephone and involving [direct] [implied] claims that the person contacted [will or is about to receive anything of value] [may be able to recover any losses suffered by the person contacted in connection with a prize promotion].

Notes

H.R.S. §708-835.6

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

10.00--"Intent to defraud"
10.00--"Obtain"
10.00--"Property of another"

For discussion regarding "alternative means" of proving an offense, *see*, *State v. Willie Jones*, No. 20543 (Hawaii July 19, 2001).

10.47 IDENTITY THEFT IN THE FIRST DEGREE: H.R.S. § 708-839.6

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

A person commits the offense of Identity Theft in the First Degree if he/she intentionally makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means] with the intent to [facilitate the commission of a murder in any degree] [facilitate the commission of a class A felony] [facilitate the commission of kidnapping] [facilitate the commission of unlawful imprisonment in any degree] [facilitate the commission of extortion in any degree] [facilitate the commission of any offense under chapter 134] [facilitate the commission of criminal property damage in the first or second degree] [facilitate the commission of escape in any degree] [facilitate the commission of any offense under part VI of chapter 710] [facilitate the commission of any offense under section 711-1103] [facilitate the commission of any offense under chapter 842] [commit the offense of theft in the first degree from the person whose personal information is used, or from any other person or entity].

There are two material elements of the offense of Identity Theft 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 intentionally made or caused to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means]; and

2. That the Defendant did so with intent to [facilitate the commission of a murder in any degree] [facilitate the commission of a class A felony] [facilitate the commission of kidnaping] [facilitate the commission of unlawful imprisonment in any degree] [facilitate the commission of extortion in any degree] [facilitate the commission of any offense under chapter 134] [facilitate the commission of criminal property damage in the first or second degree] [facilitate the commission of escape in any degree] [facilitate the commission of any offense under part VI of chapter 710] [facilitate the commission of any offense under section 711-1103] [facilitate the commission of any offense under chapter 842] [commit the offense of theft in the first degree from the person whose personal information is used, or from any other person or entity].

Notes

H.R.S. § 708-839.6

For definition of states of mind, *see* instruction:
6.02--"intentionally"

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

10.00--"Personal information" means information associated with an actual person or a fictitious person that is a name, an address, a telephone number, an electronic mail address, a driver's license number, a social security number, an employer, a place of employment, information related to employment, an employee identification number, a mother's maiden name, an identifying number of a depository account, a bank account number, a password used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of an actual or fictitious person.

10.05 to 10.07--Criminal Property Damage in the First and Second Degrees

10.11 to 10.16--Theft in the First Degree

For other definitions, *see* instruction:

9.01 to 9.07B--Murder in the First and Second Degrees

9.33 to 9.36--Kidnapping

9.39 and 9.40--Unlawful Imprisonment in the First and Second Degrees

9.57 to 9.60--Extortion in the First, Second, and Third Degrees

12.03 and 12.04--Escape in the First and Second Degrees

The court must instruct the jury on the elements of any applicable separate offense, whether charged or not, and included offenses. These offenses should be named in element two of the instruction.

10.48 IDENTITY THEFT IN THE SECOND DEGREE: H.R.S. § 708-839.7

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

A person commits the offense of Identity Theft in the Second Degree if he/she intentionally makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means] with the intent to commit the offense of theft in the second degree from any person or entity.

There are two material elements of the offense of Identity Theft 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 made or caused to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means]; and

2. That the Defendant did so with intent to commit the offense of theft in the second degree from any person or entity.

Notes

H.R.S. § 708-839.7

For definition of states of mind, *see* instructions:

6.02--"intentionally"

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

10.00--"Personal information" means information associated with an actual person or a fictitious person that is a name, an address, a telephone number, an electronic mail address, a driver's license number, a social security number, an employer, a place of employment, information related to employment, an employee identification number, a mother's maiden name, an identifying number of a depository account, a bank account number, a password used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of an actual or fictitious person.

For other definitions, *see* instruction:

10.17 to 10.22--Theft in the Second Degree

The court must instruct the jury on the elements of Theft in the Second Degree.

10.49 IDENTITY THEFT IN THE THIRD DEGREE: H.R.S. § 708-839.8

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name) is charged with the offense of Identity theft in the Third Degree.

A person commits the offense of Identity Theft in the Third Degree if he/she intentionally makes or causes to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means], with the intent to commit the offense of [theft in the third degree] [theft in the fourth degree] from any person or entity.

There are two material elements of the offense of Identity Theft in the Third 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 made or caused to be made, either directly or indirectly, a transmission of any personal information of another by [any oral statement] [any written statement] [any statement conveyed by any electronic means]; and

2. That the Defendant did so with intent to commit the offense of theft in the third degree and/or theft in the fourth degree from any person or entity.

Notes

H.R.S. § 708-839.8

For definition of states of mind, *see* instruction:

6.02--"intentionally"

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

10.00--"Personal information" means information associated with an actual person or a fictitious person that is a name, an address, a telephone number, an electronic mail address, a driver's license number, a social security number, an employer, a place of employment, information related to employment, an employee identification number, a mother's maiden name, an identifying number of a depository account, a bank account number, a password used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of an actual or fictitious person.

For other definitions, *see* instruction:

10.23--Theft in the Third Degree

The court must instruct the jury on the elements of Theft in the Third Degree and Theft in the Fourth Degree.

TABLE OF INSTRUCTIONS[16]

11. CHAPTER 709 -- OFFENSES AGAINST FAMILY AND INCOMPETENTS

[16]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

11.01 ENDANGERING THE WELFARE OF A MINOR IN THE FIRST DEGREE: H.R.S. § 709.903.5(1)

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

A person commits the offense of Endangering the Welfare of a Minor in the First Degree if he/she, having care or custody of a minor, intentionally or knowingly allows another person to inflict serious or substantial bodily injury on the minor.

There are three material elements of the offense of Endangering the Welfare of a Minor 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 had care or custody of a minor; and

2. That the Defendant, at that time, allowed another person to inflict serious or substantial bodily injury on the minor; and

3. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. §§ 709-903.5(1), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms *not* defined by H.R.S. Chapter 709, *see* instructions:
9.00 - "serious bodily injury"
9.00 - "substantial bodily injury"

For statutory defense, *see* instruction 11.01A.

11.01A DEFENSE: ENDANGERING THE WELFARE OF A MINOR: H.R.S. § 709.903.5(2)

It is a defense to prosecution for Endangering the Welfare of a Minor in the [First] [Second] Degree if, at the time, the Defendant reasonably believed he/she would incur serious or substantial bodily injury in acting to prevent the injury to the minor.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant did not reasonably believe, at the time, he/she would incur serious or substantial bodily injury in acting to prevent the injury to the minor.

If the prosecution does not meet its burden, then you must find the Defendant not guilty.

Notes

H.R.S. § 709-903.5(2).

For definition of terms *not* defined by H.R.S. Chapter 709, *see* instructions:

9.00 - "serious bodily injury"
9.00 - "substantial bodily injury"

This defense is applicable to H.R.S. §§ 709-903.5(1) and 709-904(1), instructions 11.01 and 11.02 respectively. It is not applicable to H.R.S. § 709-904(2), instruction 11.03.

11.02 ENDANGERING THE WELFARE OF A MINOR IN THE SECOND DEGREE -- RECKLESS: H.R.S. § 709-904(1)

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

A person commits the offense of Endangering the Welfare of a Minor in the Second Degree if he/she, having care or custody of a minor, recklessly allows another person to inflict serious or substantial bodily injury on the minor.

There are three material elements of the offense of Endangering the Welfare of a Minor 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 had care or custody of a minor; and

2. That the Defendant, at that time, allowed another person to inflict serious or substantial bodily injury on the minor; and

3. That the Defendant did so recklessly.

Notes

H.R.S. §§ 709-904(1), 702-206(3).

For definition of states of mind, *see* instruction:
6.04 - "recklessly"

For definition of terms *not* defined by H.R.S. Chapter 709, *see* instructions:
9.00 - "serious bodily injury"
9.00 - "substantial bodily injury"

For statutory defense, *see* instruction 11.01A.

11.03 ENDANGERING THE WELFARE OF A MINOR IN THE SECOND DEGREE -- LEGAL DUTY: H.R.S. § 709-904(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Endangering the Welfare of a Minor.

A person commits the offense of Endangering the Welfare of a Minor in the Second Degree if he/she, being a parent, guardian or other person whether or not charged with the care or custody of a minor, knowingly endangers the minor's physical or mental welfare by violating or interfering with any legal duty of care or protection owed to the minor.

There are three material elements of the offense of Endangering the Welfare of a Minor 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 endangered a minor's physical or mental welfare; and

2. That the Defendant did so by violating or interfering with any legal duty of care or protection owed to the minor; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 709-904(2), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

The phrase "being a parent, guardian or other person whether or not charged with the care or custody of a minor" was deleted from the elements of the offense as the phrase encompasses all persons in all situations.

11.04 COMPENSATION BY AN ADULT OF JUVENILES FOR CRIMES: H.R.S. § 709-904.5

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Compensation by an Adult of Juveniles for Crimes.

A person commits the offense of Compensation by an Adult of Juveniles for Crimes if he/she, being an adult, intentionally or knowingly [compensates] [offers to compensate] [agrees to compensate] any juvenile for the commission of any criminal offense.

There are two material elements of the offense of Compensation by an Adult of Juveniles for Crimes, 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, being an adult, [compensated] [offered to compensate] [agreed to compensate] any juvenile for the commission of (name of criminal offense); and

2. That the Defendant did so intentionally or knowingly.

"Compensate" means to confer any benefit or pecuniary benefit.

"Juvenile" means any person under eighteen years of age.

[It is not a defense to a prosecution that the Defendant had no knowledge of the juvenile's age.]

Notes

H.R.S. §§ 709-904.5, 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The elements of the subsidiary offense specified in element one of the offense should be submitted to the jury in a separate instruction. If more than one offense was committed or intended to be committed, a special interrogatory to the jury may be required to

enable the court to determine the grade of the charged offense. For statutory parameters of a "crime", *see* H.R.S. § 701-107.

11.05 ENDANGERING THE WELFARE OF AN INCOMPETENT PERSON: H.R.S. § 709-905

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Endangering the Welfare of an Incompetent Person.

A person commits the offense of Endangering the Welfare of an Incompetent Person if he/she knowingly acts in a manner likely to be injurious to the physical or mental welfare of a person who is unable to care for himself/herself because of physical or mental disease, disorder, or defect.

There are three material elements of the offense of Endangering the Welfare of an Incompetent Person, 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 acted in a manner likely to be injurious to the physical or mental welfare of a person; and

2. That the person was unable to care for himself/herself because of physical or mental disease, disorder, or defect; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 709-905, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

H.R.S. § 702-203 provides that there is no general duty to act in the penal code, unless otherwise provided by law.

11.06 ABUSE OF FAMILY AND HOUSEHOLD MEMBERS: H.R.S. § 709-906(1) and (7)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family and Household Members.

A person commits the offense of Abuse of Family and Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member.

There are two material elements of the offense of Abuse of Family and Household Members, 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 physically abused a family or household member; and

2. That the Defendant did so intentionally, knowingly or recklessly.

"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

HRS §§ 709-906(1) and (7), 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* HRS § 572C-3.

For degrees of consanguinity within which marriage is prohibited, *see* HRS § 572-1.

Effective July 15, 1998, Act 172, Hawai`i Session Laws 1998, established a class C felony offense of abuse of a family and household members for a subsequent offense occurring within two years of a second misdemeanor conviction. Act 172 appears to treat the prior conviction requirement as a sentencing matter for the trial court and not as an element of the offense to be determined by the jury. *See State v. Schroeder*, 76 Hawai`i 517, 880 P.2d 192 (1994) (historical facts are wholly extrinsic to the specific circumstances of a defendant's offense and therefore have no bearing on the issue of guilt *per se*).

*Effective 7/1/97 - Act 383, Hawai`i Session Laws 1997

**Effective 7/15/98 - Act 172, Hawai`i Session Laws 1998

TABLE OF INSTRUCTIONS[17]

12. CHAPTER 710 -- OFFENSES AGAINST PUBLIC ADMINISTRATION

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[17]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

12.23 Retaliating Against a Witness H.R.S. § 710-1072.2 (4/19/96).
12.24 Obstruction of Justice H.R.S. § 710-1072.5 (4/19/96).
12.25 Bribing A Juror H.R.S. § 710-1073(1) (4/19/96).
12.26 Bribe Receiving by a Juror H.R.S. § 710-1073(2) (4/19/96).
12.27 Intimidating a Juror H.R.S. § 710-1074 (4/19/96).
12.28 Jury Tampering H.R.S. § 710-1075 (4/19/96).
12.29 Retaliating Against a Juror H.R.S. § 710-1075.5 (4/19/96).
[12.30 Aggravated Harassment by Stalking H.R.S. § 711-1106.4 (12/27/96)(Renumbered 9/1/04. See 12A.02).]
[12.31 Interference With the Operator of a Public Transit Vehicle H.R.S. § 711- (12/27/96)(Renumbered 9/1/94. See 12A.03.]
[12.32A Violation of Privacy 1° (Installation) H.R.S. § 711-1110.0 (12/19/03)(Deleted 9/1/04. See 12A.05).]
[12.32B Violation of Privacy 1° (Use) H.R.S. § 711-1110.9 (12/19/03)(Deleted 9/1/04. See 12A.05).]

12.00 DEFINITIONS OF TERMS USED IN CHAPTER 12, STANDARD JURY INSTRUCTIONS

"benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he/she is interested.

"custody" means restraint by a public servant pursuant to arrest, detention, or order of a court.

"detention facility" means any place used for the confinement of a person arrested for, charged with, or convicted of a criminal offense, or otherwise confined pursuant to an order of a court.

"juror" means any person who is a member of any jury, including a grand jury, impaneled by any court of this State or by any public servant authorized by law to impanel a jury, and also includes any person who has been drawn or summoned to attend as a prospective juror.

"law enforcement officer" means any public servant, whether employed by the State or subdivision thereof or by the United States, vested by law with a duty to maintain public order or, to make arrests for offenses or to enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses.

"materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a falsification is material in a given factual situation is a question of law.

"oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated, and, for the purposes of this chapter, written statements shall be treated as if made under oath if:

(a) the statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or

(b) the statement recites that it was made under oath or affirmation, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.

"oath required or authorized by law" means an oath the use of which is specifically provided for by statute or appropriate regulatory provision.

"official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding.

"pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

"public servant" means any officer or employee of any branch of government, whether elected, appointed, or otherwise employed, and any person participating as advisor, consultant, or otherwise, in performing a governmental function, but the term does not include jurors or witnesses.

12.01 IMPERSONATING A LAW ENFORCEMENT OFFICER IN THE FIRST DEGREE: H.R.S. § 710-1016.6

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

A person commits the offense of Impersonating a Law Enforcement Officer in the First Degree if he/she, with intent to deceive, pretends to be a law enforcement officer and is armed with a firearm.

There are three material elements of the offense of Impersonating a Law Enforcement Officer 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 pretended to be a law enforcement officer; and

2. That the Defendant, at that time, was armed with a firearm; and

3. That the Defendant did so with the intent to deceive.

Notes

H.R.S. §§ 710-1016.6, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "law enforcement officer"

For definition of terms *not* defined by H.R.S. Chapter 710, *see* instruction:
15.00 - "firearm"

For prima facie inference where the Defendant was not a law enforcement officer and wore a uniform of, or resembling a law enforcement officer, or displayed the badge or identification card of, or resembling or purporting to be a law enforcement officer's badge or identification card, *see* instruction 12.01A (paragraph A).

For affirmative defense to Impersonating a Law Enforcement Officer, *see* instruction 12.01A (paragraph B).

For circumstances not constituting a defense to Impersonating a Law Enforcement Officer, *see* instruction 12.01A (paragraph C).

12.01A INFERENCE, AFFIRMATIVE DEFENSE AND LACK OF DEFENSE: IMPERSONATING A LAW ENFORCEMENT OFFICER: HRS §§ 710-1016.8, 710-1016.9

A. Inference

If you find beyond a reasonable doubt that the Defendant was not a law enforcement officer, and that he/she wore [the uniform or displayed the badge or identification card of a law enforcement officer] [a uniform or displayed a badge or identification card resembling the uniform, badge or identification card of a law enforcement officer] [a badge or identification card that purported to be a law enforcement officer's badge or identification card], you may, but are not required to, infer that the Defendant pretended to be a law enforcement officer. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant pretended to be a law enforcement officer.

B. Affirmative Defense

It is an affirmative defense to a prosecution for Impersonating a Law Enforcement Officer that the Defendant was employed by the State or a subdivision thereof or by the United States as a law enforcement officer at the time of the conduct charged.

C. Not a Defense

It is not a defense to a prosecution for Impersonating a Law Enforcement Officer that the office the person pretended to hold did not in fact exist.

Notes

HRS §§ 710-1016.8, 710-1016.9; HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 Hawai‘i 149 (App. 1997); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

For definition of "affirmative defense", *see* instruction 7.06.

12.02 IMPERSONATING A LAW ENFORCEMENT OFFICER IN THE SECOND DEGREE: H.R.S. § 710-1016.7

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

A person commits the offense of Impersonating a Law Enforcement Officer in the Second Degree if he/she, with intent to deceive, pretends to be a law enforcement officer.

There are two material elements of the offense of Impersonating a Law Enforcement Officer 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 pretended to be a law enforcement officer; and

2. That the Defendant did so with the intent to deceive.

Notes

H.R.S. §§ 710-1016.7, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "law enforcement officer"

For prima facie inference where the Defendant was not a law enforcement officer and wore a uniform of, or resembling a law enforcement officer, or displayed the badge or identification card of, or resembling or purporting to be a law enforcement officer's badge or identification card, *see* instruction 12.01A (paragraph A).

For affirmative defense to Impersonating a Law Enforcement Officer, *see* instruction 12.01A (paragraph B).

For circumstances not constituting a defense to Impersonating a Law Enforcement Officer, *see* instruction 12.01A (paragraph C).

12.03 ESCAPE IN THE FIRST DEGREE: H.R.S. § 710-1020

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

A person commits the offense of Escape in the First Degree if he/she intentionally employs [physical force] [the threat of physical force] [a dangerous instrument] against the person of another in escaping from [a correctional facility] [a detention facility] [custody].

There are three material elements of the offense of Escape 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 escaped from [a correctional facility] [a detention facility] [custody]; and

2. That the Defendant employed [physical force] [the threat of physical force] [a dangerous instrument] against the person of another in escaping; and

3. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1020, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "custody"
12.00 - "detention facility"

For definition of terms *not* defined by H.R.S. Chapter 710, *see* instruction:

9.00 - "dangerous instrument"

In a prosecution for escape, "choice of evils" is an affirmative defense. *See* instruction 7.11.

12.04 ESCAPE IN THE SECOND DEGREE: H.R.S. § 710-1021

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

A person commits the offense of Escape in the Second Degree if he/she intentionally escapes from [a correctional facility] [a detention facility] [custody].

There are two material elements of the offense of Escape 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 escaped from [a correctional facility] [a detention facility] [custody]; and

2. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1021, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "custody"
12.00 - "detention facility"

12.05 PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE -- DANGEROUS INSTRUMENT: H.R.S. § 710-1022(1)(a)

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

A person commits the offense of Promoting Prison Contraband in the First Degree if he/she intentionally conveys a dangerous instrument to a person confined in a [correctional facility] [detention facility].

There are three material elements of the offense of Promoting Prison Contraband 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 conveyed a dangerous instrument to a person; and

2. That the person, at the time, was confined in a [correctional facility] [detention facility]; and

3. That the Defendant did so intentionally.

"Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury; [a dangerous instrument may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval.]

Notes

H.R.S. §§ 710-1022(1)(a) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "detention facility"

12.06 PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE -- DRUG: H.R.S. § 710-1022(1)(a)

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

A person commits the offense of Promoting Prison Contraband in the First Degree if he/she intentionally conveys a drug to a person confined in a [correctional facility] [detention facility].

There are three material elements of the offense of Promoting Prison Contraband 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 conveyed a drug to a person; and

2. That the person, at the time, was confined in a [correctional facility] [detention facility]; and

3. That the Defendant did so intentionally.

A "drug" shall include dangerous drugs, detrimental drugs, harmful drugs, intoxicating compounds, marijuana, and marijuana concentrates as listed in § 712-1240; [a drug may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval and under medical supervision.]

Notes

H.R.S. §§ 710-1022(1)(a) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:

12.00 - "detention facility"

12.07 PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE -- DEFENDANT CONFINED IN A FACILITY - DANGEROUS INSTRUMENT: H.R.S. § 710-1022(1)(b)

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

A person commits the offense of Promoting Prison Contraband in the First Degree if he/she, being confined in a [correctional facility] [detention facility], intentionally [makes] [obtains] [possesses] a dangerous instrument.

There are three material elements of the offense of Promoting Prison Contraband 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 [made] [obtained] [possessed] a dangerous instrument; and

2. That the Defendant did so intentionally; and

3. That the Defendant did so while confined in a [correctional facility] [detention facility].

"Dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury; [a dangerous instrument may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval.]

Notes

H.R.S. §§ 710-1022(1)(b) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "detention facility"

12.08 PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE -- DEFENDANT CONFINED IN A FACILITY - DRUG: H.R.S. § 710-1022(1)(b)

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

A person commits the offense of Promoting Prison Contraband in the First Degree if he/she, being confined in a [correctional facility] [detention facility], intentionally [makes] [obtains] [possesses] a drug.

There are three material elements of the offense of Promoting Prison Contraband 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 [made] [obtained] [possessed] a drug; and

2. That the Defendant did so intentionally; and

3. That the Defendant did so while confined in a [correctional facility] [detention facility]; and

A "drug" shall include dangerous drugs, detrimental drugs, harmful drugs, intoxicating compounds, marijuana, and marijuana concentrates as listed in § 712-1240; [a drug may only be possessed by or conveyed to a confined person with the facility administrator's express prior approval and under medical supervision.]

Notes

H.R.S. §§ 710-1022(1)(b) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:

12.00 - "detention facility"

12.09 PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE -- CONTRABAND: H.R.S. § 710-1023(1)(a)

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

A person commits the offense of Promoting Prison Contraband in the Second Degree if he/she intentionally conveys known contraband to any person confined in a [correctional facility] [detention facility].

There are four material elements of the offense of Promoting Prison Contraband in the Second Degree, 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 conveyed (specify item) to a person who, at that time, was confined in a [correctional facility] [detention facility]; and

2. That the Defendant did so intentionally; and

3. That the (specified item) was contraband; and

4. That the Defendant knew the (specified item) was contraband.

"Contraband" means any article or thing which a person confined in a correctional or detention facility is prohibited from obtaining or possessing by statute, rule, regulation, or order.

Notes

H.R.S. §§ 710-1023(1)(a) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "detention facility"

12.10 PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE -- DEFENDANT CONFINED IN A FACILITY - CONTRABAND: H.R.S. § 710-1023(1)(b)

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

A person commits the offense of Promoting Prison Contraband in the Second Degree if he/she, being confined in a [correctional facility] [detention facility], intentionally [makes] [obtains] [possesses] known contraband.

There are five material elements of the offense of Promoting Prison Contraband in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant [made] [obtained] [possessed] (specify item); and

2. That the Defendant did so intentionally; and

3. That the Defendant did so while confined in a [correctional facility] [detention facility]; and

4. That the (specified item) was contraband; and

5. That the Defendant knew the (specified item) was contraband.

"Contraband" means any article or thing which a person confined in a correctional or detention facility is prohibited from obtaining or possessing by statute, rule, regulation, or order.

Notes

H.R.S. §§ 710-1023(1)(b) and (2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "detention facility"

12.11 BAIL JUMPING IN THE FIRST DEGREE: H.R.S. § 710-1024

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

A person commits the offense of Bail Jumping in the First Degree if he/she, having been released from custody by court order and upon condition that he/she will subsequently appear as ordered in connection with a charge of having committed a felony, knowingly fails to appear as ordered.

There are three material elements of the offense of Bail Jumping 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 knew he/she was released from custody by court order; and

2. That the Defendant knew he/she was ordered to appear in connection with a charge of having committed a felony; and

3. That the Defendant knowingly failed to appear.

Notes

H.R.S. §§ 710-1024, 702-206(1).

For definition of states of mind, *see* instruction:
6.03--"knowingly"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:

12.00--"custody"

H.R.S. § 710-1024 was amended by Act 10 of 1993 to include all felonies.

H.R.S. § 710-1024 was amended by Act 017, effective April 23, 2004, that substituted "knowingly" for "intentionally".

The Committee did not include in the instruction the statutory language "with or without bail" as this phrase is inclusive of all releases from custody by court order.

12.12 BAIL JUMPING IN THE SECOND DEGREE: H.R.S. § 710-1025

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

A person commits the offense of Bail Jumping in the Second Degree if he/she, having been released from custody by court order and upon condition that he/she will subsequently appear as ordered in connection with a charge of having committed a [misdemeanor] [petty misdemeanor], knowingly fails to appear as ordered.

There are three material elements of the offense of Bail Jumping 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 knew he/she was released from custody by court order; and

2. That the Defendant knew he/she was ordered to appear in connection with a charge of having committed a [misdemeanor] [petty misdemeanor]; and

3. That the Defendant knowingly failed to appear.

Notes

H.R.S. §§ 710-1025, 702-206(1).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "custody"

H.R.S. § 710-1025 was amended by Act 017, effective April 23, 2004 that substituted "knowingly" for "intentionally."

The Committee did not include in the instruction the statutory language "with or without bail" as this phrase is inclusive of all releases from custody by court order.

12.13 HINDERING PROSECUTION IN THE FIRST DEGREE: H.R.S. § 710-1029

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

A person commits the offense of Hindering Prosecution in the First Degree if he/she, with the intent to hinder the [apprehension] [prosecution] [conviction] [punishment] of another person for a class [A] [B] [C] felony, renders assistance to that person.

There are two material elements of the offense of Hindering Prosecution 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 rendered assistance to another person; and

2. That the Defendant did so with the intent to hinder the [apprehension] [prosecution] [conviction] [punishment] of that person for a class [A] [B] [C] felony.

"Renders assistance" means:

(1) Harboring or concealing another person;

(2) Warning another person of impending discovery, apprehension, prosecution, or conviction, except this does not apply to a warning given in connection with an effort to bring another person into compliance with the law;

(3) Providing another person with money, transportation, weapon, disguise, or other means of avoiding discovery, apprehension, prosecution, or conviction;

(4) Preventing or obstructing, by means of force, deception, or intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution, or conviction of another person; or

(5) Suppressing by an act of concealment, alteration, or destruction any physical evidence that might aid in the discovery, apprehension, prosecution, or conviction of another person.

Notes

H.R.S. §§ 710-1029, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

12.14 HINDERING PROSECUTION IN THE SECOND DEGREE: H.R.S. § 710-1030

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

A person commits the offense of Hindering Prosecution in the Second Degree if he/she, with the intent to hinder the [apprehension] [prosecution] [conviction] [punishment] of another person for a crime, renders assistance to that person.

There are two material elements of the offense of Hindering Prosecution 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 rendered assistance to another person; and

2. That the Defendant did so with the intent to hinder the [apprehension] [prosecution] [conviction] [punishment] of that person for a crime.

"Renders assistance" means:

(1) Harboring or concealing another person;

(2) Warning another person of impending discovery, apprehension, prosecution, or conviction, except this does not apply to a warning given in connection with an effort to bring another person into compliance with the law;

(3) Providing another person with money, transportation, weapon, disguise, or other means of avoiding discovery, apprehension, prosecution, or conviction;

(4) Preventing or obstructing, by means of force, deception, or intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution, or conviction of another person; or

(5) Suppressing by an act of concealment, alteration, or destruction any physical evidence that might aid in the discovery, apprehension, prosecution, or conviction of another person.

Notes

H.R.S. §§ 710-1030, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of "crime", *see* H.R.S. § 701-107(1).

12.15 INTIMIDATING A CORRECTIONAL WORKER: H.R.S. § 710-1031

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Intimidating a Correctional Worker.

A person commits the offense of Intimidating a Correctional Worker if he/she uses [force upon] [a threat of force directed to] a [correctional worker] [correctional worker's immediate family] with intent to influence such worker's [conduct] [decision] [action] [abstention from action] as a correctional worker.

There are two material elements of the offense of Intimidating a Correctional Worker, 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 used [force upon] [a threat of force directed to] a [correctional worker] [correctional worker's immediate family]; and

2. That the Defendant did so with intent to influence such worker's [conduct] [decision] [action] [abstention from action] as a correctional worker.

"Correctional worker" means any employee of the State or any county who works in a correctional or detention facility, a court, a paroling authority or who by law has jurisdiction over any legally committed offender or any person placed on probation or parole.

"Threat" means any of the following:

(a) cause bodily injury in the future to the person threatened or to any other person; or

(b) cause damage to property; or

(c) subject the person threatened or any other person to physical confinement or restraint.

Notes

H.R.S. §§ 710-1031, 702-206(1), 707-764(1)(a) through (c).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For other definitions of "threat" not specified in this instruction, *see* H.R.S. § 707-764(1)(d) through (k).

12.16 BRIBERY -- PUBLIC SERVANT: H.R.S. § 710-1040(1)(a)

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

A person commits the offense of Bribery if he/she [confers] [offers] [agrees to confer], directly or indirectly, any pecuniary benefit upon a public servant with the intent to influence the public servant's [vote] [opinion] [judgment] [exercise of discretion] [other action] in his/her official capacity.

There are three material elements of the offense of Bribery, 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 [conferred] [offered] [agreed to confer], directly or indirectly, a pecuniary benefit upon another person; and

2. That the other person was a public servant; and

3. That the Defendant did so with the intent to influence the public servant's [vote] [opinion] [judgment] [exercise of discretion] [other action] in his/her official capacity.

"Public servant" means any officer or employee of any branch of government, whether elected, appointed, or otherwise employed, and any person participating as advisor, consultant, or otherwise, in performing a governmental function[, and includes persons who have been elected, appointed, or designated to become a public servant although not yet occupying that position].

Notes

H.R.S. §§ 710-1040(1)(a) and (3), 710-1000(15), 702-206(1).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "pecuniary benefit"

The term "public servant" does not include jurors or witnesses. *See* H.R.S. § 710-1000(15).

For statutory defense, *see* instruction 12.16A.

12.16A **DEFENSE: BRIBERY**
H.R.S. § 710-1040(2)

It is a defense to a prosecution for bribery, that the Defendant conferred or agreed to confer the pecuniary benefit as a result of extortion or coercion.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant did not confer or agree to confer the pecuniary benefit as a result of extortion or coercion. If the prosecution does not meet its burden, then you must find the Defendant not guilty.

Notes

H.R.S. § 710-1040(2).

This defense is applicable only to a prosecution of bribery brought under H.R.S. § 710-1040(1). *See* instruction 12.16.

12.17 BRIBERY -- WHILE DEFENDANT IS A PUBLIC SERVANT: H.R.S. § 710-1040(1)(b)

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

A person commits the offense of Bribery if he/she, while a public servant, [solicits] [accepts] [agrees to accept], directly or indirectly, any pecuniary benefit with the intent that his/her [vote] [opinion] [judgment] [exercise of discretion] [other action] as a public servant will thereby be influenced.

There are three material elements of the offense of Bribery, 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 [solicited] [accepted] [agreed to accept], directly or indirectly, a pecuniary benefit; and

2. That the Defendant did so with the intent that his/her [vote] [opinion] [judgment] [exercise of discretion] [other action] as a public servant would thereby be influenced; and

3. That the Defendant was, at that time, a public servant.

"Public servant" means any officer or employee of any branch of government, whether elected, appointed, or otherwise employed, and any person participating as advisor, consultant, or otherwise, in performing a governmental function[, and includes persons who

have been elected, appointed, or designated to become a public servant although not yet occupying that position].

Notes

H.R.S. §§ 710-1040(1)(b), (2) and (3), 710-1000(15), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "pecuniary benefit"

The term "public servant" does not include jurors or witnesses. *See* H.R.S. § 710-1000(15).

12.18 **PERJURY:**
H.R.S. § 710-1060

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

A person commits the offense of Perjury if he/she makes, in any official proceeding, under an oath [required] [authorized] by law, a false statement which he/she does not believe to be true.

There are five material elements of the offense of Perjury, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant made a false statement; and

2. That the Defendant did not believe the statement to be true; and

3. That the Defendant did so under oath [required] [authorized] by law; and

4. That the Defendant did so in an official proceeding; and

[5. That the Defendant did so intentionally, knowingly or recklessly.]

Notes

H.R.S. §§ 710-1060, 720-206(1), (2) and (3).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "oath"
12.00 - "oath required or authorized by law"
12.00 - "official proceeding"

A court must rule that the false statement is a "materially false statement," as defined by 710-1000(9), *see* instruction 12.00, in order to obtain a perjury conviction.

The fifth element of the offense has been bracketed because while a state of mind would apply to elements three and four, element five need not be given to the jury by agreement of the parties.

For statutory defense and circumstances not constituting a defense, *see* instruction 12.18A.

12.18A DEFENSE OF RETRACTION AND LACK OF DEFENSE: PERJURY: H.R.S. §§ 710-1064, 710-1068

A. Defense

It is a defense to a prosecution for perjury, if the Defendant retracted the falsification in the course of the same proceeding before discovery of the falsification became known to him/her.

"In the course of the same proceeding" includes separate hearings at separate stages of the same official or administrative proceeding but does not include any stage of the proceeding after the close of the evidence.

The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant did not retract the falsification in the course of the same proceeding before discovery of the falsification became known to him/her. If the prosecution does not meet its burden, then you must find the Defendant not guilty.

B. Not a Defense

It is not a defense to a prosecution for perjury, if:

[1. The Defendant was not competent, for reasons other than lack of penal responsibility, to make the false statement alleged;]

[2. The statement was inadmissible under the law of evidence;]

[3. The oath was administered or taken in an irregular manner;]

[4. The person administering the oath lacked authority to do so, if the taking of the oath was required or authorized by law.]

Notes

H.R.S. §§ 710-1064, 710-1068.

12.19 BRIBERY OF A WITNESS -- BRIBE OFFERING H.R.S. § 710-1070(1)

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

A person commits the offense of Bribery of a Witness if he/she [confers] [offers] [agrees to confer], directly or indirectly, any benefit upon a [witness] [person he/she believes is about to be called as a witness] in any official proceeding with the intent to [influence the testimony of that person] [induce that person to avoid legal process summoning him to testify] [induce that person to absent himself/herself from an official proceeding to which he/she has been legally summoned].

There are three material elements of the offense of Bribery of a Witness, 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 [conferred] [offered] [agreed to confer], directly or indirectly, a benefit upon another person; and

2. That the other person was a [witness] [person that the Defendant believed was about to be called as a witness] in any official proceeding; and

3. That the Defendant did so with the intent to [influence the testimony of that person] [induce that person to avoid legal process summoning him to testify] [induce that person to absent

himself/herself from an official proceeding to which he/she has been legally summoned].

Notes

H.R.S. §§ 710-1070(1), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "benefit"
12.00 - "official proceeding"

12.20 BRIBERY BY A WITNESS -- BRIBE RECEIVING BY A WITNESS: H.R.S. § 710-1070(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Bribery by a Witness.

A person commits the offense of Bribery by a Witness if he/she, [while a witness] [believing he/she is about to be called as a witness] in any official proceeding, intentionally [solicits] [accepts] [agrees to accept], directly or indirectly, any benefit as consideration [which will influence his/her testimony] [for avoiding or attempting to avoid legal process summoning him/her to testify] [for absenting or attempting to absent himself/herself from an official proceeding, to which he/she has been legally summoned].

There are four material elements of the offense of Bribery by a Witness, 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 [was a witness] [believed that he/she was about to be called as a witness] in an official proceeding; and

2. That, while [a witness] [so believing], the Defendant [solicited] [accepted] [agreed to accept], directly or indirectly, a benefit as consideration; and

3. That the Defendant did so [to influence the Defendant's testimony] [to avoid or attempt to avoid legal process summoning the Defendant to testify] [to absent or attempt to absent the Defendant

from an official proceeding, to which the Defendant has been legally summoned]; and

4. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1070(2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "benefit"
12.00 - "official proceeding"

12.21 INTIMIDATING A WITNESS: H.R.S. § 710-1071

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

A person commits the offense of Intimidating a Witness if he/she [uses force upon] [directs a threat to] a [witness] [person he/she believes is about to be called as a witness] in any official proceeding, with intent to [influence the testimony of that person] [induce that person to avoid legal process summoning him/her to testify] [induce that person to absent himself/herself from an official proceeding to which he/she has been legally summoned].

There are two material elements of the offense of Intimidating a Witness, 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 [used force upon] [directed a threat to] a [witness] [person he/she believed is about to be called as a witness] in any official proceeding; and

2. That the Defendant did so with the intent to [influence the testimony of that person] [induce that person to avoid legal process summoning him/her to testify] [induce that person to absent himself/herself from an official proceeding to which he/she has been legally summoned].

"Threat" means (specify threat defined by H.R.S. § 707-764(1)).

Notes

H.R.S. §§ 710-1071, 707-764(1), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "official proceeding"

12.22 TAMPERING WITH A WITNESS: H.R.S. § 710-1072

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

A person commits the offense of Tampering with a Witness if he/she intentionally engages in conduct to induce a [witness] [person he/she believes is about to be called as a witness] in any official proceeding to [testify falsely] [withhold any testimony which he/she is not privileged to withhold] [absent himself/herself from any official proceeding to which he/she has been legally summoned].

There are two material elements of the offense of Tampering with a Witness, 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 engaged in conduct to induce a [witness] [person he/she believes is about to be called as a witness] in an official proceeding to [testify falsely] [withhold any testimony which he/she is not privileged to withhold] [absent himself/herself from any official proceeding to which he/she has been legally summoned]; and

2. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1072, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "official proceeding"

12.23 RETALIATING AGAINST A WITNESS: H.R.S. § 710-1072.2

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Retaliating Against a Witness.

A person commits the offense of Retaliating Against a Witness if he/she [uses force upon] [threatens] [damages the property of] a witness or another person because of the attendance of the witness, or any testimony given, or any record, document, or other object produced, by the witness in an official proceeding.

There are two material elements of the offense of Retaliating Against a Witness, 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, knowingly or recklessly [used force upon] [threatened] [damaged the property of] a witness or another person; and

2. That the Defendant did so because of the attendance of the witness, or any testimony given, or any record, document, or other object produced, by the witness in an official proceeding.

"Threaten" means (specify threat defined by H.R.S. § 707-764(1) and (2)).

Notes

H.R.S. §§ 710-1072.2, 707-764(1) and (2), 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 terms defined by H.R.S. Chapter 710, *see* instruction:

12.00 - "official proceeding"

12.24 OBSTRUCTION OF JUSTICE: H.R.S. § 710-1072.5

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Obstruction of Justice.

A person commits the offense of Obstruction of Justice if he/she, when called as a witness and having been granted immunity pursuant to a court order, intentionally refuses to [testify] [be qualified as a witness] when duly directed to testify.

There are four material elements of the offense of Obstruction of Justice, 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 was granted immunity pursuant to a court order; and

2. That the Defendant was duly directed to [testify] [be qualified as a witness]; and

3. That the Defendant refused to [testify] [be qualified as a witness]; and

4. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1072.5, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

The phrase "pursuant to a court order" has been substituted for the statutory language "pursuant to chapters 480 and 621C" as these chapters require issuance of a court order granting immunity.

The Committee did not include in the instruction the statutory language "before or after having been" (qualified as a witness) as this phrase is inclusive of all periods of time relating to being qualified as a witness.

12.25 BRIBING A JUROR: H.R.S. § 710-1073(1)

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

A person commits the offense of Bribing a Juror if he/she [confers] [offers] [agrees to confer], directly or indirectly, any benefit upon a juror with the intent to influence the juror's [vote] [opinion] [decision] [(specify other action)] as a juror.

There are two material elements of the offense of Bribing a Juror, 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 [conferred] [offered] [agreed to confer], directly or indirectly, a benefit upon a juror; and

2. That the Defendant did so with the intent to influence the juror's [vote] [opinion] [decision] [(specify other action)] as a juror.

Notes

H.R.S. §§ 710-1073(1), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "benefit"
12.00 - "juror"

12.26 BRIBE RECEIVING BY A JUROR: H.R.S. § 710-1073(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Bribe Receiving by a Juror.

A person commits the offense of Bribe Receiving by a Juror if he/she intentionally [solicits] [accepts] [agrees to accept], directly or indirectly, any benefit as consideration which will influence his/her [vote] [opinion] [decision] [(specify other action)] as a juror.

There are three material elements of the offense of Bribe Receiving by a Juror, 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 [solicited] [accepted] [agreed to accept], directly or indirectly, a benefit as consideration; and

2. That the Defendant did so to influence his/her [vote] [opinion] [decision] [(specify other action)] as a juror; and

3. That the Defendant did so intentionally.

Notes

H.R.S. §§ 710-1073(2), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instructions:
12.00 - "benefit"
12.00 - "juror"

12.27 INTIMIDATING A JUROR: H.R.S. § 710-1074

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

A person commits the offense of Intimidating a Juror if he/she uses [force] [a threat] with intent to influence a juror's [vote] [opinion] [decision] [(specify other action)] as a juror.

There are two material elements of the offense of Intimidating a Juror, 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 used [force] [a threat]; and

2. That the Defendant did so with the intent to influence a juror's [vote] [opinion] [decision] [(specify other action)] as a juror.

"Threat" means (specify threat defined by H.R.S. §707-764(1)).

Notes

H.R.S. §§ 710-1074, 707-764(1), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "juror"

12.28 JURY TAMPERING: H.R.S. § 710-1075

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Jury Tampering.

A person commits the offense of Jury Tampering if he/she, with intent to influence a juror's [vote] [opinion] [decision] [(specify other action)] in a case, attempts directly or indirectly to communicate with a juror other than as part of the proceedings in the trial of the case.

There are two material elements of the offense of Jury Tampering, 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 attempted directly or indirectly to communicate with a juror other than as part of the proceedings in the trial of a case; and

2. That the Defendant did so with the intent to influence a juror's [vote] [opinion] [decision] [(specify other action)] in the case.

Notes

H.R.S. §§ 710-1075, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For definition of terms defined by H.R.S. Chapter 710, *see* instruction:
12.00 - "juror"

12.29 RETALIATING AGAINST A JUROR: H.R.S. § 710-1075.5

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Retaliating Against a Juror.

A person commits the offense of Retaliating Against a Juror if he/she [uses force upon] [threatens] a juror or another person because of the [vote] [opinion] [decision] [(specify other action)] of the juror in an official proceeding.

There are two material elements of the offense of Retaliating Against a Juror, 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, knowingly or recklessly [used force upon] [threatened] a juror or another person; and

2. That the Defendant did so because of the juror's [vote] [opinion] [decision] [(specify other action)] in an official proceeding.

"Threaten" means (specify threat defined by H.R.S. § 707-764(1) and (2)).

Notes

H.R.S. §§ 710-1075.5, 707-764(1) and (2), 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 terms defined by H.R.S. Chapter 710, *see* instructions:

12.00 - "juror"
12.00 - "official proceeding"

[12.30 AGGRAVATED HARASSMENT BY STALKING: H.R.S. § 711-1106.4 Moved to Chapter 12A and Renumbered 12A.02, 09/01/04]

[12.31 INTERFERENCE WITH THE OPERATOR OF A PUBLIC TRANSIT VEHICLE: H.R.S. § 711-1112 Moved to Chapter 12A and Renumbered 12A.03, 09/01/04]

TABLE OF INSTRUCTIONS[18]

12A. CHAPTER 711 - OFFENSES AGAINST PUBLIC ORDER

[18]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

12A. CHAPTER 711-- OFFENSES AGAINST PUBLIC ORDER

12A.00 DEFINITIONS OF TERMS USED IN CHAPTER 12A, PATTERN JURY INSTRUCTIONS

"Animal" includes every living creature, except a human being.

"Cruelty", "torture" or "torment" includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.

"Facsimile" means a document produced by a receiver of signals transmitted over telecommunication lines, after translating the signals, to produce a duplicate of an original document.

"Necessary sustenance" means care sufficient to preserve the health and well-being of a pet animal, except for emergencies or circumstances beyond the reasonable control of the owner or caretaker of the pet animal, and includes but is not limited to the following requirements:

(1) Food of sufficient quantity and quality to allow for normal growth or maintenance of body weight;

(2) Open or adequate access to water in sufficient quantity and quality to satisfy the animal's needs;

(3) Access to protection from wind, rain, or sun; and

(4) An area of confinement that has adequate space necessary for the health of the animal and is kept reasonably clean

and free from excess waste or other contaminants that could affect the animal's health.

"Obstructs" means renders impassable without unreasonable inconvenience or hazard.

"Pet animal" means a dog, cat, rabbit, guinea pig, domestic rat or mouse, or caged birds (passeriformes, piciformes, and psittaciformes only).

"Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access.

"Public" means affecting or likely to affect a substantial number of persons.

"Public place" means a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

"Record", for the purposes of sections 711-1110.9 and 711-1111, means to videotape, film, photograph, or archive electronically or digitally.

12A.01 [RESERVED]

12A.02 AGGRAVATED HARASSMENT BY STALKING: H.R.S. § 711-1106.4

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Aggravated Harassment by Stalking.

A person commits the offense of Aggravated Harassment by Stalking if with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, he/she pursues or conducts surveillance upon another person without legitimate purpose and under circumstances which would cause the other person to reasonably believe that the actor intends to cause [bodily injury to the other person or another] [damage to the property of the other person or another], and the actor's actions are in violation of [an existing court order, other than one issued without prior notice to the actor, restraining the actor from contacting, threatening, or physically abusing the same person] [a condition of the actor's probation or pretrial release involving the same person] and the actor has been convicted previously under Hawai'i law of harassment by stalking involving the same person.

There are five material elements of the offense of Aggravated Harassment by Stalking, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant pursued or conducted surveillance upon the other person without legitimate purpose; and

2. That the Defendant did so under circumstances which would cause the other person to reasonably believe that the Defendant intended to cause [bodily injury to the other person or another] [damage to the property of the other person or another]; and

3. That the Defendant did so with the intent to harass, annoy, or alarm the other person, or in reckless disregard of the risk thereof; and

4. That Defendant's actions were in violation of [an existing court order, other than one issued without prior notice to the Defendant, restraining the Defendant from contacting, threatening, or physically abusing the same person] [a condition of Defendant's probation or pretrial release involving the same person]; and

5. That the Defendant had been convicted previously under Hawai'i law of harassment by stalking involving the same person.

Notes

H.R.S. §§ 711-1106.4, 711-1106.5, 702-206(1) and (3).

For definition of states of mind, *see* instruction:
6.02--"intentionally"
6.04--"recklessly"

12A.03 INTERFERENCE WITH THE OPERATOR OF A PUBLIC TRANSIT VEHICLE: H.R.S. § 711-1112

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Interference with the Operator of a Public Transit Vehicle.

A person commits the offense of Interference with the Operator of a Public Transit Vehicle if he/she interferes with the operation of a public transit vehicle or lessens the ability of the operator to operate the public transit vehicle by [intentionally, knowingly, or recklessly causing bodily injury to the operator of the public transit vehicle] [threatening, by word or conduct, to cause bodily injury to the operator of the public transit vehicle with the intent to terrorize, or in reckless disregard of the risk of terrorizing the operator of the public transit vehicle].

There are three material elements of the offense of Interference with the Operator of a Public Transit Vehicle, 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 interfered with the operation of a public transit vehicle or lessened the ability of the operator to operate the public transit vehicle; and

2. That the Defendant did so by [causing bodily injury]* [threatening, by word or conduct, to cause bodily injury]** to the operator of the public transit vehicle; and

3. That the Defendant did so [intentionally, knowingly or recklessly]* [with the intent to terrorize, or in reckless disregard of the risk of terrorizing the operator of the public transit vehicle]**.

"Public transit vehicle" means a public paratransit vehicle providing service to the disabled, any transit vehicle used for the transportation of passengers in return for legally charged fees or fares, any school bus, or any taxi.

Notes

H.R.S. §§ 711-1112, 702-206(1), (2) and (3).

For definition of states of mind, *see* instruction:
6.02--"intentionally"
6.03--"knowingly"
6.04--"recklessly"

For definition of terms *not* defined by H.R.S. Chapter 708, *see* instruction:
9.00--"bodily injury"

* Use these together.

** Use these together.

12A.04 [RESERVED]

12A.05 VIOLATION OF PRIVACY IN THE FIRST DEGREE: HRS § 711-1110.9

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

A person commits the offense of Violation of Privacy in the First Degree if he/she intentionally or knowingly [installs] [uses] a device, in any private place, without consent of the person(s) entitled to privacy therein, for [observing] [recording] [amplifying] [broadcasting] [another person in a stage of undress] [sexual activity] in that place.

There are four material elements of the offense of Violation of Privacy in the First Degree, 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 [installed] [used] a device in a private place; and

2. That the Defendant did so without consent of the person(s) entitled to privacy in that place; and

3. That the Defendant did so for [observing] [recording] [amplifying] [broadcasting] [another person in a stage of undress] [sexual activity] in that place; and

4. That the Defendant did so intentionally or knowingly.

Notes

H.R.S. § 711-1110.9

For definition of states of mind, *see* instructions:
6.02–"intentionally"
6.03–"knowingly"

For definition of terms defined by H.R.S. Chapter 711, *see* instructions:
12A.00–"private place"
12A.00–"record"

TABLE OF INSTRUCTIONS[19]

13. CHAPTER 712 - OFFENSES AGAINST PUBLIC HEALTH AND MORALS

[19]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

13.07 Promoting a Dangerous Drug 2° -- Possession of Twenty-Five or More Units H.R.S. § 712-1242(1)(a) (4/19/96).

13.08 Promoting a Dangerous Drug 2° -- Possession of Methamphetamine, Heroin, Morphine, or Cocaine H.R.S. § 712-1242(1)(b)(i) (4/19/96).

13.09 Promoting a Dangerous Drug 2° -- Possession of Other Dangerous Drugs H.R.S. § 712-1242(1)(b)(ii) (4/19/96).

13.10 Promoting a Dangerous Drug 2° -- Distribution of Other Dangerous Drugs H.R.S. § 712-1242(1)(c) (4/19/96).

13.11 Promoting a Dangerous Drug 3° H.R.S. § 712-1243 (4/19/96).

13.12 Promoting a Harmful Drug 1° -- Possession of One Hundred or More Units H.R.S. § 1244(1)(a) (4/19/96).

13.13 Promoting a Harmful Drug 1° -- Possession of One Ounce or More H.R.S. § 1244(1)(b) (4/19/96).

13.14 Promoting a Harmful Drug 1° -- Distribution of Twenty-Five or More Units H.R.S. § 1244(1)(c) (4/19/96).

13.15 Promoting a Harmful Drug 1° -- Distribution of One-Eighth Ounce or More H.R.S. § 1244(1)(d) (4/19/96).

13.16 Promoting a Harmful Drug 1° -- Distribution to a Minor H.R.S. § 1244(1)(e) (4/19/96).

13.17 Promoting a Harmful Drug 2° -- Possession of Fifty or More Units H.R.S. § 1245(1)(a) (4/19/96).

13.18 Promoting a Harmful Drug 2° -- Possession of One-Eighth Ounce or More H.R.S. § 1245(1)(b) (4/19/96).

13.19 Promoting a Harmful Drug 2° -- Distribution of Harmful Drug H.R.S. § 1245(1)(c) (4/19/96).

13.20 Promoting a Harmful Drug 3° -- Possession of Twenty-Five or More Units H.R.S. § 1246 (4/19/96).

13.21 Promoting a Harmful Drug in the Fourth Degree -- Possession of Harmful Drug H.R.S. § 1246.5 (4/19/96).

13.22 Promoting a Detrimental Drug 1° -- Possession of Four Hundred or More Units H.R.S. § 1247(1)(a) (4/19/96).

13.23 Promoting a Detrimental Drug 1° -- Possession of One Ounce or More of Schedule V Substances H.R.S. § 1247(1)(b) (4/19/96).

13.24 Promoting a Detrimental Drug 1° -- Distribution of Fifty or More Units H.R.S. § 1247(1)(c) (4/19/96).

13.25 Promoting a Detrimental Drug 1° -- Distribution of One-Eighth Ounce or More of Schedule V Substances H.R.S. § 712-1247(1)(d) (4/19/96).

13.26 Promoting a Detrimental Drug 1° -- Possession of one Pound or More of Marijuana H.R.S. § 712-1247(1)(e) (4/19/96).

13.27 Promoting a Detrimental Drug 1° -- Distributes One Pound or More of Marijuana H.R.S. § 712-1247(1)(f) (4/19/96).

13.28 Promoting a Detrimental Drug 1° -- Possession, Cultivation or Under Control of Twenty-Five or More Marijuana Plants H.R.S. § 712-1247(1)(g) (4/19/96).

13.29 Promoting a Detrimental Drug 1° -- Sells or Barters Any Marijuana or Schedule V Substance H.R.S. § 712-1247(1)(h) (4/19/96).

13.30 Promoting a Detrimental Drug 2° -- Possession of Fifty or More Units H.R.S. § 712-1248(1)(a) (4/19/96).

13.31 Promoting a Detrimental Drug 2° -- Possession of One-Eighth Ounce or More of Schedule V Substances H.R.S. § 712-1248(1)(b) (4/19/96).

13.32 Promoting a Detrimental Drug 2° -- Possession of One Ounce or More of Any Marijuana H.R.S. § 712-1248(1)(c) (4/19/96).

13.33 Promoting a Detrimental Drug 2° -- Distribution of Marijuana or Schedule V Substance H.R.S. § 712-1248(1)(d) (4/19/96).

13.34 Promoting a Detrimental Drug 3° -- Possession of Marijuana or Schedule V Substance H.R.S. § 712-1249 (4/19/96).

13.35 Commercial Promotion of Marijuana 1° -- Possession of Twenty-Five Pounds or More H.R.S. § 712-1249.4(1)(a) (4/19/96).

13.36 Commercial Promotion of Marijuana 1° -- Distribution of Five Pounds or More H.R.S. § 712-1249.4(1)(b) (4/19/96).

13.37 Commercial Promotion of Marijuana 1° -- Possession, Cultivation or Under Control of One Hundred or More Marijuana Plants H.R.S. § 712-1249.4(1)(c) (4/19/96).

13.38 Commercial Promotion of Marijuana 1° Cultivation of Twenty-Five or More Marijuana Plants H.R.S. § 712-1249.4(1)d) (4/19/96) .

13.39 Commercial Promotion of Marijuana 1° Device Capable of Causing Injury H.R.S. § 712-1249.4(1)(e) (4/19/96).

13.40 Commercial Promotion of Marijuana 2° -- Possession of Two Pounds or More H.R.S. § 712-1249.5(1)(a) (4/19/96).

13.41 Commercial Promotion of Marijuana 2° Distribution of One Pound or More H.R.S. § 712-1249.5(1)(b) (4/19/96).

13.42 Commercial Promotion of Marijuana 2° Possession, Cultivation or Under Control of Fifty or More Marijuana Plants H.R.S. § 712-1249.5(1)(c) (4/19/96).

13.43 Commercial Promotion of Marijuana 2° Cultivation of a Marijuana Plant H.R.S. § 712-1249.5(1)(d) (4/19/96).

13.44 Commercial Promotion of Marijuana 2° Sells or Barters to a Minor H.R.S. § 712-1249.5(1)(e) (4/19/96).

[13.45 Promoting a Controlled Substance In, On, or Near Schools Distribution or Possession With Intent to Distribute Controlled Substance H.R.S. § 712-1249.6(1)(a) (4/19/96, replaced by 13.45A and 13.45B, 10/4/04).]

13.45A Promoting a Controlled Substance In or On Schools or Public Parks H.R.S. § 712-1249.6(1)(a)(Distribute In/On Property)(10/4/04).

13.45B Promoting a Controlled Substance In or On Schools or Public Parks H.R.S. § 712-1249.6(1)(a)(Possess In/On Property)(10/4/04).

[13.46 Promoting a Controlled Substance In, On, or Near Schools Distribution or Possession With Intent to Distribute Controlled Substance Within Seven Hundred and Fifty Feet H.R.S. § 712-1249.6(1)(b) (4/19/96, replaced by 13.46A and 13.46B, 10/4/04).]

13.46A Promoting a Controlled Substance Near Schools or Public Parks: H.R.S. § 712-1249.6(1)(b) (Distribute Within 750 Feet of Property)(10/4/04).

13.46B Promoting a Controlled Substance Near Schools or Public Parks: H.R.S. § 712-1249.6(1)(b) (Possess Within 750 Feet of Property)(10/4/04).

[13.47 Promoting a Controlled Substance In, On, or Near School Vehicles H.R.S. § 712-1249.6(1)(c) (4/19/96 replaced by 13.47A, 13.47B, 13.47C, and 13.47D, 10/4/04).]

13.47A Promoting a Controlled Substance on School Vehicles: H.R.S. § 712-1249.6(1)(c)(Distribute On Vehicles)(10/4/04).

13.47B Promoting a Controlled Substance on School Vehicles: H.R.S. § 712-1249.6(1)(c)(Possess On Vehicles)(10/4/04).

13.47C Promoting a Controlled Substance Near School Vehicles: H.R.S. § 712-1249.6(1)(c)(Distribute Near Vehicles)(10/4/04).

13.47D Promoting a Controlled Substance Near School Vehicles: H.R.S. § 712-1249.6(1)(c)(Possess Near Vehicles)(10/4/04).

13.48 Promoting a Controlled Substance Near Schools or Public Parks: H.R.S. § 712-1249.6(1)(d) (Manufacture Methamphetamine Within 750 Feet of Property)(10/4/04).

[13.49] Defense to Promoting H.R.S. § 712-1240.1 (4/19/96).

[13.50] Inference: Possession In a Motor Vehicle H.R.S. § 712-1251 (4/19/96, 6/29/00).

13.51 Unlawful Methamphetamine Trafficking -- Manufacture, Distribution, or Dispensing: H.R.S. § 712-1240.6(1) and (2) (6/2/05).

13.52 Unlawful Methamphetamine Trafficking -- Possession With Intent to Manufacture, Distribute, or Dispense: H.R.S. § 712-1240.6(1) and (2) (6/2/05).

13.53A Unlawful Methamphetamine Trafficking -- Weight: H.R.S. § 712-1240.6(2) (6/2/05).

13.53B Unlawful Methamphetamine Trafficking -- Special Interrogatories as to Weight: H.R.S. § 712-1240.6(2) (6/2/05).

13.00 DEFINITIONS OF TERMS USED IN CHAPTER 13, STANDARD JURY INSTRUCTIONS

"Dangerous drugs" means any substance or immediate precursor defined or specified by law as a "Schedule I substance" or a "Schedule II substance".

"Detrimental drug" means any substance or immediate precursor defined or specified as "Schedule V substance" by chapter 329, or any marijuana.

"Dosage unit" means an entity designed and intended for singular consumption or administration (for purposes of §§ 712-1241 and 712-1242).

"Harmful drug" means any substance or immediate precursor defined or specified by law as a "Schedule III substance" or a "Schedule IV substance", or any marijuana concentrate except marijuana.

"Manufacture" means to produce, prepare, compound, convert, or process a dangerous drug, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical conversion or synthesis.

"Marijuana" means any part of the plant (genus) cannabis, whether growing or not, including the seeds and the resin, and every alkaloid, salt, derivative, preparation, compound, or mixture of the plant, its seeds or resin, except that, as used herein, "marijuana" does not include hashish, tetrahydrocannabinol, and any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized of tetrahydrocannabinol.

"Marijuana concentrate" means hashish, tetrahydrocannabinol, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinol.

"Minor" means any person less than sixteen years old (Part II, Offenses Related to Obscenity, §§ 712-1210 thru 712-1217). "minor" means a person who has not reached the age of majority (Part IV, Offenses Related to Drugs and Intoxicating Compounds, §§ 712-1240 thru 712-1256).

"Ounce" means an avoirdupois ounce as applied to solids and semi-solids, and a fluid ounce as applied to liquids.

"Practitioner" means

(1) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, prescribe, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State.

(2) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, prescribe, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State.

"To distribute" means to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"To sell" means to transfer to another for consideration.

13.01 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- POSSESSION OF METHAMPHETAMINE, HEROIN, MORPHINE OR COCAINE: H.R.S. § 712-1241(1)(a)(i)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers].

There are three material elements of the offense of Promoting a Dangerous Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers]; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(a)(i), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:

13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.02 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- POSSESSION OF OTHER DANGEROUS DRUGS: H.R.S. § 712-1241(1)(a)(ii)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one and one-half ounces or more of a substance containing (specify dangerous drug).

There are three material elements of the offense of Promoting a Dangerous Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one and one-half ounces or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify dangerous drug); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(a)(ii), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.03 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF TWENTY-FIVE OR MORE UNITS: H.R.S. § 712-1241(1)(b)(i)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly distributes twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes] containing (specify dangerous drug(s)).

There are three material elements of the offense of Promoting a Dangerous Drug 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 distributed twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes]; and

2. That the twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes] contained (specify dangerous drug(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(b)(i), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "dosage unit"
13.00 - "to distribute"

13.04 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF METHAMPHETAMINE, HEROIN, MORPHINE OR COCAINE: H.R.S. § 712-1241(1)(b)(ii)(A)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers].

There are three material elements of the offense of Promoting a Dangerous Drug 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 distributed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers]; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(b)(ii)(A), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "ounce"
13.00 - "to distribute"

13.05 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF OTHER DANGEROUS DRUGS: H.R.S. § 712-1241(1)(b)(ii)(B)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of three-eighths ounce or more of a substance containing (specify dangerous drug).

There are three material elements of the offense of Promoting a Dangerous Drug 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 distributed one or more preparations, compounds, mixtures, or substances of an aggregate weight of three-eighths ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify dangerous drug); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(b)(ii)(B), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "ounce"
13.00 - "to distribute"

13.06 PROMOTING A DANGEROUS DRUG IN THE FIRST DEGREE -- DISTRIBUTION TO A MINOR: H.R.S. § 712-1241(1)(c)

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

A person commits the offense of Promoting a Dangerous Drug in the First Degree if he/she knowingly distributes (specify dangerous drug) to a minor.

There are three material elements of the offense of Promoting a Dangerous Drug 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 distributed (specify dangerous drug) to a person; and

2. That the person was, at that time, a minor; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1241(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "minor"
13.00 - "to distribute"

13.07 PROMOTING A DANGEROUS DRUG IN THE SECOND DEGREE -- POSSESSION OF TWENTY-FIVE OR MORE UNITS: H.R.S. § 712-1242(1)(a)

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

A person commits the offense of Promoting a Dangerous Drug in the Second Degree if he/she knowingly possesses twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes] containing (specify dangerous drug(s)).

There are three material elements of the offense of Promoting a Dangerous Drug 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 possessed twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes]; and

2. That the twenty-five or more [capsules] [tablets] [ampules] [dosage units] [syrettes] contained (specify dangerous drug(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1242(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "dosage unit"

For definition of "possession" *see* instruction 6.06.

13.08 PROMOTING A DANGEROUS DRUG IN THE SECOND DEGREE -- POSSESSION OF METHAMPHETAMINE, HEROIN, MORPHINE OR COCAINE: H.R.S. § 712-1242(1)(b)(i)

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

A person commits the offense of Promoting a Dangerous Drug in the Second Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers].

There are three material elements of the offense of Promoting a Dangerous Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained [methamphetamine] [heroin] [morphine] [cocaine] [(specify one of named drug(s)) or any of its respective salts, isomers, and salts of isomers]; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1242(1)(b)(i), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.09 PROMOTING A DANGEROUS DRUG IN THE SECOND DEGREE -- POSSESSION OF OTHER DANGEROUS DRUGS: H.R.S. § 712-1242(1)(b)(ii)

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

A person commits the offense of Promoting a Dangerous Drug in the Second Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-fourth ounce or more of a substance containing (specify dangerous drug).

There are three material elements of the offense of Promoting a Dangerous Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-fourth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify dangerous drug); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1242(1)(b)(ii), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.10 PROMOTING A DANGEROUS DRUG IN THE SECOND DEGREE -- DISTRIBUTION OF OTHER DANGEROUS DRUGS: H.R.S. § 712-1242(1)(c)

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

A person commits the offense of Promoting a Dangerous Drug in the Second Degree if he/she knowingly distributes (specify dangerous drug) in any amount.

There are two material elements of the offense of Promoting a Dangerous Drug 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 distributed (specify dangerous drug) in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1242(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "to distribute"

13.11 PROMOTING A DANGEROUS DRUG IN THE THIRD DEGREE: H.R.S. § 712-1243

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Dangerous Drug in the Third Degree.

A person commits the offense of Promoting a Dangerous Drug in the Third Degree if he/she knowingly possesses (specify dangerous drug) in any amount.

There are two material elements of the offense of Promoting a Dangerous Drug in the Third 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 possessed (specify dangerous drug) in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1243, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of "possession" *see* instruction 6.06.

13.12 PROMOTING A HARMFUL DRUG IN THE FIRST DEGREE -- POSSESSION OF ONE HUNDRED OR MORE UNITS: H.R.S. § 712-1244(1)(a)

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

A person commits the offense of Promoting a Harmful Drug in the First Degree if he/she knowingly possesses one hundred or more [capsules] [tablets] [dosage units] containing (specify harmful drug(s) or combination thereof).

There are three material elements of the offense of Promoting a Harmful Drug 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 possessed one hundred or more [capsules] [tablets] [dosage units]; and

2. That the one hundred or more [capsules] [tablets] [dosage units] contained (specify harmful drug(s) or combination thereof); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1244(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"

For definition of "dosage unit", *see* instruction 13.00; but the definition is limited to H.R.S. §§ 712-1241 and 712-1242.

For definition of "possession" *see* instruction 6.06.

13.13 PROMOTING A HARMFUL DRUG IN THE FIRST DEGREE -- POSSESSION OF ONE OUNCE OR MORE: H.R.S. § 712-1244(1)(b)

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

A person commits the offense of Promoting a Harmful Drug in the First Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one ounce or more containing (specify harmful drug).

There are three material elements of the offense of Promoting a Harmful Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify harmful drug); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1244(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.14 PROMOTING A HARMFUL DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF TWENTY-FIVE OR MORE UNITS: H.R.S. § 712-1244(1)(c)

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

A person commits the offense of Promoting a Harmful Drug in the First Degree if he/she knowingly distributes twenty-five or more [capsules] [tablets] [dosage units] containing (specify harmful drug(s) or combination thereof).

There are three material elements of the offense of Promoting a Harmful Drug 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 distributed twenty-five or more [capsules] [tablets] [dosage units]; and

2. That the twenty-five or more [capsules] [tablets] [dosage units] contained (specify harmful drug(s) or combination thereof); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1244(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "to distribute"

For definition of "dosage unit", *see* instruction 13.00; but the definition is limited to H.R.S. §§ 712-1241 and 712-1242.

13.15 PROMOTING A HARMFUL DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF ONE-EIGHTH OUNCE OR MORE: H.R.S. § 712-1244(1)(d)

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

A person commits the offense of Promoting a Harmful Drug in the First Degree if he/she knowingly distributes one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one-eighth ounce or more containing (specify harmful drug(s)).

There are three material elements of the offense of Promoting a Harmful Drug 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 distributed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more contained (specify harmful drug(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1244(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "ounce"
13.00 - "to distribute"

13.16 PROMOTING A HARMFUL DRUG IN THE FIRST DEGREE -- DISTRIBUTION TO A MINOR: H.R.S. § 712-1244(1)(e)

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

A person commits the offense of Promoting a Harmful Drug in the First Degree if he/she knowingly distributes (specify harmful drug) in any amount to a minor.

There are three material elements of the offense of Promoting a Harmful Drug 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 distributed (specify harmful drug) in any amount to a person; and

2. That the person was, at that time, a minor; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1244(1)(e), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "minor"
13.00 - "to distribute"

13.17 PROMOTING A HARMFUL DRUG IN THE SECOND DEGREE -- POSSESSION OF FIFTY OR MORE UNITS: H.R.S. § 712-1245(1)(a)

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

A person commits the offense of Promoting a Harmful Drug in the Second Degree if he/she knowingly possesses fifty or more [capsules] [tablets] [dosage units] containing (specify harmful drug(s)) or one or more of the marijuana concentrates, or any combination thereof.

There are three material elements of the offense of Promoting a Harmful Drug 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 possessed fifty or more [capsules] [tablets] [dosage units]; and

2. That the fifty or more [capsules] [tablets] [dosage units] contained (specify harmful drug(s)), marijuana concentrates, or any combination thereof; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1245(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"

For definition of "dosage unit", *see* instruction 13.00; but the definition is limited to H.R.S. §§ 712-1241 and 712-1242.

For definition of "possession" *see* instruction 6.06.

13.18 PROMOTING A HARMFUL DRUG IN THE SECOND DEGREE -- POSSESSION OF ONE-EIGHTH OUNCE OR MORE: H.R.S. § 712-1245(1)(b)

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

A person commits the offense of Promoting a Harmful Drug in the Second Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one-eighth ounce or more containing (specify harmful drug(s)) or one or more of the marijuana concentrates, or any combination thereof.

There are three material elements of the offense of Promoting a Harmful Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify harmful drug(s)), marijuana concentrates, or any combination thereof; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1245(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.19 PROMOTING A HARMFUL DRUG IN THE SECOND DEGREE -- DISTRIBUTION OF HARMFUL DRUG: H.R.S. § 712-1245(1)(c)

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

A person commits the offense of Promoting a Harmful Drug in the Second Degree if he/she knowingly distributes (specify harmful drug) in any amount.

There are two material elements of the offense of Promoting a Harmful Drug 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 distributed (specify harmful drug) in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1245(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"
13.00 - "to distribute"

13.20 PROMOTING A HARMFUL DRUG IN THE THIRD DEGREE -- POSSESSION OF TWENTY-FIVE OR MORE UNITS: H.R.S. § 712-1246

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Harmful Drug in the Third Degree.

A person commits the offense of Promoting a Harmful Drug in the Third Degree if he/she knowingly possesses twenty-five or more [capsules] [tablets] [dosage units] containing (specify harmful drug(s) or combination thereof).

There are three material elements of the offense of Promoting a Harmful Drug in the Third 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 possessed twenty-five or more [capsules] [tablets] [dosage units]; and

2. That the twenty-five or more [capsules] [tablets] [dosage units] contained (specify harmful drug(s) or combination thereof); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1246, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"

For definition of "dosage unit", *see* instruction 13.00; but the definition is limited to H.R.S. §§ 712-1241 and 712-1242.

For definition of "possession" *see* instruction 6.06.

13.21 PROMOTING A HARMFUL DRUG IN THE FOURTH DEGREE -- POSSESSION OF HARMFUL DRUG: H.R.S. § 712-1246.5

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Harmful Drug in the Fourth Degree.

A person commits the offense of Promoting a Harmful Drug in the Fourth Degree if he/she knowingly possesses any (specify harmful drug) in any amount.

There are two material elements of the offense of Promoting a Harmful Drug in the Fourth 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 possessed (specify harmful drug) in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1246.5, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "marijuana concentrate"

For definition of "possession" *see* instruction 6.06.

13.22 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- POSSESSION OF FOUR HUNDRED OR MORE UNITS: H.R.S. § 712-1247(1)(a)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly possesses four hundred or more [capsules] [tablets] containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed four hundred or more [capsules] [tablets]; and

2. That the four hundred or more [capsules] [tablets] contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.23 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- POSSESSION OF ONE OUNCE OR MORE OF SCHEDULE V SUBSTANCES: H.R.S. §712-1247(1)(b)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more, containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.24 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF FIFTY OR MORE UNITS: H.R.S. § 712-1247(1)(c)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly distributes fifty or more [capsules] [tablets] containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 distributed fifty or more [capsules] [tablets]; and

2. That the fifty or more [capsules] [tablets] contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "to distribute"

13.25 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- DISTRIBUTION OF ONE-EIGHTH OUNCE OR MORE OF SCHEDULE V SUBSTANCES: H.R.S. § 712-1247(1)(d)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 distributed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "ounce"
13.00 - "to distribute"

13.26 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- POSSESSION OF ONE POUND OR MORE OF MARIJUANA: H.R.S. § 712-1247(1)(e)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more, containing any marijuana.

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained any marijuana; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(e), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.27 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- DISTRIBUTES ONE POUND OR MORE OF MARIJUANA: H.R.S. § 712-1247(1)(f)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more, containing any marijuana.

There are three material elements of the offense of Promoting a Detrimental Drug 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 distributed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained any marijuana; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(f), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "ounce"
13.00 - "to distribute"

13.28 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- POSSESSION, CULTIVATION OR UNDER CONTROL OF TWENTY-FIVE OR MORE MARIJUANA PLANTS: H.R.S. § 712-1247(1)(g)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly [possesses] [cultivates] [has under his/her control] twenty-five or more marijuana plants.

There are two material elements of the offense of Promoting a Detrimental Drug 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 [possessed] [cultivated] [had under his/her control] twenty-five or more marijuana plants; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(g), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.29 PROMOTING A DETRIMENTAL DRUG IN THE FIRST DEGREE -- SELLS OR BARTERS ANY MARIJUANA OR SCHEDULE V SUBSTANCE: H.R.S. § 712-1247(1)(h)

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

A person commits the offense of Promoting a Detrimental Drug in the First Degree if he/she knowingly [sells] [barters] any [marijuana] [(specify Schedule V substance)] in any amount.

There are two material elements of the offense of Promoting a Detrimental Drug 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 [sold] [bartered] any [marijuana] [(specify Schedule V substance)] in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1247(1)(h), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

13.30 PROMOTING A DETRIMENTAL DRUG IN THE SECOND DEGREE -- POSSESSION OF FIFTY OR MORE UNITS: H.R.S. § 712-1248(1)(a)

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

A person commits the offense of Promoting a Detrimental Drug in the Second Degree if he/she knowingly possesses fifty or more [capsules] [tablets] containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed fifty or more [capsules] [tablets]; and

2. That the fifty or more [capsules] [tablets] contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1248(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.31 PROMOTING A DETRIMENTAL DRUG IN THE SECOND DEGREE -- POSSESSION OF ONE-EIGHTH OUNCE OR MORE OF SCHEDULE V SUBSTANCES: H.R.S. § 712-1248(1)(b)

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

A person commits the offense of Promoting a Detrimental Drug in the Second Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing (specify Schedule V substance(s)).

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained (specify Schedule V substance(s)); and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1248(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.32 PROMOTING A DETRIMENTAL DRUG IN THE SECOND DEGREE -- POSSESSION OF ONE OUNCE OR MORE OF ANY MARIJUANA: H.R.S. § 712-1248(1)(c)

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

A person commits the offense of Promoting a Detrimental Drug in the Second Degree if he/she knowingly possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more, containing any marijuana.

There are three material elements of the offense of Promoting a Detrimental Drug 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 possessed one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more; and

2. That the one or more preparations, compounds, mixtures, or substances contained any marijuana; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1248(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "ounce"

For definition of "possession" *see* instruction 6.06.

13.33 PROMOTING A DETRIMENTAL DRUG IN THE SECOND DEGREE -- DISTRIBUTION OF MARIJUANA OR SCHEDULE V SUBSTANCE: H.R.S. § 712-1248(1)(d)

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

A person commits the offense of Promoting a Detrimental Drug in the Second Degree if he/she knowingly distributes [marijuana] [(specify Schedule V substance)] in any amount.

There are two material elements of the offense of Promoting a Detrimental Drug 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 distributed [marijuana] [(specify Schedule V substance)] in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1248(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "to distribute"

13.34 PROMOTING A DETRIMENTAL DRUG IN THE THIRD DEGREE -- POSSESSION OF MARIJUANA OR SCHEDULE V SUBSTANCE: H.R.S. § 712-1249

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Detrimental Drug in the Third Degree.

A person commits the offense of Promoting a Detrimental Drug in the Third Degree if he/she knowingly possesses [marijuana] [(specify Schedule V substance)] in any amount.

There are two material elements of the offense of Promoting a Detrimental Drug in the Third 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 possessed [marijuana] [(specify Schedule V substance)] in any amount; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.35 COMMERCIAL PROMOTION OF MARIJUANA IN THE FIRST DEGREE -- POSSESSION OF TWENTY-FIVE POUNDS OR MORE: H.R.S. § 712-1249.4(1)(a)

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

A person commits the offense of Commercial Promotion of Marijuana in the First Degree if he/she knowingly possesses marijuana having an aggregate weight of twenty-five pounds or more.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 possessed marijuana; and

2. That the marijuana had an aggregate weight of twenty-five pounds or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.4(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.36 COMMERCIAL PROMOTION OF MARIJUANA IN THE FIRST DEGREE -- DISTRIBUTION OF FIVE POUNDS OR MORE: H.R.S. § 712-1249.4(1)(b)

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

A person commits the offense of Commercial Promotion of Marijuana in the First Degree if he/she knowingly distributes marijuana having an aggregate weight of five pounds or more.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 distributed marijuana; and

2. That the marijuana had an aggregate weight of five pounds or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.4(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "to distribute"

13.37 COMMERCIAL PROMOTION OF MARIJUANA IN THE FIRST DEGREE POSSESSION, CULTIVATION OR UNDER CONTROL OF ONE HUNDRED OR MORE MARIJUANA PLANTS: H.R.S. § 712-1249.4(1)(c)

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

A person commits the offense of Commercial Promotion of Marijuana in the First Degree if he/she knowingly [possesses] [cultivates] [has under his/her control] one hundred or more marijuana plants.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 [possessed] [cultivated] [had under his/her control] marijuana plants; and

2. That the marijuana plants numbered 100 or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.4(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.38 COMMERCIAL PROMOTION OF MARIJUANA IN THE FIRST DEGREE CULTIVATION OF TWENTY-FIVE OR MORE MARIJUANA PLANTS: H.R.S. § 712-1249.4(1)d)

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

A person commits the offense of Commercial Promotion of Marijuana in the First Degree if he/she knowingly cultivates on land owned by [another person] [the government] [another legal entity] twenty-five or more marijuana plants, unless he/she has the express permission from the owner of the land to cultivate the marijuana, or a legal or an equitable ownership interest in the land, or a legal right to occupy the land.

There are four material elements of the offense of Commercial Promotion of Marijuana in the First Degree, 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 cultivated twenty-five or more marijuana plants; and

2. That the Defendant did so on land owned by [another person] [the government] [another legal entity]; and

3. That the Defendant did not have the express permission from the owner of the land to cultivate the marijuana, or a legal or an equitable ownership interest in the land, or a legal right to occupy the land; and

4. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.4(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:

13.00 - "marijuana"

13.39 COMMERCIAL PROMOTION OF MARIJUANA IN THE FIRST DEGREE DEVICE CAPABLE OF CAUSING INJURY: H.R.S. § 712-1249.4(1)(e)

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

A person commits the offense of Commercial Promotion of Marijuana in the First Degree if he/she knowingly [uses] [causes to be used], any [firearm or other weapon] [device] [instrument] [material] [substance], whether animate or inanimate, which in the manner used is capable of causing [death] [serious bodily injury] [substantial bodily injury] [other bodily injury] in order to prevent the [theft] [removal] [search and seizure] [destruction] of marijuana.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 [used] [caused to be used], a [firearm or other weapon] [device] [instrument] [material] [substance], whether animate or inanimate, which in the manner used was capable of causing [death] [serious bodily injury] [substantial bodily injury] [other bodily injury]; and

2. That the Defendant did so in order to prevent the [theft] [removal] [search and seizure] [destruction] of marijuana; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.4(1)(e), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:

13.00 - "marijuana"

For definition of terms *not* defined by H.R.S. Chapter 712, *see* instructions:

9.00 - "bodily injury"; however, there is a question of the appropriateness of this definition for this instruction

9.00 - "serious bodily injury"

9.00 - "substantial bodily injury"

13.40 COMMERCIAL PROMOTION OF MARIJUANA IN THE SECOND DEGREE -- POSSESSION OF TWO POUNDS OR MORE: H.R.S. § 712-1249.5(1)(a)

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

A person commits the offense of Commercial Promotion of Marijuana in the Second Degree if he/she knowingly possesses marijuana having an aggregate weight of two pounds or more.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 possessed marijuana; and

2. That the marijuana had an aggregate weight of two pounds or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.5(1)(a), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.41 COMMERCIAL PROMOTION OF MARIJUANA IN THE SECOND DEGREE DISTRIBUTION OF ONE POUND OR MORE: H.R.S. § 712-1249.5(1)(b)

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

A person commits the offense of Commercial Promotion of Marijuana in the Second Degree if he/she knowingly distributes marijuana having an aggregate weight of one pound or more.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 distributed marijuana; and

2. That the marijuana had an aggregate weight of one pound or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.5(1)(b), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "to distribute"

13.42 COMMERCIAL PROMOTION OF MARIJUANA IN THE SECOND DEGREE POSSESSION, CULTIVATION OR UNDER CONTROL OF FIFTY OR MORE MARIJUANA PLANTS: H.R.S. § 712-1249.5(1)(c)

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

A person commits the offense of Commercial Promotion of Marijuana in the Second Degree if he/she knowingly [possesses] [cultivates] [has under his/her control] fifty or more marijuana plants.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 [possessed] [cultivated] [had under his/her control] marijuana plants; and

2. That the marijuana plants numbered fifty or more; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.5(1)(c), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "marijuana"

For definition of "possession" *see* instruction 6.06.

13.43 COMMERCIAL PROMOTION OF MARIJUANA IN THE SECOND DEGREE CULTIVATION OF A MARIJUANA PLANT: H.R.S. § 712-1249.5(1)(d)

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

A person commits the offense of Commercial Promotion of Marijuana in the Second Degree if he/she knowingly cultivates on land owned by [another person] [the government] [another legal entity] a marijuana plant, unless he/she has the express permission from the owner of the land to cultivate the marijuana, or a legal or an equitable ownership interest in the land, or a legal right to occupy the land.

There are four material elements of the offense of Commercial Promotion of Marijuana in the Second Degree, 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 cultivated a marijuana plant; and

2. That the Defendant did so on land owned by [another person] [the government] [another legal entity]; and

3. That the Defendant did not have the express permission from the owner of the land to cultivate the marijuana, or a legal or an equitable ownership interest in the land, or a legal right to occupy the land; and

4. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.5(1)(d), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "marijuana"

13.44 COMMERCIAL PROMOTION OF MARIJUANA IN THE SECOND DEGREE SELLS OR BARTERS TO A MINOR: H.R.S. § 712-1249.5(1)(e)

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

A person commits the offense of Commercial Promotion of Marijuana in the Second Degree if he/she knowingly [sells] [barters] any [marijuana] [(specify Schedule V substance)] in any amount to a minor.

There are three material elements of the offense of Commercial Promotion of Marijuana 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 [sold] [bartered] any [marijuana] [(specify Schedule V substance)] to a person in any amount; and

2. That the person was, at that time, a minor; and

3. That the Defendant did so knowingly.

Notes

H.R.S. §§ 712-1249.5(1)(e), 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:
13.00 - "marijuana"
13.00 - "minor"

13.45A PROMOTING A CONTROLLED SUBSTANCE IN OR ON SCHOOLS OR PUBLIC PARKS: H.R.S. § 712-1249.6(1)(a)(Distribute In/On Property)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance in or on Schools or Public Parks.

A person commits the offense of Promoting a Controlled Substance in or on Schools or Public Parks if he/she knowingly distributes a controlled substance in or on the real property comprising a [school][public park].

There are three material elements of the offense of Promoting a Controlled Substance in or on Schools or Public Parks, 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 distributed a controlled substance; and

2. That the Defendant did so in or on the real property comprising a [school][public park]; and

3. That the Defendant acted knowingly as to each of the foregoing elements.

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(a) and (6), 702-206(2).

For definition of "controlled substance," *see* H.R.S. § 329-1.

For definition of states of mind, *see* instruction:

6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:

13.00 - "to distribute"

13.45B PROMOTING A CONTROLLED SUBSTANCE IN OR ON SCHOOLS OR PUBLIC PARKS: H.R.S. § 712-1249.6(1)(a)(Possess In/On Property)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance in or on Schools or Public Parks.

A person commits the offense of Promoting a Controlled Substance in or on Schools or Public Parks if he/she knowingly possesses with intent to distribute a controlled substance in or on the real property comprising a [school][public park].

There are three material elements of the offense of Promoting a Controlled Substance in or on Schools or Public Parks, 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 knowingly possessed a controlled substance; and

2. That the Defendant did so knowing he/she was in or on the real property comprising a [school][public park]; and

3. That the Defendant did so with intent to distribute the controlled substance in or on such property.

“School” means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(a) and (6), 702-206(1) and (2).

For definition of “controlled substance,” *see* H.R.S. § 329-1.

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For definition of "possession," *see* instruction 6.06.

13.46A PROMOTING A CONTROLLED SUBSTANCE NEAR SCHOOLS OR PUBLIC PARKS: H.R.S. § 712-1249.6(1)(b) (Distribute Within 750 Feet of Property)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance Near Schools or Public Parks.

A person commits the offense of Promoting a Controlled Substance Near Schools or Public Parks if he/she knowingly distributes a controlled substance within seven hundred and fifty feet of the real property comprising a [school][public park].

There are three material elements of the offense of Promoting a Controlled Substance Near Schools or Public Parks, 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 distributed a controlled substance; and

2. That the Defendant did so within seven hundred and fifty feet of the real property comprising a [school][public park]; and

3. That the Defendant acted knowingly as to each of the foregoing elements.

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(b)and(6), 702-206(2).

For definition of “controlled substance,” *see* H.R.S. § 329-1.

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

13.46B PROMOTING A CONTROLLED SUBSTANCE NEAR SCHOOLS OR PUBLIC PARKS: H.R.S. § 712-1249.6(1)(b) (Possess Within 750 Feet of Property)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance Near Schools or Public Parks.

A person commits the offense of Promoting a Controlled Substance Near Schools or Public Parks if he/she knowingly possesses with intent to distribute a controlled substance within seven hundred and fifty feet of the real property comprising a [school][public park].

There are three material elements of the offense of Promoting a Controlled Substance Near Schools or Public Parks, 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 knowingly possessed a controlled substance; and

2. That the Defendant did so knowing he/she was within seven hundred and fifty feet of the real property comprising a [school][public park]; and

3. That the Defendant did so with intent to distribute the controlled substance in or on such property.

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(b) and (6), 702-206(1) and (2).

For definition of “controlled substance,” *see* H.R.S. § 329-1.

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For definition of "possession," *see* instruction 6.06.

13.47A PROMOTING A CONTROLLED SUBSTANCE ON SCHOOL VEHICLES: H.R.S. § 712-1249.6(1)(c)(Distribute On Vehicles)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance On School Vehicles.

A person commits the offense of Promoting a Controlled Substance On School Vehicles if he/she knowingly distributes a controlled substance while on any school vehicle.

There are three material elements of the offense of Promoting a Controlled Substance On School Vehicles, 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 distributed a controlled substance; and

2. That the Defendant did so while on a school vehicle; and

3. That the Defendant acted knowingly as to each of the foregoing elements.

"School vehicle" means any publicly or privately owned motor vehicle used to transport pupils to and from a school, school functions, or school-related events [except [vehicles used to transport pupils attending schools above the twelfth grade or pupils over eighteen years of age] [privately-owned passenger vehicles when the transportation is provided without compensation of any kind] [vehicles used to transport pupils together with other passengers as part of the regularly scheduled operation of a mass transit system]

[privately-owned vehicles when the transportation is provided by a community association or nonprofit corporation, duly incorporated with the department of commerce and consumer affairs, which operates for the purpose of promoting recreation, health, safety, ridesharing, or social group functions]].

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(c) and (6), 702-206(2), 286-181.

For definition of "controlled substance," *see* H.R.S. § 329-1.

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For the purposes of this section, "school vehicle" means every school vehicle as defined in section 286-181 and any regulations adopted pursuant to that section. This jury instruction incorporates that statutory section as of the time of drafting. Counsel should review the current versions of section 286-181 and any regulations adopted pursuant to that section for any changes before using this instruction.

13.47B PROMOTING A CONTROLLED SUBSTANCE ON SCHOOL VEHICLES: H.R.S. § 712-1249.6(1)(c)(Possess On Vehicles)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance On School Vehicles.

A person commits the offense of Promoting a Controlled Substance On School Vehicles if he/she knowingly possesses with intent to distribute a controlled substance while on any school vehicle.

There are three material elements of the offense of Promoting a Controlled Substance On School Vehicles, 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 knowingly possessed a controlled substance; and

2. That the Defendant did so knowing he/she was on a school vehicle; and

3. That the Defendant did so with intent to distribute the controlled substance while on a school vehicle.

"School vehicle" means any publicly or privately owned motor vehicle used to transport pupils to and from a school, school functions, or school-related events [except [vehicles used to transport pupils attending schools above the twelfth grade or pupils over eighteen years of age] [privately-owned passenger vehicles when the transportation is provided without compensation of any kind] [vehicles used to transport pupils together with other passengers as part of the regularly scheduled operation of a mass transit system]

[privately-owned vehicles when the transportation is provided by a community association or nonprofit corporation, duly incorporated with the department of commerce and consumer affairs, which operates for the purpose of promoting recreation, health, safety, ridesharing, or social group functions]].

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(c) and (6), 702-206(1) and (2), 286-181.

For definition of "controlled substance," *see* H.R.S. § 329-1.

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For definition of "possession," *see* instruction 6.06.

For the purposes of this section, "school vehicle" means every school vehicle as defined in section 286-181 and any regulations adopted pursuant to that section. This jury instruction incorporates that statutory section as of the time of drafting. Counsel should review the current versions of section 286-181 and any regulations adopted pursuant to that section for any changes before using this instruction.

13.47C PROMOTING A CONTROLLED SUBSTANCE NEAR SCHOOL VEHICLES: H.R.S. § 712-1249.6(1)(c)(Distribute Near Vehicles)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance Near School Vehicles.

A person commits the offense of Promoting a Controlled Substance Near School Vehicles if he/she knowingly distributes a controlled substance within ten feet of a parked school vehicle during the time that the vehicle is in service or waiting to transport school children.

There are three material elements of the offense of Promoting a Controlled Substance Near School Vehicles, 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 distributed a controlled substance; and

2. That the Defendant did so while within ten feet of a parked school vehicle during the time that the vehicle was in service or waiting to transport school children; and

3. That the Defendant acted knowingly as to each of the foregoing elements.

"School vehicle" means any publicly or privately owned motor vehicle used to transport pupils to and from a school, school functions, or school-related events [except [vehicles used to transport pupils attending schools above the twelfth grade or pupils over eighteen years of age] [privately-owned passenger vehicles when

the transportation is provided without compensation of any kind] [vehicles used to transport pupils together with other passengers as part of the regularly scheduled operation of a mass transit system] [privately-owned vehicles when the transportation is provided by a community association or nonprofit corporation, duly incorporated with the department of commerce and consumer affairs, which operates for the purpose of promoting recreation, health, safety, ridesharing, or social group functions]].

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(c) and (6), 702-206(2), 286-181.

For definition of "controlled substance," *see* H.R.S. § 329-1.

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For definition of "possession," *see* instruction 6.06.

For the purposes of this section, "school vehicle" means every school vehicle as defined in section 286-181 and any regulations adopted pursuant to that section. This jury instruction incorporates that statutory section as of the time of drafting. Counsel should review the current versions of section 286-181 and any regulations adopted pursuant to that section for any changes before using this instruction.

13.47D PROMOTING A CONTROLLED SUBSTANCE NEAR SCHOOL VEHICLES: H.R.S. § 712-1249.6(1)(c)(Possess Near Vehicles)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance Near School Vehicles.

A person commits the offense of Promoting a Controlled Substance Near School Vehicles if he/she knowingly possesses with intent to distribute a controlled substance within ten feet of a parked school vehicle during the time that the vehicle is in service or waiting to transport school children.

There are three material elements of the offense of Promoting a Controlled Substance Near School Vehicles, 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 knowingly possessed a controlled substance; and

2. That the Defendant did so knowing he/she was within ten feet of a parked school vehicle during the time that the vehicle was in service or waiting to transport school children; and

3. That the Defendant did so with intent to distribute the controlled substance within ten feet of a parked school vehicle during the time that the vehicle was in service or waiting to transport school children.

"School vehicle" means any publicly or privately owned motor vehicle used to transport pupils to and from a school, school functions, or school-related events [except [vehicles used to

transport pupils attending schools above the twelfth grade or pupils over eighteen years of age] [privately-owned passenger vehicles when the transportation is provided without compensation of any kind] [vehicles used to transport pupils together with other passengers as part of the regularly scheduled operation of a mass transit system] [privately-owned vehicles when the transportation is provided by a community association or nonprofit corporation, duly incorporated with the department of commerce and consumer affairs, which operates for the purpose of promoting recreation, health, safety, ridesharing, or social group functions]].

"School" means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(c) and (6), 702-206(1) and (2), 286-181.

For definition of "controlled substance," *see* H.R.S. § 329-1.

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "to distribute"

For definition of "possession," *see* instruction 6.06.

For the purposes of this section, "school vehicle" means every school vehicle as defined in section 286-181 and any regulations adopted pursuant to that section. This jury instruction incorporates that statutory section as of the time of drafting. Counsel should review the current versions of section 286-181 and any regulations adopted pursuant to that section for any changes before using this instruction.

13.48 PROMOTING A CONTROLLED SUBSTANCE NEAR SCHOOLS OR PUBLIC PARKS: H.R.S. § 712-1249.6(1)(d) (Manufacture Methamphetamine Within 750 Feet of Property)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Promoting a Controlled Substance Near Schools or Public Parks.

A person commits the offense of Promoting a Controlled Substance Near Schools or Public Parks if he/she knowingly manufactures methamphetamine or any of its salts, isomers, and salts of isomers, within seven hundred and fifty feet of the real property comprising a [school][public park].

There are three material elements of the offense of Promoting a Controlled Substance Near Schools or Public Parks, 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 manufactured methamphetamine or any of its salts, isomers, and salts of isomers; and

2. That the Defendant did so within seven hundred and fifty feet of the real property comprising a [school][public park]; and

3. That the Defendant acted knowingly as to each of the foregoing elements.

“School” means any public or private preschool, kindergarten, elementary, intermediate, middle, secondary, or high school.

Notes

H.R.S. §§ 712-1249.6(1)(d) and (6), 702-206(2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instruction:
13.00 - "manufacture"

[13.49] DEFENSE TO PROMOTING: H.R.S. § 712-1240.1

It is a defense to prosecution for (name of offense defined by Part IV of H.R.S. Chapter 12) that the Defendant [possessed] [distributed] the (specify drug) drug [under authority of law as a practitioner] [as an ultimate user of the drug pursuant to a lawful prescription] under legal authority.

Notes

H.R.S. § 712-1240.1.

This defense is applicable to offenses defined in Part IV of H.R.S. Chapter 12, *see* instructions 13.01 thru 13.47.

For practitioner defense, *see* instruction [13.49]

[13.50] INFERENCE: POSSESSION IN A MOTOR VEHICLE HRS § 712-1251

If you find beyond a reasonable doubt the presence in a motor vehicle of a quantity of (specify drug) which is clearly greater than the quantity ordinarily possessed for personal use, you may, but are not required to, infer knowing possession by every person in the vehicle at the time the drug was found. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt knowing possession by every person in the vehicle at the time the drug was found.

Notes

HRS § 712-1251. *State v. Brighter*, 61 Haw. 99, 595 P.2d 1072 (1979); HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 Hawai‘i 149 (App. 1997); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

This instruction should not be given as to:

(a) Other occupants of the motor vehicle if the substance is found upon the person of one of the occupants therein; or

(b) All occupants, except the driver or owner of the motor vehicle, if the substance is found in some portion of the vehicle normally accessible only to the driver or owner; or

(c) The driver of a motor vehicle who is at the time operating it for hire in the pursuit of his/her trade, if the substance is found in a part of the vehicle used or occupied by passengers; or

(d) All occupants, when the vehicle is a public bus.

Applicability of the above paragraphs (a) through (d) is a question to be determined by the court.

13.51 Unlawful Methamphetamine Trafficking -- Manufacture, Distribution, or Dispensing: H.R.S. § 712-1240.6(1) and (2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unlawful Methamphetamine Trafficking.

A person commits the offense of Unlawful Methamphetamine Trafficking if he/she knowingly [manufactures] [distributes] [dispenses] one or more preparations, compounds, mixtures, or substances of methamphetamine, or any of its salts, isomers, and salts of isomers.

There are two material elements of the offense of Unlawful Methamphetamine Trafficking, 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 [manufactured] [distributed] [dispensed] one or more preparations, compounds, mixtures, or substances of methamphetamine or any of its salts, isomers, and salts of isomers; and

2. That the Defendant did so knowingly.

Notes

H.R.S. § 712-1240.6(1) and (2).

For definition of states of mind, *see* instruction:

6.03 -- "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:

13.00 -- “to distribute”

13.00 -- “manufacture”

If the defendant is charged under H.R.S. § 712-1240.6(2), then the court must also submit instructions 13.53A and 13.53B to the jury.

13.52 Unlawful Methamphetamine Trafficking -- Possession With Intent to Manufacture, Distribute, or Dispense: H.R.S. § 712-1240.6(1) and (2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unlawful Methamphetamine Trafficking.

A person commits the offense of Unlawful Methamphetamine trafficking if he/she knowingly possesses with intent to [manufacture] [distribute] [dispense] one or more preparations, compounds, mixtures, or substances of methamphetamine, or any of its salts, isomers, and salts of isomers.

There are two material elements of the offense of Unlawful Methamphetamine Trafficking, 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 knowingly possessed one or more preparations, compounds, mixtures, or substances of methamphetamine, or any of its salts, isomers, and salts of isomers; and

2. That the Defendant did so with intent to [manufacture] [distribute] [dispense] the one or more preparations, compounds, mixtures, or substances.

Notes

H.R.S. § 712-1240.6(1) and (2).

For definition of states of mind, *see* instructions:

6.02 -- "intentionally"

6.03 -- "knowingly"

For definition of terms defined by H.R.S. Chapter 712, *see* instructions:

13.00 -- “to distribute”

13.00 -- “manufacture”

For definition of “possession,” *see* instruction 6.06.

If the defendant is charged under H.R.S. § 712-1240.6(2), then the court must also submit instructions 13.53A and 13.53B to the jury.

13.53A Unlawful Methamphetamine Trafficking -- Weight: H.R.S. § 712-1240.6(2)

If you find that the prosecution proved the offense of Unlawful Methamphetamine Trafficking beyond a reasonable doubt, then you must also answer the following two questions on a special interrogatory which will be provided to you:

(1) Did the prosecution prove beyond a reasonable doubt that the one or more preparations, compounds, mixtures, or substances were of an aggregate weight of one-eighth ounce or more of methamphetamine, or any of its salts, isomers, and salts of isomers?

(2) Did the prosecution prove beyond a reasonable doubt that the Defendant was aware that the one or more preparations, compounds, mixtures, or substances were of an aggregate weight of one-eighth ounce or more of methamphetamine, or any of its salts, isomers, and salts of isomers?

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

Notes

If the defendant is charged under H.R.S. § 712-1240.6(2) then this instruction must be read to the jury.

13.53B Unlawful Methamphetamine Trafficking -- Special Interrogatories as to Weight: H.R.S. § 712-1240.6(2)

1. Did the prosecution prove beyond a reasonable doubt that the one or more preparations, compounds, mixtures, or substances were of an aggregate weight of one-eighth ounce or more of methamphetamine or any of its salts, isomers, and salts of isomers?

Yes _____ No _____

2. Did the prosecution prove beyond a reasonable doubt that the Defendant was aware that the one or more preparations, compounds, mixtures, or substances were of an aggregate weight of one-eighth ounce or more of methamphetamine or any of its salts, isomers, and salts of isomers?

Yes _____ No _____

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

TABLE OF INSTRUCTIONS[20]

14. CHAPTER 705 -- INCHOATE CRIMES

[20]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

14.07 Criminal Conspiracy H.R.S. § 705-520 (12/27/96).

14.07A Renunciation of Conspiracy H.R.S. § 705-530(3), (4) and (5) (4/19/96).

14.07B Criminal Conspiracy -- Theft 2° H.R.S. §§ 705-520, 708-831(1)(b), 708-830(2) (12/27/96).

14.01 ATTEMPT -- PURPOSE TO CULMINATE IN COMMISSION OF OFFENSE: H.R.S. § 705-500(1)(b) and (3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Attempted (specify substantive offense).

A person commits the offense of Attempted (specify substantive offense) if, he/she intentionally engages in conduct which, under the circumstances as he/she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his/her commission of (specify substantive offense).

There are two material elements of the offense of Attempted (specify substantive offense), 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 engaged in conduct which, under the circumstances as the Defendant believed them to be, was a substantial step in a course of conduct intended by the Defendant to culminate in the commission of (specify substantive offense); and

2. That the Defendant engaged in such conduct intentionally.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit (specify substantive offense).

A person commits the offense of (specify substantive offense) if (define substantive offense).

Notes

This form of attempt instruction is appropriate, for example, when the actor has not yet completed all that he/she intends to do, but liability is prescribed where the actor has taken a substantial step in a course of conduct planned to culminate in the commission of the offense.

H.R.S. §§ 705-500(1)(b) and (3), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

The elements instruction for the substantive offense should follow the attempt instruction.

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.01A ATTEMPTED BURGLARY IN THE FIRST DEGREE -- PURPOSE TO CULMINATE IN COMMISSION OF OFFENSE: H.R.S. §§ 705-500(1)(b) and (3), 708-810(1)(c)

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

A person commits the offense of Attempted Burglary in the First Degree if, he/she intentionally engages in conduct which, under the circumstances as he/she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his/her commission of Burglary in the First Degree.

There are two material elements of the offense of Attempted Burglary 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 intentionally engaged in conduct; and

2. That the conduct, under the circumstances as the Defendant believed them to be, was a substantial step in a course of conduct intended by the Defendant to culminate in the commission of Burglary in the First Degree.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit Burglary in the First Degree.

A person commits the offense of Burglary in the First Degree if he/she intentionally enters or remains unlawfully in a building, 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.

Notes

This form of attempt instruction is appropriate, for example, when the actor has not yet completed all that he/she intends to do, but liability is prescribed where the actor has taken a substantial step in a course of conduct planned to culminate in the commission of the offense.

H.R.S. §§ 705-500(1)(b) and (3), 708-810(1)(c), 702-206(1).

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 unlawful"

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

The elements instruction for the substantive offense should follow the attempt instruction.

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.02 ATTEMPT -- PURPOSE TO CAUSE PROSCRIBED RESULT: H.R.S. § 705-500(2) and (3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Attempted (specify substantive offense).

A person commits the offense of Attempted (specify substantive offense) if he/she intentionally engages in conduct which, under the circumstances as he/she believes them to be, is a substantial step in a course of conduct intended or known to cause (specify result of offense which is an element of the offense and any attendant circumstance with the required state of mind).

There are (specify number) material elements of the offense of Attempted (specify substantive offense), each of which the prosecution must prove beyond a reasonable doubt.

These (specify number) elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant engaged in conduct which, under the circumstances as Defendant believed them to be, was a substantial step in a course of conduct intended or known to be practically certain by the Defendant to cause (specify result of offense which is an element of the offense); and

2. That the Defendant engaged in such conduct intentionally. [and]

*(3. Specify attendant circumstance with the required state of mind.)

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit (specify substantive offense) , which is, (state elements of substantive offense).

Notes

This form of attempt instruction is appropriate, for example, where the actor has engaged in conduct that he/she expects to cause a proscribed result.

*Element three need only be given when the definition of the offense includes an attendant circumstance.

H.R.S. §§ 705-500(2) and (3), 702-206(1); *see State v. Kinnane*, No. 15713 (Haw. filed June 15, 1995).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.02A ATTEMPTED MURDER IN THE SECOND DEGREE -- PURPOSE TO CAUSE PROSCRIBED RESULT: H.R.S. §§ 705-500(2) and (3), 707-701.5

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

A person commits the offense of Attempted Murder in the Second Degree if he/she intentionally engages in conduct which, under the circumstances as he/she believes them to be, is a substantial step in a course of conduct intended or known to cause the death of another person.

There are two material elements of the offense of Attempted Murder 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 engaged in conduct; and

2. That the conduct, under the circumstances as Defendant believed them to be, was a substantial step in a course of conduct intended or known to be practically certain by the Defendant to cause the death of another person.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit

Murder in the Second Degree, which is, intentionally or knowingly causing the death of another person.

Notes

H.R.S. §§ 705-500(2) and (3), 707-701.5, 702-206(1) and (2).

For definitions of states of mind, *see* instruction:
6.02 - "intentionally"
6.03 - "knowingly"

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.02B ATTEMPTED SEXUAL ASSAULT IN THE FIRST DEGREE -- PURPOSE TO CAUSE PROSCRIBED RESULT: H.R.S. §§ 705-500(2) and (3), 707-730(1)(a)

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

A person commits the offense of Attempted Sexual Assault in the First Degree if he/she intentionally engages in conduct which, under the circumstances as he/she believes them to be, is a substantial step in a course of conduct intended or known to be practically certain to subject another person to sexual penetration and he/she is aware his/her conduct is by strong compulsion.

There are three material elements of the offense of Attempted Sexual Assault 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 engaged in conduct; and

2. That the conduct, under the circumstances as Defendant believed them to be, was a substantial step in a course of conduct intended or known to be practically certain by the Defendant to subject (specify Complainant's name) to an act of sexual penetration; and

3. That the Defendant was aware his/her conduct constituted strong compulsion.

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit Sexual Assault in the First Degree, which is, knowingly subjecting a person to an act of sexual penetration by strong compulsion.

Notes

H.R.S. §§ 705-500(2) and (3), 707-730(1)(a), 702-206(1) and (2), ; *see State v. Kinnane*, No. 15713 (Haw. filed June 15, 1995).

For definitions of states of mind, *see* instruction:
6.02 - "intentionally"
6.03 - "knowingly"

For definitions of terms defined by H.R.S. Chapter 707, *see* instruction:

9.00 - "sexual penetration"
9.00 - "strong compulsion"

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.03 ATTEMPT -- CONDUCT WOULD CONSTITUTE CRIME EXCEPT MISTAKE AS TO ATTENDANT CIRCUMSTANCES: H.R.S. § 705-500(1)(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Attempted (specify substantive offense).

A person commits the offense of Attempted (specify substantive offense) if he/she intentionally engages in conduct which would constitute (specify substantive offense) if the attendant circumstances were as he/she believed them to be.

There are two material elements of the offense of Attempted (specify substantive offense), 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 engaged in conduct which would have constituted (specify substantive offense) if the attendant circumstances, (specify attendant circumstances), were as the Defendant believed them to be; and

2. That the Defendant engaged in such conduct intentionally.

A person commits the offense of (specify substantive offense) if (define substantive offense).

Notes

This form of attempt instruction is appropriate, for example, where the actor's conduct would constitute the crime if the circumstances were as the actor believed them to be. In this situation, the actor has done all that he/she intends to do, but the crime has not been committed.

H.R.S. §§ 705-500(1)(a) and (3), 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

The elements instruction for the substantive offense should follow the attempt instruction.

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.04 ATTEMPT -- SUBSTANTIAL STEP: PARTICULAR RESULT IS ELEMENT OF CRIME: HRS § 705-500(2) and (3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Attempted (specify substantive offense).

A person commits the offense of Attempted (specify substantive offense) if, with the intent to commit (specify substantive offense), he/she intentionally engages in conduct which constitutes a substantial step in a course of conduct intended or known to cause (specify result of conduct which is an element of the substantive offense).

There are two material elements of the offense of Attempted (specify substantive offense), 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 intended to commit (specify substantive offense); and

2. That the Defendant intentionally engaged in conduct which was a substantial step in a course of conduct intended or known to be practically certain by the Defendant to cause (specify result of conduct which is an element of the substantive offense).

Conduct shall not be considered a substantial step unless it is strongly corroborative of the Defendant's intent to commit (specify substantive offense). A person commits the offense of (specify substantive offense) if . . .

There are (number) elements of the (specify substantive offense) . . .

These (number) elements are: (List elements numerically).

Notes

HRS §§ 705-500(2) and (3), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The elements instruction for the substantive offense should follow the attempt instruction.

When conduct alleged as substantial step overlaps other charges, or there are multiple substantial steps, *see State v. Iosefa*, 77 Haw. 177, 880 P.2d 1224 (1994).

For instruction on Renunciation of Attempt, *see* instruction 14.05.

14.05 RENUNCIATION OF ATTEMPT: H.R.S. § 705-530(1), (4) and (5)

In a prosecution for criminal attempt, it is an affirmative defense that the Defendant, under circumstances manifesting a voluntary and complete renunciation of his/her criminal intent, [gives a timely warning to law enforcement authorities] [makes a reasonable effort to prevent the conduct or result which is the object of the attempt].

A "renunciation" is not "voluntary and complete" if it is motivated in whole or in part by:

(a) A belief that circumstances exist which increase the probability of detection or apprehension of the accused or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

[A "warning to law-enforcement authorities" is not "timely" within the meaning of this section unless the authorities, reasonably acting upon the warning, would have the opportunity to prevent the conduct or result.] [An effort is not "reasonable" within the meaning of this section unless the Defendant, under reasonably foreseeable circumstances, would have prevented the conduct or result.]

Notes

H.R.S. § 705-530(1), (4) and (5).

For definition of affirmative defense, *see* instruction 7.06.

14.06 CRIMINAL SOLICITATION: H.R.S. § 705-510

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

A person commits the offense of Criminal Solicitation if, with the intent to promote or facilitate the commission of (specify substantive offense), he/she [commands] [encourages] [requests] another person to [engage in or cause (designate conduct or results of conduct specified by the definition of the specified substantive offense)] [engage in conduct which would be sufficient to establish the other person as an accomplice in the commission of (specify substantive offense)].

There are two material elements of the offense of Criminal Solicitation, 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 [commanded] [encouraged] [requested] another person to [engage in or cause (designate conduct or results of conduct specified by the definition of the specified substantive offense)] [engage in conduct which would be sufficient to establish the other person as an accomplice in the commission of (specify substantive offense)]; and

2. That the Defendant did so with the intent to promote or facilitate the commission of (specify substantive offense).

A person commits the offense of (specify substantive offense) if . . .

There are (number) elements of the (specify substantive offense) . . .

These (number) elements are: (List elements numerically).

Notes

H.R.S. §§ 705-510, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For instruction on accomplice liability, *see* instruction 6.01.

The elements instruction for the substantive offense should follow the attempt instruction. The offense solicited must be a crime. For definition of a crime, *see* H.R.S. § 701-107.

For instruction on Renunciation of Solicitation, *see* instruction 14.06A.

14.06A RENUNCIATION OF SOLICITATION: H.R.S. § 705-530(2), (4) and (5)

In a prosecution for criminal solicitation, it is an affirmative defense that the Defendant, under circumstances manifesting a complete and voluntary renunciation of his/her criminal intent, notifies the person solicited of his/her renunciation and [gives timely warning to law-enforcement authorities] [makes a reasonable effort to prevent the conduct or result solicited].

A "renunciation" is not "voluntary and complete" if it is motivated in whole or in part by:

(a) A belief that circumstances exist which increase the probability of detection or apprehension of the accused or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

[A "warning to law-enforcement authorities" is not "timely" within the meaning of this section unless the authorities, reasonably acting upon the warning, would have the opportunity to prevent the conduct or result.] [An effort is not "reasonable" within the meaning of this section unless the Defendant, under reasonably foreseeable circumstances, would have prevented the conduct or result.]

Notes

H.R.S. § 705-530(2), (4) and (5).

For definition of affirmative defense, *see* instruction 7.06.

14.07 CRIMINAL CONSPIRACY: H.R.S. § 705-520

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

A person commits the offense of Criminal Conspiracy if, with intent to promote or facilitate the commission of a crime, he/she agrees with one or more persons that [they] [one or more of them] will [engage in or solicit (designate conduct specified by the definition of the alleged agreed crime)] [cause or solicit (designate result specified by the definition of the alleged agreed crime)] and [he/she] [a person who had joined the agreement] commits an overt act for the purpose of carrying out the agreement.

There are three material elements of the offense of Criminal Conspiracy, 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 agreed with one or more persons that [they] [one or more of them] would [engage in or solicit (designate conduct specified by the definition of the alleged agreed crime)] [cause or solicit (designate result specified by the definition of the alleged agreed crime)]; and

2. That, while the agreement was in effect, [the Defendant] [a person who had joined the agreement] committed [one or more of] the following overt act[s] for the purpose of carrying out the agreement (list overt act[s] for which there is sufficient evidence); and

3. That the Defendant joined in the agreement with intent to promote or facilitate the commission of (specify substantive offense), and the overt act was also committed with such intent.

A person commits the offense of (specify substantive offense) if

. . .

There are (number) elements of the (specify substantive offense)

. . .

These (number) elements are: (List elements numerically).

[In order to find the Defendant guilty, you must unanimously agree as to the particular overt act committed.]

Notes

H.R.S. §§ 705-520, 702-206(1).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For instruction on Renunciation of Conspiracy, *see* instruction 14.07A.

The following statutes also relate to the law of conspiracy:
H.R.S. § 705-521 Scope of conspiratorial relationship
H.R.S. § 705-522 Conspiracy with multiple criminal objectives
H.R.S. § 705-523 Immunity, irresponsibility, or incapacity or a party to criminal conspiracy
H.R.S. § 705-524 Venue in criminal conspiracy prosecutions
H.R.S. § 705-525 Duration of conspiracy

14.07A RENUNCIATION OF CONSPIRACY: H.R.S. § 705-530(3), (4) and (5)

In a prosecution for criminal conspiracy, it is an affirmative defense that the Defendant, under circumstances manifesting a voluntary and complete renunciation of his/her criminal intent, [gives timely warning to law-enforcement authorities] [makes a reasonable effort to prevent the conduct or result which is the object of the conspiracy].

A "renunciation" is not "voluntary and complete" if it is motivated in whole or in part by:

(a) A belief that circumstances exist which increase the probability of detection or apprehension of the accused or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

[A "warning to law-enforcement authorities" is not "timely" within the meaning of this section unless the authorities, reasonably acting upon the warning, would have the opportunity to prevent the conduct or result.] [An effort is not "reasonable" within the meaning of this section unless the Defendant, under reasonably foreseeable circumstances, would have prevented the conduct or result.]

Notes

H.R.S. § 705-530(3), (4) and (5).

For definition of affirmative defense, *see* instruction 7.06.

14.07B CRIMINAL CONSPIRACY - THEFT IN THE SECOND DEGREE: H.R.S. §§ 705-520, 708-831(1)(b), 708-830(2)

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

A person commits the offense of Criminal Conspiracy if, with intent to promote or facilitate the commission of theft in the second degree, he/she agrees with one or more persons that [they] [one or more of them] would obtain or exert control over the property of another, the value of which exceeded $300.00, by deception and with intent to deprive the other of the property and that, [he/she] [a person who had joined the agreement] commits an overt act for the purpose of carrying out the agreement.

There are two material elements of the offense of Criminal Conspiracy to commit theft 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 with intent to promote or facilitate the commission of theft in the second degree agreed with one or more persons that [they] [one or more of them] would obtain or exert control over the property of another, the value of which exceeded $300.00, by deception and with intent to deprive the other of the property; and

2. That, while the agreement was in effect, [the Defendant] [a person who had joined the agreement] with intent to promote or facilitate the commission of theft in the second degree committed an overt act(s) for the purpose of carrying out the agreement, by (describe overt act(s)).

[In order to find the Defendant guilty, you must unanimously agree as to the particular overt act committed.]

Notes

H.R.S. §§ 705-520, 708-831(1)(b), 708-830(2), 702-206(1). *State v. Merino*, 81 Hawai`i 198, 915 P.2d 672 (1996).

For definition of states of mind, *see* instruction:
6.02 - "intentionally"

For instruction on Renunciation of Conspiracy, *see* instruction 14.07A.

The following statutes also relate to the law of conspiracy:
H.R.S. § 705-521 Scope of conspiratorial relationship
H.R.S. § 705-522 Conspiracy with multiple criminal objectives
H.R.S. § 705-523 Immunity, irresponsibility, or incapacity or a party to criminal conspiracy
H.R.S. § 705-524 Venue in criminal conspiracy prosecutions
H.R.S. § 705-525 Duration of conspiracy

TABLE OF INSTRUCTIONS[21]

15. CHAPTER 134 -- FIREARMS, AMMUNITION AND DANGEROUS WEAPONS

[21]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

15.00 DEFINITIONS OF TERMS USED IN CHAPTER 15, STANDARD JURY INSTRUCTIONS

"acquire" means gain ownership of.

"assault pistol" means a semiautomatic pistol which accepts a detachable magazine and which has two or more of the following characteristics:

(a) an ammunition magazine which attaches to the pistol outside of the pistol grip;

(b) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward hand grip, or silencer;

(c) a shroud which is attached to or partially or completely encircles the barrel and which permits the shooter to hold the firearm with the second hand without being burned;

(d) a manufactured weight of fifty ounces or more when the pistol is unloaded;

(e) a centerfire pistol with an overall length of twelve inches or more; or

(f) it is a semiautomatic version of an automatic firearm.

"automatic firearm" means any firearm that shoots, is designed to shoot, or can be readily modified to shoot automatically more than one shot, without a manual reloading, by a single function of the trigger. This term shall also include the frame or receiver of any such firearm, any part designed and intended solely and exclusively, or any combination of parts designed and intended for use in converting a firearm into an automatic firearm, and any combination of parts from which an automatic firearm can be assembled if the parts are in the possession or under the control of a single person.

"crime of violence" means any offense as defined by the Hawaii Penal Code that involves injury or threat of injury to the person of another.

"firearm" means any weapon, for which the operating force is an explosive, including but not limited to pistols, revolvers, rifles, shotguns, automatic firearms, noxious gas projectors, mortars, bombs, and cannon.

"fugitive from justice" means any person (1) who has fled from any state, territory, the District of Columbia, or possession of the United States, to avoid prosecution for a felony or to avoid giving testimony in any criminal proceeding or (2) who has fled from any country other than the United States and is avoiding lawful extradition back to that country.

"pistol" or "revolver" means any firearm of any shape with a barrel less than sixteen inches in length and capable of discharging loaded ammunition or any noxious gas.

15.01 CARRYING OR USE OF A FIREARM IN THE COMMISSION OF A SEPARATE FELONY: H.R.S. § 134-6(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of [Carrying] [Immediate Control of] [Use of] [Threatening to Use] a Firearm While Engaged in the Commission of a Separate Felony.

A person commits the offense of [Carrying] [Immediate Control of] [Use of] [Threatening to Use] a Firearm While Engaged in the Commission of a Separate Felony if he/she [knowingly carries on his/her person] [knowingly has within his/her immediate control] [intentionally uses] [intentionally threatens to use] a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether it was operable or not.

There are three material elements of the offense of [Carrying] [Immediate Control of] [Use of] [Threatening to Use] a Firearm While Engaged in the Commission of a Separate Felony, 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 [carried on his/her person] [had within his/her immediate control] [used] [threatened to use] a firearm, whether the firearm was loaded or not, and whether operable or not; and

2. That the Defendant did so while engaged in the commission of (specify applicable felony(s)); and

3. That the Defendant did so [knowingly*] [intentionally*].

[A person commits the offense of (specify felony offense) if he/she . . .

There are (number) material elements of the (specify felony offense), each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are: (List elements numerically).]

Notes

H.R.S. §§ 134-6(a), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 134, *see* instruction:
15.00 - "firearm"

For statutory exemptions to H.R.S. § 134-6(a), *see* instruction 15.14.

The court must instruct the jury on the elements of any applicable separate felony, whether charged or not, and included felonies. These felonies should also be named in element two of the instruction.

*The state of mind must correlate to the conduct, e.g. knowingly carried or intentionally used.

15.02 POSSESSION OF A FIREARM TO FACILITATE DISTRIBUTION OF A CONTROLLED SUBSTANCE: H.R.S. § 134-6(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession of A Firearm to Facilitate Distribution of a Controlled Substance.

A person commits the offense of Possession of A Firearm to Facilitate Distribution of a Controlled Substance if he/she knowingly possesses a firearm with the intent to facilitate the commission of a felony offense involving the distribution of (specify controlled substance), whether the firearm is loaded or not, and whether operable or not.

There are four material elements of the offense of Possession of A Firearm to Facilitate Distribution of a Controlled Substance, 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 possessed a firearm, whether the firearm was loaded or not, and whether operable or not; and

2. That the Defendant did so knowingly; and

3. That the Defendant did so with the intent to facilitate the commission of (specify felony offense); and

4. That (specify felony offense) involved the distribution of (specify controlled substance).

"Distribution" means the selling, transferring, prescribing, giving or delivering to another, or the leaving, bartering,or exchanging with another, or the offering or agreeing to do the same.

[A person commits the offense of (specify felony offense) if he/she . . .

There are (number) material elements of the (specify felony offense), each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are: (List elements numerically).]

Notes

H.R.S. §§ 134-6(b), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 134, *see* instruction:
15.00 - "firearm"

For definition of "possession", *see* instruction 6.06.

For statutory exemptions to H.R.S. § 134-6(b), *see* instruction 15.14.

The court must instruct the jury on the elements of the specified felony offense if the Defendant is not charged with the commission of the specified felony offense.

"Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of part II of H.R.S. Chapter 329.

15.03 PLACE TO KEEP A FIREARM: H.R.S. § 134-6(c) and (e)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Place to Keep a Firearm.

A person commits the offense of Place to Keep a Firearm if he/she [carries] [possesses] a firearm or ammunition in a place other than his/her place of business, residence, or sojourn, without a license to carry.

There are seven material elements of the offense of Place to Keep a Firearm, each of which the prosecution must prove beyond a reasonable doubt.

These seven elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant knowingly [carried] [possessed] the object in question; and

2. That the object in question was a firearm or ammunition; and

3. That, at the time he/she [carried] [possessed] the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a firearm or ammunition; and

4. That, at that time, the Defendant was in a place other than his/her place of business, residence, or sojourn; and

5. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she was in a place other than his/her place of business, residence, or sojourn; and

6. That, at that time, the Defendant did not have a license to carry; and

7. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she did not have a license to carry.

"License to carry" means a license to carry a pistol or revolver and ammunition therefor issued by the chief of police of the [City and] County of (name of county).

Notes

HRS §§ 134-6(c) and (e), 702-206(1), (2) and (3), 702-202, 702-204; *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instruction:
15.00 - "firearm"

For statutory exemptions to HRS § 134-6(c), *see* instruction 15.14.

For an instruction on lawful carrying of unloaded firearms or ammunition, or both, *see* instruction 15.03A.

This instruction does not apply where the State alleges that the Defendant was traveling between two authorized locations but the firearm or ammunition was not in an appropriate container.

15.03A LAWFUL CARRYING OF UNLOADED FIREARMS OR AMMUNITION: HRS § 134-6(c) and (e)

It is lawful to carry an unloaded firearm or ammunition in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and [a place of repair] [a target range] [a licensed dealer's place of business] [an organized, scheduled firearms show or exhibit] [a place of formal hunter or firearm use training or instruction] [a police station]. It is the burden of the prosecution to prove beyond a reasonable doubt that the Defendant was not carrying the unloaded firearm or the ammunition in an enclosed container or that the Defendant was not carrying the unloaded firearm or ammunition between (specify authorized locations).

"Enclosed container" means a rigidly constructed receptacle or a commercially manufactured gun case or the equivalent thereof, that completely encloses the firearm.

Notes

HRS §§ 134-6(c) and (e), 702-206(1), (2) and (3).

15.04 LOADED FIREARM ON A PUBLIC HIGHWAY: H.R.S. § 134-6(d)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Loaded Firearm on a Public Highway.

A person commits the offense of Loaded Firearm on a Public Highway if, while on a public highway, he/she [carries on his/her person] [has in his/her possession] [carries in a vehicle] a firearm loaded with ammunition, without a license to carry.

There are seven material elements of the offense of Loaded Firearm on a Public Highway, each of which the prosecution must prove beyond a reasonable doubt.

These seven elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant knowingly [carried on his/her person] [had in his/her possession] [carried in a vehicle] the object in question; and

2. That the object in question was a firearm loaded with ammunition; and

3. That, at the time he/she [carried] [possessed] the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a firearm loaded with ammunition; and

4. That, at that time, the Defendant was on a public highway; and

5. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she was on a public highway; and

6. That, at that time, the Defendant did not have a license to carry; and

7. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she did not have a license to carry.

"License to carry" means a license to carry a pistol or revolver and ammunition therefor issued by the chief of police of the [City and] County of (name of county).

Notes

HRS §§ 134-6(d), 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instruction:
15.00 - "firearm"

For statutory exemptions to HRS § 134-6(d), *see* instruction 15.14.

[15.04A LAWFUL POSSESSION OR CARRYING OF A PISTOL OR REVOLVER LOADED WITH AMMUNITION: H.R.S. 134-6(d) DELETED]

15.05 POSSESSION OR CONTROL OF A FIREARM OR AMMUNITION BY A FUGITIVE FROM JUSTICE: HRS § 134-7(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession of a Firearm or Ammunition for a Firearm by a Person Who is a Fugitive from Justice.

A person commits the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Who is a Fugitive from Justice if he/she is a fugitive from justice and, at the time, possesses or controls any firearm or ammunition therefor.

There are five material elements of the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Who is a Fugitive from Justice, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant knowingly [possessed] [controlled] the object in question; and

2. That the object in question was a firearm or ammunition for a firearm; and

3. That, at the time he/she [possessed] [controlled] the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a firearm or ammunition for a firearm; and

4. That, at that time, the Defendant was a fugitive from justice; and

5. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she was a fugitive from justice.

Notes

HRS §§ 134-7(a), 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instructions:
15.00 - "firearm"
15.00 - "fugitive from justice"

For statutory exemptions to HRS § 134-7(a), *see* instruction 15.14.

The words "at that time" have been added to elements four and five of the offense for clarity.

The Committee was unable to agree on the applicable state of mind for ownership.

15.06 POSSESSION OR CONTROL OF A FIREARM OR AMMUNITION FOR A FIREARM BY A PERSON CHARGED WITH SPECIFIED CRIMES: HRS § 134-7(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person [Who is Under Indictment] [Who has Waived Indictment] [Who has been Bound Over to Circuit Court] for Specified Crimes.

A person commits the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person [Who is Under Indictment] [Who has Waived Indictment] [Who has been Bound Over to Circuit Court] for Specified Crimes if, [while under indictment] [having waived indictment] [having been bound over to circuit court] for [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)], he/she possesses or controls any firearm or ammunition for a firearm.

There are five material elements of the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person [Who is Under Indictment] [Who has Waived Indictment] [Who has been Bound Over to Circuit Court] for Specified Crimes, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date), in the [City and] County of (name of county), the Defendant knowingly [possessed] [controlled] the object in question; and

2. That the object in question was a firearm or ammunition for a firearm; and

3. That, at the time he/she [possessed] [controlled] the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a firearm or ammunition for a firearm; and

4. That, at that time, the Defendant [was under indictment] [had waived indictment] [was bound over to circuit court] for [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)]; and

5. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she [was under indictment] [had waived indictment] [was bound over to circuit court] for [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)].

Notes

HRS §§ 134-7(b), 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instructions:
15.00 - "crime of violence"
15.00 - "firearm"

For statutory exemptions to HRS § 134-7(b), *see* instruction 15.14.

The Committee discussed the relationship of HRS § 806-11 to this offense.

The Committee was unable to agree on the applicable state of mind for ownership.

15.07 POSSESSION OR CONTROL OF A FIREARM OR AMMUNITION FOR A FIREARM BY A PERSON CONVICTED OF SPECIFIED CRIMES: HRS § 134-7(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Convicted of Specified Crimes.

A person commits the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Convicted of Specified Crimes if, having been previously convicted of committing [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)], he/she possesses or controls any firearm or ammunition for a firearm.

There are five material elements of the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Convicted of Specified Crimes, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant knowingly [possessed] [controlled] the object in question; and

2. That the object in question was a firearm or ammunition for a firearm; and

3. That, at the time he/she [possessed] [controlled] the object in question, the Defendant believed, knew, or recklessly disregarded

the substantial and unjustifiable risk, that the object was a firearm or ammunition for a firearm; and

4. That, prior to (date alleged in element 1), the Defendant was convicted of committing [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)]; and

5. That, at the time he/she [possessed] [controlled] the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she had previously been convicted of committing [(specify felony)] [(specify crime of violence)] [(specify offense alleging illegal sale of a drug)].

Notes

HRS §§ 134-7(b), 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instructions:
15.00 - "crime of violence"
15.00 - "firearm"

For statutory exemptions to HRS § 134-7(b), *see* instruction 15.14.

The Committee was unable to agree on the applicable state of mind for ownership.

15.08 POSSESSION OF A PROHIBITED WEAPON: HRS § 134-8

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession of a Prohibited Weapon.

A person commits the offense of Possession of a Prohibited Weapon if he/she possesses a prohibited weapon.

There are three material elements of the offense of Possession of a Prohibited Weapon, 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 knowingly possessed the object in question; and

2. That the object in question was a prohibited weapon; and

3. That, at the time he/she possessed the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a prohibited weapon.

"Prohibited weapon" means an assault pistol*, an automatic firearm, a rifle with a barrel length less than sixteen inches, a shotgun with a barrel length less than eighteen inches, a cannon, a muffler, a silencer, a device for deadening or muffling the sound of discharged firearms, a hand grenade, dynamite, a blasting cap, a bomb, a bombshell, or other explosives.

Notes

HRS §§ 134-8, 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instructions:
15.00 - "acquire"
15.00 - "assault pistol"
15.00 - "automatic firearm"

For statutory exemptions to HRS § 134-8, *see* instruction 15.14.

The Committee was unable to agree on the applicable state of mind for manufacture, sale, barter, trade, gift, transfer, or acquisition.

*For the circumstances under which an assault pistol is not a prohibited weapon, and which circumstances, if applicable, may require an additional instruction by the court, *see* HRS § 134-4(e).

15.09 POSSESSION OF PROHIBITED AMMUNITION: HRS § 134-8

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession of Prohibited Ammunition.

A person commits the offense of Possession of Prohibited Ammunition if he/she possesses prohibited ammunition.

There are three material elements of the offense of Possession of Prohibited Ammunition, 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 knowingly possessed the object in question; and

2. That the object in question was prohibited ammunition; and

3. That, at the time he/she possessed the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was prohibited ammunition.

"Prohibited ammunition" means any type of ammunition or projectile component thereof coated with teflon or any other similar coating designed primarily to enhance its capability to penetrate metal or pierce protective armor, or any type of ammunition or any projectile component thereof designed or intended to explode or segment upon impact with its target.

Notes

HRS §§ 134-8, 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instruction:
15.00 - "acquire"

For statutory exemptions to HRS § 134-8, *see* instruction 15.14.

The Committee was unable to agree on the applicable state of mind for manufacture, sale, barter, trade, gift, transfer, or acquisition.

15.10 CARRYING FIREARM ON PERSON WITHOUT LICENSE: HRS § 134-9

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Carrying Firearm on Person Without License.

A person commits the offense of Carrying Firearm on Person Without License if he/she carries on his/her person a pistol or revolver, whether concealed or unconcealed, without a license to carry.

There are five material elements of the offense of Carrying Firearm on Person Without License, each of which the prosecution must prove beyond a reasonable doubt.

These five elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant knowingly carried on his/her person the object in question, whether concealed or unconcealed; and

2. That the object in question was a pistol or revolver; and

3. That, at the time he/she carried the object in question, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that the object was a pistol or revolver; and

4. That, at that time, the Defendant did not have a license to carry; and

5. That, at that time, the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she did not have a license to carry.

"License to carry" means a license to carry a pistol or revolver and ammunition therefor issued by the chief of police of the [City and] County of (name of county).

Notes

HRS §§ 134-9, 702-206(1), (2) and (3); *State v. Jenkins*, No. 22071, slip op. (Apr. 6, 2000).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"
6.04 - "recklessly"

For definition of terms defined by HRS Chapter 134, *see* instruction:
15.00 - "pistol" or "revolver"

For statutory exemptions to HRS § 134-9, *see* instruction 15.14.

15.11 ALTERATION OF FIREARM IDENTIFICATION MARKS: H.R.S. § 134-10

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Alteration of Firearm Identification Marks.

A person commits the offense of Alteration of Firearm Identification Marks if he/she knowingly [alters] [removes] [obliterates] the name of the make, model, manufacturer's number, or other mark(s) of identity of a firearm.

There are two material elements of the offense of Alteration of Firearm Identification Marks, 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 [altered] [removed] [obliterated] the name of the make, model, manufacturer's number, or other mark(s) of identity of a firearm; and

2. That the Defendant did so knowingly.

Notes

H.R.S. §§ 134-10, 702-206(2).

For definition of states of mind, *see* instruction:
6.03 - "knowingly"

For definition of terms defined by H.R.S. Chapter 134, *see* instruction:
15.00 - "firearm"

For prima facie inference where Defendant had possession of a firearm or ammunition which has any mark of identity modified, *see* instruction 15.11A.

Wilfully is satisfied if a person acts knowingly with respect to the elements of the offense. *See* H.R.S. § 702-210.

15.11A INFERENCE: POSSESSION OF A FIREARM OR AMMUNITION WHICH HAS ANY MARK OF IDENTITY MODIFIED: HRS § 134-10

If you find beyond a reasonable doubt that the Defendant had possession of a firearm or ammunition upon which any mark of identity has been altered, removed, or obliterated, you may, but are not required to, infer that the Defendant altered, removed, or obliterated the mark of identity. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant altered, removed, or obliterated the mark of identity.

Notes

HRS § 134-10; HRE Rule 306(a)(3).

State v. Mitchell, 88 Hawai‘i 216, 965 Hawai‘i 149 (App. 1997); *State v. Tabigne*, 88 Hawai‘i 296, 966 P.2d 608 (1998).

This instruction is appropriate when there is evidence that the Defendant had possession of a firearm or ammunition which has any mark of identity modified.

15.12 POSSESSION, USE OR THREAT TO USE A DEADLY OR DANGEROUS WEAPON WHILE ENGAGED IN THE COMMISSION OF A CRIME: H.R.S. § 134-51(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession, Use or Threat to Use a Deadly or Dangerous Weapon While Engaged in the Commission of a Crime.

A person commits the offense of Possession, Use or Threat to Use a Deadly or Dangerous Weapon While Engaged in the Commission of a Crime if he/she [knowingly possesses] [intentionally uses] [intentionally threatens to use] a deadly or dangerous weapon while engaged in the commission of a crime.

There are three material elements of the offense of Possession, Use or Threat to Use a Deadly or Dangerous Weapon While Engaged in the Commission of a Crime, 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 [possessed] [used] [threatened to use] [a dirk] [a dagger] [a blackjack] [a slug shot] [a billy] [metal knuckles] [a pistol] [other deadly or dangerous weapons]; and

2. That the Defendant did so while engaged in the commission of (specify crime(s)); and

3. That the Defendant did so [intentionally] [knowingly].

[A person commits the offense of (specify crime(s)*) if he/she . . .

There are (number) material elements of the (specify crime(s)*), each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are: (List elements numerically).]

Notes

H.R.S. §§ 134-51(b), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The court must instruct the jury on the elements of the substantive offense if the Defendant is not otherwise charged with the substantive offense. Where there are multiple uncharged offenses, the jury must be instructed that it must unanimously agree that the State proved at least one of the uncharged offenses in order to convict the Defendant of the offense.

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

*Designated crime may be an inchoate offense.

15.13 POSSESSION, USE OR THREAT TO USE A SWITCHBLADE KNIFE WHILE ENGAGED IN THE COMMISSION OF A CRIME: H.R.S. § 134-52

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Possession, Use or Threat to Use a Switchblade Knife While Engaged in the Commission of a Crime.

A person commits the offense of Possession, Use or Threat to Use a Switchblade Knife While Engaged in the Commission of a Crime if he/she [knowingly possesses] [intentionally uses] [intentionally threatens to use] a switchblade knife while engaged in the commission of a crime.

There are three material elements of the offense of Possession, Use or Threat to Use a Switchblade Knife While Engaged in the Commission of a Crime, 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 [possessed] [used] [threatened to use] a switchblade knife; and

2. That the Defendant did so while engaged in the commission of (specify crime(s)); and

3. That the Defendant did so [intentionally] [knowingly].

"Switchblade knife" is a knife having a blade which opens automatically (1) by hand pressure applied to a button or other device

in the handle of the knife, or (2) by operation of inertia, gravity, or both.

[A person commits the offense of (specify crime) if he/she . . .

There are (number) material elements of the (specify crime), each of which the prosecution must prove beyond a reasonable doubt.

These (number) elements are: (List elements numerically).]

Notes

H.R.S. §§ 134-52, 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The court must instruct the jury on the elements of the substantive offense if the Defendant is not otherwise charged with the substantive offense. Where there are multiple uncharged offenses, the jury must be instructed that it must unanimously agree that the State proved at least one of the uncharged offenses in order to convict the Defendant of the offense.

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

15.14 **EXEMPTIONS:**
H.R.S. § 134-11(a) and (c)

*A. The law with respect to the offense of (specify offense defined by sections 134-6 to 134-9, except section 134-7(f) unless the person listed below is on duty and if those duties require the person to be armed) does not apply:

1. To members of police departments, sheriffs, and law enforcement officers;

2. To members of the armed forces of the State and of the United States and mail carriers while in the performance of their respective duties if those duties require them to be armed;

3. To regularly enrolled members of any organization duly authorized to purchase or receive the weapons from the United States or from the State, provided the members are either at, or going to or from, their places of assembly or target practice;

4. To persons employed by the State, or subdivisions thereof, or the United States while in the performance of their respective duties or while going to and from their respective places of duty if those duties require them to be armed;

5. To aliens employed by the State, or subdivisions thereof, or the United States while in the performance of their respective duties or while going to and from their respective places of duty if those duties require them to be armed;

6. To police officers on official assignment in Hawai`i from any state which by compact permits police officers from Hawai`i while on official assignment in that state to carry firearms without

registration. The governor of the State or the governor's duly authorized representative may enter into compacts with other states to carry out this section.

**B. The law with respect to the offense of (specify offense defined by Sections 134-6, 134-8 or 134-9) does not apply to the possession, transportation, or use, with blank cartridges, of any firearm or explosive solely as props for motion picture film or television program production when duly authorized by the chief of police of the appropriate county and not in violation of federal law.

Notes

H.R.S. § 134-11(a) and (c).

*Exemptions are applicable to H.R.S. §§ 134-6 to 134-9, *see* instructions 15.01 to 15.03, 15.04, and 15.05 to 15.10. Effective April 24, 1996, persons exempt from firearm regulations in chapter 134 are subject to section 134-7(f) (restraining or protective order prohibiting possession or control of a firearm or ammunition) unless that person is on duty and if those duties require the person to be armed.

**Exemptions are applicable to H.R.S. §§ 134-6, 134-8 and 134-9, *see* instructions 15.01 to 15.03, 15.04, 15.08 to 15.10.

15.14A **EXEMPTIONS:**
HRS § 134-11(a)

It is a defense to the charge of (specify offense defined by HRS §§ 134-6 to 134-9, except one defined by § 134-7(f)) that, at the time of the offense, the Defendant was

[a (member of a police department) (sheriff) (law enforcement officer).]

[a (member of the armed forces of (the State) (the United States)) (mail carrier) and was on duty, if those duties required the Defendant to be armed.]

[a regularly enrolled member of an organization duly authorized to purchase or receive weapons from the United States or from the State, provided the Defendant was either at, or going to or from, the organization's place of assembly or target practice.]

[an employee of the State, a subdivision thereof, or the United States, and was on duty or was going to or from the Defendant's place of duty, if those duties required the Defendant to be armed.]

[a police officer on official assignment in Hawai`i from any state which by compact permits police officers from Hawai`i while on official assignment in that state to carry firearms without registration.]

The burden is on the prosecution to prove beyond a reasonable doubt that, at the time of the offense, the Defendant was not

[a (member of a police department) (sheriff) (law enforcement officer).]

[a (member of the armed forces of (the State) (the United States)) (mail carrier) who was on duty, if those duties required the defendant to be armed.]

[a regularly enrolled member of an organization duly authorized to purchase or receive weapons from the United States or from the State, provided the Defendant was either at, or going to or from, the organization's place of assembly or target practice.]

[an employee of the State, a subdivision thereof, or the United States, who was on duty or was going to or from the Defendant's place of duty, if those duties required the Defendant to be armed.]

[a police officer on official assignment in Hawai`i from any state which by compact permits police officers from Hawai`i while on official assignment in that state to carry firearms without registration.]

If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

Notes

HRS § 134-11(a).

15.14B EXEMPTIONS -- FEDERAL AGENCY OFFICIAL EQUIPMENT: HRS § 134-11(b)

It is a defense to the charge of (specify offense defined by HRS §§ 134-2 or 134-3) that, at the time of the offense, the [firearm(s)] [and] [ammunition] [was] [were] part of the official equipment of any federal agency.

The burden is on the prosecution to prove beyond a reasonable doubt that, at the time of the offense, the [firearm(s)] [and] [ammunition] [was] [were] not part of the official equipment of any federal agency. If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

Notes

HRS § 134-11(b).

15.14C EXEMPTIONS -- RESTRAINING ORDER: HRS § 134-11(b)

It is a defense to the charge of (specify offense defined by HRS § 134-7(f) that, at the time of the offense, the Defendant was

[a (member of a police department) (sheriff) (law enforcement officer) and was on duty, if those duties required the Defendant to be armed.]

[a (member of the armed forces of (the State) (the United States)) (mail carrier) and was on duty, if those duties required the Defendant to be armed.]

[a regularly enrolled member of an organization duly authorized to purchase or receive weapons from the United States or from the State, provided the Defendant was either at, or going to or from, the organization's place of assembly or target practice.]

[an employee of the State, a subdivision thereof, or the United States, and was on duty or was going to or from the Defendant's place of duty, if those duties required the Defendant to be armed.]

[a police officer on official assignment in Hawai`i from any state which by compact permits police officers from Hawai`i while on official assignment in that state to carry firearms without registration.]

The burden is on the prosecution to prove beyond a reasonable doubt that, at the time of the offense, the Defendant was not

[a (member of a police department) (sheriff) (law enforcement officer) who was on duty, if those duties required the Defendant to be armed.]

[a member of the armed forces of (the State) (the United States)) (mail carrier) who was on duty, if those duties required the defendant to be armed.]

[a regularly enrolled member of an organization duly authorized to purchase or receive weapons from the United States or from the State, provided the Defendant was either at, or going to or from, the organization's place of assembly or target practice.]

[an employee of the State, a subdivision thereof, or the United States, who was on duty or was going to or from the Defendant's place of duty, if those duties required the Defendant to be armed.]

[a police officer on official assignment in Hawai`i from any state which by compact permits police officers from Hawai`i while on official assignment in that state to carry firearms without registration.]

If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

Notes

HRS § 134-11(b).

15.14D EXEMPTIONS -- MOTION PICTURE FILM OR TELEVISION PROGRAM: HRS § 134-11(c)

It is a defense to the charge of (specify offense defined by HRS §§ 134-6, 134-8, or 134-9) that, at the time of the offense, the Defendant [possessed] [transported] [used] [a firearm with blank cartridges] [an explosive] solely as a prop for a motion picture film or television program with authorization by the police chief of the county in which the offense took place and not in violation of federal law.

The burden is on the prosecution to prove beyond a reasonable doubt that, at the time of the offense, the Defendant did not [possess] [transport] [use] [a firearm with blank cartridges] [an explosive] solely as a prop for a motion picture film or television program with authorization by the police chief of the county in which the offense took place and not in violation of federal law.

If the prosecution fails to meet its burden, then you must find the Defendant not guilty.

Notes

HRS § 134-11©).

TABLE OF INSTRUCTIONS[22]

16. CHAPTER 291 -- TRAFFIC VIOLATIONS

[22]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

16.07 Operating a Vehicle Under the Influence of an Intoxicant or Habitually Operating a Vehicle Under the Influence of an Intoxicant--Inference from .08 Level: H.R.S. § 291E-3 (10/4/04).

16.00 DEFINITION OF TERMS USED IN CHAPTER 16, PATTERN JURY INSTRUCTIONS

"Alcohol" means the product of distillation of any fermented liquid, regardless of whether rectified, whatever may be the origin thereof, and includes ethyl alcohol, lower aliphatic alcohol, and phenol as well as synthetic ethyl alcohol, but not denatured or other alcohol that is considered not potable under the customs laws of the United States.

"Drug" means any controlled substance, as defined and enumerated in schedules I through IV of chapter 329, or its metabolites.

"Impair" means to weaken, to lessen in power, to diminish, to damage, or to make worse by diminishing in some material respect or otherwise affecting in an injurious manner.

"Intoxicant" means alcohol or any drug, as defined in this section.

"Operate" means to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway or to navigate or otherwise use or assume physical control of a vessel underway on or in the waters of the State.

"Under the influence" means that a person:

(1) Is under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

(2) Is under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;

(3) Has .08 or more grams of alcohol per 210 liters of the person's breath; or

(4) Has .08 or more grams of alcohol per 100 milliliters or cubic centimeters of the person's blood.

"Vehicle" includes a:

(1) Motor vehicle;

(2) Moped; and

(3) Vessel.

16.01 INTRODUCTORY INSTRUCTION: TWO ALTERNATIVES OF PROVING OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT

(re alcohol 291E-61(a)(1),(3),(4))

OR

HABITUALLY OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT

(re alcohol 291E-61.5(a)(2)(A),(C),(D))

A. ALTERNATIVES IN TWO COUNTS

The Defendant is charged with the offense of [Operating a Vehicle Under the Influence of an Intoxicant] [Habitually Operating a Vehicle Under the Influence of an Intoxicant]. This offense can be proved by the prosecution in either of two ways. These alternatives have been designated as Count (count number) and Count (count number). Proof of Count (count number), requires a showing that, at the time in question, the Defendant was under the influence of an intoxicant. Proof of Count (count number), requires a showing by chemical or other approved analysis that, at the time in question, the Defendant had .08 or more [grams of alcohol per 100 milliliters or cubic centimeters of blood] [grams of alcohol per 210 liters of breath]. Proof beyond a reasonable doubt of either alternative or both alternatives will result in the Defendant's conviction of only one offense of [Operating a Vehicle Under the Influence of an Intoxicant] [Habitually Operating a Vehicle Under the Influence of an Intoxicant].

B. ALTERNATIVES IN ONE COUNT

The Defendant is charged with the offense of Operating a Vehicle Under the Influence of an Intoxicant] [Habitually Operating a Vehicle Under the Influence of an Intoxicant]. This offense is being charged and can be proved by the prosecution in either of two ways. Proof of the first alternative requires a showing that, at the time in question, the Defendant was under the influence of an intoxicant.

Proof of the second alternative requires a showing by chemical or other approved analysis that, at the time in question, the Defendant had .08 or more [grams of alcohol per 100 milliliters or cubic centimeters of blood] [grams of alcohol per 210 liters of breath].

Proof beyond a reasonable doubt of either alternative or both alternatives will result in the Defendant's conviction of only one offense of Operating a Vehicle Under the Influence of an Intoxicant] [Habitually Operating a Vehicle Under the Influence of an Intoxicant].

Notes

H.R.S. § 291E-61(a)(1),(3),(4).

H.R.S. § 291E-61.5(a)(1)and(2)(A),(C),(D).

Spock v. Admin. Director of the Courts, 96 Hawai'i 190, 193, 29P.3d 380, 383 (2001): "Driving Under the Influence of Intoxicating Liquor (H.R.S. § 291-4 (repealed 2/1/02)) may be proved under either such alternative grounds ('under the influence' or with a 'BAC level of .08 or more'). *State v. Dow*, 72 Haw. 56, 61-64, 806 P.2d 402, 405-06 (1991) (stating that subsections (a)(1) and (a)(2) of H.R.S. § 291-4 presented different methods of proving a single offense." Because Habitually Operating a Vehicle Under the Influence of an Intoxicant, H.R.S. 291E-61.5, similar to Operating a Vehicle Under the Influence of an Intoxicant (formerly "Driving Under the

Influence of Intoxicating Liquor"), contains alternative means under subsections (a)(2)(A), (a)(2)(C), and (a)(2)(D), this instruction would appear to be similarly appropriate.

State v. Lemalu, 72 Haw. 130, 137-38, 809 P.2d 442, 446 (1991). Where defendant is charged in two counts with the two separate methods of proving the offense of Driving Under the Influence of Intoxicating Liquor (H.R.S. § 291-4 (repealed 2/1/02)) (and with no other offenses), the court should not submit the first sentence of Instruction 4.06: Alternative A. The *Lemalu* concept applicable to Operating a Vehicle Under the Influence of an Intoxicant (formerly "Driving Under the Influence of Intoxicating Liquor") would appear similarly to apply to Habitually Operating a Vehicle Under the Influence of an Intoxicant, H.R.S. 291E-61.5, where the two alternative methods are charged in two counts.

16.02 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT–ALCOHOL IMPAIRMENT: H.R.S. § 291E-61(a)(1)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Operating a Vehicle Under the Influence of an Intoxicant.

A person commits the offense of Operating a Vehicle Under the Influence of an Intoxicant if the person operates or assumes actual physical control of a vehicle while under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty.

There are three material elements of the offense of Operating a Vehicle Under the Influence of an Intoxicant, 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 operated or assumed actual physical control of a vehicle; and

2. That Defendant, at that time, was under the influence of alcohol in an amount sufficient to impair Defendant's normal mental faculties or ability to care for Defendant and guard against casualty; and

3. That Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

Notes

H.R.S. §§ 291E-61(a)(1), 702-206(1), (2), and (3).

For definition of states of mind, *see* instructions:
6.02--"intentionally"
6.03--"knowingly"
6.04--"recklessly"

For basis of the applicable state of mind, *see* HRS § 702-204, 702-212 and *State v. Carvalho*, 58 Haw. 314, 568 P.2d 507 (1977). This issue was left open in *State v. Young*, 8 Haw. App. 145, 795 P.2d 285 (1990).

For definitions of terms defined by H.R.S. Chapter 291E, *see* instructions:
16.00--"alcohol"
16.00--"impair"
16.00--"intoxicant"
16.00--"operate"
16.00--"under the influence"
16.00--"vehicle"

16.03 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT--DRUG IMPAIRMENT: H.R.S. § 291E-61(a)(2)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Operating a Vehicle Under the Influence of an Intoxicant.

A person commits the offense of Operating a Vehicle Under the Influence of an Intoxicant if the person operates or assumes actual physical control of a vehicle while under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner.

There are three material elements of the offense of Operating a Vehicle Under the Influence of an Intoxicant, 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 operated or assumed actual physical control of a vehicle; and

2. That Defendant, at that time, was under the influence of any drug that impaired Defendant's ability to operate a vehicle in a careful and prudent manner; and

3. That Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

Notes

H.R.S. §§ 291E-61(a)(2), 702-206(1), (2), and (3).

For definition of state of mind, *see* instructions:
6.02--"intentionally"

6.03--"knowingly"
6.04--"recklessly"

For basis of the applicable state of mind, *see* HRS § 702-204, *State v. Carvalho*, 58 Haw. 314, 568 P.2d 507 (1977).

For definitions of terms defined by H.R.S. Chapter 291E, *see* instructions:

16.00--"drug"
16.00--"impair"
16.00--"intoxicant"
16.00--"operate"
16.00--"under the influence"
16.00--"vehicle"

16.04 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT --.08 BREATH ALCOHOL: H.R.S. § 291E-61(a)(3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Operating a Vehicle Under the Influence of an Intoxicant.

A person commits the offense of Operating a Vehicle Under the Influence of an Intoxicant if the person operates or assumes actual physical control of a vehicle with .08 or more grams of alcohol per 210 liters of breath.

There are two material elements of the offense of Operating a Vehicle Under the Influence of an Intoxicant, 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 operated or assumed actual physical control of a vehicle; and

2. That Defendant, at that time, had .08 or more grams of alcohol per 210 liters of breath.

Notes

H.R.S. § 291E-61(a)(3).

In *State v. Young*, 8 Haw. App. 145, 795 P.2d 285 (1990), the Intermediate Court of Appeals held that the legislative purpose of HRS § 291-4(a)(2), the predecessor to HRS § 291E-61(a)(3), was to "impose absolute liability for such offense or with respect to any element thereof."

Effective June 29, 1995, the statutory threshold for commission of the offense of Driving Under the Influence of Intoxicating

Liquor, the predecessor to Driving Under the Influence of an Intoxicant, was reduced from .10 BAC level to .08 BAC level.

For definitions of terms defined by H.R.S. Chapter 291E, *see* instructions:

16.00--"alcohol"
16.00--"intoxicant"
16.00--"operate"
16.00--"under the influence"
16.00--"vehicle"

For "margin of error," *see* instruction 16.06

For "inference from .08 level," *see* instruction 16.07

16.05 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT --.08 BLOOD ALCOHOL: H.R.S. § 291E-61(a)(4)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Operating a Vehicle Under the Influence of an Intoxicant.

A person commits the offense of Operating a Vehicle Under the Influence of an Intoxicant if the person operates or assumes actual physical control of a vehicle with .08 or more grams of alcohol per 100 milliliters or cubic centimeters of blood.

There are two material elements of the offense of Operating a Vehicle Under the Influence of an Intoxicant, 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 operated or assumed actual physical control of a vehicle; and

2. That Defendant, at that time, had .08 or more grams of alcohol per 100 milliliters or cubic centimeters of blood.

Notes

H.R.S. § 291E-61(a)(4).

In *State v. Young*, 8 Haw. App. 145, 795 P.2d 285 (1990), the Intermediate Court of Appeals held that the legislative purpose of HRS § 291-4(a)(2), the predecessor to HRS § 291E-61(a)(4), was to "impose absolute liability for such offense or with respect to any element thereof."

Effective June 29, 1995, the statutory threshold for commission of the offense of Driving Under the Influence of Intoxicating Liquor, the predecessor to Driving Under the Influence of an Intoxicant, was reduced from .10 BAC level to .08 BAC level.

For definitions of terms defined by H.R.S. Chapter 291E, *see* instructions:

16.00--"alcohol"
16.00--"intoxicant"
16.00--"operate"
16.00--"under the influence"
16.00--"vehicle"

For "margin of error," *see* instruction 16.06

For "inference from .08 level," *see* instruction 16.07

16.06 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT OR HABITUALLY OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT-

MARGIN OF ERROR

If you find there is a tolerance for error in the alcohol test conducted upon the Defendant, then, in order to find the Defendant guilty under [Count (count number) of the Indictment/Complaint] [the second alternative of Count (count number) of the Indictment/Complaint], the prosecution must prove beyond a reasonable doubt that the results of the [breath] [blood] test conducted upon the Defendant reduced by its tolerance for error, equaled or exceeded .08 or more grams of alcohol [per 100 milliliters or cubic centimeters of blood] [per 210 liters of breath].

Notes

State v. Boehmer, 1 Haw. App. 44, 613 P.2d 916 (1980) (stipulation that a particular intoxilyzer had a tolerance of 0.165).

Effective June 29, 1995, the statutory threshold for commission of the offense of Driving Under the Influence of Intoxicating Liquor, the predecessor to Driving Under the Influence of an Intoxicant, was reduced from .10 BAC level to .08 BAC level.

16.07 OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT OR HABITUALLY OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT--

INFERENCE FROM .08 LEVEL: H.R.S. § 291E-3

In [Count (count number) of the Indictment/Complaint,] if you find beyond a reasonable doubt that the Defendant, (defendant's name), had [.08 or more grams of alcohol per 100 milliliters or cubic centimeters of blood] [.08 or more grams of alcohol per 210 liters of breath] [the presence of one or more drugs in an amount sufficient to impair his/her ability to operate a vehicle in a careful and prudent manner] within three hours after the time of the alleged violation as shown by chemical analysis or other approved analytical techniques of the defendant's blood or breath, you may, but are not required to, infer that the Defendant was under the influence of intoxicating liquor at the time the Defendant operated or assumed actual physical control of a vehicle. If you do so infer, you must nevertheless consider all the evidence in the case in determining whether the State has proven beyond a reasonable doubt that the Defendant had [.08 or more grams of alcohol per 100 millimeters or cubic centimeters of blood] [.08 or more grams of alcohol per 210 liters of breath] [the presence of one or more drugs in an amount sufficient to impair his/her ability to operate a vehicle in a careful and prudent manner] at the time Defendant operated or assumed actual physical control of a vehicle.

Notes

H.R.S. § 291E-3.

State v. Tiedemann, 7 Haw. App. 631, 790 P.2d 340 (1990); H.R.E. 306(a)(3); *State v. Mitchell*, 88 Hawai'i 216, 965 Hawai'i 149 (App. 1997); *State v. Tabigne*, 88 Hawai'i 296, 966 P.2d 608 (1998).

Effective June 29, 1995, the statutory threshold for commission of the offense of Driving Under the Influence of Intoxicating Liquor, the predecessor to Driving Under the Influence of an Intoxicant, was reduced from .10 BAC level to .08 BAC level.

TABLE OF INSTRUCTIONS[23]

17. CHAPTER 329 -- UNIFORM CONTROLLED SUBSTANCES ACT

[23]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

17.01 UNLAWFUL USE OF OR POSSESSION WITH INTENT TO USE DRUG PARAPHERNALIA: H.R.S. §329-43.5(a)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unlawful [Use of] [Possession with Intent to Use] Drug Paraphernalia.

A person commits the offense of Unlawful [Use of] [Possession with Intent to Use] Drug Paraphernalia if he/she [uses an object with the intent] [possesses an object with the intent to use it] to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] [introduce into the human body] a controlled substance.

There are two material elements of the offense of Unlawful [Use of] [Possession with Intent to Use] Drug Paraphernalia, 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 [used an object with the intent] [possessed an object with the intent to use it] to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] [introduce into the human body] a controlled substance; and

2. That the object was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind which are used, primarily intended for use, or primarily designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. It includes, but is not limited to:

[Kits used, primarily intended for use, or primarily designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a prohibited controlled substance can be derived;

Kits used, primarily intended for use, or primarily designed for use in manufacturing, compounding, converting, producing, processing, or preparing prohibited controlled substances;

Isomerization devices used, primarily intended for use, or primarily designed for use in increasing the potency of any species of plant which is a prohibited controlled substance;

Testing equipment used, primarily intended for use, or primarily designed for use in identifying, or in analyzing the strength, effectiveness, or purity of prohibited controlled substances;

Scales and balances used, primarily intended for use, or primarily designed for use in weighing or measuring prohibited controlled substances;

Diluents and adulterants; such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, primarily intended for use, or primarily designed for use in cutting prohibited controlled substances;

Separation gins and sifters used, primarily intended for use, or primarily designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, prohibited marijuana;

Blenders, bowls containers, spoons, and mixing devices used, primarily intended for use, or primarily designed for use in compounding prohibited controlled substances;

Capsules, balloons, envelopes, and other containers used, primarily intended for use, or primarily designed for use in packaging small quantities of prohibited controlled substances;

Containers and other objects used, primarily intended for use, or primarily designed for use in storing or concealing prohibited controlled substances;

Hypodermic syringes, needles, and other objects used, primarily intended for use, or primarily designed for use in parenterally injecting prohibited controlled substances into the human body;

Objects used, primarily intended for use, or primarily designed for use in ingesting, inhaling, or otherwise introducing prohibited marijuana, cocaine, hashish, hashish oil, or methamphetamine into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(B) Water pipes;
(C) Carburetion tubes and devices;
(D) Smoking and carburetion masks;
(E) Roach clips: meaning objects used to hold burning materials, such as marijuana cigarettes, that have become too small or too short to be held in the hand;
(F) Miniature cocaine spoons, and cocaine vials;
(G) Chamber pipes;
(H) Carburetor pipes;
(I) Electric pipes;
(J) Air-driven pipes;
(K) Chillums;
(L) Bongs; and
(M) Ice pipes or chillers.]

In determining whether an object is drug paraphernalia, you should consider, in

addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;
(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
(3) The proximity of the object, in time and space, to a direct violation of any state law relating to any controlled substance;
(4) The proximity of the object to controlled substances;
(5) The existence of any residue of controlled substances on the object;
(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom the owner or person in control knows, or should reasonably know, intends to use the object to introduce into the human body a controlled substance; the innocence of an owner, or of anyone in control of the object, as to any state law relating to any controlled substance shall not prevent a finding that the object is intended for use or designed for use as drug paraphernalia;
(7) Instructions, oral or written, provided with the object concerning its use;
(8) Descriptive materials accompanying the object which explain or depict its use;
(9) National and local advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(12) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;
(13) The existence and scope of legitimate uses for the object in the community; and
(14) Expert testimony concerning its use.

In order for the object to be drug paraphernalia, the prosecution must prove that the defendant intended that the object be used with a controlled substance. Although the prosecution need not demonstrate the presence of any of the 14 factors to prove the defendant's intent, the presence or absence of any of the specific factors along with all other logically relevant factors may be used

to infer the defendant's intent or the lack of such intent. Without the defendant's intent to use the object with a controlled substance, none of the specific examples or factors listed above can transform the object into drug paraphernalia.

Notes

H.R.S. §§ 329-1, 329-43.5(a), 702-206(1). *State v. Sun Na Lee*, 75 Haw. 80, 856 P.2d 1246 (1993).

For definition of states of mind, *see* instruction:

6.02–"intentionally"

For definition of "possession," *see* instruction 6.06.

17.02 UNLAWFUL DELIVERY OR MANUFACTURE OF DRUG PARAPHERNALIA: H.R.S. § 329-43.5(b)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Unlawful [Delivery] [Manufacture] of Drug Paraphernalia.

A person commits the offense of Unlawful [Delivery] [Manufacture] of Drug Paraphernalia if he/she [delivers] [possesses with intent to deliver] [manufactures with intent to deliver] an object with the intent that it would be used to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] [introduce into the human body] a controlled substance, knowingly, or under circumstances where one reasonably should know, that the object would be used as drug paraphernalia.

There are two material elements of the offense of Unlawful Delivery of Drug Paraphernalia, 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 [delivered] [possessed with intent to deliver] [manufactured with intent to deliver] (name or description of object(s)) with the intent that the object would be used to [plant] [propagate] [cultivate] [grow] [harvest]

[manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] [introduce into the human body] a controlled substance; and

2. That the Defendant did so knowing, or under circumstances where one reasonably should know, that the (name or description of object(s)) would be used as drug paraphernalia.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer or sale from one person to another of a controlled substance or drug paraphernalia, whether or not there is an agency relationship.

"Drug paraphernalia" means all equipment, products, and materials of any kind which are used, primarily intended for use, or primarily designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. It includes, but is not limited to:

[Kits used, primarily intended for use, or primarily designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a prohibited controlled substance can be derived;

Kits used, primarily intended for use, or primarily designed for use in manufacturing, compounding, converting, producing, processing, or preparing prohibited controlled substances;

Isomerization devices used, primarily intended for use, or primarily designed for use in increasing the potency of any species of plant which is a prohibited controlled substance;

Testing equipment used, primarily intended for use, or primarily designed for use in identifying, or in analyzing the strength, effectiveness, or purity of prohibited controlled substances;

Scales and balances used, primarily intended for use, or primarily designed for use in weighing or measuring prohibited controlled substances;

Diluents and adulterants; such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, primarily intended for use, or primarily designed for use in cutting prohibited controlled substances;

Separation gins and sifters used, primarily intended for use, or primarily designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, prohibited marijuana;

Blenders, bowls containers, spoons, and mixing devices used, primarily intended for use, or primarily designed for use in compounding prohibited controlled substances;

Capsules, balloons, envelopes, and other containers used, primarily intended for use, or primarily designed for use in packaging small quantities of prohibited controlled substances;

Containers and other objects used, primarily intended for use, or primarily designed for use in storing or concealing prohibited controlled substances;

Hypodermic syringes, needles, and other objects used, primarily intended for use, or primarily designed for use in parenterally injecting prohibited controlled substances into the human body;

Objects used, primarily intended for use, or primarily designed for use in ingesting, inhaling, or otherwise introducing prohibited marijuana, cocaine, hashish, hashish oil, or methamphetamine into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(B) Water pipes;
(C) Carburetion tubes and devices;
(D) Smoking and carburetion masks;

(E) Roach clips: meaning objects used to hold burning materials, such as marijuana cigarettes, that have become too small or too short to be held in the hand;
(F) Miniature cocaine spoons, and cocaine vials;
(G) Chamber pipes;
(H) Carburetor pipes;
(I) Electric pipes;
(J) Air-driven pipes;
(K) Chillums;
(L) Bongs; and
(M) Ice pipes or chillers.]

In determining whether an object is drug paraphernalia, you should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;
(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
(3) The proximity of the object, in time and space, to a direct violation of any state law relating to any controlled substance;
(4) The proximity of the object to controlled substances;
(5) The existence of any residue of controlled substances on the object;
(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom the owner or person in control knows, or should reasonably know, intends to use the object to introduce into the human body a controlled substance; the innocence of an owner, or of anyone in control of the object, as to any state law relating to any controlled substance shall not prevent a finding that the object is intended for use or designed for use as drug paraphernalia;
(7) Instructions, oral or written, provided with the object concerning its use;
(8) Descriptive materials accompanying the object which explain or depict its use;
(9) National and local advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;
(13) The existence and scope of legitimate uses for the object in the community; and
(14) Expert testimony concerning its use.

In order for the object to be drug paraphernalia, the prosecution must prove that the defendant intended that the object be used with a controlled substance. Although the prosecution need not demonstrate the presence of any of the 14 factors to prove the defendant's intent, the presence or absence of any of the specific factors along with all other logically relevant factors may be used to infer the defendant's intent or the lack of such intent. Without the defendant's intent to use the object with a controlled substance, none of the specific examples or factors listed above can transform the object into drug paraphernalia.

Notes

H.R.S. §§ 329-1, 329-43.5(b), 702-206(1) and (2). *State v. Sun Na Lee*, 75 Haw. 80, 856 P.2d 1246 (1993).

For definition of states of mind, *see* instructions:

6.02–"intentionally"

6.03–"knowingly"

For definition of "possession," *see* instruction 6.06.

17.03 FRAUDULENT OBTAINING OF A CONTROLLED SUBSTANCE: H.R.S. § 329-42(a)(3)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Fraudulent Obtaining of a Controlled Substance.

A person commits the offense of Fraudulent Obtaining of a Controlled Substance if he/she intentionally or knowingly [obtains or attempts to obtain][procures or attempts to procure the administration of] (specify controlled substance) by [fraud][deceit][misrepresentation][embezzlement][theft][the forgery or alteration of a prescription or of any written order][furnishing fraudulent medical information or the concealment of a material fact][the use of a false name, patient identification number, or the giving of false address].

There are two material elements of the offense of Fraudulent Obtaining of a Controlled Substance 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 [obtained or attempted to obtain][procured or attempted to procure the administration of] (specify controlled substance) by [fraud] [deceit] [misrepresentation][embezzlement][theft][the forgery or alteration of a prescription or of any written order][furnishing fraudulent medical information or the concealment of a material fact][the use

of a false name, patient identification number, or giving of false address]; and

2. That the Defendant did so intentionally or knowingly.

“Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(1) A practitioner (or, in the practitioner's presence or at the practitioner's direction, by a licensed or registered health care professional acting as the practitioner's authorized agent), or

(2) The patient or research subject at the direction or in the presence of the practitioner.

"Identification number" means, with respect to a patient:

(1) The unique, valid driver's license number of the patient, followed by the two-digit United States Postal Service code for the state issuing the driver's license or, if the patient is a foreign patient, the patient's passport number. If the patient does not have a driver's license, the "identification number" means the patient's social security number, followed by the patient's state of residency code. If the patient is less than eighteen years old and has no such identification, the identification number means the unique number

contained on the valid driver's license of the patient's parent or guardian; or

(2) If the controlled substance is obtained for an animal, the unique number described in paragraph (1) of the animal's owner.

“Prescription” means an order or formula issued by a licensed practitioner of medicine, osteopathy, podiatry, dentistry, or veterinary medicine for the compounding or dispensing of drugs.

Notes

H.R.S. §§ 329-42(a)(3), 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

For definition of “attempt” *see* instructions:
14.01- Attempt-Purpose to Culminate in Commission of Offense
14.04- Attempt-Substantial Step Particular Result is Element of Crime

"Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of part II of H.R.S. Chapter 329.

17.04 PROHIBITED ACTS RELATED TO VISITS TO MORE THAN ONE PRACTITIONER TO OBTAIN CONTROLLED SUBSTANCE PRESCRIPTIONS: H.R.S. § 329-46

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Prohibited Acts Related To Visits To More Than One Practitioner To Obtain Controlled Substance Prescriptions.

A person commits the offense of Prohibited Acts Related To Visits To More Than One Practitioner To Obtain Controlled Substance Prescriptions if he/she visits more than one practitioner and intentionally or knowingly withholds information regarding previous practitioner visits for the purpose of obtaining (specify controlled substance(s)) prescriptions for quantities that exceed what any single practitioner would have [prescribed] [dispensed] for the time period and legitimate medical purpose represented.

There are three material elements of the offense of Prohibited Acts Related To Visits To More Than One Practitioner To Obtain Controlled Substance Prescriptions, 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 visited more than one practitioner;

2. That the Defendant intentionally or knowingly withheld information regarding previous practitioner visits; and

3. That the Defendant did so for the purpose of obtaining (specify controlled substance(s)) prescriptions for quantities that exceeded what any single practitioner would have

[prescribed] [dispensed] for the time period and legitimate medical purposes represented.

Notes

H.R.S. §§ 329-46, 702-206(1) and (2).

For definition of states of mind, *see* instructions:
6.02 - "intentionally"
6.03 - "knowingly"

The state of mind requirement may be deleted from element one of the instruction by agreement of the parties.

17.04A PROHIBITED ACTS RELATED TO VISITS TO MORE THAN ONE PRACTITIONER TO OBTAIN CONTROLLED SUBSTANCE PRESCRIPTIONS: H.R.S. § 329-46

If you find that the prosecution has proven the offense of Prohibited Acts Related To Visits To More Than One Practitioner To Obtain Controlled Substance Prescriptions beyond a reasonable doubt, then you must answer the question(s) asked in Special Interrogatory No. _____. Your answer to each question must be unanimous and is to be indicated by answering "Yes" or “No” on the special interrogatory form that will be provided to you.

Notes

H.R.S. § 329-46.

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).

[Note: Instruction 17.04B, **PROHIBITED ACTS RELATED TO VISITS TO MORE THAN ONE PRACTITIONER TO OBTAIN CONTROLLED SUBSTANCE PRESCRIPTIONS: H.R.S. § 329-46** ***is not included in this set.]***

17.04C PROHIBITED ACTS RELATED TO VISITS TO MORE THAN ONE PRACTITIONER TO OBTAIN CONTROLLED SUBSTANCE PRESCRIPTIONS SPECIAL INTERROGATORY: H.R.S. § 329-46

Answer the questions listed below in the order that they are asked. Your answer to a question must be unanimous. If your answer is "Yes," please stop and do not answer any of the remaining questions; if your answer is "No," please answer the next question.

1. Did the prosecution prove beyond a reasonable doubt that the (specify controlled substance(s)) prescriptions that Defendant intentionally or knowingly obtained were for 100 or more [capsules] [tablets] [dosage units] in excess of what any single practitioner would have [prescribed] [dispensed] for the time period and legitimate medical purpose represented?

Yes _____ No _____

2. Did the prosecution prove beyond a reasonable doubt that the (specify controlled substance(s)) prescriptions that Defendant intentionally or knowingly obtained were for 50 or more [capsules] [tablets] [dosage units] in excess of what any single practitioner would have [prescribed] [dispensed] for the time period and legitimate medical purpose represented?

Yes _____ No _____

3. Did the prosecution prove beyond a reasonable doubt that the (specify controlled substance(s)) prescriptions that Defendant

intentionally or knowingly obtained were for 25 or more [capsules] [tablets] [dosage units] in excess of what any single practitioner would have [prescribed] [dispensed] for the time period and legitimate medical purpose represented?

Yes _____ No _____

Notes

H.R.S. §§ 329-46, 712-1244 to 712-246. This instruction should be given as appropriate.

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).

TABLE OF INSTRUCTIONS[24]

18. CHAPTER 708 PART IX -- COMPUTER CRIME

[24]The original instructions approved and published in Volume I in December 1991 are not dated. New or amended instructions in Volumes I and II reflect the Supreme Court's approval date in parentheses.

18.00 DEFINITION OF TERMS USED IN CHAPTER 18

COMPUTER CRIMES - STANDARD JURY INSTRUCTIONS

"Access" means to gain entry to, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

"Computer" means any electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes all computer equipment connected or related to such a device in a computer system or computer network, but shall not include an automated typewriter or typesetter, a portable handheld calculator, or other similar device.

"Computer network" means two or more computers or computer systems, interconnected by communication lines, including microwave, electronic, or any other form of communication.

"Computer program" or "software" means set of computer-readable instructions or statements and related data that, when executed by a computer system, causes the computer system or the computer network to which it is connected to perform computer services.

"Computer services" includes but is not limited to the use of a computer system, computer network, computer program, data prepared

for computer use, and date contained within a computer system or computer network.

“Computer system” means a set of interconnected computer equipment intended to operate as a cohesive system.

“Damage” means any impairment to the integrity or availability of data, a program, a system, a network, or computer services.

“Data” means information, facts, concept, software, or instructions prepared for use in a computer, computer system, or computer network.

“Intent to defraud” means (1) an intent to use deception to injure another’s interest which has value; (2) knowledge by the defendant that the defendant is facilitating an injury to another’s interest which has value.

“Obtain information” includes but is not limited to mere observation of the data.

“Property” includes financial instruments, data, computer software, computer programs, documents associated with computer systems, money, computer services, or anything else of value.

"Rule of court" means any rule adopted by the Supreme Court of this State, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"Statute" means any statute of this State or the federal government.

"Without authorization" means without the permission of or in excess of the permission of, an owner, lessor, or rightful user or someone licenses or privileged by an owner, lessor, or rightful user to grant the permission.

18.01 COMPUTER FRAUD IN THE FIRST DEGREE:

H.R.S. 708-891

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Fraud in the First Degree.

A person commits the offense of Computer Fraud in the First Degree if he/she knowingly, and with intent to defraud, accesses a computer without authorization and, by means of such conduct, obtains or exerts control over the property of another.

There are two material elements of the offense of Computer Fraud 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, knowingly and with intent to defraud, accessed a computer without authorization; and 2. That the Defendant by means of such conduct, knowingly and with intent to defraud, obtained or exerted control over the property of another.

Notes

For definition of states of mind, *see* instructions:

6.03 - "knowingly"

18.00 - "intent to defraud"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

Note that the first element of this instruction follows the language of the statute.

18.02 DEFENSE TO COMPUTER FRAUD IN THE FIRST DEGREE: H.R.S. 708-891(2)

It is a defense to the charge of Computer Fraud in the First Degree that the object of the fraud and the property obtained consists only of the use of the computer and the value of such use is not more than $300 in any one-year period.

The burden is on the prosecution to prove beyond a reasonable doubt that [the object of the fraud consisted of more than the use of the computer] [the object of the fraud consisted of the use of the computer and the value of such use was more than $300 in a one-year period].

Commentary

When an exception, if proved, would negate a defendant's penal liability, it constitutes a defense. *State v. Nobriga*, 10 Haw. App. 353, 873 P.2d 110 (1994). The State has the initial burden of negativing statutory exceptions to an offense only if the exceptions are incorporated into the definition of the offense, otherwise, the defendant has the initial burden of bringing himself clearly within the exception by presenting facts constituting the defense. Only if the defendant has fulfilled his burden would any obligation arise on the State's part to disprove the defense beyond a reasonable doubt. *Id.*

18.03A COMPUTER FRAUD IN THE SECOND DEGREE

(Transfer or Disposal)

H.R.S. 708-891.5

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Fraud in the Second Degree.

A person commits the offense of Computer Fraud in the Second Degree if he/she knowingly, and with the intent to defraud, transfers, or otherwise disposes of, to another, any password or similar information through which a computer, computer system, or computer network may be accessed.

There is one material element of the offense of Computer Fraud in the Second Degree, which the prosecution must prove beyond a reasonable doubt.

That element is:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant, knowingly and with intent to defraud, transferred or otherwise disposed of, to another, any password or similar information through which a computer, computer system, or computer network may be accessed.

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

18.00 – "intent to defraud"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.03B COMPUTER FRAUD IN THE SECOND DEGREE

(Obtaining Control)

H.R.S. 708-891.5

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Fraud in the Second Degree.

A person commits the offense of Computer Fraud in the Second Degree if he/she knowingly, and with the intent to defraud, obtains control of, with the intent to transfer or dispose of, any password or similar information through which a computer, computer system, or computer network may be accessed.

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

These elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant, knowingly and with intent to defraud, obtained control of a password or similar information through which a computer, computer system, or computer network may be accessed, and

2. That the Defendant, knowingly and with intent to defraud, obtained control of the password or similar information with the specific intent to transfer or dispose of the password or similar information.

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

18.00 – "intent to defraud"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.04 COMPUTER DAMAGE IN THE FIRST DEGREE - TRANSMISSION: H.R.S. 708-892(1)(a)

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Damage in the First Degree.

A person commits the offense of Computer Damage in the First Degree if he/she knowingly causes the transmission of a program, information, code, or command, and thereby knowingly causes unauthorized damage to a computer, computer system, or computer network, and was aware such damage would [result in a loss to one or more individuals aggregating at least $5,000 in value, including the costs associated with diagnosis, repair, replacement, or remediation, during a one-year period] [result in the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [result in physical injury to any person] [threaten public health or safety] [impair the administration of justice].

There are three material elements of the offense of Computer Damage 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 knowingly caused the transmission of a program, information, code, or command; and

2. That by doing so, the defendant knowingly caused unauthorized damage to a computer, computer system, or computer network; and

3. That the Defendant was aware the damage would [result in a loss to one or more individuals aggregating at least $5,000 in value, including the costs associated with diagnosis, repair, replacement, or remediation, during a one-year period] [result in the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [result in physical injury to any person] [threaten public health or safety] [impair the administration of justice].

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.05 COMPUTER DAMAGE IN THE FIRST DEGREE - ACCESS: H.R.S. 708-892(1)(b)

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Damage in the First Degree.

A person commits the offense of Computer Damage in the First Degree if he/she intentionally accesses a computer, computer system, or computer network without authorization and thereby knowingly causes damage, which would [result in a loss to one or more individuals aggregating at least $5,000 in value, including the costs associated with diagnosis, repair, replacement, or remediation, during a one-year period] [result in the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [result in physical injury to any person] [threaten public health or safety] [impair the administration of justice].

There are four material elements of the offense of Computer Damage in the First Degree, 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 accessed a computer, computer system, or computer network; and

2. That the Defendant intentionally did so without authorization; and

3. That by doing so, the Defendant knowingly caused damage; and

4. That the Defendant was aware that damage would [result in a loss to one or more individuals aggregating at least $5,000 in value, including the costs associated with diagnosis, repair, replacement, or remediation, during a one-year period] [result in the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [result in physical injury to any person] [threaten public health or safety] [impair the administration of justice].

Notes

For definition of states of mind, *see* instructions:

6.02 – "intentionally"

6.03 – "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.06 COMPUTER DAMAGE IN THE SECOND DEGREE:

H.R.S. § 708-892.5

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Computer Damage in the Second Degree.

A person commits the offense of Computer Damage in the Second Degree if he/she knowingly accesses a computer, computer system, or computer network without authorization and thereby recklessly causes damage.

There are three material elements of the offense of Computer Damage 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 knowingly accessed a computer, computer system, or computer network; and

2. That the Defendant knowingly did so without authorization; and

3. That by doing so, the Defendant recklessly caused damage.

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

6.04 – "recklessly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.07 USE OF A COMPUTER IN THE COMMISSION OF A SEPARATE CRIME: H.R.S. § 708-893

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Use of a Computer In the Commission of a Separate Crime.

A person commits the offense of Use of a Computer In the Commission of a Separate Crime if he/she knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, or procure the victim or intended victim of [custodial interference in the first degree] [custodial interference in the second degree] [sexual assault in the second degree] [sexual assault in the third degree] [sexual assault in the fourth degree] [promoting child abuse in the second degree] [promotion pornography for minors].

There are two material elements of the offense of Use of a Computer In the Commission of a Separate Crime, 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 knowingly used a computer; and

2. That the Defendant did so knowingly to identify, select, solicit, persuade, coerce, entice, induce, or procure the victim or intended victim of [custodial interference in the first degree] [custodial interference in the second degree] [sexual assault in the second degree] [sexual assault in the third degree] [sexual assault

in the fourth degree] [promoting child abuse in the second degree] [promotion pornography for minors].*

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

*The court should instruct as to the elements of the included offense, unless such offense is otherwise charged.

18.08 UNAUTHORIZED COMPUTER ACCESS IN THE FIRST DEGREE: H.R.S. 708-895.5

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Unauthorized Computer Access in the First Degree.

A person commits the offense of Unauthorized Computer Access in the First Degree if he/she knowingly accesses a computer, computer system, or computer network without authorization and thereby obtains information, and [did so for the purpose of commercial or private financial gain] [did so in furtherance of any other crime*] [the value of the information obtained exceeds $5,000] [the information has been determined by statute or rule of court to require protection against unauthorized disclosure].

There are four material elements of the offense of Unauthorized Computer Access in the First Degree, 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 knowingly accessed a computer, computer system, or computer network; and

2. That the Defendant knowingly did so without authorization; and

3. That the Defendant thereby knowingly obtained information; and

4. [That the Defendant did so knowingly for the purpose of commercial or private financial gain] [That the Defendant did so

knowingly in furtherance of any other crime*] [That the Defendant was aware the value of the information obtained exceeded $5,000] [That the Defendant was aware that the information had been determined by statute or rule of court to require protection against unauthorized disclosure].

Notes

For definition of states of mind, *see* instructions:

6.03 – "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

*The court should instruct as to the elements of the included offense, unless such offense is otherwise charged.

18.09 UNAUTHORIZED COMPUTER ACCESS IN THE SECOND DEGREE: H.R.S. 708-895.6

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Unauthorized Computer Access in the Second Degree.

A person commits the offense of Unauthorized Computer Access in the Second Degree if he/she knowingly accesses a computer, computer system, or computer network without authorization and thereby obtains information.

There are three material elements of the offense of Unauthorized Computer Access 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 knowingly accessed a computer, computer system, or computer network; and

2. That the Defendant knowingly did so without authorization; and

3. That the Defendant thereby knowingly obtained information.

Notes

For definition of states of mind, *see* instructions:

6.03 - "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.

18.10 UNAUTHORIZED COMPUTER ACCESS IN THE THIRD DEGREE: H.R.S. 708-895.7

[In Count (count number) of the Indictment, the] [The] Defendant, (defendant's name) is charged with the offense of Unauthorized Computer Access in the Third Degree.

A person commits the offense of Unauthorized Computer Access in the Third Degree if he/she knowingly accesses a computer, computer system, or computer network without authorization.

There are two material elements of the offense of Unauthorized Computer Access in the Third 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 knowingly accessed a computer, computer system, or computer network; and

2. That the Defendant knowingly did so without authorization.

Notes

For definition of states of mind, *see* instructions:

6.03 - "knowingly"

For a definition of terms defined by H.R.S. Chapter 708 Part IX, *see* instruction 18.00.