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Supreme Court  
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10-FEB-2012  
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SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

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ORDER APPROVING PUBLICATION AND DISTRIBUTION  
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL  
(By: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.)

Upon consideration of the request of the Standing Committee on Pattern Criminal Jury Instructions to publish and distribute the (1) addition of Criminal Instructions 3.17 and 3.18, and (2) revision of Criminal Instructions 1.01, 3.15, and 11.06 of the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED, that the request is granted and the attached criminal jury instructions 1.01, 3.15, 3.17, 3.18, and 11.06 are approved for publication and distribution.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered

by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, February 10, 2012.

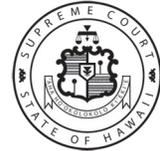
/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna



## 1.01. Preliminary Instructions to the Jury

(To be given after clerk administers oath to jury)

Members of the jury, now that you have been selected as jurors in this case, the court will give you some preliminary instructions about this trial so that you may have a better understanding of how this trial will be conducted and your responsibilities as jurors.

It will be helpful to understand the order in which a criminal trial proceeds. First, each lawyer will have an opportunity to give you an opening statement. The defense may decide not to give an opening statement, or it may give its opening statement either before or after the prosecution presents its case. An opening statement is not evidence. Its only purpose is to give you an overview of what the lawyers expect the evidence will show.

Next, the prosecution will present its evidence. Evidence usually includes the sworn testimony of witnesses and exhibits, such as photographs or documents. After the prosecution presents its evidence, the defense may choose to present evidence but is not required to do so. If the defense presents evidence, the prosecution may then present rebuttal evidence.

After all the evidence has been presented, I will instruct you on the law you must apply in this case.

The lawyers will then make their final arguments in which they talk about what facts have been or have not been proven by the evidence. Closing arguments are not evidence. The prosecution makes its closing argument first. The defense may then give a closing argument, and the prosecutor may give a rebuttal argument.

After closing arguments, you will go to the jury room to begin your deliberations.

As the judge in this case, I have three main duties: (1) I will make sure that the court proceedings are kept orderly; (2) I will determine what evidence may be received during this trial; and (3) I will instruct you on the law that you must apply in this case.

You will be the judges of the facts. You will decide what facts have been proven by the evidence. A very important part of your job will be deciding whether a witness is truthful, whether the witness' testimony is accurate, and how much weight or importance to give to the testimony.

Let me explain to you what is and is not evidence. The evidence in this case will come from the sworn testimony of witnesses and any exhibits received into evidence. A question asked by a lawyer is not evidence. Objections made by a lawyer are not evidence. Questions asked and responses of jurors given during voir dire are not

evidence. Opening statements and closing arguments of lawyers are not evidence. In addition, testimony I have excluded or stricken is not evidence.

During the course of this trial you may hear the lawyers make objections. It is a lawyer's duty to object when he or she believes it is appropriate or necessary. Objections help the court to keep out matters that are not relevant to the issues in this trial.

I will rule on objections according to the law. When I rule on objections or motions do not be concerned with the reasons for my rulings.

If I sustain an objection to a question and do not allow it to be answered, you must not speculate about what the answer might have been, nor draw any conclusion from the question itself. An unanswered question is not evidence.

At times you may be excused from the courtroom so that the lawyers can discuss legal matters with me. Under the law, some matters must be heard outside of your presence. At other times, the lawyers may approach me at the bench and hold a whispered discussion about legal matters. This is called a bench conference. Please do not be offended by our whispering and do not guess or speculate about the reasons for having the bench conference.

During this trial, you must not discuss this case with anyone, not even your friends, co-workers, family or household members. Do not allow anyone to discuss this case with you. If anyone asks you about this case, tell that person that you cannot discuss it. Do not talk to the defendant(s), the lawyers, the witnesses or anyone else connected with this case.

You must not discuss this case, even among yourselves, until I instruct you to begin your deliberations. During your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not investigate the case in any way. This means that you must not visit any places mentioned during this trial, conduct experiments, consult any dictionaries, encyclopedias, web sites or other reference materials.

Also, do not read, listen to, or watch anything about this case from any source, such as a television or radio broadcast, newspaper article or internet transmission. Your decision must be based only on the evidence you receive in this courtroom and the court's instructions on the law.

If you receive any information about this case from any source outside of this trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any other juror, you must immediately tell the bailiff.

Keep an open mind throughout this trial. Do not make up your mind about the verdict or about any issue until after you have discussed the case with the other jurors during deliberations. Do not conclude from my rulings or from anything that I say or do during this trial that I favor one side over the other. Do not let bias, sympathy, prejudice, or public opinion influence you during this trial.

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### 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. The defendant has a constitutional right [and a legal duty] to be present throughout the trial and while other witnesses testify. You must not draw any unfavorable inference regarding the credibility of the defendant's testimony on the basis that he/she was present during the trial.

#### 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 pattern instruction No. 3.09 (“you may consider ... the witness's interest, if any, in the result of this case”). See also *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116, 1119 (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”).

#### Notes

*State v. Walsh*, 125 Hawai'i 271, 260 P.3d 360 (2011), (“the jury should be instructed that a defendant has a constitutional right to be present throughout trial and while other witnesses are testifying, and that the jury must not draw any unfavorable inference regarding the credibility of the defendant's testimony simply on the basis of the defendant's presence at trial); and citing *Portuondo v. Agard*, 529 U.S. 61 (2000), “instructions that explain the necessity, and the justifications, for the defendant's attendance at trial” should be given whenever the defendant testifies to inform the jury that the defendant had a right and legal duty to be present at trial, *id.* at 76 (Stevens, J. concurring, joined by Breyer, J).

The bracketed language should not be given if the defendant is absent during any portion of the trial.

### 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. The defendant has a constitutional right [and a legal duty] to be present throughout the trial and while other witnesses testify. You must not draw any unfavorable inference regarding the credibility of the defendant's testimony on the basis that he/she was present during the trial.

#### Commentary

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The bracketed language should not be given if the defendant is absent during any portion of the trial.

### **3.17 Retention of Alternate Juror on Submission of Case to Jury**

Mr./Ms. \_\_\_\_\_, your participation in this trial is not complete. It is still possible for you to be called on to replace one of the deliberating jurors. This means that, while you may return to your normal activities and need not report to court unless informed otherwise, you are still bound by my earlier instructions about your conduct relating to this case. Accordingly, you must not discuss this case with anyone, not even your friends, co-workers, family or household members. Do not allow anyone, including members of the news media, to discuss this case with you. If anyone asks you about this case, tell that person that you cannot discuss it. Do not talk to the defendant(s), the lawyers, the witnesses or anyone else connected with this case. You must not investigate the case in any way. This means that you must not visit any places mentioned during this trial, conduct experiments, consult any dictionaries, encyclopedias, web sites or other reference materials. Also, do not read, listen to, or watch anything about this case from any source, such as a television or radio broadcast, newspaper article or the internet. A jury's decision must be based only on the evidence received in this courtroom and the court's instructions on the law. If you receive any information about this case from any source outside of this trial, even unintentionally, do not share that information with anyone. If you do receive such information, or if anyone tries to discuss the case with you or influence you in any way, you must immediately inform the court. Do not have any contact with the deliberating jurors [or other alternate jurors]. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

My staff will contact you either to summon you back to court or to release you from further participation in this case. Again, thank you very much for your continuing service.

#### **Notes**

It is recommended that this instruction be given immediately after the first twelve jurors have left the courtroom to begin their deliberations. Addressing the alternate jurors alone will highlight the importance of their role and continuing obligations in the trial and may lessen the risk that a deliberating juror will abandon deliberations knowing that there are alternates available to replace him or her.

Before substituting an alternate juror during deliberations in a trial receiving extensive media coverage, the court may wish to ensure by colloquy that the alternate juror has not been exposed to material "of a nature which could substantially prejudice

the defendant's right to a fair trial" and to take appropriate action in the event of such exposure. See *State v. Williamson*, 72 Haw. 97 (1991).

### **3.18. Substitution of Alternate Juror: During Deliberations**

One of your fellow jurors has been excused and an alternate juror is replacing the excused juror. Do not consider this substitution for any purpose. Under the law, the alternate juror must participate fully in the deliberations that lead to any verdict. The prosecution and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. Now, please return to the jury room and start your deliberations from the beginning.

**11.06. Abuse of Family and or Household Members: H.R.S. § 709-906(1)**

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

A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member.

There are three material elements of the offense of Abuse of Family and or Household Members, 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 physically abused (name of complainant); and

2. That, at that time, the Defendant and (name of complainant) were family or household members; and

3. That the Defendant did so intentionally, knowingly, or recklessly as to each of the foregoing elements.

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

**Notes**

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

For definition of states of mind, see instructions:

6.02—“intentionally”

6.03—“knowingly”

6.04—“recklessly”

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

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

- \* Effective 7/1/97—Act 383, Hawai`i Session Laws 1997
- \*\* Effective 7/1/98—Act 172, Hawai`i Session Laws 1998

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