

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

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

Upon consideration of the Pattern Criminal Jury Instructions Standing Committee's request to publish and distribute (1) revisions to Criminal Instructions 7.01 and 7.02 and (2) the addition of Criminal Jury Instructions 9.44B, 9.44C, 10.50, 10.51, 10.52, and 10.53 to the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED, that the attached criminal jury instructions 7.01, 7.02, 9.44B, 9.44C, 10.50, 10.51, 10.52, and 10.53 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

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

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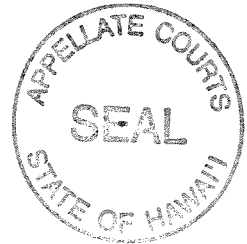
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to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, March 14, 2008.

FOR THE COURT:

  
Chief Justice



**9.44B SEXUAL ASSAULT IN THE FIRST DEGREE--**  
**MENTALLY DEFECTIVE PERSON:**  
**H.R.S. § 707-730 (1)(d)**

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

[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 to sexual penetration of  
another person who is mentally defective.

There are four material elements of the offense of Sexual  
Assault 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 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; and
4. That the Defendant knew, at that time, that the  
person was mentally defective.

Notes

H.R.S. §§ 707-730 (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 - "mentally defective"

9.00 - "sexual penetration"

**9.44B SEXUAL ASSAULT IN THE FIRST DEGREE--  
MENTALLY DEFECTIVE PERSON:  
H.R.S. § 707-730 (1)(d)**

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

[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 to sexual penetration of another person who is mentally defective.

There are four material elements of the offense of Sexual Assault 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 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; and
4. That the Defendant knew, at that time, that the person was mentally defective.

## **Notes**

H.R.S. §§ 707-730 (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 - "mentally defective"

9.00 - "sexual penetration"

9.44C      SEXUAL ASSAULT IN THE FIRST DEGREE --  
IMPAIRMENT BY SUBSTANCE:  
H.R.S. § 707-730 (1)(e)

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

[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 to sexual penetration of  
another person who is [mentally incapacitated] [physically  
helpless] as a result of the influence of a substance that the  
actor knowingly caused to be administered to the other person  
without the other person's consent.

There are four material elements of the offense of Sexual  
Assault 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  
subjected another person to an act of sexual  
penetration; and
2.    That the person was, at that time, [mentally  
incapacitated] [physically helpless] as a result of

the influence of a substance; and

3. That the Defendant knowingly caused a substance to be administered to the other person without the other person's consent; and
4. That the Defendant knew, at that time, that the person was [mentally incapacitated][physically helpless].

#### **Notes**

H.R.S. §§ 707-730 (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 - "mentally incapacitated"

9.00 - "physically helpless"

9.00 - "sexual penetration"



**9.44C    SEXUAL ASSAULT IN THE FIRST DEGREE --  
          IMPAIRMENT BY SUBSTANCE:  
          H.R.S. § 707-730 (1)(e)**

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

[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 to sexual penetration of  
another person who is [mentally incapacitated] [physically  
helpless] as a result of the influence of a substance that the  
actor knowingly caused to be administered to the other person  
without the other person's consent.

There are four material elements of the offense of Sexual  
Assault 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  
      subjected another person to an act of sexual  
      penetration; and
2.    That the person was, at that time, [mentally  
      incapacitated][physically helpless] as a result of

the influence of a substance; and

3. That the Defendant knowingly caused a substance to be administered to the other person without the other person's consent; and
4. That the Defendant knew, at that time, that the person was [mentally incapacitated][physically helpless].

#### **Notes**

H.R.S. §§ 707-730 (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 - "mentally incapacitated"

9.00 - "physically helpless"

9.00 - "sexual penetration"

10.50

THEFT OF LIVESTOCK --  
UNLAWFUL ENTRY:  
H.R.S. § 708-835.5(a)

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

A person commits the offense of Theft of Livestock if he/she  
commits theft by having in his/her possession a live animal of  
the bovine, equine, swine, sheep, or goat species, or its carcass  
or meat, while in or upon premises that the person knowingly  
entered or remained unlawfully in or upon, and that are fenced or  
enclosed in a manner designed to exclude intruders.

There are five material elements of the offense of Theft of  
Livestock, 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 entered or remained  
unlawfully in or upon the premises of another; and

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

3. That the Defendant knew that the premises were fenced or

enclosed in a manner designed to exclude intruders; and

4. That, while in or upon the premises, the Defendant obtained or exerted unauthorized control over the property of another by possessing a live animal of the [bovine] [equine] [swine] [sheep] [goat] species, or its carcass or meat; and

5. That the Defendant did so with intent to deprive the person of the live animal or its carcass or meat.

#### **Notes**

H.R.S. § 708-835.5.

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--"control over the property"

10.00--"deprive"

10.00--"enter or remain unlawfully"

10.00--"obtain"

10.00--"property"

10.00--"property of another"

10.00--"unauthorized control over property"

For statutory defense, see instruction 10.11A.

10.50

**THEFT OF LIVESTOCK --  
UNLAWFUL ENTRY:  
H.R.S. § 708-835.5(a)**

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

A person commits the offense of Theft of Livestock if he/she  
commits theft by having in his/her possession a live animal of  
the bovine, equine, swine, sheep, or goat species, or its carcass  
or meat, while in or upon premises that the person knowingly  
entered or remained unlawfully in or upon, and that are fenced or  
enclosed in a manner designed to exclude intruders.

There are five material elements of the offense of Theft of  
Livestock, 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 entered or remained  
unlawfully in or upon the premises of another; and

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

3. That the Defendant knew that the premises were fenced or

enclosed in a manner designed to exclude intruders; and

4. That, while in or upon the premises, the Defendant obtained or exerted unauthorized control over the property of another by possessing a live animal of the [bovine] [equine] [swine] [sheep] [goat] species, or its carcass or meat; and

5. That the Defendant did so with intent to deprive the person of the live animal or its carcass or meat.

#### **Notes**

H.R.S. § 708-835.5.

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--"control over the property"

10.00--"deprive"

10.00--"enter or remain unlawfully"

10.00--"obtain"

10.00--"property"

10.00--"property of another"

10.00--"unauthorized control over property"

For statutory defense, see instruction 10.11A.

**10.51**

**THEFT OF LIVESTOCK:**  
**H.R.S. § 708-835.5(b)**

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

A person commits the offense of Theft of Livestock if he/she  
commits theft by having in his/her possession a live animal,  
carcass, or meat in any location.

There are three material elements of the offense of Theft of  
Livestock, 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 by possession of a live  
animal, carcass or meat that was the property of another; and

3. That the Defendant did so with intent to deprive the  
person of the property.

**Notes**

H.R.S. § 708-835.5.

For definition of states of mind, see instructions:  
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.



10.51

**THEFT OF LIVESTOCK:  
H.R.S. § 708-835.5(b)**

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

A person commits the offense of Theft of Livestock if he/she  
commits theft by having in his/her possession a live animal,  
carcass, or meat in any location.

There are three material elements of the offense of Theft of  
Livestock, 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 by possession of a live  
animal, carcass or meat that was the property of another; and
3. That the Defendant did so with intent to deprive the  
person of the property.

**Notes**

H.R.S. § 708-835.5.

For definition of states of mind, see instructions:  
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.

**10.52**

**INFERENCE: THEFT OF LIVESTOCK:**  
**HRS §708-835.5(2)**

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

If you find beyond a reasonable doubt that the defendant possessed the livestock without a valid livestock ownership and movement certificate, you may, but are not required to infer that the livestock is or has been 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 such livestock is or has been stolen.

**Notes**

H.R.S. §§ 708-835.5(2), 142-49.

For elements of a valid livestock ownership and movement certificate, see instruction 10.53.

10.52

**INFERENCE: THEFT OF LIVESTOCK:  
HRS §708-835.5(2)**

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

If you find beyond a reasonable doubt that the defendant possessed the livestock without a valid livestock ownership and movement certificate, you may, but are not required to infer that the livestock is or has been 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 such livestock is or has been stolen.

**Notes**

H.R.S. §§ 708-835.5(2), 142-49.

For elements of a valid livestock ownership and movement certificate, see instruction 10.53.

**10.53**      **LIVESTOCK OWNERSHIP AND MOVEMENT CERTIFICATE:**  
**H.R.S. § 142-49**

To be valid, a livestock ownership and movement certificate must:

1. Describe the animal or animals, including sex, breed, age and brand; and
2. Indicate the seller or owner of the animal or animals; and
3. Indicate the buyer or consignee of the animal or animals; and
4. Indicate the origin of the animal or animals; and
5. Indicate the destination of the animal or animals.

**Notes**

H.R.S. § 142-49

**10.53        LIVESTOCK OWNERSHIP AND MOVEMENT CERTIFICATE :**  
**H.R.S. § 142-49**

To be valid, a livestock ownership and movement certificate must:

1. Describe the animal or animals, including sex, breed, age and brand; and
2. Indicate the seller or owner of the animal or animals; and
3. Indicate the buyer or consignee of the animal or animals; and
4. Indicate the origin of the animal or animals; and
5. Indicate the destination of the animal or animals.

**Notes**

H.R.S. § 142-49

## 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, including an offense involving a reckless state of mind, State v. Van Dyke, 101 Hawai'i 377, 69 P.3d 88 (2003), although the bracketed language may or may not apply depending upon the facts. 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.

## **7.01 SELF-DEFENSE**

Justifiable use of force--commonly known as self-defense--is a defense to the charge of (specify charge and its included offenses). 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, including an offense involving a reckless state of mind, *State v. Van Dyke*, 101 Hawai'i 377, 69 P.3d 88 (2003), although the bracketed language may or may not apply depending upon the facts. 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, kidnapping, 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.]

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[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 § 703-305 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 negating 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 negating 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).

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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.

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